

By Louise Phipps Senft

The negotiating table

Turning problems into opportunities

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MEDIATION – A MATTER OF CONCERNS

In every conflict, there is a main issue, maybe more than one. When the parties take their conflict to court or arbitration, this main issue(s) gets decided for one party or the other.

But there are often many ancillary matters involved in a conflict, issues other than the main one. In this article I refer to these ancillary matters as “concerns”. These concerns can be as important for a party as the “main issue”, but usually don't get resolved much less addressed in court or elsewhere outside of mediation. As a result, the parties end up with a settlement but not a total resolution of the conflict. Settlements are good but can leave what caused the conflict in the first place still in existence. Not everything of importance is addressed. The parties have a truce but there can be lingering matters (concerns) that could evoke a future conflict. People deserve a better outcome.

One of the rich opportunities offered by mediation is being able to spend time on the concerns if the parties so desire. What do I mean by concerns? In a general sense, concerns are anything related to the conflict, or even to implementation of a settlement, that may cause a party unrest. For example, one or both parties may feel uneasy about the conflict, or any settlement, being discussed with anyone or with some particular person. A person may feel that he or she conceded too much and does not want to lose face. Publicity by the other person can cause problems. An employer may not want other employees to know how a complaining employee was treated for fear of creating precedent. Information about a settlement can be understood as an unwanted admission of fault. To be sure, while there can be gag orders where a pending case in court is settled, these are not common.. By comparison, for example, a mediated agreement in a custody matter that contains a provision about confidentiality to other persons can be automatically incorporated into the court's decree. In mediation, the parties can agree, if they so choose, to issue a joint informational statement that says about the matter what the parties want, no more no less.

Business conflicts can go beyond settling a law suit into setting parameters for future business dealings between the parties. This is a related concern that can be covered in mediation. I have even had mediations where an oral apology was tendered. This was as far as the apologizing party could go but was perfectly satisfactory to the other. A court would hardly require this but was important to one of the parties. And of

course we know that an apology can mean more to the apologizing party than even to the person receiving the apology.

The parties may have many other details that are important to them that a court will not have time, or more importantly authority and jurisdiction, to address. Even after my many years experience as a mediator, I am always refreshingly surprised at concerns that parties raise that are important to them. For the parties to not have the opportunity to address these concerns creates outcomes they are not satisfied with and often bitterness towards the system and others. And it is often a further surprise to parties that our wonderful court system has little jurisdiction to address such concerns, hence the growing use of mediation by the courts and private parties. Mediators work for outcomes that the parties experience as quality and satisfying.

Parties should know that they have the option to raise “concerns”. As part of the mediation introductions, the parties can be invited to raise whatever they might think important. They are not bound by the rules of relevancy that courts have to apply but which can be confining in resolving the total conflict.

During the mediation, especially after some tentative resolution has been made of the “main issue”, the mediator can ask whether there are any other concerns that either party wants to raise. If the parties are not rushed, they may well mention some things for discussion. This all revolves around the mediator's philosophy. My philosophy is that something better than a bare settlement can happen for the parties if the opportunity to do so is there. This “something better” can include, for example, the parties ending the mediation with an improved ability to deal with each other in any future disagreements. This is valuable “something better” might happen only if all irritants are put on the table.

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