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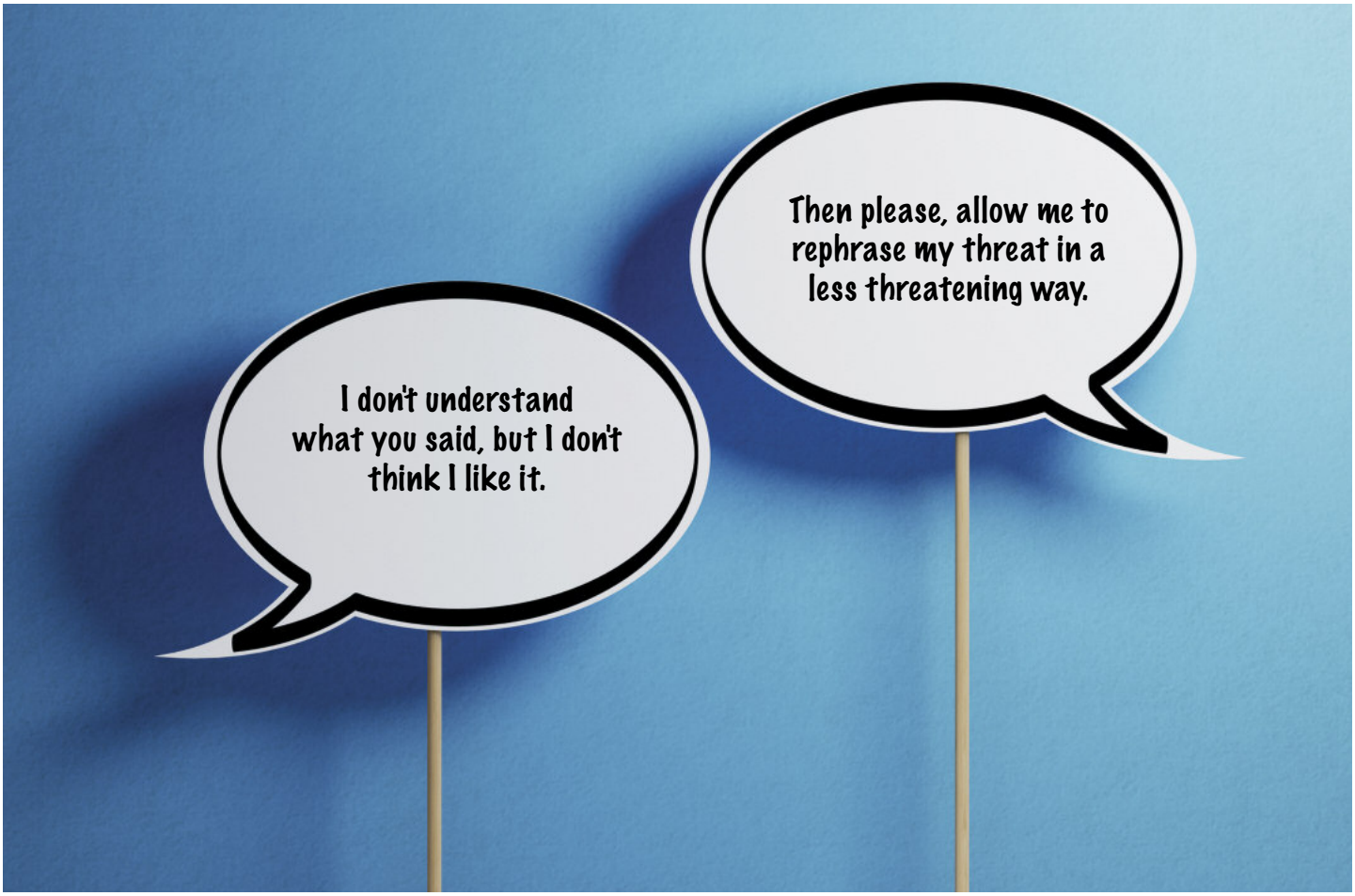


# Watch your language!

## THE CASE FOR A DIFFERENT WAY OF COMMUNICATION IN MEDIATION

In the movie "Steve Jobs," Steve Wozniak pleaded with Jobs for recognition in creating Apple, saying: "It's not binary. You can be decent and gifted at the same time."

Litigation is a binary process. There are (at least) two sides in every lawsuit. Lawyers are trained to make their complaints and advocate for "their side" zealously. In the pursuit of justice, lawyers and their clients seek to "make a record" and retain a right to "object" to any questions which may be irrelevant to the legal rights and remedies demanded. Ultimately, we wait for a "judgment" by judge or jury that we have "proven" our case by a preponderance of admissible evidence.

### Communication in mediation

The objectives in a mediation are much different than in litigation; but often the differences are overlooked. A mediation is called a "hearing" because it is an opportunity for the client to be "heard" by a third party neutral, by the opposing party and his/her/it's decision-makers and by you, their lawyer. Communication, as it is taught in universities and business schools (but perhaps not as it should be in law schools), is comprised of at least two components: speaking (or writing or body language) and listening. There is no true communication if it is only one-sided.

