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## Mediator as Juror: A Day in Middlesex County Superior Court

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In 1215, King John encoded juries into English common law by approving Article 39 of the Magna Carta, which ensures that "no freemen shall be taken or imprisoned...except by the lawful judgment of his peers." Later, trial by jury was forever enshrined in the U.S Constitution. Thus, in January of 2008, I found myself on a jury panel for Middlesex County Superior Court—feeling a little less stately than King John, but doing my duty nonetheless.

And just as an introductory video greeting by Chief Justice Marshall promised, the experience proved to be rich and thought provoking.

The case seemed simple. A commercial landlord sued his former tenant of twenty years for breaching the lease terms. What struck me was the remedy the landlord sought: approximately \$10,000 for repairs to restore the office space to "normal wear and tear" condition, and, yes, over \$40,000 in legal fees.

After an initial angry phone call about late rent, the parties "lawyered up" and communicated almost solely through written correspondence. Only much later did they try meeting face-to-face to work things out, though unsuccessfully.

As a mediator and citizen, I asked myself: how could two professionals—not to mention the judicial system—let a case of so little cash value wind its way all the way to a jury trial at such great legal expense? Frankly I felt like the parties were wasting the Court's time, the jurors' time, and my tax dollars.

Yet the case reminded me why mediators have such an important, but difficult, job in supporting justice, civil society and social capital. Many parties simply cannot find a way out of escalating conflict and assume that justice can only be served in the courts. This case was a perfect example of several time-tested conflict lessons.

- **Emotions get the better of us.** Here were two well-educated, well-off individuals who let their anger, hurt, offense, and desire for revenge get the best of them.

- **Communicating is the hardest thing to do.** A second phone call, an attempt to be conciliatory, or a short email asking to set a different tone didn't happen. Somehow, the simplest thing to do—talk—became the hardest.

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- **Sunk costs sink us further.** Clearly, the plaintiff was trying to recover his sunk costs, but had passed the point of no return. From an economic standpoint, he had failed to get out when it made dollars and sense (pun intended) and was embarrassingly digging himself deeper and deeper.

- **Taking responsibility is harder than fighting over it.** The facts, as we came to understand them, suggested that this dispute could and should have been resolved months earlier—to everyone’s benefit. Yet the parties chose to point fingers and relinquish their responsibility for resolving the dispute efficiently, fairly, and expeditiously.

- **Justice is sought but not necessarily served.** The parties, both angry, both determined that they were right, decided to take their case all the way to jury. Each was going to get a verdict in his favor one way or another! But the reality was that several partial settlements were offered, winnowing the total amount down, and the judge retained the right to rule on legal fees. We, the jury, were left with a seemingly trivial case, wishing we could punish them both for being so foolhardy.

Serving on a jury reaffirmed to me that justice doesn’t simply emanate Solomon-style from on high. Here’s what I learned.

- **Justice is not divined; it is negotiated.** As our jury deliberated, I realized that this was in fact a negotiation, constrained as it might be by our charge and the evidence. Was the contract valid? Did the defendant actually breach the contract? If so, how much were the damages really worth? When parties hand over their dispute to a jury, they are not avoiding a serious negotiation, *they are simply leaving it in the hands of strangers.*

- **Justice is blind.** As jurors, we couldn’t ask questions. We couldn’t get at the parties’ deeper motivations, feelings, and emotions (like a mediator might). We did issue a verdict, but we did so blindly, due to our exceedingly limited information and understanding.

- **Juries deliver verdicts, not necessarily justice.** I feel our verdict was fair and reasonable, given what we knew. My fellow jurors (all twelve) took the case seriously, considered the evidence, and did their best to arrive at logical conclusions.

However, we probably didn’t deliver much on the larger front of *justice*. We couldn’t help the parties find a resolution that left them better off in terms of lower costs, less bitterness, and greater self-respect. We couldn’t censure the lawyers for not doing a better job of restraining their clients’ emotions. We couldn’t issue an admonition against abusing the courts with cases that should be settled by reasonable people elsewhere. We couldn’t aid society by helping its citizens take responsibility for their actions, emotions, and disputes.

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So, mediators, next time you sit with parties who are rearing to go to court, I encourage you to keep in mind that court is really settlement, formal as it may be, by other means. And to the future parties of such a suit, it would be well to remember that there is no certainty—and in fact much reason to doubt—that a judge and jury will issue a better verdict or clearer justice than you might arrive at by your own making.