

The Clash of the Titans: Getting the Best Results in Mediation when Cooperative Negotiator meets Competitive One

By Jan Frankel Schau

ABSTRACT: California lawyers are now being routinely trained in the benefits of a win/win approach to negotiation by “expanding the pie”. However, the culture of cooperation is often confronted with a more competitive approach in mediation of litigated cases. This article will offer strategies for breaking the impasse this clash of styles presents in mediation as well as offer concrete strategies for litigators to adjust their own styles and thereby maximize their clients’ results.

Back in the early 1980’s when I went to law school, no classes were offered on alternative dispute resolution or negotiation skills. We learned advocacy skills and we studied to win.¹ Once in practice, I observed seasoned trial lawyers who routinely used the competitive approach to get their way in litigation. Sometimes they won and sometimes they lost. But they always went for the win. Over the past 15 to 20 years, our legal practice, and law school curricula has evolved.² Now, it is not uncommon to see younger litigators approaching mediation very differently than their older, more seasoned counterparts because so many younger lawyers have received negotiation and mediation training on the cooperative approach to “problem-solving” where the goal is to consider the needs and interests of both sides of the dispute.³

As a mediator, the clash between these two divergent styles presents an added conflict to resolve. Many times, the language and intensity, as well as the pacing and depth of emotion, can threaten to stall even the most promising settlement negotiation. The mediator’s challenge is to bridge this cultural chasm, just as she attempts to do in any cross-cultural mediation.

Over the past several years, many of the most challenging cases I’ve mediated have been those where the conflict extended beyond the facts and the evidence. In order to get to the heart of the conflict, the mediator has to first enter inside the gates that created the barrier to communication and settlement in the first place. These gates may be ringed in fire or covered with daggers of ice. The mediator, therefore, needs to take stock of the divergent styles presented in any given conflict before proceeding through those gates. In order to assure the mediation is successful, the mediator has to make early process choices and remain flexible and creative throughout the negotiation.

¹ My experience also reflected that many of us who chose law as a profession (or at least litigation) did so because we were naturally competitive.

² The Fall, 2008-2009 curriculum at my law school, Loyola Law School, includes classes in mediation advocacy, negotiation and a full Alternative Dispute Resolution department dedicated to training law students to mediate community conflict through the Center for Conflict Resolution.

³ Carrie Menkel-Meadow, “Toward Another View of Legal Negotiation: the Structure of Problem Solving”, *UCLA Law Review*, April, 1984

Some of the important questions the mediator will need to address are: “What is the right time for the mediation in the life of the conflict?” “Who will be present at the initial session?” “Will there be a joint session?” “Who makes the first offer?” “How do we break a threatened or actual impasse?” These questions and strategic responses will be addressed in a series of real scenarios presented below.

The Cooperative Approach to Negotiation

The classic cooperative approach is one where interest-based or integrative bargaining is employed by the parties to achieve a “win-win” solution.⁴ It is common to observe the disputants in this type of scenario develop relationships of trust and come up with mutually beneficial options for settlement.⁵ This type of approach is usually preferable where there is an on-going relationship or multiple issues to resolve. Typically, the parties or their representatives aim to maximize the joint return, look for reasonable results and generally approach the negotiation politely and sincerely, with a view towards satisfying the underlying interests of both parties.⁶ A cooperative problem solver is often generous with disclosure of critical information and open to considering alternatives and trade-offs.⁷

The Competitive Approach to Negotiation

People approach conflict differently, and many parties or their counsel are naturally adversarial and competitive. The literature is replete with explanations that extend beyond the scope of this discussion.

In my own early training as an insurance Defense lawyer, I was skilled in the steely refusal to offer any settlement beyond that which my client had authorized the day prior to what was in those days a Voluntary or Mandatory Settlement Conference. It took practice and resolve, but no case was to be settled for a number that we had not pre-authorized.⁸

It is still common, in my experience, to find the insurance Defense Attorney the most competitive negotiator in the mediation. She will often rely upon an evaluation that has been subjected to a round-table discussion amongst various levels of corporate decision-makers, computerized programs, such as Colossus and their own deep statistical analysis of what a particular injury is worth in mediation. Such a Defense attorney may, as I was trained to do, use a competitive strategy by initially taking a hard-line approach and declaring Plaintiff’s opening demand “ridiculous”.

