

Communications in Mediation

Communications in mediation. My mediation focus is finding real alternatives to litigation, rather than processes that merely 'soften' litigation. My interest is to facilitate the movement from mediator-centered settlement conferences where bargaining is positional, to party-centered mediations aimed at better understanding and interest-based bargaining. Consequently, my approach to mediation differs substantially from the current and dominant paradigm of commercial mediation. Effective communication is essential, so I work to have the parties communicate directly to the greatest extent possible.

Key tasks for parties. The key tasks for parties in mediation are (1) adjustment of **perspective** from litigation mentality to exploring resolution options, (2) improving **communications**, (3) **understanding** (the conflict, their own views and the opposing party's) and (4) **decision-making** (e.g., "Can we form an agreement that, for all parties is superior to the risks and opportunities of trial?"). All four tasks require that the parties improve their communication to ensure that each obtains the information and understanding needed to make the best decision about resolving the conflict.

Assertion and listening. Effective communication requires both willingness to assert yourself as well as to listen to and understand the other party. Without the willingness to listen to understand, the process cannot be effective. We must balance both (assertions and listening) in time and quality. Of course, this may include difficult and complex discussions; yet proceeding to court is also difficult. When participants can balance asserting their views and listening to understand, then opportunities for resolution increase dramatically. That can move conflict from nonnegotiable to negotiable.

The key elements of improved communications in mediation are:

- Higher and mutual levels of disclosure.
- Use of interest based bargaining processes.
- Ensure that negotiations involve both legal and business interests, not just litigation risk avoidance.
- Improved assessments of risks and opportunities.
- Avoidance of the customary "settlement culture" (e.g., low disclosure, sham offers & strategic misrepresentation).
- Explicit discussion of and work to avoid the common settlement decision-making errors.
- Seeking optimal settlement rather than the settlement that is minimally acceptable to all parties.
- Recognizing and therefore dealing with the difficulty in settlement negotiations.

Who speaks and who listens? Each party to the mediation needs to have a client representative who is qualified and able to lead the communications (assertion and listening). If communication is principally the duty of legal counsel, mediation will only address legal component and fail to consider the personal and business realities. If mediation is to achieve its key goals, the communication must involve more than counsel.

Communications - About the conflict, we seek to understand:

- The conflict and its elements.
- Potential court resolutions if settlement is not found
- What factors that drive each resolution?
- The personal and business implications of the conflict.

Communications - Searching for resolution options.

The goal of this phase of the mediation is set aside our litigation "frame of mind and work together to see if we can find options that serve our interests better than proceeding to trial and appeal. In assessing options for resolution, we can assess:

- Each parties' interests regarding the conflict, and beyond.
- What issues are important to each party, and why?
- What issues do we need to resolve by negotiation?
- Brainstorming - Can we search for creative options for resolution (adding issues for resolution, perhaps combining or separating issues)?
- Exchanging options and making proposals for resolution. Can we look for "productive compromises" and "improvements" to the best options found?
- We should then compare options presented with our "Interests" – Which options best satisfy our Interests?

The mediator's role in communication. To achieve the goals described above, the mediator needs to have an express discussion with the participants about:

- How communications in mediation can be improved/optimized?
- What guidelines, safeguards, ground rules or understandings are needed to improve communications?
- How can we avoid past communication problems among the parties?
- What do we see as each participant's role in this mediation? *E.g.*, Legal counsel, party representatives, mediator and others.
- How can the mediator intervene to correct communication difficulties?