

## Jeff Trueman: When searching for a mediator, look by listening

By: Commentary: Jeff Trueman   February 7, 2018

The private mediation market is flooded with people looking to break into the field. When law students ask me whether they can make a career in mediation, I tell them to become a well-respected judge for about a decade, retire, and then business will be much easier to generate without the need for advanced ADR training (the basic course is essential). Of course, that is not completely true: many senior lawyers are supplementing their practice or retirement plans with commercial mediation after decades of litigation advocacy.

Still, retired judges are often called to mediate many non-domestic litigated disputes. The rationale is usually based on the belief that a retired judge carries enough clout to "readjust" expectations on one side or another. This often entails "banging heads" until the parties agree to a compromise deal.



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Many lawyers justify this one-dimensional strategy to clients and insurance companies because, if and when a dispute does not settle, they can claim to have hired "the best" or most knowledgeable legal subject matter expert. Who better to break the impasse in a litigated dispute than an expert in litigation? The answer may depend on whether the lawyers can see beyond the legal positions and discern the drivers of behavior such as grief, disrespect, a loss of opportunity, or a clash of personalities.

But before discussing the skills possessed by "gem" mediators – those who have fashioned pearls of wisdom through the grit of experience – consider the manner in which the mediator interacts with people. How well does the mediator listen?

### Listening, not talking

Mediators who listen more than talk have a better grasp of the real issues at stake between the parties. Great listeners are great observers. They take in not only what people say, but how they express themselves through body language and action. By taking the time to gather information, great mediators create bargaining currency in the form of a rapport-building trust "account" with participants. Withdrawals from that account will be necessary later when concessions are needed. A mediator may rightly have a superb reputation before coming to the table, but the parties in a particular case may not trust the mediator if he or she fails to garner that trust and develop a rapport with the participants.

In other words, trust is earned through each personal interaction. It is not bestowed by way of title or status.

### Generating movement

In an effort to persuade parties and counsel, retired judges often soft-pedal their experience as deciders of other peoples' disputes. And many lawyers want retired judges to do just that – be the authority figure who can predict the outcome at trial so that the right participants are persuaded to compromise. Fortunately or unfortunately, parties in mediation are free to reject recommendations, no matter who offers them. Insurance adjusters, for example, often live and work in other jurisdictions and therefore have no relationship with or knowledge about the retired judge or senior lawyer. They have their own authority figures at the corporate office miles away.

Furthermore, the mediator's qualifications will matter less to good negotiators who develop bargaining strategies in advance because their concessions hinge less on mediator status and more on whether the other side sends the

right motivational signals.

Movement occurs for a variety of reasons. Some parties are frightened of and exhausted by extended and contentious litigation. At some point they realize they have no control over the outcome. Some lawyers generate movement by adopting a problem-solving approach to impasse and getting the most from the mediator.

Great mediators generate movement by assessing the underlying reasons for the impasse, evaluating – if they evaluate at all – very carefully, solving problems creatively, managing difficult conversations, and tailoring the process to fit the conflict. These skills have nothing to do with status or the law. The sort of experience that makes a good jurist or strong advocate does not necessarily make a good facilitator of negotiation.

The law is a narrow expression of what the parties really want: just compensation, accountability, recognition, security, protection of investments, access to loved ones, etc. By working with a mediator who goes beyond predicting legal outcomes, attorneys permit their clients to access the deeper, more significant opportunities afforded by mediation.

*Jeff Trueman is a commercial mediator and directs Baltimore City Circuit Court's Civil ADR program. He can be reached at [jt@jefftrueman.com](mailto:jt@jefftrueman.com).*

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## Jeff Trueman: Predictions in mediation can break – or build – impasse

By: Commentary: Jeff Trueman   February 27, 2018

(Click here for Jeff Trueman's previous column on finding the right mediator.)

In most compromise mediations, the main tactic employed by many retired judge and senior lawyer mediators is case evaluation: a forecast, or an educated guess, of the litigated outcome. Granted, litigation professionals do this all the time. Based on past experience, and perhaps with few facts, lawyers decide whether to take new cases and companies decide how to manage litigation. Some predictions are fairly straightforward and will come true more often than not. Great mediators keep their calculators readily available because most parties want to know the bottom-line number if they settle.

Great mediators also prompt counsel to factor in the risks as well. Is the claim really worth policy limits when liability is contested? The inevitable last gap in the negotiations is always hotly contested and it's usually smaller than the projected costs. This is a critical time for the mediator to run the numbers so that counsel and the parties think about whether "the juice is worth the squeeze." It's also a critical time for the mediator to consider using closing techniques that may save the attorneys from themselves.



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Predicting other types of litigated outcomes is specious. As the stakes increase and complications mount, the number of possible outcomes explodes. In my experience, few lawyers consider possibilities such as sub curia rulings on key motions in limine, hung juries, compromise verdicts or flat-out rejections from the bench or the jury. Numerous research studies have documented the negative consequences of lawyer over-confidence, but many lawyers continue to over-play their cards and do worse at trial than the last rejected offer or settlement demand.

