

COMMENTARY

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Overcoming reluctance to engage in mediation

By LAURA A. ATHENS

Many attorneys know and appreciate the benefits of mediation. Those who are familiar with the benefits of mediation readily propose and eagerly participate in it. However, if you encounter resistance, how do you address it.

You do what any good mediator does: start asking probing questions to determine the underlying reason for the reluctance. This article reviews some common sources of resistance to mediation and ways to overcome it.

Lack of Understanding of Mediation and Its Benefits

Sometimes education of the hesitant party is necessary. You may need to explain what mediation is and what it is not. As prevalent as mediation is, some still do not fully understand the process. Reviewing some basic cannons may be helpful. Mediation is voluntary. The parties must choose to participate and may discontinue at any time. Engaging in mediation does not preclude pursuit of traditional litigation or other forms of alternative dispute resolution (ADR). The mediator has no authority to impose a decision or force any particular outcome. The mediator is a neutral, impartial professional who helps the parties communicate concerns, identify issues, explore options and reach solutions.

Confusion may arise concerning the different forms of mediation. The facilitative approach focuses on helping parties to discuss their interests, generate potential options and reach their own mutually satisfying agreement. In evaluative mediation, the mediator often shares opinions, evaluates legal positions and predicts likely outcomes to guide the parties in reaching a resolution. Transformative mediators empower the parties by fostering their recognition of each other's perspectives, building understanding and transforming the quality of their interactions.

You may wish to share the many benefits of mediation. Mediation promotes communication, collaboration and joint problem solving. It is efficient and cost effective. Confidentiality and privacy are protected. Mediation provides the parties with an unparalleled opportunity to craft a unique agreement that—with the help of the mediator and legal counsel—addresses their particular concerns. Together, the participants are able to reach innovative, mutually satisfying and enduring solutions that neither party, nor a judge or jury, would have contemplated.

Mediation is particularly advantageous to parties who have a continuing relationship. The mediation process builds trust and rapport, preserves the relationship, and teaches fundamental negotiation skills that can be utilized if and when future disputes arise. Parties actively engaged in the negotiation process tend to be more invested in the result and less likely to pursue future litigation.

Concerns about the Mediator

At times, opposition can stem from the mediator proposed by a party. Opposing counsel or their clients may not be comfortable with the style or reputation of a proposed mediator. They may have had a negative prior experience with the mediator or the entity with which the mediator is associated. Some may prefer a mediator with subject matter



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expertise; others may prefer a mediator who uses a particular approach.

Some may wish to pursue private mediation; others may wish to utilize an alternative dispute resolution center. In some cases, mediation is available through a judge or magistrate who is not presiding over the case. If there is a concern that the other party will reject a particular mediator based on a perception of bias, Professional Resolution Experts of Michigan (PREMI) offers a diverse panel of seventeen neutral ADR providers with a wide-range of subject matter and process expertise to assist legal counsel and their clients to resolve disputes.

Concerns about the Mediation Process

Mediation is not an all or nothing proposition. One of the hallmarks of mediation is that the process is flexible and user friendly. If you sense that an attorney is interested in mediation, but seems concerned about it being premature, you may want to point out that mediation serves many purposes and is valuable at any stage of litigation. Engaging in mediation early can clarify the issues in dispute, promote informal and expeditious discovery, result in full or partial resolution and make the entire litigation process less adversarial.

Selection of a mutually convenient time and place for the mediation is crucial. Careful and deliberative planning of the time, place and duration of the mediation, consideration of the needs of all participants is essential. Pre-planning allows the parties to focus on negotiation, rather than being distracted by other concerns. If work or other obligations preclude pursuit of mediation during normal business hours, many mediators offer flexible evening or weekend options. A good mediator will work to accommodate the schedules of the participants and ensure that all participants are comfortable with the time and location of the mediation session. If necessary, rely on the mediator to help you plan the mediation process and identify the key participants to foster collaboration and promote an optimal outcome.

Cost Concerns

A disparity in the economic resources of the parties often exists. An even split of the mediation costs is not always an equitable arrangement. Each party's ability to contribute to the costs should be assessed. To reach a fair cost sharing arrangement, you may wish to suggest proportionate payment of the mediation costs based on the respective resources of the parties. Mediation costs should not serve as an obstacle when utilization of it often results

in substantial cost savings as well as greater satisfaction with the outcome.

