

February - April 2006

DISPUTE RESOLUTION JOURNAL

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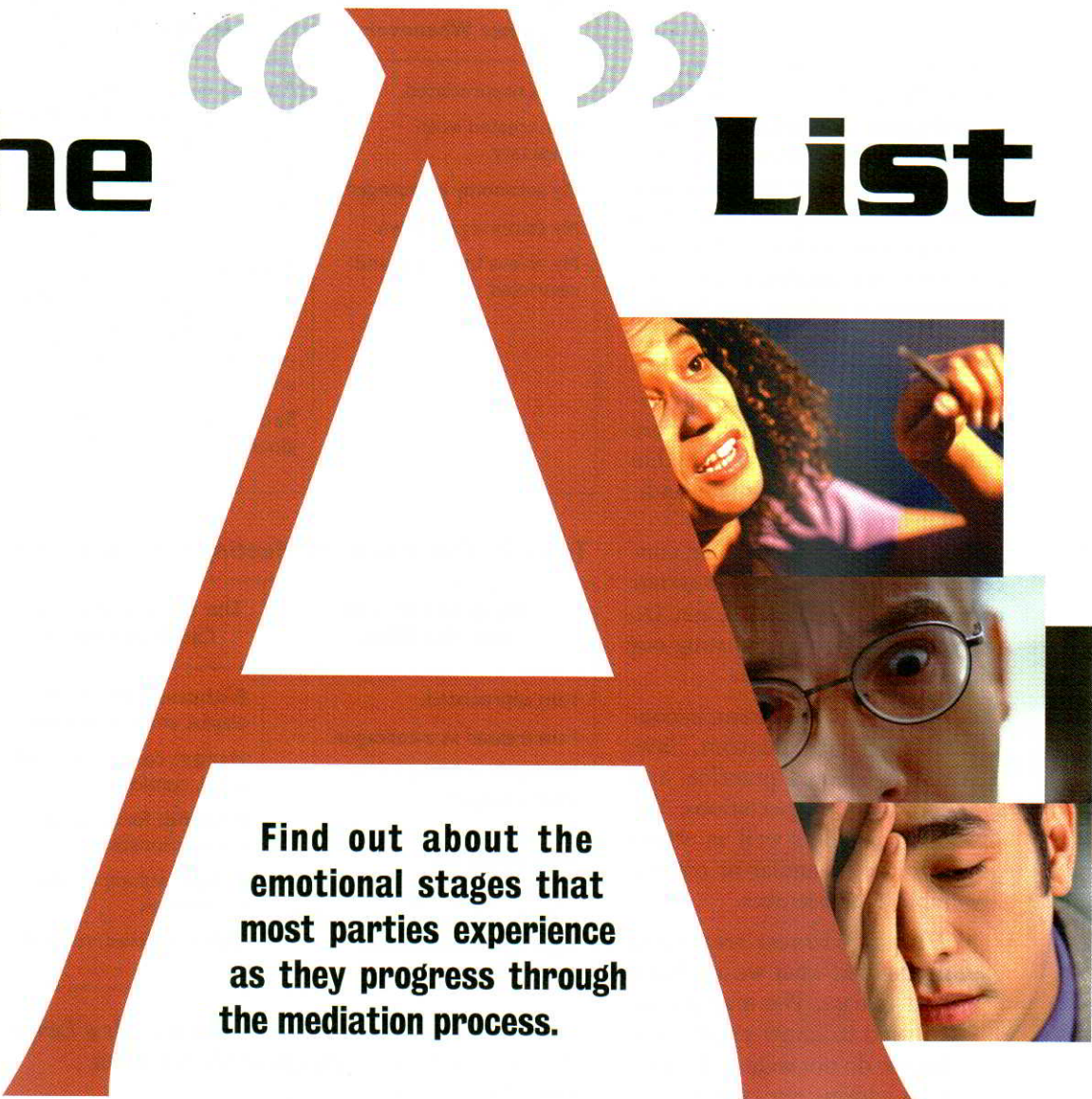


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The “A” List



Find out about the emotional stages that most parties experience as they progress through the mediation process.

Going through employment mediation is an emotional experience that brings to the surface pent-up feelings aroused by a conflict in the workplace. Indeed, I often think that the emotions expressed in mediation can be measured by the number of Kleenex the parties ask for during the process. (I keep a large supply handy.) In my practice as an employment mediator, I have observed many different kinds of emotions in both parties, but particularly in the claimant employee. Sometimes it is fear of seeing the person whose actions led to the mediation (“You mean I have to see my boss at the joint session? He’s the one who did this to me!”), anger

of Emotions in Mediation

from Anxiety to Agreement



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because that person is not at the joint session (“The company didn’t even bring my boss—and he was the main person involved in all this!”), and frustration (“Why don’t they just pay us what we ask?”). For employees who have sued their employers, litigation also takes a huge emotional toll. Litigants often describe it as an emotional roller coaster that can go on for years.

