BY RANDE S. SOTOMAYOR

Transforming a Mediation into a Positive Outcome for All Parties

WHILE NO TWO MEDIATIONS ARE EVER THE SAME, this one looked pretty "normal" in advance: a residential real estate sale involving claims of nondisclosure and concealment of water damage and extensive mold. The parties and lawyers were pessimistic about the prospects of settlement and, as usual, the attorneys initially objected to a joint opening session. It typically is an uphill battle with counsel and clients who think a joint session will exacerbate the dispute, prompt a blow-up, or reveal facts they would rather save for trial.

I strongly favor joint sessions. They allow the parties to observe their opponents as witnesses and the lawyers in action, as well as to informally exchange information, while everyone confronts the discomfort of the adversarial proceeding. Also, it all takes place in a confidential setting in which the parties are not required to settle, but well might.

In this case, the first thing that went right was that all parties and counsel kept an open mind about the joint session. We discussed pros and cons and all agreed to give it a try. Mediation sessions are necessarily flexible, and a good mediator can tell when it is time to separate into caucus.

Part of my regular spiel is to discuss the importance and value of listening to understand as opposed to listening in order to respond. Lawyers are trained to nimbly respond to arguments on the fly. It is difficult to put yourself in the other guy's shoes, especially if your client is depending on you to set the other guy straight about the facts and be a tough negotiator. This is when determined lawyers and determined clients can be an effective team. Paying close attention to what one's opponent is saying while trying to discover what he or she really thinks and wants helps solutions emerge, along with an evaluation of what you really think and want.

In this case, it got a little ugly. After all, the buyers were claiming they were deceived. Still, the joint session was civil and polite. The lawyers made full presentations, and the parties asked each other questions. Importantly, the parties and attorneys carefully examined the bases for each side's position and the circumstances surrounding the sale of the house. I could see each side strategically deciding how to engage, how much to disclose at certain points, and becoming eager to work toward a nonlitigated solution.

The buyers insisted the seller must have been aware of the water damage and mold, but the seller had lived there for only two years and insisted he did not know of the problem. Off they went to their separate caucus rooms to dig their heels in and maintain their righteousness in private. However, everyone still listened, primarily because the lawyers and parties were well prepared. Their documents, witness interviews, and expert reports were all in order. The lawyers knew their cases and had spent considerable time with their clients before the day of the mediation discussing process, objectives, risks, costs, and alternatives to settlement.

Over the course of the day, as I was shuttling back and forth between rooms and discussing compelling reasons for everyone to move closer to agreement, the gap between demands and offers remained stubbornly large. The lawyers were advising limits; the parties were convinced they were right and their opponents were wrong. They were ready to proceed to arbitration. Still, they listened.

And then it happened.

The day had grown long. The seller and I were chatting about his prior career, his family, and his new home in a new town. (And I did bring out the chocolate.) The seller became very quiet. Then, very slowly, and tearfully, he began to speak words that I believe were the "magic" in this case. He said, "As much as I feel I have been wronged, I can see how [the buyers] feel that they too have been wronged." He suggested a compromise that I delivered to the other room along with his revelation. That led to more tears…and a settlement.

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The agreement was drafted and signed. We had another joint session, followed by handshakes, expressions of gratitude (and awe), and a further agreement of "no hard feelings."

These people got it. They took responsibility for exploring solutions. They prepared for the mediation independently and with their lawyers. They listened to each other. They turned destructive interaction into constructive cooperation by expanding their perception of the case through flexibility, open-mindedness, listening to understand, and humanizing the ordeal.

It all came together when the parties began to imagine each other's point of view, even while disagreeing with it. The human interaction between warring counsel and parties allowed them to take a break from the war and discover reasons and ways to close the gap and end the dispute.

This case is cause to celebrate the trust lawyers can place in the parties once they have fully prepared themselves and their clients and set the stage for an empowering process of resolution. This was not just a mutually unhappy result of mediation. Instead, it was a result that reinforced the parties' self-determination and the usefulness of a relational approach that led to understanding others' points of view.

That day, everyone got to be a hero. I hope more parties, lawyers, and mediators have incredible days like that one. ■

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