WHY ARE SO MANY ATTORNEYS BAD AT MEDIATION? AND HOW CAN THE MEDIATOR HELP?

By Stephen D. Kelson[1]

I. Introduction

A mediator friend of mine recently found it necessary to terminate the mediation of a civil dispute due to the actions of one of the parties' lawyer. Frustrated by what had occurred during the mediation, he asked: "Why are so many attorneys bad at mediation? Don't they teach attorneys how to mediate and negotiate in law school?" His statement is not uncommon. Over the years, I have heard other mediators express similar complaints about the actions of legal counsel in mediation. Too often, lawyers obstruct rather than help their clients to get the most from mediation, including reaching resolution, due to the assumed role they bring to mediation, and their inability to adapt to the mediation process.

The following discussion examines: 1) the lawyer's role and philosophical assumptions in legal disputes; 2) the lawyer's philosophical conflict with mediation; and 3) three common pitfalls made by lawyers in mediation, including; a) inadequate preparation, b) focusing too much on advocacy, and c) over-aggressiveness. Recommendations and strategies to each pitfall are provided to enable mediators to reduce and surmount these difficulties when they arise, and to help lawyers better serve the interests of their clients in mediation.

II. The Lawyer's Role and Philosophical Assumption in Legal Disputes

In general, by the time parties seek legal counsel, they have already invested themselves emotionally and financially in the dispute they bring with them. It then becomes the lawyer's

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job, as a provider of professional services to define the needs of the client.[1] The method lawyers apply to define the needs is instilled in them through law schools training, and has been defined by Professor Leonard Riskin as "the lawyer's standard philosophical map" ("standard philosophical map")[2] This philosophical map is governed by two significant assumptions; 1) that disputants are adversaries, where one must win and one must lose, and 2) disputes may be resolved through the application of law to facts of a given case.[3] According to Riskin, lawyers are trained by law school "to put people and events into categories that are legally meaningful, to think in terms of rights and duties established by rules, to focus on acts more than persons."[4]

After law school, the assumptions of the standard philosophical map are regularly encouraged throughout lawyers' professional careers by its regular application, the legal process itself, procedural rules, and perception of their role under jurisdictional rules of professional responsibility. With these experiences and standards, lawyers apply themselves to a given case by primarily behaving in an evaluative manner, focusing upon the parties' rights and duties under the law, determining the strengths and weaknesses in legal positions, and deciding how to exploit these positions to the clients' advantage. The duty to zealously represent clients by focusing upon disputes in an evaluative manner discourages lawyers from concerning themselves with their opponents' situation and the ultimate results caused by the application of the standard philosophical map.[5] Victory by lawyers on both sides becomes solely defined by the size of the monetary judgment.[6]

The standard philosophical map may affect more than professional careers. It may affect the manner in which lawyers live their personal lives away from work. Researchers have concluded that lawyers generally apply "a cognitive and rational outlook" on the world, have underdeveloped emotional and interpersonal skills, and "tend toward an adversarial orientation."[7]

Whether or not the lawyer's standard philosophical map is the cause of these deficiencies, it arguably reinforces them, and provides lawyers the excuse and/or justification that "this is how a lawyer acts."

Clients rely upon their lawyers' training, knowledge of the legal process and negotiation skill to provide solutions to their disputes.[8] Accordingly, lawyers' recommendations to clients can influence decisions to resolve cases.[9] By accepting their lawyers' recommendations, clients often unwittingly adopt their standard philosophical map as their own, and assume it is the best or only way to resolve disputes.