BY
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Lawyers who represent employees in mediation must understand the emotional aspects of mediation and how emotions can help lead to resolution. Without this knowledge, they will have difficulty assisting their clients in moving through the different emotional stages of the mediation process. This article discusses these emotions and when they tend to find expression. It also offers some helpful hints to deal with them.

To simplify this discussion, I have created an "A" list of emotions in mediation. These are anxiety, anger, adrenaline, awareness, acknowledgment, analysis, accommodation, active participation, acceptance, and agreement. Each will be discussed in turn.

Anxiety

Anxiety is the most common emotion experienced by parties waiting for a mediation to begin. They know their own views of the conflict and strongly believe in the rightness of their positions. They each believe the other is being unreasonable and fear that the conflict will escalate, so that the goal of resolving the dispute in mediation will not be achieved.

You can easily tell anxiety is present from the parties' body language (such as clenched hands, arms held across the abdomen, or hunched carriage) and facial expressions. The attorneys may be laughing and sharing pleasantries with each other. They may even be sitting in a forward-leaning position, expressing that they are "ready to go." However, the parties are usually leaning back, waiting tensely for the session to begin.

To diffuse the tension in the room, I usually ask, "Has anyone been through mediation before?" Almost always, it is at least one person's first time. I then ask the indulgence of the other participants in order to spend at least 10-15 minutes describing the mediation process. I always tell the parties that if one day of mediation seems stressful, it is far less so than being in court for one or two weeks. I explain that mediation is a voluntary process, that no one can be forced to mediate or forced to agree to anything that doesn't seem fair or acceptable to him or her. I explain that mediation provides a respectful envi-

ronment in which each person can share his or her perspectives, concerns and goals. I tell them that there will be breaks and a lunch period (always critical to a successful day-long mediation). I speak long enough so that the parties can feel as if they at least are getting to know me, and to make them feel that they have made the right choice in coming to the mediation table. I also ask if there are questions or concerns and address any that are raised. This is helpful in alleviating anxiety, but even more so are the private caucuses discussed later.

After I finish speaking, I explain that I will ask everyone present at the joint session—both lawyers and clients—to share their perspectives on what brought them to the mediation, and what they hope to achieve. This type of extended joint session is not the norm in mediations of cases that have been in litigation for some time. Yet, I have been told repeatedly by both lawyers and their clients that this initial discussion really helps to reduce the anxiety level and start the mediation on a positive note.

Anger

Anger often goes hand in hand with disputes. If we believe our position is right, the other side must be wrong and is being unreasonable in failing to agree to our demands.

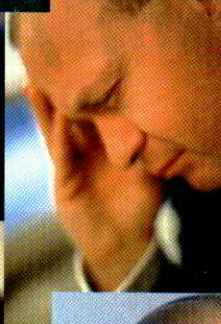
While a conflict remains unresolved, we can become obsessed and relive it over and over, thereby increasing our stress and the anger we feel toward our adversary. Negative feelings like anger can cause us to become less productive professionally and greatly harm our personal relationships. We may know intellectually that displaying anger is unlikely to help us achieve a resolution of the conflict, yet, we may be unable to prevent an angry outburst or other negative expression that could derail the mediation.

I use the term "we" to discuss anger with parties to mediation because this emotion is universal. I like to put anger right on the table, acknowledging that it exists. I tell the parties that it is normal to feel angry and resentful when "we" believe we have been unfairly treated. Hearing that angry feelings are normal tends to take some of the juice out of them.

While the parties need to know that it is okay



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to feel angry, they also should be made to realize that it is not okay to let anger get the best of them by acting on it. I explain to parties in the joint session that anger could block their ability to get where they want to go—resolution of their conflict—and that it is the mediator's job to detect if that is happening and assist them by validating their anger and helping them to set it aside so that they can move ahead. For example, a mediator should be able to prevent the mediation from falling apart if one side angrily threatens to walk out of the mediation.

Adrenaline

When people argue their positions, beliefs and feelings to those who disagree with them, their bodies are likely to produce adrenaline. This hormone is produced by the adrenal glands when the body is in a state of high anxiety, fear, or excitement. In a sense it enhances alertness and prepares the body for battle. However, too much adrenaline in an advocate for a party can be detrimental in mediation, where the goal is to identify commonalities so as to find a basis for an acceptable settlement. As explained above in connection with anger, we need to acknowledge our emotions but not let them rule our conduct. If emotions take control, the intellect, which allows for choices to be made to achieve desired goals, will take a back seat.

One way a mediator can deal with what I call "over-advocacy" is to remind the lawyers that they are not just advocates, but also counselors and advisors to their clients. Accordingly, they may need to "switch hats" to assist in reaching a final settlement. A mediator could also take the over-advocating lawyer aside and tactfully remind him that it isn't his money or livelihood or emotional distress that is on the line. Ultimately it is the client's needs and interests that must take priority.

