

Is Trust a Necessity in Bankruptcy Negotiation and Mediation?

By: *Sylvia Mayer*¹



An oft-touted truism about both negotiation and mediation is that trust is critical to reaching an agreement. But is it?

Parties typically come to mediation or engage in negotiation with a trust deficit. Perhaps parties feel wronged, betrayed, or angry. Perhaps there is no prior history between the parties, or they have a particularly challenging history. Notwithstanding this trust deficit, reaching an agreement remains possible.

Parties often select a mediator based on recommendations, counsel's experience with the mediator, or available data (i.e., subject matter expertise, neutral experience, or stated philosophies). But even if counsel knows the mediator, the actual parties do not. Notwithstanding this lack of pre-existing trust in the mediator, settlement remains possible.

So, is trust critical to reaching a negotiated or mediated agreement?

Consider it from a different perspective. Have you ever done a trust fall? Trust falls are often used as a team-building exercise. One person stands on a raised platform, closes their eyes, and falls backward trusting that the rest of the team will catch them. Could you walk into a room full of strangers and do a trust fall? Or could you stand on the platform and trust that the opposing party will catch you?

Real trust takes time. It requires proven integrity, reliability, and credibility. But we do not have that kind of time in a negotiation or mediation, so how do we bridge the trust divide to get to an agreement?

In my experience, as both neutral and counsel, while we may not be able to create deep and abiding trust in a negotiation or mediation process, we can use trust-building tools to create a trust-like feeling enabling parties, who otherwise distrust one another, to reach a negotiated outcome. The myriad ways to build this feeling include, but are not limited to, these examples:

- a. **Reputation:** The bankruptcy bar is small. So too is the roster of experienced neutrals. It is harder to build a good reputation than it is to get a bad one, so remember that your reputation will precede you in the negotiation. While first impressions matter, there may be two "first" impressions: the one formed before you meet (based on credentials, experience, recommendations, news, or even gossip) and the one formed soon after you meet (based on what

you say, how you say it, and how well you listen).

- b. **Process and Process:** Parties need to understand the process of mediation. This includes understanding the “who, what, when, how, and where” of the mediation, as well as the mediator’s role as a neutral. The same is true in a negotiation. Reducing the fear of the unknown is trust building. In fact, in an academic study analyzing successful mediations and what led parties to “trust” the mediators, they found that the three top factors were the mediator’s (i) explanation of the mediation process, (ii) mastery of the mediation process, and understanding of the issues, and (iii) perceived impartiality.ⁱⁱ

In addition to the steps in the process, an ability to process the experience is a critical component. It is rare for a negotiation or mediation to conclude in 10 minutes. Why? Parties need time to process their emotions, information, options, and proposals. Allowing this time creates a feeling of safety and confidence in the process, which engenders openness to new ideas. That safety and openness lead to greater confidence in the process.

- c. **Safety and Consent:** In *Negotiation Mythbusters: Rethinking Everything You Know About Building Strong Agreements*, the authors assert that trust is a luxury, not a necessity. Instead, they focus on safety and consent as critical to effective

negotiation. So long as each party can say no (consent), the parties can feel safe engaging in dialog around their wants and needs. This combination of safety and consent produces a trust-like feeling, which allows the parties to explore creative solutions and reach an agreement.ⁱⁱⁱ

- d. **Receptivity, Credibility, and Unity:** In *Pre-Suasion: A Revolutionary Way to Influence and Persuade*, the author explores ways to enhance receptivity.^{iv} Essentially, he posits that what you say and do before you make an “ask” influences the outcome more than the actual proposal because the other person is more receptive to the ask. Among other things, he explores the value of creating a sense of unity (a feeling of “we” instead of “me”) and building credibility. We can build credibility and create a sense of unity by acknowledging mistakes, recognizing weaknesses in our position or strengths of the other’s position, and/or identifying shared challenges and common interests. Credibility and unity may prime parties to reach a negotiated outcome.

The list of trust-building tools is long. But these few examples illustrate that, even if we cannot create true trust, we can create a trust-like feeling. Perhaps that is a semantic distinction, but what is clear is that using trust-building tools can bridge a trust divide and pave the path to resolution in a negotiation or mediation.

ⁱ Sylvia Mayer is an Arbitrator, Mediator, and Attorney with S. Mayer Law. She is a member of the National Academy of Distinguished Neutrals and frequently

serves as a neutral in bankruptcy disputes.

ⁱⁱ See Jean Poitras, *What Makes Parties Trust Mediators?*, *Negotiation*

Journal, Vol. 25, No. 3, pp. 307 – 325 (July 2009) (academic study analyzing feedback from parties to mediation and identifying the reasons that parties “trust” a mediator).

iii *See* Dan Oblinger and Allan Tsang, *Negotiation Mythbusters: Rethinking Everything You Know About Building Strong Agreements*, pages 37-40, (2021) (dispelling the myth that trust is necessary in negotiation); *see also* Mark Raffan, *The Negotiation Mythbusters Tackle 3 Widely Held Beliefs* (February 28, 2022), <https://podcast.negotiations.ninja/public/67/Negotiations-Ninja-Podcast-40637fd7/e03270d3> (interviewing Dan Oblinger and Allan Tsang about their

book, including their view that trust as a necessity in negotiation is a myth).

iv *See* Robert Cialdini, *Pre-Suasion: A Revolutionary Way to Influence and Persuade*, pages 173-208 (2016) (exploring the use of “pre-suasion” to achieve favorable outcomes, including the use of unity and credibility); *see also* Barry Ritholtz, *Masters in Business* (June 18, 2021), <https://podcasts.apple.com/us/podcast/robert-cialdini-on-the-psychology-of-persuasion-podcast/id730188152?i=1000423074089> (interviewing Robert Cialdini about his book).