Business consultants begin their process with a meeting with their clients where they seek to learn the business client's goal and help them to identify their underlying interests at the outset. Lawyers, generally, will be more guided and instead, assess the client's story and advise them about a reasonable goal within the law, based upon the damages as outlined at the beginning of their engagement. The litigator will seldom dive in to inquire about the client's underlying interests – or why they are seeking to pursue this claim through the legal system.

Business strategists pride themselves on a measure of "authenticity," helping

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to shape their client's brand and message to reach the desired consumer. Lawyers, by contrast, adopt a "position" and advocate for their clients in a way that is intentionally avoidant of any possibility of vulnerability or doubt. To that end, where there are probative questions asked which may cause the client's position to be subject to doubt, lawyers will generally object and instruct their client not to answer a particular request or demand.

Years ago, I represented a client who had worked as a part-time temp in accounting for a large corporation for many years. When a full-time position became available, she was not hired for it. The client was an African-American woman over 40 and a cancer survivor. I accepted the case quickly and felt confident that I could show employment discrimination under FEHA on a theory of wrongful failure to hire. I invested both time and costs in the case, even though the client refused to advance costs after it was forced into a binding arbitration.

It turns out that I never really listened to what the client wanted. She always had less confidence in "the case" than I did. She had always been treated as "an outsider" and really urgently wanted management to know her story, her experience after 20 years as a part-time bookkeeper who was treated as though she was invisible as the company grew and expanded. She was not surprised when they hired a bright, young Hispanic college graduate to fill the full-time position at a lower rate of pay than she was earning or would be willing to accept. Like the arbitrator, she couldn't link up the dots to be certain that the failure to hire her full time had anything to do with her race, age, gender or history of disability. She was just not liked well enough to be engaged full time by the company where she had been working 15-20 hours per week for all of these years.

The first failure of communication was mine at the outset of my engagement. Excited by the facts as they were presented to me, I spoke more than I listened. The attorneys for the defense fought hard and made no real effort to engage in any meaningful communication with me or my client during the course of the litigation or during the trial. After my case in chief was presented, they brought a non-suit, which was narrowly defeated. My client's direct testimony was abbreviated and subject to a brutal, bruising cross-examination. They refused to hear how this had affected her and had no sympathy when she revealed that her cancer had since recurred, and she was now on total disability.

After the defense verdict was delivered, I never heard from the client again. Yet another failure of communication after I had buffeted her with courage to go forward against her own best judgment on the assurance that we were going to win the suit.

Law schools have not yet adopted a curriculum which includes training lawyers to consider the underlying interests, such as respect, ego, pride, anger, revenge, reputation, hurt and other "non-legal" harms that may be driving a dispute and therefore may also be an important key towards resolving conflicts that play out in our courtrooms regularly. While we are skilled in rights and remedies arising out of torts, contracts, property law and statutes, we have not been schooled in trust-building, listening without judgment or accepting and admitting some blame or fault on the part of our clients in the dispute at hand.

## Mediator speak

Mediation is a chance to communicate directly, but more often in California is a chance to deputize a third-party neutral to effectively communicate your client's position and then reflect the defense's position back to you so that you and your client can be in the best possible position to make decisions about the ultimate outcome of a given dispute in a single day. Unlike a judge, a mediator is undeniably not there to ferret out truth or justice, nor to make any judgments as to credibility, weight of evidence or even interpretation of the law.

Like a psychologist or therapist, mediators are trained to listen without judgment and to listen more than they speak. The use of language like "I see," and "That must be hard," or "It sounds like this affected you deeply," are words conveying understanding and empathy, without judgment as to their truth or falsity.

Mediators use a method we refer to as "active listening" which engages each party in an exercise of funneling down to get to the core of their true contentions and what is driving the dispute. We also drill down by asking probative questions in an effort to find out the underlying "interests" which often go beyond the pleadings. We listen, not just for content, but because clients are desperate to be heard. We demonstrate understanding by re-stating what we've heard and by nodding often and listening without distraction. Where appropriate, we express empathy because it may be the first time that anyone has done that, and certainly will be a very different experience than a deposition or testimony in court. We summarize the client's position so that they know we understand and so that we are clear on the factual allegations.

In the other room, we engage a process of "re-framing" so that the most accusatory and passionate claims are somewhat neutralized. Why? Because the parties have usually already heard the most accusatory claims in pleadings and discovery (and the written briefs, if they have been exchanged). They have not responded favorably and in fact, may be positioned to "fight back" against the most outrageous of these claims. If, instead, the mediator can re-frame to take out the "sting" while still giving a fair portrayal of the legitimate claims being made, the defense may take a more cooperative approach towards resolving the dispute.

