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Mediation can bring results that no trial can match. Trial by jury is a fundamental liberty, emanating from the core of Anglo-American jurisprudence, going back to time of the Magna Carta in 1215. The founding fathers of America agreed. The Virginia Declaration of Rights, adopted in 1776, proclaims that in "suits between man and man, the ancient trial by jury is preferable to any other, and ought to be held sacred."

However, litigation by trial may not always advance a client's interest. In fact, President Abraham Lincoln, a skilled trial lawyer, saw litigation as a last resort. He said, "Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser in fees, expenses and waste of time." Abraham Lincoln's Notes for a Law Lecture, July 1, 1850. Many lawyers have Lincoln's advice prominently displayed on an office wall, and some even heed this advice from time to time. Lincoln might have become a mediator if he practiced in today's legal arena. (Needless to say, without the alternative of a trial looming in the background, even Lincoln would not have been a successful mediator.)

In addition to avoiding a costly trial, mediation has some other decided advantages:

- A. Clients view the outcomes of mediation as fairer than the outcomes of trials;
- B. The rate of compliance with mediated settlements is higher than the rate of satisfaction of judgments;
- C. Mediation does not increase the costs of resolving a dispute, even when it fails; and
- D. Mediated settlements can be more imaginative and more detailed than judgments. See Chapter 3, Section B.2 of "Dispute Resolution: Negotiation, Mediation, and Other Processes" by Stephen B. Goldberg, Frank E.A. Sander and Nancy Roger (Little Brown, 1992).

In fact, a relatively recent survey of in house counsel showed that 81 percent of those polled considered mediation to be superior to litigation as a dispute resolution methodology. "1997 ADR Survey", (Price Waterhouse, 1997.)

Of course there are times when the desired result can only be achieved by trial. A case should be tried when: (1) Your case is so strong that the other side will never voluntarily pay what the case is worth; (2) You need to stop the other side from continuing to do business or from engaging in some other wrongful activity that is highly profitable or desirable to the adversary; (3) There is a need to establish a written precedent; and (4) Law and motion will certainly dispose of the case, eliminating any need to compromise. In most other cases, a concerted attempt to mediate is worthwhile.

Some commentators (perhaps professional mediators chumming for business) have suggested that a litigator has an ethical obligation to consider mediation. "Arguably, the 'learning and skill' reasonably necessary to represent a client (see California Rules of Professional Conduct, Rule 3-110 (b)) includes the duty to (1) develop a settlement plan and (2) explore ADR possibilities with opposing counsel." (California Practice Guide; Alternative Dispute Resolution; Section 1:18, by: Knight, Fannin & Disco (The Rutter Group, 2001.) Whether ethically required or not, common sense dictates that litigators should take a serious stab at settlement through mediation in most cases.

Mediation can produce vital incidental benefits as well. A successful mediation can produce satisfaction, not only to the parties, but to the lawyers. Mohandas K. Gandhi practiced law. He wrote: "My joy was boundless. I had learnt the true practice of law. I had learnt to find out the better side of human nature and to enter men's hearts. I realized the true function of a lawyer was to unite the parties riven asunder. The lesson was so indelibly burnt into me that a large part of my time during the twenty years of my practice as a lawyer was occupied in bringing about private compromises of hundreds of cases. I lost nothing thereby -- not even money, certainly not my soul." *The Story of My Experiments With The Truth, An Autobiography* by Mohandas Gandhi, (Beacon Press; November 1993)

Lincoln and Gandhi agreed that it was not only fulfilling to settle a client's case, but it was profitable as well. "As a peace-maker, the lawyer has a superior opportunity of being a good man. There will still be business enough." Abraham Lincoln's, *Notes for a Law Lecture*, July 1, 1850. A satisfied client will gladly bring new business to a lawyer who solves the client's problems in a cost-effective manner.

In most cases, a trial lawyer has everything to gain and nothing to lose by mediating the litigated case. A successful mediation produces a satisfied client, a compensated attorney and a feeling of satisfaction in helping a client resolve a significant problem. The worst that can happen is that the case does not settle, you spend a day or more giving close attention to a case that is going to trial, and get the benefits of hearing and assessing the adversary's arguments and evidence. Also, according to Lincoln and Gandhi, mediating your cases can not only makes you a good person, but produces joy and avoids injury to the soul. You have every good reason to contact your friendly local mediator.

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