LOS ANGELES & SAN FRANCISCO
Daily Journal
www.dailyjournal.com
WEDNESDAY, NOVEMBER 28, 2018

Lessons in communication that you didn't learn in law school

By Jan Frankel Schau

It is a scene played out in court rooms and conference rooms daily. The palaintiff, acting through skillful counsel, lays out his "complaint" in formal bullet points on numbered (pleading) paper. In response, the defendant engages counsel who carefully and categorically deny each point and then add their own "affirmative defenses" (which are seldom formally addressed unless accompanied by a cross-complaint before trial). The pleadings are followed by formal interrogatories, which typically draw formal responses and objections, in equal measure. Even the depositions of the parties are subject to more objections than earnest information gathering at times.

In many instances, the mediation hearing, designed to settle the dispute, is the first genuine opportunity for the parties and their lawyers to communicate. Unfortunately, lawyers are seldom taught or trained in how best to communicate (other than with a jury or judge in the ultimate trial or written motions), but rather how best to argue or advocate on behalf of their clients. Although this skill is of course valuable, since so few cases actually go to trial, there is ample reason for lawyers to consider honing their skills in communication too.

One of the critical features of communication is listening. In business consulting, this translates to sitting down with a client and engaging them in focused conversations to learn their goals and helping them to identify their underlying interests. It is only after this that a strategy can be developed to meet their goals. The trusted advisor can then guide the business to make the best decisions or deals that they can. A key to critical messaging, according to a marketing business strategist who teaches Communication at a local university, is gaining the trust of the consumer, which requires authenticity. This is a divergence from legal training, which encourages a formal "position" without permitting the prospect of some vulnerability or doubt. In fact, much of litigation is aimed at avoiding that true "authenticity" by refusing to answer questions under oath or objecting to the phrasing of the requests.

Enter the mediator, who is trained in listening and who can listen empathetically and permit for the "gray areas" which may expose an overlap on the parties' legal and factual positions. The mediator can listen attentively and then reveal those areas that will facilitate a more meaningful discussion of how to settle the dispute, even while allowing that there are two divergent views. All of this works efficiently because of the cloak of confidentiality, but also because mediators are trained to listen in ways that lawyers (and even judges) are not. Lawyers and judges are ostensibly searching for the truth, justice or who or what is right. Mediators, more akin to psychologists, are meant to be listening without judgment and for a way to address a deeper level of needs and interests than the parties might achieve in court.

In a letter to the New Yorker, published Oct. 29, 2018, from a neuropsychologist, Dr. Rebecca Goodman pointed out that as a specialist in dementia patients, she recommends responding to the emotion instead of the content of the confusion or delusion. By responding to the emotion behind the confused statement, as opposed to challenging the patient as to the true content of what they say, they can offer peace and calm over the conflicting realities and limit the feelings of disrespect that come from challenging their affirmations as lies. Thus, she contends, it's fine to lie to an elder dementia patient if it calms her and reassures her. An example would be where a dementia patient tells his therapist that he is comforted by the sounds of a bubbling brook alongside his home when in fact, there is no brook, but instead freeway traffic nearby. Instead of arguing with the patient, the therapist might offer up a comforting "yes, and the constant sounds each day at 8:00 a.m. and 5:00 p.m. make you feel safe and that there is some consistency in your life here now." Is this a lie or is it aimed at achieving a peace where life is otherwise messy and conflicting realities exist?

Metaphorically, parties engaged in a legal dispute also usually present with differing realities and even, some might say, delusions or confusion in their recollection or presentation of past events. The courtroom is designed to choose the side who is "right" and declare the other side wrong. In mediation, the objective is to accept that there are two ways to view the conflict, to minimize the disrespect to either side, to avoid challenging either side's affirmations as "lies" and to restore peace and calm. There are no ethical restraints that preclude this as long as the parties are willing to indulge the possibility that there are two ways of looking at the conflict.

In order to accomplish that, mediators will listen for understanding, rather than for the purpose of refuting or disproving the logic of the assertions made by either party. A good mediator approaches every dispute with an open mind and every party with empathy and compassion, not judgment or contempt. At times it can be a challenge, but where it can be done, it is an effective way of reaching resolution of what may be a longstanding dispute in a single day.

Once the negotiation begins, mediators can take the opportunity to reframe the basis for the offers and counter-offers to develop a narrative that will ultimately be an acceptable justification for settling the dispute for each side. For example, where an employee refuses an offered severance package and instead engages a lawyer to attempt to get a more favorable package, the initial demand can either be communicated as a "we want to punish this company for all of its bad acts" or "the employee was really hurt by this abrupt termination of her employment and had no time to prepare or otherwise plan for her family's expenses". In response, the initial offer may be communicated as either "we made a fair offer and you rejected it, so we're not inclined to be fair today" or "since the date you rejected our offer, we've incurred legal costs and the company's revenue has continued to spiral downward". Consider which explanation is more likely to encourage a settlement.

As the business consultant, the mediator's task is to assist her clients in a constant measuring of whether the messaging is working effectively towards achieving their goals. If not, the strategy employed for the negotiation may need to be adjusted and shifted. Ultimately, the effective mediator, like the effective business strategist, is there to guide each client through their journey to make the best decision, and the best deal that they can.

Mediation, like a business campaign, is outcome driven, but the process of getting to "yes" can be wildly divergent. Clients come to a mediation somewhat bewildered or even beleaguered from the bruising process of litigation. It takes time to replace those platitudes of certainty with a subtler, blurring of the lines between fact and delusion, right and rights, justice and justness. For some, the experience of telling their story to a mediator will be a satisfying experience in "venting" all of their frustrations with the litigation process, the court's rulings and the other side. For others, it is simply an opportunity to "exhale" and to avoid the uncertainty of the future instead of fixating on the past.

At its best, mediation is designed to be a communication between the two sides of a conflict. Unfortunately, in the litigated case, most lawyers are not sufficiently skilled (or motivated to become skilled) in communication of their client's underlying interests, such as respect, addressing hurt feelings or damaged pride. The promising news is that law schools all over the country are now including courses in dispute resolution and are training law students in such anomalous concepts such as listening, trust-building and the value of resolving disputes without the black letter of law imposing its imprimatur on the rights and remedies we learned in our core curriculum in torts, contracts and real property. There is cause for great optimism in a more humane way of resolving legal disputes through honest communication.


SCHAU

Jan Frankel Schau *is a mediator at ADR Services Inc.*