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Where Angels Fear to Tread

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The Tricky Matter of How a Commercial Mediator Shows Respect for the Attorney/Client Relationship

by Geoff Sharp

Those of us who were lawyers in a previous life and are now mediators, or those of us who dabble in both worlds, will know that there is a sensitivity surrounding the whole question of the mediator and the attorney/client relationship. This tension is largely unspoken but it is nevertheless an anxiety for most attorneys as they head into a mediation session. Speak to any attorney and they will have views on what level of ‘mediator intrusion’ into their relationship with their client they are comfortable with.

One of the biggest insecurities attorneys have with the mediation process, and more especially perhaps if the mediator has a legal background, is that the mediator will somehow usurp them and their role and have a disproportional influence on their client’s attitude to resolution. This may be for a number of reasons on an attorney’s part, some worthy, some not - but one thing is for sure they have had enough of being thought of as some sort of mediation interloper - more so when lawyers reflect on the overwhelming message from the mediation community that mediation has become a mainstream dispute resolution tool.

In my experience, whilst attorneys may choose to engage me as a mediator, they don’t want me taking control, even if that control is limited to process -- leadership maybe but outright control, no. Come to think of it, I have never seen ‘control freak’ on the list of mediator attributes and if I had to write the mediator’s guidebook on how mediators should handle the attorney/client relationship; I would offer these suggestions:

Respect It
It is the attorney who has the relationship with their client, a mediator like me is a newcomer.

Attorneys see nothing in the mediation handbook that tells them that their relationship with their client is somehow handed over to/threatened by the mediator just because they invite me to intervene in the dispute.

The deal is simple, and you won’t find it in the signed mediation agreement.... I must show that I respect and understand the dynamics that exist between attorney and client. I can do that in a number of ways, overtly or implicitly.

So, as mediator I may have to demonstrate that I understand that;

- mediation is a process that allows one attorney to speak directly with the other’s client and this can be very threatening to those used to filtering outside messages before they are heard by their own client. In mediation, attorneys are no longer the conduit by which the other side must...
attorneys are no longer the conduit by which the other side must communicate - the only other place such direct access occurs is by cross examination - the parallels are inevitable

- many clients engage an attorney to keep the other party away from them - its easier and less stressful than having to deal with the conflict themselves. As mediator, I am doing (and asking the attorneys to do) the exact opposite to the task they were hired to do
- many attorneys have difficult relationships with their clients – although it looks ok at the table, in private it is not always a mutually trusting one. Often the client is, in reality, disgruntled either because they are frustrated at the lack of progress in the case to date or angry at the ‘unreasonableness’ of the other side and blame this on their advisor, assuming that if the attorney had done things differently, they would ‘have won by now’. So, as mediator, I cannot always assume the attorney is going to be listened to and can in fact ‘get their client to see a different perspective if only they really wanted to’.
- although I must reality test parties’ views or positions that are in turn based on legal advice, I must do it in a way that does not challenge the attorney’s competence in the eyes of the client

**Acknowledge Their Expertise**

Attorneys representing clients have actual or perceived expertise. This may be in the substantive content and/or the negotiation process -- attorneys need this to be acknowledged and I need to use that expertise -- as the mediation wears on, I will be grateful for it because at some stage it is more than likely I will ask the attorneys to do some heavy lifting for me in an effort to move their clients to a better place.

An example is the practice that has grown up in my part of the world for the mediator to ask the parties to sit ‘up close’ -- and for attorneys to be banished to the far end of the table – which, it seems to me, is asking for trouble but more than that makes no sense in terms of table dynamics. To me the natural epicentre of the mediation is a way down the table, where the sight lines with and between the parties are at their best.

Attorneys are, just like me, at the mediation to add value to the negotiation -- if I neutralise that and they become mere observers of process, they

- look irrelevant and expensive
- look for ways to sabotage the process, and
- look for another mediator next time round

All I need to do is recall the rare occasions when attorneys have prevented me from doing my job as a mediator and I understand the importance of letting them do theirs.

**Treat Them as a Co-Mediator**

It is sobering to observe some attorneys and acknowledge that, if they were not lawyering, they would make great mediators, perhaps better than the present incumbent -- I need to remember that I don’t have a monopoly on good skills and that mediation is in many respects a partnering exercise between attorneys and mediator.

**Make Them Look Good**

Whether I like or not, part of my job is to make the attorney look good -- to their clients and to the other side -- this is simply the market and I must meet consumer need. It is also in the interests of the process. That doesn’t mean I am compliant, neither does it mean they dominate the air waves – like a lot of things in this game, take the middle way.

If I show the attorney up, and it is easy to do that from my mediator’s chair, the process will pay and I will pay. My job becomes harder. That doesn’t mean that I cannot go to work (moving the parties to more realistic expectations, creating doubts -- even in the face of over optimistic legal advice) but I need to do it in a way that meets the various needs at the table, including the requirement for me to respect the attorney/client relationship.

So, if the mediation is successful, sure take some of the accolades but make sure the attorneys get as many, if not more. It goes with the territory that if it is

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unsuccessful I need to shoulder much of the responsibility for the impasse, in an effort to bring it eventually to resolution.

Say It In Private
If something needs to be said as between mediator and attorney, I say it one on one – no client, no other side – just me and the advisor. Don’t risk it any other way. Not even something that seems relatively benign like “it would have been helpful if there was a detailed schedule of losses like in most claims of this size…” or “I assume there have already been attempts to settle this…” (yeah, I know its ASSume).