



FACILITATIVE MEDIATION:

# Mending the Broken Relationship

In the world of commerce, productive mediation is frequently an end game for the disputants. If the mediator is successful, the adversaries go their separate ways, counting their money or what is left of it, and probably each hoping to never see that expletive deleted “other guy” again. Certainly there are many situations where that truly is the best possible result for all sides involved.

However, as mediators, we do our clients a disservice if we do not at least consider whether a better result for the parties is one where they can continue on in a productive commercial relationship. This is likely to be the case in situations where the parties initially entered into what they all presumed would be an enduring commercial affiliation; for example a long-term sales agreement or some type of ongoing service relationship. Indeed, before most such relationships commence, the parties invest a great deal of time and effort into determining not only whether the product and/or services to be provided are appropriate but also whether party business cultures and philosophies are compatible to a long-term relationship. To throw this investment away with the writing of a settlement check might not be the best result for the parties.

So, a cardinal question we must ask ourselves when considering the mediation assignment is whether the best outcome will keep the parties together, and if so, what mediation skills and techniques must I be able to bring to the table?

### **THE HYPOTHETICAL**

Here is the situation: After many months of meetings a contract is executed through which Company A, a manufacturer of machine tools supplies customized milling machines to Company B, a packaging manufacturer. Moreover, Company A agrees to provide at least monthly maintenance to the equipment but also as often as is otherwise needed to meet specified production levels. Additionally, Company A is to provide new and upgraded parts for the milling machines as they are developed. Company B assumes responsibility for maintaining and upgrading the machine manufacturing software to ensure that its packaging product is cut to the specifications required by its customers.

After several months Company A periodically delays maintenance and parts are upgraded less frequently. Company B cannot seem to resolve little glitches in its software. The efficacy of the milling machines drops. Difficulties with machine maintenance rises while both parties satisfaction with the relationship drops. Company B slows its payments to Company A. Eventually the parties reach an impasse; Company A refuses to do maintenance and upgrades and Company B refuses to pay what it owes to Company A. Surprisingly, each blames the other. They want to sue until their respective lawyers point out the foresight each exhibited by agreeing to a mediation clause in the contract.

### *You were selected as the mediator.*

#### **FACILITATIVE MEDIATION TECHNIQUES**

From reviewing the parties' briefs and in listening to the parties' stated goals it becomes apparent to you that a reasonable outcome for these companies is one in which they return to the good relationship they had when the contract began. You ask yourself: How should I conduct this mediation to encourage the parties to reach this result?

Drawing generally from gestalt therapy like ideas, take steps to develop the parties' "awareness" of the ramifications of the dispute. Encourage them to consider all of the

costs associated with abandoning the good efforts both companies have thus far made to achieving production results. Promote the parties' introspection. For example, suggest that they consider their contribution to the current state of disagreement, their capabilities in rectifying plant production, their business and personal needs that are derived from the business. Parties considering themselves as part of the solution (as opposed to a payer or payee of cash), may have keener insights into a win-win solution rather than a winner take all outcome.

While mediators have varying opinions on the issue of party "venting" it is an option you should consider. It helps the parties to clear the air and focus their energies on truly understanding what is in their best long-term interest. Controlling the venting environment is not easy for the mediator; it must be kept under control or the parties could become more polarized. Consider whether venting should occur privately or in the presence of the other party.

Utilizing these techniques may help the parties de-focus on personal disappointments with each other, often a hurdle to settlement that is too high for either or both parties to clear, and instead concentrate on what will best benefit them. It will let them focus more clearly on the true cost of losing a customer or having to establish a new service relationship, and possibly even re-tooling, as the case may be for either party.

Finally, as a facilitative mediator, it may still be worthwhile to contribute your evaluation of the party positions. Again, evaluations have to be measured; you want direct the parties to a realistic evaluation of the case but yet you must be careful not to polarize or otherwise discourage self-evaluation. Your role as a facilitative mediator is that of an aide. You want to aid the parties in making their own evaluation and consequential decisions. Such decisions will result in long-term productive solutions.

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