

# Understanding Mediation's 'Apex Conversation'

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The highlight of every mediation, as with other forms of drama, is when action comes to a climax (i.e., a decisive moment or a turning point in a storyline at which the rising action turns around into a falling action). It is generally “the moment when the main character changes his point of view or has a transforming event happen.” When this climax happens — and it’s usually easy to tell when it does — you know that settlement is almost certain to result.

Mediators know this, too, and so will structure your mediation to include a series of conversations which ascend to that climax, that "apex conversation," that moment when a main participant in the mediation, usually a client, begins to consider seriously settlement options which he or she had not considered seriously before. Once that apex conversation takes place, all else is, to use another literary term, “denouement,” or falling action which generally leads to settlement, albeit perhaps with bumps on the road along the way.


The purpose of this article is to help advocates understand how mediators structure those ascending conversations and how they, as advocates, can make sure that those conversations do in fact ascend and that the apex conversation does in fact take place.

## What Does the Apex Conversation Look Like?

As with other dramatic climaxes, mediation’s apex conversation often takes place late in the day. It takes place after the client, and her lawyer, have made strenuous efforts to achieve the client’s desired settlement, and have failed, resulting in impasse. Commonly, the apex



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conversation is private, between attorney and client alone. Equally frustrated, both attorney and client will ask, “What do we do now, if we want the case to settle?” If the case indeed is to settle, the client must change her point of view, and consider new options. In many cases, the attorney may have raised these options with the client before, to no avail. But now, the time may be right.

Managing client expectations can be hard. It’s in the client’s best interests for the attorney to keep those expectations in the zone of reality. Mediation can give attorneys their best opportunity to do that difficult job, when we ascend to the apex conversation.

### **How Does Mediation Ascend to the Apex Conversation?**


A choreographed set of steps leads to the apex conversation. Let’s first take them in order of proximity to the apex conversation, and then put them back in chronological order so that the logic of the sequence can become most clear.

#### ***Frustrated Bargaining***

Recall, the apex conversation takes place after strenuous efforts to achieve the client’s desired settlement option — pay less or take more, as the case may be — have failed. So, we need the opportunity for those strenuous efforts to take place. Typically, that consists of bargaining and then impasse. The impasse must be real and the client must understand it to be real. For clients to believe it, every reasonable effort to break that impasse must take place. Those efforts may include:

- shuttle diplomacy by the mediator;
- direct communication between the lawyers (with or without the mediator present); or
- direct communication between the clients (with or without the lawyers or the mediator present).

While shuttle diplomacy by the mediator seems to be used in almost every commercial mediation, shuttle diplomacy alone is not likely to have the greatest persuasive impact on




the clients. The mediator, after all, is neutral. The mediator is not your client's zealous advocate — only you are. When the mediator reports back to you that he has not been able to budge the other side, how do you know that he has done as good a job of trying as you would have? His motivation is never as strong as yours. When you, the lawyer, the advocate, take your best shot at persuading the other side to break the impasse on your terms and fail, the client is more likely to believe that it cannot be done. And, in appropriate cases, where the client takes that best shot him or herself, the lesson can be learned even more strongly.

### ***Information Exchange***

Bargaining goes better if an exchange of information precedes it. Lawsuits are works in progress and good lawyers are always refining, sharpening and improving their arguments. When the sides express their state-of-the-art thinking before the bargaining takes place, the bargaining gains context. The sides better understand why they are bargaining as they are and can focus their persuasive energies on the facts, law and circumstances which most seem to be animating each other's bargaining strategies.

Without this context, negotiation moves can seem random, or at least unprincipled. How does information get exchanged? There may be many ways, including: mediation briefs, sometimes called mediation statements, explanations by the mediator in private caucuses and direct communication between the sides in joint sessions.

Direct exchanges of information are in many ways the best: mediation briefs and joint sessions. The joint sessions may include the mediator with the attorneys alone or with their clients as well. Indirect information exchanges, through shuttle diplomacy in private caucuses for example, essentially make you rely on the mediator to get your message right when he explains it to the other side. The mediator becomes the hearsay declarant of your message, and we all know that hearsay is inherently unreliable. Mediators may have biases, are likely not as fluent with your message as you are and so may leave something out, and are not likely to be able to answer any questions the other side may have as well as you could. In short, it's problematic to rely on the mediator to do your job for you.



Direct information exchanges, on the other hand, allow the other side to receive your information unfiltered, and with the commitment, sincerity and detail that only you, the zealous advocate, can provide. This provides the richest context for the bargaining — often hard bargaining — which is to follow. When the mediator makes sure that high-quality direct communication is taking place, the mediator is not doing your job for you; rather, he is helping you do your job better. Your client benefits when you do your job well.

What about the joint session — the epitome of direct communication — which was once a mainstay of mediation, but which now seems to be an endangered species? Many lawyers have had poor experiences with joint sessions, and now avoid them altogether. Here, we have good news. Joint sessions can still be valuable, if managed properly — and differently than before.


### **Yesterday's Joint Session**

In days of yore, to start a mediation the mediator would simply usher unprepared parties from the reception area to a large conference room, seat them, turn his head one way, blithely ask what they thought, then turn his head to the other side of the table and do the same. With a plenary, unrestricted, unguided agenda, lawyers would default to the familiar courtroom-style opening statements, and conflagration was the predictable result.

No wonder these have fallen into disuse!

