

ADR Skills

How the ‘Inside Out’ of Emotions Affects the Inside of a Mediation

BY NANCY HOLTZ

If you have kids, grandchildren, nieces or nephews, or just like a good Disney movie, you are probably familiar with last year’s Pixar animated film “Inside Out.”

The feature, which was set to finish 2015 as one of the year’s top five money-making films, tells the story of an 11-year-old girl, Riley, who unhappily must relocate with her family to San Francisco from Minnesota when her Dad gets a new job.

The movie tells, from a comical perspective, of the various emotions that live inside young Riley’s head.

So Fear, Sadness, Anger, Disgust and Joy are the real stars of the movie. The Disney movie shows us how these various emotions actually play out inside Riley’s head in a variety of circumstances.

Now, with apologies to Walt Disney, this article delves inside these same emotions as they have manifested themselves in mediations.

FEAR

Mediations can be scary for some people.

This author realized that fear was present when a party asked me, in my role as the mediator, a question about a half hour into a private session. After the plaintiff’s attorney and I had been going back and forth for a bit, the plaintiff interjected with a simple question: “Can I say something?”

While many of us spend a lot of time in mediation rooms, it is always important to remind ourselves—both as neutrals and attorney-advocates—that for many people in the room, this experience may be a first. There can be a fair amount of anxiety as to what to expect.

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Don’t brush past this. Rather, talk to the client about the process and what to expect. Describe who the players will be.

Some clients are regular users of mediation services and have no hesitation speaking up. Many parties, however, have never been involved in litigation or alternative dispute resolution.

They may have never even heard of mediation until their attorney discussed it with them. They are scared of the process, of speaking up, of possibly not saying the “right” thing. They need assurances.

Both the mediator and the attorneys need to help ease this fear. This can be done with reassuring words and careful explanation of the process. A little humor can also go a long way to making the environment less foreboding.

SADNESS

I cannot begin to list the mediations in which parties, while talking about the dispute in question, wistfully describe relationships now soured and irreparably damaged.

I remember speaking to one side of a family dispute in which there was a sister who was now at war with all of her siblings. Once we got past the expressions of betrayal and anger, I heard loud and clear that the sister was very sad.

The woman described Thanksgiving and Christmas dinners that were now a distant memory. She told me that one of her siblings, in the room nearby, was the godfather to one of her kids.

I asked her if I could share some of her feelings with the other side. I relayed some of her feelings and memories to her siblings in the other room.

When I spoke of the nice things she had said about her now estranged brother, he asked, “She said that about me?” He was surprised that his sister still had some affection for him.

Passing along this small expression of lingering affection to one of the parties helped thaw things out a bit.

Frequently in mediations, I see people who were once very close now torn apart by litigation: former business partners, doctors with former patients, and supervisors and their once-star employees. The list goes on.

Sometimes when I am reading the mediation memoranda and exhibits provided prior to a mediation, I see emails exchanged between the now-warring parties. Many times it is clear that there was a fondness and friendship which seemed so deep. Yet, these same people now sit across from each other, doing battle.

The attorneys may be arguing over legal positions and advocating for their clients zealously. But never forget: there is sometimes a lost relationship, a broken friendship.

It is important to recognize that either or both sides may have feelings of sadness over the loss of this relationship. There can be occasions when there actually may be reason for hope that if this dispute can be resolved, the parties may begin to restore their relationship in time.

True, participants often say it will never happen, at least at the outset. But a good mediator traffics in optimism. Reminding the parties that they once actually liked or respected each other can help move them closer to compromise. At a minimum, acknowledging this lost relationship is important to move toward closure.

ANGER

Ahhhh, anger: Mediation veterans have seen that from every perspective, and everyone in the room. “Tell the other side to get serious!” “I’ll take my chances with a jury!” “We’re not going to bargain against ourselves!”

This emotion needs to be managed carefully. Too much negativity can create a downward spiral.

In the heat of a mediation session, an attorney and his client stormed out and headed for the elevator. I caught up with them at the

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elevator. When I asked them to please stay and continue on, they both unleashed a torrent of angry comments about the other side and why the mediation was a huge waste of their time.

It was clear that there was no point in trying to get them back based on any appeal to logic.

Therefore, I simply asked if, as a favor to me as the mediator, they would please hang in just a little longer.

