

## Establishing “Mediator-Attorney Synergy”

by N. Janine Dickey, Esq., APM

Many experienced mediators would likely rate their most notable successful mediations as those where *Mediator-Attorney Synergy*\* moved the most intransigent of parties towards a mutually satisfactory resolution. The idealist mediator would say this synergy occurs in every successful mediation, but the realist mediator knows it is a difficult goal which the mediator must intentionally strive to achieve using honed skills and expertise built up over time. The following considerations may assist both novice and experienced mediators to reach that sought after *Mediator-Attorney Synergy*, which at its core is simply building a rapport of credibility and trust with counsel, to facilitate working together towards successful dispute resolution.

**Exercise professionalism and intentionality during each and every communication.** The first substantive communication in the mediation process is typically the telephonic organizational call. While it is my practice to have previously reviewed the parties’ pleadings, I still begin by asking each counsel to briefly summarize the matter. This invites the attorneys to be active players in the process from the onset, and becomes the first step towards establishing *Mediator-Attorney Synergy*. This preliminary exchange also gives the mediator instant cues and insight as to the personality, advocacy style and relationship between counsel.

**Conduct case management with deferential control and flexibility.** I have heard a myriad of complaints from attorneys that mediators often push them into a mediation session before they are ready. While one of mediation’s greatest benefits is the

opportunity to resolve disputes before the parties incur substantial discovery costs, a mediator can destroy the opportunity to establish *Mediator-Attorney Synergy* if he/she dictates the level of discovery without meaningful input from counsel. Counsel needs a comfort level regarding his/her ability to advise clients during the mediation. Thus, while a mediator should encourage the exchange of only critical discovery prior to the initial mediation session (typically document production), in appropriate cases, a deposition or two, or even the exchange of expert reports may be essential. Establishing the sought after *synergy* demands that you work WITH counsel and avoid conveying that your mediation process is at odds with counsel’s perceived early discovery needs.

**Mediator-Attorney Synergy demands deferential, yet FIRM CONTROL of case management and the mediation process.** This is not a contradiction. To the contrary, because a mediator must consider the positions and requests of all counsel representing adverse parties, a mediator’s role as a neutral offers built-in checks and balances. It is, in fact, essential to firmly reign in unreasonable demands of one party (for example demands for costly excessive pre-mediation discovery) in order to promote a controlled balanced forum. [And *always* confirm discovery and scheduling agreements in writing.] Attorneys will respect a mediator who maintains deferential control; this two-way professional respect fosters *Mediator-Attorney Synergy*.

**Customize your mediation approach and process.** One size does not fit all. One of mediation’s greatest benefits over litigation is the ability to tailor the process to account for the substantive nature of the dispute, the complexity of issues, the amount in controversy, the personalities of the parties, and the personalities of counsel. Attorneys will appreciate the mediator’s willingness to be flexible and said flexibility will lead to a more synergistic and effective process.

**Remain Accessible.** A mediator should extend an open invitation for counsel to contact him/her confidentially prior to and throughout the mediation process.

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Incorporating the above, maintaining professionalism, and exercising intentionality during each and every communication with counsel, will result in the establishment of *Mediator-Attorney Synergy* and the ultimate goal of effective mediation.

\*SYNERGY *n.* “The action of two or more substances, organs, or organisms to achieve an effect of which each is individually incapable.” *The American Heritage Dictionary 2<sup>nd</sup> Col. Ed. 1985.*

**N. Janine Dickey, Esq., APM** practices in NJ and NY and is accredited in business and commercial mediation. She serves as: advanced mediation trainer & coach; co-chair of NJAPM’s employment mediation interest group; director of NJSBA-DRS; member of NYSBA-DR and member of Garibaldi Inn of Ct. [njdickey@civil-mediator.com](mailto:njdickey@civil-mediator.com)