



WWLD: What Would Lincoln Do?

5 Mediation Skills



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Be Likeable

Lincoln, a legendary lawyer, as well as president, declared, “The only lasting way to eliminate an enemy is to make him your friend.”

Professor Robert Cialdini’s seminal book, Influence: The Psychology of Persuasion, cites seven “weapons” of influence. Likeability is one. Cialdini’s research shows likeability is a way in which we can influence people. It’s the key reason that when I’ve tried cases, I’ve always tried to be the nicest person in the courtroom. Jurors are human, and they are more likely to be susceptible to persuasion from someone they like.

This works in mediation, too. Being the most likeable person in the mediation room can work to your client’s advantage as well. This involves “making nice,” a different mind-set than the warrior mentality often seen in litigation. This warrior mind-set is sometimes encouraged by the client and sometimes by the milieu in which lawyers work. We need to educate our clients that the warrior mind-set they want to see is almost always counter-productive in mediation, especially in the joint session.



Take it from master negotiator Charles Craver, the well-known negotiation professor at The George Washington University School of Law, who points out in his hornbook, Effective Legal Negotiation and Settlement:

“Even inherently competitive legal negotiations—such as those pertaining solely to money—do not have to be conducted in a hostile fashion. In fact, negotiators who can induce their opponents to like them and their clients are usually able to obtain better results than bargainers who do not generate sympathetic feelings. (Citations omitted.)”

He cites to studies which show this, as well as studies which show the opposite: lawyers who commence negotiations in a negative mood negotiate more adversarially and tend to generate less efficient overall results

Be Positive

As I just mentioned, lawyers who litigate for a living are apt, at times, to take on the persona of a warrior. As a lawyer representing clients in litigated conflict, I have taken on my clients' causes as my own. Sometimes it feels like winning is everything and the only thing. The skill set used in day-to-day litigation tends to be zealous, aggressive advocacy.

When I speak to litigators about mediation, I sometimes start with what mediation is not.

- It is not armed conflict.
- It is not hand-to-hand combat.
- It is not Moot Court.

Mediation calls upon us to use a different skill set. One that is more collegial, cooperative and collaborative. Best to leave the attack dog persona at home.



Effective negotiators listen to, and often out-listen, the other side. They accentuate the positive. They look for common ground. They talk about interests, not positions. They engage the other side in problem solving. They figure out ways to create value.

Cialdini's Rule of Reciprocity is helpful here.

(See [Influence: The Psychology of Persuasion](#).) We are trained from birth to repay favors, gifts, hospitality and concessions. Be nice. Give out compliments.

Express appreciation.

To be an effective negotiator, changing your attitude can reap rewards for your clients. Imagine a mediation in which you "won" by creating value for your client. And in the process, you were your own best (albeit tough) self.

It starts with the mood and attitude you take into the mediation room. If you walk in feeling positive and optimistic, you'll be more likely to stay balanced throughout the mediation and get a better result for your client.

**Be positive. Stay positive.
See the difference it makes.**

Be Open to Being Persuaded

O.K. This is counter-intuitive.

In preparing for a mediation, wouldn't you want to be rock solid in the rightness of your position, so that you can more effectively wrestle the other side into submission? Not necessarily.

Being open to persuasion can make you more persuasive.

Professor Jay Conger (Claremont McKenna College), in Winning 'Em Over, addresses the myth that persuasion is a one-way process.

“At the heart of successful persuasion there is a continuous feedback loop from our audience to ourselves. To persuade meaningfully, we must not only listen to the other person and understand his point of view; we must also incorporate his perspective in our arguments. And we must do it in a manner that allows him to feel that we have positively responded to his needs.”

This is a tricky frame of mind for zealous advocates. One of the things we do for our clients is take on their causes. Many times this involves persuading ourselves of the rightness of their



cause. The better job we do of persuading ourselves, the harder it is to be open to different points of view. We get caught up in the “I’m right, you’re wrong” syndrome.

If the other side gets the vibe from you that you are not open to persuasion, however, you run the risk that they will close down themselves. If you won't give an inch, chances are, they won't either.

