

***SEVEN HABITS OF HIGHLY EFFECTIVE
ADVOCATES IN MEDIATION***

By

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Introduction

*"We are what we repeatedly do.
Excellence, then, is not an act, but a habit."
Aristotle*

The Seven Habits of Highly Effective People, by Stephen R. Covey, is a practical and insightful review of the power of communication in both our business and personal lives. Over the course of the more than one thousand mediations that I have facilitated to date, I have discovered that the principles espoused by Dr. Covey are clearly applicable to the mediation process – no surprise, as communication is the key element in a successful conference.

So, with due apology to Dr. Covey, this paper represents my attempt to tie together my mediation experiences with hundreds of attorneys over the past ten years to the seven habits he espouses. I have found that excellent advocates generally practice all of these habits, and approach each mediation thoughtfully and with insight into the case at hand.

1. ***Be Proactive***

The ability to subordinate an impulse to a value is the essence of the proactive person. Proactive people are driven by values.

Stephen R. Covey

Your client will be looking to you for your recommendations on how to proceed with their legal action, and will particularly look to you for your thoughts on how to proceed with the settlement process. Your values will drive the case. Good advocates look at their clients for insights into what the parties really need to get out of the process, and look for creative solutions to address those interests. While clients often cannot get what they want

from the legal system, knowing where their interests lie can help in ultimately creating a suitable settlement for them.

One of the most valuable assets of the mediation process, and one frequently overlooked by attorneys who have practiced in our trial system for many years, is the flexibility it allows in applying new solutions to old problems. To revisit an old maxim, this is an ideal setting for you and your client to “*Think outside the box.*” You should always look at each case as an opportunity to find another creative solution that more perfectly suits your client’s needs. Every case is unique – every client is unique – every resolution can be unique.

As a proactive attorney, prior to coming in to a mediation you should have evaluated your case from the perspective of *all* parties, and shared these perspectives with your client. Determine all of the factors likely to impact on the resolution of the case, and be prepared to share them with your client and with the mediator prior to the conference, if possible. If what you tell your client before the mediation is reiterated by the mediator at the conference, your client will be more willing to face reality than they might otherwise have done.

In particular, attorneys should feel free to let the mediator know of any problems that they anticipate, knowing that the mediator will keep this information in strict confidence. In general, the more the mediator knows about what pitfalls to expect during the course of the conference, the more prepared they can be to handle them. Remember, the mediator is not a judge of the case, but is a neutral third party with no interest in the claim outside of assisting the parties to settle it. As a neutral, the directive against *ex parte* communications with a judge do not apply. That is precisely why caucuses are permissible and effective.

After you have fully evaluated your claim, I would encourage you to talk with the mediator you have chosen and discuss how they can be most helpful to you. Does your

client need a “reality check”, or just an opportunity to vent? Does the adjuster need to be convinced of the validity of the plaintiff’s position, or the other way around? Does the mediator need to defuse the anger between the claimant and adjuster, or between the two attorneys, or between the claimant’s attorney and the adjuster? Are there particular concerns that need addressing that are not obvious on the face of the case? The more a mediator knows in advance, the more efficient and effective the mediation can be.

And, finally, discuss the mediation process with your client in advance, particularly noting the fact that the conference will allow them the full opportunity to be heard, unlike a trial, where the information received by the jury will be restricted by the rules of evidence. Emphasize the fact that the resolution of the case through mediation will be in *their* hands, not the hands of unknown jurors, and can be crafted to more personally resolve their particular issues. Help them understand that they have more control through mediation than they ever would through a trial.

II. Begin With The End In Mind

Start with a clear understanding of your destination, so that the steps you take are always in the right direction.
Stephen R. Covey

This should go without saying, but, in my experience, parties often fail to discuss the real parameters of the range of settlement possibilities and the end that they have in mind before they approach a mediation conference. They may have a general idea of what may be available to them, but they often fail to set a real goal for themselves which takes into account the myriad of solutions that a mediation conference can provide, and look instead to the mediator to give them this insight. As counsel, you should *always* be in a better position to make this call than anyone else.

Once you have had an opportunity to discuss the case with your client from a legal perspective, give them an opportunity to give you an overview of their individual concerns. While money is the medium by which settlements are achieved, it helps a great deal to know what it is that your client is seeking to achieve with those funds. What do they need? How do they expect their wrongs to be redressed? How do their expectations fit into the reality of our legal system? After listening to them, you may be able to come with some creative ideas that you can bring to the table to resolve those issues. In any event, working this through with your client in advance of the mediation may allow them to come up with some ideas of their own that can be addressed in caucus. At the very least, it will give you an opportunity to more fully explain to them the reality of our legal system, which the mediator can then reaffirm at the mediation conference.

