The Power of Connecting:
Establishing Relationships & Building Trust[1]

by

Sheldon J. Stark
Mediator and Arbitrator
2531 Jackson Ave., Suite 102
Ann Arbor, MI 48103

I. Trust is the cornerstone of Mediation. Without trust, the process is more likely to be unproductive, without leading to better understanding or resolution.

A. Where there is trust, participants are willing to open up and listen to each other - and sometimes the mediator - with an open mind. Mediation works best when people listen to one another and evaluate what they hear objectively and thoughtfully. Where there is little or no trust, participants remain tightly closed off from one another. They hear but they do not listen. They expect the worst and suspect all they hear from the other side, assuming every communication is a threat or mask designed to frighten or gain an unfair or improper advantage.

B. Where there is trust, participants are not afraid to present themselves honestly. At least one reason mediation provides confidentiality is to encourage participants to say what is truly on their minds. The mediator's task becomes that much more difficult if we must add "mind reading" to our list of skills. Where there is little or no trust, we are forced to guess and speculate about what is going on beneath the surface. Distrustful participants hide their feelings, conceal their motivation and project false impressions to avoid giving up or providing any advantage or insight that might be put to use against them.

C. Where there is trust, people are willing to take a few risks. A trusting environment is safe one. Giving up any part of their claims or defenses even for the sake of discussion is a risky – and scary – proposition, and without trust there is little incentive to do so. Achieving resolution through agreement is a risky proposition – and it takes some measure of trust to take a chance. Some participants worry they might leave money on the table. Some participants cannot believe representations that vary from their pre-existing conclusions.

D. Where there is trust, participants are willing to be flexible, engage in movement. They will examine the needs and interests of the other

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side and look for ways to accommodate them. Where there is little or no trust, even the smallest accommodation is suspect. In an environment lacking any trust, even after a case is settled, suspicion and anxiety can derail a resolution. How many times have you heard: "How do I know I'll get that check by the 27th?" Or, "What's going to prevent them from telling all their friends the settlement amount?"

E. In the 1980s, when Ronald Reagan was making deals with the Russians to reduce nuclear weapons, he campaigned for public support with a slogan. Do you remember: "Trust but verify!"

F. Those of you familiar with my political views will understand why I prefer an alternative formulation of this principle from Finley Peter Dunn: "Trust everybody but cut the cards!"

G. These are statements that recognize how difficult it is to establish trust and why confidence-building measures and fact checking help the process along.

H. In my experience mediating civil cases, it is a rare dispute indeed where mediation will create trust between the parties. In employment and commercial business disputes, it has often taken years for the parties to reach their current level of distrust and suspicion. In personal injury cases, the litigants don't know one another, but plaintiffs have harbored negative feelings about the practices of the insurance industry most of their lives; and many long time claims adjustors are cynical about claims administration and skeptical about the extent of injuries. For the most part, the best we can hope to achieve is a START on trust building between the parties.

I. What we can more realistically expect to achieve, is the development of trust between ourselves as mediators on the one hand, and the parties represented by counsel on the other.

J. We do ourselves a disservice, therefore, if we engage in reality testing and risk assessment without first taking care to engage the parties in a relationship and use that relationship to build trust.

K. As Gregory Wood wrote in the Summer 2010 edition of "The Dispute Resolution Journal": "The success of negotiation will be enhanced if trust building, rather than strategy execution becomes a deliberate objective."

L. One of our strategies, our objectives, our goals needs to be the building up of trust. Mediators want the parties and lawyers to trust them in order to best do their work.

II. Building trust with the parties and their lawyers begins by establishing a professional relationship, a relationship based upon respect, confidence and experience. Out of that relationship, trust can grow and flourish.

A. Arthur Ashe, the great tennis pro, has written, "Trust has to be earned and should come only after the passage of time." Indeed.

B. The relationship building process begins for me with the lawyers – they are the first to contact me, and it is through them that I can communicate with their clients.

C. This may not be true in community dispute resolution center practice; but in my experience, generally speaking, there is ample time to work on a better relationship with the lawyers. It may be weeks if not months between initial contact and opening statements at the mediation table. During that interim period, the mediator begins the process of earning the trust so dear to a successful outcome.

