



What I learned at Harvard

The mediation program offers mediators the eye-opening opportunity to role play as plaintiffs and defendants

BY DEBRA F. BOGAARDS

In simulations at Harvard's Advanced Mediation Program in June, where we, as experienced mediators, played the roles of the plaintiff(s), defendant(s) and co-mediators, the most interesting perspective occurred when I acted as the plaintiff. This role-playing has assisted me tremendously as a mediator, since the experience gave me insight into how the plaintiff feels during the mediation.

Pre-mediation telephone conference

This important call leaves out the plaintiff. The attorneys provide the mediator with a brief summary of the case, the procedural posture of the case, prior settlement discussions as well as obstacles to settlement/goals/interests. So, by the end of the call, the attorneys are on board with whether there will be a joint session, whether opening statements can be given by the attorneys in such a way that it won't lead to the elevator, whether the claims adjuster will be present or on telephone standby, etc.

Sometimes, the plaintiff's attorney doesn't explain to the client why certain decisions have been reached. So, as the mediator, I may need to go over what we discussed in the pre-mediation telephone conference with the plaintiff, so we are all on board.

Outside, looking in

Often, as the mediator, I will start with the first party to arrive, even if early. After all, why not utilize the time wisely?

While playing the role of the plaintiff, however, it was upsetting to arrive on time or slightly late and see through a glass conference room that 1) the mediator was meeting with the defense and, 2) the defense had six people in the room (two attorneys, the claims adjuster, an

expert, the client and the client's general counsel). It felt like a power imbalance.

So now, as the mediator, to appear impartial, I wait until all parties have arrived unless the parties are expecting me to proceed with the first party who is there. I also start with the room whose side it is to make the next demand/offer or I ask which side I should meet with first. Transparency is the best policy.

Time

As the plaintiff, I felt incredibly frustrated when the mediator spent more time in the defendant's room, especially when my counsel and I had been put in the inferior room, the size of a broom closet. What was I, bupkis? As the room became even more stuffy and hot, particularly since the mediator was spending a seemingly inordinate amount of time with the defendant, I was ready to walk out in a huff.

As the mediator, I emphasize in my opening remarks to both parties that I will be going back and forth between the two rooms, and I don't want anyone to consider that I am spending more time with one room. Now I make sure to check in with the plaintiff in plaintiff's room if I am caught up in a longer discussion with defense counsel and their claims representative.

Trust

Mediator in Hebrew is "gesher" from the root word for bridge. As the mediator, I hope to develop rapport, earn trust and bridge the gap. The goal is to get into a relationship with the parties. Jumping into the substance too soon may derogate from the relationship connection.

As a plaintiff in our role-playing exercises at Harvard, when the mediator jumped into the case specifics without connecting on some level, I felt less

invested in the process. A quick moment of affiliation, like the mediator knew a favorite ice cream spot in my neighborhood or went to the same college, made me feel more comfortable and trusting of the process.

As a mediator, I gain trust by saying what I will do and doing as I said, actively listening, understanding and demonstrating my understanding.

Breaking impasse and breaking bread

There are many tools in the mediator's tool box to break an impasse. Changing the players is a good option. As the plaintiff, I would wonder why my attorney was meeting with the opposing counsel and mediator without me when the mediation was all about me! The mediator explained that she would be talking just to the attorneys on occasion. When my attorney came back in the room, I appreciated being filled in on what had been discussed with opposing counsel and the mediator.

Food is vital. As the mediator, I serve bagels, lox and a schmear in the kitchen so the parties can break bread and perhaps talk to each other. When glucose is depleted, people can't make decisions. It's called "decision fatigue." Or, as we call it in my family, "hangry." We know people feel cared for with food and the small talk may ease the negotiations. So, the coffee break strategy leaves space for something to happen.

Taking a break is simple yet crucial. Sometimes the plaintiff is getting agitated or the process is too intense. I've asked the plaintiff to take a walk around the block. The fresh air and time away from the mediation helps with one's ability to focus and re-energize.

