

TIPS

Best Practices in Alternative Dispute Resolution

Endnotes

¹Adam D. Galinsky's studies and writings on the anchoring effect of numbers in negotiations are the foundation for anyone desiring more information about this negotiation strategy. See Adam D. Galinsky, *Should You Make the First Offer?*, HARV. BUS. REV. ART. (July 1, 2004).

²"People tend to irrationally fixate on the first number put forth in a negotiation—the anchor—no matter how arbitrary it may

be. Even when we know the anchor has limited relevance, we fail to sufficiently adjust our judgments away from it." PON staff, *Integrative Negotiation Examples: Effective Anchors as First Offers*, HARV. L. SCH. PROGRAM ON NEGOTIATION BLOG (Apr. 11, 2016), available at <http://www.pon.harvard.edu/daily/negotiation-skills-daily/effective-anchors-as-first-offers>.

Words Matter: Being Mindful of Language in Mediation

BY THEODORE K. CHENG

More often than not, how you say something is as equally important, if not more so, as what you say. Toward that end, mediators should develop—and counsel and their clients should expect from their mediators—a sensitivity to how language is used in the mediation process. In particular, all participants in a mediation should avoid the use of labels that diminish mediation as an alternative dispute resolution process.

Mediation is a confidential, dispute resolution proceeding in which the parties engage a neutral, disinterested third party who facilitates discussion among the parties to assist them in arriving at a mutually consensual resolution. Selecting the appropriate mediator—one who is well versed in mediation process skills, with perhaps some knowledge of, or prior experience with, the subject matter of the dispute—is oftentimes necessary to maximize the likelihood that a resolution will be achieved. Because mediation is a non-adjudicative process, there is no judge or other decision-maker who will determine the merits of the dispute. Rather, the mediator's role is to try and improve communications between the parties, explore possible alternatives, and address the underlying interests and needs of the parties in hopes of moving them toward a negotiated settlement or other resolution.¹

Being mindful of the language that is used in this process can have a significant impact on the experiences of the participants who agree to undertake a mediation. For example, take the pre-mediation conference call. As the name suggests, this call typically takes place before, and in preparation for, the mediation session. One subject that is usually on the agenda for that call is whether there is any information or documents that the participants believe would be

helpful to exchange in order to have a more meaningful and productive session. This exchange is often referred to as "limited discovery." This likely happens more often during court-annexed mediations because the attorneys are already in a litigious mindset, thus tending to refer to apparent equivalents in that procedure when discussing the mediation process. Such nomenclature should be avoided in mediation proceedings, however, because the limited exchange of information and documents in connection with mediations is quite unlike discovery as contemplated under the U.S. legal system. The purpose of full-blown discovery in the litigation context is to comprehensively request information and documents that might conceivably bear on the claims and defenses interposed in the dispute (and perhaps reveal previously unknown claims and defenses). By contrast, the exchange contemplated in connection with a mediation encourages counsel and their clients to work together cooperatively and share information and documents that will assist them in both conducting a more realistic assessment of the value of the dispute and helping to make the mediation session as productive as possible. Framing this part of the process as a "limited exchange" helps to dispel the notion that it is anything like discovery associated with court proceedings.

Moreover, oftentimes counsel will raise any number of objections to engaging in even a limited exchange, such as burden, time, and confidentiality.² Those objections are rarely well founded since the specific information and documents in question will likely end up being produced during the formal discovery process if the dispute ever finds its way into the court system. This, of course, is self-evident if the mediation is being conducted under a court-annexed program. Of course, if the limited exchange of information and documents

ultimately leads to a resolution, then the clients will have saved themselves from the almost assuredly more expensive and invasive full-blown discovery required under court procedure rules. Thus, declining to engage in this limited exchange only delays the inevitable.