III. The Lawyer's Philosophical Conflict with Mediation

After years spent learning and honing evaluative and adversarial skills, which are constructed upon the standard philosophical map, lawyers often find themselves confused by the mediation process, where the age-old philosophical assumptions do not regularly apply. While the standard philosophical map assumes that disputants are adversaries, where one must win and one must lose, and disputes are resolved through the application of law to facts of a given case, mediation has its own distinct philosophical map, that assumes 1) parties can work together and cooperate to create solutions to which each gain, and 2) the parties can resolve their conflict without being limited by strict rules of procedure and substantive law (the "mediation philosophical map").[10]

It is my personal experience that lawyers who are ingrained with the standard philosophical map, react to mediation in one of three ways. First, some lawyers adapt to the circumstances once they gain an understanding of the difference between the philosophies of litigation and mediation. This ability to adapt is usually due to training in alternative dispute resolution and prior experiences in mediation, and may also involve each lawyer's personal

disposition. They set aside the standard philosophical map, at least in part, to apply or tacitly permit the application of the mediation philosophical map. Second, some lawyers' "fight or flight" mechanism appears to kick into play when they are confused and unprepared for the philosophical differences in mediation. These lawyers revert to what they know best – the standard philosophical map. Third, some lawyers fail to distinguish the difference between the philosophical assumptions between litigation and mediation, or simply refuse to set aside any part of the standard philosophical map, and proceed in mediation as if it were trial.

IV. Common Pitfalls Created by the Lawyer's Standard Philosophical Map in Mediation

Many mediators do not like having lawyers attend mediation. The intentional and unintentional application of the standard philosophical map often undermines mediation's overarching purpose – to resolve disputes. While lawyers and clients alike can create any number of challenges, the application of the standard philosophical map can create and foster serious pitfalls in mediation which prevent the parties from achieving resolution. These pitfalls include; 1) inadequate preparation, 2) focusing too much on advocacy, and 3) over-aggressive and uncivil behavior. While these pitfalls can be discouraging to many mediators, they should be viewed as challenges to overcome. By focusing on the mediation process and applying their skills, mediators can help lawyers avoid self-created pitfalls to their own benefit and that of their clients.

A. Inadequate Preparation for Mediation.

While preparation is essential to successful mediation, too many lawyers fail to prepare themselves and their clients. According to the mediator William Ury, "Most negotiations are won or lost even before the talking begins, depending on the quality of preparation."[11] Many attorneys still have only a general understanding of mediation, or carry misperceptions about its

purpose, and therefore do not take the opportunity to educate themselves about the process, and underestimate its value and usefulness. Unfortunately, attending mediation is often viewed by lawyers as an opportunity for "easy billing," with little work beyond trading settlement numbers. Some lawyers believe they can just "wing it" at mediation and see if the dispute resolves. These views are inaccurate and often backfire. Failing to actively prepare for mediation wastes time, and requires the mediator to educate the lawyers and their clients themselves. Clients tend to adopt their lawyers' standard philosophical map through the course of a dispute. When lawyers fail to educate and prepare their clients, and mediation is explained for the first time by the mediator during the mediation, clients tend to cling to the standard philosophical map. This can make the mediation process more difficult and less successful for the involved parties. Moreover, Ury explains: "Even if [lawyers and their clients] reach agreement, they may miss opportunities for joint gain they might well have come across in preparing. There is no substitute for effective preparation."[12]

Michael P. Carbone, another practitioner in dispute resolution, provides recommendations on how lawyers should prepare themselves and their clients for mediation.[13] Lawyers should analyze the theories of the case and evaluate strengths and weakness, examine the case from the other side's position, assess the probabilities of success of both sides, and evaluate the measure, calculation, and amount of damages.[14] Other recommendations from mediation practitioners include preparing an opening statement and anticipating questions the mediator and the others side may ask, as well as responses thereto.[15] This self-preparation is accomplished through application of the standard philosophical map. However, lawyers also need to prepare their clients by setting aside the standard philosophical map and meeting with their clients to discuss the following: 1) How the mediation will be conducted, and the roles of

the various participants; 2) The necessity to ensure there is settlement authority will be obtained prior to mediation; 3) The difference between litigation and mediation (including their philosophical maps), and the role of the mediator; 4) If the client will speak, and the content of remarks; 5) The negotiation strategy, and the importance of keeping an open mind; 6) Both the best alternatives to a negotiated agreement ("BATNA"), and the worst alternative to a negotiated agreement ("WATNA") (both can include discussion about attorney's fees, costs, and the likelihood of success or failure); and 7) The necessity to be patient and allow the mediation process to work.[16] All of these topics should be discussed to help both lawyers and their clients to examine both the clients' and the other side's interests, and how to best meet those interests to reach an acceptable resolution.

