Mediation Skills for Lawyers
by G. Carmichael Lemaire

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Mediation Skills for Lawyers

Gillian Carmichael Lemaire

Summary

Mediation, a close cousin of negotiation, has become a standard and key dispute resolution tool for many corporations, large and small. What does this mean for the skill-set lawyers must possess in order to serve their clients? For example, how does the traditionally “rights-based” training of lawyers support, or stand in the way, of interest-based mediation?

This article discusses the proposition that lawyers must use a particular skill-set in order to properly serve their clients in mediations. The author examines the lawyer’s traditional skill-set and how it can be adapted for mediation.

Introduction

2013 was mediation year at the Paris Bar.\(^1\) A highlight of the year was the creation of the Paris Bar Mediation School (Ecole de la médiation du Barreau de Paris – EMBP), which took the innovative step of training lawyers in mediation, with a focus on the skills required as counsel rather than mediator.\(^2\)

Through my participation in the EMPB, I concluded that the traditional “rights-based” training of lawyers must either be set aside or adapted for mediation. An “improvised” mediation risks ending in failure. By the end of the EMBP I was in no doubt that mediations in which lawyers assist parties stand a much higher chance of success if the lawyers have been trained in and have experience of mediation.

This article addresses: (1) the traditional training and skill-set of lawyers; (2) what can happen if a traditional skill-set is deployed in a mediation; (3) a useful skill-set for a mediation lawyer; (4) how to acquire a mediation skill-set.

(1) The traditional training and skill-set of lawyers

The references below to the litigation lawyer are generalisations to which there are many exceptions. For the purpose of this article references to litigators include arbitration lawyers, as I am of the view that, very broadly speaking, the arbitration lawyer uses skills similar to the litigator. It is also of note that there may be a significant variation in skills between lawyers from different jurisdictions and legal

\(^1\) Although mediation is a long-standing practice in France, its development has been slow and it is still not as widespread as would, in my opinion, be desirable. The legislative framework on judicial civil and commercial mediation was only created in 1995 (Law N° 95-125, February 8, 1995, amended by Ordinance 2011-1540 of November 16, 2011 to include conventional mediation).

\(^2\) All lawyers from the 2013 EMBP also trained as mediators. The 2013 EMBP was created by the Bâtonnier Christiane Féraux-Schuhl and was led by Michèle Jaudel, avocat and mediator.
systems, for example, differences which arise from whether the lawyer comes from a common or civil law system.

In many jurisdictions, the litigation lawyer rather than the transactional lawyer is seen as possessing the most traditional skill-set, instilled at university and carried through to practice.

Litigation lawyers necessarily use a particular skill-set given the nature of their job. Litigators engage their clients in court proceedings to enforce a right and win the case, whereas the objective in mediation is not to win but to reach an agreement acceptable to the client.

In an article discussing the adaptations that litigators should make when they act for parties in mediations, Stephen D. Kelson refers to “the lawyer’s standard philosophical map”, which he says is governed by two significant assumptions: (1) that disputants are adversaries, where one must win and one must lose and (2) disputes may be resolved through the application of law to facts of a given case. He explains that: “In the practice of law, the assumptions of the standard philosophical map are regularly encouraged through regular application, the legal process itself, and procedural rules and the professional standards. With these experiences and standards, attorneys apply themselves to a given case by primarily behaving in an evaluative manner, focusing upon the parties’ rights and duties under the law, determining the strengths and weaknesses in legal positions, and deciding how to exploit these positions to the clients’ advantage. The duty to zealously represent clients by focusing upon disputes in an evaluative manner discourages attorneys from concerning themselves with their opponents’ situation and the ultimate results caused by the application of the standard philosophical map.”

It nevertheless appears from examination of the litigator’s traditional skill-set that many of these skills will be useful in mediation, provided their focus is shifted to meet the specific demands of mediation.

One of the litigator’s first tasks is to interview the client and witnesses, ingather relevant documents, generally investigate the case and carry out legal research. The skills used here are also essential for the mediation lawyer, but what the latter will do with the assembled information may be distinguished from the use of such information in litigation. In litigation, lawyers will use the information to shape a legal case which they strive to win. In mediation, although the information will also be used for the legal case, its primary use will be to better understand the client’s interests, needs and preoccupations. The mediation lawyer will assess what information will be necessary for the mediation and how to convey that information to the mediator and the other party. This requires careful consideration as, for example, it is likely that in mediation documents such as contemporaneous evidence will not be used to the same extent as in litigation. In any event, the ability to understand, distil and convey key facts is important, as is being able to identify what is agreed and what remains in dispute.

