

3. *Examples of Mediation in Action*

a. *Death of a student*

Note: Confidentiality is one of the most important attributes of mediation. The facts in the following account that have not previously been published have been approved by attorneys for both parties.

In August 1997 Scott Krueger arrived for his freshman year at the Massachusetts Institute of Technology. Five weeks later, he was dead. In an incident that made national headlines, Krueger died of alcohol poisoning following an initiation event at a fraternity. Nearly two years later Krueger's parents sent MIT a demand letter stating their intent to sue. The letter alleged that MIT had caused their son's death by failing to address what they claimed were two long-standing campus problems: a housing arrangement that they said steered new students to seek rooms in fraternities, and what their lawyer called a culture of alcohol abuse at fraternities.

MIT's lawyers saw the case as one that could be won. An appellate court, they believed, would rule that a college is not legally responsible for an adult student's voluntary drinking. Moreover, under state law the university could not be required to pay more than \$20,000 to the Kruegers (although that limit did not apply to claims against individual university administrators). MIT officials felt, however, that a narrowly drawn legal response would not be in keeping with its values. They also recognized that there were aspects of the institution's policies and practices — including those covering student use of alcohol — that could have been better. MIT's president, Charles M. Vest, was prepared to accept responsibility for these shortcomings on behalf of the university, and felt a deep personal desire for his institution to reach a resolution with the Krueger family. MIT also recognized that defending the case in court would exact a tremendous emotional toll on all concerned. The Kruegers would be subjected to a hard-hitting assessment of their son's behavior leading up to his death, whereas MIT would be exposed to equally severe scrutiny of the Institute's culture and the actions of individual administrators. Full-blown litigation in a case of this magnitude was also sure to be expensive, with estimated defense costs well in excess of \$1 million.

The question, as MIT saw it, was not whether to seek to engage the Kruegers in settlement discussions, but how. The university decided to forego a traditional legal response and reply instead with a personal letter from President Vest to the Kruegers, which noted the university's belief that it had strong legal defenses to their claims, but offered to mediate.

The Kruegers responded with intense distrust. Tortuous negotiations ensued. The parents eventually agreed to mediate, but only subject to certain conditions: At least one session would have to occur in Buffalo, where the Kruegers lived. MIT would have to offer a sincere apology for its conduct; without that, no sum of money would settle the case. There would be no confidentiality agreement to prevent the parents from talking publicly about the matter, while at the same time any settlement could not be exploited by MIT for public relations purposes. The Kruegers would have the right to select the mediator. And, President Vest would have to appear personally at all the mediation sessions. The university agreed to most of the conditions and the mediation went forward.

MIT's lawyers believed that it was important that the Kruegers' lawyers and the mediator understand the strength of the university's defenses, but plaintiff counsel knew that subjecting the Kruegers to such a presentation

would make settlement impossible. To resolve the dilemma, the lawyers bifurcated the process. The first day of the mediation, which the Kruegers would not attend, would focus on presentations by lawyers and would be held in Boston. One week later the mediation would resume at a conference center located a 40-minute drive outside Buffalo, this time with the Kruegers present. Their counsel selected that location so that "no one could leave easily." On the second day the Kruegers would personally meet President Vest, and the parties would begin to exchange settlement proposals.

Counsel had agreed that the mediator, Jeffrey Stern, should begin the day by having a private breakfast with Mr. and Mrs. Krueger and their lawyers. The Kruegers vented their anger, first to Stern and later to President Vest. "How could you do this?" they shouted at Vest, "You people killed our son!" They also challenged Vest on a point that bothered them terribly: Why, they asked him, had he come to their son's funeral but not sought them out personally to extend his condolences? Vest responded that he had consulted with people about whether or not to approach the Kruegers and was advised that, in light of their anger at the institution, it would be better not to do so. That advice was wrong, he said, and he regretted following it.

Vest went on to apologize for the university's role in what he described as a "terrible, terrible tragedy." "We failed you," he said, and then asked, "What can we do to make it right?" Mrs. Krueger cried out again at Vest, but at that point her husband turned to her and said, "The man apologized. What more is there to say?" Their counsel, Leo Boyle, later said that he felt that, "There's a moment . . . where the back of the case is broken. You can feel it. . . . And that was the moment this day." The mediator gradually channeled the discussion toward what the Kruegers wanted and what the university could do.

Hard bargaining followed, much of it conducted through shuttle diplomacy by the mediator. In the end the parties reached agreement: MIT paid the Kruegers \$4.75 million to settle their claims and contributed an additional \$1.25 million to a scholarship fund that the family would administer. Perhaps equally important, President Vest offered the Kruegers a personal, unconditional apology on behalf of MIT that no court could have compelled and that would not have been believed if it were. At the conclusion of the process Vest and Mrs. Krueger hugged each other. For MIT the settlement, although expensive, made sense: It minimized the harm that contested litigation would have caused to the institution. And, most important, the university felt that it was the right thing to do.

What did the mediator contribute to the process? During the first day, Stern questioned both lawyers closely about the legal and factual issues, creating a foundation for realistic assessments of case value later in the process. The initial money offers put forth by each party were far apart, but the mediator put them into context so that neither side gave up in frustration. According to plaintiff counsel Brad Henry, Stern's greatest contribution was probably the way he responded to the Kruegers' feelings: "What he did most masterfully was to allow a lot of the emotion to be directed at him. He allowed it almost to boil over when it was just him with the Kruegers, but later he very deftly let it be redirected at President Vest and the university. . . . He also prepared Charles Vest for the onslaught. . . . Mediation can be like a funeral — especially with the death of a child. He mediated the emotional part of the case, and then let the rest unfold on its own."

Questions:

6. What barriers made it difficult for the participants in the Krueger case to negotiate with each other directly? In what ways was mediation likely to be more effective than direct negotiation at overcoming them?
7. What goals did the university have in proposing mediation? What did the student's family appear to be seeking from the process?
8. What did the Kruegers obtain in mediation that they could not have won at trial?