

Alternative Dispute Resolution

WWW.NYLJ.COM

VOLUME 259—NO. 52

MONDAY, MARCH 19, 2018

Mediating **Highly Emotional** Workplace Disputes

BY STEPHEN P. SONNENBERG

Workplace disputes provide fertile ground for intense emotional conflict. While the #MeToo movement has focused attention on workplace harassment and the psychological impact of sexual misconduct, many other types of workplace disputes generate emotional turmoil. Discrimination and termination claims, allegations of pay disparity and even claims of unpaid wages often are impacted by strong emotions.

When employees and employers turn to a mediator to help resolve their legal disputes, they bring not only evidence and arguments, but emotional reactions that are definitely not “one size fits all.” Workplace conflict that leads to anxiety and depression in one employee may promote anger and outrage in another. Nor are individuals identically resilient. The same experience that engenders a long-term traumatic reaction within one individual may give rise to only mild discomfort within another. Co-workers or supervisors accused of

STEPHEN P. SONNENBERG is a JAMS panelist based in New York. He previously practiced labor and employment law for 25 years at Paul Hastings, before which he was a psychotherapist. He can be reached at ssonnenberg@jamsadr.com.



misconduct will also have intense, but not identical, reactions. Deciding whether or how to address varied emotions that stand in the way of resolution often is a key to a successful mediation.

Doing so does not mean that the mediator acts as a psychotherapist. Although mediation and psychotherapy address the ways in which individuals feel, think and make decisions, they are

far from synonymous. This may reassure those who contend that the resolution of legal disputes should be grounded solely on facts and the law. As a former psychotherapist, employment lawyer and now mediator at JAMS, I have been asked two critical questions: Are the intense emotions generated by employment disputes really pertinent to settlement of the legal claims and, if so, why? After all,

some assert, the prima facie case for discrimination under Title VII of the Civil Rights Act of 1964, or workplace harassment under state and city laws, does not include “intense emotions” as a formal element of a claim.

The response is straightforward, with a caveat. Attending to intense emotions in employment disputes increases the chances of resolution. Emotions affect not only the way in which individuals *feel*, but the way in which they *think*, and therefore the manner in which they negotiate. Instead of impeding resolution, intense emotions often provide opportunities for the mediator to convey a measure of understanding and respect for the parties. This, in turn, supports the parties’ ability to examine the legal claims and defenses from different perspectives, consider their options and make clear-headed decisions. That said, it is important for the parties, attorneys and the mediator to recognize the distinctions between the roles of mediator and therapist.

The Impact of Intense Emotions

Although many people strive to separate facts from emotions, strong emotions often influence an individual’s perception of the facts, and “what happened.” Understanding how the parties’ feelings impact their perception of their legal claims and defenses is one of the mediator’s tasks. Emotions and cognition directly influence each other. On the one hand, emotions create beliefs and may distort memories. On the other hand, thoughts and memories impact the way individuals feel. Together they

have a substantial impact on behavior, including not only the manner in which individuals interact, but the strategy and tactics they adopt while negotiating with each other.

Individuals who bring harassment, discrimination or retaliation claims and believe they have been victimized may experience feelings of anger, anxiety, helplessness and depression. See, e.g., Reed, M.E., Collinsworth, L.L., Lawson, A.K. et al., “The Psychological Impact of Previous Victimization: Examining the ‘Abuse Defense’ in a Sample of Harassment Litigants,” *Psychol. Inj. and Law* (2016) 9: 230. Even claims for unpaid compensation grounded on wage-and-hour law

When employees and employers turn to a mediator to help resolve their legal disputes, they bring not only evidence and arguments, **but emotional reactions that are definitely not “one size fits all.”**

technicalities or the interpretation of contracts and workplace policies may involve strong emotions. Claims alleging pay inequality, promotions denied, or unwarranted terminations are often grounded on fundamental disagreements over the value and utility of individuals, not inanimate objects. These disagreements may impact an employee’s self-esteem and cause significant distress.

Employees who bring claims do not have a monopoly on strong emotions. Reactions by those accused of discrimination, harassment or

retaliation may include anger, anxiety, embarrassment and depression. Co-workers or managers accused of wrongdoing are not emotionally insulated simply because they may have acted on behalf of their employer. Some feel insufficiently supported or even abandoned by their co-workers and employer, fearful that their job, reputation and future prospects will be irretrievably damaged. This, too, causes distress for those accused.

