

The Art of Attorney Mediation:



10 Ways to Improve Your Law Practice Using Negotiation Skills

BY JEFFREY KRIVIS

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Mastering basic mediation skills can take your practice to the next level. Philosophically, litigation and mediation seem worlds apart. While both are forms of conflict resolution that involve an outside party, the outcomes differ wildly. The results of litigation rarely satisfy both parties. The results of mediation are far more satisfying, since mediators use negotiation skills to reach a common ground on which all parties can agree.



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Many attorneys could dramatically improve their law practices by learning to negotiate effectively both inside and outside the courtroom. For example, **learning the art of negotiation would help them** negotiate with demanding, disgruntled clients to obtain information that clients aren't always eager to disclose, often out of fear that it will hurt their case. **It would also help them** negotiate with opposing counsel to reach concessions that will save time and money by reducing the issues in dispute or even settling the case. In addition, **they will be better able** to help their clients become willing to negotiate. Clients who are angry or feel hurt in some way may not always be willing to agree to a proposal that isn't completely in their favor, even if they don't have the strongest case. A lawyer who is a good negotiator will be able to present the case in a way that helps the client clearly see all points of view, not just one viewpoint. Many trial attorneys I see in my mediation practice are surprised to see how negotiating with a client can help open doors to solutions the client may have rejected when the attorney first proposed them.

I explain mediation as a way of reframing a situation in order to persuade people to shift their positions **so as to** make a resolution possible. To be a successful negotiator, attorneys need to understand some basics about human behavior and practice the fine art of paying attention.

Here are 10 tricks of the negotiation trade that can make a positive difference in your legal practice:

1 LET YOUR CLIENTS TELL THEIR STORY.

A person who is deeply upset about something needs to get his story out. Allowing people to tell their stories is a basic principle of mediation. While it is true that this can increase the level of

conflict, it is necessary to get through this phase of the conflict to find the solution. This can happen **when** a person with a grievance feels that he has finally "been heard" **and** undergoes a dramatic change in outlook. Plus, allowing the story to be told is also a means by which new information may come to light that could allow a solution to emerge.

2 WHEN YOUR CLIENT IS RELUCTANT TO DISCUSS AN IMPORTANT MATTER, DIG FOR THE EMOTION BEHIND THE WALL OF SILENCE.

I recently mediated a situation in which a famous television producer was on the verge of being sued for plagiarism. The would-be plaintiff was about to claim the producer had stolen his

idea for a TV show. When anyone talked to him about his grievance, he gave terse emotionless answers. So during a private meeting I asked him what he wanted to achieve. He almost broke down, saying, “I never wanted to bring this case in the first place. I just want to break into television.”

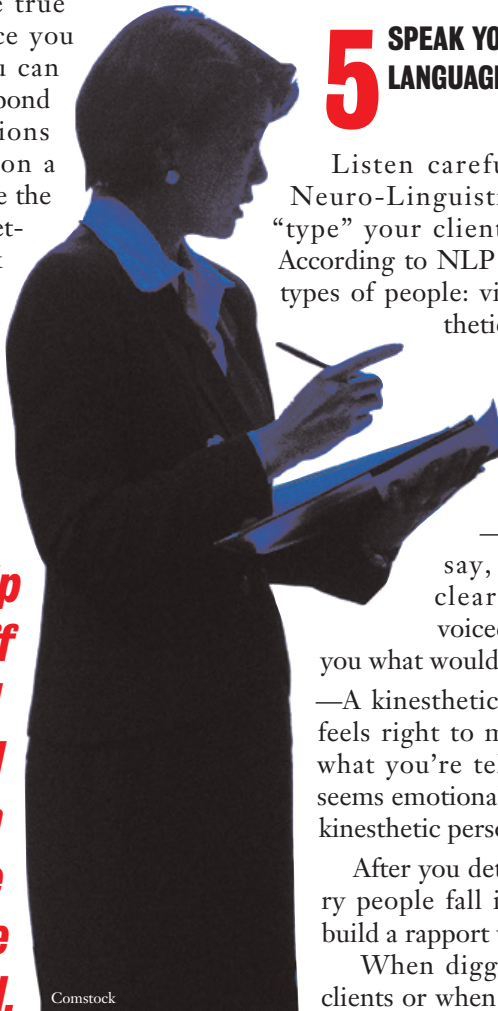
So I returned to the producer and asked, “Is there any way you can help this guy out?” When the producer said, “Sure, let me talk to him,” I arranged for them to meet. The producer ended up offering the would-be plaintiff a development deal. This illustrates how tapping into repressed emotions can lead to a solution that makes everyone happy.

You generally do not have the ability to speak openly with both parties, but you can use this approach to encourage your clients to open up and reveal everything you need to know to create a solid case.

