Mediation for "normal" people

Lawyers and mediators can easily forget how frustrating it is to be a "normal" person in a mediation session

By Rebecca Grey

We, dear readers, are not normal people. As litigation-hardened lawyers, mediators, judges, and (yes) insurance professionals, we are abnormal. The "normal" has been beaten, trained and educated out of us. The more our experience with litigation in general, and with the mediation process in particular, the less normal we become. The wisdom and skills legal professionals gain are wonderful tools that make us better at helping the people and entities we serve. However, in my mediation practice, I am struck by how we non-normals can easily forget what it's like to be a normal person in a mediation.

In this context, normal people are litigation-naive individuals, people who have little to no regular experience with legal disputes. Most individual plaintiffs are, by definition, normal people. Many individual defendants and some corporate representatives are normal people whose lives have not previously been disrupted by a lawsuit. Normal people think "discovery" is a television channel, "motion" is physical movement, and "judgment" is how they feel about ugly shoes.

The process is not normal

The process of mediation is not normal. It's a unique and idiosyncratic method of resolving disputes. The dramatic arc of mediation can be uncomfortable and counter-intuitive. But, one of the strangest things about mediation is that the main beneficiaries of the mediation process and the resulting resolution – the individual parties, the *normals* – are often the least informed about the *strangeness* of the cultural experience, decision-making process and methods of communications used in many mediations.

I tell the parties in my mediations that they are normal people on safari observing the rest of us – lawyers, mediators, and insurance representatives – as we behave in our native environment and *it is a strange trip indeed*. The strangest part of the safari experience, I tell the normies, is that the rest of us who do mediation regularly have forgotten how peculiar the mediation process is.

Popular culture helps us understand many occupations. We have an idea of what police officers, doctors, judges, blood-spatter experts, serial killers, bartenders, mafia bosses, sex workers, lawyers, and farmers do from movies and television. Perhaps a skewed idea, but an idea. Mediation is not yet the subject of a popular TV show (Aaron Sorkin, call me). So, normal, mediation-naive people come into the ADR process armed at best with what their lawyer told them, usually in one short office visit or phone call.

Perhaps you, dear readers, are demonstrating my point now by asking themselves, how is mediation strange? It seems normal enough to me. Exactly!

Playing with monopoly money

Mediation will go better when the normal mediation participant is amply prepared for the flagrant use of monopoly money numbers that borders on the silly. Distributive negotiation often starts with the plaintiff demanding a number intentionally much higher, sometimes by an order of magnitude, than their "target" or "bottom line" result.

This can create problems for the normal people on both sides. The unprepared normal people on the defense side are agog, they gasp and roll their eyes, they ask *is that a typo*? There is confusion, outrage and a sense by some normal defendants that this is insanity and wonder why their lawyers aren't screaming bloody murder. (This may encourage the defense lawyer to then theatrically scream bloody murder, which does not really move the process along.)

The normal people in the defense room will benefit from being told these numbers are not real, they are placeholders, this

is a dance, a play, a performance which both sides use to telegraph information. The mediation process is partly a decoding exercise to reveal the Rosetta Stone of the messaging. The savvy advocate and empathetic mediator counsels the normal defendant that learning what we can about what the numbers mean will benefit them, both in settlement negotiations and in further litigation.

The opening demand, whether twice, thrice or ten times what the plaintiff's lawyer hopes to settle for, also confuses the normal plaintiff. Normal plaintiffs may also misconstrue the opening demand for a real target, a realistic settlement number. Because confirmation bias so powerfully slants a plaintiff to want to believe those numbers are reasonable, it is critically important that the plaintiff's lawyer manage expectations by explaining *repeatedly* that the opening demand is a fictional number far from a realistic potential settlement amount.

Predictably, a corresponding opening *offer* by the responding party is often also artificially low, which creates offense and confusion to the mediation-naive normal people in the plaintiff's room. To exaggerate, the plaintiff demands $5 million for a sprained wrist and the defendant offers $20 and a bus token in response. While frustrating to the repeat players in the room, us non-normals, this is still familiar territory. We all know this is communicative, that the plaintiff is willing to come down, come down *a lot*, and the defense likely has much more to put on the table. Again, the lawyers and mediator should counsel the normals in both rooms that this is one step of many and the early moves on both sides are intentionally far from the actual reasonable settlement range.