Reluctantly, and with heavy emphasis on this being done solely for me, they returned.

And the case settled.

How much should someone be able to express anger in the course of a mediation? It can be difficult to dig back out of the black hole of anger so it is important to know how much is enough.

Some venting? Sure. Keeping the receiver on and listening to these feelings? Yes. A party needs to be able to express these feelings and not feel stifled. It is finding the point at which to stop a party expressing feelings of anger that is the challenge.

It can be made more difficult when the angry comments come from the attorneys themselves. When a party sees his attorney snarling and posturing to the mediator and/or the other side, never conceding a point, it may give that party an unrealistic expectation.

Attorneys should recognize that when they indulge themselves in front of their clients, it could impede the mediator's efforts to create an atmosphere of compromise.

Angry outbursts directed toward the other side during a joint session are particularly unhelpful. I know that there are some mediators in certain situations who might encourage this type of venting. Anger is a valid emotion that cannot always be avoided.

But as a general rule, anger is not an emotion that will help get a case settled. Mediators should try to neutralize these feelings by acknowledging them, while simultaneously trying to redirect the discussion in a more positive way.

DISGUST

What mediation would be complete without one or both parties expressing their feelings of disgust at the numbers they are hearing from the other side.

Far too often mediations start badly

because either or both sides commence the negotiation with wholly unrealistic positions.

I recently had a mediation in which one side's attorney threatened to walk out when his opening demand was met with an extremely paltry counteroffer. The attorney asked, "Why should we stick around if this is where they are?"

Working on Emotions

The mediation challenge: What to do when the participants are speaking and acting from the heart.

The mediation information source: Disney's 2015 hit animated film, *Inside Out*.

The mediation reality: They are always speaking and acting from the heart.

I replied to that attorney,

The number they are offering seems small compared to what you are demanding. But you need to consider their perspective. For your adversaries, the case is almost certainly going to be a defense verdict if taken to trial. So, to them, the offer is a sum of money far beyond the "zero" which they believe a jury will award. Measured that way, can you see why they didn't mean this to be offensive? You each have a different view of the case and these numbers reflect that.

One of the hardest parts of being in a mediation is accepting that someone—the mediator, arbitrator, judge, or jury—may not agree with your narrative.

The over- or under-valuing of a case can cause feelings of disgust because an attorney and/or the client refuses to look at the case from the other side's perspective.

When there is a Grand Canyon between the parties' views of the case value, the strong feelings of disgust at how the other party is bargaining need to be acknowledged and managed.

I always try to remind both sides that "the dance" is just beginning and that each needs

to be patient. I also stress that each needs to consider the other side's position.

Then there is the very end of the mediation. This is where the real feelings of disgust emerge. I can remember finishing up a mediation in which I listened to one of the parties tell me that he could not believe he was resolving this matter for the amount agreed to. He told me, "If someone had told me I would be settling this for X, I would have told you that is crazy! . . . But here I am doing it."

Mediation is not about getting the result you want. I remind participants that it is really about getting a result you can live with. No more, no less.

So it is natural that when a party takes far less than he, she or it believes is deserved, or pays far more than the party thinks it is obligated to pay, the party will be disgusted by the whole process.

It is important that the mediator remind them that even though they may not be thrilled with the final number, it is one that they can live with, the case is over, the legal bills have ended, and the uncertainty and risk are over. In short, each party has achieved a good result.

JOY

I don't see a lot of joy in mediations. In fact, I make a point of telling the parties up front that if the settlement is fair, neither side will be "happy." Instead, each side should leave, if not joyful, at least satisfied.

I do believe, however, that joy can follow. In the case discussed immediately above, in which the party said he couldn't believe what he was doing, I heard from him a couple months after the mediation.

He wrote a nice note telling me that he was skeptical of the process and believed the case would never settle. He said that since that day when they settled the case, he and his wife were never happier. They loved being able to go out to dinner and not talk about "the case."

The real joy in mediations is that experienced by the mediator. I truly feel joyful when a case I have mediated reaches a settlement. Being able to be a part of resolving a case is very rewarding.

I have learned that it is not just about the evidence and the legal arguments of counsel. I have learned that recognizing, managing and, where appropriate, validating the range of human emotions we all experience is an important part of the mediation process. Joy included. 