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Early in a case the litigator may prepare a risk assessment for the client and come to a view on the prospects of success. This exercise may well be repeated several times throughout a court case. This is an excellent skill for the mediation lawyer, who will at several stages in a dispute advise the client on its Best Alternative to a Negotiated Agreement (BATNA); the BATNA is what a party will do if no agreement is reached, in other words, its best alternative.

The litigator will then prepare the case for court by drafting legal pleadings. Although writing skills will be useful in mediation for the preparation of certain documents (e.g., the mediation agreement, a written submission, a settlement agreement), the focus in mediation documents will differ from the focus in litigation documents, where the lawyer is arguing to win. Writing skills are of course also used by a litigator in everyday correspondence with the court and opposing counsel. Litigation-related correspondence is frequently written in a forceful and positional tone, which is usually unhelpful in mediation.

A litigator will also employ tactics and strategies throughout the litigation in such areas as procedural motions in which the court is asked to decide on incidental matters. The skills used here by a litigator may be helpful in mediation provided they are adapted to the context. For example, a mediator may be asked to decide how documents such as contracts and related correspondence will be dealt with in the mediation: will parties be allowed to submit documents; if so, which documents? The litigator will typically possess insight into which documents it will be necessary or desirable to submit in a mediation. To take another example, the litigator will also be used to taking a “big picture” view of a case as part of an overall case strategy, which can be invaluable in mediation.

As far as preparation for and conduct of hearings is concerned, naturally lawyers in different jurisdictions hone varying skills. Most litigation lawyers will use their skills to prepare a convincing story aimed at persuading the court to find in favour of their client. This is a useful technique but is used in a different way in a mediation where there is no decision-maker to persuade. The art of persuasion has many facets and perhaps one of the most important of these in a mediation is ethos, a factor addressed by Ronald Waicukauski, Paul Mark Sandler and JoAnne Epps in their book “The 12 Secrets of Persuasive Argument”, in which they identify the qualities that contribute to ethos as including “honesty, integrity, intelligence, knowledge, goodwill and sincerity.” In his short polemic on how to be seriously good in court, Iain Morley QC asks how persuasiveness is measured and answers: “By getting the tribunal to REALLY, REALLY, REALLY THINK ABOUT YOUR CASE.” Applied to mediation, persuading the other party to think about your case is a precious skill.

Questioning techniques used in litigation may also be useful in mediation, more so for the mediator but also for counsel, especially at the stage of preparing the mediation with the client. Particularly useful is the skill necessary to conduct examination-in-chief or direct examination in which open questions are asked. Open questions are desirable when ascertaining the client’s interests. Cross-examination skills, in which

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4 See Ronald Waicukauski, Paul Mark Sandler, and JoAnne Epps, The 12 Secrets of Persuasive Argument 43 (2009).
5 See Iain Morley, The Devil’s Advocate, A short polemic on how to be seriously good in court, 2nd ed 34.
closed and leading questions are posed, are more likely to be used in discussions relating to the monetary value of the case.

Negotiation skills are of key importance. However, not all lawyers are trained in negotiation skills and even if they are, they may not have learned the type of skills that may be used to best effect in a mediation. Diane Levin explains that “… the kind of negotiation that many lawyers are familiar with is traditional distributive, value-claiming bargaining and not the integrative, value-creating negotiation that mediation offers.”

In the preface to their classic work “Getting to Yes: Negotiating an Agreement Without Giving In”, which addresses “principled negotiation” or “negotiation on the merits”, methods which are frequently used in mediation, Roger Fisher, William Ury and Bruce Patton say: “A generation ago, the term ‘negotiation’ also had an adversarial connotation. In contemplating a negotiation, the common question in people’s minds was, ‘Who is going to win and who is going to lose?’ To reach an agreement, someone had to ‘give in’. It was not a pleasant prospect. The idea that both sides could benefit, that both could ‘win’, was foreign to many of us. Now it is increasingly recognized that there are cooperative ways of negotiating our differences and that even if a ‘win-win’ solution cannot be found, a wise agreement can still often be reached that is better for both sides than the alternative.” They observe that the method can be reduced to four points: “People: Separate the people from the problems. Interests: Focus on interests and not positions. Options: Invent multiple options looking for mutual gains before deciding what to do. Criteria: Insist that the result be based on some objective standard.”

