



Mediation Magic: Transforming Adversity into Collaboration

By Lucy Chernow Brown
Retired Judge 15th Judicial Circuit

Bitterly adversarial opening statements and attempts to intimidate the opposing side set the tone in too many mediations. In one case after both sides enthusiastically started down that intensely negative path, I privately queried counsel in the first caucus as to whether and how he could ever expect to negotiate an agreement with the opposing party after his fierce opening. He looked at me hopefully and replied, “I don’t know. Maybe...mediation magic?”

Since that day I have been contemplating the meaning of “mediation magic.” I wondered how I could use it to help the dispute participants overcome their negativity and successfully collaborate with the mediator and opposing parties to arrive at a resolution to their case.

I have found it helpful in many cases to have a confidential pre-mediation telephone conference with counsel for each side separately. This enables the mediator to become acquainted with the emotional undercurrents and personality issues in the case. These matters are not generally found in attorneys’ pre-mediation briefs. Howev-

er, in a frank private telephone meeting the mediator can learn valuable information about the relationships among the parties and counsel so as to develop effective strategies for working with the participants during the mediation.

Increasingly, counsel tells me they plan to waive opening statements because of bitterness between the parties. “We both know the other side’s position, and if I give an opening it will just increase the stress and tension and be counter-productive.” In response, I have developed and successfully used the concept of the “soft opening.” I request that counsel take the opportunity to speak briefly and directly to the opposing party in a manner designed to demonstrate respect for that person as an individual. Without detailing all the controversies in the case, counsel can formulate an effective and respectful opening statement which shows a willingness to collaborate during mediation. Because mediation is essentially an effort to end bitter controversies by collaboration and agreement, starting the process in a manner conducive to establishing positive rapport can foster settlement of even the most difficult and complex claims. Remember, if the case fails to settle at mediation, counsel can always resume their tough “master of trial” techniques in

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Visit www.jamsadr.com/lucy-brown or contact Business Manager Sherman Humphrey at 305.371.5267 or shumphrey@jamsadr.com.



court. Of course, it is important to have a frank talk with your client about this approach before the mediation so your client understands your strategy and does not interpret it to be you giving up or “going soft” on her case. I have successfully resolved many cases in which counsel effectively used the “soft opening” approach to set a positive tone for the mediation session.

I have discovered another important aspect of “mediation magic” – the art of effectively listening to and empathizing with dispute participants. In my experience, the importance of your mediator’s talent and ability in this area cannot be overstated. This has proven to be true, even in disputes involving purely business relationships. Naturally, you will have selected a mediator knowledgeable in the area of law which governs your case. Yet, you may not have analyzed the relationships among the disputants to select a mediator who is also able to effectively gain the trust of the individual participants to help guide them in a positive way toward the collaboration necessary to reach a resolution.

I have taken many courses and read numerous articles describing how to be an effective listener. All of the recommended techniques are use-

ful, such as maintaining eye contact, avoiding distractions, etc. But in my experience, the heart of the matter is simply to make the person who is speaking feel as if s/he is truly being heard. In 24 years on the circuit bench, I learned to appreciate the real need of litigants to feel they have “had their day in court.” In other words, to feel that someone in a position of authority has really listened to what they have to say and has understood and respected them.

Can mediation turn adversaries into collaborators? We have learned that “mediation magic” is real. After a good thirty years of using mediation to resolve civil disputes in Palm Beach County courts, history has clearly established that the magic works. We now recognize that collaboration can be superior to adversarial proceedings. Today we are even witnessing the growth of “collaborative law” in the challenging field of family law.

Lucy Chernow Brown, retired Judge 15th Judicial Circuit, joined JAMS after serving for 24 years as a judge in Palm Beach County, Florida. She is available as a mediator, arbitrator, special master and discovery referee in the JAMS Boca Raton and Miami resolution centers. She can be reached at lbrown@jamsadr.com.