

Patrick C. Campbell - Acknowledgements and Apologies in Mediation

It's not always about the Money: Can Mediation Be Saved as an Alternative for Dispute Resolution?

Introduction

Unfortunately, most of what is written today about mediation is no different than what you hear about taking a case to trial in the court system in any country or to hearing in the commercial arbitration system of any provider. Counsel are advised to prepare for mediation like it is a trial, i.e. prepare lengthy legal briefs on the issues, bring and prepare witnesses, even the input of experts orally or in writing, etc. How different this is from the purposes of mediation and the techniques that many of us studied and honed years ago when this all started.

We also learned long ago that mediation did not always have to be successful. I shuddered when I hear mediators bragging that their cases always settle. Why it is often stated, and I hear this in mediations all the time, that the benchmark should be what a jury trial would fetch in this case. The short answer is a jury trial would fetch a considerable cost, an inordinate waste of time and an enormous emotional strain on the parties.

When mediation seemed to be just a fad, it was about sharing the lemon between the disputing parties by discerning who wanted the juice and who wanted the rind for their recipes. The skill that is required first and foremost if a mediator wants to apply acknowledgments and apologies to such a successful conclusion of a mediation is that he or she must be someone who does not just listen to but also hears what the parties are saying. This is not the easiest skill to acquire and is also not one that is honed by mediators who take a results or money oriented approach to mediating cases. Obviously, this does not always

work. However, my experiences have shown me that it is not always about the money, and that there are ways to achieve this end.

Discussion

Like any safe landing, the approach is the most important part. From the extensive briefs and opening statements, mediators need to get a handle on and set the tone for the session as soon as possible. While some venting is generally necessary, insult only adds to injury. At this point, the mediator should acknowledge the injured feelings, battered reputation or other human emotions that could be a driving force behind the dispute and, if possible, set the table for the use of acknowledgement and apology as a vehicle towards settlement. These topics can heat things up, so you need to know how much steam to let out of the kettle before someone gets burned.

If it is not readily obvious from the prior written submissions, this is the time to ask reassuring questions to uncover whether there is a connection, familial, business, etc., that evidences a potential for the use of acknowledgement and apology. Many times in the business setting, the parties may very well want to do business together again, and this is the perfect tool to accomplish this end. Such a focus helps to address emotional issues that are often ignored and prohibit settlement.

Many attorneys are not prepared properly for mediation and see money as the only impediment to settlement. This is especially true with many contingency fee cases in the United States. The mediator needs to ensure that the client remains the decision-maker. If the case does not settle, then a judge or arbitrator will have the pleasure of doing that for him.

This approach also promotes the free flow of information between the parties, which is necessary for any good decision making. It shows you are not just listening to but also hearing what the parties are saying. Additionally, mediators evidence neutrality and add to

their credibility when they address the human side of the dispute. If need be, there is no reason why a mediator should not talk to the attorneys separately to make these points.

Examples

Back to Basics. I learned an early lesson about the curative powers of the use of acknowledgement and apology in one of my first mediations that involved a personal injury case with familial overtones. The petitioner/daughter slipped on the front steps at her brother/respondent's home, where their father lived, and was injured. After much acrimony and mistrust was vented, the sister admitted that she was worried about their father slipping as well. The brother's agreement to apply adhesive strips to the steps resulted in the civil case being dismissed without any monetary recovery.

Try Humor. In another case, the parties were from the Philippines and not even speaking to one another. I thought that the one party's claims were pretty extravagant. I asked if she felt that the other party had inherited Imelda Marcos's collection of shoes, putting him in a financial position to afford the demands. It got her smiling and turned out that while the underlying litigation revolved around the purchase of some real estate that went sour, the parties were related by marriage. Feelings had been hurt when it did not work out the way they planned and an apology between the parties was part of the settlement that required a level of financial commitment that the other could now afford. The extravagant demands were just an attention-getter in my opinion.

Know Your Audience. While we are on the subject, tuning in to and turning on your audience based on ethnic or other character traits is advisable and essential in most cases. I had one party who spoke with a very distinct Irish accent. We were getting no where with the mediation, when I asked what part of Ireland he was from. Fortunately, I had travelled there several times and knew my way around. I also enjoyed my time there, so we could talk

pleasantly and at some length about his native country. Here, an attorney had sued him for unpaid fees, so it was not hard to figure out that he was not happy with quality of the work the attorney did. Once I suggested that his attorney should be paid something, and the attorney acknowledge that his work was somewhat shoddy, the credibility that I had established was a key component in finalizing the settlement than one might have thought at first glance.

Conclusion

The use of acknowledgement and apology allows the parties to transform their relationship back into something positive; rather than leaving everyone with that horrible feeling after many mediations that neither party is happy or satisfied and has given up too much just to reach a King Solomon's decision. Acknowledgement and apology serve as important vehicles in achieving settlement in most mediations. Mediators need to return the mediation process to the alternative to dispute resolution that it was initially intended to be. Like everything else in this modern world, we seem to be losing the human touch that made mediation something different.

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