Professor Harold I. Abramson identifies two negotiation approaches. The first is positional (or competitive or adversarial) and the second is the type referred to in Getting to Yes, namely the problem-solving (or interest-based, principled or possibly cooperative). He also distinguishes negotiation approaches from negotiation style, referring to a highly regarded study by Professor Andrea Schneider in which “Styles encompass a mix of descriptions that are labelled as traits, strategies and goals”: “Designating the descriptors as adjectives, Schneider’s study found that the top six problem-solving traits and skills are ethical, experienced, personable, rational, trustworthy and self-controlled; the top six adversarial traits and skills are stubborn, headstrong, arrogant, assertive, irritating, and argumentative. The top four problem-solving bipolar pairings of negotiation strategies are no derogatory personal references, interest in other client’s needs, courteous, and no offensive tactics; and the top three adversarial bipolar clusters are disinterest in clients’ needs, extreme opening demand, and an unrealistic initial position. The top three problem-solving goals are ethical conduct, maximizing settlement, and fair settlement; while the top adversarial goals are maximizing settlement, outdoing the other, and profitable fee.”

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8 Id. Separate the People from the Problem, Ch 2.
11 Id. 22.
Abramson provides two extremely useful tables summarizing both positional and problem-solving approach and style.\textsuperscript{12}

Skills used by transactional lawyers include certain of those referred to above, in particular, oral and writing skills and negotiating skills. It may generally be said that the transactional lawyer is more used to giving transactional and business advice to the client and understanding the client’s business issues, underlying interests, priorities and risks.\textsuperscript{13} Lawyers possessing a mix of litigation and transactional skills may be highly effective in a mediation. Many in-house lawyers fit this bill. Moreover, nowadays both litigators and transactional lawyers are developing their skill-sets way beyond “traditional” skills to include, among other things, much stronger commercial and financial skills, enhanced negotiation skills, a move away from the traditional adversarial approach by learning about collaborative law and other techniques,\textsuperscript{14} and soft skills such as communication skills, listening (one of the most important skills in mediation), and attentiveness to cultural differences. The EMBP attached particular importance to the latter and opened with a three-day module focusing on mediation and intercultural negotiation.\textsuperscript{15} There was an opportunity to take an Intercultural Readiness Check,\textsuperscript{16} which examined the participant’s level of intercultural sensitivity and ability to communicate, build commitment and manage uncertainty in an intercultural context.

(2) What can happen if the traditional skill-set is deployed in a mediation?

When one or both lawyers have no training or experience in mediation they may try to conduct themselves as if they were in a courtroom or an arbitration hearing. There was no shortage of examples in the role-play exercises conducted in the early stages of the EMBP. This type of approach can affect the chances of the mediation progressing satisfactorily and ultimately reduce the prospects of the mediation being successful.

Listening effectively can be problematic as most lawyers are not taught how to listen and may not know how to employ the technique of active listening. They may be too intent on concentrating on what they are going to say next rather than listening to what is being said. The first practical exercise at the EMBP was a listening exercise under timed conditions in which participants were divided into pairs, the task being for one person to introduce him/herself and for the other to make a presentation based on what had been said. This simple exercise was more difficult than it sounds.

The tendency of litigators to want to talk, the pressure to be seen to be speaking up and to perform, sometimes aggressively, in front of clients, and generally intervening

