

Readings on Negotiation & Mediation

Fall 2011

From Golan & Farber, *The Role of Advocate & Neutral* (2006), pp. 13-15

Negotiation is the process of communication we use to get something we want, when another person has control over whether or how we can get it. If we could have everything we wished, materially and emotionally, without the concurrence of anyone else, there would be no need to bargain, but because of our interdependence there is a pervasive need to do so. Everyone bargains as part of modern life, and negotiation is at the core of what lawyers do in representing clients.

Legal negotiators use varying styles and approaches. Lawyer styles correlate closely with their view of the goal of the process-- what they are seeking to achieve-- and their relationship to others in it-- whether the other side is viewed as a partner or opponent. Many terms are used to describe styles of negotiating. For purposes of introducing the process, we focus on two basic categories: competitive and cooperative.

A *competitive* negotiator assumes that the purpose of bargaining is to obtain the best possible response for her client at the expense of the other side. Competitive negotiator is likely to think that the negotiation process involves a limited resource, or fund, that must be distributed between competing parties -- in effect, a fixed "pie." She sees this "pie" as consisting primarily, if not exclusively, of money and assumes that a dollar more for her opponent is necessarily a dollar less for her own client. The goal is to pay as little as possible (if a buyer or defendant) or obtain as much as possible (if a seller or plaintiff). From a competitor's perspective the parties' relationships and other intangibles are either absent or relatively unimportant. A competitive bargainer, in other words, sees negotiation much as a litigator sees a trial-- someone must win and someone must lose, and the competitor's central mission is to win. This approach is also known as "distributive" or "zero-sum" bargaining, since the negotiators see the task as to distribute a limited resource between them, and as "positional" negotiation, because competitive bargainers tend to trade positions in a gradual progression toward compromise.

An example of a competitive bargaining situation is one in which a lawyer represents a client whose car has been damaged by another motorist. The attorney is bargaining with the insurer of the other driver, and neither bargainer expects to deal with the other in the future. Both sides have an interest in conducting the bargaining process efficiently, but otherwise the lawyer and the adjuster are likely to see their sole goal as to agree on a dollar amount the company will pay the insured to give up his claim. In these circumstances they are likely to assume that a better settlement for one will necessarily be worse for the other.

A *cooperative* bargainer, by contrast, does not view negotiation "pies" as fixed. Cooperative bargainers work to identify interests and examine differences in how the parties value items. They then search jointly with the other negotiator for a solution that will best satisfy both parties' interests. This approach is frequently called "integrative"

bargaining, because it emphasizes integrating the parties' needs to find the best joint solution. It is also referred to as "interest-based" or "problem-solving" negotiation, because the participants' goal is to satisfy people's underlying interests, and they see conflict as a problem to be solved rather than as a cause for battle.

A classic situation that calls for cooperative bargaining is an effort by two businesses to form a joint venture. Cooperative bargainers would first ask what special resources and capabilities each partner could bring to the deal (e.g., Does Partner A have special expertise in marketing, while Partner B has more strength in design? Does one have good access to financing, while the other has unused office space?). The negotiators would also ask whether either partner had particular needs, for example, for one an assured stream of income, and for the other cutting-edge technology. Cooperative bargainers would focus on finding terms that best exploit each partner's abilities and minimize weaknesses, creating the strongest possible future partnership.

Cooperative and competitive bargaining are not mutually exclusive: Working to "bake the biggest possible pie" does not, in itself, say how the final pie will be divided. Savvy competitive negotiators, for example, will look earnestly for ways to "expand the pie" and at the same time get the biggest possible piece. Competitors, however, are likely to see pie-expansion as the less important goal. Cooperators, by contrast, would emphasize creating the best deal and then look for a principle that both partners saw as fair to divide the benefits, rather than trying to outfox the other side and get the lion's share. In practice, cooperative and competitive approaches may be mixed or sequenced, depending on the setting, subject matter, and personalities of the negotiators. Still, the concepts of cooperative and competitive styles provide a paradigm for understanding the dynamics of negotiation.

There are important styles of bargaining that go beyond either cooperative or competitive, and which might be seen as more intense versions of each approach. So-called *adversarial* bargainers view negotiation as a kind of war and believe that all is fair in winning it. They are willing, for example, to renege on tentative deals, misrepresent their authority, make empty threats, and lie about facts that cannot be checked, if such tactics seem likely to win them a better outcome.

