

Psychological Insights Can Be Helpful Tools in Mediation

By William H. G. Norman
and Barry A. Goodfield

Practice Notes
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Ninety percent of all civil lawsuits filed in this country settle before trial, but only after prolonged discovery. Even experienced litigators don't agree about why. Finding a satisfactory explanation might lead to more efficient and less expensive dispute resolution.

Traditional observers have explained that litigants need extensive information gathering before they can knowledgeably discuss settlement. More cynical commentators have said that lawyers exploit litigation in order to generate fees. We have come to a different conclusion. If correct, it suggests a need for greater use of psychological principles in mediation.

Our premise is that in many situations litigation is driven much less by legal or factual analyses of claims that it is by a need to use the lawsuit to exercise power over perceived wrongdoers. In this highly-charged emotional setting, the "blame game" begins with its emphasis on making everything the other person's fault and with the immediate consequence of producing counter accusations. Both sides then become entrenched in a cycle of insult trading which quickly gathers momentum.

On a psychological level, such a one-dimensional approach evokes a variety of unrelated but deeply felt insults that may have occurred years earlier at the hands of wrongdoers who have no connection with the lawsuit. The "real" wrongs become confused (often unconsciously) with the pain of past injustices and today's litigation adversaries become symbols of historical

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enemies. As a result, the emotional content of the present dispute becomes disproportionate to the issues at hand.

Through this inappropriate symbolization, the amount of money which may ultimately change hands becomes just a metaphor: it symbolizes the expression of power over an opponent through an aggressive use of discovery weapons. The potentially explosive psychological need to gain retribution for old wounds is intense. It becomes purposely drawn out and unnecessarily expensive.

To bypass the expensive blame game requires "resymbolization" that can divest the dispute of its excessive emotional baggage. A trained mediator accomplishes this through reorienting the parties' perceptions, separating the litigants' feelings about the old wrongs, from the current litigation issues. The mediator helps the parties understand that old strategies that seemed to work against historical opponents are neither appropriate nor effective in the current setting.

For example, an employee who has been terminated comes to understand that his or her employer had reasons
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for making the layoff. Though possibly wrong or even in bad faith, the employer's decision has nothing to do with earlier mistreatment the employee received at the hands of other authority figures. In fact, the motivations and attitudes of these authority figures were completely different from those of the recent employer.

Close Relationships

To be sure, such circumstances do not underlie all lawsuits, but they are common when the parties formerly enjoyed a close working relationship. We have found them prevalent in disputes such as partnership dissolutions, wrongful termination claims, breaches of fiduciary duty, and professional malpractice cases.

These kinds of lawsuits often are not about money but about power; they are not about law but about emotional feelings towards issues. The lawsuit is merely a vehicle to express feelings about those issues. It is no wonder, then, that even the most skilled mediators often find it difficult to bring

level. The crucial premise of this step is that no problem can be resolved on the level on which it developed.

Meta-level thinking provides four distinct advantages. First, the parties effectively abandon their two-valued orientation—that is, seeing things as black or white, good or bad, right or wrong. Second, the insights the parties gain give them a better base for clearer, longer-lasting, and more accurate decision making. Third, when the parties are open to diverse viewpoints, they hear and see more; they are therefore apt to make more relevant decisions. Fourth, parties who are open to understanding their own behavior are likely to be open to creative solutions to a dispute.

Another psychological tool that a trained mediator can use involves reading non-verbal behavior. By looking closely at patterns in an individual's facial or body movements the mediator can see the unconscious "other half of the message." Very frequently people say one thing verbally but communicate a different message through a "non-verbal leak." For example, eyes


(often more than the parties do themselves). By demonstrating this understanding, the mediator gains the trust of the parties and uses that trust to convince the parties to demonstrate openness. One of the basic approaches to generating openness is for the mediator to require each side to articulate

Today's litigation adversaries may be symbols of past enemies.

in detail the positions, concerns, and needs of the other side. Almost always this discussion de-escalates a conflict.

Dramatic Results

All of this is not just textbook theory or pop psychology. We have observed dramatic results at settlement conferences where mediators used such techniques. For example, in one extremely bitter wrongful-termination case involving a high-level executive at a nationally prominent company, the parties were millions of dollars apart and threatening to destroy each others' lives by bringing criminal charges; they ended up tearfully embracing each other and agreeing to a very modest monetary resolution. Clearly, money wasn't the issue but it took an application of psychological principles to get the parties to recognize that.

Lawyers need not fear mediation based on the use of psychological principles because legal issues will always remain important. A competent and dispassionate legal analysis is a critical ingredient in defining the limits and costs of using litigation power tools if the blame game continues. But when emotional objectives disproportionately dominate a conflict, a mediator trained in the use of psychological techniques can often help diffuse the anger, speed a resolution, and save money. 

The mediator can help the parties understand that old strategies that seemed to work against historical opponents are neither appropriate nor effective in the current setting.

the parties together simply by focusing the discussion on legal liability.

A mediator who understands the psychological dimensions of a dispute can guide the parties towards replacing the power tools of litigation with a new feeling of empowerment. The parties gain that new feeling by stepping back from the legal issues and monetary bargaining to what psychologists call a "meta" (more removed)

opening wide can signify shock; a tongue out generally signifies anger; eyes closed and swallowing down generally means denial. Being able to interpret these unconscious movements gives the mediator a powerful tool for reading some of the hidden thoughts of the parties in a negotiation.

A mediator who discerns the other half of the message can comprehend the true attitudes and needs of the par-