There is a method of mediation known as "narrative" mediation where the parties, usually in a joint session, will create an agreed upon joint narrative of the underlying facts and circumstances leading to the dispute or conflict. While this is seldom used in the course of a litigated case, the principles can be very useful. For example, instead of pushing back against an assertion, consider building upon it with a "yes and" instead of a "but." For example, take the case where the plaintiff claims the defendant ran a

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red light while intoxicated, but the plaintiff had no seat belt on when he was ejected from his vehicle. Instead of responding to plaintiff's plea that he is entitled to full policy limits with a "but you won't get that at trial because you were comparatively negligent," the mediator (or lawyer) may suggest: "yes, and the offset will be minimal under those circumstances for the issue regarding the seatbelt." In other words, keep the conversation fluid. If it shuts down, you risk losing the opportunity to settle the case. Remind yourself, as Steve Wozniak said, [in mediation] "It's not binary."

## Communication lessons for advocates in mediation

There are language lessons here for the legal advocate too. Lawyers would be well served to ratchet down their declarative style of communication in mediation and work towards bridging the gulf between the two sides of the conflict from the very beginning of the day. Though it seems counter-intuitive, most mediators have witnessed the power of a cordial face-to-face interaction, however brief, long before the two sides become entrenched in their positions.

In some cases, whether literally or metaphorically, the parties think and speak in different languages. For example, in an employment suit brought by a car salesman, the defense lawyer was clever to speak in terms of "getting in gear" and "selling a Yugo when he thought he was buying a Cadillac." It's equally important to make sure that the tools used in mediation are understood in the same ways by all parties. For example, a "bracket" may have a different connotation to a car salesman than a college athlete and different still to a mediator. Communication experts call this "situational analysis." It's critical that all parties understand the meaning behind the expressions being used throughout the process. Where there is a true language barrier, it's both respectful and wise to make sure that there is someone involved in the mediation who can speak the same language as your client. Once in a while, there is a true miscommunication based upon an incorrect translation of a particular word or phrase which can throw off the negotiation and, worse, can offend or disrespect the non-English speaker when assumptions are made that there is an understanding that is inaccurate.

Sometimes, the use of some well-placed rhetorical questions or hedging is worthwhile. For example, rather than a bald assertion that: "none of your client's testimony will be believable because of the felony conviction in his record," you may want to approach the same evidence by a technique we call "hedging," saying: "I think my client's assertions may be given more weight than your client's version, assuming that I can introduce evidence of his criminal record." You get the same point across, but in a less declarative and more cooperative tone.

Legal advocates should also be aware of the concept of "attribution error," which suggests that an offer made by one side will be discounted or distrusted if it comes from "the out-group" rather than communicated by a trusted member of the "in group" or a mediator who has gained your client's trust as someone who is unbiased or, better, still, an ally. In these instances, it's wise to harness the power of your third-party neutral mediator to convey the hardest messages to handle. For example, where your client has a hard "bottom line" that is beyond what may be achievable based upon insurance coverage or other issues limiting the ability to recover, consider using your neutral to convey that message, rather than risk that if you convey it directly, the other side will attribute some "bluff factor" simply because it was conveyed by you.

There is a salient concept of "saving face" in many cultures and in many local disputes. Unlike litigation or trial, mediation is not a "zero sum" or a "win/lose" event. In fact, many mediators will tell you that mediation is not an event, but a process. Translating that into language and expression, the litigator would be well served to consider writing the narrative so that your client experiences the outcome as a "win," not a "settlement" or "compromise." The nuance of the re-frame for the best possible result is essential to a satisfied client. That is, after a long day of negotiation where the parties start high or low and wind up reaching a deal, the effective lawyer will need to remind the client that this is the best possible result achievable. At the mediation, the client can be reassured that he or she is in control of the outcome, the timing, the ability to collect upon the payment and their own claims (meaning they can keep the claims, their testimony, the defenses and the outcome confidential if they wish). It's a bridge from victim to victory. The savvy advocate will begin writing that victory speech early on so that his/her client will be satisfied with the ultimate outcome, rather than focused upon the initial goals or hopes for a more substantial recovery.

Mediation is a unique opportunity to reset the dialogue from the narrow confines of a binary dispute building upon demands, complaints and defenses, to a more heartfelt and satisfying outcome for both lawyers and their clients. With some effort, lawyers can adjust the style of communication in mediation from that of "zealous advocate" to business person engaged to help clients meet their goals and address their interests.

There is a lesson from the recent Oscar-winning "Best Picture," "Green Book." "Being genius is not enough. It takes courage to change people's hearts." By listening to your clients' interests and approaching the mediation differently than the rest of litigation, trial lawyers can be both decent and win the admiration of clients and colleagues.

*Jan Frankel Schau,* ADR Services, Inc.*, has been a mediator for over 15 years in Los Angeles. She learned her diplomacy skills at Pomona College in Claremont, where she majored in International Relations and her skills as a litigator at Loyola Law School. Practicing on both the Defense and Plaintiff sides of the aisle, she devoted herself to becoming a full-time neutral after 20 years of practicing law. Specializing in employment, tort and business disputes, Jan is also Adjunct Faculty at Pepperdine University's Straus Institute of Dispute Resolution, where she teaches "Mediation Skills and Theory."*