Opportunities arise during the joint session as well. After the mediator handles introductory and welcoming remarks that set the tone and the ground rules, participants are typically afforded, in the first instance, the opportunity to direct comments at each other. In commercial mediations, this opportunity is usually handled by counsel representing the participants. In those situations, the mediators or counsel generally refer to this as making an “opening statement.” Using that terminology, however, reinforces the notion that the participants are locked into something that is akin to a trial in a courtroom—an adversarial setting where they (or, rather, their counsel) attempt to persuade the mediator of their positions. With that mindset, the participants are not likely to have much success persuading the other participant of their contentions, as that has usually been the tenor of the dialogue before they agreed to mediate the dispute. Moreover, referring to this opportunity as an “opening statement” largely mischaracterizes the (perhaps) unique chance to have one participant directly address the other(s) in hopes of communicating something meaningful and, thereby, contributing to the possible resolution of the dispute. Perhaps a more palatable term might be “opening remarks,” thereby having this process naturally flow from and complement the introductory and welcoming words of the mediator.

For the same reason, it is a better practice to avoid referring to the participants in the mediation—counsel or their clients—as “parties,” “opposing parties,” or even “sides.” Again, using such labels only serves to heighten the conflict and reaffirm the mistaken premise that a mediation is somehow a combative environment. To the contrary, a mediation is meant to be a collaborative process where participants seek to engage in a dialogue—facilitated by the mediator—that will hopefully uncover areas of mutual gain and alternatives to the straightforward resolution of finding one participant in the “right” and the other(s) in the “wrong.”

Much about resetting the mindset here falls upon the mediator, who, after all, is the one participant in the mediation who is not entrenched in the dispute itself or so enamored of the contentions as to be potentially blinded by them.³ Two of the most powerful skills that a mediator brings to the table is the ability to listen and then to reframe what she hears. When those opportunities arise, the mediator can assist the participants by avoiding the use of litigation-laden labels and mindfully using language that elevates and respects the process. Although beyond the scope of this article, the thoughtful use of language becomes even more paramount when the interactions between the participants and/or the mediator raise cross-cultural and implicit bias concerns. Those considerations strike at the heart of how participants in a mediation receive and process infor-

mation and, more generally, communicate with each other and with the mediator. Mediators who either are alert to these issues or can anticipate them arising will be in a much better position to provide a meaningful and beneficial experience for the participants. Being mindful of language and avoiding unnecessary labels is something to which all participants in a mediation should aspire. ☉



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Endnotes

¹See Theodore K. Cheng, *Using Alternative Dispute Resolution to Address Your Entertainment Disputes*, RESOLVER (Fall 2015), at 9, <http://www.fedbar.org/Image-Library/Sections-and-Divisions/ADR/Resolver-Fall-2015.aspx> (last visited Sept. 20, 2016). There are also a number of organizations that provide more information on mediation as a dispute resolution mechanism. See also *Civil Mediation Resources*, N.J. COURTS, <http://njcourts.judiciary.state.nj.us/web0/civil/medipol.htm> (last visited Sept. 20, 2016); *What is ADR?*, N.Y. STATE UNIFIED COURTS Sys., http://nycourts.gov/ip/adr/What_Is_ADR.shtml (last visited Sept. 20, 2016); *ADR—And Introduction*, NAT’L ACAD. DISTINGUISHED NEUTRALS, <http://nadrn.org/faq-adr.html>; *About Mediation*, MEDIATE, <http://mediate.com/about> (last visited Sept. 20, 2016); INT’L MEDIATION INST., <https://immediation.org> (last visited Sept. 20, 2016); AM. ARBITRATION ASS’N, <https://www.mediation.org> (last visited Sept. 20, 2016); *JAMS Mediation Process*, JAMS, <https://jamsadr.com/adr-mediation> (last visited Sept. 20, 2016).

²Whatever confidentiality concerns the clients may have are usually addressed by the general principles of confidentiality that cloak mediation processes, along with any additional confidentiality and protective order agreements the clients choose to execute among themselves.

³This entrenchment impairs the judgment and decision-making process, a phenomenon known as “client-think.” See Laura A. Kaster, *Improving Lawyer Judgment By Reducing the Impact of “Client-Think,”* 67 DISPUTE RESOLUTION J. 1 (Feb./Apr. 2012), available at <http://www.nadrn.org/articles/LauraKaster-Sep2012-CLIENTTHINK.pdf>.

The Best Laid Plans of Legislators and Mediators: The Case for Broadening the Scope of Mediation Confidentiality

BY CAMERON G. STOUT

The past three decades have seen the explosive growth of mediation. In California alone, hundreds of thousands of cases that otherwise

would have clogged its courts have been resolved through mediation.¹ Confidentiality is a central pillar of the mediation process. California