

# SPEAK NO EVIL — INCREASE YOUR EFFECTIVENESS AT MEDIATION

Mediation & Arbitration Section

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**P**rimacy theory suggests that first impressions are very powerful. Mediation typically presents the first opportunity for a lawyer to talk directly with the opposing party. Yet many lawyers often fail to take full advantage of such access to the other lawyer's client, and instead alienate that person within just a few moments. These first impressions can make or break the chances for a successful resolution.

## The opposing party is your business partner

Everyone understands that people prefer to do business with people they “like.” In fact, many lawyers’ marketing efforts revolve around this primary tenet of human commercial behavior.

Yet these same attorneys will often approach mediation just as they approach litigation — as a form of combat. They emphasize the weaknesses of the other party's positions without acknowledging any of the strengths or the underlying interests. They attack the other party with verbal and nonverbal communication.

What they fail to realize is that the opposing party most assuredly is their business partner in the conflict, and that they will need to do business with this person before the conflict can be resolved. It is crucial for counsel to exhibit the

highest levels of personal grace and civility toward the opposing party. Attorneys should treat opposing parties no differently than they treat their family members or their best clients. Resolution — a “deal” — is less likely and/or takes longer to occur if the mediator is compelled to spend time and energy dispelling actual or perceived disrespect.

## From “legalese” to “mediation-speak”

“Legalese” is a code — both in its provision of rules of engagement (code of conduct) and in its use of unfamiliar terms (ciphers). Attorneys use legalese in litigation because it helps them interact with one another more efficiently. But they sometimes forget that the opposing party may not understand the code. Legalese often creates an imbalanced communication dynamic. Many laypeople perceive it as condescending, elitist, and/or untrustworthy. At a minimum, we suggest that lawyers pay close attention and correct themselves as soon as they slip into legalese when interacting with opposing parties at mediation.

Even better, we suggest an alternative to legalese — “mediation-speak.” This



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communication technique emphasizes understanding on the part of the recipient. The speaker uses simple words and sentence structure, and breaks down complex processes into component pieces. The speaker seeks regular feedback from the recipient to ensure comprehension, and revisits topics that are confusing to

the recipient. The speaker engages in dialogue rather than monologue.

As mediators, we have seen amazing transformations when parties come together and resolve previously unsolvable conflicts. Win-win solutions more often occur when attorneys treat the opposing parties as business partners rather than targets.

We hope that these suggestions are helpful to counsel seeking to be more effective in gaining favorable resolutions for their clients.



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