By contrast, *problem-solving* bargainers employ intensely cooperative tactics. Problem solvers focus almost exclusively on finding solutions that will maximize the value of the deal for both parties. They are extremely reluctant to become involved in trying to obtain a better outcome for their client than the other side and insist on using genuinely neutral principles to accomplish the task of allocating benefits. For simplicity, we will discuss bargaining styles in terms of "cooperative" and "competitive," but will also refer to adversarial and problem-solving techniques.

From Folberg, Golann & Stipanowich, *Resolving Disputes: Theory Practice & Law* (2005), pp. 223-5.

What Is Mediation?

Mediation is a process of assisted negotiation in which a neutral person helps people reach agreement. The process varies depending on the style of the mediator and the wishes of the participants. Mediation differs from direct negotiation in that it involves the participation of an impartial third party. The process also differs from adjudication in that it is consensual, informal, and usually private: The participants need not reach agreement, and the mediator has no power to impose an outcome.

In some contexts you may find that this definition does not fully apply. The process is sometimes not voluntary, as when a judge requires litigants to participate in mediation as a precondition to gaining access to a courtroom. In addition, mediators are not always entirely neutral, a corporate lawyer, for instance, can apply mediative techniques to help colleagues resolve an internal dispute, despite the fact that she is in favor of a particular outcome. Occasionally mediation is required to be open to the public, as when a dispute involves governmental entities subject to "open meeting" laws. And finally, a mediator's goal is not always to settle a specific legal dispute; the neutral may focus instead on helping disputants to improve their relationship.

There is an ongoing debate within the field about what "mediation" should be. To some degree, this results from the different goals that participants have for the process: Some focus only on settlement and seek to obtain the best possible monetary terms. Others seek to solve a problem or repair a relationship. Still other participants use mediation to change people's attitudes. As we will see, the increasing application of mediation to areas such as family and criminal law also raises serious questions of policy. We will focus primarily on "civil" mediation, involving legal disputes outside the area of collective bargaining, since that is the form that you are most likely to encounter in law practice. However, to give you a sense of what mediation may become, we also will present other perspectives on the process.

What Do Mediators Do?

Mediators apply a wide variety of techniques. Depending on the situation, settlement-oriented mediator may use the following approaches, among others:

- Help litigants to design a process that assures the presence of key participants and focuses their attention on finding a constructive solution to a dispute.
- Allow the principals and their attorneys to present legal arguments, raise underlying concerns, and express their feelings directly to their opponents, as well as hear the other side's perspectives firsthand.
- Help participants to focus on their interests and identify imaginative settlement options.

- Moderate negotiations, coaching bargainers in effective techniques, translating communications, and reframing the disputants' positions and perceptions in constructive ways.
- Assist each side to assess the likely outcome if the case is litigated, and to consider the full costs of continuing the conflict.
- Work with the disputants to draft a durable agreement and, if necessary, to implement it.

What Is the Structure of Mediation?

Because mediation is informal, lawyers and clients have a great deal of freedom to modify the process to meet their needs. In practice, good neutrals and advocates vary their approach significantly to respond to the circumstances of particular cases. This said, a typical mediation of a legal dispute is likely to proceed through a series of stages.

Pre-mediation

Before the disputants meet to mediate, the neutral often has conversations with the lawyers, and sometimes also with the parties, to deal with issues such as who will attend the mediation and what information the mediator will receive beforehand. Lawyers can use these contacts to start to build a working relationship with the mediator and educate him about their client's perspective on the dispute and obstacles that have made direct negotiations difficult.

The Joint Session

Most mediations begin with a session in which the parties, counsel, and the mediator meet together. As we will see, the content and structure of a joint session can vary considerably, depending on the goals of the process. When mediation is focused on reaching a monetary settlement, the joint session is likely to be dominated by arguments of lawyers, perhaps followed by questions from the neutral. If, by contrast, the goal of the process is to find an interest-based solution or to repair a ruptured relationship, then the mediator is much more likely to encourage the parties themselves to speak, and to attempt to draw out underlying issues and emotions.

