

July 2014 Newsletter

Settling a protracted lawsuit can trigger a "loss reaction" from either side. If the negotiating parties and mediator fail to acknowledge and manage this loss reaction, it can derail the most challenging negotiations and shut down the mediation.

But you can manage the parties' intense emotions of loss by doing this.

Like the well-known stages of grief and mourning described by Elizabeth Kubler-Ross, civil litigants sometimes fall into an emotional trap in which they avoid the feelings of loss triggered by the devastating accident, injury, loss of job or marriage by displacing those strong emotions with the lawsuit itself. In Freud's view, the existence of a "loss object", (such as a lawsuit), may in fact "psychically prolong" the emotions not expressed at the time of the original loss.

Interestingly, this may occur on either side. For example, a long-term employee may suffer a sense of lost pride, loss of sense of community, friendships and finances upon her abrupt and unexplained termination. On the other side, the management of her former employer may feel personally offended at the suggestion that they would allow unlawful or prejudicial practices to control the way they treated their good and loyal employees, and may also fear that the lawsuit will set a precedent which others may follow if they decline to take the matter all the way to trial in order to vindicate their conduct. Both are victims of the other. Either set of intense emotions may disrupt negotiation and derail settlement.

Signing a settlement agreement is a final act which some litigants are simply unprepared to do when they have not yet processed this "loss reaction". In order to avoid surprises and minimize this risk, it is best practice to encourage an early and honest expression of emotions in advance of asking for painful compromises to be made. Being mindful that the goal is not to "fix" the emotions of loss, but simply to acknowledge them and begin to facilitate a process for the client to work through the loss of the original hurt or offense. In this way, the "loss reaction" can be managed effectively, and settlement, even in the most emotionally difficult matters, can be achieved.

P.S. I am pleased to be hosting an informal Negotiation Round Table on August 21 for the Beverly Hills Bar Association's Labor & Employment Section. For more information, please contact me. All are welcome!