III. ***Put First Things First***

Come up with a game plan to get to your destination.
Stephen R. Covey

You know the game better than your client, be it plaintiff or defendant. You are the expert. Once you have had an opportunity to evaluate the claim and work through the evaluation with your client, and an end point is clear to you, it is time to map out a mediation strategy. I have been witness to numerous mediation strategies practiced by many excellent attorneys, and I have discovered that the following result in the most favorable settlements:

- Prepare your initial demand/offer based upon a realistic range of possibilities that you have discovered through your initial evaluation. Starting too high or too low will frequently result in the opposing party taking offense and digging in their heels, making for a long day, and will ultimately make for an unhappy client

when they have had to move “further than the other side” in order to reach a reasonable settlement.

- DO NOT RENEGOTIATE A PRIOR DEMAND UPWARD OR A PRIOR OFFER DOWNWARD AT THE START OF THE MEDIATION CONFERENCE. This is guaranteed to lengthen the mediation conference considerably, generally results in the opposing party digging in their heels and refusing to make reasonable compromises, and often results in an unsuccessful mediation at the end of the day.
- Make your first move the biggest one. With this move, send a message through the mediator that you are here in good faith, but that equally large future movements cannot be expected. It sets a good tone, and frequently brings the range of settlement options into focus quickly.
- Give yourself enough room to move comfortably. In my experience, this is not generally a problem. Most attorneys do this automatically. The trick is in being able to combine this practice with making a large first move.
- Always plan to respond with at least a small amount as a counter. While you may be disappointed with an offer/demand, a response of some kind sends two messages: (1) that you are willing to stay and listen; but, (2) that you have limited resources available.
- Splitting the difference works, but it works best when the gap is a small one. The parties are generally uncomfortable with the results if the split is agreed upon too soon in the process.

IV. Think Win/Win

Win/Win is a frame of mind and heart that seeks mutual benefit in all human interactions. With this process, all parties feel good about the decision.

Stephen R. Covey

The goal of a successful mediation is for all parties to walk away from the table comfortable that the resolution was a fair one, and that the needs of all parties have been addressed. With this attitude in place, the parties will make a commitment to follow through with the results, and the settlement will not fall apart at the end of the day.

Even though the parties, by definition, see things differently, if you (and by extension, your client) will make a commitment to try to understand each other's point of view, the mediator can more effectively assist you to work together toward a mutually beneficial resolution of the case. The key is to *replace competition with cooperation* – admittedly a difficult concept to adopt for those of us in an advocacy system.

There are several actions that you can take to effectuate this frame of mind and make the mediation work.

- First, educate your client to the position of the opposing party prior to the mediation conference. (I know that I am repeating myself here, but this is such an important element that it bears repetition.)
- Second, encourage your client to display courteous behavior at the opening conference. In conjunction with this recommendation, counsel is *strongly* encouraged to adopt a conciliatory attitude at the opening conference as well. If the opposing party believes that you are really listening to them, it gives the mediator a very effective tool to work with throughout the remainder of the day. In addition, if your opponent believes that you are really listening to them, they are much more likely to honestly listen to you. Explain to your client in advance

the reason for this tactic, and let them know that you will be their strong advocate through the caucus process.

- Provide the parties a *safe* place to tell their stories in the opening conference. Once the stories have been told, the parties will be much more likely to listen to each other, and will not then require a trial in order to air their grievances. It is so often about being heard, about being really listened to. The mediator will provide that function, of course, but it helps tremendously if the parties feel that they are being heard by their opponent as well.

V. Seek First To Understand, Then To Be Understood

LISTEN – Don't just hear.
Patricia M. Killingsworth

As I stated above, a conciliatory opening can work wonders in a mediation. Providing the parties with a safe place to tell their stories, and then really listening to them, is a key to making the process work. Plaintiffs want to be heard – whether by a jury, a judge, or a mediator. They need to be heard by their opponent as well. Encourage your client to really listen to the stories told at the opening, and to listen without judgment. Listen as a bystander would listen, as a juror would listen, and put aside your own prejudices. You will frequently be surprised at what you hear in that setting.