The dance

When I was a baby lawyer, then much closer to a normal person than the warped desiccated husk of litigation calluses I am today, I was totally perplexed by the safari rituals of mediation. How is it that smart plaintiff's lawyers with decades of education and a detailed knowledge of their own case could engage in such a silly charade as demanding two, three or ten times what they knew to be a reasonable settlement range? And how could a risk-savvy defense lawyer and experienced insurance professional keep a straight face by offering pennies on best-case scenario dollars? Can't we just go in and tell them we think the settlement value of the case is X, I wondered. Or can't we agree that the realistic range is really from, say, $200,000 to $400,000 as opposed to demanding seven figures?

After thousands of hours of experience as lawyer and as a mediator, the answer is still no. The parties have to do "the dance." The "dance," another safari ritual, is the back-and-forth haggling from an absurd monopoly-money range to a closer, more reasonable range and hopefully to a mutually agreeable compromise position somewhere in the middle.

The reasons for this are cultural, psychological and process-based. Parties, and their lawyers, are themselves going through stages of acclimating to a realistic, pragmatic and often painful compromise. One gets there by baby steps. People often don't feel that they've negotiated the best deal for themselves unless they've gone through the haggling, the bargaining, the tedious tit for tat that is the "dance" of settlement negotiation.

Parties, and their lawyers, need to believe they worked to move the other side from a ridiculous, unreasonable position to one they can live with. They need to see the results of that movement – "they started at $2 million but we've gotten them down to $800,000; we've made progress!" A doctor once told me that many patients refuse to believe a medication is working unless they experience unpleasant side effects. The performative back-and-forth haggling dance is the unpleasant side effect of the medicine of mediation.

The trigger warning

In most legal disputes, someone has been hurt. Strange as it may seem, we abnormals often forget the series of events it takes for a normal person to take the drastic step of acknowledging an injury, a wrong, an injustice, then finding and retaining a lawyer and committing to filing a lawsuit.

Genuine injuries experienced by plaintiffs usually go beyond irritating, or fleetingly difficult, they are often experienced as *trauma*. For better and worse, litigation is the repetitive reliving of that trauma, the constant painful backwards-looking process in which the more color, detail and pain the plaintiff can evoke, the better the case shapes up for her lawyer.

In my experience, the most effective mediations are ones in which the normal people have the cathartic experience of telling their story to the neutral in a safe, non-adversarial space. It can be healing to share one's story to a neutral person who isn't paid to be on their side. Often mediation is the closest thing the normal litigant has to their own "day in court." But sharing the story of personal trauma is often triggering to a plaintiff who is asked to relive it. Trauma isn't limited to sexual assault or deeply personal intentional torts. Tenants who contend they lost a home, personal-injury victims, employees who were treated unfairly, or the victims of theft, including corporate ones (like a wrongful insurance denial), can experience severe psychological injury from those experiences.

We abnormals do our clients a disservice when we are blithe about the depth of their pain and the discomfort of retelling it. The best approach for us abnormal lawyers and mediators alike is to give the parties as much authorial agency, as much power and control as possible to share their narrative, including the right to stop and take breaks, to ask questions, and to drive the narrative bus as much as possible.

I try to give express permission to be emotional, angry, to cry or tantrum and expressly give time in the mediation for

self-care to step away from the mediation or Zoom room, pet their cat, have a snack, touch a tree or do jumping jacks. While lawyers and mediators can fall into the habit of treating the mediation process as a rote professional business transaction, it's important that we help the parties who are hurt, frustrated or traumatized, know that we see how personal it is for them.

Defendants have stories, too

We litigation-savvy abnormals understand the importance of the plaintiff's story. But defendants benefit from telling their stories, too. Those stories also often involve fear, trauma and evoke the animal brain. An individual defendant in an employment matter may deeply resent being accused of bias or other employment offenses. An at-fault driver may be as traumatized, both physically and psychologically, as the injured plaintiff. A landlord who believes she did everything by the book is likely to be troubled and threatened by accusations of intentional misconduct.