Unfortunately, mediators often do not know the level of preparation lawyers have put into mediation until well after the mediation begins. Mediators should not simply assume or hope adequate preparation has been made, but should utilize opportunities available to encourage and help prepare lawyers for mediation. These opportunities include: 1) Written explanations and requests for information from the mediator, 2) Pre-mediation interviews and conference calls, and 3) The mediator's opening statement.

1. Written explanations and requests for information from the mediator.

A useful method to encourage lawyers to prepare for mediation is to provide a clear written explanation of the mediation process, recommending steps to prepare for mediation, and encouraging discussion between lawyers and their clients. The mediator can supplement this explanation with a small packet of educational materials, including articles describing how to prepare for mediation, a checklist of tasks for lawyers to accomplish before mediation, a list of common obstacles to settlement, and forms the lawyers can use when meeting with clients to

discuss the clients' interests and evaluate the BATNA and WATNA of the particular case. Where possible, the mediator should request that lawyers provide a mediation brief, providing an overview of the case, its procedural posture, prior efforts at resolution, and their parties' interests. Emphasis should be made on requesting information that requires lawyers to think beyond the standard philosophical map.

The mediator's explanation and request for information can be sent with the agreement to mediate, but should be sent with sufficient time to allow lawyers to examine the information and respond. Sending this information early also allows the mediator to follow-up on the information requested, answer questions, and ascertain the level of preparation that has been accomplished.

2. Pre-mediation interviews and conference calls with lawyers.

Pre-mediation interviews and conference calls allow additional opportunities for mediators to educate and prepare lawyers for mediation. Beginning with the intake coordination of a case, mediators can educate lawyers about mediation, including the process, each participant's role and behavioral expectations.[17] Admittedly, the ability to utilize intake coordination to educate counsel depends on whether the lawyers themselves are coordinating the mediation or have delegated it to office staff. When speaking with the lawyers, the mediator should adapt the content of the conversation based on each lawyer's background and understanding of the mediation process.

Private and/or joint conference calls with lawyers from both sides provide additional opportunities for the mediator to request input from the lawyers about ways to help achieve their clients' best interests, and to describe how the mediation process will be applied in the dispute. Private conference calls provide discrete opportunities for the mediator and lawyers to discuss

views of the case, case specific issues, interests, and for the mediators to provide encouragement and recommendations for lawyers to prepare themselves and their clients for mediation.

3. The mediator's opening statement.

The overarching goal of the mediator's opening statement is to create a positive atmosphere of optimism, safety, hope and empowerment.[18] The mediator's opening statement should never be undervalued, because it must accomplish several functions to prepare lawyers and their clients for a successful mediation.[19] In the book "*Mediation Theory and Practice*," authors Suzanne McCorkle and Melanie J. Reese list the functions of the mediator's opening statement, which include: 1) Introducing the parties and the mediator to each other as a team working on the parties' issues; 2) Modeling a positive tone; 3) Building trust and rapport between the mediator and each party; 4) Educating parties about mediation as a process; 5) Reducing anxiety about what will occur during the mediation; 6) Discussing the role of mediator; 7) Discuss the role of disputants; and 8) Transitioning to the phase where the disputants tell their stories.[20]

By applying the mediator's skills to accomplish these requisite functions, the opening statements will help reinforce any preparation the lawyers have made for mediation, fill in the gaps to the extent preparation is lacking, and further prepare lawyers by the example of the mediators themselves.

