

ARTICLES

Mediator Insights: A Glimpse Behind the Curtain

By Sylvia Mayer – June 14, 2022

*Somewhere over the rainbow, skies are blue, and the dreams that you dare to dream,
really do come true.*

Sung by [Judy Garland](#), as Dorothy in *The Wizard of Oz* (MGM 1939).

In mediation, just like Dorothy, we travel from Kansas down the yellow brick road to the Emerald City to reach blue skies and our dream—home for Dorothy or conflict resolution (or settlement) for us. And, just as Dorothy needed help from Scarecrow, Tin Man, and Lion, so too mediators need help from the parties. While we have many tools in our mediator’s toolbox, we need you to help us help you. Below are some suggestions.

Authority to Decide

Pay no attention to that man behind the curtain.

Spoken by [Frank Morgan](#), as the Wizard in *The Wizard of Oz* (MGM 1939).

Although Dorothy is told to pay no attention to the man behind the curtain, in the Land of Oz the man behind the curtain is the one whose attention is most needed to achieve her dream. The same is true in mediation.

While, to some degree, the mediator may be “the man behind the curtain,” there is no settlement without authorization from the true decision makers. It is important that the actual decision makers, with final settlement authority, participate in the mediation. Absent participation, the decision maker loses out on the dialogue and information exchange that occurs throughout a mediation. It is this process that guides the progression of settlement offers.

For those instances where the true decision maker cannot fully attend a mediation, effective workarounds usually are available. (Of course, in some situations, a settlement in principle attained in the mediation may remain subject to board or regulatory approval.) Over the last two years, one of the advantages of mediations on a videoconferencing platform is that it is far easier for the ultimate decision makers to participate substantively, without interrupting their entire workday, by having them join periodically. As in-person mediations resume, keep in mind that conducting the mediation in an online or hybrid format may enable greater participation. Alternatively, the authorized representative attending the meeting should have an open line of communication with the decision maker throughout the mediation. This allows the decision maker to share in the learning curve even if on an abbreviated basis.

Addressing Client Emotions

You’ve always had the power my dear, you just had to learn it yourself.

Spoken by [Billie Burke](#), as Glinda the Good Witch in *The Wizard of Oz* (MGM 1939).

Talk to your mediator. Openly and candidly. Is your client emotional about the mediation? Does your client have an unrealistic view of the case? Is there a barrier to settlement and, if so, what is

it? Are there business concerns outside the scope of the mediation that impact settlement? Is there an upcoming hearing, ruling, or deadline that affects the negotiation? What is the history of settlement talks between the parties? These are all things to share with your mediator in a pre-mediation discussion. Here's how this helps:

- When I know your client is emotional, then I can make sure to give your client space to safely share his or her views with an empathic listener (me).
- When I know there is a barrier to settlement, then through mediation, we can explore ways to avoid the barrier, go around the barrier, or pivot, depending on the resolution of the barrier.
- When I know your client has unrealistic views, then I can frame information in different ways to assist your client in seeing the situation through a new lens.

Look within. You probably know what I need to know to help the parties move to resolution.

Receptivity

Follow the yellow brick road, follow the yellow brick road, follow, follow, follow, follow, follow the yellow brick road.

Sung by the actors cast as [Munchkins](#) in *The Wizard of Oz* (MGM 1939).

To get to the Emerald City, you must follow the yellow brick road. But before you can follow, you must be open to being led. In the context of mediation, this is receptivity.

Receptivity means being open (receptive) to new information and, in particular, new information that conflicts with your preexisting views. Common barriers to receptivity include the following:

- Emotions—because parties need time to process their emotions before they can take in new information.
- Anchor bias—because when a party becomes fixated on a specific fact, event, or case, it is hard for that party to hear anything that contradicts those views.
- Unconscious bias—because it causes parties to discount information based on factors not relevant to the decision-making.

Think of these as the Tin Man (emotions), Scarecrow (anchor bias), and Lion (unconscious bias) of the mediation. In *The Wizard of Oz*, the Wizard shows them that what they sought (heart, brain, and courage) was within them already, which their journey with Dorothy demonstrated.

So, to do this in mediation, we take the time (the journey) to work through the barriers—like emotions, anchor bias, and unconscious bias—to find what is already within, which is receptivity to opportunities to settle.

Reciprocity

If ever a wiz there was, if ever, oh ever a wiz there was, the Wizard of Oz is one because, because, because, because, because, because, because of the wonderful things he does.
Sung by the actors cast as [Munchkins](#) in *The Wizard of Oz* (MGM 1939).

Reciprocity works hand-in-hand with receptivity. Engrained in the psyche of nearly every culture is the rule of reciprocity. We learn it as babies and carry it with us forever. If I give you something, you feel the need to reciprocate and give me something. But in mediation, reciprocity is ineffective unless and until there is receptivity.

Often in mediation, one party makes a big move early in the mediation, but that party becomes frustrated when its expectation of reciprocity is unmet. Why is there no reciprocity? Because the other party isn't there yet. This does not mean that an early big move is a mistake (sometimes it is quite effective), but it does mean that you cannot rush the process. Receptivity is needed before reciprocity can work. Giving the other party the time, space, and information needed to reach receptivity paves the way to effective reciprocity, which just may lead you straight to Oz.

[Sylvia Mayer](#) is an arbitrator, mediator, and attorney with S. Mayer Law in Houston, Texas.