The inescapable truth is that some litigated outcomes are unknowable to anyone – judges, senior lawyers, jury consultants, and other subject matter experts. Mediators who overly rely on forecasting the future tarnish their credibility because, at some point, they will get it wrong. Furthermore, they risk creating impasse instead of breaking it. One side who likes the forecast will realize, "I have the upper hand. Why should I compromise?" The other side who disagrees with it will react defensively, "What does the judge know about my case?"

Remember, the goal in mediation is to break the impasse, not reinforce it. Often, impasse cannot be broken by "educating" a party (or lawyer) who is highly invested in the dispute. To borrow an analogy from Professor Ava Abramowitz of the George Washington School of Law, instead of "pushing" someone with logic from an authority figure, expert mediators help parties convince themselves. How do they do that?

After gathering information and earning the trust of the parties, the mediator is in a better position to persuade. One way to influence parties is to have each side actively consider the views and positions of the other. This goes beyond telling one side why they will lose the case in court. Instead, the mediator will try to get each side to articulate the opposing argument or factual scenario.

The mediator must be careful in asking hypothetical questions because parties usually recognize the mediator's intentions and double-down on their feelings and opinions. Parties heavily invested in their version of the dispute are likely to reject the mediator's recommendations.

To be persuasive, mediators need to take small steps, over time. Sometimes, that means difficult or emotionally charged conversations need to occur.

*Jeff Trueman is a commercial mediator and directs Baltimore City Circuit Court's Civil ADR program. He can be reached at [jt@jefftrueman.com](mailto:jt@jefftrueman.com).*





## Jeff Trueman: Sifting through mediators to find a gem

Posted by: Commentary: Jeff Trueman ☹ March 26, 2018

*(Click here for Jeff Trueman's previous columns on finding the right mediator.)*

Skilled mediators are elephant-whisperers, able to manage and redirect powerful emotions with grace and, at times, bring about new understandings. This is often how “impossible” conflict gets resolved. A “touchy-feely,” therapist-type mediator will not always work wonders in highly competitive civil litigation. But good mediators who manage the competitiveness of litigators in distributive bargaining contexts are listening for and responding to emotional clues about what’s driving the positions of the parties and counsel.

The way in which a mediator stages and directs difficult conversations is critical. Ground rules must be clearly delineated and be fairly enforced by the mediator. The mediator must direct the conversation toward the issues that are driving the behavior of the parties. Lawyers usually have to be persuaded that the joint session is necessary and that it will make a difference.



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The results speak for themselves. In a wrongful death, medical malpractice mediation, for example, the father of the deceased did not realize how much pain he was causing the rest of his family by litigating the dispute until an attentive mediator helped him to see the fallout effect it had on those around him. Doing so resolved the case.

Following a joint session that counsel on both sides preferred not to have, warring business partners shook hands and thanked the mediator for the opportunity to share their perspectives on why the partnership became dysfunctional. Opposing lawyers were immovable until the mediator facilitated a direct discussion concerning the reasons why they mistrusted each other and how they could forward. The list goes on. The mediator’s ability to manage tough conversations requires a nuanced ability to understand people and a willingness to be bold.

### ‘Soft’ skills

Good people skills equate with good mediation skills. Patience and complete devotion to the resolution are essential as mediators wade through hours and hours of unreasonable bargaining rounds, drop-dead promises of “best and final” offers, and over-the-top advocacy rhetoric. Today’s mediators in complex cases do a significant amount of work before the session and, if the case does not resolve, follow up afterward to ensure talks continue. Perhaps most importantly, the most effective mediators earn the trust of the parties and their lawyers to help them negotiate and not to divulge information without consent.

While repeat business is nice, some mediators fall into a rut. A large number of experienced mediators think they have “seen it all” and that their experience will see them through. Some attorneys, however, have participated in hundreds of mediations; they are good at gaming the process and the mediator. Perceptive attorneys will digest the mediator’s playbook of techniques and use them to create impasse as leverage for their bargaining positions. Without an evolving menu of techniques, some mediators will be hard-pressed to generate movement and close the deal.

### Permanent students

Top-tier mediators are permanent students of the practice. Different kinds of conflict generate different dynamics for the mediator to consider. Technology is changing how we negotiate. Negotiation theory is overwhelming in its

variation and application. Younger lawyers, as well as those from other cultures, have different values and ways of communicating. Counsel should expect a mediator to stay on top of his or her game. Not everyone can enroll in formal educational courses, but regular attendance at conferences and local continuing educational programs is easily accomplished.

Lawyers who understand the proficiencies and aptitudes exhibited by mediators who effectively resolve conflicts will position their clients for success at the mediation table. Regardless of whether the mediator's prior life was on the bench, in front of it, or elsewhere, the best mediators in this author's opinion listen to others and to themselves with clarity. They respond with emotional intelligence, process expertise, and negotiating skills to generate movement between and among the parties.

A "gem" mediator is a rare find, one who adds value to lawyers and their practices, and to the lives of people engaged in the process. The gems are out there if counsel does some digging with a discerning eye and ear.

*Jeff Trueman is a commercial mediator and directs Baltimore City Circuit Court's Civil ADR program. He can be reached at [jt@jefftrueman.com](mailto:jt@jefftrueman.com).*

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