

Mediating Highly Emotional Cases

BY JOE EPSTEIN AND JULIE M. WILLIAMSON

*Mediating highly emotional cases presents particular challenges.
This article discusses effective strategies for managing those challenges.*

Many cases give rise to intense emotions in mediation. With reference to words of wisdom from a wide range of sources, this article addresses strategies that counsel can use to mediate emotionally charged cases.

Emotions at Mediation

There is a sacredness in tears. They are not the mark of weakness, but of power. They speak more eloquently than ten thousand tongues. They are the messengers of overwhelming grief, of deep contrition, and of unspeakable love.

—Washington Irving

Mediation involves many types of cases that can evoke strong emotions. Family law disputes are an obvious example. Catastrophic personal injury cases may include life-altering injuries such as quadriplegia, paraplegia, burns, traumatic brain injuries, and amputations, as well as wrongful death claims. Probate cases may trigger not only grief for the loss of the deceased but also powerful memories of deep family wounds. Professional malpractice cases implicate both harm to the plaintiff and threats to the defendant's livelihood and competency. Employment cases based on sexual harassment, Americans with Disabilities Act violations, age discrimination, or retaliation may raise strong feelings of anger and disrespect. Commercial disputes involving business dissolutions, breach of long-term relationships, or allegations of fraud can also become highly emotional.

Mediation often takes place years after the events that gave rise to a lawsuit and long after a case was filed. But because parties have the renewed chance to tell their entire story to the mediator, the mediation session often involves unearthing past wrongs and reliving trauma. Negative emotions—whether grief, anger, sadness, betrayal, loss, disillusionment, fear, or insult—can be raw. Yet mediation can also add positive emotions to the equation—relief, a measure of closure, freedom from litigation, even forgiveness and reconciliation.

Grief, anger, and fear are the three emotions most widely and deeply displayed at mediation.¹ Grief is almost always

involved, whether parties grieve the death of a loved one, the end of an important business relationship, the loss of physical or financial capabilities, or other life disappointment. Anger can erupt from either the underlying wrong or from frustration at the opposition's perceived inflexibility. Whatever the cause, anger, described by Seneca in the first century as "short madness," can temporarily blind both clients and attorneys. And fear of change, the future, or even the finality of a settlement can impede resolution. Mediators, advocates, parties, and negotiators must be aware of these emotions and wisely gauge and address their impact before and during mediation.

Select the Right Mediator

Look at situations from all angles, and you will become more open.

—Dalai Lama

Not all mediators are alike. It is important to examine the legal and emotional issues that are part of the case. Determine which mediator has the life experience, mediation experience, and legal experience the case requires. Choose a mediator who will infuse the process with a sense of calm optimism and understand and work the case as hard and skillfully as required. Hire the mediator who will look at all aspects of the case, listen objectively and compassionately to all parties, and stay open to disparate information. Find a mediator who approaches parties with clarity, compassion, empathy, patience, and insight. Select one who can lead with humility, measured confidence, and intuition based on experience, wisdom, and mindfulness.

There are many ways to find the right mediator. Professional colleagues are an important source of information about potential mediators, but don't confine yourself to a particular mediation organization out of habit. Instead, think about what your case needs in terms of the mediator's background, experience, technical and legal knowledge, and temperament. In addition, many lists of potential mediators are readily available. ADR organizations, such as The Mediation Association of Colorado and Mediate.com, maintain online directories with biographical information, and The Colorado

Legal Directory lists attorneys whose fields of practice include ADR.

Once you have a list of potential mediators, conduct an Internet search to investigate the mediators' background and experience. Also, feel free to call potential mediators and interview them ahead of time; there is no ethical rule against ex parte contact with mediators. Ask them about their experience, technical background, billing rates and structures, available facilities, and approach to mediation. They also should be able to provide you with names of other lawyers whom you can contact for a reference, if needed.

Structure the Mediation to Fit the Case

If you don't know where you are going, you'll end up someplace else.

—Yogi Berra

Counsel should work with the mediator to individualize the mediation process to fit the unique dynamics of the emotional case. One helpful strategy to achieve this is for counsel and their mediator to address, before the mediation, questions such as:

- How many parties/teams are there on each side of the case?
- Who is coming to the mediation on each team?
- Would pre-mediation meetings with the mediator be helpful?
- Has the case been mediated before?
- What is the magnitude of the injuries, damages, and losses?
- Who needs to give voice to their thoughts and feelings?
- Who needs to be heard by others?
- What should the structure of the mediation look like?
- What preparation do my client, my opponent, and my mediator require?

Depending on the answers to these questions, consider whether the case might benefit from co-mediation. Mediators with different backgrounds and perspectives can often help the parties to feel heard and to come up with creative solutions to resolve the case. Mediators should be willing to work with counsel to structure

a fee arrangement that makes co-mediation cost-effective.

Once these foundational questions have been answered, counsel and the mediator can design a mediation structure that fosters creativity, connection, flexibility, and trust, and encourages closure and settlement. When devising the structure of the mediation, answer these questions:

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Throughout the mediation, counsel should remember that the opposing party and opposing counsel are people with their own problems, fears, and concerns.

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- Should there be an opening session? If so, what should it look like? Would the case benefit from starting the day with a joint session?
- How should breaks and lunch breaks be handled? Is lunch an opportunity to bring everyone back together in a joint session?
- Should the mediation occur at a particular pace?
- How should the information flow be managed?
- What are the parameters for time-outs?

Prepare Thoughtfully for the Mediation

Wisdom can only come by way of a willingness to accept truth from any source.

