



Grief, Anger and Fear in Mediation

By Joe Epstein, Esq., with Susan Epstein, Esq.

Introduction

The focus on this article is to assist lawyer advocates and lawyer mediators in being attuned to the presence and in addressing the key emotions of grief, anger and fear as they arise in the context of mediation. Dealing with these emotions is more often than not the key to successful mediations. Commentators in the field of mediation often address the motivations, underlying interests and needs of the parties involved in conflict.¹ Skillful mediators search for and address these factors during the course of mediation.² Nonetheless, commentators, mediators and negotiators tend to overlook the emotionally powerful issues of grief, anger and fear. Acknowledgement of emotional factors empowers parties, creates a legitimate sense of control and fairness and creates the opportunity to restore, preserve or enhance relationships.³ In short, by addressing emotions mediators and negotiators will unlock the door to key motivations, interests and needs facing parties.

The focus on the emotional issues of grief, anger and fear will often allow the parties to untie the knot that stands as a barrier to resolution of legal disputes.

These emotions are like strands of a braid, with the braid undone the knot dissolves and rational solutions become possible. Untying the knot first requires being alert to the fact that emotions govern many if not most of our “rational” decision making process and that grief, anger and fear in one form or another are the emotion bundle we are most likely to see during the mediation process. If awareness is the first step in addressing the knot of emotions than empathic listening is the second step. Empathic listening requires lending an ear with understanding, appreciation and respect. It means attending to another, as you would have another listen to you when you are vulnerable.

Emotions of grief, anger and fear often arise in wrongful death and catastrophic injury cases; but are also present in business, employment, family business and other disputes. It takes an empathetic negotiator and/or empathetic mediator to zero in on these underlying dynamics.

It is our view that utilization of a strictly evaluative approach, which focuses on only the “rational” evaluation of issues, leaves parties feeling unheard and unappreciated.⁴ Though the resolution may be fair with this approach, the failure to attend to the emotional components of grief, anger and fear leaves parties with unresolved emotions and a palpable sense of perceived injustice. An opportunity for positive closure is lost, even if the case is settled.

The purpose of this article is to draw attention to the emotions of grief, anger and fear and to discuss how to explore them and attend to them during the mediation process.

The Emotions of Grief, Anger and Fear

Emotions

*We cannot stop having emotions any more than we can stop having thoughts. The challenge is learning to stimulate helpful emotions in those with whom we negotiate and in ourselves.*⁵

Fisher and Shapiro quoted above define “emotions” as a “felt experience” that affects our bodies, our thinking and our behavior.⁶ Michelle LeBaron expands on this by noting that “emotions” are instinctive and intuitive impulses to act that kick in before rational analysis.⁷ Michael Brown identifies the three basic emotions as grief, anger and fear.⁸ Gary Zukav, states that love and fear are the two basic emotions.⁹ We see the emotions of grief, anger and fear

most frequently during mediations, but of the “big four” emotions, love is least frequently in play during mediations.

Contrary to the indication by some authors,¹⁰ we believe that it unrealistic to separate people from their conflict problem. People’s emotions are part and parcel of the conflict. We cannot separate reason from emotions, if we are to reach the soul of the conflict.

If we avoid dealing with emotions during mediation, we will often miss the core of the mediation process thereby losing the opportunity for a full measure of peace, reconciliation, restoration and a perception of fairness.

When emotions arise in mediations, we must address and explore them, rather than ignore them. Attorney advocates and attorney mediators must be prepared to deal with both the rational and the emotional aspects of conflict. Empathy and empathetic listening is an important tool in the arsenal of negotiators and mediators.¹¹ Empathic listening (listening from another’s perspective) allows a good negotiator or mediator to hear and appreciate the emotional factors that motivate parties in order to reach the core or soul of their issues. The skillful attorney mediator draws a person out in the expression of his feelings by creating a safe environment. We accomplish this, in turn, by eliminating distractions (such as laptops, cell phones and note taking), listening for deeper meanings, making eye contact and by using body language that reflects involvement, attentive silence, active listening and connection. It all begins with listening with your eyes and focusing on the person who comes to the conflict with an emotional knot that needs to be untied. You listen and look for the emotional currents. You draw them out by establishing a connection. You

can develop a connection by listening with patience - as if there were no one in the room besides you and the other person in the midst of a difficult conflict. Reflective listening, which, is nothing more than testing by reframing, paraphrasing and summarizing what you think you heard, can create the connection that then becomes that basis for trust. Careful listening may reveal a shared experience that will enhance the bond of connection.

