Hidden Agendas

by Janet Rubin Fields, Esq.

`When Roger Fisher and William Ury wrote the best selling book, Getting to Yes, in 1981, they taught us the first rules of what is now the premise of modern mediation practice. They taught us to first, "separate the people from the problem", and second, "attack the issues, not the person". These are the basic foundations of what is known as "principled negotiations" and the framework for every commercial mediator in this country.

The primary reason clients retain a lawyer, is not to "take me to court" as the entertainment media would like to portray, but rather, to get their problems fixed, and their "wrong" to be "righted".

As counsel, whether it is for the plaintiff or defense, the job is to determine the facts, evaluate the evidence and the witnesses, and then do the best possible to give the client advise on the probable outcome at court.

As we all know, of course, that despite what counsel will do to determine and recommend on the legal issues, it is almost always external issues that lead parties to a settlement.

"Can you afford the fight", a lawyer may ask the client? "Will you have the financial resources to sustain the litigation? "Is it worth risking your business and family relationships to pursue a lawsuit for what might be a less than perfect recovery?" These are all legitimate questions that a lawyer may and should ask their client. The answers given by the client, or more often than not, the answers NOT given by the client, all lead to the area of the hidden agendas.

By the time a matter gets to mediation, litigation is often protracted, and instead of parties being closer to resolution through earlier discovery and negotiations, they are farther and farther away. What at one point may have been a very easy case is now horrifically difficult due to the personalities involved.

Much of the mediator's role is to understand and then to differentiate the two main stumbling blocks of the case: The legal issues and the hidden agendas. Whether it is the victim of a car crash, the fired employee, or the patient whose doctor botched their surgery, there are often emotional issues and hidden agendas that cause the client difficulty in either listening to legal advice or letting go of their emotional attachment to the litigation.

As a mediator often called in to deal with the "personalities" of a case, I tend to spend a lot of time with clients, with or without their attorneys present. Much of that time is focused not on the facts of the case as the client perceives them to be, but rather I am far more interested in learning what external issues there are that seems to be making settlement discussions so difficult.

Very often I see lawyers speak to their clients and try to convince them as to the reasons to settle, but as I watch that dialogue going on, I see that the client is simply in another world, someone who is focused on anything but what the lawyer is saying. The lawyer may be saying "settle", "settle" "settle", while the client is saying "but why was I treated so badly", "why can't they feel my pain", "I won't settle because of the principles involved" or "I am entitled to what is 'fair'" and other remarks we have all heard many times over.

The role of the mediator at that point is to help both the client and the lawyer by opening up the issues, away from the logic of the moment, to unearthing the emotion of the moment. This is often an area where lawyers fear to tread. The issue they want to deal with is the law, the negotiation, the risks. The mediator on the other hand, is often in a far greater position to pose questions to the client, that help uncover and often times challenge the client in a way that the lawyer cannot, not because of the lawyer's inability, but rather because of the role the lawyer plays in the mind of the client. *To the client, the lawyer is the spirit of the law and the mediator is the spirit of resolution*.

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Hidden agendas are often the stumbling block to settlement. In order to uncover the hidden agendas of the parties and get to resolution, it is important for the mediator to look beyond the law. When a party has been angry and wishes for an apology, or two friends had not spoken in more than seven years because their attorneys counseled them not to, the employee who wants their job back, a quadriplegic who simply wants a better bed, or the long time business relationship needs to be mended for future business, the law becomes irrelevant and a venue for listening to the parties becomes priority.

Unmasking hidden agendas generally takes place during caucus when the lawyers have had an opportunity to present their legal positions and the parties have given their version of the facts. Learning to recognize hidden agendas requires the mediator to ponder and ask themselves questions reflective of the human dimension including "Why did the plaintiff file the lawsuit?", "Does this employee *really* want their job back?", "Is their anger misplaced?", "Is this about entitlement, ego or reputation?"; "Is the party emotionally attached to the case as opposed to the real issue involved?" Can the court outcome ever satisfy this individual? If not, what will?" "Is this case *really* about money and if not, then what?"

Once the mediator identifies the hidden agenda, they will use this opportunity to create a major breakthrough in the mediation negotiations which otherwise may have resulted in an impasse. Sincere acknowledgment, validation, and empathy of the identified hidden agenda communicated by the mediator to the parties are crucial tools to achieve the goal of settlement.

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