



Mediating with Lawyers at the Table

By Marilyn J. Endriss

"The good lawyer is not the man who has an eye to every side and angle of contingency, and qualifies all his qualifications, but who throws himself on your part so heartily, that he can get you out of a scrape."

— Ralph Waldo Emerson

"When it comes to the cause of justice, I take no prisoners and I don't believe in compromising."

— Mary Frances Berry

As lawyers, we are (and are expected to be) zealous advocates for the legal rights of our clients – to take up the sword and fight our client's battles in the courtroom toward victory and justice! Our focus is on promoting and securing our client's legal rights. In law school we are taught to focus on what is relevant to the rule of law. Emotional and interpersonal dynamics are de-emphasized, if not outright ignored or dismissed as irrelevant.

In her article, *Law as a Healing Profession: The "Comprehensive Law Movement,"* Professor Susan Daicoff notes that law school actually fosters two shifts in values. The first is a shift from "care ethic," values such as "preserving interpersonal harmony, maintaining relationships, attending to people's feelings and needs, and preventing harm" to a "rights or justice" orientation that "focuses on rights, rules, standards, individuality, independence, justice, fairness, objectivity, accomplishments, ambitions, principles, personal beliefs, and freedom from interference of others." The second shift is from "an emphasis on 'growth/self-acceptance, intimacy/emotional connection, and community/societal contribution'" – that is, intrinsic values – towards "an emphasis on 'appearance/attractiveness,' 'money/luxuries, popularity/fame, and beauty/attractiveness,'" – that is, extrinsic values. According to Prof. Daicoff, empirical research indicates that these shifts appear among law students as early as their first year in law school and are embedded by the time students graduate and become lawyers.

As community mediators, we are (and are expected to be) professional neutrals and impartial to the rights of the parties in conflict. Our focus is on ensuring a meaningful opportunity for the parties in conflict to communicate with each other. Our objective is to facilitate their communications as they share information and negotiate a resolution of their interests. As facilitative media-

tors, our approach places high importance on the "care ethic" and intrinsic values. It often seems that there is a clash of values between interest-based mediation and rights-based legal practice. How ironic that we may find ourselves as mediators directly at odds, if not in conflict, with the very people the parties have hired to support them in the mediation!

Fortunately, an increasingly number of law schools are offering curricula that promote more humanistic approaches to the practice of law. And, there are growing numbers of lawyers who are changing the way they practice law away from a rights-based orientation to one that is client-centered and values a comprehensive, integrated and restorative approach to problem-solving.

"Our task is not to fix the blame for the past, but to fix the course for the future." -JFK

When a party has retained a lawyer who will attend the mediation, the mediator should recognize that the lawyer has been hired to do a job, just as the mediator has role to play and a job to do. I like to describe our respective functions this way, "As a mediator, I am the guardian of the mediation process while you as the lawyer are the guardian of your client's legal rights."

Given my awareness that lawyers are trained to focus on legal rights and that a shift in values may have (knowingly or unknowingly) resulted, I acknowledge that the facilitative model of mediation may seem foreign and may cause the lawyer some level of discomfort or uncertainty of his or her role. As guardian of the mediation process, one of my jobs is to help the lawyers serve a useful role in mediation. There are several ways to accomplish this. First, mediators (or intake staff) should talk with the lawyer prior to the mediation and describe the interest-based negotiation model using a

facilitative process. Attorneys who practice traditional litigation are familiar with a rights-based and distributive negotiation models and use a shuttle style of mediation where parties and their attorneys remain sequestered in separate rooms. Pre-mediation contact is essential so that lawyers know what to expect and have a meaningful opportunity to prepare for the facilitative process. Second, mediators (or intake staff) should explain the role that lawyers will play during the mediation. I like to say that the lawyer's role is to ensure that the client's important legal and non-legal concerns are addressed, that all reasonable options are identified and that the client has a meaningful opportunity to make informed decisions. I tell the lawyer to view his or her role as a counselor of law rather than an advocate of rights. Third, I review the principles and benefits of the facilitative model as it pertains to people in circumstances similar to the lawyer's client. I often mention the importance facilitative mediation places on interpersonal, emotional and relational concerns. Fourth, I emphasize that as a professional neutral I honor the voluntary nature of mediation and respect the self-determination and autonomy of the parties. And fifth, I often paraphrase JFK's quote and say that it will be up to the attorneys to help their clients move from

the past (and fixing blame) and seize the opportunity that mediation affords to design their client's future. These preparatory explanations open up the process as transparent; help to build rapport, credibility, and respect; and assure that the mediation table is set and ready for all participants.

In my experience, the most rewarding mediations have been those when I have come to the mediation table with an open heart, respecting and appreciating that every person – client, lawyer, union steward, HR representative or management official alike – is contributing value to the mediation process.

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Tips on Mediating with Lawyers in the Room

*Adapted from Marilyn Endriss' presentation on 6/17/08
Bellevue Neighborhood Mediation Program*

- Many attorneys are familiar with a shuttle-style, evaluative mediation model (also know as a "settlement conference"). They may not be familiar with our facilitative mediation model. Describe our facilitative process -- emphasize that it is "client centered" and explain the benefits of client engagement and face-to-face discussion for promoting good durable solutions.
- In pre-mediation discussions with lawyers explain that their role in a facilitative mediation is to help their clients meet their goals.
- In describing the process, don't call the client's opening statement an "Opening Statement" (this is a term of art for trial attorneys); instead call them "initial snapshots," "client's perspectives," or whatever feels right to you.
- After clients have given initial perspectives and you have given them feed back, ask the attorneys if they have anything to contribute to the mediators' understanding.
- Invite attorneys to add to agenda building: legal concerns, non-legal concerns, material terms (e.g., confidentiality of settlement terms).
- If a contentious legal issue emerges, invite the attorneys to be teachers and explain the law "in a nutshell."
- Because attorneys are familiar with shuttle style settlement conference they may advocate that you shift your method and adopt that model. Reassure them that the facilitative model is effective, and that you have training and experience in using it.
- Some attorneys may be zealous and forceful advocates for their clients. In response, stay centered and remember that you are guardians of the process.
- Be transparent, explain the reasoning behind your process decisions.
- Use caucus creatively to get at the real underlying issues.
- Be aware of the conflict triangle (princess / helpless victim --- prince / savior hero --- dragon / the other party or the conflict). Attorneys and clients can be drawn into playing these roles. You may want to caucus with the attorney alone, to probe if this dynamic is helping the resolution process.