3 IDENTIFY THE TRUE IMPEDIMENT IN EVERY CONFLICT.

Ask yourself, “What is the true motivating factor here?” Once you identify the impediment, you can predict how your client will respond and then shape the negotiations accordingly. I once worked on a wrongful termination case where the plaintiff employee refused to settle. One day I happened to ask about his family. He told me

Negotiating with clients can help you serve them better. Indeed, negotiating can help steer a client off of a hardened position toward new solutions, even those that the clients may have initially rejected.



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one of his kids had cerebral palsy. Suddenly, I understood why he felt it necessary to win the case: he didn’t have medical insurance to cover his child’s medical treatments. Armed with knowledge of what was driving the lawsuit, I spoke to **an officer of the company, who agreed to have the company** pay the plaintiff’s health insurance for five years.

4 LEARN TO READ YOUR CLIENT’S MIND.

Mind reading is not magic. It’s a combination of observation, listening, intuition and experience. Observing body language and listening closely, not only to what clients say but also to the emotional tone of their words, can reveal a lot about what your clients think. Ask your clients to talk about themselves (most will gladly do so). This will provide information about their perspectives and create openings for questions. Once you have the information you need, you should be able to anticipate how your clients might react to certain developments in the case.

5 SPEAK YOUR CLIENT’S LANGUAGE.

Listen carefully to determine what Neuro-Linguistic Programming (NLP) “type” your client and adversary may be. According to NLP principles, there are three types of people: visual, auditory, and kinesthetic.

—A visual person would say, “Can we look into this further?” and “I am getting a clearer picture now.”

—An auditory person might say, “I hear you loud and clear,” or “Now that you’ve voiced your opinion, may I tell you what would resonate with me?”

—A kinesthetic person might say, “That feels right to me,” or “I’m not grasping what you’re telling me.” A person who seems emotionally shut down is probably a kinesthetic person as well.

After you determine what NLP category people fall into, you can deliberately build a rapport with them.

When digging for information with clients or when questioning witnesses, use

the same words and phrases that they use. This will make it easier for them to respond.

6 THINK CREATIVELY ABOUT WAYS TO COOPERATE.

In every case, there is a tension between the desire to compete and the desire to cooperate. As an attorney it is up to you to find a solution that serves your client's best interests. If your client does not know what her best interests are, you can use your negotiation skills to steer her in the right direction. If she hints that she might be open to mediating the dispute, it could be in her best interests to try to steer her towards this process. Mediation can protect clients from the anxiety and delays associated with litigation and save them from incurring large counsel fees.

7 "EDIT THE SCRIPT" TO HELP CLIENTS SEE THEIR OPTIONS IN A DIFFERENT LIGHT.

Clients tend to get stuck in their positions because they tell what happened over and over again from a narrow and negative viewpoint. They can't see the situation any other way without help from counsel or a mediator. When clients are reluctant to move off of a position, preventing any forward movement, one way to motivate them is to retell their story in a positive, forward-looking way. This literally gives clients new words with which to see their options in a different light.

8 PROVIDE A REALITY CHECK TO CLIENTS WHO FOCUS ON MINUTIAE, RATHER THAN THE BIG PICTURE.

Often clients involved in a dispute are so focused on the grains of sand that they cannot see the beach. As their attorney, you need to bring them back to reality, communicating what is really at stake in a case. Doing so may help clients reach a solution at a startling speed.

Here's an example. I was mediating a rape case involving a security officer (the alleged victim) and a superior (the alleged rapist). Everyone at the company was nit-picking the details. One person said, 'Well, we don't know if we can believe the officer.' Another

said one of the witnesses was biased. Yet another said of the security officer, "She's asking for too much money."

I stepped in and said to the company representatives, "Let me paint the picture the way the jury is going to see it: the horrific crime of rape, a woman in distress, a thriving six-figure career cut short, and so forth." I told them that if they go ahead and nitpick the details, they will lose the jury, then wish they had that moment back.

Providing a reality check can be done in a way that does not provoke anger and instead creates movement toward a solution.

9 INSPIRE TRUST.

Many people are naturally skeptical of attorneys. Everyone has heard a few good lawyer jokes and they never present attorneys in a positive light. Ambulance-chasing lawyers who advertise on TV don't help improve the image. That's why it is necessary to always present yourself to clients and potential clients in a way that communicates that they can trust you to be fair in the way you charge them, treat them, and handle their case.

10 FINALLY, REALIZE THAT NEGOTIATION SKILLS CAN TAKE YOU ONLY SO FAR.

Negotiation skills won't allow you to get through to every client. Some will not budge from their position no matter what you do or say. When this happens you simply have to argue the case to the best of your ability when your client's day in court arrives.

No matter how great an attorney you think you already are, you can always improve. One way of doing this is by mastering the skills of effective negotiation. Doing so will improve your ability to understand your clients and what motivates them. Ultimately, these skills can help you serve your clients on a higher level.

Not only that, employing negotiation skills will make your work as an attorney feel richer and more satisfying. ■