### **The Joint Session of Tomorrow**

Mediators are learning. Better mediators work proactively with lawyers on the phone before the mediation, to tailor and focus the agenda for the joint session on those issues which, when joined, will lead to progress when pursued in the subsequent private caucuses and throughout the mediation day. It's no longer correct to call these joint sessions "plenary." Their agendas are no longer unrestricted. In these remodeled and tailored joint sessions, each side can give and receive complete, often new, information about each other's stance on the rubber-meets-the-road issues, interests, needs and values. Hence, each side has a fuller understanding of why the other side is bargaining as it is and can react accordingly.



If the key issues are too sensitive to discuss in front of the clients, at least the lawyers can meet face to face with the mediator. Then, the lawyers' reports back to their clients are more trustworthy than they would be if each lawyer had met with the mediator alone. The report the client hears is a direct report of what her own loyal lawyer has heard from the other side, not a report of the other side's views as filtered through a hearsay declarant, the mediator.


To maximize the effectiveness of the joint session, though, clients should be present. When clients are present in the joint session, they get the other side's message with no filtering at all. To accomplish this, though, we still must deal with the reasonable concerns of both lawyers and clients that these joint sessions not become unduly antagonistic, and that the clients (often relatively unseasoned in litigation) not say anything under pressure that they will later regret. To deal with these concerns, we need to go one more rung down the ladder which ascends to the apex conversation.

### **Building Rapport With the Client**

Rapport between a mediator and a lawyer often pre-exists a particular mediation. Or, that rapport can be built as the lawyer communicates with the mediator during the process of hiring that mediator. Rapport can also be built during the telephone calls before the mediation, to plan the joint session.

Rapport between a mediator and a lawyer's client, though, is a much more delicate subject. A mediator has tremendous power to embarrass a lawyer in the eyes of his client, to upstage a lawyer, to make a lawyer "wrong." Understandably, therefore, a lawyer will closely control a mediator's access to his client. Very few lawyers will permit a mediator to talk on the phone with his or her client before the mediation, even if the lawyer is also on the line.

Instead, it is often possible for a mediator to meet with a lawyer and his or her client, together, at the very start of the mediation day, right after they arrive at the reception desk. This preliminary meeting serves many purposes:

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1. It can answer any questions the client may have.
  2. It can be a dress rehearsal for the joint session and preview of the mediation day.
  3. It can establish some rapport, some chemistry, between the mediator and the lawyer's client.

When this happens, we are ready for a smooth joint session. Everyone understands the agenda for the joint session. Everyone understands what the client's role will and will not be. Lawyer and client are prepared for the client to play that role. Lawyer and client are also reassured that the mediator will not ask the client to say or answer anything inappropriate. The rapport and chemistry lead the lawyer and client to trust the mediator to manage the joint session for maximum progress and minimum unnecessary antagonism. The new style joint session is ready to begin.


Now, let's put it all back together in chronological order. [Literarydevices.net](http://Literarydevices.net) points out that, in classical dramas, there are three acts leading to the climax. Our mediations have three acts, or stages, too, leading to the apex conversation:

1. building rapport;
2. exchanging information; and
3. bargaining.

In any particular mediation, the sequence may not be followed exactly, and there may be backing and filling along the way. Nonetheless, this template can help advocates tell where they are in the mediation process, test whether the groundwork for the next stage is adequate and lead them to what should happen next.

As the third act nears its end, we are ready for the crucial, climactic, apex conversation. All progress has ground to a halt. There seems to be nothing left to do. While our apex conversation will lack the drama of Romeo's duel with Tybalt after the latter has killed Mercutio, it is vital to the mediation nonetheless.

Here's how it commonly unfolds:



After bargaining has led to impasse, the mediator has a caucus with the lawyer and his or her client. The mediator and lawyer underscore what is clear, that the settlement for which the client had hoped cannot be achieved. It is usually best if the lawyer takes the lead and the mediator supports the lawyer's comments. The client, as always, has more reason to believe her own lawyer, who has a fiduciary duty to her, than to believe the mediator, who owes duties to all sides, and who may be perceived as simply interested in making a deal for the sake of making a deal.

The apex conversation finally unfolds when the mediator leaves the room. The client and his or her lawyer must agree that, either they adjourn the mediation, or they take a new approach. They need to consider settlement options which they had not considered seriously before.

Perhaps you have felt what happens when the apex conversation works. There's a palpable feeling in the room. The client's body language, his or her tone of voice, even their breathing, changes. Mentally, emotionally and practically, the client has turned a corner. We are in denouement, the road to resolution. The client is open to new possibilities, perhaps possibilities that the lawyer had predicted and even recommended before, but which the client was not ready to consider, much less accept, until now.

While some bargaining is yet to be done after the apex conversation, it is commonly straightforward, with the parties taking relatively few steps to reach the terms on which the case ultimately settles. Though the denouement road may have bumps, those bumps are generally possible to overcome. Good lawyers will show attention to detail in creating settlement documents, and those details, in particular, can expose disagreements. Where there's a will, there's a way, though, and after the apex conversation, the will to settle is strong. Any further disagreements are commonly worked out in short order.

With this enhanced understanding of the underlying structure of the choreographed conversations we call mediation, it becomes easier for lawyers to work collaboratively with their clients, and with the mediator, to keep the dance going, and move from stage to stage in the mediation process. The result will be better decision-making, more and better settlements and greater client satisfaction with the performance of their lawyers, who will



have proven themselves experts in mediation.



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