

Annual Montana Arbitration and Labor Relations Conference

How to Become a Better Advocate and Negotiator

September 2025

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"The best explanation of the good old days is a bad memory"

Franklin P Jones, 1953

While labor relations have become more civil in the last decade, there are still skills and behaviors that we can improve upon to become better advocates and negotiators.

YOUR CLIENT

Does your grievant or management representative act like you are the enemy? Why? You think of yourself as their champion! For example, in my 35 years as a mediator I have noticed that toward the end of the session, the plaintiff will often ignore his or her lawyer's advice and ask for mine. This is something that labor relations reps can improve upon with some simple strategies.

Try this:

1. Front Load Trust. Spend time with your client and LISTEN. Let them vent. This takes time and many advocates are not comfortable with the emotions or the time it takes to do this. Emotions make many people uncomfortable and looking for an escape hatch. Practice just "being present." The payoff will be evident throughout your relationship with your client.
2. Use Listening Skills. These are skills we never learned in law school:
 - Make eye contact when your client is talking. Put down your yellow pad and truly engage.
 - Ditch your watch and devices. (Would you want your doctor to check his watch for messages while you are describing your fear or pain?)

- Lean forward as they speak.
- *“Don’t just do something, stand there.”* Be quiet. This is about them.
- Paraphrase so that they know you are listening. (“So, what I am hearing you say is....”)
- RELIVE = RELIEVE. Allow for the “Magical History Tour.” It is cathartic for people. (For those under 40, the Magical Mystery Tour is a Beatle’s song.)
- Listen carefully to better understand the motivation for an action.
- Learn about patterns of human behavior.

(As an example, in sexual harassment cases there is often a link between sexual abuse at a young age and behavior in the workplace. Learn to look beyond the black and white issues before you! Read up on behavioral psychology, not just case law.)

3. Simplify Everything You Say. You are used to legal words but they are not.

Recently, Justice Sonia Sotomayor was featured on a talk show with a host who asked her how cases get to the Supreme Court. Her explanation about the appeals process was clear and simple and could be understood by a fifth grader. However, at the end of the lesson she added, “but cases are truncated now and that is bad.” She lost many people with that one word. (Your client probably doesn’t know what an MSJ is or what arbitrability arguments mean. Simplify.)

4. Do a Deep Dive. What many people call intelligence really boils down to curiosity. Use “open ended” questions to draw out your client. For example, if you are the management representative, ask the terminating manager to tell you what the relationship was like with the grievant on a day-to-day basis and if there were any personality conflicts between them. (An arbitrator can often pick up on this and it may dilute a “just cause” argument). The union representative might want to ask the grievant what was going on in their life during the time leading up to a charge.
5. Step Back. *“When you are inside the jar, you can’t see the label.”* Learn to step away from your case and see it from an outsider’s point of view. You may be missing something with your advocate glasses on that is glaring to others. Run your case by a relative or friend. (Teenagers are good at providing accurate feedback.)

6. Watch the Optics. Arbitrators will notice your interaction with your client. Are you placing them far away from you at the hearing table? Do you let them eat lunch alone? If you don't like them, should I?
7. Deliver Bad News Without Insulting Your Client. In mediation I often say, "*They may lie better than you tell the truth.*" You could lighten your message by saying, "The arbitrator may think you only have a pair of 2s." By softening the delivery of bad news, you won't alienate your client.

When you truly show empathy by drawing out your client without harsh judgment, they will trust you and listen to your advice.

YOUR OPPONENT

"Seek first to understand and then be understood"

Saint Francis of Assisi (13th Century AD)

Sometimes you will be up against an advocate that you just can't get through to.

You may have had run-ins with them just once or over a long period of time. Fights may break out over minor issues and personal insults often follow. This is not uncommon in the labor setting, and used to be not only acceptable but encouraged. (On my first day with a major airline, I was told the last VP of labor relations got fired because he was "too cozy with the union." His replacement's style of communication contributed to the first flight attendant strike in the airline's history. (One labor relations officer was quoted as saying that employees are a "brick in the company's backpack".)

Try this:

1. Be Civil at All Times.

"Before taking a journey of revenge, dig two graves." There is a management side attorney in California who copies arbitrators on all of his scheduling emails to opposing counsel. They are always rude and unnecessarily combative. When insults get hurled at the scheduling stage of the process, a grievance that should have been settled probably won't be, and a one-day hearing will turn into three.