Many times lawyers don't make the effort to see the dispute from the other side's point of view. Sometimes lawyers don't

understand the other side's point of view. My recommendation is to ask. Listen to where they're coming from. If you can figure out a way to be persuaded to one of their points (even a small point), you can pave the way to mutual concessions and probable resolution.

Listen to Your Clients

We, as lawyers, tend to be better at message delivery than we are at listening.

Let me make a clear distinction between hearing and listening. Hearing is automatic. Listening requires effort.

Ken Cloke made the distinction recently between “listening at” and “listening with.” If you listen “with” your client, that is, be fully present (thus the photo) when they speak, you’re more apt to discover what is important to them. (I realize the “present” photo is a little cheesy, but my other choice was an ear, which could connote hearing instead of listening, and then the whole point would be lost.)

The ABA suggests that we ask our clients: What is really important to you about this case and why? As a lawyer, I’ve made a lot of assumptions about what my clients have wanted. If I had adopted a more curious attitude and asked more open-ended questions, as opposed to cross-examining them, I likely would have discovered there was more to the case, in my client’s view, than the monetary value.

Here are some suggestions for empathetic listening:

- Suspend your own thoughts and feelings
- Give your full attention and be present
- Don’t judge
- Check to make sure you understand



Fortunately, Mark Goulston, M.D., a psychiatrist, business consultant and coach, has outlined his secrets of success in *Just Listen*. One of the impediments to deeply listening is our natural inclination to interrupt with a comment or with an analogy from our own experience. Dr. Goulston recommends reining in that inclination, and instead, asking the speaker to continue speaking. He encourages them with three types of “interventions”:

1. “Tell me more.”
2. “Hmmm,” and,
3. “Really?”

The point is that the case is the client’s. If you listen carefully and ask open-ended questions, you may find that what they want is not what you assumed they wanted. And it is likely that at mediation you will serve your clients better, because you will work to create value which will address all of their concerns and interests.

Prepare for Emotions: Your Clients'...and Yours

As a practicing lawyer, I never thought much about emotions. If anything, I made an effort not to feel them. Yes, my clients had them, but that's why they hired me—so that I could be their dispassionate advocate. Yes, I had them, but dwelling on them only made me compassionate, not dispassionate, so I ignored them. That philosophy worked pretty well in trial preparation and trial, but not so well in negotiations and mediations.

Strong emotions come up in every negotiation. Your client feels them and you feel them. It therefore makes sense to plan for, and address, emotions—the elephant in the room.

Prepare your clients by letting them know that during the mediation, they will have strong emotions, mostly negative. Tell them that in similar circumstances you have had clients who felt anxious, perhaps a little fearful, angry, vindictive, used, disrespected, etc. Explain the back-and-forth of negotiations, an arena in which most likely at some point, they will begin to feel devalued. A party in a recent mediation made this point beautifully: he said he felt like a used car being haggled over.

Prepare yourself. It's a rare mediation in which at least one lawyer doesn't get angry. The causes are many: a lowball initial offer, a failure of the other side to reciprocate in concessions, a feeling that you are being jerked around, etc. Enter every negotiation with some strategies for dealing with strong emotions: a well thought out plan of concessions, three deep breaths (this actually works—ask the neuroscientists), taking a physical break and walking around outside, becoming the fly on the wall and looking at the big picture, etc.

By having a conversation with your client before the mediation, you can help defuse some of this reactivity, which will allow your client to be more objective in considering demands and offers. By having a conversation with yourself, you can be less reactive, too. Negative reactivity is the last place from which you want to be negotiating.



Further Reading

All of the books I've cited in this guide are excellent books on persuasion and negotiation.

Cialdini, Robert, [Influence: The Power of Persuasion](#)

A social psychology book full of research studies which support Cialdini's seven tools of influence.

Conger, Jay, [Winning 'Em Over](#)

Essentially a book for marketers and salespeople, with good practical negotiating advice for all of us.

Craver, Charles, [Effective Legal Negotiation and Settlement](#)

This is a hornbook with a classic roadmap for negotiation.

Goulston, Mark, [Just Listen](#)

Goulston is a coach for leaders whose tips and strategies are useful in all of life's negotiations.

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