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## Hurdling the barriers

Here's how to overcome some of the most common barriers to successful mediation.

By Norman A. Ross

Barriers to success are different than impasses. Impasses may result when the parties have exhausted their ability or willingness to meet each other's needs. Barriers are hurdles that must be surmounted during the course of the mediation which, if unaddressed, will usually result in impasse and failure to reach agreement. Difficult people and difficult behavior are dealt with separately because while anger may be the cause of the difficulty, there may be a lot of other reasons causing the problem.

### Anger

I have selected anger as the first barrier to successful mediation because of my experiences mediating cases where the parties had commenced litigation prior to agreeing on mediation. How far into the litigation process can mediation be effective? My own view is that generally the further down the litigation road the parties travel, the more difficult it is to turn the boat around. It has momentum. It's in litigation mode. When a conflict escalates to the point where lawyers are the only means of getting someone's attention, fierce emotions are guaranteed. In private session, disputants often confide to the mediator that the real motivation for the litigation is anger, at least partially. They are often loath to talk about any of this directly with their ex-spouse, even though such a discussion would better enable him or her to understand what is driving the litigation.

- While there may be few common denominators from one dispute to the next, anger or other strong emotions are usually present. Emotions should be recognized as playing a central part in any negotiation. Failure to acknowledge them may be costly and result in failure.

Denial or suppression of angry feelings by the mediator, the opposing party, or their lawyer will cause problems in the mediation for several reasons:

- Anger is a genuine, often positive, human emotion that results from feeling hurt, humiliated, betrayed, rejected, or threatened, either personally or economically.
- Anger results from frustration when we are being asked to compromise our interests and rights, whether legal or human.
- Anger results when we feel cheated or ripped off by individuals, the system, friends, relatives, business partners, life partners, or children.
- In polite society, we are urged to ignore or suppress anger. We constantly deny that we are angry. Whenever I hear, "it's a matter of principle," I have a strong clue that anger is involved.

There is nothing wrong with feeling angry, any more than there is with feeling sleepy. Anger is perfectly acceptable, and in many ways may be a productive emotion. For example, it helps us to protect ourselves when we are at risk. What is unproductive is giving in to anger and giving vent to it by using intemperate language, gestures, and actions. Examples might include storming out of a room, slamming a briefcase shut, hurling something (even an epithet) at another party. Expressions of anger must be made at the appropriate time and place and should not destroy the negotiation.

### How to Recognize Anger in Yourself and Your Ex

The need to recognize anger in ourselves is obvious, but it is equally important to recognize it in others. This is a critical skill because when people are at the peak of anger they cannot hear or understand anything you say. Recognizing the signs of anger in the context of a negotiation is important. Flushed face, agitated body movements, turning away, and uncontrolled interruption are but a few examples. There is a difference between feigned anger and the real thing. There are also differences in intensity. Mild anger such as impatience, annoyance, or irritability, is common enough and may be useful in negotiation. In contrast, there is anger -- rage really -- that comes from betrayal, resentment, hatred, and disappointment: the kind that simmers under the surface of many disputes. This type of anger is very negative because it drives the dispute and litigation. This is the more powerful sort of anger that prompts immoderate behavior. "I'd rather pay my lawyer than that son of a bitch."

In negotiation, it's important to keep tabs on yourself and your ex so that you understand where his or her anger, and yours, is coming from. If you're able to identify yours, you will be able to articulate your needs in a constructive way. Identify the source of your ex's, and you will be well on your way to understanding the source of his or her anger and a resolution of the dispute. While these strategies are highly successful when employed by negotiators and during mediation, they will also be used by the mediator. Leave confrontation to the mediator. Occasionally it will be necessary to identify extreme and unproductive behavior that threatens to derail the mediation. In these cases the mediator will calmly identify the behavior and set parameters about what isn't acceptable and what will occur if it continues.

### What to Do about Your Own Anger

Know yourself, your hot buttons, and the matters in dispute that are particularly annoying to you. Sit down before going into a mediation and clearly articulate these points. Consider what you'll do if you're triggered. Perhaps take a break; for example, use some pretext to get a glass of water. When dealing with your own anger, you should focus on what you set out to accomplish in the negotiation. Remind yourself of your objectives and their importance. The bottom line in dealing with anger is taking care of yourself first. Don't allow yourself

to be derailed from your objectives in the mediation by anger. In any dispute, there's a lot of letting go that has to happen before settlement is possible. Letting go of emotions that are bound up in the dispute -- whether they're feelings of anger, betrayal, or resentment -- is of paramount importance in achieving closure. Understand this and be prepared to do your share.