D. Often, I'm contacted by lawyers who know me already. As a result, a core of trust exists from day one. While their trust may be misplaced, they have selected me because some degree of trust and respect exists. But equally often these days, at least ONE of the lawyers does not know me personally. Whether I know both lawyers, only one or neither, my process is the same. It is a process that establishes a relationship and builds confidence and trust; or it enhances and confirms for the lawyers that they made the right choice.

E. The mediator's intake procedures should gain confidence, build trust and earn respect from ADR consumers. Every mediator should try to see how his or her practices are perceived by the lawyers who contact them. Officious or unfriendly case managers, unreturned phone messages, and lack of direction can undermine rather than increase trust. The mediator can find himself in a hole without realizing how or why it happened. Mediator intake needs to be

1. User friendly
2. Responsive
3. Understandable
4. Thorough
5. Competent
6. Party oriented

F. For me, the process typically begins with a phone call from one of the lawyers asking about availability, conflicts and fees. During this call I listen to the lawyers' needs, trying to limit the amount of detail given at this early stage and to get an early sense of how well the lawyers are getting along. I explain that a pre-mediation conference call should be scheduled to work out logistics, make disclosures, and obtain a preview of the dispute. The agenda for the pre-mediation conference call is an important element of the process.

G. An agenda for a pre-mediation conference call can be found on my website. www.starkmediator.com.

1. I invite you to take a look. I encourage the lawyers hiring me to do so.
2. The first link to which I send them is "Forms" where they will find a comprehensive agenda for the call. I ask them to print it out and have it ready when the call is placed.
3. When the pre-mediation conference call occurs, I go through the agenda item by item, taking notes to capture what the parties say and when they agree.

4. The agenda is thorough, neutral, detailed and comprehensive. I always invite the lawyers to suggest additional items for the agenda, but they rarely do.
5. Every logistical question is addressed: When and where are we going to hold it? Who will be present? Will there be written submissions? When are they due? Will they be exchanged? What KIND of process will we use? What's the fee? Etc.
6. I err on the side of disclosing as much information as I can – and share my sense of whether I am the right mediator for this dispute. I don't always feel confident that I can give value.
7. I ask about the status of the case. What are their claims and defenses? Are they attending mediation voluntarily or by court order? Is discovery complete? Where do negotiations stand? Have there been any offers or counter-offers?
8. Taking care of the logistical questions and concerns of lawyers gives them comfort the mediator will be well prepared, providing a professional environment and full engagement.
9. I seek a commitment from the lawyers that temporarily, and for the purposes of mediation only, they remove their zealous advocate hats and replace them with joint problem solver hats. The idea is that they take a step back from advocacy for one day. If the case doesn't settle, they can resume their familiar roles as hard-charging, aggressive litigators. They have lost nothing by doing so. Solely for purposes of mediation, however, I encourage them to think about identifying options that could meet everyone's needs. I encourage them to inform their clients – to avoid giving clients the impression that the lawyers are scared or selling out. I always hope that perhaps the lawyers, in turn, will involve the clients as joint problem solvers, as well.
10. During the conference call, I maintain neutrality concerning the merits, and a professional demeanor toward the litigators. If I know one lawyer and not the other, I avoid familiarity. When I was in practice, and judges greeted opposing counsel like long lost friends, I hated it! I won't engage in the same practice as a mediator. It doesn't build trust, it undermines trust!
11. When I was employed at ICLE, responsible for putting together basic and advanced mediation training programs, I needed to take vacation time to mediate – which limited the number of cases I could take. As a result, I encouraged lawyers who hired me to try the SCAO-approved facilitative model, characterized by joint sessions, opening statements by parties and lawyers, and caucus limited to problem solving difficult issues. If I was going to give up my vacation time to mediate, I wanted to be sure that the techniques we were offering in ICLE mediation training actually worked. Today, I am careful to solicit

attorney input about the mediation model they prefer. I do not push litigators outside their comfort zone. No one knows better than the lawyers what technique will work best for their clients. I am happy to tailor my approach to the needs of the participants.

