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That's Outrageous! Dealing with Offensive Demands in Mediation

Sometimes, even over my objections or “suggestions,” one side insists on communicating something they fully know will be considered offensive or poorly received in the other room. What are some strategies for dealing with a mediation that appears to be going sideways or skidding out of control?

A good mediator will protect one side or the other from insults or offensive deal terms by trying to temper the offers or demands being made before they are communicated. Such potentially offensive deal terms can be framed with a warning, “You are not going to like this,” before repeating it in the other room. Then you try to sooth it over. In the rare cases where I am instructed to communicate what I think is a counter-productive demand, I tell the other side what is coming, that I don't like it, and think it is in bad form. This validates their upset even before they hear the offensive or insulting offer. (The other side doesn't know that I am cushioning the blow—sorry, my secret's out).

Is it improper for a mediator to temper or frame the message that minimizes its gravity or forcefulness? Nope. If I do not change the words or actual message, but just share my thoughts about the message, my conduct is appropriate. The mediator does have an obligation to communicate a demand as dictated by a party, but the mediator is not precluded from offering his reaction to the demand or empathizing with the recipient's anticipated upset. There is no foul—that's just managing the process. Also, eliminating the effect of vitriolic demands is fully consistent with the

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Standards of Professional Conduct for Mediators under Rules 10.210 – 10.230. Rule 10.220 states that the mediator should “reduce obstacles to communication, explore alternatives, and facilitate voluntary agreements.”

If you are driving, you are told to turn in the direction of the skid. As a mediator, I suggest we use a similar strategy—turn directly into the unreasonable demand. Why are you doing that now? What is the goal? What do you really want? Sometimes the person making the offer won't explain the “offensive” demand and their reason for asking me to throw a grenade in the other room. But I don't just throw it and let the mediation end. I will spend at least a couple of minutes trying to figure out why they want me to throw it. If the client won't tell me, I may draw the lawyer aside and try to get some information. Usually, we can put the pin back in the grenade.

Sometimes, what looks like an unreasonable or unachievable deal term is workable in some way. You have to find a less offensive substitute that satisfies the underlying interest or concern that prompted the demand. Offensive demands should not prompt an immediate walkout. Consider the possibility that the offensive or outrageous deal term is just an ugly and imperfect expression of a hidden concern or fear by the litigant. Sometimes just making the “outrageous” demand is cathartic and a form of venting. If you spend a few minutes digging down into the reason for the offensive deal term being voiced, you can sometimes overcome what might otherwise prompt a walkout.

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