⁴ Roger Fisher and William Ury, “Getting to yes: Negotiating Agreement Without Giving In”, 1981

⁵ Brad Spangler, “Cooperative v Competitive Conflict Styles, Beyond Intractability, July, 2003

⁶ Charles Carver, “Impact of Negotiator Styles on Bargaining”

⁷ Menkel-Meadow, *Id.* at 766.

⁸ Unlike modern mediations, those conferences were often not attended by the insurance adjuster, who was available by telephone—but before the advent of mobile phones could rarely be reached during a hearing!

The consequence of a competitive negotiation leads to two options: either the Plaintiff and his Attorney will be forced to re-evaluate or negotiation breaks down and impasse settles in. The other option, however, is that the mediator negotiates between the styles of the competitive and cooperative negotiator in order to facilitate a different level of conversation and communication and achieve a settlement even in the face of these divergent approaches by counsel.⁹

In another example, I mediated an employment dispute in which the Plaintiff himself was the competitive negotiator. He had devoted his entire career to working for Big Corp. and wanted a judge or jury to tell it that the Company was wrong in terminating him in the last reduction in force. The client held a considerable amount of power, as he rejected every offer that was made. His competitive approach led to what appeared to be an impasse at the conclusion of the first session of mediation.

A couple of months later, when they returned, all parties (including the mediator) were intent upon focusing on the competitive client to get him to agree to settle the case. However, because this Plaintiff felt he'd been pushed into the acceptance, he resisted ending the dispute by refusing to sign the final agreement once his Attorney prepared it. The Defense counsel was forced to petition the court to enforce the memorandum as a Judgment under CCP Sec. 664.6.

A real hazard to competitive bargaining, in addition to the potential of an early impasse, is the strong possibility that a party who has been pushed involuntarily to accept a hard-negotiated offer will ultimately renege on the settlement or resist its enforcement.

In the example offered above, the reluctant plaintiff's moral compass, or principles, had not been addressed sufficiently and his interests remained unmet, even though the settlement money exceeded his attorney's expectations by thousands of dollars.

The Mediator's Role

Because of the divergent styles that are presented in every mediation, a mediator needs to always carefully consider the styles or approaches, including her own, which converge to create the universe of problems needing to be solved within any conflict resolution.

As with every aspect of negotiation, a skillful mediator should try to evaluate the styles of all of the disputants (both counsel and clients) and attempt to achieve a balance between the cooperative and competitive approach in order to facilitate a settlement.¹⁰

⁹ Of course, it is also not uncommon that the Plaintiff's Attorney, with the right set of facts and evidence, will be the non-cooperative, more competitive negotiator. Sometimes, this can be met by a competitive, and sometimes by a cooperative adversary. The task for the mediator, though, is virtually the same: to creatively re-frame and alter the communication between the two in order to avoid impasse.

¹⁰ Unfortunately, it is all too common to find that when the competitive negotiator is unable to achieve his goals with the opposing counsel, he will turn on the mediator. Many of us have momentarily questioned our own competence when a

The mediator's role from the outset of engagement to the conclusion of the settlement is to manage the tide presented by this particular mediation. This means not only are there ebbs and flows, but the personalities of both parties and counsel as they get thrown into the waves together to create their own unique challenges in each negotiation. For this reason, many of my colleagues and I recognize a pattern over time. Typically, there is a period of cooperation and fact-finding at the beginning of a mediation, followed by either collegiality or hostility, or both at about the time first offers and demands are exchanged, followed by some positive energy moving towards the goal of resolution, and then often seasoned by a second wave of threatened disaster before the tide gently flows towards resolution.

In reviewing a few of the most challenging cases that I have handled, I noted a surprising number of them presented with the dynamic of at least one competitive negotiator negotiating against at least one cooperative one. Here are some of the strategies and interventions I employed in order to get the cases resolved.¹¹

The case of the Defective Widget: Cooperative Plaintiff Lawyer v. Competitive Defense Attorney

This case presented classic evidence of products liability, with real, although relatively minor injuries that included a scar and stitches on a young woman's arm. While Plaintiff and her counsel made a rather modest demand, Defense counsel was a particularly "competitive" negotiator who responded with no more authority than the pre-mediation offer, which had already been rejected. He attended the mediation with the intent to settle the case at that amount—and hoped the mediator would assist him in persuading the Plaintiff that she would not do better at trial.