### **What to Do When Your Ex is Angry**

In the face of anger, most people retreat or attack. We react negatively to anger because we're afraid. This is both instinctual and learned behavior. People experiencing full-blown anger are not in control because powerful chemicals are being released in their brain. Since it's not possible to reason, or sometimes even to hear, when this is going on, it's not possible to process information. Obviously that's not a good situation for conducting interest-based negotiations. When this happens, an excellent strategy is to simply take a break. This allows the individual to cool off and return to reason. Some call it "going to the balcony." Others call it a "time-out." I call it taking care of yourself. If you encounter anger during the mediation from your ex, tips for dealing with it include:

- Validate or agree with your ex by taking a proper share of responsibility. Say something like, "You have a right to be annoyed. Acting peremptorily to change the kids' visitation schedule without consulting you was inconsiderate." Apologize, but only if you are able to do so with sincerity.
- Probe to better understand the underlying causes. Show you are interested, but don't try to stifle the anger. Say something like, "I'd like to know more about that."
- Empathize, indicate that you understand and walk in the other person's shoes. You don't have to agree with them to do this. Say something like, "I understand how you might feel that way."
- Silence is golden. Pay close attention, show respect, and don't do as some people do and meet anger with a wall of words.
- Build rapport. Don't look afraid. Be open, interested, and friendly.

### **Anger and Mediation**

A skillful mediator will divine the root of the anger and assist the parties in talking about it in a productive and safe manner, intervening only when angry behavior threatens to derail the process. Often workable options involving apologies result in eliminating or lessening these feelings. The mediation provides valuable opportunity to give expression to these feelings and provides a necessary catharsis enabling the parties to move on to address other issues.

### **The Myth of Litigation**

Many lawsuits result from the suppression and denial of anger. The lawyer is our surrogate and champion who will trounce our opponent, legally. The judge will vindicate our position with a lengthy discourse in a well-reasoned, scathing denunciation of our ex, from which we will derive enormous satisfaction. This is the myth of litigation in our culture. In truth, the law of averages dictates that a lawyer, even if he is highly competent, wins at trial only slightly more than half the time. A few highly gifted and equally expensive lawyers may do slightly better. Judges are busy, overworked, and often overwhelmed. They are unaware, unimpressed by, or do not permit us to express anger. In their decisions judges rarely assign blame or culpability. They speak of legal liability, a rather antiseptic concept.

### **Bottom Lines**

I wish I had a dollar for every time I heard, "What I really hate about mediation is that the minute I say a number, it becomes the base, and my ex thinks it's just an opening position to be ratcheted up, up, and up. I don't fool around, I just give my number and that's it." This attitude says to me as a mediator that the speaker hasn't come to negotiate and may not understand the process. While having a walk-away position is necessary in evaluating any proposed agreement, the thinking that produces bottom lines ignores the other parties' needs or concerns. This approach tends to focus only on getting or keeping as much as possible. It's arrogant because it suggests that you know exactly what is important to them or that you don't care, even before hearing from them. This kind of take-it-or-leave-it approach is not constructive and is unlikely to produce agreement. People who employ this form of negotiation like to think of themselves as hard-nosed negotiators. In truth, it's lazy and unbusinesslike. It suggests a lack of preparation and understanding of interest-based negotiation, or for that matter, any form of negotiation.

I have rarely seen a bottom line that was just that. Usually this type of negotiator will table several bottom lines even during a three- or four-hour mediation. As the trial approaches, or new information emerges, new offers are made. This approach also assumes that only money is of real importance to the other party and disregards other important factors, such as a need for vindication, anger, or other considerations.

### **Lack of Preparation**

Lack of preparation and unfamiliarity with the mediation process are the most common impediments to success. Parties or their lawyers who are ill-prepared do not, as a rule, participate actively. They tend to behave strategically in ways that are not productive, for example, by negotiating positionally. Positional negotiation takes very little preparation.

Not taking the mediation process seriously gives well-prepared opponents a tremendous advantage. Some of the strange wisdom I've overheard during the last three years include:

- "It's informal and you can make it up as you go along."
- "It's only a question of what's their bottom line and what's ours."