Mediation, Not Psychotherapy

Psychotherapy generally involves the treatment of mental or emotional disorders or related bodily ills by psychological means. See, e.g., Definition of Psychotherapy, Merriam-Webster.com. Mediators, in contrast, assist individuals involved in conflict to come to an agreement, rather than focusing on psychological “disorders” or “illness.” Attending to the emotions that motivate parties to bring, maintain, and ultimately let go of their legal claims and defenses does not require a mediator to formulate diagnoses or even think in terms of pathology. Rather, the mediator understands that emotions influence the ways in which individuals think and, therefore, the manner in which they negotiate.

A mediator has the opportunity to attend to strong emotions by actively listening and openly acknowledging a party’s emotional experience. One of the mediator’s goals is to respectfully convey compassion for employee and employer alike. There is no specific formula or magic phrase for the mediator to use when acknowledging strong emotions. Timed well, a simple

statement that the mediator understands that a party feels outraged, or wounded, for example, may be just right. Active listening and acknowledgment are not the same as encouraging a party to simply “vent,” which under some circumstances in mediation may be quite counterproductive.

The distinctions between a mediator’s and psychotherapist’s role are varied. While mediators may have more than one meeting with parties and their counsel, they do not have the therapist’s opportunity to develop trust and rapport through sustained discussions. They must do so quickly.

Therapists often focus on the impact that prior experiences have had on an individual’s emotions and decisions. They may interpret patterns of prior behavior, or an individual’s current thoughts and emotions, in ways that differ from and expand their clients’ self-perception. Mediators focus on the past to ensure that they understand the relevant factual and legal issues and their impact on the parties. Understanding the chronology of events and the emotions they generate is far different than analyzing and interpreting them for a client. In mediation, the former will likely be welcome, the latter unwelcome.

Therapists rely primarily, sometimes exclusively, on their client’s subjective reports regarding past and current events. Although mediators adhere to certain rules and protocols regarding confidentiality, they have access to information from all sides to a dispute. This enables them to talk with the parties relatively quickly about different perspectives on the facts and the law and to encourage

the parties to step into the proverbial shoes of the judge and jury. It also allows the mediator to explore the risks inherent in the parties’ positions. In my experience, this fundamental difference between the mediator and therapist role benefits all who attend mediation.

Cultural Influences On Emotional Expression

A discussion of emotionally laden disputes is incomplete without mention of cultural differences in the manner in which individuals experience and express their emotions. If overlooked or misconstrued they make such disputes more difficult to resolve.

The basic premise is that culture influences how individuals understand, interpret and express their emotions. Norms specific to a given culture impact how an individual within that culture feels he or she *should* express emotions. In mediations involving a party who suppresses his or her expression of negative emotions, it would be a mistake for the mediator or counsel to assume that a calm demeanor signifies the absence of emotional turmoil. Of course, a mediator typically does not have an opportunity to conduct, prior to mediation, a thorough assessment of the impact of the parties’ respective cultures on their emotional styles. There are opportunities, however, to seek clues. During separate pre-mediation conference calls, for example, the mediator may ask each party’s counsel about the client and how the client is coping with litigation.

This does not mean that the mediator should presume that an individual’s cultural background

dictates or guarantees a particular emotional posture in an employment mediation. To presume so risks stereotyping individuals.

A Greater Chance of Success

Attention to the parties’ emotions helps not only the parties but the mediator. Understanding the parties’ emotional styles and concerns enables the mediator to employ a line of reasoning that the parties are most likely to find compelling. An individual uncomfortable with the outward expression of intense or negative emotions, for example, may not find arguments based on strong emotion persuasive. An individual who expresses intense emotions with ease may not be impressed by a highly intellectual line of reasoning. A mediator’s approach should be in tune with each party’s emotional style and comfort level.

Mediators and therapists share the goal of empowering individuals to make important decisions *informed*, not *dictated*, by their emotions. Doing so allows the parties to consider perspectives different than the ones they brought to mediation, and to consider their options well informed as to the potential outcomes of their dispute.