Mediator's Intervention: Harnessing the Cooperative Lawyer's Style to Give Opposing Counsel a Chance to Save Face with his Client

In this case, I prevailed upon the cooperative negotiator to speak privately with Defense counsel. Mr. A said something like: "Mr. S, I mean no disrespect and I recognize that we value this case differently and that your client does not accept full liability for my client's injuries, but unless I can get \$X, I won't be

tough negotiator will begin packing his briefcase declaring: "This has been a waste of my time". Not only has the negotiation stalled, but also the competitive negotiator has now made the mediator complicit in wasting his time (which impliedly is more valuable than either the opposing party or the mediator's time).

¹¹ Because my work is always confidential, I have taken pains to alter facts and evidence as well as personalities in these vignettes. Any apparent similarity is therefore completely coincidental and should not be considered to reveal any confidentiality presented in the context of mediation.

able to convince my client that it's not worth taking the risk at trial. She doesn't need a huge windfall to be persuaded, but she does need at least that to pay her medical bills (past and future) and have something to take care of my fee and her pain and suffering." This gave the Defense attorney an opportunity to discuss the bottom line for the Plaintiff, and to present it as a "win" in light of the original demand. The following week, the defense counsel sent a written offer at almost double the original offer and the case settled.

Former Clients Seek Funds Back from their Own Former Attorney: Competitive Lawyers v. Competitive Clients

When an attorney is sued, it is often extremely emotional and can present particularly complex issues at mediation. In this case, the attorney-Defendant was representing himself, making the competitive negotiation even more challenging.

Mr. B was a competitive negotiator who was angry and hurt by his former clients' lawsuit against him. In brief, Mr. B represented husband and wife in a property dispute that arose out of the purchase of their home. A motion for summary judgment was granted against them in the underlying lawsuit and Mr. B agreed to handle the appeal for a higher fee. In total, the litigation lasted almost ten years, ultimately resulting in a re-trial and a verdict in the husband and wife's favor for \$1 million. Mr. B took \$500K plus his costs as a contingency fee, leaving husband and wife to the balance.

Dissatisfied with that amount, Mr. and Mrs. Plaintiff retained an attorney to sue their former lawyer (Mr. B) for the balance of the fees which they believed were due and owing to them in an amount of \$200K.

The attorney representing the couple in the case was an extremely aggressive, competitive negotiator who raised his voice and shouted at the Defendant and the mediator so vigorously that the Defendant (Mr. B) left the room during the initial meeting, leaving Plaintiffs without any opportunity to achieve an early or amicable settlement at that time.

Mediator's Intervention: Breaking an Early Impasse

In a room full of angry and competitive negotiators, I found one slightly cooperative spirit in the husband Plaintiff. Although I did it in the presence of both Plaintiffs and their Counsel, I looked into his eyes and reminded him of the toll another lawsuit might take over the course of perhaps many years. I expressed my concern about his health, since he had suffered a heart attack in the last decade while the other lawsuit was pending. Then I left the room, so that he could discuss the very real prospect of yet another protracted litigation with his wife and their counsel.

Within an hour, Plaintiffs gave me the authority to make a demand that was less than one-half the initial one, even without receiving any offer from Defendant by that time. Without ever bringing either the parties or counsel back together, I succeeded in re-framing Plaintiff's initial competitive demand to a cooperative offer to compromise.

Plaintiff in Chronic Pain and Lashing Out as the Competitive Voice v. Cooperative, but Realistic Defense Counsel:

Plaintiff had re-injured herself in a slip and fall accident and sued the property owner for what had now become critical, crushing pain that could not be treated. The client wanted enough money to retire, as she had no real prospect of returning to work. She had already had at least a dozen surgeries to the same part of her body, and was unlikely to be helped by further medical intervention. The client took a competitive stand, beginning with her adamant communication to the mediator that she would reject any offer that didn't include a lifetime of lost earnings. Her lawyer, a cooperative negotiator, knew this was a long shot.

