Kluwer Mediation Blog

How does mediation add value for lawyers?

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It is not uncommon to hear lawyers speak warmly of mediation in general, but when asked if they would recommend it for a particular case respond that they could not see it working. Related to this, lawyers who have developed well-honed negotiation skills may struggle to see how a mediator could improve on their outcomes. In an attempt to counter these phenomena I suggest three ways in which mediators 'add value' to legal disputes.

1) Procedural justice

Since at least the 1980's scholars have identified the powerful role of procedural justice. Put simply, substantive justice (what we get) turns out to be less important than procedural justice (how we are treated) in people's evaluation of how well they have done at the hands of the courts (for a summary of the research see MacCoun, 2005).
A procedurally fair process provides 'voice' (the chance to make your case), 'being heard' (the belief that the authority figure considers your views); and 'respectful treatment' (that is, even-handed and dignified). This list conveys well the importance to parties of telling their story. One of my students, an experienced family lawyer, reacted to this research by saying that it explained one client's surprising response. When she negotiated what she regarded as 'the best possible deal', he said he was 'gutted'. The whole deal had been struck behind closed doors, between legal experts, whose training and commercial inclination teach them to cut to the chase. While the deal had scored highly on substantive terms, the client had no sense of being heard, affecting his perception of procedural fairness.
So how can mediation help? It provides a forum where parties get to tell their story, even if parts of it are legally irrelevant. And a decent mediator will demonstrate that she has heard and understood that story. Respectful and dignified treatment ought to go without saying.
The net result? Buy-in. When these crucial dimensions of procedural justice are present, parties are more likely to consider the substantive outcome fair. Tamara Relis's study of personal injury mediation found that: '93% of plaintiffs and 89% of physicians discussed the importance of expressing themselves and "being heard"' (Relis, 2008, p.174). Experienced legal practitioners know how important is their client's overall sense of justice in achieving a settlement. They should not neglect the potential of mediation.

2) Substantive Justice

This does not negate the importance of substantive justice. While lawyers are occasionally sceptical about the capacity of the courts to deliver consistent, predictable and principled decisions,

they rightly ask the same questions of mediation. So how does mediation perform?
First, mediators have no option but to seek a fair outcome: because they lack the power to impose decisions, they have to keep asking the question: 'is this acceptable?' And unlike others in the system, they ask that question of both parties, until both parties agree that it is. US scholar John Lande suggests that mediation delivers 'high quality consent' (Lande, 1997, p.856). This assertion highlights the importance of an alert and flexible legal advisor (a 'mediation advocate') in assisting parties to assess proposals.
Second, mediators bring to the table their own sense of justice. Modern mediators are not passive. Reality testing is a key element in their armoury. For example a mediator may ask client and legal advisor, in private session, 'How will this play in court?' The mediator is not saying, 'I think this will go badly for you.' But he is alerting the practitioner and client to a potential problem. The practitioner may have it covered: well and good. Often, however, the lawyer may welcome the mediator's input as a way of managing client expectations: 'lawyers may also value mediators for their ability to deflate their own clients' over-optimistic, dogmatic positions (something that lawyers themselves may have difficulty achieving given their status as client "champions")' (Carrie Menkel-Meadow).

3) Negotiation agents

Here I borrow from Dick Calkins, veteran law professor and founder of the USA's largest mooting and mediation competitions. He asserts that the mediator is the only person in the justice system who gets to hear both sides' weaknesses. For this reason mediation can add value to even the most canny and experienced negotiators.
To use technical terms for a moment, negotiation involves 'decision-making under conditions of uncertainty' (Raiffa, 1982). In layman's terms, you don't know what you don't know. Each side tends to put on its best face in any negotiation. In the adversarial cauldron of negotiation 'on the steps of the court' this phenomenon is heightened. While we know our own strengths and weaknesses, when it comes to the other side we are left to guesswork. And there is plenty of evidence that, when it comes to this type of estimation, our guesses are often flawed (see Bazerman and Malhotra, 2006, for a brief summary of the research).
Put simply, mediation improves negotiation efficiency by increasing the amount of data in play. It is not that mediators unearth people's weaknesses and then betray them to the other side. A mediator who did this would quickly develop a very poor reputation. Rather, mediators help each party consider its own vulnerabilities as well as strengths, aware that the same process is playing out in the other room. In doing so mediators can also unearth different but complementary interests: where one party can gain more than the other party loses. To give a concrete example, it can emerge in the course of an employment mediation that one party no longer wishes reinstatement and is more concerned about securing a reasonable pension. The mediator may already know, from similar private conversations, that the employer is open to considering this. Handled with care, the mediator can explore with each party the range of possible settlements, leading to an outcome that is satisfactory for all but which neither side could have broached for fear of losing face or looking weak.

To summarise, mediation can add value by enhancing procedural justice (how clients are treated), honing substantive justice (what clients agree, ensuring 'high-quality consent) and expanding negotiation options (ensuring strengths, weaknesses and wider interests are taken into account).

References:
Max Bazerman and Deepak Malhotra (2006) 'When NOT to Trust Your Gut'

http://hbswk.hbs.edu/item/5465.html
John Lande 'How Will Lawyering and Mediation Practices Transform Each Other?' [1996-7] 24 Florida State University Law Review 839-901
Robert MacCoun 'Voice, Control, and Belonging: The Double-Edged Sword of Procedural Fairness' [2005] 1 Annual Review of Law and Social Science 171-201 Available from http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1693356
Howard Raiffa, The Art and Science of Negotiation: How to Resolve Conflicts and Get the Best Out of Bargaining [1982] Cambridge, Mass: Belknap
Tamara Relis, Perceptions in Litigation and Mediation: Lawyers, Defendants, Plaintiffs, and Gendered Parties [2008] Cambridge: Cambridge University Press

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