Unfounded fears

Those who have limited or no mediation experience, may feel like a "fish out of water." The philosophy underlying mediation may be counterintuitive and foreign to them. Mediation requires a paradigm shift from positional bargaining to joint problem solving. Attorneys are accustomed to zealously advocating and defending the client's position, not focusing on the interests of both parties.

Some attorneys may fear that if their clients can reach agreements with the help of a mediator, then legal representation may be viewed as superfluous. Because the mediator's role is to facilitate the parties in reaching a mutually agreeable resolution and not to provide legal advice or usurp the role of the attorney, the parties often want and need legal representation during mediation. While the lawyers' roles shift from zealous advocates to trusted legal advisors in mediation, their counsel is equally valuable. Clients will continue to rely on their attorneys to advise them of their legal options, assist them in evaluating potential solutions, drafting settlement terms and protecting them from exploitation.

You may be concerned that proposing mediation may be perceived as a weakness. However, proposing mediation demonstrates to your clients that you understand the importance of seeking more expeditious and economical ways to resolve disputes. Fewer clients are willing to tolerate the extraordinary costs, considerable time commitment and excessive delays associated with traditional litigation. Mediation allows parties to be masters of their own destiny. By promoting mediation as an option, attorneys enable their clients to take a more active role in the dispute resolution process and have more control over the ultimate outcome. Successful, expeditious resolutions will lead to more satisfaction, increased perceived value and generate more business. Your clients will thank you for suggesting mediation and will be more likely to refer their colleagues and associates to you.

Laura A. Athens is an attorney, mediator, and arbitrator in Farmington Hills. Her practice focuses primarily on education law and disability rights. She provides legal representation and alternative dispute resolution (ADR) services in special education matters. She previously served as a hearing officer in special education due process hearings and in vocational rehabilitation matters. She continues to mediate special education, vocational rehabilitation, guardianship and disability rights cases. As an adjunct professor at Wayne State University Law School, Athens taught education law, health law and bioethics. She also taught Legal Research and Writing at Washington University School of Law. She is an associate of Professional Resolution Experts of Michigan, LLC (PREMI, <http://premiadr.com>) and has served on the State Bar of Michigan Alternative Dispute Resolution Council and as a former Chair of the Oakland County Bar Association ADR Committee. Athens has published numerous articles on education law and ADR issues and frequently lectures on school-related topics.

DANIEL FENECH
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"I REALIZED I WAS OVERWHELMED WHEN I STARTED DREAMING IN E-MAIL..."



under
analysis
BY THE LEVISON GROUP

By Lisa Henderson-Newlin

To tell or not to tell, that is the question

I rarely tell people I'm a lawyer. It's not because I'm ashamed of my profession. On the contrary, I'm proud of it, as my law degree proves I'm capable of a three-year commitment, despite what past boyfriends say.

I just don't like talking about my job. Depending on the situation, there are times I will admit my career choice, but it's mostly when I want to point out the absurdity of court proceedings in television programs and movies. (Newsflash: The cross examining lawyer actually has to ask questions and not just hurl accusations.)

One thing is for certain, I never reveal my profession to anyone coming to my house for service calls or repairs. It's unnecessary and I can't imagine anything good coming from such disclosure. I refuse to do so because I'm afraid people will think I have more money than I do.

Why? Didn't you know? Attorneys make millions of dollars and are literally rolling in the dough. I know I wash my dishes with \$100 bills, which is probably what clogs my pipes.

Yes, everyone knows attorneys make obscene amounts of money; everyone except my boss and my bank. I guess they didn't get that memo.

So recently when I had a worker out to the house, I didn't mention my chosen career. I was afraid he would increase the price if he knew I was part of one of the most joked about professions.

He certainly wouldn't have guessed what I do based upon my living quarters. I live in a two bedroom, one bathroom home with my husband and three dogs, which means there's random socks strewn about and a light coating of hair on everything. No matter what he thought I did, cleaning houses wouldn't be one of them.

The gentleman arrived and I greeted him nicely. His name was Rafael. Actually, I don't remember his name but Rafael is sassy and has a nice ring to it, so let's go with that.

Before we go any further, I want to assure you that this tale I'm about to tell actually happened. I didn't make this up, mostly because I'm just not that clever.

Rafael came over to cut the tree roots away from my sewer lines. I live in an old house with big trees so this has to be done every few years. I feel like there's a joke here about lawyers being "full of it," but I'm not going to make it because I'm classy (and because it just isn't coming to me).

