

In Early Mediation, Negotiate With Empathy, Not Threats

By **Sidney Kanazawa** (April 7, 2022, 5:17 PM EDT)

On March 30, Los Angeles Superior Court Presiding Judge Eric Taylor announced an expansion of an early resolution employment case pilot program.

The program encourages resolution of employment cases through early virtual mandatory settlement conferences. Other courts have similarly encouraged early settlement conferences and mediations to relieve their crowded dockets of their COVID-19 backlog.

These early settlement conferences, mediations and negotiations will require a different mindset. Quite commonly, we negotiate with hard bargaining threats and disrespect for the opposition, only focusing on how our side is right and will win at trial or arbitration.



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Our threats are intended to make the other side feel vulnerable and force them to see the world through our eyes. Our attempted imposition of fear on our counterpart often triggers primal reactions — to flee, to freeze or to fight. Wishing to appear strong, both sides usually choose to fight and to intimidate each other rather than flee or freeze by withdrawing or succumbing to the opposition's demands.

Neither side generally chooses to listen and acknowledge any weakness in their own case. Both fear such acts will be interpreted as weakness. Both sides opt for power and leverage rather than empathy and understanding. And both sides assert with confidence that a third party — court, jury or arbitrator — will vindicate their perspective of justice.

But what happens when the threat of vindication by a third party is absent, or when pandemic forces or crowded dockets defer or suspend the threat indefinitely?

Doors open. If nothing else, the last couple of years of COVID-19 restrictions have taught us that there are so many more options if we talk about opportunities rather than threats. This shift has beneficially forced us to see the world through the eyes of our opponent.

What would our opponent see as an opportunity? What could we do to fulfill that opportunity? Options could include immediate monetary or injunctive relief, flexible business arrangements, payment schedules, future options, and personnel or procedural changes.

During negotiations and mediations, parties should keep in mind that none of these creative resolutions can be ordered by a court or arbitrator. A court and an arbitrator are like an on-off switch. They can only decide a narrow range of issues up or down. They can only order a very limited set of remedies. And they can only make their orders when their dockets and schedules permit.

Even simple apologies and payments of a judgment over time are usually not within the range of orders a court or arbitrator can issue.

Moreover, threats of a court determination are generally hollow. The rate of disposition by trial in civil cases had fallen to less than 2%. In fiscal year 2021, only about 0.5% of federal cases even reached trial.[1]

Negotiations and mediations should therefore be opportunity-focused, as they encourage a very helpful mindset of curiosity, cooperation, creativity, brainstorming, empathy and flexibility. Without an imminent threat of a court or arbitrator action, we are forced to be curious about how this dispute got to this stage and what continues to drive it.

Through dialogue and cooperative brainstorming, we can explore creative options that might fulfill the interests of both sides, without threats. In the process of actively listening to each other — as opposed to threatening and parrying against threats — we may begin to hear and feel the other's interests and may find that a little empathy and flexibility will spark reciprocal conduct on the other side.

This is not the mindset of a warrior or zealous advocate.

It is the mindset of a curious scout: one who attempts to accurately see things as they are, not as her side would like things to be; one who wonders how the parties got here; one who listens to what is said, and what is not said, and tries to see — without filters — the world through the eyes of the other and how that perspective was formed. Julia Galef writes about this mindset at length in her recent book, "The Scout Mindset: Why Some People See Things Clearly and Others Don't."

It is also the mindset of a hostage negotiator who recognizes that a hostage taker will only hear and be persuaded if he feels he is negotiating with someone with whom he can identify and trust on some level. Chris Voss, a former FBI hostage negotiator, writes about how open-ended questions are the FBI's secret weapon and help to establish this identification and trust in his book, "Never Split the Difference: Negotiation As If Your Life Depended On It."

And it is the mindset of a negotiator who understands that common interests cannot be assumed. To find common interests, open-ended questions must be asked to give the parties a chance to express — in their own words — what is important to them. Alexandra Carter, a mediator, litigator and law professor, writes about the value of open-ended questions in her recent book, "Ask for More: 10 Questions to Negotiate Anything."

In their respective books, without mentioning Rule 1 of the Federal Rules of Civil Procedure, which succinctly states the scope and purpose of our federal civil courts and procedures, Galef, Voss and Carter separately describe how to secure a just, rapid and inexpensive determination of every action — without threats.

All of them rely on building trust. All of them recognize that our natural bias of seeing the world through only our own lenses is limiting and unproductive when confronted with someone who sees the world

from a different perspective. All of them understand it is hard to force an opponent to see the world through our eyes.

It is far easier to see the world through the other's eyes and brainstorm with the other about how we might solve their problem. All encourage asking, rather than assuming, the other's intentions and interests. And all suggest open-ended questions to uncover the other's interests and a possible road map for a mutually acceptable path forward.

To capitalize on the opportunities of early negotiations and mediations, we need a different mindset. Threats of a distant court or arbitrator action are weak. Threats and disrespect fuel distrust and fear that prevents listening and collaboration. Threats and taunts push people apart and compel them to fight and defend. And unfulfilled threats — like insincere apologies — are costly to a party's credibility.

By contrast, curious, nonjudgmental, open-ended questions signal respect and a willingness to listen. Open-ended questions give the opposition a semblance of power to answer in any way they think appropriate. Open-ended questions allow an opponent to describe, in their own words, their underlying interests. Open-ended questions do not demand opponents concede the error of their perspective.

Rather, open-ended questions allow opponents to hear each other and non-threateningly collaborate on mutually agreeable solutions. Questions could include the following:

- Tell me how you arrived at your perspective?
- What would you like to accomplish today?
- How can we do that?
- Who needs to be consulted?
- What can we do now to put the past behind us?
- What problems do you foresee?
- How should we proceed?
- What should we consider first?
- What are our alternatives?

In fact, openness to listening and conceding weakness is one of the most powerfully persuasive acts in a negotiation. Think about it. If a party concedes a weakness, it crushes the opposition's bravado and exponentially increases the party's credibility and negotiating power. Authenticity, honesty and the ability to see beyond our own talking points are far more persuasive tools than threats of a distant possible determination by a court or arbitrator.

Threats make others feel vulnerable, triggers their primal instincts to fight and are ineffective when court congestion and backlog renders the threat remote at best. There is real gold in early dispute resolution but to uncover that gold requires a clear-eyed opportunity mindset, not a partisan threat mindset.

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[1] Jeffrey Q. Smith and Grant R. MacQueen, "Going, Going, But Not Quite Gone: Trials Continue to Decline in Federal and State Courts. Does It Matter?", 101 *Judicature*, No. 4, 27 (Winter 2017) <https://judicature.duke.edu/articles/going-going-but-not-quite-gone-trials-continue-to-decline-in-federal-and-state-courts-does-it-matter/> (April 5, 2022); https://www.uscourts.gov/sites/default/files/data_tables/jff_4.10_0930.2021.pdf (April 5, 2022).