

Facilitative mediation and the value of listening

By Jaymeson Pegue

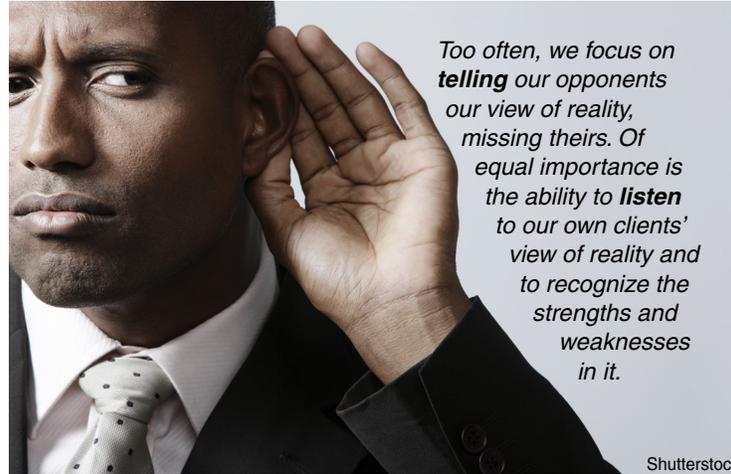
Those of us who work in the world of litigation, whether as claims professionals or lawyers, increasingly rely on alternative dispute resolution as the avenue to case closure. While the tools of dispositive motions and trials are important, statistics tell us that the vast majority of lawsuits settle. The roads to settlement may vary, but most cases end up in a setting where settlement is the stated goal. Improving our skill set in the arena of mediation is critical.

Having recently obtained certification to act as a mediator in New Mexico (California currently does not have a certification requirement), I have been introduced to a type of mediation which is decidedly not like the type of mediation that claims professionals and lawyers use in litigation: facilitative mediation. It is defined as mediation controlled solely by the parties, where the mediator simply facilitates possible resolution. The measure of success in facilitative mediation is not resolution.

This is markedly different from evaluative mediation, which is the type most often engaged in by those of us in the business of litigation and formalized disputes. In our world of evaluative mediation, the mediator helps the parties arrive at resolution by showing them the weaknesses in their cases and evaluating what a judge or jury will be likely to do if the matter proceeds to trial. In our world, we measure the success of mediators by their settlement success rate.

Before attending the mediation course at the University of New Mexico, I had been counsel for clients in hundreds of mediations. So I felt supremely confident that my understanding of the process was well developed. Yes, I was a smug student. I was that lawyer-student that my instructor dreaded.

Our instructor stunned me with one statement and one group exercise. Her first statement: The goal of mediation is not resolution. My response: Then what is the point? The group exercise: The students took a vote on who con-



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trols the process of mediation. Out of 20 students, 19 voted that control rests solely with the parties. One student voted that control rests with the mediator and the parties. I was, of course, that one student. While it was clear to me that I had to suspend my views about mediation as I knew it in order to learn, it also became clear to me that tools exist in facilitative mediation for all of us to use in the goal oriented world of evaluative mediation.

In our first exercises in class, we focused on listening, acknowledging and learning the difference between the parties' positions and their interests. These are skills to be developed by the mediator, but they can prove to be invaluable when used by the parties.

For an understanding of the value of listening, we were challenged to learn how to listen well. We were reminded that effective listening requires that we let go of our own ego, that we make the choice to focus by managing distractions and that we cultivate a desire to be curious, to learn something. We were instructed that the subjective realities of the parties about the conflict, including our opponents' reality and our own clients', is not objective. It is truly in peoples' heads.

Facts, even if established, may do nothing to effect a perceived reality. So, as we mediate our disputes, and focus on evidence, perhaps listening to the perceived reality of our opponents can give us greater guidance in finding valuable compromise. Too of-

ten, we focus on telling our opponents our view of reality, missing theirs. Of equal importance is the ability to listen to our own clients' view of reality and to recognize the strengths and weaknesses in it. For these concepts, we were guided to books on listening and mediation including "The Zen of Listening" and "Getting to Yes."

The notion of acknowledging came next. My initial reaction was that this tool felt a bit too much like therapy. The phrase "I think what I hear you saying..." describes the skill. For a mediator, making sure the parties feel heard, and actually are heard, is invaluable. For the parties, this tool can be disarmingly important particularly in cases which have emotional elements. Because acknowledging does not equate with agreeing, the parties will not impair their positions just by acknowledging the position of the other side. Rather, the aim of this tool is to communicate to the other side that their point of view has been heard. Coupling that with effective advocacy of one's own position maximizes credibility, with the mediator and the other parties. Credibility is absolutely necessary for effective negotiation.

Finally, the students in the class, each training to be a mediator, were taught the difference between the positions and the interests of the parties to any dispute. For example, in a bad faith case, the position of the plaintiff at the outset of mediation may simply be that the carrier denied a

claim that it should have paid and the plaintiff wants money for that error. The plaintiff's interest, the core of the dispute, answers the question not of what the party wants, but "why" the party wants it. In a bad faith case, will some amount of money be the interest because the plaintiff is simply out of pocket? More often, after hard damages are nailed down, we wade into compensatory and punitive damages where the interest may be a notion of punishment, justice, anger, vindication.

For the carrier, the position may simply be that a claim is not covered, or a demand is too high and not supported by evidence. But the interest may be in protecting policy interpretation against attack, or defending a legal issue that is on appeal, or testing a novel theory of recovery. As a party to mediation, understanding the positions, interests and needs of the opponent, can move the dialogue of resolution toward agreement.

It is clear that there is value for any mediator in using the tools from facilitative mediation in the more "mediator centric" world of evaluative mediation. For those of us who are the actual participants in mediations where a deal is the goal, where the strength of the mediator is measured in his or her rate of successful settlements, let's take a page from a style of mediation where resolution is not the goal.

Try to listen, try to tell the other side you have heard them, and try to work with and through their positions, to their interests and needs. A deal may be easier than you think.

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