

# The Power of a Positive Relationship With Opposing Counsel

By Paul Fisher

The vast majority of the disputes I mediate involve attorneys whose strategy is more competitive than cooperative, or whose style is more adversarial than friendly. Clearly, though there are many additional reasons disputes are mediated other than the strategy and style of the attorneys, the focus of this discussion is on attorneys' strategy and style and the impact on the relationship of the attorneys.

Because so many of my cases involve competitive or adversarial attorneys, it was extremely unusual when I recently had two cases in which the attorneys were cooperative, problem-solving and friendly. A lot can be learned from these unusual cases.

To appreciate how beneficial a good relationship with opposing counsel is, it is helpful to place it in the context of classic negotiation strategies and styles. Cooperative tactics include reasonable opening offers, arguments based on fairness, and making concessions to encourage the other negotiator to reciprocate. This tactic is premised on the notion that when one party is being fair, reasonable and accommodative, the other party is likely to respond in kind. Problem-solving techniques are designed to identify and create value for both sides in negotiations. Competitive tactics, such as high demands, threats or arguments are those negotiating styles designed to undermine the other negotiator's confidence in his bargaining position and to cause him to enter into an agreement less beneficial to his client. (Definitions paraphrased from *"Legal Negotiation — Theory and Practice, 2nd ed.,"* Donald G. Gifford, Thompson West Publishing.

A negotiator's style is the manner in which the lawyer interacts with other



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people, and in particular the opposing attorney. Style includes tone of voice, non-verbal communications and other nuances. An adversarial style might include rudeness, personal attacks, abrasiveness or aggressiveness. Disadvantages to these tactics include the possibility of deadlock, premature breakdown of

negotiation, and generating ill-will and distrust with the other negotiator. It is often these behaviors that keep me busy as a mediator.

The first of these two cases, let's call it the Estate of X, involved a dispute between the six surviving adult children of their not so recently deceased father.

The father died five years prior to the mediation. All of the children had been named successor trustees under the trust created by their father. By the time I mediated the case, the attorneys had resolved most of the issues and were stuck on only a key few. At the start of the mediation I met with both attorneys

to clarify the open issues and discuss what they believed would be the most productive process. Then I caucused with each attorney and their clients separately, made a good connection with the parties, and addressed their frustrations, anger and needs. The next meeting was with the attorneys only. That was when the conversation between them turned from strictly legal and positional to friendly. They had been acquainted for a number of years through the same civic organization. Our discussion of the issues continued over lunch in the conference room of the host attorney. They talked about each other's families, vacations and common interests. We talked for awhile about the case. A rapport was building based on their prior non-legal acquaintance.

After an agreement was reached in principle between the parties I again met only with the attorneys. I sat at the host attorney's computer and facilitated the discussion between them as I typed the terms of the settlement agreement, which they jointly dictated. This was not unusual. What was very unusual was their conversation. I heard zealous advocacy in a friendly conversational tone. When a paragraph was done, they switched the conversation to their recent vacation experiences and laughed together. On to another paragraph. Back to discussion about their children. More laughter. In the end, the settlement agreement was the same as one would expect of attorneys who had concluded a hard fought battle. Rare from my perspective, this negotiation was without wear and tear on the attorneys and their relationship was not only in tact, but stronger. I shared my observation with the attorneys and they both said that neither would let the dispute between their clients impact their relationship with each other. "Remarkable!" I said to the

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attorneys. "This is so unique. Congratulations."

Two weeks later I mediated a real property dispute that had been filed in civil court and had strong estate conflict issues and cross cultural overtones. The plaintiff was the surviving significant other of the decedent. Plaintiff was an older gentleman who had long ago immigrated from an island in the Mediterranean. He claimed he inherited the Southern California residence from his deceased significant other under her oral promise to make a will, and because he provided the down payment, was on the mortgage and made the monthly mortgage payments. The defendants were the decedent's surviving father and decedent's sister, both living in Sweden. The father and sister claimed the decedent owned the property in partnership with the decedent's family, to the exclusion of the significant other, pursuant to a will prepared and signed by the decedent in Sweden some years after the relationship between decedent and the significant other had begun. There was some dispute as to the nature of the relationship.

**T**he interests of the parties were completely divergent. The surviving significant other wanted to continue living in the house where he and the decedent had been living for many years, and to be able to provide some legacy to his daughter after he died. The Swedish family wanted to continue to own the property and keep it in the family for generations, as is the Swedish culture. They also wanted to have a place in a milder climate to visit during the winter, and that could also serve as an occasional vacation destination during the rest of the year, just as they had done for as long as the decedent had owned the house. The family also wanted someone to keep a watchful eye on the house when they weren't there. After the interests of the parties had become clear, I met with both attorneys. The attorneys were determined to find a solution short of trial, scheduled only three months hence. They worked hard in attempting to meet the needs of each other's clients without sacrificing any of their own client's interests. Aware that in the week preceding the mediation the sister had flown out from Sweden, had been staying in the same

house with the significant other, and that the significant other had driven both of them to my office for the mediation, the attorneys were particularly careful to preserve the relationship of the parties.

The attorneys crafted a settlement that allowed the significant other to continue living in the house during his lifetime, and that provided a lump sum payment to resolve his claim of ownership to the house. The agreement included a loose schedule for visits by the Swedish family, and allocation of household expenses.

During the entire negotiation the attorneys were very friendly to each other, always professional and great advocates for their client's positions.

When the settlement agreement had been signed, the parties left to go out to dinner together at a Mexican restaurant. When I commented to the attorneys that they had done a marvelous job for their clients and without rancor, they both replied, "We had to get this done. We had to preserve the relationship."

I believe both attorneys from each case enjoyed working with their opposing counsel during the mediation.

Build a positive relationship with the opposing attorney. Nurture it for your benefit and for the benefit of your client. Imagine how much more you might enjoy practicing law. Keep in mind that happier or more satisfied clients lead to more client referrals.



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