



Reflections VI

By Joe Epstein, Esq. & Susan Epstein, Esq.

Introduction

This is the sixth in our series of reflections articles about mediation. In our continuing dialogue with our readers, we try to address points that are both on and off the beaten path of consideration in mediation. Citing a wide variety of sources, we try to cover topics that occur to us as being important in our work as mediators. It is our hope that “partners in conflict” and their able advocates will find our reflections helpful in their pursuit of conflict resolution. Conflict may be healthy, but closure is even healthier.

I. Persistence

The resistance to working toward a conclusion must be met by persistence.¹

Persistence is a trait to be highly valued by negotiators, mediators and parties involved in settlement negotiations and mediations. It is the cousin to patience.² Persistence is patience combined with the zest for achievement.

Persistence requires establishing a reasonable goal, being willing to acknowledge a variety of perspectives, staying calm and exercising patience, while being driven by the goal of resolution.

Persistent mediators are those who can find the light, despite the turbulence of the dark storm of debate, disagreement and distress. Persistent mediators are those who calm themselves and have the ability to calm others. They are the ones who are able to tack into heavy winds and bring the sailboat of settlement safely to port.

II. Preparation

Know the enemy and know yourself, and you can fight a hundred battles with no danger of defeat. If ignorant of both, your enemy and yourself, you are sure to be defeated in every battle.³

In settlement negotiations and mediation, it is critical to know both your opponent’s position and your own. Discovery is designed to create equal sharing of information. Parties need to arm themselves with this data. But, beyond the data, it is essential to know your opponent’s “story” in addition your own. The most successful negotiators and mediators are those who through preparation and fact finding can see a third path that melds the two stories which gives the parties a new way to get to closure. In some instances, the third path may be closer to one or the other story. If the parties want a mediator who does more than shuffle numbers, they must prepare him or her for the mediation. The parties need to work with mediators beforehand, designing their mediation with them and later providing a candid and concise mediation statement. In order to travel this way of mediation successfully, participants in mediations must be just as prepared as Sun Tzu would have generals prepared for warfare.

III. Rapport

Rapport exists only between people; we recognize it whenever a connection feels pleasant, engaged and smooth... Rapport feels good, generating the harmonious glow of being simpatico, a sense of friendliness, where each person feels the other’s warmth, understanding and genuineness. . .⁴

Some mediators do not seek to establish rapport with the parties to mediation; rather they seek to impose their will in the manner of a judge without the encumbrance of jury of peers. Skilled mediators seek to build rapport with both sides of the mediation so the parties are more willing to have them be the neutral go-between in the dance of compromise.

Fortunately, some mediators have developed skills that enable them to forge a meaningful connection with others. They have a way to walk in another's shoes, sense how another feels and see the world as another sees it. These skills enable mediators to build rapport, connection and trust. It is the foundation that allows the mediator to become a trusted reality check, a devil's advocate and an accepted critic. When the mediator establishes rapport, the parties feel that the mediation process – the judicial process – has been fair and even. Given that fairness, they are more willing to accept an outcome that they may not have anticipated at the onset of the mediation process. Thus, a key for negotiators is to find mediators who have both the gift of the “third eye” and the gift of a compassionate way.

IV. Reactive Devaluation

...a party may devalue a proposal received from someone perceived as an adversary, even if the identical offer would have been acceptable when suggested by a neutral or an ally.⁵

When there is an absence of trust and rapport between combatants in the midst of legal warfare, there is a well-known social phenomenon that occurs - reactive devaluation. Any proposal, suggestion or point made by an opponent is viewed skeptically and with distrust. The same information, suggestion or proposal is viewed more favorably,

if presented by a neutral mediator who has gained some level of trust and rapport. Strategically, it is wise for negotiators to allow the mediator to present suggestions and proposals as their own. Careful and objective “reframing” comes from both a reasoned perspective and from critical analysis. Thus, honoring the concept of reactive devaluation parties and mediators can constructively create a mediator's proposal rather than a party's proposal to bring to the other side.

V. Reality Check

An essential turning point in most conflict comes when we come to terms with facts or insights that we have resisted or have been hidden from us.⁶

It is the role of the mediator to be a reality check, to be the looking glass on reality. It is a mediator's task to assist parties with an objective risk analysis that recognizes the reality of the law, a careful analysis of the facts, along with due consideration of the emotions that are relevant in a particular case. It is not always easy to provide a cogent reality check especially when zealous advocates seek advantage during the negotiation process by concealing information and insights. In the end, the clarity of the reality check is often influenced by the clarity and integrity of the information provided to the mediator. Advocates should keep in mind that if they fool the mediator, they may fool themselves and squander the opportunity for settlement.

VI. Reciprocation

That rule of reciprocation says that we should try to repay, in kind, what another has provided us... By virtue of the reciprocity rule, then we are obligated to the future repayment of favors, gifts, invitations and the kind... The

impressive aspect of reciprocation with its accompanying sense of obligation is its persuasiveness in human culture. . .⁷

Mediators often sense but do not acknowledge the rule of reciprocation in negotiations. In fact, the rule of reciprocation comes into play throughout the dispute resolution process even if participants do not reference its application. It may start with one participant's acknowledgement of a weakness, which then engenders confession of a reciprocal weakness. These reciprocal concessions often become the stepping-stones of a new path of resolution if not reconciliation.

We also see application of the rule of reciprocation when a small negotiating move begets its mirror image and when a substantial move causes another to respond in kind.

Thus, while we negotiators often see the application of the rule of reciprocation, we usually sense it but do not often identify it by name. Nevertheless, thoughtful mediators need to be mindful of this rule and recognize its impact on the negotiation process.

