

When Is the Right Time To Mediate?

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For many years, I, like many other mediators, answered the question of when to mediate something like this: "It's always the right time to mediate. The cost is modest compared to the overall legal fees, so if there's even the slightest chance of settlement, mediation is a good bet. Plus, even if you don't settle, you learn a lot along the way."

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As time passed, this answer grew hollow to me. Mediation involves time, money, and inconvenience. It isn't always worth it. I became concerned that questioners would feel suspicious that I was trying to generate fees regardless of whether I was truly adding value.

Identifying When

We need a better answer. Can we define those challenges which mediation is uniquely able to address? If we can, then when those challenges emerge, and you identify them correctly, you'll know the time to mediate is right.

To identify the challenges that mediation is uniquely able to address, perhaps we can learn from the great healing profession, medicine. A profound new book by George F. Blackall, Steven Simms, and Michael J. Green, *Breaking the Cycle: How to Turn Conflict Into Collaboration When You and Your Patients Disagree* (American College of Physicians, 2009), gives us significant direction. Blackall, Simms, and Green describe systems of interactions between physicians and patients that are analogous to the interactions between lawyers and clients. Typically, the systems work well. Sometimes, they don't. When they don't, and lawyers need help to meet that challenge, mediators can provide it.

How does the system look when it works well? In the medical context, it's simple. There is an external problem (illness, injury) with which the patient must deal. The patient comes to the physician and views her as the "expert." The physician accepts the role, reaches a diagnosis, and prescribes a treatment. The problem is resolved. The patient feels better, with acceptable levels of cost and pain.

For lawyers, it is no different. When the system works well, the client has an external problem (he may need to sue someone, someone has sued him), comes to a lawyer and views her as the

"expert." The lawyer analyzes the situation and recommends actions. The problem is resolved. We win, they lose, with acceptable levels of cost and pain.

Of course, it doesn't always work that way. Sometimes, despite all reasonable efforts, the external problem does not get resolved but persists or increases. The lawyer might take depositions that do not yield the expected testimony or bring a motion that is denied. The likelihood of "winning" shrinks, and the need to settle grows. Sometimes, the client accepts the disappointment and adapts or adjusts. Other times, though, the client becomes ever more demanding. "It hasn't worked yet. Do more! DO MORE!"

The Symptomatic Cycle

Here, what Blackall, Simms, and Green call "The Symptomatic Cycle" can take over, with unfortunate results. In the professional's eyes, the "symptom" to be addressed is no longer the external medical or legal problem (after all, what is likely to work has already been tried), but rather the client's escalating demands to "Do More!"

Sometimes, the professional just doesn't know what to do. Still more lab tests? Still more discovery? The professional knows these acts are unlikely to help. But what are the choices? If she tries stronger tactics with her client—such as better or more forceful arguments, to control the demands to "Do More!"—she will likely generate increased resistance, not acceptance. If the professional acquiesces in the demands, though, she will feel unprofessional, maybe even unethical. All that is left for many professionals is to feel frustration, powerlessness, and failure. When this happens, the professional's next step could be defensive, an emotional withdrawal. Phone calls go unreturned. Meetings are dreaded. Thinking about the case is avoided. The professional can find the demands so frustrating that she starts to blame the patient or client for his own suffering. "He just won't listen to me."

Patients and clients, though, are alert as well as demanding. They sense the professional's withdrawal, and in response, they feel abandoned, betrayed, and isolated. Their demands are likely to grow more strident as the professionals seem less responsive. "Why won't you *please* just give me the help I need?"

In this "Professional-as-Expert" model, there's nowhere to go. There is nothing more the professional can do to deal with the external problem effectively. There is no end to the client's demands to "Do More!" According to Blackall, Simms, and Green, once a client has turned to the professional-as-expert, the client has inadvertently excluded himself from the problem-solving loop. The focus of so many conversations between lawyers and clients (as between physicians and

patients) is exclusively on how the expert should or should not try to solve the external problem. The client sits back and waits. It's an impasse. Lawyers can't negotiate settlements when their clients refuse to take their advice. But continuing with ineffective, expensive litigation is wasteful and futile. It's terrible. Fortunately, though, it's not completely hopeless.

Identifying Why and How

The physician has nobody to call for help. But the lawyer is in luck. If a lawyer can't deliver the solution the client initially wants (we win, they lose, fast and cheap), and an impasse emerges, it's the right time to mediate.

Mediation is a powerful tool to deal with clients' external problems and get cases settled. The great paradox of mediation, though, is that mediators help clients resolve their external problems by also addressing and clarifying lawyers' and clients' intramural differences regarding the results litigation is likely to achieve. That is why so much of commercial mediation takes place in private caucuses, where the mediator meets separately with the respective sides. In those caucuses, the mediator provides an important supplement to the lawyer's own work.

The professional mediator can function as "collaborator" rather than "expert." When a mediator does so, by definition, he declines to accept full responsibility for solving the client's problem. That responsibility remains shared with the client. Indeed, there is nowhere else for it to go. To do this, the mediator may first confirm and support the lawyer's expert advice regarding litigation's likely outcome, risk, and cost. The mediator then allows room in the conversation for the client to contribute his internal resources and devise new ways to adapt or adjust to the disappointment that the likely outcome will bring. Then the case can settle. But whether cases settle or not, this new understanding almost always increases clients' appreciation of their lawyers' work, and strengthens the bonds of the lawyer-client relationship.

When allowed to do so, clients discover all kinds of ways to bridge the gap between the results they want and the results their professionals can actually deliver. Clients can imagine their relief at achieving finality and eliminating the inconvenience, delays, and costs of further litigation, or sense the possibilities of moving forward with their lives and careers, perhaps even restoring business or personal relations with their current litigation opponents. Coping and resilience can take many forms.

The impasse may be between you and your client, or it may be between another lawyer and client. It's generally not hard to notice when another lawyer and client are out of sync. Those other lawyers may be reluctant to suggest mediation because they fear it will leave their clients feeling

further abandoned, that they are about to be "dumped." But these same lawyers may welcome the suggestion coming from you. Your suggestion of mediation may be less likely to arouse their clients' anxieties. And, if the mediator's work with the other lawyer and client helps your own client reach an advantageous settlement, then your suggestion has served your own client's interests well.

Blackall, Simms, and Green have advice on how to give clients this help. For the professional-as-collaborator who wants to draw out the client's internal resources, the focus is on relationship-building rather than problem-solving, and the conversation has the following four themes.

Acceptance

Allowing a client to have their feelings, even when those feelings don't please you. The professional-as-collaborator does not try to get a client to change his feelings.

Respect

Listening to the client, validating his concerns, taking what he has to say seriously.

Curiosity

As Blackall, Simms, and Green put it, "Asking (yourself) the simple question, 'What would a curious person do in this situation?' sets the stage for the (professional) to migrate away from controlling behaviors."

Honesty

Turn your own negative feelings to a productive end. Blackall, Simms, and Green suggest questions such as, "I find this situation frustrating too. How do you think we can move toward finding a solution?"

Conclusion

These approaches—common among professional mediators—will inevitably lead clients to new thinking. "Remaining curious," Blackall, Simms, and Green write, "as opposed to controlling, will lead to unforeseen discoveries." So supported, clients come to appreciate how far their lawyers have brought them and discover all kinds of internal resources which take them the rest of the way toward acceptance of the admittedly imperfect settlements their lawyers recommend.

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