

How Mediation Changed Me as a Lawyer

By Adam J. Halper with Caroline P. Oppenheim

My path to being a mediator began in the back of a courtroom. The case was a child guardianship matter between the children's maternal grandmother and their father. The mother had passed away. I represented the grandmother. I was sitting next to my opposing counsel in the last row of the courtroom and we were waiting to appear before the bench. Our clients were sitting outside, shooting daggers at each other with their eyes.

The case began shortly after the mother's death. The children had been living with their grandmother when she died. The father, who had been marginally involved in their lives to that point, stepped back into the picture and fought the grandmother for custody of the children. The grandmother filed for guardianship.

The matter had dragged on for two years. There had been motions, document exchange and innumerable crises and frantic weekend phone calls connected to the visitation arrangement. The father alleged that the grandmother was obstructing his relationship with his children. The grandmother alleged he didn't really have one. Neither was entirely wrong. Neither was entirely right.

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The trial phase of the case had been going on for four months. We had completed testimony on three witnesses. There were about five left to examine. My opposing counsel and I spent hundreds of hours on the case. As I was looking over the papers for that day, I was struck by how little had been accomplished that benefited anyone. I turned to my opposing counsel and I asked, "What are we doing here?" There was a pause. He responded, "I don't know."

The next week, I started talking with a few people about mediation.

I'm the legal director at a non-profit called The Family Center. We work with clients who are very sick. Most of our clients are referred to us by hospital oncology and palliative care units. If you have a serious illness such as cancer and you're of modest means, you're bound to have legal troubles. They come in many forms. Many are remarkably bitter. The litigation often continues after someone has passed away. Regardless of one's resources,

in the midst of catastrophic illness, no matter how much they may try to avoid it, people often leave behind unresolved issues. My team has clients with insurance disputes (public and private), housing problems, family law issues, public benefits disputes and more.

You'd think that when people are sick or if someone dies, those affected and those left behind living with terrible grief would be more clear-headed about major decisions. Or, you might imagine that having been through the trauma of the illness of a loved one, they would lack the motivation for litigation. Not so. Most people, seemingly to sublimate sadness, are all too happy to fight over housing, money or children. It's remarkable I didn't look at ADR sooner.

Before I started mediation training, my approach to conflict was that of many other advocates. I focused on defense and attack. By way of example, many years ago, I met with a client who was known throughout the agency as trouble. Edward had been through innumerable court battles with other attorneys and his complaints were legion. At the time, he was locked in a vicious custody battle. He was also engaged in a divorce that was going nowhere. He had fired two attorneys. He was in arrears on the rent for his apartment—which needed significant repairs. He was well over six feet tall and he had a tendency to raise his voice when he didn't get the answer he wanted. His temper was explosive. Edward had a lot to be frustrated about but he often didn't help himself. He had a habit of making enemies of everyone, including those trying to help him.

One day, after he complained about one of the staff attorneys, I met with him to discuss his grievances. I did a lot of talking and, in the end, I shut him down. I felt like his complaints about his representation were baseless. I was sharp and defensive. I explained, at length, why we had taken particular actions in his case. He left our office grumbling. In response to one of the worst moments in his life, I dismissed him. I felt that I had to. It hadn't occurred to me that there was really any other way to deal with Edward.

When I first began studying mediation, I found myself impatient to begin practicing. Some time ago, during a commercial mediation observation, I asked the mediator how long it had taken him to become good at it. Five years, he responded. I scoffed. Five years seemed like a long time to be "training."

At the time, I thought becoming a mediator worked like this: You take the training and then you mediate cases. I learned quickly that it was not that simple, but for a surprising reason. It wasn't the substance or the skills sets that were foreign. It was the internal adjustment. What I learned is that to go from the mindset of a litigator to a mediator isn't something that can be learned in one class or three. It turns out that the mediator in that commercial case wasn't wrong. Starting may be simple -- becoming good and making that adjustment takes time.

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Since I began my mediation training, I've observed, mediated and co-mediated many cases. I've taken several classes and an advanced mediation practicum. I've trained in how to resolve community disputes, employment disputes, family disputes, matrimonial disputes, commercial disputes, wage and hour cases, unlawful arrest cases and more. Every trainer has their own bent. Some focus on facilitative mediation—having people understand each other. Others focus on caucusing and how to do evaluative mediation—helping people understand the weakness of their case and the cost of moving forward. There's a lot to learn.

Of course, there are many common elements to these approaches. The most obvious one is that all of them require intense listening. Listening in mediation is not like listening to your friend unburden themselves at dinner.

