

Winning at Mediation!

Focusing on beating your adversary and “winning the mediation” rather than obtaining the best result for your client ignores the nature of negotiation—agreement is voluntary.

By Joan Stearns Johnsen

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Within a single week I heard two very respected professionals bemoan the far too prevalent “winning the mediation” mindset. This is that particularly dangerous approach where in the role of mediation advocate, the litigator continues to apply a litigation strategy. Litigators appropriately employ this strategy in trials and hearings where for one party to win, the other must lose. This is the winner take all paradigm taught in law school. It is the Vince Lombardy philosophy of “winning isn’t everything, it is the only thing.”

Litigators are competitive by nature. They love to win and hate losing even more than winning. Law school reinforced this competitive inclination by encouraging them to compete with one another in moot court and for grades where the curve mandates winners and losers. Take a competitive litigator and add what behavioral economics teaches us about loss aversion and this win/lose approach to mediation appears to make sense. As Nobel Prize winner Professor Daniel Kahneman wrote in his 2011 best-selling book, *Thinking Fast and Slow*, “The concept of loss aversion is certainly the most significant contribution of psychology to behavioral economics.” Litigators despise the devastation of losing and apply this competitive approach to their mediations as a strategy to win.

In their mediations, these litigators measure their own success relative to that of their adversary. Winning means their adversary loses. They may for example fixate on the observed unhappiness of their adversary as a measure of how well they themselves are doing. In my mediations, parties have asked me about the state of mind in “the other room.” These litigators do not want to hear laughter or see smiles coming out of the other room. An otherwise good deal becomes suspect if the other side leaves the mediation smiling.

Measuring your success based on the other side’s perceived or imagined loss is an unreliable measure of success and ironically endangers your opportunity for an actual win. Focusing on beating your adversary and “winning the mediation” rather than obtaining the best result for your client also ignores the nature of negotiation which is that agreement is voluntary. In fact, even if your leverage is so strong and their options so limited that you are tempted to bludgeon the other side, you may be surprised instead by impasse. It has been demonstrated over and over, and you have probably personally experienced people leaving money on the table and passing up objectively good deals if they believe that they are not being treated fairly or that the leverage

card has been played a bit too aggressively. Your adversary does not like losing any more than you do.

How do you avoid leaving the mediation feeling like a loser with a knot in your stomach and anguish at leaving money on the table because your adversary is smiling? The answer is rather pedestrian. If you have done your homework, you will have confidence in your result. Does the deal you have negotiated meet or possibly even exceed the optimistic target you set based on your thorough analysis conducted in consultation with your client? If you have thoroughly prepared, you will define winning based on whether your deal satisfies your client's objectives. If you treat your adversary with respect, you can use your leverage appropriately and subtly.

If you understand based on objective norms and standards whether or not your deal is a good one, you will not be determining if you have won based on if your adversary has lost.

My two wise colleagues separately arrived at the identical conclusion as to what inevitably is a losing approach for mediation—trying to win. Or at least not correctly defining what winning at mediation means. Trying to “win the mediation” is failing to recognize that for you to win, your adversary does not need to lose. Seeking to win the mediation by defeating your adversary is bad. Focusing on what winning for your client looks like is smart.

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