Overcoming Common Barriers to Settling Cases

John J. McCauley

For an overwhelmingly large number of cases, the optimal economic outcome for both parties is not extended litigation, but early settlement through collaboration with the adversary. Mediation is the approach designed to facilitate that outcome, and, when properly handled, has a very high success rate.

Nonetheless, considering its effectiveness, mediation remains grossly *underutilized*. The reason is not that people have not heard enough about mediation to think of it as an option. The reason is more basic: many find the alternative attractive. For them, litigation carries with it immense psychic and other perceived benefits. Mediation comes not as a welcome resource, but as a deprivation.

For the *lawyers*, taking matters to trial creates seemingly irreplaceable opportunities to build their professional reputation as advocates, to have the satisfaction of making full use of the rhetorical skills for which they have been trained, and, at least in the short run, to maximize income.

The *parties themselves* are often equally wedded to litigation, but for a different set of reasons. In general they tend to stay in the court system to satisfy one or more of three needs they sense are more readily satisfied there than in mediation:

- The Need to Inflict Pain on the Enemy ("Retaliation")

  People have enemies. The judicial arm of the state makes itself available to have its powers brought down against them. For the cost of a filing fee, the state will permit one to invade the lives of others in extremely intrusive ways. Some value the power to intrude more than they mind the intrusion they suffer in return. (Classic expression—King David: "Lord make my enemies into my footstools.")

- The Need to Secure Public Vindication ("Reputation")

  People need social affirmation. The reputedly public forum of the courtroom provides a beguiling opportunity to prove oneself "in the right" in the eyes of fellow citizens. For some, a favorable judgment in a court of law is an incalculably valuable form of vindication or self-affirmation. (Classic expression—John Donne: "No man is an island.")

- The Need to Find Refuge in the Rule of Law ("Refuge")

  People need protection from the wrongs of others. What provides that protection is an institutional commitment to the "Rule of law, not of men" as the standard by which major disputes get resolved. This is a deep and ancient value, whose roots precede Plato, whose existence is a hallmark of civilization, and whose implementation is a prerequisite to liberty. Its protectors are judges who are charged and under oath to impose not their will, but public and predictable rules of social conduct, and who are themselves held accountable to a higher power, the Court of Appeal, whose only mission in life is to correct errors of law as a failsafe on human corruption or fallibility. (Classic expression—Thomas More, "A Man for All Seasons.")

As to these needs, mediation appears at first to be a paltry response. Far from satisfying *Retaliation needs*, mediation stops the fun. It is, by its nature, non-authoritarian. With it, there is no stick.

Moreover, in mediation, *Reputational* needs fare little better. The use of mediation eliminates the *possibility* of public vindication. Not only is it private; it is "officiated" by one who is not even there to declare authoritatively who is in the right and who is in the wrong.

Finally, at first blush, mediation is antithetical to the defining principle of civilization, the *Rule of law*. In litigation, the decisionmaker is the judge, whose role is to be the neutral acolyte of the law. In mediation, the real decisionmaker is the adversary, the very person whose evil necessitates the imposition of law to begin with.

The depth of these needs is often underappreciated in the mediation community. But it is mediators who can least afford to ignore those needs. Those needs do more than discourage some parties from using mediation to begin with. They often impede the settlement process once the mediation has begun, taking

center stage as the primary obstacles the mediator must contend with in the mediation itself.

How do good mediators open the way for settlement despite these needs?

The first need, the need to Retaliate, tends to fade quickly on its own after the heat of the opening salvos of litigation has spent itself. The key benefit of the court system has already been conferred — the parties have each other's focused attention. Thereafter, the pain of litigation begins to dull the pleasure of inflicting pain. What remains is often nothing more than a serious need to "vent" before serious progress can be made in the mediation session, and good mediators are trained *not* to resist that need.

The remaining two needs—the Reputational and Refuge needs—are often more difficult barriers. The good news is they only thrive in the presence of two *perceptual* distortions, which the mediator can directly or indirectly harness:

- *The Myth of Predictability*: the common, but demonstrably false, belief that the human institution called "our system of justice" has reached the point of development where there is a tolerably predictable outcome at trial for complex civil disputes.

- *Partisan's Distortion*: the virtually universal phenomenon of advocates involuntarily overassessing their own likelihood of prevailing.

The mediator, in short, does not need to fight basic human needs. He or she only needs to counter the perceptual distortions that drive those needs toward continued litigation. The need for *refuge* may remain, but a courthouse provides no place of refuge, if there is a serious risk of an unmeritorious adverse judgment. Moreover, trusting one's *reputation* to a fallible and unpredictable arbiter of justice makes little sense. If those in the right do not consistently win, then the favorable judgment may never arrive, and carries far less vindication when it does arrive.

Countering the partisan's distortion has this subtlety: it must be done in a way that does not impair the mediator's neutrality, which is his or her only source of strength. Close questioning, in caucus, about the elements of the claims and their admissible supporting evidence, accompanied by such skepticism as is in fact genuine, is usually enough to impact that distortion. Whatever the partisans' belief on the merits, they can be moved by the stubborn reality of a neutral sincerely unmoved.

Finally, there is this paradox: if the Rule of Law is surprisingly absent in litigation, it can be surprisingly present, even forceful, in mediation. The parties are "bargaining in the shadow of the law." They each have a self interest in paying close attention to what the law is, and for one reason: their only alternative to settling is to proceed to a court of law. For that reason, each party's only tangible yardstick by which to gauge an acceptable outcome in mediation *is* his or her own prediction of what a court would otherwise do. To the extent that the outcome of litigation is in reality far less predictable than most perceive it, the Rule of Law has its greatest strength *as myth*, in mediation. It is one of those strong forces in life that only loses its strength once it is put to the test.-

Copyright © John J. McCauley 2000. This article originally appeared in the October 2000 edition of Orange County Lawyer Magazine.