B. Focusing Too Much on Advocacy.

There is nothing necessarily wrong with lawyers advocating their client's position – to a limited extent – in mediation. Experienced mediators have even found that the most persuasive communicators in mediation spend about ten percent of the time advocating their viewpoints, and the remainder of the time asking questions, and exploring interests.[21] However, many

lawyers cling to the standard philosophical map and spend far too much time advocating legal positions to the disadvantage of both themselves and their clients.

As previously discussed, the standard philosophical map assumes the parties are adversaries, who must compete to win. Accordingly, when lawyers rely on the standard philosophical map, the only method to achieve desired results is by competitively advocating legal positions and arguments. Discussing the competitive strategy in negotiations, Professor Peter Robinson states: "The competitive motive arises from a perception that the objective of the negotiation is to allow a finite sum between the negotiators. The assumption is that the parties are involved in a 'zero sum' situation—one in which the only way for one side's outcome to improve is at the other side's expense."[22]

According to Robinson, lawyers who adopt a competitive strategy during mediation are usually easy to identify through their actions early in mediation, which include; 1) avoidance of social pleasantries by arriving late or talking on their cell phone until the mediator begins the session, 2) demeaning opposing counsel and/or the opposing party, 3) insulting opposing counsel and/or the opposing party; 3) expressing frustration that mediation would have been unnecessary if opposing counsel/party had been reasonable; 4) describing similar cases they have won; and 5) delivering a well-prepared trial opening statement and closing argument.[23] Lawyers who employ these strategies unwittingly believe they have gained a professional advantage by demonstrating resolve.[24] Additionally, when lawyers focus on advocating their clients' positions in mediation, they present their opening and comments to the mediator as if the mediator were a judge or jury, and attempt to persuade the mediator that their position is correct.[25] In doing so, they overlook the interests of the other party, and lose site of the fact that it is the other party and not the mediator that they need to persuade.[26]

Too much advocacy during mediation wastes the opportunity to learn helpful information to reach a "satisfactory and swift resolution of the dispute."[27] Too much advocacy also results in lawyers and their clients "anchoring" (placing over-reliance on a particular fact or piece of information), and becoming overconfident in their view of the dispute, resulting in decision-making errors that undermine otherwise potential resolutions.[28] Having created anchors, lawyers lock themselves and their clients into their positions and subsequent offers, from which they find it difficult to move.[29] Moreover, over-advocacy often results in the escalation of emotions and the untimely termination of mediation.

In order to manage mediations where one or more lawyers are focusing too much on advocacy, the mediator first needs to recognize that traditional, competitive negotiation behaviors are being employed by at least one side. The mediator may then decide how the mediation will proceed by encouraging cooperative negotiation or permitting traditional competitive negotiation.[30] Regardless of which negotiation process is ultimately employed, over-advocacy hinders the potential for resolution. To address this pitfall, mediators can employ several tools to encourage attorneys to move beyond mere advocacy in mediation, including: 1) Reframing; 2) Focusing on interests; 3) Coaching; and 4) Reality checks.

1. Reframing.

"Reframing" is defined as "a listening skill that validates the general interest of one disputant without confirming his or her tone, position, or slanted perspective of the facts."[31] While the lawyer's statements cannot be changed, their meaning is altered to change how they are received by the other side. Accordingly, reframing is regularly used by mediators to take the sting out of statements made by lawyers and their clients in mediation.

Over-advocacy in mediation can raise the level of emotions in parties. When lawyers over-advocate their positions, it is necessary for mediators to intervene and reframe the message, to prevent the mediation from deteriorating.[32] Care should be taken to avoid paraphrasing the positions advocated, because doing so is likely to only further entrench lawyers into their advocated positions. The mediator should reframe the positions advocated in terms of the parties' mutual interests. This allows lawyers to hear a different spin on what they have said, and gives them the opportunity to accept the statement as their own. Reframing helps return lawyers and their clients to the true purpose of their attending mediation.

