

## “It’s Not My Fault” in Mediation

By  
David I. Karp<sup>1</sup>

In my sixth year of full time mediation practice, I continue as a student of human behavior. Most recently, I have become interested in how people behave in mediation who believe “it’s not my fault.”

As a real estate mediator, I often see these people, for example, in the role of plaintiffs in fraudulent non-disclosure cases. They are buyers who, for one reason or another, were disappointed in their purchase of real property. They have brought suit against the sellers, the real estate agents and brokers in the transaction, sometimes the home inspector, and so on. They say they weren’t told something material about the property they were purchasing and have suffered some resulting loss (property value loss, cost of repair, whatever). Many times, however, the defendants contend that the plaintiffs as buyers had their own contractual and legal duties of due diligence to investigate the property and they did not fulfill those duties. Plaintiffs respond that they were relying on others to inform them. Sometimes the Plaintiffs in fact have been harmed by deliberate omission on the part of others; sometimes the Plaintiffs have harmed themselves by not looking into the property’s condition or circumstances enough.

Wise and experienced mediators have told me to listen to the very first words a disputant says in mediation, which I do. Often the words descriptive of the other person describe the speaker himself. Thus, if a person suggests, “it’s not my fault,” it may actually have been his or her<sup>2</sup> fault.

The difficulty is to get the person to see that he may have contributed to the problem, if he has, in order to resolve the problem – to help manage sometimes unrealistic expectations as to others’ culpability or liability, to learn to share some of the responsibility for the loss, and so forth.

I am not a psycho-therapist, but I have a sense of the emotional obstacles at play. They, I think, may include the person’s no-fault expectations of entitlement to his dream home as in the above example, his shame or guilt or his perception of the potential for a diminished self-image if shown to be at fault, his need to prove himself right (guiltless), or his inability to accept blame.

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<sup>1</sup> David I. Karp is a full time mediator of real estate and business conflicts throughout Southern California. Located in Van Nuys, CA, Mr. Karp can be reached at 818-781-1458 or at [david@karpmediation.com](mailto:david@karpmediation.com).

<sup>2</sup> Not to give offense, but purely for editorial reasons and “to keep it simple” I will use the masculine forms of pronouns hereafter.

The consequence may be the person's attempt, through the litigation and in mediation, to shift blame away from himself, to others, knowingly or unknowingly, and thus to bolster his own self-esteem. Psycho-therapists may refer to this as scapegoating or narcissism but I cannot speak to that.

Nevertheless, as a mediator, this takes me beyond the simple facilitative or evaluative approach to conflict resolution.

One of my favorite resources is Kenneth Cloke's Mediating Dangerously: The Frontiers of Conflict Resolution (Jossey-Bass, 2001). In it, Cloke suggests, among many other things, getting to the heartfelt conversations that lead to introspection, self-honesty, authenticity and a "willingness to explore the conflicts within yourself." (Id. at 40.) And I have seen this reflection work in mediation to lead to resolution.

But sometimes it won't work or we cannot get there. Sometimes the disputant's own unwillingness to look at himself in the proverbial mirror is an obstacle (and this is not a therapy session anyway). Or, the lawyer may not want to go there either – perhaps because he may be fearful of or inexperienced with this approach or have his own control issues with the client or the mediator.

If so, maybe we are left with the evaluative approach in dealing with the "it's not my fault" litigant. Many lawyers may want this anyway – perhaps to be validated thereby. In this approach, the mediator becomes "the agent of reality" (a phrase often heard in mediator training courses) to suggest how the case, in his opinion, might possibly turn out if tried. But here the risk is that the disputant will come to believe the mediator is taking sides, especially but not only if the analysis differs either from his own belief system or from that of the person's own lawyer.

On the other hand, if the case does not settle and the disputant does not win, the lawyer can say, "See, the mediator was right," and "it's not my fault."