\textsuperscript{12} Id. 32 and 56.
\textsuperscript{14} The EMBP included a session on collaborative law and procédure participative. These are similar techniques in which the emphasis is placed on communication and settlement out of court. There is no intervention by a third party neutral. Each party is assisted by a lawyer trained in these processes. Collaborative law was introduced in France from its origins in the USA. Procédure participative, which is regulated by Articles 2062 onwards and Article 2238 of the French Civil Code, would not appear to be used frequently.
\textsuperscript{15} This module was conducted by Jeremy Lack and François Bogacz of Neuroawareness and Juanita Wijnands of Ideas4.
\textsuperscript{16} Copyright 2014 Intercultural Business Improvement.
and trying to control the process, may result in too much advocacy. The litigator may forget that there is no point in trying to persuade the mediator of anything, as the mediator is not there to make a decision. Rather lawyers should make it their job to be persuasive vis-à-vis the other party and opposing counsel. Stephen D. Kelson says that “too much advocacy during mediation can harm the potential of reaching resolution. It wastes the opportunity to learn helpful information from the other party and to reach a mutually acceptable and swift resolution of the dispute.” Moreover, “Too much advocacy also results in attorneys and their clients ‘anchoring’ (placing over-reliance on a particular fact or piece of information) and becoming overconfident in their own view of the dispute, resulting in decision-making errors that undermine otherwise potential resolutions…”

One unfortunate occurrence which can emanate from the traditional skill-set is lawyers “gaming the process” or using “contentious tactics” or “tricks.” Peter S. Adler states that this takes a variety of forms, one of which is “using mediation as free or low-cost discovery, a little peek at the other side’s case, with no real intention of using the process to negotiate resolution.” Stephen D. Kelson also cites an array of contentious tactics which are “overwhelmingly counterproductive” in mediation and concludes that “Attorneys who employ contentious tactics in mediation often believe they gain a professional advantage by demonstrating resolve. Instead, such advocacy results in the escalation of the dispute, poor decision making, and the failure to achieve their clients’ interests.”

Whilst some tactics may not fall foul of ethical rules, others may be outright breaches of such rules. Bette J. Roth Esq. explores a number of ethical situations which lawyers face when they have to switch from litigation to mediation advocacy. For example, she addresses what happens if the lawyer engages in “bluffing or puffing” about the value of the case when the mediator explores the BATNA with a party: “In so doing, the mediator will challenge the lawyers to discuss candidly their case weaknesses and any key concerns.” She notes, however, that the response is often an underestimate of the negative evidence, an overstatement of the supporting evidence or both, the tactic being to bluff the mediator to encourage the other party to make greater concessions. Ms Roth explores in particular whether this is ethical, which is not the subject of the present article, suffice to say that I and others agree that any form of extreme bluffing is likely to have a negative impact on the mediation process and could jeopardize the client’s ability to settle.

An occurrence I have noted recently is recourse to mediation simply to satisfy a contractual obligation. A typical scenario is where a contract provides for mediation as a prerequisite to final and binding resolution of a dispute through the courts or

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17 See supra Kelson note 3.
18 See Peter S. Adler, Expectation and Regret – A Look Back At How Mediation Has Fared In The U.S., 7th National Conférence Civil Mediation Council (May 2, 2013).
19 See supra Kelson note 17.
20 See supra Abramson, 27.
21 See supra Adler.
22 See supra Kelson note 3.
23 See Bette J. Roth, Ethical Considerations for Advocates in Mediation, adapted from draft published by the Boston Bar Association in November 2004, and later reduced and reprinted by Massachusetts Lawyer’s Weekly, Litigation Tactics in Mediation: Are They Ethical? (February 7, 2005).
arbitration, a provision which may be enforceable in some jurisdictions. Rather than making a genuine attempt to resolve the dispute through mediation, one or more parties nominate a mediator and might attend the hearing only to leave promptly, fail to attend, or attend but decline to participate in any meaningful way, merely to be able to say that they took the steps required by the contract and went through the motions of a mediation. Whilst it is true that mediation is not appropriate in all cases, and may be pointless if one party is in bad faith, most parties will see the commercial sense in dedicating what is a relatively small amount of time and resources to possibly settling a dispute through mediation.

(3) A useful skill-set for a mediation lawyer

Many elements of the traditional skill-set are unhelpful or counter-productive if used in a mediation in the same manner as they would be in litigation, yet those same elements may be highly useful and effective if they are adapted for the mediation process. Moreover, business and soft skills are valuable in mediation.

First and foremost the mediation lawyer should have an understanding of the mediation process, its objectives and the roles played by the participants in a mediation. Specific training is highly desirable and, naturally, there is no substitute for experience.

