

POINT OF VIEW

*Diana Richmond, Esq.**

Generosity and Trust

Generosity and trust are not the first traits that emerge in a family law practice. Greed and revenge more readily come to mind. In fact, the lack of trust and generosity is among the reasons this practice can be so wearing. I was reminded recently by two true stories of how much our own behavior can fuel either the negative or the positive in clients' behavior.

Sharing a glass of wine with me recently, an old friend, himself an attorney, who was divorced years ago, told me the story of his own divorce. Opposing counsel was a highly skilled attorney whom I knew well. My friend complained bitterly about my colleague's distrust of him and how he had gotten his petty revenge. After the MSA had been inked, my friend tried to make arrangements to obtain his share of the family photos. My colleague insisted he come to her office to review and mark those photos he wanted duplicated. He asked to sit in a room somewhere to go about his task. My colleague turned him down, told him he must sit in her presence, so that she could be certain he did not "steal" any of his family photos. Thus incarcerated with my colleague as his warden, he made it his challenge to pocket some of the family photos-something he never otherwise would have done! His story was funny but sad: all of us have made some decision or other that caused our opponent to "live down" to the distrust we accorded rather than live up to the trust we ascribed.

It happens all the time in discovery, particularly with accusations of hiding assets or other bad conduct. One of the reasons I like the fiduciary duty of disclosure is that it puts the onus of disclosure on each spouse to open up rather than encouraging the challenge of hiding the ball.

If any of you have not played out a Prisoner's Dilemma negotiation exercise, I strongly encourage you to try it. It is a powerful experience. An exercise of incremental trust, it requires each

participant to make a move without knowing whether the other player will reciprocate to mutual advantage or will betray the first player. It is played against a backdrop of knowing that maximum advantage can be gained only by betraying one's counterpart, but betrayal can also cause one to lose everything. If both participants continue to act with reciprocal trust, each obtains a good outcome, though not the best possible outcome.

Which brings me to my generosity story. In a recent settlement conference with able lawyers accompanying their clients and a mediator presiding, the parties struggled over a complex property characterization issue that had no clearly predictable litigated outcome, except that it would be very expensive for each side to prepare and try the case. One of the lawyers had developed a formula that the mediator considered so elegant a solution that she sought authority from the author of the formula to present it to the other side. The lawyer objected initially, insisting that she would need to ask for more in order to obtain the amount sought by the formula. After much persuasion by the mediator, the lawyer relented and allowed the mediator to carry the proposal to the other side. The lawyer and the party on the other side immediately recognized the fairness and elegance of the proposal and accepted it on the spot. Rather than being happy, the author of the excellent proposal expressed regret for being too generous, that she could have gotten more, and recommended to her client that she ask for something else to compensate. At this point, the mediator brought both sides into the same room. The author of the elegant solution started to make her pitch for the additional money, and her client-in the presence of all-said no, she didn't need that extra money. The husband was so moved by the wife's gesture that he offered her something additional in a different category, which she accepted.

The parties had not only agreed upon an elegant and fair solution to their property settlement; they had also been generous to the other and reestablished some level of core trust that could very well form the basis of a lifelong good relationship. Only the lawyer who wanted to maximize her own client's recovery seemed less than thrilled by the day's outcome.

This second story wouldn't have this happy outcome with every set of spouses. Some spouses will match an offer of generosity with the equivalence of a spit in the face. But in this story, there was no harm to either side in making the elegant proposal. At worst, the husband would have said no. But

extending the proposal made possible a happier outcome than any of them had foreseen. That's the take-away: it's worth taking the risk of trusting. Try it: even with someone you don't trust, you can extend a unilateral courtesy, an olive branch, a correction of an error that had favored your own client, any small vulnerability that does you or your client no essential harm and opens the doorway to reciprocity.

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