

By Louise Phipps Senft

The negotiating table

# Turning problems into opportunities

MEDIATION - HUMANIZING

People coming to mediation often have tried repeatedly to resolve their conflict or their dispute without success. For them to be able to resolve it within the mediation room, some thing or things have to change. It may be how they had gone about addressing their conflict, or not addressing their conflict, how they had negotiated or not negotiated, how they had dealt with emotional barriers or created emotional barriers, whether they had identified mutual goals or only their own goals, and so forth. Some change is necessary. The mediator, however, does not seek to change people but rather fosters the opportunities or creates the environment where change can take place. And, with the assistance of the mediator, the parties do manage to make necessary changes. Parties do so because they inherently want to resolve the conflict, especially difficult ones that wear them down. This is especially so for people in business. What they needed most was a special setting and opportunity and some help that a mediator and the mediation process can provide.

In civil mediation a different kind of change is sometimes necessary or at least useful. We refer to it as “humanizing”. A lawsuit for example can be more easily settled when a plaintiff becomes seen and recognized as a person who has been harmed or damaged in some way, a human being, instead of just a “Plaintiff”. The same can be true when a defendant becomes seen and recognized as a person who may have been negligent or careless but who is otherwise a decent human being. It is easier for people to agree to pay money to a “person” than to a “plaintiff” since “plaintiffs” are sometimes seen as people who are only out to get money, to take money, too much money. And it may be easier for a person to accept a lesser amount in settlement which that person is satisfied with the interaction and the humanity that was genuinely shown from a “person” than from a “defendant”. “Defendants” can sometimes be seen as bad or uncaring people who are not concerned about other people, and some defendants can sometimes view themselves as the victims and perpetuate the same negative self-absorbed cycle. When people are humanized, all interactions become easier.

How can this humanizing come about? It comes about when parties are invited and encouraged to speak to each other and with each other. Sounds simple, but it is often true. Counsel often talk to the mediator. It’s much more effective and moving when parties speak to each other. Counsel also talk about legal issues and matters of evidence and proof, and properly so, but parties seldom talk about that. They talk about what has happened to them and about difficulties they are faced with, personal difficulties. They may express regret over what has happened. They may explain why certain things happened, not excuses but explanations. And as the parties talk to each other and hopefully listen to each other, they may understand each

other a little bit more. Inside every plaintiff there is a person and inside every defendant there is a person. Persons can sometimes get along better than plaintiffs and defendants.

So I extend an invitation to all the mediators to in turn invite attorneys to talk about settlement and legal issues, but also invite the parties to talk about themselves and to talk to each other. They are not going to damage their lawsuit by talking about their concerns and difficulties. Mediation confidentiality protects against that in Title 17. Such talking may just make it easier for them to get together resolving their conflict in a less painful manner. It's not just reaching a settlement but how it came about and how the parties feel about it that makes them satisfied. If the parties are satisfied, so are their lawyers. Counsel, you may try to prepare your clients for the experience of talking directly with the other party about whatever is important to be discussed. Notice the difference this makes and how much more satisfied the client is with your representation as well. Better process...better outcome.

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*Her column, The Negotiating Table, appears in this space on a Friday of every month.*