Mediation clauses

This article does not address the vast subject of mediation clauses in contracts beyond saying that mediation lawyers should be equipped to advise their clients on the inclusion or otherwise of such clauses and how they should be drafted, particularly as regards their possible combination with other dispute resolution methods.\textsuperscript{25}

Ascertaining whether a dispute is suitable for mediation

Ascertaining whether a dispute is suitable for mediation demands an approach that must seek out how the client’s interests will be met by the mediation process itself and how those interests are likely to play out on their merits in a mediation. Professor Abramson addresses these issues in detail in his chapter “Counselling Your Client About Mediation”, in which he deals with a range of questions including posing open-ended questions to work out the client’s broader interests,\textsuperscript{26} paying special attention to cultural specificities,\textsuperscript{27} ensuring that the client understands the advantages and disadvantages of mediation,\textsuperscript{28} ascertaining whether there may be any impediment to mediation\textsuperscript{29} and when to propose mediation to a client.\textsuperscript{30} Michael P. Carbone takes the view that willingness to compromise is of critical importance: “No mediation should ever be undertaken unless both the lawyer and the client are prepared to make

\textsuperscript{25} See Laurence Kiffer, \textit{La formation : un prérequis au succès de la médiation}, ICC France, Special edition on mediation, Echanges Internationaux, N° 92, 2\textsuperscript{nd} quarter 2011, p. 32.
\textsuperscript{26} See supra Abramson 147.
\textsuperscript{27} See supra Abramson 148.
\textsuperscript{28} See supra Abramson 149.
\textsuperscript{29} See supra Abramson 163.
\textsuperscript{30} See supra Abramson 172.
When to propose mediation and how to initiate it

When to propose mediation and how to initiate it are aspects of the process that demand particular skills. It may not be easy to persuade the other side to engage in a mediation. The question against which one almost inevitably runs up is: “Am I going to look weak if I am the first to propose mediation?” Participants and faculty at the EMBP generally felt that whilst this had been a problem in the past, now that mediation has become a more frequently used process, both parties and lawyers have become more comfortable about making such an approach. Obviously it helps if opposing counsel is trained in or has experience of mediation. Professor Abramson proposes strategies for persuading the other party that mediation should be considered, including starting with a general discussion of alternative options, and making a pitch emphasizing the benefits of mediation. 32 Eileen Carroll and Karl Mackie take the view that when there are a number of parties and strong sensitivities, “the entry to mediation should be regarded as a mediation process in its own right” and they propose a number of options “to get into mediation without losing face.”33

Selecting the mediator

Selecting the mediator also forms part of the desirable skill-set. This may come more naturally to the arbitration lawyer, who will have experience of selecting arbitrators, than to the litigator, who has no such choice to make. However, it should obviously be borne in mind that the skills required of a mediator are different from those demanded of an arbitrator. A key issue to discuss with clients is whether they expect a mediator to adopt an interventionist approach or not. Some mediators will not go beyond guiding the parties towards a solution; others will be prepared to put forward their own creative suggestions for settlement. It is essential for the parties to have confidence in the mediator and confidence can be lost if the parties’ expectations of the mediator’s style are not met.

Preparation – especially preparing the client and the BATNA

Preparation34 for the mediation is extremely important and is radically different from preparing for a court hearing. Preparing the client is an essential skill, as a well-prepared client will contribute significantly to the success of the mediation.

The foundation of the mediation, the mediation plan, should be prepared by lawyers in conjunction with their clients and can cover the pre-mediation phase right through to the end of the mediation including, if necessary, enforcing any agreement reached.

32 See supra Abramson 177.
34 The International Chamber of Commerce’s Mediation Guidance Notes provide guidance on preparing for mediations and are helpful whether or not the mediation is being conducted under the ICC Mediation Rules.
Professor Abramson provides an excellent and extensive checklist, “Checklist: Preparing Mediation Representation Plan.”35

Among other things, a mediation plan may deal with setting out the purpose of the mediation; the objective; what type of mediation is being engaged (institutional, ad hoc or judicial); how the party intends to work with the mediator to best effect; the client’s BATNA and the other party’s BATNA; whether the client’s BATNA may be improved and, if so, how; the strategy for the mediation itself: when will it take place; in what conditions; what roles will the client and the lawyer play; who will attend; what information will be shared; how will confidentiality be dealt with; will there be any written submissions; will exhibits be allowed; who will make the opening statement; how to act in joint sessions; approach to caucuses… Preparing a thorough mediation plan will maximize the chances of a fruitful mediation.

