

## Advanced Mediator Moves

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## Advanced Mediator Moves

Once the 40 hour basic training is over, and newly minted mediators have practiced reflective listening and making agendas, it quickly becomes clear that beginners' interventions can only take a mediation so far. As the field of Alternative Dispute Resolution in Family Law matures, reflective practitioners find that willingness to mediate or work collaboratively doesn't necessarily translate into cases that are easy to settle. Sophisticated approaches to complex cases are needed to address the special requirements of more complex and higher conflict cases.

This article introduces some advanced skills, some which skilled mediators are practicing reflexively and some which will be new, requiring some practice.

### Advanced skills:

- Mediator's choice;
- Promoting self soothing and self-regulation;
- Content to process shift;
- De-Positioning an entrenched party;
- Changing the Perception of Gap;
- Party Presentation of Offers;
- Turning business away.

### Mediator's Choice

Mediator's choice is a technique to use when you're all out of other ideas and time is running short. This move is more often used in civil mediations than in family mediation situations, but it's useful to discuss because it's an interesting jumping off point for how it might be adapted in family law mediations.

Here's how it works: The mediator silently formulates a proposal that he or she thinks will be barely palatable to each side---hanging the ham low enough to where the dog can get at it, so to speak. After spending several hours with both sides, if the mediator has an idea of each side's breaking point, he or she can formulate the "mediator's choice" proposal. The idea is that it's the last dollar that each side may be willing to concede.

The mediator then presents the proposal to each side in caucus clearly indicating that it's the mediator's proposal, not a proposal made by either side. In the first round there's no "yes" or "no" answer, but simply an opportunity to think about the mediator's proposal. Some mediators put the proposal in a basic stipulation form so that a written agreement can be left with the parties and signed if there is indeed an agreement.

Once the proposal has been made to both sides, the mediator clearly explains the rules: the mediator will not reveal either side's answer to the proposal unless the answer by both sides is "yes" and the parties have an agreement. If they have an agreement, the stipulation is signed. There is no re-negotiation of any terms of the agreement—it's mediator's choice or no agreement.

If either side says "no", the answer from both sides is kept confidential. That way, if one side says "yes" and the other side says "no", the rejecting side doesn't know the agreeable side would settle for the mediator's proposal. By revealing only mutual "yes" answers, the mediator preserves confidentiality for the ongoing negotiations.

This is a last-ditch attempt to help the parties reach an agreement, and is generally only suggested 15 minutes before the mediation is scheduled to end. It's very evaluative in nature, and is simply one last mediation intervention to try before sending the parties on their way without an agreement.

### **Self Soothing and Self Confrontation**

At times in the mediation process, some clients will become agitated such that they cannot continue to mediate. If you're already in caucus, it may be time for a break or even a postponement of the rest of the mediation session. If you're in joint session, however, there's a technique which can help clients self-soothe and self-regulate before the entire mediation is derailed.

Here's how it works: When you note that a client is too agitated to continue to make progress in a joint session, to use this technique you'll call a caucus. We'd suggest that your client is too agitated to continue when you observe such behaviors as crying, slamming the table, twitching, incessant sniping, and other clearly agitated behaviors.

In caucus, you'll ask the upset party, "what can you do to make yourself feel better?" Your first focus is just on helping the agitated party calm down. Acknowledge his or her pain or fear in the underlying conflict. Get the client to make a commitment to get a grip in him or herself. Ask them what has worked in the past, and let them choose what they think might work. Don't suggest a method for self-soothing until after the client has made his or her own suggestions and decided that they won't work. Make sure the client is out of ideas before you make your first suggestion.

Suspend the negotiations until the party has calmed down and self-soothed. Expect a relapse, but hope for progress! Once the party has self-soothed, you may wish to move onto self confrontation before going back into joint session.

### **Self Confrontation**

In caucus, after self-soothing, you'll ask your client, "what can you do to take responsibility for improving your (or your spouse's) willingness to negotiate?"

Explore the possibilities with him or her. Acknowledge the progress he or she has made from self-soothing. Before asking your question, confirm that the client is ready to go on and if they're ready for a bigger challenge. Ask what they can do to move the negotiations along. Use this caucus time in a focused way to discuss the client's options and select an acceptable proposal for the client to make in joint session or as part of your shuttle diplomacy.

### **Content-to-Process Shift**

When things get too heated or counter-productive in the mediation room, you can borrow a therapists' intervention called content-to-process shift.

The premise is pretty basic: when the content of the session, e.g., the current discussion topic, is too controversial or generating too much conflict, step back a little in the session and think about what mediation process tools you could use to diffuse the tension. You're switching from the discussion itself to the mediation process, hence content-to-process shift. Do you need to take a break? Call a caucus? Help a party self-soothe? What mediation intervention can you use to lower the temperature in the room and make the discussion possible again?