In mediation training, you learn to listen in a particular way. It goes like this. A party speaks. The mediator listens. At a point at which something important needs to be confirmed, the mediator synthesizes what has been said and repeats it back to the speaker. The mediator asks for confirmation that they heard the speaker correctly. The speaker confirms or corrects and the process continues. This is called looping. In mediation listening and confirming understanding of the story is a crucial form of communication. However this transaction is accomplished, the message is always the same. "I hear you." In the hours of a mediation session, this quiet call and response may be transacted many times between the mediator, parties and counsel.

Looking back, I think it has taken me about five years of mediation training, observations and actual mediation to listen differently. You can understand and do looping in about 15 minutes. Still, it takes some time to internalize this skill and other skills that drive resolution. It goes against just about everything taught in law school. Instead of offering answers, in mediation one of the most important elements of the mediator's job is to have parties know you understand them. This is the beginning of

probing for a party's deeper interests. It is the place from which problem solving begins.

Mediation training has had noticeable effects on my thinking. (1) My clients are often from a very different background from me and sometimes it didn't feel productive to discuss their feelings unless there was something I could do about them as their lawyer. Now, I find that acknowledging frustrations, anger and fears is often a big step towards helping clients find satisfaction and sometimes resolution. (2) On a personal level, when listening to a story, especially of friends or relatives discussing an issue they're wrestling with, I'm now also listening for the deeper issue. I'm not psychoanalyzing, I'm just trying to get in tune with the context. (3) Finally, I understand, more than ever, the power of a well-done apology in the context of a litigation matter.

Over time, and with more mediations under my belt, I came to realize that I was listening to people differently both inside and outside of the mediation sessions. In both casual and formal conversation, instead of responding or waiting to respond, I was waiting to make sure I really understood the person speaking. I was also taking pains to make sure they knew I had understood them. Mediation is a lot more than listening, of course. During my training (which never really ends), I was relearning other pieces of lessons I thought I had sat through long ago. Problem solving, evaluation, applying the facts to the law—all took on a new color.

The result of acquiring a very different set of skills is that clients are better served. On most days, I feel better about my work and I love my work. Don't get me wrong. I didn't start looping my friends at dinner. It's just that something in the conversation changed. I became aware that it was happening with friends, family and at social and professional functions.

It also started happening at work.

Not long ago, Edward paid our office a visit. I was hardly looking forward to it. Although it had been several years since I last saw him, he hadn't changed much. He had survived a number of significant health issues as well as legal issues. Because not all of those legal issues had been resolved, he was seeking our counsel again.

When we sat down, I could see that he was tense. I remembered that when he spoke he had a habit of wringing his hands as if exercising. It's like he was training to throw a shot put. Had he been holding walnuts, he would have cracked them open.

He began by speaking about his then current problem, which focused on the mother of his children. He had custody, but she had brought him to court again, seeking custody. Although I can't say more here (and I have changed all of the relevant points of this case), I can say that the mother used the court system as way to harass him. Edward and even the court fought back, but she

had a way of making allegations against Edward that the court, in good conscience, had to explore. As Edward discussed the case, his voice and temper rose. Without being conscious of it, I started looping with him.

“Edward, you’re saying a lot here. Just so that I understand you, you feel that because you’re a black man and because you’re in a courtroom, you’re held to a different standard?” “Yes.”

“You cannot make mistakes, ever?” “Yes.”

“She (ex-wife) can, though? After all, the court knows that she’s troubled.” “Yes.”

“That seems really unfair.” “Yes.”

The conversation lasted about 45 minutes. By the time we were done, Edward was calmer. I couldn’t give him any grand answers or tell him what would happen in his case, of course. I did let him know that he had been heard. I think he may have felt that he had been heard. The difference between this encounter and our first, many years ago, was vast. It was more than just the passage of time for him or me. He had certainly changed and saw his current problems in a larger context. It made them no less infuriating. I offered no answers, but rather confirmed his understanding of the events thus far. He was visibly affected and relieved. I don’t think he had been able to have that kind of conversation with anyone else and no one had offered.

When he left my office—we were going to speak in a week’s time—he hugged me. Given my work, I don’t get a lot of hugs (sadly). I gave him a few things to think about for our next conversation.

“I hear you,” he said.

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State Bar and Foundation Seek Donations to Help Hurricane Harvey Victims Obtain Legal Aid

The State Bar Association and The New York Bar Foundation are seeking donations to a relief fund for victims of Hurricane Harvey who need legal assistance.

As the flood waters recede, residents of Texas will face numerous legal issues including dealing with lost documents, insurance questions, consumer protection issues and applying for federal disaster relief funds.

Nonprofit legal services providers in Texas will be inundated with calls for help.

Tax-deductible donations may be sent to **The New York Bar Foundation, 1 Elk Street, Albany, NY, 12207**. Checks should be made with the notation, “Disaster Relief Fund.” Donors also can contribute by visiting www.tnybf.org/donation/ click on restricted fund, then Disaster Relief Fund.