12. At the conclusion of the call, the agenda exhausted, every issue buttoned down, I am confident the lawyers have been impressed by the organization and are comfortable we've established the foundation for a professional process with a competent, neutral and well-prepared mediator. They will pass along those feelings to their clients.

H. When the call is concluded, I follow up with a letter summarizing what we've agreed to and hammered out. I enclose a copy of my CV and Agreement to Mediate and encourage the lawyers to send all three to their clients. Why?

1. First, the letter confirms everyone has a common understanding of the next steps and responsibilities. There is no confusion about dates and times, locations, deadlines, and the kind of process they will experience.

2. I provide my CV because I do NOT want to talk about my credentials during the mediation. I'd rather they learn about me from their lawyer. Describing my own credentials at the start of the process sounds like bragging; tooting my own horn. This is not a matter of modesty – though, in Churchill's words, I have much to be modest about. Rather, if there's a contrarian at the table, I don't want to motivate him to take me down a peg. If someone thinks I'm spending valuable and expensive time talking about myself, it can be a turn off. If the clients have my CV in advance, there's one potential pot hole avoided.

3. The letter also contains material from which the lawyers and their clients might benefit. I remind the lawyer that my website contains articles and practice aids which might be helpful to them in taking full advantage of the process.The more participants are familiar with the process, the greater the likelihood that trust will grow.

4. Finally, because not every mediator uses a written Agreement to Mediate, I want the lawyer to be comfortable with it before signing. It is one more place to demonstrate preparation, thoroughness and professionalism.

5. Moreover, my Agreement to Mediate contains a paragraph about confidentiality, which reinforces openness and candor.

6. I trust that the lawyers will share these documents or their contents with their clients. Based on my limited observation, most seem to do so. It's important to trust the lawyers. They are our customers. They are also responsible for preparing their clients to make the most of the process. In turn, they will

convey their trust in you to their clients. When the mediator trusts the lawyers, the lawyers gain trust in the mediator. Lao Tzu has written: "He who does not trust enough will not be trusted." If you expect trust, you must give it.

I. If any special issues or problems surface during the pre-mediation conference call, I follow up by contacting the lawyers in hopes of resolving it early. Private conversations often provide a better understanding without everyone listening in. If problems are not addressed early, they inevitably arise at the mediation table to cause mischief.

J. The follow up call may be to both lawyers, but does not need to be. Sometimes I call both just to continue that relationship building process.

III. With the pre-mediation conference call complete, I look forward to learning more about the parties to the dispute. I wait anxiously for the mediation summaries to read their stories unfold. What did the parties do? What did they say to one another? How did they behave? How did they end up in litigation? What wrong was done, if any? What motivates them now? What makes them tick? What are they after? What do they need? How can mediation help them? Have they identified their goals and objectives? Do they actually know what they want? Do they share common interests they may not yet recognize? What can I do to help them? What value can I bring to the dispute?

A. Reading the summaries carefully, especially the deposition transcript pages normally attached, provides preliminary impressions of who the parties are and how they think. I want very much to understand them.

B. The better a mediator understands the parties, the better able he is to know where they are coming from, recognize what is important to them, and appreciate how they view the world. A better understanding can unlock the secret of how to connect and establish a relationship out of which trust can develop.

C. This preparation is going to show up – whether you want it to or not, when the day of mediation arrives and you meet and start talking to the parties. Mediator preparation sends an important message. It gains party confidence, builds additional trust, and helps the parties bond with the mediator.

IV. Meeting the parties for the first time is one of my favorite moments in the process. Parties are as anxious to meet the mediator for the first time as the mediator is to meet them. I look forward to it. We have only one chance in life to make a first impression, and whatever impression we leave with them is likely to linger throughout the day. I want to make the best impression I can. On the trust front, there are typically built in headwinds blowing favorably in a mediator's direction. The lawyers who selected us have likely shared their opinions of us and encouraged the parties to place their trust and confidence in our skills. At the same time,

though we have no authority as mediators, the parties are likely to see us as representatives of the justice system, empowered to help them achieve a good result.

A. Even in cases where the parties prefer a joint session approach, I like to meet separately with each side for a short time before mediation officially kicks off.