Emotions can have either a positive or a negative impact on the mediation process. If a party has not yet dealt with the grief associated with the loss of a loved one, a long-term business relationship, a leg, a major business deal or the end of a way of life, it may be too early to sit down at the mediation table – the grief may still be too raw. Advocates and mediators need to have some familiarity with the grief process in order to ascertain where parties are in adapting to a profound life change. Is a party so stuck in anger, remorse, numbness, sadness or denial that they cannot participate in a rational case assessment? Do one or more parties need to have a pre-mediation visit with an empathic mediator or a professional counselor? If possible, you should make this assessment in advance of mediation. In most instances, counsel can make this assessment if he or she is at all attentive to the moods and emotions of the clients. Based upon experience and training the lawyer mediator may well be the one to ask attorney advocates if a pre-mediation caucus or a staggered start would be helpful in addressing some of these difficult emotional concerns. As ex-parte communication occurs throughout the course of most mediations, there is no reason why pre-mediation meetings should not occur as long as long as all parties have equal access to the attorney mediator. Even

if there has been some healing, the participants in mediation cannot ignore its existence, as mediation is likely to reopen the emotional wounds that have scabbed over.

The displaying or sharing of emotions and feelings add energy and dimension to a party’s story – which is why, generally, the parties in conflict, not their lawyers, should tell their story. In many instances, the opposing party will have greater appreciation for the opponent’s story if they hear it from him/her rather than his/her attorney. Also, sometimes the parties in conflict need to tell their story and share their emotions so they can continue with their journey through this conflict. Mutual story telling allows parties to share emotions, thereby giving context to rational case analysis. The enlightenment that comes from this sharing can often generate creative problem solving. Thus, the key at mediation is creating an opportunity for story telling to either a party in conflict or to a mediator. The point is that the conflict story is that of the “partners in conflict” and not their counsel. In many instances, the parties need to express their feelings; they are the ones who need both to listen and to be heard. Studies reflect that recognizing these needs has a significant impact on the principals’ sense of process fairness and their willingness to come to closure. This requires lawyer advocates who have enough self-esteem to step back and lawyer mediators with sufficient skill to facilitate rather than adjudicate. Thus, lawyer mediators and lawyer advocates can often do more with a sense of humility that allows for the parties in conflict to have center stage. When this is accomplished, we generally find that there is plenty of room on the stage for all the actors and their talents can end the “play” of conflict successfully.

Grief

*... the term grief refers to the process of experiencing the psychological, social and physical reactions to your perception of loss.*¹²

Grief is a profound multi-dimensional reaction to change that accompanies a significant loss, loss of a relationship, way of life and/or sense of security. Grief often involves an abrupt social or personal change accompanied by feelings of anxiety, sadness, depression, denial, numbness, frustration, remorse, regret, bewilderment, uncertainty, emptiness and/or fright. The social change may involve the loss of an occupation, the loss of friends and family. The personal change may involve the loss of self-esteem, self-worth and faith in God. Parties in one type of conflict or another may find their entire world torn asunder. They may face financial ruin and emotional collapse. In such circumstances, should we be surprised if the question of “why do bad things happen to good people” burdens them? Why then should we be surprised that grief is one of the three intertwined strands of emotion that often tightly binds up a party’s capacity to deal with conflict? Yet, this is when people reach out to lawyer advocates to seek legal redress for grief that they feel another’s misconduct caused. Then lawyers appropriately seek a way of finding a “rational” process of legal redress. But, can you expect the emotional component of their client’s legal grievances to diminish? No, they go on.