Private Caucusing, and No-Caucus Models

After disputants have exchanged perspectives, arguments, and questions, most civil mediators adjourn the joint session in order to meet with each side individually in private "caucuses." The purpose of caucusing is to permit disputants and counsel to talk candidly with the neutral. Keeping the parties separated, with communications channeled through the mediator, also allows the neutral to shape the disputants' dialogue in productive ways. When the mediation process is focused on monetary bargaining, the participants usually spend most of their time separated, with the mediator shuttling back and forth between them. Occasionally, in extraordinarily contentious cases, parties may not meet at all. If, however, parties are interested in exploring an interest-based resolution

or repairing a broken relationship, then the mediator is much more likely to encourage them to remain together so that they can work through difficult emotions, explore options, and learn to relate productively with each other. Mediators who handle family disputes often prefer to remain in joint session during the entire process, and some mediators are experimenting with no-caucus formats in general civil cases.

Moderated Discussions

Even when a mediation is conducted primarily through private caucusing, neutrals sometimes ask the disputants to meet with each other for specific purposes, for instance, to examine the tax issues in a business breakup or to deal with a difficult emotional issue in a tort case. And in almost every mediation, whether or not conducted through caucusing, the lawyers or parties meet at the end of the process to sign a memorandum of agreement or decide on future steps in the case.

Follow-up Contacts

Increasingly the mediation process is not limited to the specific occasions on which the mediator and disputants meet together. If a dispute is not resolved at a mediation session, then the neutral is likely to follow up with the lawyers or parties. Depending on the situation, the mediator may facilitate telephone or e-mail negotiations, or convene additional face-to-face sessions.

From John W. Cooley, *Mediation Advocacy*, (National Institute for Trial Advocacy 1996), pp. 91-95

The client should face the mediator when speaking

It is important for you to advise your client to face the mediator when speaking. If your client talks across the table to the opposing party and opposing counsel, it is quite possible that either or both of them will interpret what your client is saying as accusatory or demeaning. This may arouse anger in one of them and perhaps cause an outburst and an interruption of your client's story. The opponent's outburst, in turn, may cause your client to react emotionally and perhaps say something in front of the mediator that is embarrassing or even harmful to your case.

Apart from avoiding these unpleasant happenings, having your client face the mediator when speaking has other benefits. Your client's eye contact with the mediator will help to make his message more persuasive to the mediator. Persuading the mediator is important because, even though mediators are duty-bound to remain neutral and impartial regarding the parties and the subject matter of the dispute, they are human beings whose perceptions and actions can have a great impact on the quality of the ultimate settlement. They are constantly vigilant for clues to finding the true heart of the conflict, the relative credibility and/or memory acuity of the parties, and their essential needs and interests. By maintaining eye contact with the mediator, your client can begin to build trust and rapport with the mediator and convey forthright of purpose, desire, and motivation to achieve a joint goal. This kind of bonding with the mediator has the effect of building a type of teamwork atmosphere that can spill over into caucuses and, through the mediator's shuttle pollination, positively reinforce the problem-solving efforts of both sides. Making sure your client faces the mediator also carries with it the added benefit of having the opposing party and counsel actually listen to what your client is saying without feeling threatened. Equally as important, it gives *you* the opportunity to observe the body language of the opposing party and counsel while your client is speaking. An opponent's frown or a smirk made while your client is giving a factual presentation may communicate the opponent's denial or assent to your client's version of the events giving rise to the dispute.

The client should speak to be understood

When preparing a client for mediation, allow him to rehearse the factual presentation in your presence. Listen very carefully while your client gives this practice presentation. Is it organized? Does it begin at the beginning and touch on all necessary points? Is it a fair, honest statement of what occurred? Does the client use terminology that can be understood by both the mediator and the opponents? This last question is a very important one. Clients with industrial, medical, or technical expertise may use words or expressions that are common to their everyday experience, but that are like a foreign language to others present at the mediation session. In the rehearsal session with your client, listen for such words, and when you hear one, stop your client and have him define it in simple terms. Impress on your client the importance of using words that everyone understands at the mediation conference. Point out to him that big words not only can communicate arrogance and insensitivity, but also can be boring, distracting, and misleading and in the worst case scenario, can precipitate very unpleasant results. When

Benjamin Franklin was quite young, he once said to his mother, I have ingested an acephalous molluscous." Fearful that the young Benjamin had swallowed something poisonous, his mother forced him to take a large dose of castor oil. The next day the effects of the medicine having subsided, Ben confided to his mother that he "had eaten nothing but an oyster." While recuperating from the resultant vigorous spanking, young Ben vowed never again to use big words when little words would do.