The lawyer/client team should carefully prepare the BATNA. Fisher, Ury and Patton counsel in favour of knowing your BATNA and using it as “the standard against which any proposed agreement should be measured,” this being preferable to adopting a bottom line. They state that “… while adopting a bottom line may protect you from accepting a very bad agreement, it may keep you both from inventing and from agreeing to a solution it would be wise to accept.”36 The BATNA on the other hand, i.e., the best alternative, “is the only standard that can protect you both from accepting terms that are too unfavourable and from rejecting terms it would be in your interest to accept.”37 They explain that three steps are required to produce possible BATNAs: “(1) inventing a list of actions you might conceivably take if no agreement is reached; (2) improving some of the more promising ideas and converting them into practical alternatives; and (3) selecting, tentatively, the one alternative that seems best.”38 Professor Abramson distinguishes between the public and personal BATNA, the former being the legal case and the latter the client’s personal costs and benefits of litigating, and underscores the importance of thorough research into knowing the total BATNA: “The importance of knowing the total BATNA cannot be overstated when you realize that inaccurate assessments are one of the most common reasons for failed mediations, something I have personally observed.”39

The lawyer should ensure that the client understands the mediation process and knows the mediation hearing will not be conducted like a court or arbitration hearing. The lawyer should ensure that the client is aware of the mediator’s role and what the mediator will do and will not do, notably that the mediator is not a judge or an arbitrator and will not make a decision. The client should also understand the roles of all other participants, including the roles played by the lawyers. If the client is given this information, the lawyers should feel less need to be seen to be “performing”.

The client should also understand the importance of having its view heard by the other party and not just by the mediator. The negotiation techniques that will be used should be explained and, assuming a principled negotiation approach is to be used, the

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35 See supra Abramson 364-380.
36 See supra Fisher, Ury and Patton, ch 6, What If They Are More Powerful ?
37 Id.
38 Id.
39 See supra Abramson 260.
client should know that this involves separating the people from the problem.\textsuperscript{40}

The fact that much can be achieved by being reasonable, realistic and prepared to compromise should be discussed with the client. This includes making the client aware of the desirability of taking an open approach to sharing the right amount of information, as withholding it risks being counter-productive.

The lawyer should go through the various steps in the mediation, and ensure that the client understands what role it will play in each of those steps, bearing in mind that the mediator will be keen to hear the party rather than the lawyer, e.g., what will the client be expected to do in the joint session and, if there are caucuses, what is their purpose, what can the client say in these confidential sessions, and what is the mediator allowed to say, if anything, to the other side about the caucuses. Careful consideration should be given to who will attend the mediation and speak on behalf of a corporate client. The division of tasks between the client representative and the lawyer should be made clear and the client should understand the importance of its role and feel comfortable with the tasks attributed to it.

\textit{Written submissions}

Some mediators will ask parties to prepare the possibly unfortunately named position paper or pre-mediation submission\textsuperscript{41} setting out their case and provide key documents. Other mediators will deliberately want to know nothing or little about the case in advance. Where the mediator wishes such a submission this is an important job for the lawyer. This submission should succinctly tell the mediator what the case is about and set out the strongest points of the case. An aggressively written court-style document will not be helpful and the objective of reaching a mutually acceptable solution should be borne firmly in mind. The right tone for the mediation can be set if the submission contains a statement of willingness to seek a mutually acceptable solution and remain open to compromise.

\textit{Joint sessions}

It is likely that after the welcome and introduction by the mediator, the mediation proper will start with a joint session (although note that many mediations, particularly in the Anglo-Saxon world, are conducted mainly through caucuses in which the mediator meets with parties separately). The mediator will usually ask each party to make a short presentation of its case and allow time for questions to be asked and explanations given. The parties themselves, rather than their lawyers, have the opportunity to describe their case in their own words. Whilst in a litigation or arbitration the lawyers will prefer to do most of the speaking, they need to understand that participation by the parties in a mediation is desirable and is usually encouraged. The skilled mediation lawyer may also participate at this stage without taking over from the client and it can be effective to speak directly to the opposing client as well as their lawyers. It is helpful to address the weak areas of a case from the outset, be seen to have listened carefully to the other party’s statement, identify points of agreement and address points of disagreement. It is also useful to mention the client’s

\textsuperscript{40} See supra Fisher, Ury and Patton.

