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Anger and Violence in Mediation

BY AMY LIEBERMAN

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On January 30, 2013, attorney Mark Hummels and his client Steven Singer, as well as a bystander, Nichole Hampton, were shot by Arthur Harmon in Phoenix, just after attending a settlement conference. Steven Singer was the CEO of a company that had been sued by Arthur Harmon over a business dispute. Arthur Harmon was litigious, having filed nearly a dozen lawsuits in his life. Arthur Harmon was an angry man. Arthur Harmon was *pro se*.

The entire state is saddened by this terrible tragedy. Every attorney, and anyone who has ever been a defendant in a lawsuit, particularly feels the pain of these awful deaths. Most cases today are likely to be mediated at some point, and we all know, it could have been us. In fact, one person who had been sued by Harmon in the past was quoted in an *Arizona Republic* article stating, "Oh, my god, that could have been me."

Mediation is a process of peace. As noted by one of Mark Hummels' law partners, "For this to have happened to them, while participating in a mediation, is beyond understanding."

Anger and Violence in Mediation

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This tragedy is a call to action, for lawyers and mediators alike. When people act on their anger, there is an escalated risk of violence. We know that people who bring lawsuits, and people who are sued, are angry.

There are metal detectors in the courthouse, to protect judges, parties, witnesses and courthouse employees from the dangers of uncontrolled anger. But what protections exist for parties, lawyers and mediators when a private mediation, arbitration or settlement conference is held in a law office, where there is no security system in place?

Mediation is a voluntary process, where parties to a lawsuit appear before a neutral third party who facilitates discussion, evaluation and negotiation, with the goal of bringing parties to a resolution they both agree to. The purpose of mediation is to bring peace, which is why violence at a mediation is so shocking.

Yet, sometimes, parties do not really want peace. Their goal is "justice." And if their version of justice is not forthcoming, they can yell, hurl accusations, call the other person names, shout profanities, pound the table, cry, threaten to leave, or actually walk out. This behavior derails the mediation process, and, as we saw in the office shooting, it can lead to physical violence. The desire for justice may turn into a desire for revenge.

So what can lawyers and mediators do to prevent, neutralize or de-escalate such anger?

Accept and Address Strong Emotion—in Advance

First, we must recognize and accept that anger and strong emotion are part and parcel of the litigation process. People who sue are not the only angry ones; defendants can be equally as angry, believing they have been falsely accused. Both parties can feel anxious, tense, fearful and even hostile. There may be a strong sense of betrayal and a desire to get even for the pain, embarrassment and humiliation caused by the other party. There also may be significant fear of financial ruin. Relationships may have been destroyed.

Let's face it—lawsuits are no picnic. They are costly, time-consuming and wearing. Time after time in mediation, I hear someone say, "I just need to be done with this!"

Start With Your Own Client

For the lawyer, going to court or to mediation is all in a day's work. These events are professional for the lawyer, but they are personal for the client. As one lawyer who regularly represents companies in court said, "This case, and going to this mediation, this is my job. I forget sometimes that it's personal for the client."

Lawyers should work with their clients closely the day before the mediation. They should not only discuss their case and negotiation strategy, but also gauge the level of their emotion. Is the client hostile, fearful or relatively calm? Increase your sensitivity. Ask the emotional questions. Learn and plan accordingly.

Call the Mediator

Put in a call to the mediator ahead of time. Talk about any concerns you might have about the level of anger that might exist at the mediation, and whether and to what extent a joint session should be held.

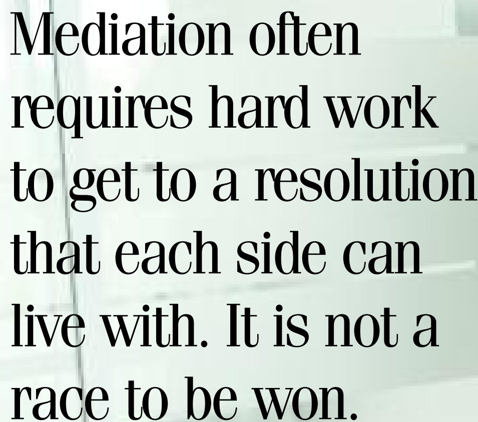
One way that lawyers address anger is by telling the mediator that they prefer not to have a joint session; instead, they want the mediator to meet only with parties in separate session. Some mediators agree with this approach, and never put parties in the same room.

