

Daily Record Article

By Louise Phipps Senft

January 2008

“The Negotiation Table: Turning Problems into Opportunities”

The Aftermath of Reaching Agreement

In previous articles, I have discussed the importance and need of the parties to a conflict or dispute to achieve some degree of inter-relating as a prerequisite to reaching a successful and satisfying self-resolution of their conflict. This is true with respect to all conflicts, but especially so where there is or was a relationship between the parties that had significance beyond the conflict itself, such as those relationships between business partners, doctors-patients, builders and contractors, family members, employers and employees, co-workers, co-parents, church and synagogue members, customers and an entity to name a few. This is partly because of the toll a serious conflict takes on human beings. Relationships are an essential aspect of human existence and a very important component to a person's well-being. Destruction or damage to relationships has negative consequences, some minor, others more devastating. It is also because the hurt, anger, resentment, frustration or other feelings or emotions can become an integral part of the conflict itself as well. Indeed emotions are present in every serious conflict, including disputes about “only money”. For instance, have you ever given up or received a sum of money and not experienced an emotional response of some sort? Ah, I digress. Mediation which focuses on only getting a settlement usually falls short. Merely reaching a settlement to end a lawsuit or a claim often does not acknowledge or touch upon the emotional elements, which may be at the heart of the conflict to begin with or may be the barrier that developed and made the conflict so difficult to deal with productively. You know, the physician who feels screwed, the patient who feels unheard, the customer who says I'll never do business with that company again, the family member who vows never to speak again to another family member and passes this down through the next generation, and so on. Even after an agreement was reached. What a shame, a settlement and no real resolution of what lay underneath.

A satisfying outcome is one that acknowledges the emotional elements in some way and the destruction to the relationship or negative consequences of the conflict. This is as true for professionals and businessmen and women as it is for adult siblings. If the emotions and the negative aspects of the conflicting are not completely addressed or resolved, there is a need for them to at least be talked about genuinely, acknowledged and recognized so that the parties have an opportunity to understand the impact, even if they do not see eye to eye or have the same experience. Indeed, it's not necessary to agree with each other at all in order to understand, authentically—although understanding usually promotes agreement. A mediator focused not on the settlement only but on the quality of the interaction can foster the environment for the parties to have this experience. Often with some degree of recognition and understanding comes a degree of acceptance, from which follows the ability to more productively manage and tackle the resolution of the remaining difficult more tangible issues like the money and the property

and the damages. Just getting to that point is helpful for parties in dealing with the toll the conflict has taken.

What I have not commented on yet is the therapeutic aftermath of reaching a resolution. Most resolutions include agreement, although many do not. Whether it's the signing of a good and satisfying agreement or the verbal promise not to carry on the strife, there is a beneficial closure effect, even a mini-ceremony, of purposefully, ceremoniously and gently closing a difficult chapter in a relationship and beginning another whether with the same person or with others similarly situated. This is true in medical malpractice claims, subcontractor walk offs and delays, estate and trust conflicts, property ownership and maintenance squabbles, equal disposition of personal property, and numerous family and business conflicts. Parties feel good about themselves for having been able to discuss, work through and overcome the emotional obstacles and other difficulties—to have risen to the occasion. And they often think at least slightly higher about the other party who has now become a collaborator with them, instead of just an adversary, on the issues they felt were important.

On the other hand, a bad agreement can make a conflict worse. Bad agreements are ones where the parties felt their arms were twisted by the mediator or agreements in which the parties' opinions were never solicited or requested while their legal representatives postured and the mediator separated the parties and brokered the deal between counsel. Bad agreements may resolve the legal dispute but leave the parties feeling more raw, more suspicious, and weaker than before the agreement. A good agreement, on the other hand, may even have terms that one party doesn't like but consents to or even offers because of gaining a wider view of the totality of the circumstances and a better understanding of the full dispute. A good agreement often addresses the needs of the parties and of other affected persons as well. Agreements such as this can make a conflict and its resultant effects much more tolerable and often provides learnings for the future that strengthen individual capacity for prevention and more appropriate responsiveness, which is often modeled in turn for others, whether among colleagues or family members. This is another one of the promises of mediation, so much more than a mere quick settlement forum, but rather a true alternative for conflict resolution that adds to the fabric of relationships and society.

My team and I have found that smart and sophisticated people who find themselves in a serious conflict or a legal dispute choose a mediation with a wider type of dialogue and decision making focus rather than a narrow settlement focused approach because they know they need a chance at affecting for themselves the heart of the conflict in many instances and they do not want to be worse off in the aftermath. The parties do not have to have been friends or partners or patients or clients for a bad agreement to negatively impact their lives. And, the parties do not have to become friends or partners again for the event of a real discussion and a good agreement to improve their lives and outlook. Having a forum to discuss face to face in a controlled "safe" setting what has mattered most and has been most disturbing is often enough to provide satisfaction and relief from the grip of the conflict itself. Mediators who highlight the opportunities for

such discussions and parties and their representatives who seize these opportunities accomplish far more than agreement.

I've had hundreds of outcomes where this is so regardless of the "equality" of the terms and even in cases where one party chose to give or give up more than was otherwise recommended, by for example counsel or others in his or her life, because it was the appropriate thing to do under their circumstances. I have also witnessed parties who agreed to waive or dismiss what many others would have termed an actionable cause for similar reasons that in the totality of the circumstances, it was the right thing to do. Far more often, I have had the privilege to be part of a process where people, face to face discuss the nitty-gritty aspects of what troubled them most about the situation and co-create terms that work for both, or all, of them.

When a mediator sees the parties leaving the room having accomplished what had seemed impossible, the mediator appreciates the value of a mediation that does more than just settle a claim or a lawsuit; the value of enabling the parties to be able to talk face to face about the conflict itself and to work it through and figure it out successfully. It's a special treat for a mediator to touch base with parties during a mediation to ask what would be helpful to foster such an experience as well as to touch base six months and sometimes years after the mediation to learn of the strengthening aftermath. The aftermath is so important.