The client should state only facts

In the presentation rehearsal and at the mediation conference itself, your client should state only facts. He should be careful not to confuse facts with exaggeration and hyperbole. If your client finds it necessary to offer speculation or hearsay regarding a part of his story, he should label it as such when speaking to ensure that no one will be misled. Making these distinctions between fact and conjecture can have a very positive influence on listeners. It communicates that the speaker is making a determined effort to be fair and objective in his recollection of events. It also conveys an openness to have his recollection refreshed by the opponent, thereby imparting to the listeners an attitude of flexibility and an inclination to cooperativeness.

Conversely, a speaker's overstatement, embellishment, or stretching of the truth usually inspires listeners to be apprehensive and cautious about accepting all of the speaker's message. If the speaker misrepresents an important fact--even innocently--a listener may lose complete confidence in the speaker's ability to be truthful, may refuse to communicate with the speaker, or may become vindictive.

The client should never argue

Refraining from arguing is a cardinal rule everyone should observe at the mediation. "Arguing" carries at least two connotations. The first type of "arguing" makes a point persuasively with the purpose of convincing a listener to the speaker's point of view. That type of arguing is certainly well within the scope of permissible mediation behavior. What is taboo is "arguing" of the second type--making an argument, anger-based, that is combative and offensive and does nothing but distract listeners from the task at hand. Most such arguments consist of isolated or periodic episodes of seemingly endless blustering and pointless discourse, resulting in a total waste of everyone's time. Admittedly, arguments of the first type and arguments of the second sometimes produce very similar effects. Consider the story of a young lawyer who had been talking for about four hours in court to twelve jurors, who, when he had finished, felt like lynching him. After the young lawyer took his seat at counsel table, his opponent, a crusty old professional, rose slowly to his feet. After glancing quickly toward the jury, then down at his watch, he looked pleasantly at the judge and said, "Your Honor, I will follow the example of my friend who has just finished and submit the case without argument."

The client should display no reaction to settlement offers

Because no one really knows what the true settlement value of a case is before the settlement agreement is actually reached, you should counsel your client not to display any reaction to any settlement offer--either verbally or nonverbally. If your client is the plaintiff, and the defendant's offer is much higher than anticipated, your client's reaction of shock and elation or statements of "sounds great!" or "hot dog!" may preclude you

from later convincing your opponent that your client wants (or needs) more to settle the case. If your opponent makes what she thinks is a reasonable offer to settle, and your client scoffs at it and verbally berates the opposing party, your client's reaction might anger the other side sufficiently to cause them to withdraw from the mediation. If your client is a defendant, impulsive reactions should do similar damage to the potential for successful negotiations. It should be emphasized that verbal reactions are not the only type of prohibited reactions to settlement offers. Facial expressions can communicate what people are thinking. In the proper context, they can be a strong asset. In the wrong context, they can be a devastating liability. Counsel your client to display no body reaction- even facial reactions- to settlement offers.

The client should behave as if before a jury

Advise your client that, although he will not be under oath during a mediation session, he should speak narratively and answer questions as if under oath. Your client should make every effort to give the appearance to the mediator and opposing party and counsel alike that he is trustworthy and honest. The best advice to your client is "be yourself-don't try to be the person you think the mediator, or anyone else, wants or expects you to be." Tell your client to tell his story to the mediator "straightforwardly and sincerely," and if appropriate, "empathically." If your client tries to pretend to be someone he is not, the masquerade will undoubtedly fail, and it will probably adversely affect the success of the negotiations. No one easily tolerates a phony. That statement is as true with respect to mediations as it is with trials, and its truth was aptly demonstrated in an incident that occurred in a Kansas court some years back. A tall, awkward, somewhat timid fellow was called to testify as a witness for the defendant in a civil case. Defense counsel said to him, "Now sir, take the stand and tell your story like a preacher." "No sir!" roared the judge. "I want you to tell the truth!"

The client should neither answer nor ask difficult questions

At times during the course of the mediation, the opposing counselor the mediator may direct difficult questions to your client. Difficult questions might be defined as those that require some knowledge of the law to answer, seek information beyond the specific expertise of a client, or require a client to make or imply an admission against interest without having available the necessary information to give a full explanation. During the premediation preparation, advise your client that when such questions are posed during the mediation session, your client should defer to you for an answer. You should also have an understanding with your client before you go to the mediation session that when someone asks your client a question during the course of the mediation, your client will pause slightly before answering to permit you to interject, if you think it necessary, to answer the question or to provide a reason why it cannot be answered at that particular time.

