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Mediation Notes

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Finding the Wormhole That Leads to Resolution

In many of the mediations I am asked to attend, either as a lawyer or mediator, money is not the only solution to the problem. The parties have long-standing family or business connections or history that create animosity, distrust and some psychological impediment to resolution. This is particularly true in closely-held businesses, probate disputes or failed partnerships. Resolving these cases requires attention to things that lawyers are actually trained to ignore—legally irrelevant information. Lawyers are trained as extraordinary filters. Most frequently, we talk to the client and filter the inadmissible from the admissible, the procedurally possible from the desired, emotion and belief from provable fact, legally cognizable theory from inequitable but tangential "fairness" arguments that we know don't fly.

But in many mediations, paying attention to the legally irrelevant topics can be hugely important because success at mediation does not turn on provable facts, discrete theories of law or logic. It turns on getting people to believe they have been heard and getting them to decide that their self interest warrants a cessation of hostilities. Not listening is perhaps the biggest mistake lawyers make. We know the law, the procedure and the process. We feel the need to "run" the mediation and advocate for our client. We need to curtail that urge to be in control.

In a litigated dispute, lawyers do the talking because the rules and the need to safeguard a legal position essentially require that we do so. However, in mediation, the need to

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protect legal positions and privilege is not so important, and we lawyers are all guilty of talking too much and not letting our clients speak. The mediation confidentiality and privilege rules protect us and our clients from verbal miscues. There is some latitude in mediation that we don't enjoy in a court of law, and we should use that time and flexible space. Letting the client and opposing side have their say in mediation is extremely important. Paying attention to issues like "respect," "history," "fairness" and other loose concepts can be frustrating because one is trained to dismiss those concepts in court. Surprisingly, even in the most sterile commercial disputes, we find that attitudes, beliefs and hurt feelings play a role in decision making. I frequently hear large, sophisticated lenders complain about the borrower's attitude and borrowers complain of the lender's insensitivity when supposedly the case is only about a promissory note and collateral. Why is that? Because many disputes are about relationships that have failed, and everyone wants to speak to the failure and their perceived inequity.

When I have a hard case, I endeavor to quiet the lawyers and tease out the unspoken concerns, gripes and stories that the client needs to tell. It is not uncommon to find there is some unresolved personal baggage or emotional issue that one side thinks the litigation will solve or fix, and if we get to the nub of that concern or interest, often we have a breakthrough. If you are stuck in what appears to be an intractable problem at mediation and difficult personalities, consider the possibility that you may need to focus on what is legally irrelevant, and even inadmissible, to find the wormhole that leads to resolution.