Indeed, denial, despair, loss and sadness are some of the feelings of the mourning process that accompanies grief encompasses. It is hard to make decisions, much less rational ones, when a loss that affects you emotionally, physically and/or financially shat-

ters your world. As noted before lawyer advocates and lawyer mediators must be aware of the overt and covert feelings associated with loss. The reactions to losses that fuel intense grief do not move along a timed natural progression. Feelings and adjustment come and go in waves that circle back. Leaving go of the case, working through the mediation may enable the grieving party or parties to move ahead. One piece of advice is that for intense cases lawyer advocates may wish to role-play the mediation with their clients. The idea is not to script the mediation but to get their client emotionally set to make difficult and important decisions at the mediation.

Grief clouds judgment and fuels the thought process. Grief can paralyze you or cause you to react irrationally. How then can a grieving participant, frozen by grief, find a way to analyze and accommodate this emotion, so rational resolution of legal conflicts becomes possible? One idea that we have just suggested is a realistic role-play. Another is to work with an empathic lawyer mediator who will hold premediation meetings, use staggered starts and be patient and calm.

It is generally a mistake not to attend to a party still grieving a profound loss. There are two main ingredients for successfully dealing with a participant’s grief at mediation. The first is to listen, really listen, to bear witness. The second ingredient is to forge a connection with the grieving party, if possible. For example, in a recent wrongful death case, the widow (whose husband had been burned to death and a mediator (who had just lost his son), spoke together about their respective journeys in grieving. During a conversation between the two of them during a caucus the widow noted experiencing an over whelming sense of drowning-

an inability to catch her breath. The lawyer mediator looked up in surprise and said, “I thought that I was the only one who had this feeling.” A quiet connection of trust and a bond of understanding were forged between the two “fellow travelers” in grief. The point here is that utilizing active listening skills and, when appropriate, self-disclosure are important tools that can create a connection that can assist in the many levels of resolution. In the case described following the mediation the widow sent the mediator a book she had used as part of her grief therapy.

While grief is a strong strand in the braid of emotions, it generally does not stand alone. Whether standing alone or in a “braid” accompanied with anger and/or fear, we generally cannot ignore grief during mediation.

Anger

*When you say something unkind, when you do something in retaliation, your anger increases. You make the other person suffer, and they try hard to say or do something back to make you suffer and get relief from their suffering. That is how conflict escalates.*¹³

While people seek counsel for all manner of redress in all sorts of situations they are, as suggested previously, often fueled by grief, anger and/or fear. These emotions frequently accompany the parties to mediation.

Thus, we come to the second strand of the emotional triad or “braid” - anger. Anger is a blinding emotion that has the power to permeate a conflict and radically color the character of the mediation. During mediations, we see feelings of rage, pain, bewilderment, distress, loss, remorse and regret flowing from intense anger. Unresolved

anger however expressed, causes enormous barriers to conflict resolution.

It is extremely difficult to reduce the level of anger in cases where a wife has lost her husband or a child. People who suffer life-changing injuries such as amputations, spinal cord injuries or severe burns also endure profound grief and intense anger.

The painful process of dealing with anger issues often requires a pre-mediation meeting, since you cannot and should not rush your dealing with these issues. A agreed upon pre-mediation meeting can allow the lawyer mediator to gauge and engage the anger and to do some effective coaching in relation to this emotion. You must apply patience, presence, understanding, compassion, calmness and empathy in such cases. In many instances, mediations are rush. The “regular” participants in mediation (attorneys, adjusters, risk managers) are ripe and ready for a rational risk assessment with the input of a neutral who they mutually trust. However, the person whose life has been turned upside down is not willing to rush or move into a different phase of his or her life. The catastrophically injured have to not only accept a new life but they also have to let go of litigation that has been the focus of their life since the occurrence. They deserve a mediator who will exercise patience and understanding, dignity and respect that addresses both the emotional components and the rational components of mediation. The story telling, silent attentiveness, the active listening takes time. In some cases, the pre-mediation meetings or a staggered starts we suggest allow for the required extra time that parties deserve. Such techniques facilitate more case closures and require fewer mediation sessions.

