

THE **RECORDER**

## Dealing With Emotions in Mediations

Emotions can be important—even necessary—challenges for resolving disputes, according to retired Los Angeles Superior Court Judge B. Scott Silverman, now a neutral with Signature Resolution.

By **B. Scott Silverman**

June 7, 2023

Conventional wisdom says that emotions have no place in the legal world. Emotions are messy, complicated and illogical. They don't fit within the statutes or on the documents lawyers create. They may in fact require lawyers to engage in nonlegal thinking.

But emotions can be important—even necessary—challenges for resolving disputes. As a mediator, I am frequently called upon to help resolve disputes in which emotions play a significant role. With the aid of tools and techniques honed over the course of my career, I must often help lower the emotional temperature so that the parties are able to successfully resolve their disputes.

### Identifying Emotional Issues and Triggers

The mediator will want to understand what drives the actions and demands on both sides in a dispute. In a divorce negotiation, any number of “hot-button” issues can affect how parties deal with each other. These may include the following:

- A primary wage earner feels resentful about paying spousal support, believing the other spouse should contribute more.
- Though assets acquired during marriage are presumed to be community property, the predominant earner is angry about the equal



Courtesy photo

**Retired Judge B. Scott Silverman, a neutral with Signature Resolution.**

interest given to the party who didn't pay for the assets.

- A party whose partner was unfaithful harbors doubts that the adulterer can be trusted with care of children, division of property, disclosure of earnings, or other aspects of the divorce agreement.
- A stay-at-home spouse, or one with primary responsibility for home improvements, is so attached to the family home that the very thought of losing it causes anxiety or insecurity.

- A family pet is so important to one or both of the parties that any thought of sharing—or losing—the furry friend is untenable.
- A new spouse generates resentment and suspicion as he or she takes on raising children, managing finances, or otherwise usurping the former spouse's territory.

These can be issues for the parties that obscure or obstruct their ability to evaluate the legal elements of a case. It will take time for them to talk through their issues, recognize what those issues signify, and begin to envision a path for moving forward. The mediator provides a safe space, listens carefully, and asks thoughtful questions.

### **The Mediator's Role**

In most legal disputes—whether a family conflict, a personal injury matter, a job termination, even a copyright infringement—emotions play a role. People's bodies, assets, or feelings have been hurt or disrespected. They want not just monetary compensation for their injuries but an acknowledgment that someone did them wrong.

Dealing with emotions is part of the playbook for those involved in resolving such disputes. In a mediation, the ultimate objective is a settlement agreement that addresses the interests and concerns of both parties. Emotion, as much as money, can be a significant interest or concern. Instead of viewing emotions as obstacles to overcome, a thoughtful mediator will recognize them as vehicles for achieving a positive result. He or she will work with the parties to channel, redirect and repurpose those emotions, helping them identify their emotionally charged issues while also helping them evaluate the merits of their positions and to think about other approaches to resolving the dispute.

By asking good questions, the mediator can help parties see the role emotions play in their decisions. He or she can guide them toward more rational, measured thinking, enabling

them to understand the potential disconnect between their emotions and the legal or factual issues in their case.

A spouse whose identity is strongly tied to the family home, for example, may—with the mediator's guidance—begin to envision a new identity. What appeared early in the mediation to be a priceless treasure may, after emotions have dissipated, turn out to be a costly burden standing in the way of an economically feasible new life.

Working through emotions often takes more than one session, but the mediator should be patient. The goal is to help the litigant move through the emotional minefield and reach the other side recognizing the legal, financial and emotional benefits of settlement.

### **Building Rapport**

The mediator's challenge starts with establishing rapport. Unless both parties see the mediator as someone who is fair, neutral and dedicated to achieving a good outcome, they may effectively check out of the process. A mediator who appears to discount or dismiss either party's emotions—even inadvertently—may lose the trust of the litigant regardless of the soundness of the mediator's evaluation of the legal issues.

When parties feel that their feelings are heard and appreciated, they are more likely to be candid and open in mediation sessions. The mediator can lower the emotional temperature by allowing parties to vent, listening to their stories, and showing genuine empathy for what they're going through.

Through this back-and-forth, trust is built. The mediator can ask questions, explore options, and develop an understanding of issues so that they can be framed in a way that helps the other side see the bigger picture. Trust sets the stage for both parties to develop a plan to resolve the issues at the heart of the dispute. They are more receptive to suggestions, more willing to

entertain other perspectives, and more open to compromise.

### **Obstacles and Challenges**

In many legal disputes, one party is more invested and emotional than the other. Often one spouse is rational and logical while the other is seriously distraught. Employment disputes often reflect disparate sides as workers—whose lives, livelihoods and self-worth have been upended by seemingly arbitrary decisions—deal with hyperrational corporate decision makers.

Helping the nonemotional party appreciate the role of the other side's emotions can be a significant factor in moving the parties to settlement. Perspectives or positions may be changed after hearing what the other party is experiencing. At a minimum, a party may need to recognize that the other side's approach to settlement will not be governed by rational analysis of risk.

Some issues can seem trivial or more symbolic than meaningful, but they are just as real for the parties involved as child custody and support checks. The court process may not recognize or resolve such issues, but mediation offers a solution. Mediation can address notions, preoccupations and whims in ways that are both creative and effective, allowing parties to make trade-offs that resolve problems in ways that may not be legally required but are more successful than the solutions available in a courtroom.

The issue may not be a house, a car or some other tangible asset. For one couple, the issue was a spouse's dependence on the other. The marriage was over but for one party the relationship continued to be seen as a source

of security. This spouse wanted their ex to answer calls, respond to texts and show up when bad things happened.

The mediator can help parties identify deal points that hold emotional significance and structure trade-offs that recognize the emotions while providing real-world responses. When a spouse struggles with leaving the family home, the other might agree to delay the sale date or consider relocation assistance. A slightly higher support payment or willingness to surrender treasured artwork or favorite furnishings could serve as the apology an emotionally injured party so desperately wants. Accepting an offer that leaves a little bit on the table rather than insisting on the last concession can be the final gesture that reduces hostility.

For the case involving strong emotion, mediation provides multiple benefits. It offers a venue for a party to be heard and feelings to be understood. The opposing party can be helped to appreciate the emotional elements of the other side's position. Solutions can be considered that are creative and more flexible than are available by litigation. A successful mediation more often than not depends as much on recognizing and addressing emotional issues as it does on the evaluation of legal risk.

**Judge B. Scott Silverman** is a neutral with Signature Resolution. He served 12 years as a judge for the Los Angeles Superior Court in the family law department, including time in the long cause trial department and the family law settlement conference division. While on the bench, he oversaw thousands of cases, including complex property, business valuation, child and spousal support, and child custody issues.