2. Focusing on interests.

Throughout mediation, mediators use their skills to ascertain the parties' "interests" (why they want particular options) and to keep the parties focused on how to best achieve their interests through mediation. Lawyers that focus on advocacy commonly lose sight of the interests in the case, and anchor themselves into extreme positions. The mediator should repeatedly remind lawyers of their clients' common interests, and provide encouragement to realize those interests throughout the mediation process. Focusing on mutual interests helps to bring lawyers around to recognizing the benefits that the mediation philosophical map provides to their clients, including self-determination in the mediation process and ultimate resolution of their dispute.

3. Coaching.

Mediators regularly use coaching skills. When lawyers over-advocate in mediation, the mediator can utilize a caucus as an opportunity to better understand the reasoning of the approach, and coach them about more effective methods to proceed in the mediation. Before coaching, the mediator should take care to respect and avoid offending the lawyers by preparing

how and what they will say. According to Magistrate Wayne D. Brazil, "[a] party that is treated as a peer, that is not patronized, will feel respected."[33] The same is true with lawyers. If there is a concern that coaching in the presence of clients may cause the lawyer to lose face, ask to take a break and speak with the lawyer separately. The lawyer will appreciate the consideration and respect.

To begin coaching, the mediator should calmly summarize the situation, pause for a few moments, and then ask for ideas on how to keep the mediation moving.[34] If ideas are not forthcoming, the mediator can offer respectful recommendations. For example, the mediator might say: "I've seen parties in this situation in other cases, and it has turned out that what was getting in the way of further progress was X. Do you think that factor is at play at all here?"[35] The mediator and lawyer can then discuss options about how to more effectively proceed in the mediation.

4. Reality checks.

As previously discussed, overconfidence caused by too much advocacy often results in decision-making errors. "Reality checks" allow the mediator the opportunity to provide an independent perspective on the theories of the parties' cases to help them avoid and overcome decision-making errors.[36] In this regard, "the mediator is an agent of reality, sometimes even seen as a 'prophet of doom' by identifying the parties' alternatives to a negotiated agreement."[37]

When dealing with lawyers who are over-advocating in mediation, the mediator should wait until caucus to provide any reality checking specific to positions being advocated by any one party. The mediator can then discuss the BATNA and WATNA of the case. For most parties, the BATNA is an objective view of the ultimate outcome of litigation. The WATNA's

generally includes discussion of the time and cost of litigation if the outcome is unfavorable and, if there a decision in the client's favor, the likelihood of recovering a judgment.

As part of the reality check discussion, the mediator can discuss the decision errors caused by overconfidence in advocated positions. For example, one study shows 80% of interviewed entrepreneurs believed their chances of success were 70% or better, and 33% described their success as "certain." However, the reality is that only 33% of new businesses have better than a five-year survival rate.[38] In a study of couples getting married, couples estimated their chance of divorce at zero, although most were fully aware the actual divorce rate was between 40% and 50%.[39] Hitting closer to home, a 2008 study examined 2,054 California civil cases decided between 2002 and 2005, to examine whether, and under what circumstances the parties did better at trial than they could have through settlement.[40] The study showed in only 15% of the cases, both sides did better at trial than their last settlement offer before trial. On average, in 61% of the cases, plaintiffs did worse by going to trial, and in 24% of the cases, defendants did worse by going to trial.[41]

The mediator can use these and other empirical studies as a launch into discussing the basis of the lawyer's position, and potential outcomes of the case, as a means to reassess their approach in mediation, and the benefits of the mediation philosophical map.

C. Over-Aggressive and Uncivil Behavior.

Another pitfall at mediation that is often caused by the standard philosophical map is over-aggressive and uncivil behavior. The legal profession is becoming increasingly more competitive, and unfortunately, that competition appears to be increasingly spilling over into lawyer civility. Lawyers that cling to the standard philosophical map can become too invested, personally and professionally, in the dispute, and demean and insult the other side's lawyer and

client.[42] In extreme circumstances, lawyers will attempt to hurt, humiliate, threaten or bully opposing counsel in the attempt to force resolution on their terms. Such behavior quickly destroys the potential for resolution. Since resolutions rely upon some degree of trust, both sides must refrain from uncivil behavior to prevent the loss of trust.[43] Moreover, uncivil behavior can escalate and trigger ultimatums and/or the untimely termination of mediation.