\textsuperscript{41} Abramson refers to the « pre-mediation submission ». 
desire to settle the dispute. Although emotions may run high and the mediator may allow parties to vent any emotions, it is generally best to avoid stirring them by being aggressive with the other party.

Throughout the mediation session lawyers should remain alert to helping the mediator and the parties identify the issues and the corresponding interests, needs and preoccupations. Lawyers must know how to put forward their clients’ interests effectively to all participants in the mediation rather than focusing on positions, and to show that the other party’s interests have been understood. Creativity is also a valuable asset for a mediation lawyer when it comes to brainstorming various options for settlement.

During the mediation session the focus will be on listening rather than too much advocacy. Actually listening to others (and not just giving the impression of listening) is one of the most important skills both for the lawyer and the mediator. Active listening needs to be practised, where listeners concentrate only on what is being said and do not allow themselves to become distracted in any way, including by preparing what they are about to say next. Fisher, Ury and Patton say that “Standard techniques of good listening are to pay close attention to what is said, to ask the other party to spell out carefully and clearly exactly what they mean, and to request that ideas be repeated if there is any ambiguity or uncertainty.” Carroll and Mackie suggest that: “A key question to ask when preparing to mediate is – how will we help their team listen actively to us? And how do we show we are actively listening to them?” One thought-provoking definition of listening is: “Listening is a voyage into another person’s universe.”

Caucuses

The caucus, which is a confidential meeting between the mediator and one party only, is the place where, among other things, proposals and the client’s BATNA may be discussed. The lawyers can use their negotiating skills to help their clients at this point. They may be able to counsel their clients to consider making an offer or to be realistic about an offer made by the other party.

Settlement agreements

The mediation lawyer must be able to advise on, draft and, if necessary, take steps to enforce a settlement agreement. Whilst one of the main advantages of mediation is the freedom it affords parties to craft their own solutions, care must be taken to ensure that the obligations set out in the settlement agreement are compatible with the law and other rules such as those applicable to the governance of a corporate party.45

42 See supra Fisher, Ury and Patton, ch 3, Focus on Interests, Not Positions.
43 See supra Carroll and Mackie, 72.
44 Author’s translation from French to English of a definition provided in Institut d’Expertise, d’Arbitrage et de Médiation (IEAM) mediator training materials, in which definitions of listening were provided by participants in mediation training.
45 See supra Beaujour, p. 13.
(4) How to acquire a mediation skill-set

Of course acquiring a mediation skill-set is easier said than done. Whilst there is no substitute for experience, there are a number of steps that may be taken.

Generally familiarising oneself with the process through reading and sharing experiences with others is a start.

Participating in moot competitions, whether as a party, a lawyer, a mediator, a coach or a judge, or observing mediation sessions at those competitions, is a valuable experience (in France competitions are organised by the International Chamber of Commerce (ICC) and the Centre de Médiation et d’Arbitrage de Paris (CMAP)).

Observation of “live” mediations, acting as co-mediator, taking part in training sessions in which simulations and role plays take place, and developing soft skills are all important.

Finally, courses aimed specifically at lawyers, such as the EMBP, are well worthwhile. The three days of intercultural training with which the EMBP opened were followed by a variety of modules covering the various steps in a mediation, including how to counsel a client to go to mediation, obtaining the agreement of the other party to go to mediation, when to commence mediation, preparation for mediation (notably preparation of a mediation plan), numerous role play exercises, modules on related disciplines such as collaborative law, and modules on judicial mediation. The participants were able to benefit from the experiences of members of the judiciary, in-house counsel to a number of Paris-based international corporations, mediators, business people and other lawyers.

Conclusion

The lawyer’s “traditional” skill-set is a double-edged sword when it comes to mediation. On the one hand, if that skill-set is used as in litigation, the result can be a sabotaged mediation. On the other hand, the “traditional” skill-set, supplemented by soft skills, may be used to excellent effect in mediation, provided the focus is shifted to adapt to the mediation process. That is the difficult part and requires a conscious effort as well as specific mediation training and practice.