### **Mediator Intervention: De-Positioning**

In caucus, you can work on de-positioning the most entrenched party by:

- Accurately restating the party's position;

- Ask the party: imagine if a judge accepted your position: how would that benefit you?
- Squeeze those benefits dry—keep asking that question until the client is all out of ideas. Add a few of your own if the client runs out. The idea is to exhaust the concept of the benefits of the client’s position;
- Restate and summarize all the benefits of the client’s stated position--- then ask “if an ultimate settlement dealt with each of these concerns, would you consider settling on that basis?”

The idea behind this intervention is that parties must feel heard before they’re ready to change.

The keys for success in this intervention are:

- Be accurate in restating the party’s position;
- Lean over backwards to accept the party’s stated goals, even if you don’t agree;
- Go for the baby-step toward an agreement, and don’t rush the agreement itself. What you’re doing here is creating a readiness for an agreement, not the agreement itself.

You can use this technique with just one goal or issue or the overall settlement. What you’re doing is helping the party to create his or her priorities. You’re also helping them to truly examine whether they really want to do what they say they want to do. It’s a very gentle version of a reality test coupled with goal setting and goal prioritization. Let the party come to their own realization that they want to change—they don’t want to hear from you or their spouse that they need to change. This is a realization they need to come to on their own....but you can nudge it along.

The next step is for the party to realize that in order for that party to get an agreement, it must also be an agreement the other party will sign. Again, we’re back to hanging the ham low enough to where the dog can get at it. The idea is to:

- Create an openness to the other’s needs; and
- Pointing out that there’s a low cost and just a little time invested in exploring the other party’s needs; and
- Listening* to needs is not the same thing as *obeying*, or doing what the other party asks.

And, just like it was necessary for the client to feel heard before he or she was ready to change, it will be necessary for the other client to feel heard before he or

she will be ready to change. It all comes back to baby steps toward and agreement.

### **Changing the Perception of Gap**

Changing the perception of gap is a more sophisticated approach to the tried-and-true mediation intervention of pointing out the costs (monetary and otherwise) of continuing the conflict.

In changing the perception of gap, you'll start by using a flip chart to:

- Delineate the gap;
- Assess the probable outcome (get the lawyers to help with this step if they're available);
- Assess the soft costs and emotional costs;
- Talk about the financial benefits of settling;
- Examine the transaction costs of not settling;
- Do the math to delineate the remaining gap;
- Set strategies for closure.

When the client makes an estimate as to costs of litigation or other expenses, encourage them to over-estimate. Anyone who's been to a timeshare presentation will recognize this as a sales technique. Also over-assess the client's chances of success at trial—if the client sees it as 50/50, encourage him or her to assume 60% for the sake of this discussion. By being overly optimistic and encouraging in this part of the exercise, the math works such that the gap seems even smaller.

After you've done the steps above, then ask the client to:

- Assess the probability of winning his or her position in a percentage;
- Define the amount of money it would take to make him or her feel better
- Assume the cost of trial;
- Assess any financial benefit to keeping the relationship (*e.g.*, not polarize friends, being able to stay on medical insurance, etc.);
- Agree that estimates have been conservative.

Remember, you're taking baby steps here:

- Be modest in your strategy goal;
- Stop before you're pushing the client too much or too fast;
- Do this exercise in the light most favorable to the client;
- No hammering the client to accept any of this.

## Party Presentation of Offers

The key to the party presentation of offers is that once the offer is presented, there is no discussion except to ask clarifying questions before the presenter leaves the room.

The scenario: you are already in caucus and one party would like to make a settlement offer. If there's a lawyer helping the party, the lawyer will make the presentation. If there's no lawyer helping the party, or the lawyer isn't at the mediation session, the party will present the offer.

Generally, the party will have formulated the proposal in caucus with the mediator and/or his or her lawyer. When the offer is ready to be presented, the party will present the offer himself to the other side.

The mediator accompanies the party to present the offer in the other caucus room to the adverse party and his or her lawyer (if a lawyer is involved). The recipient of the offer may ask clarifying questions but may not respond or otherwise react to the offer when it is made. When the presenting party is done, he or she returns to their original caucus room. The mediator stays with the party receiving the offer to discuss the pros and cons and perhaps formulate a counter-offer which will be presented by that party.

**Why this move works:** If lawyers are involved in the case, they typically love being able to make their own pitch of the offer. As the mediator, you facilitate the discussion but you remove the risk that you've interpreted the offer incorrectly as you move from room to room. By not allowing an immediate reaction, you give the recipient of the offer a chance to think about it before making a knee-jerk response. Since you'll stay in the room after the offer is made, you give the offer a chance by sorting it out with the recipient and giving him or her a chance to make a reasonable, thoughtful response.

## Conclusion

One of the tangible benefits of a career in mediation is the opportunity for lifelong learning. Adding to your mediation toolbox, and expanding your thinking about what you're doing in the mediation room, will help you move to the next level in your mediation practice.