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Intersection between law and mediation



The psychology behind mediation: According to Robert Cialdini¹ there are six psychological factors based in our ancestry, which influence people to agree. The first factor is liking - we tend to trust people who we see as similar to ourselves because historically those within our tribe are less likely to hurt us. The second is authority - we tend to obey authority because the people who listened to the village elder thrived to pass on this tendency to their offspring. The third is reciprocity - our nature is to reciprocate a friendly gesture. Those without this instinct lacked the support structures needed later to survive difficult times. The fourth is scarcity - if something is limited then we want it more. The fifth is commitment and consistency, we want to be consistent and honor our commitments. The thinking required to change our minds takes time and energy away from the most essential tasks like gathering food and having sex. The sixth is social proof - when we are uncertain then we do

what everyone else is doing. Those who stopped to investigate why everyone was running were the people who got eaten by the raging bear.

Types of mediation: Evaluation-Based: The experienced judge-turned-mediator, who has decided two hundred personal injury cases, says, "I can predict the award for this case would be one hundred thousand dollars." Here the parties have picked an impartial mediator with expertise in the subject matter of the dispute. This approach utilizes the social proof factor because the parties are influenced to agree to an amount that fits with what others in similar circumstance have been awarded. Also, the authority of the judge-mediator is used to guide the parties to agree.²

Interest-Based: Two cooks argue over using the only orange left in the kitchen. Both are sure they deserve the use of the orange. One cook wants the rind to use in the icing for his cake while the other wants the juice for a glaze on chicken. A mediator helps these cooks move from their stated position of wanting the orange to their more specific interest. By exploring their needs, both cooks can be satisfied.

Interest-Based mediators often rely upon three specific process techniques to move the parties toward resolution of their dispute: active listening, identifying interests, and re-framing issues. This provides the neutral space for parties to explore options and is particularly helpful where clients have a history together over which miscommunication, false assumptions and emotions fuel a large part of the dispute.³ Guided by the mediator, parties explore their underlying interests. As the parties feel heard and understood, the liking factor begins to emerge. Also, there are many ways the mediator sets a friendly and respectful tone, which is then reciprocated by the parties. Also, during the process the parties start to make small agreements. Under the commitment and consistency factor, the parties feel good to be agreeing and the presumption builds toward resolution.

Litigation Stew⁴: Imagine the family with the complex relationships created by a second marriage. The parents get a will written but minimally involve the family. Further, the adult children do not initiate issues because they are reluctant to muddy still waters. One sister lives closer to the aging parents and takes on more of the care and financial responsibility. Add the normal assumptions that family members make based on a life time of insecurities. Illness sets in and the adult children start to talk about treatment. The brewing pot has been simmering. After the parents' shocking death, however, the situation finally blows up. The adult children hire their respective attorneys who vigorously represent them. Relationships between the executor and beneficiaries immediately degenerate into battles that leave family relationships in tatters.

This scenario shows how party frustration can build over years to erode communication. By the time lawyers become involved, the conflict is driven more by perception than reality and more by emotions than law.

Conclusion: Traditional settlement negotiation is a limited tool in addressing the underlying interests that exist in the litigation stew scenario. Perhaps the social proof and authority factors present in evaluative mediation can be important to help parties agree. The more important point in my opinion, however, is that mediation helps people communicate and in many conflicts that is the critical element necessary to find durable resolution.

¹ Goldman, Barry. "The Psychology of mediation"

² Brand, Norman. "Learning to use the mediation process - A guide for lawyers."

³ Bachle, Laura. "Estate planning and family business mediation"

⁴ Id.