Another way that lawyers deal with strong emotion is by *not* dealing with it. As one lawyer told me, "I tell my clients, we need to take the emotion out of it. I tell them, don't speak—let me be the one who talks, especially if we are in a joint session." Or simply avoid the joint session altogether.

By all accounts, Mark Hummels strove to maintain a respectful relationship with Arthur Harmon. And news reports indicate that the mediator that day sought to segregate the parties. So the techniques in this article are no guarantee, of course; but they may diminish the chance that contention will turn to anger—or worse.

And remember that each matter is unique: The avoidance strategy of staying separate may not always be the best approach. Stifling or suppressing strong emotion can cause it to erupt at a later point, and can eliminate several potential benefits of mediation, such as the healing that comes with catharsis, empathy and/or acknowledgment.

The most fundamental need anyone has in a serious conflict is the need to be heard. Has the client been deposed? How did it go? Was she able to feel that she was fully heard? Can the need to be heard be met by



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the mediator in separate session, or does the client need to be heard by the other side? Be sensitive to this need, and work with the mediator on the approach.

The decision of whether parties should be in the same room for introductions, for a discussion about the process or for any substantive sharing of perspectives truly depends on the type of case. Business, employment, personal injury or divorce mediations will each be handled differently. It also depends on whether there is any chance of an ongoing relationship, in a family, business or professional community, and whether any form of personal healing is necessary or desirable.

The joint session decision further depends on the state of mind of all those involved, which is often based in part on how far into the litigation process the parties are, and how tense relations have been between counsel.

Manage Expectations

It has often been said that "the greatest source of anger is unmet expectations." Individuals and even corporations who go to mediation for the first time often think they will appear, make their demand, and the other side will either pay it, or not.

But mediation is not a "take it or leave it," one-step process. It is a give-and-take exploration of positions and interests, and it often requires hard work to get to a resolution that each side can live with. It's not "win–lose," like a trial. It's typically not "win–win," where everyone leaves happy. Nor, hopefully, is it "lose–lose," where everyone leaves unhappy. Rather, mediation is a process designed for the "can live with–can live with" resolution. It is not a race to be won. Mediation is a process of peace, and lawyers and mediators need to be sure to prepare their clients for this realistic outcome.

Unrealistic expectations can be created by clinging too long to extremely artificially high or low demands and offers. We all know that it is hard to un-ring that bell.

At one mediation earlier this year, plaintiff's counsel stayed in the million-dollar range all day. At the end of a long day, the defendant's offer stopped at $100,000, and plaintiff's counsel advised his client to take it. "But I have a million-dollar case!" she exclaimed, and became extremely angry not only with the defendant but also with her own lawyer and the entire process. Her lawyer had not adequately prepared her for the negotiation process.

Be Respectful with *Pro Se* Litigants

If there is an unrepresented party ("*pro se*"), what can the opposing lawyer do? Be professional, but exercise caution and restraint. Hold back on taking as strong of an adversarial stance as you might with an opposing counsel. Try not to inflame raw emotion.

As human beings, when we are attacked, our adrenaline kicks in and we respond defensively with a "fight or flight" reaction. A *pro se* litigant, especially one who has been ordered by the court to attend a settlement conference, is likely to feel overwhelmed and backed into a corner in the presence of powerful counsel representing the defendant.

The mediator can play a critical role in defusing strong emotion by respectfully educating the *pro se* litigant about the process of mediation, establishing a sense of balance, and modeling calm behavior. Most important with such litigants, the mediator needs to shepherd the process to ensure he or she feels that they are heard, that their strong emotion is acknowledged, and that their perspective is heard and understood. Where appropriate, the mediator can facilitate a needed apology.

Above all, lawyers and mediators should provide a process of respect and dignity. Using our skills to provide an atmosphere of collaboration instead of confrontation may be the best tool we have to prevent tragic events such as what happened in Phoenix from ever happening again.