

Mediation Techniques That Can Help You

By Chaim Steinberger, Esq.

I've been a mediator since 1992, and serve on mediation panels of the New York State Supreme Court Commercial Division, the Southern District of New York (SDNY), the Matrimonial Mediation Project, and the Part-137 Attorney-Client Fee Dispute Panel. I've helped many people resolve their disputes and, importantly, used these mediation tools to help my clients obtain good results even when I served as their partisan advocate and not as a neutral mediator.

Changing the Tone

I was brought into one paradigm case. Boy met girl. Boy dated girl. It wasn't working out and, three weeks later, they broke up. Several weeks after, he got the happiest phone call any guy could ever get: "Guess what? You're going to be a father!" And they were off to the races. By the time I was brought in, they were gouging each other's eyes out, fighting over every five minutes of time with the, by now, three-year-old beautiful girl.

Calling opposing counsel, I told him that I wanted to change the dynamic between the parties. I told him that if I was brought in, I would try to create a safe



space for my client and his, to "hear and be heard"—a safe space each could air their concerns and disappointments without the situation spiraling out of control. Opposing counsel mocked me. "Safe space, safe space," he mimicked.

I was retained and we arranged a four-way conference. I arranged refreshments for the conference and began to establish trust with the other attorney and party. Before continuing with the story, though, a brief review of some of the core principles of mediation may be helpful.

Positional Bargaining vs. Interest-Based Negotiation

If you and I are trying to divvy up a bowl of jellybeans, and every jelly bean I get is one less than you get and vice versa, what technique do we use to decide who gets how many? Is it based on power, intransigence, the ability of one of us to harm the other? Using any one of these dispute resolution mechanisms further traumatizes our already damaged relationship and makes it harder, if not impossible, for us to work together in the future. But there is a better way: interest-based negotiation.

Using interest-based negotiation, I try to understand, not what you want, but why you want it. I, similarly, explain what objectives I hope to realize, instead of making demands for particular results. We can then work together to help you achieve your objective while I achieve mine.

The famous example of this is the two people fighting over an orange. "I want it." "No, I want it." Tired of fighting, one of them pulls out a knife and cuts the orange in half. The first person takes half, peels the orange, throws away the peel and eats the orange. The second takes the other half, peels it, throws away the fruit and uses the peel to bake a cake. Slapping my forehead I realize that if only we knew each person's ultimate objective, each could have had the whole orange.¹ One person's winning did not necessarily require the other's losing.

Unfortunately, we've become so conditioned to think that I can't win unless you lose, that we're unable to envision it differently. Too often, we think in this either/or, black or white, absolute paradigm that we fail to consider how we might be able to work together to make us both win.

Interest-based negotiations has several advantages. Even in the most intractable disputes, solutions can often be found that allows both parties to realize their most important objectives—a "win-win" solution for all. But even if the parties can't or won't find such a solution, interest-based negotiation will allow them to find a principle they can both agree on, that they can then use to resolve their dispute. For instance, they might agree to divide the jellybeans on the basis of what is fair under the circumstances. They can then

discuss what resolution each feels is fair and why. Importantly, whatever resolution they reach, they will likely feel better about each other and their relationship, than they were before the negotiation started. Business partners can continue to work together, parents can continue to co-parent their children, and a customer and supplier may do more business after their dispute is resolved than they've done before.²

And with that, I return to the story. In the case I was involved in, the parties viciously fought one another. Whatever one wanted, the other rejected. "Give no quarter," seemed to be their guiding principle.

In our conference, we were able to establish and agree that both parents loved their daughter, both were primarily concerned with her welfare, and that both wanted, first and foremost, to do what was right for her. We established that it was important for their daughter to have a strong relationship with each of her mother and father, and that it was best for her if each would give her the space and freedom to love the other.

By developing these mutual goals and the trust and good will that resulted from it, one of them made this startling (and unsolicited) offer: "If I'm working on [such and such minor holiday] and you have off, of course you can take her for that [entire] day." Whereas until now they had fought each other over every five-minute interval, this party had now made a concession of an eight-hour period that the other could spend with their daughter. It was the start of establishing good faith between them and, instead of working against the other, allowed them to begin working together for their daughter's benefit.

Several months later I received an apologetic phone call from opposing counsel. "I have to hand it to you, Chaim," he said. "I initially mocked you. But you did it. You created a 'safe space' where the parties could begin to work together."

"You Want Me to Pay For That?"

It had been a long and arduous day. It was late afternoon and we were in an unused courtroom in the matrimonial part. We had been negotiating since early morning and we were all tired. The end was in sight, though.

After months of revising draft agreements to satisfy the husband's increasing demands, he stopped negotiating and made a motion in court. We did a pretty good job cataloguing his shortcomings. On the return date, we asked for an empty room hoping that, with the four of us together, we could resolve the action. We'd worked the entire day and I was hoping that we could resolve it all without reconvening them all at the courthouse. I took a deep breath and forged on.

"I have to compliment you both," I told the parties. "We've worked really hard all day, and we resolved almost everything. We have only one issue remaining."

My client shot me daggers. "Don't ruin this deal for me," her eyes pleaded. I knew what she was thinking. "I need to end this litigation now! It's draining all of my energy, money and lifeforce."

"We resolved almost everything," I continued. "The only issue remaining," I said slowly, "is the legal fees your wife incurred. In the course of this representation, your wife incurred substantial legal fees. Is there any way you can offset some of that?" I asked.

"Let me get this straight," the husband

replied sarcastically. "You want me to pay you for all those nasty things you said about me in your papers?" he asked incredulously.

"You're upset," I commiserated. "I understand that. If someone said about me the things I said about you, I'd be upset too," I told him honestly. Though everything we'd said in our papers was true, it was still hard to take criticism and I could empathize with his pain. "You told us a few hours ago that you still care about your wife."

"Yes. Though I'm divorcing her, she's still the mother of our children and I still care about her."

"Yes. And you told her that you would stop paying child support," I continued.

"I never stopped paying child support," he countered defensively.

"No, you never stopped," I conceded. "You did delay it. And you did unilaterally reduce it. But you didn't stop. But you did threaten to stop. And your wife got scared. The mother of your children was afraid."

"And someone had to step in to protect and defend the mother of your children, so that she wasn't living in fear."

"Is there any way that you can contribute and defray some of the costs incurred in ensuring that your wife, the mother of your children, wasn't living in fear of losing her ability to pay the costs of raising your children?" I asked him.

Scrunching up his face with as much disdain as he could muster he asked his wife, "Is this really going to make a difference to you?"

"Oh God, yes," was her quick response.

"Fine," he said with a dismissive wave of his hand. And with that he threw a five-digit number into the pot.

Before my client's plane even landed at her home airport she had a voicemail message from her husband. "Your lawyer's a son of a bitch," he told her, "but he did a good job for you."



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¹ Roger Fisher & William Ury, *Getting to Yes: Negotiating Agreement Without Giving In* 57 (1981).

² Niccolò Machiavelli writes that every dispute is an opportunity for improvement. Nederman, Cary, "Niccolò Machiavelli," *The Stanford Encyclopedia of Philosophy* (Fall 2014 Edition), Edward N. Zalta (ed.), <http://plato.stanford.edu/archives/fall2014/entries/machiavelli> citing (Machiavelli 1965, 202 & 211). Every achievement society has made has been the result of someone being dissatisfied with the status quo. As Rahm Emanuel and Winston Churchill are quoted to have said, "Never let a good crisis go to waste."

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