In order to create an environment in which your client will feel most comfortable reaching a settlement, you should make every effort to have all of the parties in the room that your client is listening to *outside* of the conference room, if at all possible. In the case of plaintiffs, it helps to have the key family members, perhaps the minister, or even the family doctor, in the room. Depending upon the type of case, that might work for the defendant as well. If an adjuster is involved in the case, having their client available is extremely helpful,

particularly if that client is an active participant in settlement negotiations. A rule of thumb: If the party want to make a phone call and discuss the settlement with someone else before agreeing to it, that someone else should have been in the room all along. I know that it isn't always possible, and sometimes it makes the process somewhat less than "wieldy", but it makes for settlements that stick.

V. Synergize

The essence of synergy is to value differences – to respect them, to build on strengths, to compensate for weaknesses. When you communicate synergistically, you are simply opening your mind and heart and expressions to new possibilities, new alternatives, and new options.

Stephen R. Covey

There are several levels of communication that are possible in the mediation process. You can communicate from a defensive posture, effectively a win/lose position. With this approach, someone always walks away mad. Or, you can communicate from a respectful posture, which will result in a compromise solution. This is, of course, an acceptable result of mediation, with both parties walking away grumbling but content with the resolution. But you can also communicate through a synergistic posture, a win/win position, and both parties can walk away from a mediation conference with a positive attitude, genuinely happy with the results all around.

The synergistic model requires that everyone have an open mind to all of the possibilities, that they be willing to work *together* to reach a resolution. Does this happen often in mediations? Not in my experience. A respectful approach is generally the best that I see. But on those rare occasions when I am a participant in a settlement where the parties are all trying to reach a resolution that they can all live with, the results are remarkable. The defendant can feel good about what they have given, and the plaintiffs feel good about what they have received. When the parties are not strangers, when they will be working or living

in proximity in the future, this is the approach that the best advocates take. It is what the best lawyers do for their clients.

Solutions reached by a consensus effort can be much more effective than those proposed by either party individually coming into a mediation. The mediator, as a neutral party, can help to identify those possibilities, but it is the attorneys who make it work. The old adage that *“Two heads are better than one”* is absolutely applicable to a mediation – it presents our legal system’s best opportunity to fix what’s broken, which is, after all, the goal.

VI. ***Sharpen The Saw***

Continue to educate yourself, through each new mediation and with every case that you try. Compare notes with your fellow attorneys. Ask questions and do not be afraid to take suggestions from your mediators. Stay plugged in to your community. Listen – constantly listen. Creativity is the key to a successful attorney, and to a successful advocate in mediation.

Thank you very much for giving me the opportunity to talk with you about these issues. Many of the points that I have made are ones you have heard often, and I thank you for allowing me to repeat them to you. But I hope that there have been some suggestions made in this presentation that will prove insightful to you. Even one new idea is a step in the right direction. I certainly have received my share of new ideas from all of you, and I thank you for that. Good luck in your future mediations!

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***SEVEN HABITS OF HIGHLY EFFECTIVE ADVOCATES
IN MEDIATION***

Be Proactive

Prior to coming to the mediation:

- Evaluate your case from the perspective of *both* parties, not just your own
- Share all perspectives with your client
- Be prepared to “think outside of the box”
- Educate and share your concerns with the mediator

Begin With The End In Mind

- Get an overview of your client’s concerns, whatever they may be, and address them
- Set a realistic goal for your client, given the facts available

Put First Things First

Come up with a game plan to get to your destination:

- Prepare your original demand/offer based upon the reasonable range of possibilities – do not start unreasonably high/low
- Make your first move the biggest one
- Give yourself enough room to move comfortably
- Always plan to respond with at least a small amount as a counter
- Consider splitting the difference when the gap has been sufficiently narrowed

Think Win/Win

Seek mutual benefit for all parties in the mediation:

- Educate your client to the position of the opposing party prior to the conference
- Display courteous behavior at the conference, and encourage your client to do the same
- Provide the parties with a safe place to tell their stories

Seek First To Understand, Then To Be Understood

- LISTEN, don’t just hear, and encourage your client to do the same
- Have all of the individuals possible at the conference that your client will be seeking advice from [Rule of thumb: If your client has to talk with someone before agreeing to the settlement, that person should have been in the room.]

Synergize

- Be willing to work *with* the mediator *and* the opposing party to reach a creative and mutually beneficial resolution

Sharpen The Saw

- Continue to educate yourself – learn something new at every mediation