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MEDIATION "SUCCESS:" PROCESS MATTERS AS WELL AS RESULTS

By Gilda R. Turitz

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We often talk about a mediation being "successful" because the case settled, or conversely that it "failed" because a full settlement was not achieved and at least some parties are continuing to fight. But "success" or "failure" articulated by the result does not always correlate with the parties and counsel being fully satisfied with the mediator and the mediation.

Intuitively, as mediators, we would expect a "successful" mediation to result in participant satisfaction and therefore referrals, good references, repeat business, and an enhanced reputation. We would also assume that not reaching settlement might have an adverse, or at least a neutral, effect on the mediator's reputation and the continued ability to get referrals.

But such conclusions are too facile. Speaking both as a long-time mediator and a litigator who engages mediators to help resolve business cases, achieving a settlement is not a bright-line litmus test correlating to the participants' satisfaction with the mediator and the process in a particular case. The process itself, not just the end result, matters and affects how parties feel when they leave the mediation. Trust is a critical element. The mediator needs to work hard not only to establish trust at the outset but maintain it throughout the process. The parties need to perceive that the mediator truly listened to them, that they were both heard and understood, and that they were respected. If not, trust will be eroded and parties will be dissatisfied even when they have settled on favorable terms.

There are many reasons why even a mediation resulting in a global settlement might cause counsel and parties to be dissatisfied and therefore disinclined to give a mediator positive referrals or repeat business. Here are just a few:

- *Lack of Respect:* The mediator was disrespectful or discourteous to a client or counsel, by being short, belittling, or dismissive of certain arguments, emotional expressions, concerns, or needs. This may occur by marginalizing a participant: acting in a sexist manner toward women participants, being patronizing, not crediting the comments of less experienced lawyers, or listening only to counsel while ignoring the client.
- *Rushing the Process:* The mediator was seen as prematurely pushing the parties to a resolution. This could occur because the mediator perceived an optimal solution (in his or her opinion) early on, but did not lay adequate groundwork with the parties to promote it effectively. Another cause could be the mediator's lack of patience to work with the parties through their negotiating steps. In either case, the participants may feel that they have received short shrift and had their decision-making power eroded by the mediator.
- *Misrepresentation:* The mediator misrepresented a party's position or critical aspects of an offer or demand. This may be unintentional, arising from a miscommunication or a sincere but mistaken belief that a message was correctly understood when it was not. And while that problem was overcome in the ultimate resolution, trust was severely injured in the process.
- *Indiscretion:* The mediator was indiscreet by, for example, referring to other matters he or she had mediated in some detail, or acting overly friendly with some of the lawyers or parties concerning acquaintances or groups shared in common. If such talk is excessive or especially revealing in details, it can erode the parties' confidence and trust that the mediator will truly honor the confidentiality of their own case and serve impartially.
- *Unauthorized Mediator Proposals:* The mediator did not ask permission of counsel and/or the parties before making a mediator's proposal for settlement. This may force a party into a position it did not want to face or could not respond to effectively. It may also be perceived in some circumstances as siding with the opposing party, eroding trust in the mediator's neutrality. At a minimum, awkwardness or surprise has resulted, which parties do not appreciate.

Mediators have to be vigilant throughout joint and separate sessions to stay attuned to the parties and "read the temperature" in the room, especially when the atmosphere is emotionally charged. Even if their settlement expectations were not realized, participants who feel they were fully heard and respected may still leave satisfied with the mediator and the process.

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