When an over-aggressive lawyer verbally attacks, the mediator must act as a good leader and take immediate action to prevent damage to the mediation process. Strategies to prevent and address over-aggressive attorneys in mediation include: 1) Setting ground rules; 2) Taking breaks; 3) Caucusing; 4) Shuttle mediation.

1. Setting ground rules.

If the mediator recognizes the potential for over-aggressive and uncivil behavior before mediation begins, strict ground rules should be set to prevent the event of uncivil behavior from occurring. In the opening statement, the mediator can explain the necessity of courtesy and establish rules. For example, the ground rules may require 1) lawyers and parties to speak and treat one another courteously during the mediation, and 2) permit the mediator to cut in and stop any uncivil behavior when it occurs. Once such ground rules are laid out, the mediator should ask each party and their lawyers if they will agree to abide by them. Verbal agreements to accept ground rules help lawyers to buy into them, and strengthen the expectation of civility in mediation.

2. Taking breaks.

When a lawyer has acted in an uncivil, over-aggressive manner, the mediator should immediately intervene and stop it from continuing. An effective method to intervene and prevent the escalation of uncivil behavior is by taking a break. Taking breaks provides time for

lawyers to calm down. After the break, the mediator should return the parties to focusing on common interests, the importance of the ground rules, and express optimism in moving forward.

3. Caucusing.

Another strategy to prevent and respond to over-aggressive lawyers is to "caucus" with the parties when uncivil behavior has occurred. A caucus gives the mediator the opportunity to meet and speak privately with the different parties to 1) help the offending lawyer to evaluate what has occurred and provide coaching to prevent the uncivil behavior from reoccurring, and 2) allow the mediator to meet with the offended party to backtrack and undo any damage from the behavior.

While meeting with the offending lawyer, the mediator can utilize the same coaching skills used with lawyers who over-advocate: Calmly summarize what occurred, pause for a few moments, ask for ideas how to address the uncivil behavior, and if ideas are not forthcoming, offer respectful recommendations [44] In this process, focus should be kept on discussing the offensive behavior without offending the lawyer. Before ending the caucus, the mediator should again ask the offending lawyer to agree to abide by the ground rules. This not only reaffirms the ground rules, but allows the mediator to assess whether similar offensive behavior will occur based on the lawyer's response.

The goal in caucusing with the offended side is to get the mediation back on track and mitigate any damages caused by the offensive behavior. This can be accomplished by the mediator by figuratively "falling on his sword," and accepting personal responsibility for the occurrence, relaying an apology if one has been offered by the offending lawyer, and generally acknowledging strong emotions in the case.

4. Shuttle mediation.

If there is a likelihood uncivil behavior will continue regardless of the ground rules, the parties should remain separated. The mediator can then have separate meetings with the parties in "shuttle diplomacy." Moving back and forth from party to party, the mediator filters out the offending lawyer's uncivil behavior, "allowing only useful communication, void of communication styles and behaviors that otherwise inhibit progress toward resolution."[45]

V. Conclusion

Nearly every mediation has distinct challenges. Lawyers who rely upon and cling to the standard philosophical map in mediation, add to these challenges through inadequate preparation, over-advocacy, and over-aggressive and uncivil behavior. Regardless of the challenge presented, mediators should remain optimistic. The mediation process works, and the appropriate application of proven mediation strategies and skills enable mediators to surmount these pitfalls created by the standard philosophical map when they arise. The more that mediators apply these strategies and skills to address the pitfalls of the standard philosophical map, the more educated and acquainted lawyers will become with the effectiveness of the mediation philosophical map. In this process, more lawyers will learn to better serve the interests of their clients.

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