B. The purpose is to say hello, shake hands, get acquainted and "take the temperature of the room." I want to look each party in the eye, and let that party look me in the eye. Eye contact is a big deal. It is part of relationship building and it enhances trust. Trial lawyers have done it for generations with jurors. Litigators have been doing it with witnesses in depositions or on the witness stand since Hadley vs. Baxendale! Why? Because people believe they perceive something from looking into each other's eyes. An old proverb has it that "the eyes are a window to the soul." Amen. Window or no, we believe we gain more clues about truth-telling and honesty from what our eyes see than from what our ears hear.

C. To meet privately, I first await the arrival of all parties and all lawyers to inform them of my intention. This can be awkward when one side is late, but it is worth waiting. The reason is simple. Anyone who gets involved in the legal system brings with them a "healthy" measure of paranoia about lawyers and judges. Imagine what a party might think when she arrives at the appointed place and sees the mediator walk out of a private meeting with opposing counsel and client wearing a smile on his face? Can she ever trust that mediator again? No amount of explanation is going to make that party totally comfortable.

D. I like to begin the private meeting by looking for a way to make a connection. "I see you grew up in Port Huron. So did I." Or, "When were you at the University of Michigan?" Or, "I see you're a history buff. What period are you interested in?"

E. When the introductions and the effort to find common ground are complete, I find it useful to ask questions and get the parties started talking. This is not the time for a lecture or more explanation from the mediator.

1. "How are you feeling today?"
2. "Anything going on with you we should address before the process starts?"
3. "Have you been worrying about today?"
4. "Do you have questions about the process?"
5. "What would you like to see come out of this today?"
6. If the party isn't forthcoming or is unready to share, I invite them to ask for a private meeting any time they feel it would be helpful.

F. We're now ready for opening statement, in which I continue to work on establishing a relationship with the parties, build on my ongoing

relationship with the lawyers and gain trust and confidence from everyone at the table.

1. Eye contact is once again an essential. While I rely on notes when I deliver an opening statement , it is NOT read. My goal is to have a conversation that keeps everyone engaged. From time to time, I ask if anyone has questions. If the parties are not making eye contact back, I may include that party's name in my comments to make certain they recognize I know they are present.
2. I say I've read their summaries and feel comfortable that I have a sense of the dispute. I praise the attorneys and express my appreciation for their good work in explaining their respective positions.
3. I have a file in my hand, full of their papers and my notes, which sends a message that I've put time into their matter. I am prepared! Litigants like to see a prepared mediator as much as the attorneys do.
4. Someone is paying a lot of money for mediation services. They are entitled to preparation, commitment and engagement from the mediator. I do everything in my power to demonstrate they will get that from me.
5. Another of my strategies – again something I developed trying jury cases – is to see if I can get heads nodding in understanding or agreement around the table. For example: "Mediation is an information exchange process. I've found that if we all agree to listen to one another with an open mind, we might just hear something new or see something in a new light that helps everyone reassess the risks they face." Or, "Mediation is not a justice process where we establish who is right and who is wrong. Mediation is a dispute resolution process where we try to find common ground on which a settlement can be built."
6. Describing the process – how the day will unfold - helps manage expectations. What can they expect? When will we meet privately? What is supposed to happen? What role will each of us play in the process? "Expectations are resentments under construction." A process description helps build confidence and reduces anxiety. It is difficult for participants to hear if they're uptight and can't relax because they don't know what to expect.
7. Opening statement is another opportunity for the mediator to telegraph confidence in the process and in the litigants' ability to resolve their dispute. Confidence from the mediator spreads to the participants. Confidence is infectious.

G. Reframing party opening statements is another important opportunity to give a boost to the trust-building effort.

1. Reframing demonstrates that the mediator has heard and understood the party – so much so, that the mediator is able to put the statements and concerns in his own words.
2. Reframing seeks to instill the idea that, "this guy really gets me!"
3. A good reframe demonstrates that the mediator has heard the words AND the music: the mediator's words address what the party described and what the party was feeling.

V. During the mediation process itself, whether in joint session or caucus, when reality testing and risk assessment begin, the mediator begins "spending" down the reserve of trust and confidence so carefully built up from day one.

