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## Giving Clients a Voice at Mediation

In most of the cases I mediate, the parties know each other. The dispute may be with former employees or business partners, competitors, customers or myriad other relationships that existed prior to the dispute and mediation. One strategy I occasionally employ is to let the clients speak to one another without their lawyers. From time to time, getting the lawyers out of the way is helpful. Of course, if there is any concern over the potential for bad behavior or vituperative comments, then I will keep the parties separate or stay in the room while they speak to one another. Every mediator has the obligation to safeguard the process and protect the parties from threats, duress or incivility. To be sure, we have to be careful here—lest the clients elevate the situation with bickering or even worse—but we also have to guard against the tendency to make this a lawyer-driven process. Clients should not be denied their voice. Many times, allowing the clients to be heard is a key component and integral step on the path to settlement.

While litigation is replete with rules and formalistic ways of communicating, a mediation is not scripted and every word does not need to be voiced by an attorney. In fact, there is a growing body of literature suggesting that sometimes lawyers speak too much when trying to settle cases (hard to believe, right?). Disputes often flow from failed communication and a breakdown in the relationship between the parties. During litigation there is no real opportunity for the parties to communicate as disputants. They are told they must communicate through counsel and that communication is largely scripted and attendant to the lawsuit—not

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necessarily in tune with the underlying problem. One must be careful not to miss the quieter riffs and notes emanating from the clients, which too often may be drowned out by the amplified drums of competing litigators playing the all too common refrains attendant to litigated but not mediated results.

Turning down the volume of the litigation and allowing parties the opportunity to talk can be cathartic, productive, creative and useful in eliminating misunderstandings. I have had a few cases where, after a heartfelt chat without counsel, we were able to work through some of the obstacles that were actually based on misperceptions, a lack of trust or wrong information. As a mediator and a lawyer, it is helpful to remember you do not always have to be the mouthpiece or architect of the deal. Be sensitive to the fact that the parties may feel a strong urge to blow the horn of perceived injustice and communicate on their own terms. Under the right circumstances and with a watchful eye, we can take a step back and let the parties communicate in the way they desire. Mediation can and should be flexible enough to accommodate the sounds of different instruments in the orchestra of the dispute.

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