By the same token, you should caution your client not to ask the other side or the mediator difficult questions during the course of the mediation. Actually, better advice would be for your client not to ask the mediator or the other side any questions without first clearing the questions with you privately. After you screen the question, you may decide that it is appropriate to ask, and you may determine that your client is the appropriate one to ask it. Or, you may conclude that it would be better if you asked the

question. Inappropriate questions posed by a client can sometimes have the effect of undermining a negotiating strategy, exposing a negotiation tactic, revealing the client's gullibility, threatening the other side, disclosing clues to your bottom line, or demonstrating the client's lack of knowledge, skill, ability, or competence. As to the last effect, consider this historical example. Mozart was once asked by a lad how to write a symphony. "You're a very young man," Mozart replied and then asked, "Why not begin with ballads?" "But you composed symphonies when you were ten years old," the youth urged. "Yes," said Mozart, "but I didn't ask 'how'."

3. REPRESENTING THE CLIENT IN MEDIATION

The role played by an attorney in representing her client in mediation may vary depending on the type of case, the nature of the client, and the style of the mediator. The following are examples of the differing kinds of participation that an attorney may perform:

a. DEGREE OF PARTICIPATION

(1) Attorney as Non-Participant

The classical model of mediation once envisioned the parties mediating without attorneys being present. This model was particularly favored by family-law mediators who often viewed attorneys as hindrances to resolving the dispute out of court. Today that attitude has changed a good deal (in part because attorneys have become more sensitive to how mediation works), but there may still be valid reasons in a particular case for the attorney not to directly participate in a mediation.

In such a situation, the attorney must protect the party's interests by insuring that the party has adequate legal advice both in advance in order properly to participate in the mediation and after the mediation in connection with any settlement. The attorney's legal advice, however, may be counterproductive if it prevents the party from engaging in the mediation in good faith and unduly restricts the options available. The attorney must walk a thin line between adequately advising the party about legal aspects and so preconditioning the party that creative and useful approaches to settlement are impossible.

In family mediations where attorneys may not play a central role in the mediation discussions or, may not even be present at all stages, they still provide a critical source of information and advice as to legal matters as well as strategy. Consider Judy K. Dougherty & Josefina M. Rendon, *Models, Styles and the Process of Family Mediation*, *Alternative Resolutions* 22, 25 (June 2001):

During the actual mediation, the lawyer may help with evaluations, clarification of issues, legal questions, development of options, consideration of the range of possible judicial rulings for particular issues and development of tradeoffs. The attorney is in direct contact with the client during this stage. Often, in mediations where the attorneys are not present, memos of each session are prepared by the mediator so that the particular legal questions are clear and so the attorneys can point out problem areas before a final agreement is solidified and owned by the parties.

(2) Attorney as Silent Advisor

There are also mediation models in which attorneys sit through the mediation with their client but do not take an active role. Some dispute resolution centers encourage attorneys not to sit at the table with the parties, but rather on the periphery where they can still intervene or give advice if necessary. Arguably under these circumstances the attorney has a better chance to judge how and when to provide legal advice without risking undermining the creativity of the process. Normally attorneys should resist the temptation to interject themselves into the mediation, and such intervention should only take place if necessary to protect the client's rights and interests (the "I'm not a potted plant" situation).

(3) Attorney as Co-Participantⁱ

If the attorney attends the mediation, she may sit at the table with her client and be a co-participant in the discussion. They may both participate in all phases of the negotiation, or they may decide among themselves on more specialized roles. Obviously the attorney is more likely to address the legal issues while the party may focus more on the factual and emotional issues. The attorney will be in a position to consult privately with the party at the table, although this can detract from the spontaneity of the discussion and generate defensiveness on the other side. Considerable advance thought should be given to how the respective roles will be conducted.

(4) Attorney as Dominant or Sole Participant

Finally, there are mediation models in which the attorney is the dominant or sole participant. The attorney may either not be accompanied by the client at all (as in some court-ordered settlement conferences) or may come with the client who, however, does not take an active role in the mediation (as in some settlement-week mediations). Such mediations are necessarily more focused on legal issues and the application of law to fact. In such mediations, however, the attorneys should give consideration to how the human side of their client and the client's position can best be conveyed, including having the client speak to certain matters.

ⁱ [This is the role lawyers should play in the Buffalo Creek Mediation Exercise.]