These defense stories are critical to the mediation process for many reasons. First, the effective mediation process includes space for the individual defendant or defense representative to air their narrative. A mediator who has heard the defense side, told as a personal story, will be more effective. Normal defendants may approach the mediation feeling like they have been unfairly cast as a villain. It's important that their story has been heard and taken seriously by the neutral. Having the defendant tell their story gives the mediator a helpful counternarrative for the plaintiff and her lawyer and establishes rapport between the mediator and the normals in both rooms.

Moreover, litigation storytelling is iterative. Rehearsing the story of the case helps lawyers, insurance adjusters, mediators and the parties themselves refine case themes.

Plaintiff's financial needs are irrelevant to settlement value

Another hard reality that is totally incoherent to normal plaintiffs is the relationship between their financial needs and the settlement value of a case. When I was a plaintiff's lawyer discussing settlement negotiations, my client would invariably explain that, "I have bills, I need X dollars" or "to get a new apartment, I need Y dollars" or "I need X dollars to live until I find a new job." What a plaintiff believes she "needs" has almost no relationship to the reasonable settlement value of her case. Lawyers do well to repeatedly itemize legitimate categories of damages with their clients and explain that each number will be subject to challenge.

A good mediator here will strengthen the trust in the lawyer, encouraging the normal plaintiff to have a healthy skepticism of her own intuitive settlement value of the case and to rely upon the subject matter expertise of her advocate.

The role of insurance

Litigators sometimes forget that normal people embroiled in a lawsuit often have an incomplete understanding of the role of insurance. It's important that plaintiffs understand that in most cases the defense decisionmaker in a mediation is not the individual or corporation the plaintiff sued. It helps for plaintiffs to understand that their adversary is not making the decisions about how much to offer in settlement, but in most cases, it is an insurance adjuster calling the shots.

It helps mitigate the confusion and offense for the plaintiff to understand that the alleged wrongdoer is not the one offering her pennies on the dollar for her damages but is rather an insurance company professional whose entire job it is to attend mediations and evaluate litigation risks. This understanding can help depersonalize the negotiation so that the plaintiff has a psychic remove from herself and the person or entity she views responsible for her injuries.

Normal parties, both plaintiffs and defendants, do well to understand the concept of settlement authority. We abnormals need to explain to the parties that the insurance professional attending the mediation has a top dollar amount they can offer today and to get more money requires phone calls, meetings, and often a series of both, which take time. Normal people are invariably shocked to learn that the insurance claims representative usually keeps her "authority" secret, at least at first, not only from the mediator but often from the defense lawyer and the defendant.

The normal plaintiff will benefit from understanding that the negotiation is driven partly by what's *available*, as opposed to what the plaintiff wants or needs. I always explain to the normal plaintiff that one of the most important things we try to find out together in mediation is what settlement amount is available. It's important to add that the amount may not be sufficient to fund what the plaintiff and her lawyer rationally assess the settlement value to be, but it is a critical piece of information that can empower the plaintiff to learn.

Plan C: Information is power

I always explain to the normal people in my mediations that though the mediation process is likely to be confusing and frustrating, there is a tremendous benefit from the exchange of information.

Plan A for a mediation is to get the case settled that day. I tell plaintiffs and defendants I am hopeful we can negotiate a "divorce and a check." The parties are in an unhealthy, toxic, distracting and expensive relationship that should end, and I hope to help facilitate the terms of that end. Plan B, I explain, is to get as many steps towards resolution as possible. Even if we do not settle the matter the day of the session, we will make steps towards progress; every move, starting with opening demands and offers, are steps gained.

But Plan C is a near certainty that will reassure our normal clients. An effective mediation, even one that doesn't result in a settlement that day, will reveal information that helps the normal litigant, her lawyer and the insurance adjuster. A fruitful mediation session is a rich back and forth of factual stories, legal theories and an adversarial evaluation of the value of the harms. This process benefits the lawyers during the session itself, but also moving forward if the case does not settle that day.

We all should remind normal mediation participants that the point- counterpoint of competing narratives helps the lawyers refine their own case strategy, sharpening tools of attack and shoring up their own case weaknesses.

I ask the normal litigation parties to remember this when they are understandably frustrated by the mediation safari and to use it as a token of faith that the mediation process is valuable despite its strangeness.

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