Mediator's Intervention: Process Decision About the First Session

In this case, I deliberately brought counsel together outside the presence of the Plaintiff in order to begin a dialogue on cooperating towards maximizing plaintiff's recovery. In other words, the two opposing counsel set up a plan for production and inspection so that Defense counsel could arrive at a full evaluation of the claim. Then Plaintiff's counsel and I could go back to her and present her with some real progress, respect and empathy. We could also really reassure her that the Defendants were taking her claim very seriously and would be working towards resolving it. Following the completion of that discovery, there were a few exchanges of offers and counter-offers and the Plaintiff eventually became willing to entertain these offers rather than risk the lower results possible at trial.

Tragic Accident with Troubling Liability and Cooperative Negotiators v. Competitive Defense Counsel:

This was a tragic motor vehicle accident that inexplicably may have lead to a full stroke and paralysis (which occurred a month after a minor impact collision) in an otherwise healthy, young adult. The attorney was a family member of the Plaintiff, creating yet another interesting dynamic. At the mediation, he made a multi-million dollar demand, which was not unexpected with injuries as presented, but was way beyond the Defendant's contemplated settlement range, given that they were not accepting liability or proximate causation. The Defense counsel was not mean in his competitive approach—but is a well-known and well respected trial attorney who was not about to get thrust into the drama that this case presented by engaging in a joint session at mediation.

Mediators Intervention: Structuring the Joint Session and Making the First Offer

I recommended that the parties and the attorneys come together for a joint session, not for purposes of saying anything about the facts or liability, but just as a gesture of good will, since neither counsel nor parties had met. There was a brief, but deliberate exchange of niceties and then we separated for the balance of the negotiation. This allowed the family member/attorney to establish to his clients that he was respected and would be making sure that the client was treated with respect as well even though it was clear to me that the Defense Counsel simply did not believe the accident caused the injury.

At the conclusion of this initial session, the Defendants put out their initial offer at a starting place that was in the 6 figures, not 7. Still, in a case of disputed liability, the Plaintiff saw that this competitive negotiator also maybe had a heart.¹² The parties agreed to await a medical opinion on the meaning of some particular lab tests that may have shed light on the causation of the stroke. At the conclusion of that event, I have every confidence that these parties will arrive at a settlement.

Legal Malpractice: Cooperative Attorney v. Competitive Client

This was a case brought somewhat reluctantly by a cooperative attorney and his docile client against a law firm with a very fine reputation. Unfortunately, the Defendants had missed a critical deadline due in part to their former client's unavailability, and this action followed. The lawyer client had both reputation and ego at stake, contributing to an extremely competitive stance at the mediation. Fortunately, this lawyer was represented by a cooperative attorney who understood the risk his client was facing.

Mediators Intervention: Structuring the Initial Session

In this case, I spoke to the Defense attorney privately to test his analysis of the claims. He also had a very fine reputation, and never confessed his doubts to me, but acknowledged his client's potential exposure to liability with a smile and a nod. By doing that, he opened a window for me to explore settlement with the Plaintiff's side. I harnessed this more cooperative negotiator as my ally in impressing upon the Defendant's counsel that there are real benefits to settling, or at least tendering the claim to his carrier rather than requiring a more thorough litigation of this matter, and potentially causing unwanted attention within the legal community of this unfortunate incident. They are returning for a second session soon.

Businessmen: For them Competition is Sport:

I've had a couple of business disputes where the Attorneys are Competitive, but their Clients are Cooperative. In the first, there was a huge trust issue where one of the businessmen was alleged to have stolen trade secrets from his former employer to launch his own competing business. The lawyers were equally competitive, and refused to engage in cooperative discovery, based upon many of the same trust issues. In the other action, the Defendant refused to sell

¹² By orchestrating the negotiation so that the defendant was making what appeared to be a generous offer even before the Plaintiff made a demand, the defense counsel could be made to appear cooperative despite his very competitive spirit. Ironically, it was the defendant's adjuster who had prevailed upon her attorney to double the intended opening offer after meeting the Plaintiff for the first time at the mediation.

designer garments to the Plaintiff when he learned he'd be discounting them and re-selling them to a competitor.