VII. Reconciliation

We have thought of peace as passive and war as the active way of living. The opposite is true. War is not the most strenuous life. It is a kind of a rest cure compared to the task of reconciling our differences. . .⁸

During the mediation process, finding the way through the battlefield of conflict, tiptoeing through the fields of righteousness and surmounting the sorrow of loss is the difficult task of both the advocate and the peacemaker. Lawyers trained in the difficult task of waging litigation have to develop another skill set of waging peace that is

ever bit as difficult as waging war. Indeed, skillful negotiators bundle the ability to utilize litigation leverage with the ability to “go to the other side” of the negotiation table. Showing respect, which may take more effort than showing disdain, they can often accomplish a whole lot more. The energy and effort required to listen, to find common ground and to reconcile takes knowing yourself and knowing others. But, reconciliation or closure requires more than the “knowing,” it also requires the indomitable will to get there.

VIII. Risk Tolerance

Each person’s level of risk tolerance is a complex balance of personality (our personal tendency to like risk, or not), our past experiences with (and perceptions of) similar situations. Not surprisingly, it has little to do with factual assessment of risk because human beings are notoriously bad at assessing actual risk. . . .⁹

In mediation, we need to be aware of how partisan perception, judgmental overconfidence, first impressions and varying sizes of bank accounts impact risk assessment and risk tolerance. Interestingly, lawyers are trained on rational assessment of risk and even decision tree analysis.

However, lawyers do not always recognize the enormously important emotional component of risk tolerance.

For example, a catastrophically injured poor person may have “high” risk tolerance because without significant compensation, his life will not measurably change. On the other hand, a known certain loss may be more daunting to an adjuster than a future uncertain larger verdict

rendered by an “emotional” jury. Negotiators must be aware of not only the law and the facts, but emotions, psychology and social intelligence of the parties in conflict when judging another’s and their own risk tolerance.

IX. Respect

Making deliberate space for people who have a different point of view is vital to learning to share in dialogue.¹⁰

Whether conflict involves parties involved in an ongoing relationship or a one-time interaction, giving another or showing another respect is an important stepping-stone through the turbulent waters of conflict. William Isaac’s thrust in *Dialogue*¹¹ illustrates how to forge difficult dialogue both by speaking respectfully and by drawing out other’s perspective in our manner of communication. From our perspective, respectful listening is listening intently with your eyes without a fast retort on your lips. Thus, respect on both sides of dialogue moves parties toward conflict resolution.

X. Resilience

...everything can be taken from a man, but one thing: the last of the human freedoms – to choose one’s attitude in any given set of circumstances, to choose one’s own way.¹²

Resilience is a core concept in Victor Frankl’s description of survival in the midst of degradation, brutality and inhumanity of the Holocaust.¹³ Resilience, that inner core that allows a person the free will to choose his or her own way, despite numbing emotional, physical, or financial loss is also the theme of Rabbi Harold Kushner’s, *When Bad Things Happen to Good People*,¹⁴ Phillip Yancey’s, *Where Was God When it Hurt*¹⁵ and Pema Chodran’s

When Things Fall Apart.¹⁶ While the authors of these books come from a variety of perspectives, faiths and philosophies, they share a common theme that man has it within his power to choose his response to adversity.

In mediation, we often find people who have had to endure incomprehensible, incredible and enduring loss. Many times this loss is not of their doing, but rather the fault of another. Yet, their display of resilience can be astounding and appealing. While it is our task to look for the measure of that loss, we also can have the opportunity to assist them with their healing, to encourage and reinforce their resilience. We can encourage and reinforce their resilience by bearing witness, by treating them with respect and dignity and by expressing our compassion and empathy.

XI. Responsibility

Life ultimately means taking the responsibility to find the right answer to its problems and to fulfill the tasks, which it constantly sets for each individual.¹⁷

Often in conflict situations, we are searching for the appropriate allocation of fault, legal liability or responsibility. We often seek to have the “wrongdoer” accept responsibility by atonement, apology or acknowledgment. The acceptance of responsibility, when appropriate, can be as important to the “wronged” person’s healing from loss as the financial compensation. Viktor Frankl’s quotation above reflects a broader concept of responsibility. It reflects the need for the person to respond to difficult circumstances, no matter how caused, in a positive manner. Thus, in the midst of conflict, those responsible for conflict and its resolution must be mindful of the dual aspect of a healing power of responsibility.

Conclusion

Through a series of reflections and observations ranging from persistence to risk tolerance, we have tried to share some of our “on the ground” experience as mediators to help lawyers. It is our goal to provide you with stepping stones to insure your safe passage in the pursuit of conflict resolution. ▲▲▲

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Joe Epstein, President of Conflict Resolution Services, Inc. (CRS), a Fellow and former Vice President of the International Academy of Mediators and a member of the National Academy of Distinguished Neutrals, has mediated over 3500 cases. He regularly mediates bad faith, business, catastrophic injury, employment, medical malpractice, nursing home, probate, products liability, professional liability, railroad and trucking cases throughout

the Rocky Mountain and Southwest regions. Reach him at CRS, 5445 DTC Pkwy., Ste. 770, Greenwood Village, CO 80111, 303-355-2314, 888-355-2314, joe@crs-adr.com, or visit his website at www.crs-adr.com.

Susan L. Epstein is a CRS panelist who focuses her mediation practice in the areas of health care, business and employment. Reach her at CRS, 5445 DTC Parkway, Ste. 770, Greenwood Village, CO 80111, 303-355-2314, 888-355-2314, susan@crs-adr.com or visit her website at www.crs-adr.com.

Endnotes

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- ¹³ *Id.*
- ¹⁴ RABBI HAROLD KUSHNER, WHEN BAD THINGS HAPPEN TO GOOD PEOPLE (2004).
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