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The Art of Mediation: Six Steps to Sussing Out the Subtitles

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By Judge John D. Moore (Retired)

The movie “Annie Hall,” through the clever use of subtitles, illustrated clearly that, where matters of the heart are concerned, what one says is not what one means. A successful mediator understands this trope holds true during financial negotiations as well. The secret to a mediator’s success is knowing how to puzzle out what people need from what they say they want. Here are six keys to decoding the positions that lawyers take during mediations.

1. Respect counsel and value what they have to say, even when counsel takes an extreme position. To establish the kind of trust that you need to settle complex cases, mediation must be a respectful dialogue among equals.
2. Listen more than you speak. All information you glean from counsel is good information. When you do speak, pose probing questions to elicit additional data. When listening, pay attention not only to what is said, but to what is not said. Often, the areas that lawyers choose not to address reveal the fault lines in their cases.
3. When you speak, demonstrate to counsel that you have read and carefully considered their position statements. Doing so will continue to establish trust between the mediator and the attorneys.
4. Carefully weigh whether it would be more helpful to comment on a party’s position publicly or during a private session. Embarrassing an attorney in front of his or her client is always counter-productive. Equally dangerous is reinforcing an overly--bullish lawyer in front of her of his adversary.
5. When a lawyer irrationally thinks he or she will succeed on an important issue at trial, don’t engage in endless argument. Instead, press counsel on exactly how counsel will present this issue at trial, e.g. through which witnesses, what documents and/or what caselaw.

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6. Most importantly, always be forthright. Counsel needs to know that you are an honest broker, not one who will cave to expedience just to resolve a case. Along these lines, it is good to remind counsel that, although they may be the bug today, they will be the windshield tomorrow.

Following these six steps will create an environment of trust and respect in which not only will counsel share important information with the mediator, but also in which the mediator will become equipped to discern the subtext of what the client needs from the text of what counsel says the client wants.

Judge John D. Moore (Ret.), a former Connecticut Superior Court Judge, is a member of the Alternative Dispute Resolution practice at Pullman & Comley, LLC, which offers mediation and arbitration services in complex civil matters in state and federal court, including commercial, construction, employment, environmental, health care, insurance, personal injury and probate disputes. .

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