



**2018 New York (Claims & Litigation) Conference**  
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**“Peace, Joy & Happiness: The Zen of Mediating Difficult Positions and Issues with Emotional Parties”**

Mediation can be an extremely constructive and fulfilling process that results in a mutually agreeable resolution. However, the resolution of each specific dispute can take very different paths. Difficult personalities and unreasonable positions can be the most significant impediments to final resolution.

It is often the case that difficult personalities and unreasonable positions are identified early in the dispute process. Once counsel becomes involved, the relative positions can become even more divisive when counsel magnify the client’s personality or issues. While counsel is working through discovery, on the way to trial or arbitration, the ability to change gears and attempt conciliation often can be difficult for both the parties and counsel. When this occurs, it is often important to take a “time out” on litigation before attempting to mediate a matter. This is especially true where the process leading up to mediation has been emotionally charged.

For counsel who are involved in an emotionally charged dispute with difficult personalities or positions, selection of the right mediator can make or break the resolution process. Counsel needs to understand both the positions of the parties and the basis of those positions. After identifying the issues, counsel needs to understand the mediation style that would be most helpful in overcoming the issues presented to resolve the case. Hard-nosed, direct styles can be extremely effective where the dispute is centered on unreasonable positions. However, this same style can sometimes impede the process when a dispute is emotionally charged.

Once the mediator is selected, and it becomes apparent that there are difficult personalities or unreasonable positions being taken, it is imperative that the mediator utilize pre-mediation discussions to establish a constructive session process. However, if the mediator does not contact counsel prior to the mediation, counsel aware of such

issues should always endeavor to contact the mediator before the session to communicate any identified issues.

When the session begins, there are a number of strategies that can be employed by both the mediator and counsel to facilitate a discussion toward resolution.

**Pay Attention and Listen.** The fastest way to anger a party is to neglect them. Paying attention and employing active listening devices will help identify the concerns behind positions. Elicit ideas about how to accomplish the goals of each party privately. Look for advice from the parties, their counsel and experts. **By listening, you show a willingness to resolve the problem.**

**Find Common Ground.** Elicit common goals in advance of the mediation session during phone calls or at an initial private caucus session. Once common goals are ascertained, a joint meeting with all involved parties can be utilized to frame common ground as a foundation for further constructive communication. Goals can be constructive or destructive, as long as a common ground can be found. In many instances, goals that initially appear to be destructive are in fact positions that are derived from unrecognized agendas and/or purposes. It is important that the mediator not prejudge the goals of the parties, but to acknowledge them at face value. Once the parties have received recognition of their respective goals, there is typically no further reason to raise them in further discussions.

As Paul McCartney so aptly expressed:

*And when the broken hearted people living in the world agree  
There will be an answer, let it be  
For though they may be parted, there is still a chance that they will see  
There will be an answer, let it be*

Attempt to determine the purpose and/or intent behind the goals of each party to identify additional opportunities for consensus. Use your understanding of the purpose and intent, to guide the parties toward additional points in common.

**Building Rapport Among the Parties:** Establishing rapport with each participant early in the process is critical to the final steps of the resolution process. Rapport is a state of connectedness between people that facilitates recognizing common ground, common interests, common humanity. Without rapport, the ability to form an eventual lasting agreement among the parties is much more difficult. Each step of the mediation process establishes the connections among the parties, which ultimately come together in composing an agreement.

**Acknowledge Emotion and Point of View:** A mediation may be the first time the parties have had an opportunity to communicate their point of view to a neutral third person. It is typically emotionally charged and needs to be acknowledged before the party/ies can move on. While extreme points of view often lure the mediator to reframe the discussion, reframing can appear judgmental. Mediators must constantly evaluate the discussion to determine the need for reframing. Often is the case in many preliminary discussions, the mediator must accept the party's point of view, and even without judgment, carry the discussion to the logical extremes. When a mediator inserts personal agendas and/or appears to be judging the party's point of view or emotions, the mediator runs the risk of becoming untrustworthy to that party.

**Be Reasonable:** Emotionally invested individuals may not have a logical basis for their positions. Objective, open ended questions can be effective tools in understanding the basis for the position and providing structure to the discussion. However, the questions must be balanced with the non-judgmental responses. Emotionally charged individual have typically been told on multiple occasions that their goals are unreal and not rational. As such, during initial discussions, restrictive responses, such as "impossible" or "no" should be avoided. Acknowledgement of the position and emotion allows rapport to be established.

**Raise Risk:** Emotionally invested individuals and positions typically lack significant alternative perspective to appreciate the risk inherent in the position. Utilization of empathetic questions can be a useful tool to help the party gain perspective. Once the party has had an opportunity to express their position, and the attendant emotions, there has to be a determination of how to proceed. Sometimes the logical extension of the position is unworkable, such that allowing the progression of logic is sufficient. However, where a position needs reframing, the utilization of comments and observations made by others in mediation can be used as a guideline. Utilization of a joint session information can often provide the comments and positions necessary to redirect and/or redefine a party's goal.

**Transferring the Focus:** Shifting attention away from the most contentious or difficult issue and reframing the discussion around the shared interests can provide a common theme around which consensus can be built. As mentioned above, reframing must be done at the appropriate time or the mediator and/or parties will lose trust in the process.

**Express Compassion and Empathy:** Negotiations can serve many different goals. Where the parties are in a continuing relationship or there is the potential future relationship, the parties need to understand the reasons for the dispute in order to foster a more productive working relationship. Processes can be discussed and agreed

upon to address the way in which disputes can be resolved in the future, providing additional assurance for a mutually beneficial working relationship.

If there has been a consensus of goals by the end of the mediation session, then those goals have to be reduced to an agreement that takes into account the mechanisms of post mediation conduct of the parties.

However, what happens when it becomes apparent that while the parties have made significant progress, there is not sufficient consensus to conclusively resolve the dispute?

There is often a strong temptation at the end of an emotionally charged mediation for a mediator to disband the parties and send them to trial or arbitration without guidance. However, there are a number of techniques that can be utilized to keep the parties on a road to resolution, even after the mediation session has ended.

In particular, a mediator can make a recommendation or proposal to the parties on the framework for resolution. Even though during the mediation the parties had been resistive to additional compromise, by providing a recommendation, the mediator provides the parties with the ability to see alternatives to further litigation.

Where essential elements of a resolution need further post mediation development, the mediator can provide the parties with focused direction to develop those elements subsequent to the mediation session. By focusing the parties on missing elements, the constructive work accomplished during the mediation can be utilized to keep the discussion on commonalities.

Finally, post mediation follow-up by the mediator can also be a critical element to an eventual resolution of the dispute. By maintaining contact with the parties and monitoring post mediation work, the remaining elements for a settlement can be put into place. The success of mediation often is the result of persistence by both the parties and mediator working toward common goals. Remember, overcoming emotionally invested individuals and positions take time, understanding, and a commitment to the process.

*For though they may be parted, there is still a chance that they will see -  
There will be an answer.*