Lack of preparation may include failure to consult an expert, investigate the true facts, conduct a proper review of legal rights and appropriate remedies. Mediation is consensual and getting an agreement is a process that requires cooperation from both sides to achieve agreement. It stands to reason that your chances of success improve immeasurably if both sides are well prepared because preparation is so central to achieving your goals in mediation. The following are important elements in preparing for mediation.

**Understand Your Interests.** Careful analysis of your own or the family's needs, concerns, and objectives will assist you in conveying what's important to you to your ex. Identify your essential basic interests, prioritize them, and evaluate their importance by assigning each a weight out of, say, a total of 100. When this analysis is complete, you will be able to articulate a range of acceptable options and time lines that reflect your priorities.

## Understand Their Interests

The same extensive analysis of your ex's interests will further prepare you by helping you to evaluate realistically your position and the options you think might resolve all issues. What is important to him or her? Walk in your ex's shoes. What are his or her suspected essential interests? Prioritize and evaluate them, assigning weights on the same basis.

## Preparation Checklist

- Do I understand the mediation process?
- Have I clearly analyzed my interests: my concerns, needs, aspirations, fears?
- What are my ex's essential interests?
- What about cultural differences, gender issues, perspectives of power?
- Is my information complete?
- What information do I need from my ex? Have I got it? If not, is mediation still worth pursuing without it, or do we need discovery first? Is my case logical, simple, and compelling? If not, why not? Is it neutral in tone?
- Has the law been properly and exhaustively researched? How important is it? Do we have reprints or excerpts?
- What is my strategy if we reach impasse or deadlock? Where will it likely occur? Have I given enough thought to possible barriers and how to overcome them?
- Have we met with the mediator and signed the Agreement to Mediate?

## Difficult People

Difficult people have been the topic of many books and articles, and may include your ex, his or her lawyer, your lawyer, the mediator, and even you. You take people as you find them. Some display irksome behavior because they're nervous. They may not even know they are annoying you. They may be quick tongued or sarcastic or have irritating ticks. It really shouldn't matter. The best advice that I can give is that unflinching courtesy goes a long way. If these activities are intentional, but obviously missing their mark, they will end. Also keep your eye on the ball, your ball, so that you're not diverted from your course. Try treating your ex as you would your grandparents (who, like all of us, are not without foibles). If you demonstrate courtesy towards your ex, the mediator, and the process, you will be amazed at how this will defuse difficult people. The courtesy may be returned in kind. Concentrate on solving the problems, not on your ex's personality.

## Difficult Behavior

Difficult behavior is behavior that, by design, has the potential to derail the mediation. Included are such things as put-downs, interruptions, slamming briefcases or books, and any behavior that suggests lack of common courtesy such as sighs, grunts, turning away, twirling pens, rolling eyes, or flipping through files. Calling someone a liar, cheat, or fraud; criticizing; diagnosing; name-calling and sarcasm; ordering; ingratiating praise; moralizing; advising; diverting; inappropriate questions; appealing to somebody's sense of logic; finishing people's sentences; and second-guessing motives are also examples of difficult behavior. Dishonesty, misinformation, insupportable demands, threats, trickery, or sleazy negotiating tactics such as the never-ending ratcheting up of demands, and last-minute "add ons" are other examples of difficult behavior. Unacceptable and difficult behavior suggests discomfort with the process or perhaps a weak case. At some level, it is calculated to overthrow the mediation. Tough-minded or hard-nosed negotiation is not difficult behavior provided it's based in reality. Unwillingness to compromise essential interests is principled behavior, not difficult behavior. Even mild emotion such as exasperation, impatience, annoyance, indignation, and irritability are acceptable and may be used to good effect. Mediation is not an elegant dance like a minuet or gavotte; it is an event that may sometimes feel like a full-contact sport.

This article has been edited and excerpted from *You Be the Judge: The Complete Guide to Resolving Legal Disputes out of Court* by Norman A. Ross (John Wiley & Sons Canada, \$22.95). A lawyer and mediator, Ross has mediated hundreds of cases at the Alternative Dispute Resolution Centre in Toronto. His exceptional book demystifies and simplifies mediation and other conflict-resolution processes; puts you in charge of your divorce process; helps you select the right mediator; reviews the entire process step-by-step, teaching simple but powerful negotiation techniques; includes many practical examples and tips on creative solutions; and points out potential pitfalls to avoid. Available at better bookstores, or order directly from [chapters.ca](http://chapters.ca) in Canada or [amazon.com](http://amazon.com) in the US.



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