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Should lawyers and mediators also play the role of therapists?

By Jan Frankel Schau

Family therapists work to create a comfortable, safe space for their clients to express themselves. In the confines of a small office furnished with an upholstered armchair or sofa, clients are invited to express how they are feeling and encouraged to get in touch with their emotions in a way that will be useful in improving their interpersonal relationships with those with whom they hold conflicts in their family circle or beyond.

Lawyers, by contrast, are not generally trained or "attuned" to addressing their client's feelings in the same way. Instead, the typical lawyer discourages the client from becoming "too emotional" or too wedded to any particular outcome. We are typically hyper-focused on the facts, the evidence and the legal remedies, instead of on the way an incident made our clients, or their adversaries feel. We are focused on doing something, not feeling something.

In many cases, the mediation process lies somewhere in between. That is, when the clients (or in some instances their advocates) become too emotional, they are unable to negotiate rationally, cutting short the opportunity to resolve the conflict in a single day. There are many good reasons to deal with emotions in mediation, rather than avoid or ignore or suppress them. Many of the most successful mediations are products of a fully engaged process where the clients and their advocates are given a full opportunity to express their emotions before any decision-making is entertained.

Why Dealing with Emotions May Be Necessary in Mediation

Take the case of a fee dispute where a young man was unable to cash the settlement check coming out of a bitterly fought probate matter against his siblings after their mother, a popular author of children's books, passed away. The young man had discharged his first attorney when he asked for another advance on fees and costs just 60 days before trial, and then engaged a new attorney, who settled the case on contingency fee, but at a value that was insufficient to pay the first attorney's lien. The emotions of the young man ranged from anger (at both lawyers who, because of their own disagreements, had held up his own payout) to sadness (at the end of the probate against his brothers and the loss of his mother), to shame (at having been taken advantage of by the two lawyers who overpromised and underperformed).

In that case, Jeremy (not his real name) could simply not make a rational decision about how much to pay each of his lawyers until he dealt with those far-ranging emotions on the day of his mediation. He had flown in from the Midwest and had no plans to stay in L.A. more than the one night (no interest in seeing his estranged siblings, nieces or nephews or visiting any of his childhood friends here).

In his initial demand, Jeremy asked for 100 percent of the settlement proceeds, less 100 percent of the lien to his second lawyer, essentially shutting out the first lawyer completely. This was irrational and clearly would not settle the dispute. When the first lawyer made a counteroffer that included compromising his lien by 50 percent, Jeremy all but shut down. In psychological terms, his amygdala (the part of his brain that produces a "fight or flight" reflex) had been hijacked and all he could consider was "flight" then "fight" — with no compromise potential.

In order to get past those strong emotions, it's critical to take a few steps back and honor the emotions that are being demonstrated. Therapists call this process "attunement" in Emotional Focused Therapy (EFT). Either the lawyer or the mediator can actually label the feelings and then pause to give the person feeling those strong feelings a chance to cool off before reacting. In this case, a simple: "Wow. I can see that this makes you angry. And on top of that, you are clearly still sad about losing your mom and now your siblings in this thing. And I guess you probably feel betrayed by your lawyers, too. How awful." After that candid and "heartfelt" validation of the client's feelings, the courageous mediator or lawyer will deliberately pause the negotiations in order to let the individual who has expressed these strong emotions get back to a place where he can rationally respond to an offer or counteroffer. In the heat of the emotions, that rational response is simply unobtainable. Therapists refer to this phase of EFT as "sitting with the emotions." It is only after the client is permitted to express himself that the parties can move into the phase which includes a strategy for deescalating the strong emotions by addressing the conflict itself.

Strategies for Dealing with Strong Emotions in Mediation

Sometimes, the facts of the incident leading to the lawsuit are so sad or outrageous that the emotions arising then cloud the negotiation process many years later. In those cases, the parties' subjective feelings can cloud their ability to make any objective decisions. For example, in the case of a wrongful death (by suicide) of a young adult against a rehab facility, the parents were so overwhelming sad and perhaps anxious and fearful that a jury would see them as contributing to their daughter's addiction disorder, that they could not even begin negotiations in the mediation. Although they wanted the case to go to a jury, and their lawyer reassured them that the case had huge verdict potential, they were terrified of the trial itself, seeing themselves on trial instead of as victims to the negligence of the facility where their daughter drank herself to death in the parking lot while on a weekend "pass" from treatment.