In cases where anger abounds, it is sometimes necessary to facilitate its

expression even though it makes others uncomfortable. In other cases, it helps if the person can express some of that anger to a surrogate – the mediator. Regardless of the decision on how to deal with anger during the mediation process, the fact is that the mediator and the parties must deal with it. Thich Nhat Hanh’s Buddhist mindfulness teaching about anger quoted above allows for a calming of one’s anger. Some people can reach a positive reflection about their anger after some verbal expression. Generally, total avoidance of anger issues is a mistake, as it often leads to a barrier to resolution and a lingering “after taste” of unfairness and incompleteness. Patient, calm listening combined with positive reframing can often move the energy expressed with anger forward in a helpful manner. When lots of anger abounds in mediation, some mediators find it helpful to calm themselves in order to stay outside the anger and to listen to what is being communicated. This, in some instances, means allowing parties to express their anger, rather than cutting it off in fear of its expression. Several things may occur with the expression of anger. The party expressing his anger may finally feel that he has given full expression to his feelings. The recipient of the anger may finally appreciate the passion of his partner in conflict. A skillful mediator may be able to use this anger in a positive way with reflective reframing.

Fear

...Fear is the gatekeeper of your comfort zone. Your comfort zone is whatever is familiar to you... Now your comfort zone is the people you already know, the routines you’re used to, the places you feel at home... Your comfort zone is what you are comfortable with, where you feel safe.¹⁴

Fear, the third strand of the braid of dominating emotions, is raw and basic. While mediation articles do not often address it, fear can be a palpable, powerful and a primal force during the mediation process. It can be paralyzing. It can shut a party down or lead to avoidance (flight), capitulation (fright), or intransigence (fight). All three responses are formidable barriers to conflict resolution.

Fear can be described as apprehension, dread, or fright.¹⁵ Fear has both a psychological and physiological component. Fear is often associated with the significant change. That change can involve a personal injury, employment, business or other significant disruption of a way of life.

Joseph LeDoux, the foremost researcher on fear has stated that:

[a]nxiety and fear are closely related. Both are reactions to harmful or potentially harmful situations. Anxiety is usually distinguished from fear by the lack of external stimulus that elicits the reaction – anxiety comes from within us, fear from the outside world.¹⁶

Put another way, anxiety stems from our internal processing stemming from our concern of external factors. Anxiety is uncomfortable, so we are motivated to change the uncomfortable stimuli, remove ourselves from the anxiety causing stimuli or avoid such stimuli.¹⁷ Fear and anxiety stem from uncertainty, lack of predictability, lack of self-confidence and lack of control.

People in conflict often shut down with fear and anxiety, which paralyzes their thoughts action. “Fear is without question the most intense persuasive factor.”¹⁸ “Parties, counselors and claim adjusters fear failure, embarrassment, ridicule, loss of face and financial

harm.”¹⁹ Fear affects political campaigns, fans nationalism and controls parties involved in mediation. Fear of change, loss of face, loss of control and economic loss drive mediations. Fear may well be the dominant influence in mediation.

John Gray, the author of Men Are from Mars, Women Are from Venus, has stated:

*Sometimes life frightens me and I'm tempted to retreat instead of risking failure. But when I challenge this fear and choose to take risks, this stretches my soul. By forging ahead and trying something new – even when I am scared – I perform an act of courage. And this act of courage strengthens my soul and strengthens my character.*²⁰

*To the extent that we stop struggling against uncertainty and ambiguity to the extent we dissolve our fear is the extent to which we are able to adjust, to face the future, and to move ahead.*²¹

The lawyer mediator needs to recognize and draw out the parties' fears. Often when a party openly discusses his or her fears, they do not seem as insurmountable as when it is a silent fear. Sometimes a discussion about fears can lead a party to appreciate his or her resilience. The reverse side of fear is courage. A key for mediators and negotiators is to show fearful parties there is hope and positive possibilities to be found in the future; that the challenge of change can be met. So often a candid discussion will lead a party to see not only what has been lost but also what he or she still has and what he can take on. It may also mean that encountering a known risk (fear) is what circumstances require.

