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“Trauma-Informed” Mediation: 6 Key Strategies for Attorneys and Mediators

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We are hearing more and more in the practice of law about the impact of “trauma,” and particularly the ways that traumatic experiences impact the brain and body. There’s even a growing movement to help lawyers practice in a way that is more “trauma-informed.” The ABA just published a fantastic book entitled [“Trauma-Informed Law: A Primer for Practicing Lawyers and a Pathway for Resilience and Healing,”](#) by my friend Myrna McCallum and three other astute practitioners.

But what does it mean to be trauma-informed? And most importantly for present purposes, how can trauma-informed principles be helpful in the context of a mediated settlement conference?

My First Experience Dealing with Trauma During a Mediation

My interest in this topic, particularly as it relates to mediation, dates to the first time I served as a mediator in a will caveat case, over a decade ago. The plaintiff had filed a caveat to her late father’s will, which had essentially excluded her and left his house to his two granddaughters, the plaintiff’s nieces. Her caveat, filed just before the statute of limitations had expired, pled claims for lack of capacity and undue influence. The granddaughters contended that they had been close with their grandfather and were the only relatives who had cared for him in the waning days of his life. In the first private caucus session, when I asked the plaintiff why she thought her caveat claim would be more compelling to a jury than the granddaughters’ defenses, she told me,

“Well, I know I am going to win, and I should win, because one night not long after he died, Daddy came to me in a vision and told me that I was his favorite daughter and I was supposed to have his house.”

I realized then that there was more going on with this case than a straightforward rational application of law to the facts. The plaintiff’s ability to participate in a settlement discussion, despite her erstwhile lawyer’s best efforts, was affected by how she was (or perhaps was not) processing her grief. Not only had she lost her father, whom she loved dearly, but she was also still grappling with the painful choice that he had made regarding the disposition of his estate. No amount of explaining the inadmissibility of a decedent’s testimony from the hereafter was going to persuade her to let go of her claims.

Since that time, I have had numerous opportunities to learn about the effects of trauma on a person’s well-being and decision-making processes. I have always been fascinated with how insights from the counseling/psychology realm can be helpful in dispute resolution. And over the last five years, I have received a good deal of advanced training on trauma-informed mediation so that I can better serve my own clients, as well as the parties and counsel for whom I mediate. With that background in mind, I will share some observations and suggest some best practices for how lawyers and mediators can be more trauma-informed and use that knowledge to provide better service to our clients.

Defining Trauma and How it Affects the Brain and Body

Being trauma-informed first involves understanding what we mean by the word “trauma.” The English word trauma is derived from the Greek word for “wound.” A trauma is essentially an event or series of events that one experiences as harmful, painful, or emotionally disturbing. Natural disasters, motor vehicle accidents, incidents of physical or sexual abuse, major health crises, and the like are typically characterized as traumatic without much controversy.

Through the relatively recent work of several notable medical experts such as Dr. Gabor Mate and Dr. Bessel van der Kolk, we now understand that that other less obviously catastrophic occurrences can also be experienced as “traumatic.” Used in this

broader sense, trauma describes the body's response to anything that is disruptive to our lives or well-being. Or as Gabor Mate puts it, "Trauma is not what happens to you. Trauma is *what happens inside you as a result of what happened to you.*"

The term "traumatic response" describes how the human body is affected by all kinds of disruptive stimuli. Essentially, the more primitive part of our nervous system (sometimes referred to as the "lizard brain") activates whenever the body senses that we are under some kind of threat to our safety or well-being. At this point, the frontal cortex (the part of the brain that controls executive functioning and rational thought) essentially goes offline. The part of the brain responsible for processing emotions, known as the amygdala, activates, and the "fight, flight, freeze, or fawn" instincts of the more primitive system of the brain take over.

The two most important things to understand are that: (1) even stimuli or external circumstances that are less obviously traumatic than others may trigger essentially identical responses; and (2) the primitive trauma response has no sense of time or history, and thus can be triggered by *both* actual events *and* later circumstances that invoke a similar feeling or response. For the trauma victim, when the trauma response is activated, it is as if the past suffering is present NOW, and the body is on high alert to avoid further harm.

Once the amygdala is activated past a certain threshold, it is simply "running the show," and the person is in a dysregulated, or triggered state, and therefore generally unable to engage in a more rational conversation. No amount of telling the person to "calm down" or "just be rational" is going to work at this point, so a mediator or lawyer needs to have other tools to navigate this kind of challenge as it arises. Or, better yet, to try to head it off before it happens.

Understanding the Role of Trauma in Legal Matters

As lawyers, we can begin to be more trauma-informed first by recognizing that in almost any kind of case, the parties involved (or the human beings who represent them, in the case of business entities) have likely been through some kind of potentially traumatic situation. For a person involved in a lawsuit of any sort — whether a family law matter, a contested inheritance case, or even a construction

project gone awry — there has been a significant and major disruption in their world. Promises have been broken. Tempers have flared. Harm of some sort has been done. And the parties are looking to the legal system to bring relief, or to exonerate them, or to absolve them from responsibility despite the other party’s accusations.