There was no other way to approach this mediation than to create a safe space in which the parents could express their grief and fear, where all parties involved could demonstrate genuine empathy towards them and express their deep regrets at the loss of their child.

Mediators call this technique "modelling" and "mirroring." In order to show empathy, a sensitive mediator or counsel will physically "lean in" towards the person in the emotional state and will repeat back ("mirror") their words, rather than argue or counter them. For example, in this case, the mediator might say to Mrs. Jones (again not her real name): "I hear you. This was unimaginable grief. You did not see this coming. And it sounds like you and your husband are genuinely afraid that when a jury hears this, they may blame you and not the Rehab facility. Or blame Chelsea, your daughter. Who was such a shining light. Unimaginable!"

In order to empathize effectively, the mediator and the lawyers need to allow themselves to be vulnerable to their own feelings and to react genuinely. If the sadness or grief causes you to cry, it's OK to do so. The key is to be self-aware enough to pivot towards the "modelling" that comes after that in order to effectively resume settlement discussions. This requires avoiding getting dragged in to the anger or frustration that may also be expressed so that you can help the person experiencing those strong emotions express them and then make a good decision about how to resolve the conflict which they have engaged you to resolve.

Sometimes, that will mean orchestrating a joint session so that the other side can see and appreciate the depth of the emotions. At other times, that will mean deputizing the mediator to express those emotions to the opposing side, in order to open them to the other side's perspective. It can be enough to have provided the safe space and the confidential forum within which a party may express her emotions freely, but where strong emotions emerge, repressing or ignoring them will only serve to sabotage any potential of a deal. Unfortunately, the opportunity to express emotions is seldom afforded in the modern American courtroom, or under the scrutiny of cross-examination in deposition.

The Results of a Failure to Acknowledge Emotions in Mediation

Where strong emotions are disrespected or ignored, the negotiations can easily break down. For example, in a disability discrimination case based upon a failure to accommodate a disability, Ernie, the plaintiff, wanted desperately to express his frustration with the new head of human resources, since he, himself, had been head of HR for 14 years before becoming vice president and then suffering a heart attack, causing him to request to return to work at two days per week indefinitely after a six-month leave of absence. The employer refused to allow him to work only two days a week since Ernie was a "key" position and the company believed he could not perform the functions needed on a 40 percent work week, so Ernie had been out on a full medical leave of absence for the past three years. Now at age 73, he wanted to return to work and could not understand the company's stubborn refusal not to accommodate his requested accommodation. Although they offered him a substantial severance package, he was so angry and sad at the potential loss of his job, his career, his day-to-day existence, that he refused to make a counteroffer and the case reached an impasse within a few hours.

Ernie's employer refused to acknowledge the emotions involved in negotiating this case, and instead, was solely focused upon the merits of the pending motion for summary judgment, which was based upon the theory that Ernie could no longer "competently perform" his job, a theory which insulted Ernie to his very core. They saw no potential of a future relationship with Ernie and therefore could not see clear to acknowledge any of his emotions at the time of the mediation hearing. Expressing those emotions to the mediator, in that case, proved to be insufficient. His emotions had overcome his logic and the case did not settle until the eve of trial, after discovery had been completed and the MSJ denied.

Why Emotions Need to Be on the Mediation Table

When strong emotions present themselves in mediation, lawyers can greatly improve their chances at settling their cases if they take the time to acknowledge those emotions, rather than argue with them or ignore them. Where the sadness, anger or fear comes up in separate (not joint) session, the mediator can help the process by attempting to label the emotion, the lawyers can validate and acknowledge the feelings and then pave the way towards a more rational response. There is no benefit to arguing with the emotion or trying to ignore or suppress it. Where the mediator has earned the trust of the client, he or she will likely feel safe expressing even the strongest of emotions.

Sometimes the only way to make a rational decision is to first express those feelings that are keeping the parties from solving their conflict to begin with. By pausing and taking the time to listen without judgment, a mediator or counsel can pave the way for the emotion-filled client to make a more rational decision about letting go of the dispute. Without taking that pause, the parties may simply be unable to make any rational decision.

There are other added benefits to approaching emotions in conflict in this way. Your clients will feel "heard" and respected in ways that they would not likely experience at trial or during their deposition, and occasionally, the other parties to the dispute may truly gain perspective on how their conduct or alleged conduct has affected other people in a way that is ultimately going to benefit them in future interactions. Finally, you may feel better having both "done something" positive and allowing your client to "express something" that was not previously addressed. It may be counter-intuitive for lawyers, but it can produce a "win-win" that your clients are looking for.

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