

TRUST AND THE MISSION OF MEDIATION

by B. Kent Warner

I have often marveled at how much of the thinking of ancient philosophers applies to modern-day law and mediation. Consider the concept of trust, as discussed by Aristotle, and the application of trust in modern-day tort mediation. The mediator is called upon to step out of whatever role he or she may have practiced and be trusted to put all of his or her efforts toward striking a deal. The parties need to trust that my job as the mediator is not to drive the case toward my evaluation, but rather to drive the case to an agreed-upon settlement both sides can live with. In short, the mediator needs to leave personal biases and judgment out of the negotiation. Pondering the concept of trust presents a conundrum for the mediator, in that he or she must be trustworthy while orchestrating a settlement that frequently none of the litigants totally embrace. The focus of a trustworthy mediator becomes the application of skill and honorable practices to implement and close a deal, guiding all parties to settle.

In Aristotle's *Rhetoric*, the speaker persuades the audience with language, character, and skill. Rhetoric represents a linguistic tool for practical debate and a means for persuading, using probable knowledge to resolve practical issues. According to Aristotle's *Rhetoric*, there are three modes of persuasion: *ethos*, *logos*, and *pathos*. *Ethos* represents the guiding beliefs of the community and moral character; it is the origin of the English word "ethics." According to Aristotle, the speaker must establish *ethos* from the start. For purposes of this article, "mediator" or "advocate" may be substituted for "speaker."

There are three things which inspire confidence in the orator's own character – the three, namely, that induce us to believe a thing apart from any proof of it: good sense, good moral character, and goodwill. False statements and bad advice are due to one or more of the following three causes. Men either form a false opinion through want of good sense; or they form a true opinion, but because of their moral badness do not say what they really think; or finally, they are both sensible and upright, but not well disposed to their hearers, and may fail in consequence to recommend what they know to be the best course. These are the only possible cases. It follows that any one who is thought to have all three of these good qualities will inspire trust in his audience. – Aristotle, *Rhetoric*

The mediator brings together an audience consisting of two or more opposing parties within a forum of con-

flict resolution. As they posture for position, the parties' need to project power and to achieve their vested interests heightens the peak of opposition. Resolution hangs in the balance of trust and negotiation. The mediator assesses and compares each individual to arrive at a projected level of reconciliation. In order to bend and facilitate stances and viewpoints, the mediator projects the ability to absorb negative emotions and reflect logic. The audience before him must acquire an attitude of comfort and trust to relinquish defensive emotions and reach a common platform. Even before the moment of introduction and seating, the process of establishing trust begins.

The three categories of Aristotle's *ethos* include practical skills and wisdom (*phronesis*), virtue (*arete*), and goodwill toward the audience (*eunoia*). Therefore, the establishment of *ethos* requires competency, honesty, and unbiased intentions on the part of the speaker, which together establish trust. In the adversarial system, the establishment of trust can indeed be challenging. Trust is a goal toward which the participants in mediation should all strive, balancing the demands of advocacy with professionalism and ethical behavior. Trust lowers defenses, diffuses emotions, and opens discussion. Violations of *ethos* would include a lack of expertise or a direct or vested interest that would destroy trust. Trust is a two-way street between all parties as a practical matter in mediation. Certain unwritten conventions dictate that attorneys will be more or less candid while presenting their case in the best light, yet acknowledging weaknesses so the matter can be compromised. An advocate must trust the mediator to be candid, confidential, and trustworthy. Advocates at arm's length deal in good faith, while still being entrusted to not give their side away and to negotiate vigorously in the best interest of their client. The mediator will handle the mediation in accordance with the rules, both unwritten and written, and act honorably. Therefore, in mediation everyone is an audience and everyone is a speaker, not just the mediator. Trust becomes a necessary transaction between however many participants are present in the conversation. The idea of trust becomes linked with the idea of ethics for both the mediator and the attorneys. The concept of ethics is consistent with the development of trust.

Trust begins with reputation. As an advocate, an attorney hopefully develops a reputation of skill, professionalism, and dignity. My reputation has been based on nearly 40 years of trial experience, dominating the court room, vigorously defending my clients, and achieving exceptional

victories for my clients. Transitioning to the role of mediator, my client becomes "the deal." Arriving at a settlement result may be perceived as unjust if a disparity of the bargaining power or of the motivation to settle exists. As the advocate morphs into the mediator, the reputation needs to morph into that same professional, utilizing many of the same skills, advocating not for one party or another or one value or another, but for the deal – a deal that will result in the litigants having a resolution they can live with and perceive as a sound economic decision, if not a victory for both sides.

A successful mediator will project an honest reputation, experience, expertise, and neutrality. In law and in any profession, your reputation precedes you. Being diligent at maintaining character, integrity, and ethics will amplify your success. An air of trust will permeate the mediation quarters with the presence of a trustworthy and competent mediator. Confidence reflects and reinforces trust.

With the establishment of ethos and trust, the mediator and attorneys may draw upon *logos*, or argument from reason. According to Aristotle, *logos* makes it possible to make clear through reasoned discourse the perception of what is advantageous and what is harmful, what is just and what is unjust, what is good and what is evil. *Pathos*, persuasion by way of emotional appeal, puts the hearer in a certain frame of mind, appealing to sympathies and imagination, leading to identification with the point of view of the speaker.

But since rhetoric exists to affect the giving of decisions – the hearers decide between one political speaker and another, and a legal verdict is a decision – the orator must not only try to make the argument of his speech demonstrative and worthy of belief; he must also make his own character look right and put his hearers, who are to decide, into the right frame of mind. Particularly in political oratory, but also in lawsuits, it adds much to an orator's influence that his own character should look right and that he should be thought to entertain the right feelings towards his hearers; and also that his hearers

themselves should be in just the right frame of mind. That the orator's own character should look right is particularly important in political speaking: that the audience should be in the right frame of mind, in lawsuits. – Aristotle, *Rhetoric*

A mission statement of mediation using Aristotle's *ethos*, *logos*, and *pathos* would include ethics, logic, and emotion. Trust built through *ethos* enhances the power of persuasion with arguments of reason. Building and maintaining your ethical reputation, expertise, knowledge, and human relatedness will create a forum of trust, results, and satisfaction. Develop your own mission statement to serve your clients, your career, and your reputation. A mission statement defines your goals clearly, guides your decisions, and motivates action. Here is a mission statement for mediation built on centuries of philosophy, reason, and persuasion: "Just as advocates must be trusted to vigorously represent the interests of their clients within the boundaries of professional ethics, so the mediator must be trusted to advocate for the deal, the settlement arrived at between the parties and facilitated by the skill of the mediator." – B. Kent Warner

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B. Kent Warner brings nearly 40 years of trial and settlement experience to his mediation company, Warner Dispute Resolution. Mr. Warner has served as a settlement officer in superior court for over 20 years, as well as a settlement judge pro tem and private mediator for the past 10 years, achieving excellent results. Serving all counties in Southern California, Warner Dispute Resolution offers exceptional full-service mediation. Visit WarnerDisputeResolution.com or email BKW@WarnerDisputeResolution.com for more information.