An apology from the mediator can also assist in breaking the impasse. After



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Harvard, I was noodling on how to follow up on a failed mediation. I asked myself, if I could rewind a videotape of what happened in the mediation, what I would have done differently? I thought of my intent and the impact my actions had on the party. It is important for the mediator to recognize when she really stubs her toe. I apologized for starting early and later keeping the plaintiff waiting during an especially long break-out session with the long-winded defense expert who liked to pontificate about marble slabs. An earnest apology went a long way to opening the door to a settlement.

Looping back the emotion is also an effective way for a mediator to break impasse. In employment cases, oftentimes the plaintiff has worked hard in her job only to be terminated without good cause. The plaintiff may feel a huge loss of her identity. In role-playing, as the plaintiff, I wanted my position to be heard and validated. When the mediator looped back my feelings about the job loss, I felt more motivated to consider the employer's proposals.

Tenacity is the secret characteristic of the best mediator and a solid gold way to break an impasse. It's like Wonder Woman revealing "T" is for tenacity on her costume. Staying with the parties after a failed mediation is key. Is there some missing information that one party needs to provide to the other side? Do the experts on both sides need to talk together? Is there a creative solution? By looking at the global picture and figuring out inroads for further negotiation, a tenacious mediator will help the parties reach a settlement.

Finally, the last few mediations have settled with a mediator's proposal. In each case, the parties reached an impasse when lowering their demands/increasing their offers. By presenting both parties with a typewritten letter containing the mediator's well-thought-out number, and giving the parties another avenue towards settlement, this has proven to be a most effective tool.

Parties and their lawyers

As a mediator, I must keep in mind and employ five core concerns of each party: 1) autonomy, 2) appreciation, 3) affiliation, 4) status, and 5) role. Core concerns are "human wants that are important to almost everyone in virtually every negotiation." (Fisher & Shapiro, *Beyond Reason: Using Emotions as You Negotiate* (2005).)

Autonomy may mean the parties don't want to be micromanaged during the mediation. As a strategy, the mediator needs to discover what steps will increase their autonomy. Appreciation can be useful in connecting with the party. For example, the mediator tells the employer in a discrimination case, "You were not trying to document lapses over the years. That was really important to you." (When really that led to the predicament we are in today). Or, the mediator shows appreciation to the party: "You prepared these financials which are very useful."

Affiliation means: are you in or out? For example, the mediator can show that the attorney or party is "in," or build ties with the attorney or party: "You're from Santa Monica? I'm from Santa Monica!" Status is self-explanatory, such as the status of the attorney as a badass trial attorney. The mediator can acknowledge the attorney's trial record to give deference to the attorney's deserved status. Lastly, role is about each party wanting a role that either we like or are good at in the mediation.

Yelling can be productive

One of the most interesting observations at Harvard was that yelling in a joint

session can be productive. It seemed counter-intuitive. As a mediator in the simulation, I didn't want the longtime employee of a small family-run company who was laid off to be in the same room as the employer. Emotions were running high and I assumed that the parties should be in different rooms on different floors of the mediation. But the parties really wanted to talk directly with each other. With parameters set beforehand (and disregarded) as to civility, we watched the parties yell at each other. After the initial fireworks display, the parties engaged in problem-solving and came up with a proposal that made them both happy.

Final word: Wisdom

Bottom line, the parties have their own wisdom to solve the problem. As the mediator, I merely need to provide the structure. And as an activist mediator and 100% Jewish mother, I will assist (okay, maybe nudge a little) the parties with options and creative ways to help resolve their case.

Let's get your case settled!

Debra F. Bogaards has a new solo practice, Bogaards Law, in the Union Square district of San Francisco. She is both a mediator and a plaintiff's attorney. In 2019, she stopped doing insurance defense work for State Farm and Mercury as well as private clients after 37 years. Debra completed the Harvard Advanced Mediation Program in June of 2019. Her mediation practice is well suited for her, given her strong background in both insurance defense and plaintiff's personal injury, employment, elder abuse and tenants' rights cases. An accomplished trial attorney, she has successfully completed 37 jury trials and one bench trial, and she's been a Northern California Super-Lawyer for the past 14 consecutive years. She also is Vice President of the U.C. Hastings Board of Trustees. In her free time, Debra enjoys cycling in West Marin.



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