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PERSPECTIVE



The importance of trust building in mediation

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By Robert M. Cohen

The process of Mediation has been refined and studied relentlessly since the late 1970's by jurists, academics and ADR professionals. A myriad of law school courses, legal seminars, articles, blog posts and memoranda have addressed the key elements for a successful mediation:

- Selecting a qualified, impartial mediator with subject matter expertise;
- Adhering to the three Ps of mediation - preparation, preparation, preparation;
- Exchanging persuasive yet succinct briefs;
- Constructing a negotiation game plan with alternative options and outcomes;
- Advocating enthusiastically and actively listening;
- Encouraging decision makers to be engaged, respectful and to move beyond anger;

- Defining the true cost of litigation – in terms of dollars, time, energy, and emotion – in the event impasse is reached.

Yet such courses, seminars and articles seldom focus on the importance of trust building as being a critical element in moving the decision makers to consensus and “Yes.”

Earlier this Summer I was mediating a mid-six (6) figure dispute between two close family members. The Plaintiff was represented by competent and experienced legal counsel. The Defendant was in Pro Per and relying on advice from numerous attorney friends. This prelitigation mediation was an attempt to avoid costly and emotional family litigation.

Five (5) hours into the mediation, the Pro Per Defendant seemed to be losing energy and focus. I sensed he was disappointed with the process. I asked him, “Do you believe you can trust my commu-

nications with you?” His immediate response was, “I trust you as much as I can.” The Pro Per Defendant’s response was not inappropriate. He had significant monetary skin in the game, as did the other side; meanwhile, I had no skin in the game other than my pride and reputation and I was profiting by their conflict. I decided immediately that I had to have skin in their game too to prove that I was more passionate about resolving their dispute than in making additional fees. I offered to extend the mediation after the scheduled seven (7) hours - for two (2) additional hours at no charge, because I believed it was paramount that these two close relatives put their dispute to rest once and for all. My offer was gladly accepted, and it energized the parties; after several more hours a partial settlement was reached. I am positive my action made the difference.

Though the concept of trust is amorphous, successful mediators recognize that trust is vital to the process. A party that trusts his/her lawyer, the mediator, and the mediation process, is more likely

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to share information, collaborate, lower defenses, concede “wants,” and be comfortable with the mediator’s guidance. Clearly trust is a rare commodity in today’s world: alternative facts, misinformation, half-truths, and plain lies dominate the internet, electronic and print media, political parties, and social action groups.

How then does one build “trust”? Here are a few of the factors:

- Mediator empathy, impartiality and competency;
- Dependability on the part of counsel;
- Respect for the participants and their positions;
- Transparency, authenticity, sincerity and on occasion vulnerability;
- Reliance on and reciprocity with the opposition – putting into action “The Golden Rule.”

While counsel must contribute to the trust process, it is the mediator’s

duty to take the lead. Several ways that seasoned mediators create an atmosphere of trust include:

- Establishing goodwill by reassuring all counsel and parties that the mediator is empathetic to their circumstances and vulnerabilities and by confirming that the mediation is a safe environment for cooperation, collaboration and problem solving.
- Displaying impartiality and reducing the appearance of bias by being patient, working equally with all parties, being inclusive and never displaying indifference.
- Creating rapport by focusing on the needs of the parties and ensuring that they understand the process.
- Identifying each party’s wants and needs by asking open-ended questions.
- Communicating a realistic understanding of the dispute, being

candid, encouraging, and explaining to each party the gains and losses that any concession will bring about.

- Helping the parties develop clear and realistic expectations while explaining the benefits a mediated settlement will bring.
- Being the benchmark for honesty and integrity.

Trust building is a multilayered and multilateral process that requires continuous effort on the part of all engaged. According to Bryant Uzzi and Shannon Dunlap in their article entitled “Make Your Enemies Your Allies” in *The Harvard Business Review*: “Research shows that trust is based on both reason and emotion. If the emotional orientation toward a person is negative, then reason will be twisted to align with those negative feelings. When we experience negative emotions, blood

recedes from the thinking part of the brain, the cerebral cortex, and rushes to its oldest and most involuntary part, the “reptilian” stem, crippling the intake of new information.” “...(In) these situations, the emotional brain must be managed before adversaries can understand evidence and be persuaded.”

Noted and much sought-after ARC mediator, retired Superior Court Judge Charles “Skip” Rubin explains how trust is created and the impact it has on the mediation process: “Mediated disputes, by their very nature, begin with the parties distrusting each other. Trust building begins and ends with the mediator but is also dependent on the good faith actions of the parties and their counsel, whose trust in the mediator and process is a sine qua non of settlement.”