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Mediation Offers Advantages to Litigants Looking for Insights

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Ever since Roscoe Pound presented "The Causes of Popular Dissatisfaction with the Administration of Justice" at the annual convention of the American Bar Association in 1906, voices within the profession have lamented the low opinion of the legal system held by many litigants and laypeople. Although the reasons behind this sense of irritation with the legal system are myriad and complex, alienation from other parties and from decision-makers is a common theme.

Litigants also complain about the time and money consumed by the process, often in what seem to be feints over matters that are far from central to what they see as their actual dispute. They often crave the speed and honesty that come with a more direct approach, but for many reasons, formal litigation either forbids or disincentivizes direct communication over central issues. This is not true of mediation, and for that reason the mediation process offers a powerful advantage to impatient clients, an advantage that a good lawyer should always keep in his or her portfolio.

Imagine the following scenario: A wealthy couple has purchased a prominent and expensive racehorse for stud. At some point thereafter, they deliver the racehorse to a local veterinary hospital in order to treat some digestive problems. The horse dies while in the care of the head doctor at the veterinary hospital and the wealthy couple files suit against the doctor and the hospital. The parties agree to try to resolve their dispute in mediation.

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Going into mediation, the veterinary doctor is worried about the high dollar amount at which the couple has listed the horse's value. He imagines that the couple is very motivated to recoup such a serious investment. He tells his attorney, "I'm very concerned that they are thinking about all the money they would have made on that horse, and are looking to clean me out." He and his lawyer are surprised when the mediator confides in them that the primary emotion in the opposing camp is not anger at an investment gone wrong but sorrow at the loss of a beloved pet. "Although they ostensibly purchased the horse as an investment, they have both grown attached to his playful personality, and they speak most not about the money, but about the loss of their relationship to him."

This revelation gives the lawyer the ability to prepare his client for the emotional tenor that interactions with the couple during mediation will likely take on. "If we act as if this is solely a business investment gone wrong, we risk inflaming their grief," advises the doctor's lawyer. "Being sensitive to their hurt costs us nothing and will make this process smoother, for all of us."

The mediator's disclosure pays off for everyone, as the doctor is able to offer his sympathy at the outset of the next negotiation session. However, although negotiations begin smoothly, they are almost derailed when, two hours later, the doctor himself begins behaving irrationally. He is visibly angry and begins to refuse fair requests seemingly only because they are made by the couple, his adversaries.

The mediator suggests a break, and during the parties' time apart, checks in with the doctor's lawyer. The lawyer reports that, as soon as the parties separated, the doctor exclaimed: "They are acting like I'm a murderer! I didn't get into this business for the money — I love animals. How dare they suggest otherwise!" Although the doctor had been mentally prepared to have his skill as a veterinarian impugned, he had not considered that he might also end up feeling like his compassion for his patients was being called into question. As soon as the negotiations triggered this subconscious sore spot, it became impossible for him to proceed rationally.

The mediator gently recommends to the couple's lawyer that, when negotiations resume, they mention that they are aware that the doctor has an excellent reputation for his bedside manner and for donating labor and supplies to local animal welfare organizations. "That's why we chose him — we know he loves his patients," says the wife. "We just don't understand what happened."

As this example illustrates, many of the key benefits that mediation offers to potential litigants are psychological in

nature. For instance, whereas in the courtroom, many crucial decisions are made by people who have no stake in their outcome and whose familiarity with the issues comes primarily through presentations of evidence and testimony at trial. In mediation, decisions are made by those who are most interested in the outcome and who are utterly familiar with the issues already — the parties. In addition to determining the ultimate result of their mediation, parties may also decide what to reveal to one another, how much to cooperate with one another, and how to relate to each other and to their mediator. Having control over these aspects of the process can put an uncomfortable client at ease.

A good mediator is likely to have many years of experience that she can rely on in analyzing the parties' stakes in the conflict at hand. For instance, any judge who has presided over homicide proceedings can recall instances when a defendant accepted a guilty plea carrying with it a sentence of 20 to 40 years or even life in prison. For the defendant, it is imperative before accepting such a plea offer to be absolutely sure that the prosecution's case is as strong as the prosecutor says it is — otherwise, the defendant might rather take his chances at trial.

The defendant is also wondering how much faith he should have in his lawyer, who may be urging him to take the plea or, on the contrary, expressing confidence in the defendant's odds at trial. The prosecutor, too, has in mind the strengths and weaknesses of his case, but is also considering the impact that a trial will have on the family of the victim and on witnesses, and the relief for the victim's family when the defendant accepts his guilt through a plea. Experience in presiding over such pleas provides an experienced judge with a reservoir of emotional insights that she can then deploy in mediation. Risk analysis in terms of monetary damages is easier to contemplate than living one's life in prison and, although the stakes are high in all litigation, the stakes in homicide trials frequently dwarf considerations at play in other types of litigation. A mediator with years of experience on the bench knows well the risk that litigants run when they rely on decisions made by juries, or even judges or arbitrators, rather than deciding the outcome jointly in agreement with the other party. This insight into managing risk is key to a successful mediation.

Mediation is also flexible in terms of the types of relief it can offer to parties, and this is another potent psychological advantage over litigation. Because mediators work with each side and its specific needs, and because the proceedings are clothed in confidentiality, parties can offer apologies, acknowledgements of the other's position, in-kind offers of labor or property, or other novel offerings that are unlikely to emerge as part of the litigation process.

Often, a mediator's offer to hear what a party is feeling without judgment is the key to unlocking that party's ability to move forward with a settlement.

For example, in a dispute over construction work, the construction firm could offer a certain amount of free labor on another of the other party's development projects. The construction firm is more likely to feel comfortable making that offer if it can do so under the auspices of working with a customer in order to make the customer happy, rather than laboring or being forced to pay under the authority of a court order.

A mediator also has more time for the parties than a judge, who may not speak directly to a litigant until trial, if at all. Besides laboring under increasingly clogged dockets, judges are simply not put in a position to listen to litigants talk about their emotional experience of the dispute. A mediator can listen to what the parties have to say, unburdened by the emotional reticence imposed by the bench. Parties can say what they feel without worrying that the mediator or the other party will feel that their emotions are being aired in a cynical ploy to sway a jury. Often, a mediator's offer to hear what a party is feeling without judgment is the key to unlocking that party's ability to move forward with a settlement. As experienced litigators know, this sense of truly being heard is difficult to find in litigation, and is less likely to occur the longer the litigation has been ongoing.

Thus, trust in a mediator who has experienced many areas of litigation — and knows how fact-finders like lay jurors may react to the facts — is essential in order to take full advantage of the benefits of mediation. Parties and lawyers must be willing to confide in a mediator and rely on that mediator's discretion and sophisticated communication skills in order to feel confident that information about their strengths and weaknesses will be deployed subtly and only in service of reaching a fair settlement. Lawyers who familiarize themselves with available neutrals will be able to offer their clients a fuller range of legal services — including access to processes that may leave their client feeling a lot better than they would have, had they litigated. •