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The Asymmetry of Mediation Results and Litigated Victories

In an article called “Head Winds, Tail Winds Asymmetry” by behavioral economists Tom Gilovich and Shai Davidai, the authors discuss the idea that people think their burdens are unique or harder than the burdens experienced by others, and while we focus on the obstacles or “headwinds” we don’t see, the invisible advantages or “tailwinds” are propelling us along and making life a lot easier. As Gilovich and Davidai studied and learned, any gratitude for the tailwinds tends to dissipate after a very short time. Unlike headwinds, which garner your attention and linger in your mind, tailwinds and those who altruistically generate them for us tend to become invisible. Tailwinds, like the benefits of a successfully mediated dispute, are easier to forget.

Recently, I was listed in Best of Orlando™ for mediation, along with four other mediators who are appreciably more experienced than I (Jay Cohen, Jeff Keiner, Stephen Sawicki and Larry Watson). I did not vote or fill out any form. The listing was, to me, unforeseen and, well, unexpected and weird. I am no more “Best of Orlando” than a dozen other mediators—the only difference is that I had some invisible tailwind.

I trained under all of the other mediators on the list or had my cases mediated by all of them at some point in my career. Truth be told, I have pinched some tip, phrase or trick from the best mediators I have encountered. But that’s expected. You replicate things you like. If we are good at anything, it is almost always because we had the tailwind of assistance from clients, customers and good teachers we

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were lucky enough to come across along the way.

Litigation is one of the nastiest headwinds our clients encounter. What starts as annoying wind sometimes turns into an ugly gale, or worse. We have a system of justice that allows us to resolve disputes through litigation in a way not found in most places on earth. Because mediation is confidential and privileged, and the results are not published or celebrated like litigated victories, we tend to lose sight of the fact that resolution eliminates nasty headwinds and provides a much needed tailwind for claimants. Settlement for defendants eliminates an uncertain and unpredictable headwind, and the time, sweat and money needed to brace against it.

We celebrate trial results or litigated victories, but Gilovich and Davidai would tell us that the failure of some to appreciate the tailwind of private dispute resolution is fully consistent with the asymmetry they have studied. There are a host of beneficiaries of the tailwind created by the resolution of a dispute. Resolution is usually unremarkable for lawyers and mediators because a large percentage of cases settle, but it is surely not mundane for the client. As we delight in the joys and trappings of Spring and recognize Memorial Day, let us be mindful of the people and institutions past and present who created or sustained those helpful tailwinds we enjoy. Let us be mindful of our role as captains of our clients' vessels and the need to ready our clients' sails to catch the favorable, but unseen, wind a settlement affords.

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