Alarm, concern, unease, apprehension, panic, distress and fright accompany fear and can stymie mediation. Meaningful dialogue halts until we process or dissipate these physiological and psychological responses. The key for mediators and negotiators is to identify the fears that are operative, fueling these emotional reactions of the participants. Thus, lawyer mediators need to listen before they lead. Sometimes, fear is apparent while in other instances fear is hidden. In either instance, skill is required to recognize and address them via a transparent dialogue. Often it is best to explore them openly. In other instances, story telling can allow a person to put his fears in a proper perspective.

In short, lawyer mediators and lawyer advocates have to be aware of the fears that are in play during a particular mediation. We have to spot these concerns and address them with open dialogue. Failing to spot or attend to fears frequently can doom mediation. The key to appreciating and understanding fears is the utilization of the people skills we have discussed before in this article. Recognizing parties fears and motivation requires not only knowledge of the law but of people. Mediators have to know the parties, create a connection with the parties and establish trust if they want them to listen to and respect their risk assessment.

Conclusion

Key emotions mediators have to deal with are grief, anger and fear. Generally, an abrupt or profound change like that which underlies conflict and the pursuit of legal redress can evoke these emotions. We know that where a death is deemed wrongful, the failure to deal with the ensuing emotional braids of grief, anger and fear can doom a mediation that would otherwise be successful. This is also the case in

catastrophic injury cases, domestic dissolutions, business and professional dissolutions, probate, employment cases, and business deals that threaten careers or institutions.

Mediators and negotiators must be prepared to untie the braid of emotions that entangle people so that a rational dispute resolution analysis can occur. A sense of satisfaction, fairness and justice cannot occur until and unless you address the emotional triad. In our view this braid of emotions, often avoided and ignored or worse - -negatively reacted to - must be skillfully untied so that you can successfully utilize rational risk assessment and decision tree analysis. Indeed, dealing with these emotions can often be the key to successful mediation.

Discussion about the loss or change that has brought parties to mediation in caucus or as the case and circumstances warrant, in general session, allows the party or parties who have experienced loss or change to discuss it and share it. This allows the party or parties the opportunity to share their story. It allows others to respond to those stories. Connection, understanding, appreciation, acknowledgement and respect may then evolve. This dialogue impacts the fuel that underlies the litigation. It impacts how parties will anticipate how jurors will appreciate the story or stories that will unfold before them in the courtroom. Thus, the airing of emotions may give a different slant to the evaluation and disposition of the dispute that brings the parties to mediation. In the right circumstances, the airing of emotions may be helpful for both the teller and the listeners. It is often the key to conflict resolution. As lawyer mediators, we sometimes suggest a pre-mediation caucus or a staggered start to get at these emotions, hear the stories, discuss the changes and, in the process,

Case Reports

Case Name: *Rocky Mangini v. Anthony Baca and Michael Baca*

Court Name: Pueblo County District Court

Case Number: 08 CV 1520

Trial Judge: Larry Swartz

Date of Verdict: May 12, 2010

Verdict Amount: \$40,000.00

Facts of Case: Plaintiff was stopped waiting to make a left turn when struck by uninsured motorist travelling 50 mph. Suit brought against negligent driver. The plaintiff's UIM insurance company intervened, demanding a jury trial.

Injuries/Damages Claimed/Amounts:

Soft tissue neck injuries treated by chiropractor after emergency room treatment. Total of 16 visits in 10 months. Meds totaled 3,400.00.

Unique Issues: Subsequent one car accident 18 months after re-render aggravated neck injury.

