

By Louise Phipps Senft

The negotiating table

Turning problems into opportunities

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How Parties Can Prepare for Mediation

In previous columns we have discussed what might or should be in the minds of mediators entering a mediation and what might or should be in the minds of attorneys entering a mediation with their clients. I have also focused a great deal of our mediation training on these subjects. In this article we will discuss what might or should be in the minds of parties entering a mediation. This is less frequently written about because people who are neither mediators nor attorneys do not often read mediation articles or journals or come to mediation training. This article therefore might be on the suggested reading list for mediation parties “to be”, whatever their professional or nonprofessional background..

Are there things a party entering mediation should expect, dread, or prepare for? Should parties be optimistic, pessimistic, or neither? What mind set is appropriate? Here are a few thoughts.

Obviously, a party should have an open mind set. I have had mediations where the first thing out of a party’s mouth has been, “I’m here but we’re not going to resolve anything” or similar language. I don’t try to change this mind set. I couldn’t if I wanted to. In fact, I mention that they could be right-- maybe the matter won’t be resolved; however, I always invite them to see what might happen. They have always accepted that invitation. Often, to their great surprise, progress is made and this progress results, then or later, in a resolution of their conflict or at least of some of the issues in their conflict. Just because the parties have failed in a colossal fashion in prior attempts to deal with their conflict or even to have a civilized conversation about it does not mean that the same thing will happen in the calmer setting of the mediation. In fact the opposite frequently happens.

Parties should realize that emotions can be a persistent, natural companion to a lingering conflict, maybe even strong emotions. These may surface during the mediation. There is a bright side to everything, including strong emotions. For one thing they show that, at least deep down inside, the parties care; and if the parties care, they may have a greater incentive to resolve the conflict that is causing these strong emotions. It can be positive when parties care and the mediator can help the other parties realize this. When parties don’t care about the issues, they may not care about resolving them. An

unemotional mediation might also be a nonproductive one.

One can tire of living with strong emotions. While yelling and the like should not go on forever during the mediation, parties should not dread strong emotions arising. This can be a natural part of the mediation and this venting need not derail efforts towards resolving the conflict. The mediator can help the parties work past this, not by cutting them off, but by reflecting what they say and feel, and inviting them to go forward. The point here is that parties can better deal with emotions during the mediation when they know in advance that strong emotions may arise and that they are in a good process for making requests for how they wish to deal with them or not to deal with them, to set boundaries or to otherwise loosen up rigid formalities. Either way, emotions do not have to block having a productive mediation.

Finally for purposes of this article, parties entering mediation should resist feelings of pressure to reach settlement, at least when working with a mediator from the transformative approach. Why? Because parties often have more options and resources available to them to live and survive without a quick settlement than they may realize. Pressure can lead to quick but not satisfying settlements. Pressure can also make reaching an acceptable settlement more difficult. A better feeling than pressure for parties to carry in with them is hope. Not reaching an early settlement can be difficult for parties feeling pressure, but hope can survive this. Many times all that will happen early in a mediation is for the parties to get the comfort of expressing themselves and finally being heard; getting some options and new information to consider; and maybe getting a better understanding of what they need and what the other party needs and where each is coming from. All of this is progress. And of course better understanding does not have to mean agreeing with the other party.

If some or all of this happens, some encouragement can set in and the parties can develop hope. It is remarkable how much better parties can converse and relate to each other when they have some degree of encouragement and hope. This goes for all types of people from subcontractors and engineers to artists, homeowners, supervisors and business executives. Again, this is because most people want to resolve their conflicts, even those who might enjoy carrying a grudge.

In summary, parties should enter mediation neither with high expectations nor with terminal pessimism. They should view mediation for what it is, a unique opportunity for good things to possibly happen and have hope this will happen. This positive attitude will make the most of this opportunity. Why not? It's the opportunity to have a decent conversation that leads to meaningful resolutions.

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