—Jewish saying

As in any mediation, preparation for mediation in a highly emotional case is key. Only by having a firm grasp of the facts and the law can counsel be prepared, after emotions have calmed, to bring discussion around to the objective strengths and weaknesses of the case. Investigate early, thoroughly, and continuously. Gather and organize relevant documents, locate and meet with key witnesses, and maintain a “cast of characters,” chronology, and storyline that are updated to fit the evolving evidence. Conduct the necessary discovery and file appropriate motions. Select and work closely with the best available experts.

Whenever possible, try to develop a positive relationship with opposing counsel. Take the time to meet for lunch or coffee to get to know each other as people. Make interactions civil, professional, and respectful. Remember that it is the clients, not the lawyers, who have the dispute. Don't amp up the already emotional case by badmouthing the opposing lawyer to the client. Keep the mediation unburdened by fights between counsel.

Use the mediation statement to refine case thinking for trial and evaluate the evidence objectively. Be wary of “drinking your own Kool-Aid,” that is, being so persuaded by your own advocacy that you lose sight of the opposing view. Describe the relevant facts and legal issues, highlighting strengths and addressing weaknesses. Make the statement concise and pare down the attachments to the essentials. Consider the creative use of government reports, investigative reports, witness statements, television reports, video, charts, and graphs.

Finally, prepare the client and yourself. Educate the client regarding the mediation process, including the possibility that emotions may be high at times. Let the clients know that they can express their views and feelings and can ask for a break if needed. Approach the mediation with as much calm, patience, and objectivity as possible. In the end, remember

that mediation requires the wisdom that comes from combining knowledge and understanding.

Mediate Mindfully

If you want others to be happy, practice compassion. If you want to be happy, practice compassion.

—Dalai Lama

Careful attention to words and actions at the mediation, while often just a matter of common courtesy, can bolster the chances of reaching a resolution. Throughout the mediation, counsel should remember that the opposing party and opposing counsel are people with their own problems, fears, and concerns. Begin by greeting each of the participants warmly. Listen kindly to the feelings voiced by the other side throughout the process. Without conceding responsibility, express understanding of and compassion for the other party's circumstances. Look for opportunities for self-disclosures that create a common bond. Address the opposition respectfully; avoid accusations and insults, and advise the client to do the same.

[B]e quick to listen, slow to speak, and slow to anger.

—Apostle James

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A successful mediation requires the parties to look at their present alternatives for making the future as good as possible.
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Appreciative, courteous, and compassionate listening are valuable tools in building a settlement. Having lawyers and a mediator who will listen carefully to the parties' stories goes a long way toward achieving settlement goals.

Consider responses carefully, particularly if the opposition's statements or offer are offensive to the lawyer or the client. Wait for the anger to subside before responding.

Grief is in two parts. The first is loss. The second is the remaking of life.

—Anne Roiphe

Strong emotions arise from past wrongs and disappointments, and neither mediation nor a court case, no matter how successful, can undo the past. A successful mediation requires the parties to look at their present alternatives for making the future as good as possible. Honor the clients' feelings but help them to not stay so trapped in their emotions that they are unable to make reasonable decisions. And be careful to not let empathy for the client cloud professional judgment. Mediation is an opportunity for parties to structure a resolution that will free them from the stress of litigation so they have space to heal and rebuild their lives. Help the client do just that.

[D]on't ever underestimate the importance you can have because history has shown us that courage can be contagious and hope can take on a life of its own.

—Michelle Obama

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Counsel's attitude can have a profound effect at mediation, negative or positive. Lawyers should be mindful that their emotions, particularly anger, fuel those of the client; clients are best served by taking the lawyers' emotions out of the equation. Mediation is a time for careful, reasoned evaluation of alternatives for resolution. Remaining a calm voice of reason is essential. Give clients hope and support their courageous efforts to momentarily set aside their emotions to make wise and thoughtful decisions about the future.

Stay focused, go after your dreams and keep moving toward your goals.

—LL Cool J

Remember, as a negotiator the lawyer is looking for closure. Focus on the objective and look for the path to settlement through the roaring thunder of argument. Be enlightened and enlightening, gracious, and clear. Be open to creative closing strategies that end the litigation and leave all parties with "face" and respect.

Move Clients Forward

You gain strength, courage and confidence by every experience in which you really stop to look fear in the face. You are able to say

to yourself, "I lived through this horror. I can take the next thing that comes along."

—Eleanor Roosevelt

Like the end of any prolonged, arduous effort, resolving a highly emotional case can cause its own set of emotions. While the end of litigation is a welcome relief, it can also be a reminder of the finality of the loss and trigger emptiness and fear. This is a good time to commend the clients' courage throughout the process, reinforce the wisdom of their decision, and express your confidence that they will be able to handle the next steps in their journey.

Conclusion

Mediating highly emotional cases requires extra care. The process should start with the selection of a mediator who is qualified for the case by temperament and experience and who can listen carefully to the parties and lead them to a settlement. The mediation should be designed to fit the unique circumstances of the case and the needs of counsel and clients, while remaining flexible enough to fit the ebb and flow of a dynamic mediation process. Careful preparation of the case, the client, and the lawyer are important. At mediation, respect for parties and counsel, compassionate and critical listening, appreciation of all aspects of

the case, and a will to reach a settlement are the necessary ingredients to a successful resolution. Finally, supporting the client in resolving the highly emotional case can help the client to move forward confidently. ^{CL}

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NOTE

1. See Epstein and Epstein, "Grief, Anger and Fear in Mediation," *Trial Talk* 37 (June/July 2010).

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