Plaintiff's Attorney: Nicholas Gradisar, Gradisar, Trechter, Ripperger & Roth, Pueblo, CO

Defense Attorney: Nina Hammon Jahn, Joel Varnell & Associates, Denver, CO

Plaintiff's Expert: Dr. Wayne Carter, Chiropractor

Defendant's Expert: None

Insurer: Truck Insurance Exchange

Email: ngradisar@gttrllaw.com

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build trust that later on in the process allows parties to seek and hear evaluative comments or coaching from a neutral.

In short, we believe that lawyer mediators and lawyer advocates must consider whether grief, anger and/or fear are involved in their negotiation and then consciously determine how to deal with them. Overlooking or ignoring the emotional components underlying most mediation will often either result in the continuation of the conflict or a resolution that fails to meet the level of procedural fairness and personal satisfaction that people seek in mediation.

The authors dedicate this article to the memory of Daniel Scott Epstein (January 26, 1979 – March 25, 2009).

Joe Epstein, J.D. is President of Conflict Resolution Services, Inc., (CRS). Mr. Epstein has mediated over 3500 cases and works throughout the United States. He handles wrongful death, catastrophic injury, products liability, medical malpractice, class action, multi-district, insurance bad faith, employment and other litigation matters. Reach him at CRS, 5445 DTC Parkway, Ste. 770, Greenwood Village, CO 80111, or by phone 888-355-2314 or joe@crs-adr.com or visit his website at www.crs-adr.com.

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Endnotes

- ¹ *E.g.*, O. RUSSELL MURRAY, THE MEDIATION HANDBOOK 16-17 (2006).
- ² *Id.*
- ³ Joe Epstein & Scott Baroway, *Top Mediation*, TRIAL TALK, June/July 2009, at 21.
- ⁴ *Id.*
- ⁵ ROGER FISHER & DANIEL SHAPIRO, BEYOND REASON ix (2005).
- ⁶ *Id.* at 4, 11.
- ⁷ MICHELLE LEBARON, BRIDGING TROUBLED WATERS 47 (2002).
- ⁸ MICHAEL BROWN, THE PRESENCE PROCESS 191 (2005).
- ⁹ GARY ZUKAV, THE SEAT OF THE SOUL 120 (1998)
- ¹⁰ ROGER FISCHER, WILLIAM URY & BRUCE PATTON, GETTING TO YES (1991).
- ¹¹ *Compare* Douglas Stone, Bruce Patton & Sheila Hein, DIFFICULT CONVERSATIONS 163-164 (1999) with Joe Epstein & Susan Epstein, *Pre Litigation and Early Dispute Resolution*, TRIAL TALK, April/May 2007, at 23-25.
- ¹² THERESE A. RANDO, PH.D., HOW TO GO ON LIVING WHEN SOMEONE YOU LOVE DIES 11 (1988),
- ¹³ THICH NHAT HANTI, TAMING THE TIGER WITHIN 115 (2005).
- ¹⁴ Rhonda Britton, FEARLESS LIVING (Perigee 2001), P23
- ¹⁵ *See generally*, ROGET'S INTERNATIONAL THESAURUS, (Harper Resource 6th edition 2001), P 127.
- ¹⁶ Joseph LeDoux, THE EMOTIONAL BRAIN, (Simon and Schuster 1996), P 228.
- ¹⁷ *Id.* at P. 232.
- ¹⁸ Roger Dawson, SECRETS OF POWER PERSUASION, (Prentice Hall Press 1992), P 7.
- ¹⁹ Joe Epstein, *The Powers of Psychodynamics in Shaping Mediation Outcomes*, THE COLORADO LAWYER, Jan. 2004, at 45.
- ²⁰ John Gray *Love Vitamins for Your Soul*, in 54, 57 HANDBOOK FOR THE SOUL (Richard Carlson & Benjamin Shield eds., 1995).
- ²¹ PEMA CHODRON, THE PLACES THAT SCARE YOU 103 (2002).