Acknowledging the 13th Player

Cultural, Economic, & Institutional Conflict & Bias

Carl H. Perdue JD, LLM
Debi Yohn Ed.D., CLSW

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Trial Lawyers v. Litigators

• Trying Cases v. Negotiated Settlements
  ▪ 4% Civil Cases Go to Trial
  ▪ Litigious Society
  ▪ Time to Resolution
  ▪ Uncertainty of Outcome
  ▪ Cost
Law

- Rule Bound
  - Future Predictability

Equity

- “Conscience of the Court”
  - Current Fairness
Private Justice System

Shadow of the Public Justice System”

TRANSPARENCY
OPERATING ASSUMPTIONS
DISCLOSURE
Mediation

Neutral Decision Making

Circumstances → Evolving New Story
Guided Negotiations

- Trust
- Collegiality
- Neutrality
- Use of Quiet
Complex Mediations

Corporate & Commercial Transaction
Construction Contract Disputes
Family Office Conflicts
Co-Mediation Team

Gender  Linguistic  Cultural
Business  Professional
Co-Mediation Plan

Pre-Mediation Conference

Documentation Review

Process Strategy
Is Co-Mediation Efficient?

Duration Usually Shorter
Less Dead Time With “Back Sliding”
Co-Mediators Control Process Pace
Disputants Come to Appreciate Differing Perspectives
Conflict, Prejudice, and Bias

“The Problem”
Different View of What the Problem
Ego-Centric Perspective
Why Mediation?

✓ Party Expectations
✓ Counsel Expectations
✓ Mediator Expectations
“Power of Psychic (Psycho) Forces”
Mediator

1. The Power of Perception
2. Concentration (Listening)
3. Decision Making (Consensus)
Rational Decision Making
  • Law and Economics Movement

Cognitive Decision Making
  • Behavioral Law Movement
“Power of Persuasion”

1. Establishing Trust
   “People by Nature Suspicious”

2. Learning to Listen
   “What Others are Saying AND Not Saying”
Power of Persuasion

3. Don’t Browbeat
   “Slay But Don’t Humiliate”

4. At Least Pretend to Sympathize
   Caring and Compassion
Yoritomo’s “Rules of Speech”

1. Speak With Conciseness
2. Speak With Clearness
3. Speak With Moderation
4. Speak With Discretion
Mental Focus

• “People Tune In on Our Emotions and Our Focus”
  Focus is Transferable
  Role Modeling
Co – Mediation
Effective Use of Caucus

1. Spinning
2. Information is not lost
3.
4.
Emotion Trumps Logic

Anger  Hatred  Malice
Fear   Shame  Regret
Hope   Pride  Envy
Robert Caldini: Psychology of Influence

- Rule of Reciprocity
- Authority
- Linking
- Commitment & Consistency
- Social Proof
- Scarcity
Influence

Substituting One’s Own Will For That of Others