A. No one is pleased when their theories or favorite facts - with which they have fallen in love - are questioned or challenged. "Isn't it self-evident…?" they sometimes imply incredulously.

B. As Ann Radcliffe has written: "I never trust people's assertions. I always judge of them by their actions." The mediator's actions, in questioning risks, asking about problems or identifying weaknesses, seem to speak louder than verbal reassurances that the mediator is neutral or has "no dog in the fight." Parties especially may begin to question whether they should have listened when you invited them to trust you and the process. "Why are you in here questioning my case," they are often thinking and sometimes ask. "Why aren't you in the other room administering the kind of beating THEY so richly deserve?" In such moments I rely on process symmetry. I promise that whatever is happening in this room, will happen next in the other. I remind everyone that my job is to help them appreciate their risks, not decide who wins or who has the stronger case.

C. Sometimes parties become adversarial and start looking at the mediator as their enemy. If the mediator has not prepared the participants for reality testing and risk assessment, they may feel betrayed. Trust once lost may be difficult to win back.

1. Here it is helpful to be as honest and transparent as possible. If you seem to have lost your neutrality, recognize you have done so and explain yourself. "Perhaps my experience in cases like this is beginning to show. I apologize if I appear not to be appreciating the strengths of your position. I don't mean to be favoring one side over the other. I wouldn't be a very good mediator if I did that. On the other hand, I've seen cases just like this in the past. By and large, based on my experience, the issue about which I'm asking is a problem and if you're going to engage in meaningful risk assessment, you need to face it and either develop a way to meet it or acknowledge there's an elephant in the room. It's probably a factor you should consider in assessing your likelihood of success. I'm sure your

lawyer can handle it well, but it warrants some discussion so at least you're able to think it through."

2. When the going gets tough, mediators must continue to demonstrate their neutrality and their confidence that the process is working as it should.
3. I remind the party that my analytical reasoning, experience, questions about risk assessment, and focus on reality testing are among the reasons they hired me.
4. I promise anyone complaining about my questions and concerns that I expect to engage in a parallel process in the next room.

D. The mediator should continue to accumulate capital and trust during the mediation process itself.

1. The mediator always remains a careful listener. A good mediator should never grow impatient or worse, LOOK impatient.
2. Reframing whenever possible to show the mediator understands their perspective and can put it in your own words is a way to replenish the supply of trust.
3. I may also draw their attention to the process and ask for help putting together "ammunition" to help create movement in the other room. "Let's try something different. Let's talk about the strengths of your case and what I can say to the other side that might just loosen them up. What's your take on why it took so long for them to launch an investigation into the charges of sex harassment?" With one mediator intervention and call for help, an increasingly skeptical participant may see that the tables can be turned and the other side made to face the risks that it hasn't fully appreciated.
4. Mediators should avoid "judging" party behavior – which is not always so easy. A judgmental mediator can put a party off, create an adverse reaction or turn trust into hostility. If the mediator finds a party's conduct or decision problematic, putting the onus on others can help: "Your lawyer tells me this is a jury trial. How will you explain to the jury that the pressure to start an intimate personal relationship bothered you so much that you resigned, and yet you never brought it to anyone's attention in management?"
5. Whether in joint session or caucus, neutral sounding questions to encourage a party to question his or her own assumptions are the rule.

E. Through patience, clear communication, honesty, transparency, and a better understanding of the needs of the participants, the mediator can help the parties identify options on which all sides can agree.

VI. When the case settles, trust and confidence in the mediator continue to be an important to completion of the process.

A. Parties may turn to the mediator as one person they can count on to keep track of the terms.

B. The mediator may be the only one trusted to draft a term sheet or Memorandum of Understanding.

C. The mediator may be asked to serve as an arbitrator in the event of a dispute in the agreement drafting or administration stage.

D. When the parties have achieved their legitimate settlement expectations, trust flows into the room. Appreciation is evident in the eyes of participants. Gratitude can be heard in their voices.

E. Litigators remember this feeling of trust – or the lack of it! – the next time they need mediation services. With trust they will call again.