

Is It Only ‘the Number’?

Mediation is not simply a linear, rational process, which arrives at ‘the number’. Veteran mediators recognize that, for the litigants, the emotional aspects of a settlement often involve far more than just venting. Giving up a goal, settling below a certain expectation, or even achieving a favorable settlement can be a very painful and intense experience.

Freud wrote that people can experience intense grief over the loss of not just a person, but abstract ideals. Legal disputes are overflowing with such loss. In personal injury cases, loss is apparent. In employment cases, a terminated worker loses a job, income, social status and personal identity. The employer may feel the loss of reputation or disruption in the workplace. In family disputes, almost no part of a person’s identity remains intact. Even corporate and organizational litigants experience loss because their sense of justice has been violated and they refuse a settlement based on ‘principle’.

Interestingly, for litigants, these emotions reappear and intensify during mediations and settlement discussions that occur long after their initial loss. For people who have experienced the loss, the lawsuit may provide a substitute focus which helps them avoid their pain. Unfortunately, this can result in the postponement of the psychological work needed to accept loss. Dwight Golann, a Suffolk University law professor, who has written and lectured extensively about grief reactions in mediation, wrote “people temporarily avoid the feelings of loss triggered by a dispute by investing another ‘object’ with their feelings... a terminated employee, for example, might escape some of the pain of losing his job by convincing himself that a court will rule in his favor.”

This delay in grieving over the original loss can lead to another form of grieving that exists in litigation. When the litigation moves toward the settlement number, a party has to also mourn the loss of their case. During the mediation, a litigant is faced with the reality that the legal system may not agree with their view of the case, or that the value they assigned may not be attainable. As reality sets in, they often experience grief over both the loss of the case’s promise as well as the original loss. Such a double blow is very difficult and can create many problems in the context of mediation.

In the course of a mediation, a litigant may experience some of the stages of grief described by Elizabeth Kubler-Ross: denial, anger, bargaining, depression and acceptance. It is imperative that these feelings be handled in an appropriate way, by a skilled mediator, if the case is to have a chance for settlement. The mediator must recognize that the behavior attached with grief is not intentional and must be treated with empathy. Asking questions can help the litigant acknowledge and label their feelings and can keep the other mediation participants from misunderstanding behavior. Understanding that the feelings being expressed are not a personal attack but relate to the grief and pain of loss can keep everyone from escalating an already tense situation. Extraordinary patience is sometimes required.

What we describe as venting is so much more than that word implies. A litigant’s grief and sense of loss can be far greater than we can imagine, especially in cases that, to us, have become routine. An experienced mediator’s understanding and guidance can help litigants acknowledge their grief and work through their loss so that they can move forward with a negotiated resolution to their dispute.



Judge Elaine Gordon (ret.)

A note from Judge Gordon

My column this month continues to address some unique and important aspects of mediation. I hope you find it interesting. I also appreciate all the feedback I continue to receive from my newsletter.

I feel very fortunate to work with so many lawyers who are becoming increasingly comfortable with mediation as a settlement option. While the skill set may be different from litigation, the goal remains the same.

I just returned from the spring conference of the International Academy of Mediators held in Banff, Alberta. It is a spectacular region in Canada and worthy of consideration for a future vacation.

I’d like to wish you and your family a wonderful July 4th holiday. Now that summer is upon us, it’s time to enjoy all that Connecticut has to offer at this time of the year.



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