

A NOTE FOR THE LAWYERS

Some Impediments to Successful Mediation Outcomes

1. Reciprocity in Mediator and Lawyer's Roles ¹

How direct, honest and specific is it appropriate for a mediator to be? Just as litigators need honesty from mediators, mediators need honesty from litigators. Although few clients understand legal ethics, they do understand at some level that their own lawyer owes them a fiduciary duty of undivided loyalty and a mediator does not.

So if a mediator's view conflicts with lawyer's advice, the odds are overwhelming that the client will favour their lawyer over the mediator.

With an appropriate preparation and coordination between the litigator and mediator, an emotional, stubborn or "optimistic overconfident" client, can often be nudged from anger into acceptance. The task of the mediator in teamwork with the lawyer is therefore to assess the client's likely reaction to different kinds of influences or pressures, and to be able to change course or even stop if nothing seems to be working that day.

Much conventional mediation training takes the condescending view that lawyers just get in the way and mediators have to eliminate them at best, or just work around them at worst! Mediators are there to help lawyers and their clients make the best decisions possible under the circumstances.

2. Optimistic Overconfidence ²

Another term used is "optimism bias". Research studies show that on average, people are often overconfident in their predictions concerning the outcome of future events. A good illustration of this is in a US study of people about to enter marriage, where 95% of them believed that their marriage would last notwithstanding that statistics showed 48% of marriages would eventually fail. People believe the chances of good things happening to them are better than they are in reality, and that the chances of bad things happening to them are worse than they are in reality.

Why are people on average, overconfident in the prediction of future events? There are likely at least two explanations.

The first is that people pay differential attention to positive and negative facts. That is people tend to place more emphasis on facts that are consistent with desired outcomes than fact that are inconsistent with desired outcomes.

The second is the tendency of people to make self-serving assessments of their ability. Sometimes referred to the "*above average effect*", this phenomenon leads to

¹ From "*The Concept of Reciprocity in Mediation*" Kichaven, Jeff, www.IMIR.com, January 2007

² Extracts from "*Psychological Impediments to Mediation Success*", Korobkin, Russell, UCLA School of Law, 2006

the result that as perceived control over events and outcomes increases, so does the observed level of optimistic overconfidence.

The involvement of lawyers is critical here. The lawyer's role is to negotiate and evaluate the offers that are made. Naturally, and properly so, the lawyer wants to project confidence in the client's case and belief in the justice and viability of the client's claim. Who wants to hire an unsupportive or sceptical lawyer? The result can be however, a natural bias of the lawyer towards overconfidence in the client's legal position through the very process of arguing the client's case.

Don't fall in love with your own case.

In recognising this phenomenon, the role of the mediator in private sessions therefore may involve testing weaknesses of the positions of each party's case by unapologetically challenging the parties and the lawyers' evaluations of the case.

3. Adverse Reaction to Offers

Clients are often unfamiliar with the mechanics of negotiation. Be wary of the client who has been overseas and hated the idea of bargaining in markets.

For a dispute to settle in mediation, one party must eventually be willing to accept a proposal advanced by the other party. To have a party accept a perfectly reasonable offer (or counter-offer) often causes difficulties for that party due often to a number of psychological barriers. Some of these are:-

- (a) While the mediator will attempt to guard against an unrealistic first offer being made and prepare the clients for that possibility, simply receiving a first offer from the other side can unnerve a client whose immediate reaction may be to devalue the offer with statements such as "*I won't accept that that*", "*They must be joking*" "*If that the way they want to negotiate, we might as well leave now*" etc etc.

These devaluations sometimes arise simply because the client is in unfamiliar and uncomfortable territory, namely being involved in a hardnosed financial negotiation. The client needs to be prepared for the likelihood of a negotiation process. With the making of the first offer by the other party, some clients freeze and do not understand that it is a first offer, it will be unrealistic and be testing the waters, and that their role is to evaluate the offer with the lawyer, most probably reject it, and then work on a counter-offer.

- (b) Often the worth of an offer is simply but mistakenly judged on who has made the offer. Thus mediators often hear loaded statements such as "*He would make that offer*" or "*I would expect that from her lawyer*". The point here is that the offers should be simply addressed on their worth, based on some assessment of the client's case worth.
- (c) In a negotiation containing offers and counter-offers, when a "final" position is pressed upon a client as worth accepting, they have the feeling that by accepting they therefore become the loser, picturing the other party as the one whose terms have to be acceded to. What is forgotten however is that embedded in the final makeup of the proposal, are concessions made by the other party through the offer and counter-offer process. It is not all one-sided.

- (d) During a negotiation process, mediators often hear the statements by clients and lawyers that “*we have made all the concessions here*” or “*they are not making concessions as large as we are*”. Whilst they may be mathematically correct on the figures, it assumes that the opening positions expressed by parties in negotiations were realistic. The opening offers that are made sometimes constitute nothing more than an unrealistic first position to “test the water”.

4. Different Negotiation Styles ³

One role of the mediator is to recognize and manage (if possible) different negotiation styles where they may clash. Family Law attracts both adversarial style negotiators and cooperative style negotiators especially in property disputes. The following extract has some interesting points.

- Studies by Andrea Kupfer Schneider found that over the past twenty-five years adversarial styles have become more extreme, and are perceived by other lawyers as less effective: “*effective negotiators exhibit certain identifiable skills [A] negotiator who is assertive and empathetic is often perceived as more effective. The study also reveals distinctive characteristics of ineffective negotiators, who are more likely to be stubborn, arrogant, and egotistical.*”
- Additionally, Kupfer found that “*over 50% of the adversarial bargainers were ineffective. . . . As these negotiators become more irritating, more stubborn, and more unethical, their effectiveness ratings drop As adversarial bargainers became nastier in the last 25 years, their effectiveness ratings have dropped.*”
- Clients are typically in the midst of extremely stressful circumstances when they seek attorneys’ counsel, whether regarding criminal matters, contract disputes, divorces, etc., and often experience physical or emotional pain, guilt, regret, frustration and hatred of their circumstances. The adversarial perspective fails to address these feelings because it operates in a binary, win/lose fashion. This failure may result in less than optimal results and decreased client contentment with the services rendered.
- While the cooperative style lends itself to a less confrontational process, it is vulnerable to exploitation. If matched against an adversarial negotiator, the cooperative party will openly share information, including the weaker aspects of their position. The adversarial opponent will accept this information, offer nothing in return, and use that information against the cooperative party. When presented with a cooperative opponent, an adversarial negotiator will often “*increase their demands and expectations about what they will be able to obtain.*”

³ Extract from “*New Perspectives in Negotiation*” Harvard Negotiation Law Review January 2010