

# The Zen of Mediation - Tactical Warfare at it's Best

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A good friend of mine once said that there are 6 essential traits for a good mediator: Patience and Persistence, Patience and Persistence, Patience and Persistence.

Mediators specialize in the impossible. If a case were easy to settle the parties wouldn't need a mediator, unless ... there are client control problems, communication problems, ego and personality issues, animosity, poor legal representation, hidden issues, recalcitrant partners, and/or group constituencies that must be satisfied. The good news is that these problems are so prolific that mediators have job security. Yet not every mediator is the same and not every negotiation can be dissected out of a casebook. The real cost of a mediation is the time and expense of assembling the key players. It is imperative to use this time wisely. There is a certain momentum to the process that good mediators capture and build on. Yet, some people tend to come out better, the settlement is more satisfying, more beneficial or more skillfully performed. What is the difference? How do you use mediation tactically and strategically for your own best interests?

Before going into battle a Zen master carefully prepares himself. S/he removes any obstacle from the mind, eliminates any distractions, and concentrates completely and intensely upon the matter at hand. A Zen master sees *beneath* the surface of the problem to what is *motivating* the reaction, what underlying emotions are stimulating or challenging my opponent. How deep can I go in my understanding of the multiple layers of meaning implicit in any human interaction? What are my objectives, what is my skill set, my tools necessary to achieve a skillful result?

Meditation is separated from mediation only by a little "t". How centered and balanced can I make myself, concentrating my energies and magnifying my power? In the calm quiet of my own reflection I can see deeper into the eyes of my adversary. As a mediator, my adversary is the problem. How can I move this immovable mass into something lighter, more flexible, and more transportable so that solutions can be found? If I am lucky, several of the attorneys and clients in the process will understand the tactical nature of mediation and I will have partners to work with. In other cases, the parties are so entrenched in their animosity, greed, expectations or righteousness, that I must work alone. So how then, do you become your own Zen master at negotiation?

First of all, you select a mediator that has the power to blend process expertise, creative problem solving and common sense. Using a mediator allows you to control and observe the proceedings simultaneously. Just because someone is a good lawyer or judge does not mean they are a good mediator or a master at negotiation. Does the mediator have the ability to think creatively and help fashion novel solutions? Can the mediator handle difficult personalities? Venting is a necessary part of the process. Can the mediator deal with intense emotion without "ventus interruptus" and shutting off the necessary emotion dump?

Second, prepare the mediator for the case. What do you want the mediator to know so that s/he can set the stage? Giving the mediator a "heads up" on client issues, personality issues or hidden agendas is tactically wise. Of course, you have to trust your mediator before you divulge your game plan. You want to know how s/he will play out "the game".

Third is concentration. Don't allow any distractions. Focus entirely upon the matter at hand. Strategize with the mediator and with your client. Good negotiators never just make an offer. They make an offer designed to *provoke* a response from the other side. When you are provoked to reaction, who is really in control, you or your opponent? It is essential that you maintain control, both of yourself and of the process. Don't become reactive. *The difference between responding and reacting is the difference between winning and losing.*

When you react to something, your opponent is pulling your string and making you dance like a puppet. When something happens that makes you angry, reactionary or distrustful, take a deep breath and go into clinical mode. Why did the person do this? What reaction was s/he trying to provoke? Was it intentional or merely a result of his own reactionary status? Once you begin to diagnose, the sting of the reaction cools a bit and you can reflect on the response you want to make. Of course, with a skilled mediator, s/he will know when you need to vent and will then help you regain a sense of control so that your negotiations continue in a responsive mode rather than a reactive mode.

Closure is a critical element in any negotiation. As my father taught me when I first began to practice law, "be a deal maker, not a deal breaker." When negotiations are difficult or the stakes are high, the propensity for a last minute scam, final thrust, or remorse is high. You must guard against this. As a mediator I control the process. There have been times when I kept one side in their caucus room and escorted the other side out the elevator so they wouldn't see each other. One small smile interpreted as a snicker can ruin a deal. Of course, closure with handshakes and congratulations is optimum, but maintaining the deal is always the key. A Zen master never gloats. You never know when you'll have to deal with these folks again and more importantly, gloating takes away from the mastery of yourself.

Ultimately, mastery of self is the key to mastery of life. Negotiation and the use of mediation can be coursework in the curriculum of life. By seizing every opportunity to perfect yourself, your skill set and your ability to get and stay centered in difficult situations, you develop self-mastery. It is the greatest gift you can offer.



**Hesha Abrams, Esq.** a nationally acclaimed attorney mediator for over 30 years, is known for crafting highly creative settlements in very difficult cases. She has created settlements worth over \$700 million in the past year alone. She specializes in creating innovative solutions for complex or difficult matters in Commercial, Intellectual Property and "Deal Mediation", which is driving a complex business deal to successful signing. She has the unique ability to work with big egos and strong personalities. Hesha has successfully mediated for thousands of parties and was an innovator in the mediation field serving on the legislative task force that drafted the landmark Texas ADR law. She mediates, consults, and negotiates on behalf of private parties throughout the country and internationally. She has worked in London, Hong Kong, Mexico, Thailand and India and with parties from all over the globe in complex patent licensing deals. She taught mediation and negotiation at the 2001 International Symposium on Negotiation and Conflict Resolution in The Hague. She was on the national panel for Dow Corning Implant cases and was the Chair of the Texas Bar Intellectual Property ADR Committee. She has been appointed Delegate to the Fifth Circuit Judicial Conference, 1988, 1990, 2002, speaker 2005, elected as a fellow of the Texas Bar Foundation in 2006 and received the Brutsché Award for Excellence in Mediation from the Association of Attorney Mediators.

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