Another attorney (in the same firm!) sends casual, friendly reminders and suggestions to opposing counsel, and is always willing work on location preference

and closing brief extension requests. His cases normally settle. If not, the hearing is very cordial and productive with little grandstanding and objection hurling.

2. Practice Empathy and Kindness Even When It Seems Impossible. (Get curious not furious!)

Put yourself in their shoes. Your opponent may have a very difficult client who thinks they are not aggressive enough or they may not understand the contract case they are about to present. Empathy is a muscle group. (Over the past 34 years, countless attorneys have called me the night before a mediation to tell me that they despise their client but will have to act like a jerk in the session to pacify them.)

Maya Angelou said, *“People might remember what you said, they might remember what you did, but they will always remember how you made them feel.”* Keep this in mind and look back to something you may have said to an impossible opponent to cause the rift. (I have this quote posted near my Zoom screen to remind me to avoid the end-of-day impatience.)

One of best litigators in Texas starts all of his opening statements in mediation by complimenting the other lawyer's skills in front of their client. (Often this is the first time they have met!)

3. Your Behavior May be So Loud They Can't Hear You.

While being theatrical and insulting to the other side may seem like that is the way to be a good advocate, it is not. Many young lawyers and old school labor reps feel like this is their duty. While it may be kind of fun in the moment it is counterproductive.

In handling dozens of police terminations for a large city in Texas, I have witnessed the chief of police approach the grievant before the hearing and shake his hand. Every arbitrator in Texas who has heard these cases has commented on this at professional gatherings. We have concluded that although we don't want this moment to affect our decision-making process it is difficult to ignore when assessing the chief's credibility as a witness.

4. If It Feels Good, Don't Say It.

Screen your words. Your job is to resolve conflict, not create it. The sign of a good advocate is someone who is “measured” in their communications. If an insult slips out apologize at your first opportunity. This makes you look bigger, not smaller.

Ask yourself, *“How will this make them feel”*.

TEXAS STYLE NEGOTIATING TIPS

1. Is Your Opponent “All Hat and No Cattle?” Probably.

We develop the showmanship that we think will work in a negotiation. It doesn't mean your opponent isn't experiencing the same anxiety that you are. Usually, the bigger the show, the more insecure the negotiator is. When an attorney is misbehaving during an arbitration hearing, it is a clear sign that they sense they are losing.

2. Are You Waiting for a Ship at the Airport?

- Sometimes you are not on the same page as your client or opponent. This is where good communication and listening skills come in.
- Open the lines of communication.
- Are you dealing with an opponent who is a “I'm not happy 'til you're not happy” kind of negotiator? Be curious and get to know them better.

3. If You Want a Kitten...Ask for a Pony.

This is an ancient negotiating technique. It is well understood and is part of “the dance.” (That is what mint tea and conversation is for in a rug market in the Middle East. They are insulted if you don't join in the ritual.) Learn this dance! Americans are not very good at it.

4. Ok...a Pony...But Not a Clydesdale.

There is an old Texas saying that “If you hang the meat too high, the dog won't jump.” Your client will often want you to start too high (or too low), but you can manage this process by carefully explaining your past experience with this strategy.

5. “Behind Every Jerk Is a Sad Story.”

If the negotiation is taking a cruel vector, turn on your empathy skills. Talk to your opponent about something besides the deal you are trying to make. Talk about how you are nervous that your client is about to fire you, if that is genuine; or even about stressors at work or at home. Your opponent may reveal something that is affecting their ability to horse trade. Empathy breeds cooperation.

6. Respond Gracefully to Disarm a Combative Opponent.

- In a recent employment mediation, while responding to the monetary demand, a defense counsel blurted out in the opening session, “Who is your supplier?” The 70-year-old plaintiff counsel calmly responded, “If we settle this case today, I will share that with you over a margarita.”
- A plaintiff lawyer in another case shouted out, “Well you are often wrong but never in doubt.” In this case, the young defense counsel closed his brief case and walked out. (I did a short elevator mediation to get the session back on track but a calm clever response would have shown strength and confidence.)
- Another experienced lawyer said to the young female labor advocate who was clearly nervous in her opening, “I have thrown up scotch older than you” in front of the entire room. She had no comeback and her anxiety was evident throughout the day. However, he had not prepared as well as she had, and her client went back to work with full back pay.

In short, the best negotiator in labor relations is prepared, kind and empathetic toward all involved. Practice makes perfect.

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She attended Boston College and Gonzaga University School of Law.

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Quotes are attributed to the author when possible. However, most are not traceable to one definitive source.