

Chicago Daily Law Bulletin®

Volume 159, No. 238

The emotional and evaluative elements involved in mediation

It will come as no surprise to most veteran mediators that parties may be unwilling to carefully evaluate their own case. As a mediator, I have found that even a highly intelligent person will sometimes stick to a position that ignores obvious reality, even in the face of counsel's advice to the contrary.

This article will explore what psychological principles come into play in mediation and how a skilled mediator can work through these emotional elements to help parties negotiate a settlement.

Why do parties often ignore reality? I believe there is a kind of pleasure principal at work. According to Freudian psychology, the mind seeks pleasure and avoids pain. It is immensely pleasing to justify one's own actions and beliefs, ignoring all evidence to the contrary, even when serious risk is involved.

In mediation, one side often bathes in the glow of their own self-righteousness, while negatively perceiving the other side as trying to avoid responsibility for legal, economic and moral wrong. Like a theatrical production, through organized casting, choreography and publicity, one party will showcase his or her own side and refuse to entertain other interpretations.

During my time as a mediator, I have frequently observed such behavior, and if a mediator fails to deal effectively with this emotionally fueled behavior, the mediation can run into a brick wall.

Through engaged conversation, it is the mediator's job to help the

parties defer their need for gratification — the need to be "right" — when reality requires it. In Freudian terms, the mediator contrasts the pleasure principle with the opposing reality principle.

To do so, the mediator must first acknowledge the emotional angst present in the dispute by letting the party know that their position is understood. Never mind that if the mediation fails and the dispute is adjudicated, the realities of litigation will operate largely independent of any emotion.

For now, the party must see that the mediator is empathic and engaged. This is the best way to gain connection and credibility in the eyes of the party. Without this relationship, the mediator's words will fall on deaf ears.

Consider your own experience outside of mediation. When we speak to a capable person who is empathic to our situation, we tend to ascribe intelligence, empathy and truthfulness to that party. When we speak to someone who does not appear interested in our views or well-being, we do not consider them to be a trustworthy advocate.

This does not mean that the mediator should agree that the party is correct. Therein lies the trap of sounding duplicitous later.

Instead, the point is to gain the parties' trust and a good rapport. As the mediation progresses, the mediator may become less facilitative and more evaluative, as he/she hones in on the risks, costs and advisability of settlement.

In time, when the mood permits, the mediator begins to break

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away from the party's ingrained view of the case and to reframe events in a more realistic manner.

Once the discussion takes on such a realistic character, the mediator can begin to seriously discuss the "actual" case. What are the claims and defenses, the evidence? What will be required in terms of cost to continue the litigation? What is the risk of an appeal or the expected difficulty in collecting a judgment? What is the risk of an adverse outcome?

Once the emotional elements and evaluation of the case are both completed, real discussion of

the settlement possibilities can begin.

Often opening negotiations begin on an unrealistic note — the plaintiff asks too much, and the defendant offers too little. My strategy is usually to inform the parties that this unrealistic bargaining is counterproductive and can even harm the possibility of a successful outcome for the mediation.

I usually suggest that parties adjust their offers/counteroffers to keep the ball in play. Sometimes parties will modify their negotiation strategy. If not, I may carry their offers to the other side anyway. Of course, there is some risk. However, when parties hear the reaction to unrealistic offers, communicated through the mediator's shuttle diplomacy, real offers usually evolve.

Ultimately, mediation involves the human decision-making process. Dispute resolution is rarely purely fact driven and will almost always possess some emotional component. It is necessary to consider both elements in order to get to an agreement.

Few people really want the aggravation and cost of litigation. The knowledgeable mediator helps each party see a way out of — what they may regard as — a maze of issues, problems and disagreements.

When the mediator is the voice of reason, and has the ability to empathize with the self interests and emotions of all parties, agreement and settlement of even the most difficult cases becomes possible.

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