Another way to diffuse the effect of too much adrenaline is to change the topic. The mediator could say, "I hear you on that point, which relates to liability. How about if we switch gears just for a moment and talk about what damages would be?" Or the mediator could direct a question to the client, saying, "We've been talking about what happened while your client was employed. Can I just ask your client what she has been doing since she left the company?" Redirecting the conversation gives the advocate

time to cool down. The mediator could also suggest that now might be a good time to break into separate sessions. This is a tactful way to let an advocate know she is getting carried away, and that it is not effective in moving the parties toward resolution.

Awareness

Mediation often provides the first opportunity the participants have to become fully aware of what each other's views are. Take this "failure to hire" case in which the claimant, who was deaf, first filed an EEOC charge alleging violations of the Americans with Disabilities Act, later sued the employer, and then went to mediation. The employer wondered for years why the claimant chose it to sue since she had applied for lots of other jobs and didn't sue other employers. The

employer was able to satisfy its curiosity at the mediation. At the joint session the claimant said, "This is the first time in three years I have the chance to tell you how I feel and why I chose to file a lawsuit against you." She explained that it was because the company told her that she could not do the job because she was deaf. (Apparently other employ-

ers never mentioned her deafness so she couldn't prove discrimination.) She believed that this was blatant discrimination that she could, and should, redress.

Before mediation begins, the parties usually know their respective positions—but not what led to those positions or the underlying interests or needs of the other side. This is especially true where there is a breakdown in communications between the involved individuals, who then get lawyers involved. Perhaps the employee never complained to the company's human resources department before filing suit, or never consulted with the ombudsperson. Even when there is communication, the parties are often unable or unwilling to really listen to what the other has to say.

I have yet to mediate a dispute in which the parties did not learn something they did not know before they came to the mediation. The "something" could be a document, a statement someone made or heard, or an e-mail someone sent. It could be how someone felt about something that happened, or a legal argument not previously thought of, or a fact not previously considered. It is typically this new awareness that leads to the "magic" of mediation. The magic is the willing-

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ness of parties, based on new information, to view the conflict in a different light. It is this willingness that opens the door to resolution.

To increase the odds that this magic will happen, I set the stage in the initial joint session by telling the parties that most people learn something new in mediation and that they can too if they are open to it. This gives the parties permission (not that it is needed, but it saves face) to later move from a deeply held position and have a way to explain to themselves and others the reason for the change.

Acknowledgment

When new information comes to light in mediation and the mediator communicates it to the other party, what usually follows is a verbal acknowledgment that this information was not previously considered. One employee confessed during the caucus, "I never realized I could have gone to Human Resources ... perhaps I should have before I quit ... I do see things a bit differently now ... I might even lose this case because I quit before complaining!"

Analysis and Accommodation

The acknowledgment of new information typically leads to a new analysis of the disputed issues that takes this information into account. Each new fact can affect the dynamics in a mediation. Thus, the parties cannot stand pat on their positions. For example, an employer may learn during the mediation that the employee would make a great witness and decide that this information warrants a change in its position. This happened in one mediation where the employer's human resources manager told me in a private session, "We had no idea she would come across so well. We'll increase our offer because the jury is going to love her."

The result is a willingness to shift closer towards an amicable resolution. Even a slight shift can start the ball rolling.

Active Participation

Progress often fosters progress. So when one side makes an accommodation by changing its position, the other side is more likely to reciprocate. In this way, the parties begin to actively participate in the give and take of mediation. They see that the process requires moving away from hardened positions toward reaching an

agreement that is acceptable to both sides. This creates an environment in which they can reach a mutually acceptable settlement.

Acquiescence and Agreement

A final settlement rarely looks exactly like either side envisioned it would before the mediation, since it could contain terms that they initially believed were not appropriate. I find it helpful to address this in the initial joint session.

While some people describe mediation as a "win/win" process, I see it as a process both sides "can live with." I tell the parties that reaching a settlement is not likely to produce euphoric feelings of winning. However, it is likely to produce feelings of satisfaction because the parties reached an agreement they each can live

with and will have a respite from the dispute that has plagued them. Most parties to disputes would rather not be involved in a conflict and when they are, they want to put the dispute behind them and move on with their lives and businesses.

Many times I have heard the last party to agree to an open issue smile and say, "I can live with that." I think a "can-live-with" settlement is a realistic goal. Preparing the parties for this kind of settlement helps establish realistic expectations from the outset.

Once an agreement is reached in principle, I prepare a memorandum of mediated settlement. (The lawyers draft a more formal agreement later on.) I always include an ADR clause calling for mediation if any disputes arise out of or in connection with the memorandum of mediated settlement. This gives the parties closure and reassurance that a courtroom is not in their future.

One key to a successful mediation is instilling in the parties the prospect of a good outcome. A mediator can do this by sharing with the parties statistics that show mediation's success in resolving disputes. The mediator can also emphasize when progress has been made during the mediation. It is necessary for the mediator to remain positive—even when the parties are feeling pessimistic—and persist in looking for unspoken needs and interests and ways to satisfy them.

When the parties have long been mired in conflict and negativity, a positive mediator can help them navigate through and beyond their emotions to settlement. ■

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