Kluwer Mediation Blog

Lawyers Are From Mars, Clients Are From Venus – And Mediators Can Help Communicate in Space

John Lande (University of Missouri Center for the Study of Dispute Resolution) · Saturday, February 6th, 2021

"Managing a Client's expectations and advising them on a course of action turned out to be far more difficult than negotiating with the other Party." So wrote newly-minted Indian lawyer Varsha Manoj about her experiences negotiating with her clients.

Many lawyers in the US and other countries undoubtedly have similar experiences.

Legal clients often experience intense stress in the litigation process. Professor Dwight Golann noted that parties often grieve over significant feelings of loss in negotiation, which can prevent them from negotiating effectively and reaching agreements. Any party – including defendants and plaintiffs – may have these strong reactions in any kind of case.

A recent study, based on 50 focus groups of new lawyers and supervisors of new lawyers, found that new lawyers are "woefully unprepared" to work with clients. The study, by Professor Deborah Jones Merritt and Institute for the Advancement of the American Legal System Research Director Logan Cornett, provided the basis for their report, *Building a Better Bar: The Twelve Building Blocks of Minimum Competence*. The report states:

New lawyers described three clusters of abilities that they needed to work effectively with clients:

1. The ability to gain a client's trust, gather relevant facts, and identify the client's goals.
2. The ability to communicate regularly with clients, convey information and options in terms that a client can understand, and help the client choose a strategy.
3. The ability to manage client expectations, break bad news, and cope with difficult clients.

Many clients notice these deficiencies even in experienced lawyers. Professor Clark Cunningham summarized studies showing that many clients – including individuals and large organizations – are extremely dissatisfied with their lawyers' communication with them. He wrote, "Many lawyers equate client satisfaction with the outcome achieved; however, studies over the past three decades in three different countries [have] produced impressive evidence that clients evaluate their lawyers' competence more in terms of the process experienced by them in the representation than the outcome." He cited a study finding that "[c]lients complained about the quality of their lawyers' services in terms of inaccessibility, lack of communication, lack of empathy and understanding, and lack of respect."

Researcher Tamara Relis wrote that lawyers and clients live in "parallel worlds of understanding" of legal disputes. Based on a study of mediation of medical malpractice cases, she found that lawyers focus primarily on monetary outcomes because legal remedies in court generally are limited to monetary awards. By contrast, plaintiffs generally had "extra-legal" goals including "obtaining admissions of fault, prevention of recurrences, retribution for defendant conduct, answers, apologies and acknowledgments of harm [which] remained invisible to virtually all lawyers throughout the duration of the processing of their cases." Even some plaintiffs' lawyers discounted plaintiffs' non-monetary goals.

In another article based on the same study, Relis wrote that the lawyers on all sides of the case generally felt that the doctors shouldn't participate in the mediations, whereas the parties – including the doctors – generally wanted the doctors to participate so that the parties could talk about what happened.

So Martians – the lawyers – often develop routines of focusing only on monetary outcomes based on what the courts might decide and discounting clients' concerns as too "emotional" or "unreasonable." This is sadly ironic because negotiation and mediation provide opportunities for outcomes that aren't limited to remedies that courts can provide. It is doubly ironic because the typical "positional negotiation game" involves obviously unrealistic claims about likely court outcomes.

The litigation, negotiation, and mediation processes are bewildering to Venusians – the clients – who typically aspire to have a meaningful process and not merely get a favorable monetary outcome. The positional negotiation game can feel particularly jarring because parties anchor their expectations on arbitrary negotiation positions and with each new concession, they feel the added pain of a new loss. In the end, they usually surrender their non-monetary aspirations because their lawyers insist that they can get only monetary outcomes.

How Lawyers Can Promote Good Inter-Planetary Communication

There is no "client school" to teach people how to be good clients in legal cases. In cases where lawyers represent parties in legal disputes, lawyers need to train their clients. This is true not just for "one-shotters," who haven't previously been litigants, but also for many sophisticated "repeat-players" because they often struggle with the same problems.

Lawyers may need to improve their communication skills so that they and their clients can communicate on the same wavelength between their different planetary perspectives.

When lawyers listen empathetically, clients are more likely to feel heard – and may be more open to hearing the lawyers' perspectives. If clients feel that their views aren't being recognized, they are likely to repeat them hoping that they will eventually be acknowledged – and tune out their lawyers' advice because the lawyers don't seem to understand them. So lawyers should display sincere curiosity and concern about the clients' perspectives and goals. This is especially important when lawyers believe that clients can't achieve their objectives in or out of court.

Lawyers can promote good communication with clients by discussing the three elements of their bottom line for settlement: expected court outcome, tangible costs of litigation, and the value of the clients' intangible interests in litigation. Focusing on the bottom line enables lawyers and clients to consider all these elements in a single framework that includes all of their concerns.

Jointly developing bottom lines can help clients set realistic expectations and develop effective strategies for handling their disputes. Bottom lines represent the "tripwire" to end negotiation and are important in deciding on positions in the positional negotiation process.

Decisions about bottom lines change during disputes as people get new information and revise their assessments of the elements of the bottom line. The discovery process may produce evidence altering expectations about the court outcome. Parties may change their valuations of their intangible interests – such as getting an apology or relief from litigation stress – as the litigation proceeds. So lawyers and clients should review their assessments periodically, especially when they need to make important decisions.

Lawyers should seriously consider clients' intangible interests for at least two reasons. First, lawyers are required to try to achieve clients' objectives, which may include advancing intangible interests. Lawyers' duties are not limited to helping achieve only remedies that courts can provide. Second, lawyers may help clients settle cases by satisfying clients' intangible interests. For example, defendants generally are willing to agree to pay more if they can reduce the harm to their reputations and potential losses of opportunities.

Lawyers should have these conversations with clients starting at the earliest appropriate time in a case. Starting early helps clients exercise more control and minimize tangible and intangible litigation costs.

How *Mediators* Can Promote Good Inter-Planetary Communication

The problematic communication patterns described above are deeply entrenched in the mindsets and habits of many lawyers.

Mediators can help lawyers and clients improve their communication with each other. If mediators have separate conversations with each side before convening a mediation, they can discuss elements of the bottom line, particularly the parties' intangible interests. Except at the very end of a mediation, it's generally better for mediators *not* to ask each side for its ultimate bottom line because these determinations change during mediation.

If the lawyers haven't developed good understandings of their clients' interests, these preparatory conversations may prompt the lawyers to discuss them with their clients. Often, clients don't participate in preliminary conversations with mediators, but this may be more convenient in the era of video communication.

This post provides checklists for mediators to gather information before convening mediation and during mediation sessions. It includes separate checklists to help assess court outcomes and parties' intangible interests. Lawyers can use or adapt these checklists in conversations with their clients.

Of course, these techniques will not work in every case. Some lawyers are not open to considering non-monetary issues. Some clients have unreasonable expectations about what they could achieve in court or by settlement and are not open to changing their perspectives. Some mediators have narrow views about the appropriate focus for discussion, similar to lawyers acting as advocates.

But lawyers and mediators can help improve the process and outcomes if they are open to hearing clients' interests and considering how they may address them in negotiation and mediation.

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