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# Managing mistrust in mediation

By: Commentary: Jeff Trueman October 27, 2020


I often hear lawyers and parties express frustration over the adversarial nature of some mediation sessions. They want to negotiate openly without posturing. But enough lawyers engage in overly competitive tactics to make the process arduous and aggressive at times.

Common tactics include pressing specious arguments, concealing significant information, obscuring weakness, diverting attention from the main evidentiary risk, misleading others about the existence or persuasive power of evidence not yet presented (experts, fact witnesses), resisting client-responsive suggestions, injecting hostility, remaining attached to positions not sincerely held, delaying access to information sought by other parties, and protracting the proceedings to wear down the other side.

It's hard to set the tone for productive, cooperative settlement talks when counsel threaten to crush each other in court. The process takes much longer when the mediator has to redirect everyone's mindset back to making a deal.

Parties who seek litigated value in settlement talks also soak up precious time. No one likes to bargain with positions that are not realistically maintained; it's harder to get a deal when people are antagonistic.

Withholding or unveiling "bombshell" information is another common tactic that will interfere with productive talks. It destroys any sense of goodwill, assuming any exists at the outset, and usually derails the process.

These problems reflect a lack of trust between counsel and/or the parties. Sometimes the dynamic may be to blame rather than the behavior of counsel. For example, when bargaining over limited resources, such as insurance proceeds, perhaps parties should not be completely honest with each other.

Important ethical issues are raised in distributive bargaining contexts where one party's gain is another's loss. One party's "reasonable" opening position is often exploited by her opponent. Full and candid disclosure may feel altruistic but it surrenders valuable information the other side wants to know.

Although the needs and fears of a party should not determine the price one gets, that's exactly what the other side wants to know. In my opinion, until some degree of trust in the mediator and in the mediation process is established, there are sound reasons to conceal some information and outcome goals, especially in distributive bargaining contexts.

## Better outcomes

When attorneys trust each other, however, they generate better outcomes for themselves and their clients; the experience is less frustrating and more rewarding. As stated to me by a personal injury attorney, "If we know and trust counsel on the other side, they get better numbers from us."

Lawyers who value good working relationships with each other and with claims professionals keep the big picture in mind. A good working relationship takes time to build and can be easily destroyed with obfuscation and posturing.

Much of the time, however, trust is in short supply in mediation. This is where a good mediator can help by building rapport with party participants and bridging the gap where mistrust exists between opposing parties.

It takes time to establish rapport and trust. It can vanish in an instant — "trust comes by turtle and leaves by jaguar." It's a good sign when I am asked by counsel or her client, "How should we proceed?" But even then, I am careful because in competitive bargaining dynamics, participants may use anything to gain leverage, including the rapport I have developed with the opposing side.

Good meditators also bridge the gap in trust between opposing sides. As brokers of information, mediators have to be trusted by the participants and counsel to perform dual roles that communicate and filter information with credibility.

This can be tricky, however, because mediators are not in a good position to assess the trustworthiness or reliability of any of the participants. Given the adversarial nature of mediating litigated cases where information is guarded and bargaining positions can be deceptive, it may be difficult for mediators to discern which facts and figures are truthful and which are not.

For these reasons, in my view, you have good reason to be skeptical of mediators who vouch for anyone's bargaining position.

In my experience, the way around these issues is to manage the bargaining process. Your mediator should have a good sense of timing and patience to help counsel avoid reacting to inflammatory rhetoric or insulting moves from the other side. "Banging heads" through multiple bargaining rounds takes time; like landing a plane, it is a process where gradual is better than sudden.

After all the tactics have been exhausted and lines in the sand drawn, strategic management of the bargaining process often results in an "apex" or critical conversation between counsel and client. As golfers know, once the ball is on the green, the cup will come to you.

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