Rafael arrived and immediately went to work cutting the roots. It was a warm day so after a while I took him a bottle of water and asked if he needed anything. I'm not sure what I would have offered other than the water, so I was

grateful when he declined anything further.

We began to chat as he drank his water. I pointed out he probably gets to see a lot of houses in his line of work and how that must be an enjoyable part of the job, not that cleaning sewers wouldn't be fulfilling in itself. He agreed it can be fun to see different houses and interact with different people.

"Do you know what people are the worst to work for?" he asked as he took a swig of fresh spring water?

"No. Who?" I asked, wondering how many bottles of water he was going to drink before he finished the project.

"Lawyers. They're the worst people to work for."

"Really?" I asked. "Why is that?"

"They're rude and they always want to negotiate everything. Nothing is ever good enough and they are never happy with the service or the charges. I hate working for lawyers."

I tried my best to hide a smile, knowing I wasn't going to volunteer my career choice.

"So," he said as he finished the bottle of water, "what do you do?"

I debated for a moment as to what to tell him. The options were endless. Sales? Secretary? Store manager? But then I decided to tell him the truth. Why be ashamed of who I was and what I did? I wasn't ashamed and certainly shouldn't hide it from Rafael. We had bonded over bottled water and I felt I owed it to him.

"I'm a lawyer," I replied with a sheepish grin.

The look of horror that came over his face was priceless. Actually, it wasn't priceless. It was \$159 plus tax.

"You are?" He asked in a panicked voice. "I had no idea."

I assured him it was fine and I wasn't offended. I also brought him another bottle of water to ensure he knew everything was alright.

However, I suspect Rafael learned a lesson that day. He learned never to complain about a profession until he knows the profession of the person to whom he is complaining. I learned a lesson too. I learned that if you make someone working on your house feel guilty about mocking you, you can get a discount on sewer work.

Under Analysis is a nationally syndicated column of The Levison Group. Lisa Henderson-Newlin is a shareholder of the law firm McNany, Van Cleave, and Phillips. She's a contributing writer at NickMom.com and writes a humor website, LisaNewlin.com. Contact Lisa at lhenderson@mvplaw.com or contact Under Analysis by email at comments@levisongroup.com.

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Keeping a secret can pay dividends

By MARIE E. MATYJASZEK



Marie E. Matyjaszek

Confidentiality is a common theme throughout the legal world, and for good reason. The most recognized example of this is the fact that conversations between attorney and client are privileged and held confidential, which you would think promotes an open and honest relationship between the two, but that is not always the case (i.e. clients sometimes lie, despite the fact that you can't tell anyone what they say).

In family law, many settlement agreements are kept out of the public file, especially in high profile cases, so that the privacy of the divorcing couple and their family is held intact. When resolutions are reached behind closed doors, those involved are often held to confidentiality agreements so that no one knows what really happened or how much was awarded. Lawsuits are often publicly humiliating for corporations and individuals; naturally, the PR people want to minimize any potential damage to the extent possible. Many people assume that the higher the monetary award, the more truth there was to the allegation that brought the lawsuit in the first place.

This type of confidential agreement was brought to light in Florida by the Snay family. Patrick Snay sued his former employer, Gulliver Preparatory School, claiming age discrimination when he was not brought back on board to head the school. The school and Snay eventually reached an agreement—meant to be confidential—where Snay would receive \$80,000 as a settlement, in addition to \$10,000 in wages and \$60,000 for his attorneys. The agreement did allow exceptions to the confidentiality so that Snay and his wife could speak to his attorneys and other "professional advisors."

Unfortunately, Snay decided to

let his daughter in on the secret, claiming that she was entitled to know "something" due to the fact that she was involved in the family ordeal and had needed therapy. This probably wouldn't have been a big deal, except that Snay's daughter posted a little something on her Facebook page, which just so happened to have 1,200 individuals following it (and I thought I was doing well with 420 friends): "Mama and Papa Snay won the case against Gulliver. Gulliver is now officially paying for my vacation to Europe this summer. SUCK IT!"

Gulliver Preparatory Schools was less than impressed and refused to fork over the \$80,000, based on a breach of the confidentiality agreement. Various court hearings and appeals were held, but Gulliver prevailed in the end.

I wonder if Snay's darling daughter still got to go on that European vacation.

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COMMENTARY PAGE

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