Being trauma-informed at its most basic, then, begins with understanding that we don’t always deal with parties at their best. Because they have experienced some kind of incredibly stressful or disruptive situation, they may not always behave in a reasonable and rational manner. So we shouldn’t be at all surprised when a client or party has an “emotional reaction” or “loses their cool” in the context of navigating a legal matter.

Similarly, we need to be aware that there may often be more to “the story” than just the immediate events that precipitated the present legal matter. In my work as a mediator and a collaborative lawyer, I often encounter parties who are struggling to make a cool-headed, rational decision — no matter how well their lawyer or I may be explaining the situation. Certain facts, or ways that the other party or another participant is communicating, might evoke a visceral reaction, rather than a thoughtful response.

Finally, being trauma-informed also involves recognizing that *interacting with the legal system itself* can often cause further trauma to the ordinary people who must navigate it. The adversarial system pits parties against one another, and often puts their credibility at the center of what we bill as a “quest for the truth.” However, the way that lawyers cross-examine witnesses, communicate using legal jargon, and talk casually about procedures and rules and statutes (which are second nature to us, but foreign to them) often leave the parties dazed and confused. My clients over the decades have frequently expressed feeling powerless and even hopeless during the litigation process, because the whole enterprise feels very foreign and threatening to them.

Reducing The Impact of Trauma During Mediation

These dynamics are especially important to bear in mind in the context of mediation. A skilled mediator typically encourages the parties to consider “the big picture,” and to think about options other than continuing with litigation. To make thoughtful decisions, parties need to be in the best frame of mind possible. And yet, we’ve all seen

what can happen in a mediation when a party (or perhaps opposing counsel or the mediator) makes a comment that draws an angry or reflexively uncooperative response from one of the participants.

As a mediator, I try to be extremely sensitive to the interactions in the opening session. I pay close attention to the relational dynamics between the parties during those awkward moments when they may first gather in a conference room or on a Zoom session.

I want to try to create a calming and relaxing setting, so that each of the participants can feel as comfortable as possible. Keeping their level of sophistication and familiarity with the legal process in mind, I aim to provide a welcoming environment. It can be easy to forget how intimidating we lawyers and our offices, formalities, and ways of speaking can be.

Other strategies to mediate with a trauma-informed perspective include:

- **Cultivate self-awareness.** Being trauma-informed means being aware of our own sensitivities and potential reactions to hearing difficult stories or encountering difficult personalities in the context of a mediation. Like many attorneys, I have experienced my own set of formative incidents that may make me more reactive to certain comments or behaviors. It's tempting to just adopt a sort of "Teflon" approach and act as if nothing bothers us. And that may work for the vast majority of the interactions in a typical mediation. But I find it helpful to try to remain attentive to what's going on in my own mind and my own body as I interact with the parties. And when appropriate, we can even encourage parties (or, perhaps the occasional lawyer) to take a break, take a walk, or otherwise engage in some kind of action that promotes calm and a return to a more peaceful state of mind.
- **Minimize the risk of re-traumatizing the parties.** Sometimes simply talking about a traumatic event forces the person involved to relive the trauma. So, we need to be very thoughtful about what kinds of communications happen during the opening session, as they will set the tone for how combative or productive the ensuing conversations will be. We can also pay close attention to

the physical setting of the mediation, and design it to put parties at ease, rather than feeling stuffy, adversarial, or intimidating. Even the choice of seating (using a round table instead of a rectangular one, for example) can set a different tone for a safer, more welcoming process.

- **Honor the person’s voice.** Traumatic experiences often leave people feeling like no one heard their cries for help — either beforehand, or for care and kindness in the aftermath. One way to help the mediation be a different experience is to give each person time to process and respond without hurrying them. The skill of “active listening” that many of us learned in mediation training can help a potentially triggered person feel more at ease and can help calm or regulate their nervous system.
- **Offer the triggered party a choice.** Letting an activated person have choices — about how to proceed, whether and when to take a break, or what agenda items to address at any point in time — helps give them a greater sense of control over the process. And this can pay big dividends in securing their buy-in to a proposed resolution.
- **Stay flexible.** You may have a game plan going into a mediation but plans often change. Stay in the moment and be responsive to what is happening during the mediation. A willingness to adjust your expectations throughout the process is key for attorneys and neutrals alike.

As an attorney or a mediator, many of you likely use some of these strategies already, but there is always room for growth and improvement. Understanding more about trauma and traumatic responses can help all of us serve our clients better, no matter what role we play. At Miles Mediation and Arbitration, we’re already seeing how using trauma-informed principles during mediation can help minimize the stress on the parties and can even improve their chances of reaching a satisfying resolution.

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