Mediator's Intervention: Breaking Impasse by Using the Client's Negotiating Skills

In both of these instances, I took a chance and allowed the business people to meet together without their lawyers present. Lo and behold, they each had something to gain from one another, and took less than an hour to resolve their differences, shake hands with their attorneys, sign an agreement and walk out my door. The key was to isolate the clients from their competitive lawyers, after I had successfully gained the trust from all of them, and gotten their permission to facilitate a business meeting between principals.

Employment Discrimination: Competitive Attorney v. Cooperative Employer

In this case, because I knew the Plaintiff's counsel to be extremely competitive, I offered the parties an opportunity to strategize about the timing of the mediation session. Defendant and it's counsel wanted Plaintiff (and me) to see the full cadre of defenses, so they wanted to file their Motion for Summary Judgment before the mediation was heard. Plaintiff, for his part, expected a Motion for Summary Judgment to be filed, and agreed (to me privately) that if he had any chance of getting his client to re-think the original evaluation that he had made (in the high six figures), he would need to be able to fully evaluate not just the legal theories, but the strength and depth of the evidence the Defendants would mount to try to defeat the claim.

Mediator's Intervention: Setting the Mediation at the Right Time for the Most Successful Outcome

While he never let up in the presence of the Defense counsel, Plaintiff's counsel gave me the green light to evaluate the claim in the presence of his client so that the offer, which was slightly under the six figure mark, would appear to be a save or even a win, in view of the evidence and facts of the particular claim to his client.

Towards a Sustainable Negotiation Strategy

In today's litigation environment, we find ourselves negotiating with opposing counsel and their clients who may be half our age. Newer lawyers have been trained in negotiation and the "win/win" strategy where more senior lawyers, or, in many instances the clients, may see all litigation as entirely adversarial where they are out to win, which implies that the other side must lose.

The skillful negotiator carefully evaluates the dispute in advance and remains flexible throughout. For example, if you've dissected the dispute and

determined that even though you despise opposing counsel, your client may want to sell widgets to the Defendant again in the future, it's imperative to avoid the competitive, adversarial approach and try to engage in a cooperative discussion by making an effort to learn of the other side's interests and by offering critical information that may ultimately unlock the dispute. If you can't do that convincingly, engage your mediator as your emissary to send the message you wish to deliver. If on the other hand, you've reached that place in the negotiation where there is only one issue remaining, and it begins and ends with dollar signs, you may need to switch to a distributive bargaining, competitive negotiating stance.

Conclusion

These stories have been illustrative of some strategies for employing your mediator to prevent impasse and open up the lines of communication, even when the styles of the opposing sides are entirely oppositional. Your first step is to evaluate the styles and approaches, with the help of your mediator, including your own. The next is to remain flexible, if it's working—keep it, but if not, try a different approach. The modern practitioner will not limit herself to any one overarching principle of negotiation. She will carefully analyze the nature of the dispute with her client in advance of mediation, discussing both interests and options for solutions. In most instances, if there is only one issue (money) a tough, competitive negotiation style will work best. However, there are very few instances where there is truly one issue, as our complicated and overlapping lives tend to create both opportunity and hazard that our paths will continue to cross on into the future.

The skillful mediator will manage the varying styles presented in the particular dispute throughout. Sometimes, the mediator may be drawn into the conflict, but her primary focus should remain the problem solving for which the parties have engaged her. Accordingly, it will be necessary to anticipate the negotiator's response to a particular approach before conveying it.

The mediator is ultimately responsible for the management of the timing and pacing of a negotiation which is before her, assisting the parties in determining the level and timing of that crucial "first offer" and helping the parties and their counsel to adopt the appropriate negotiating strategy throughout the mediation—even when it is inconsistent with their personality or style, or their training or expertise.

In this age of mediation as a true and ever increasing alternative to the court system, consider all of the options and strategies that will be necessary in order to achieve the best results for your client. Once you've arrived at the strategy you intend to employ, remind yourself that flexibility is key: if that initial strategy isn't getting you where you want to go, be ready to change it and change it again until all of your client's needs and interests are met.

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