

When Logic Just Doesn't Work

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by Jeff Kichaven

Sometimes during mediation, progress and negotiations are stalled due to one of the parties inability to act, a type of client paralysis. Mediation tactics, such as the “magical paradox” technique, can be used to help overcome this paralysis. Attorneys and negotiators alike need to realize that establishing human connectedness is the key to a successful mediation.

It's a painful point in a difficult negotiation, and legal training hardly qualifies lawyers to handle it. The plaintiff has been exposed to something that might, or might not, make him sick: asbestos, tobacco, mold, you name it. The illness is not likely to manifest for years, and the plaintiff might end up not getting sick at all. But the litigation is taking place now. The defendant wants a general release, and the defendant is ready, willing, and able to pay real money to get it.

Plaintiff's lawyer thinks the money is reasonable and that the plaintiff should take the deal. She looks at her client for approval, but sees only fear in his eyes. “What if he actually does get sick?” he's thinking. How can he ever settle? How will he ever be sure he has settled for enough?

Mediators and lawyers for both plaintiffs and defendants deal with this problem every day. The deal is reasonable but the plaintiff is paralyzed. It is critical that we have tools to deal with this situation sensitively, compassionately, and effectively. The deal should not be allowed to get away. But nobody should feel bullied, either. What is likely to work?

Dealing with Plaintiff Paralysis

Let's start with the process of elimination. From bitter experience, most of us probably have a long list of approaches that don't work. Most of these ineffective approaches fail because, in one form or another, they are little more than “arguing with the plaintiff.” And they're trying to argue rationally when the plaintiff's barrier to settlement is not rational but rather emotional. The same points are generally repeated over and over, sometimes louder, sometimes softer. Rhetorical stunts and flourishes are tried as well. But it doesn't matter. No matter how good we, as lawyers and insurance professionals, are at rational argument, our left-brain approaches won't help meet the plaintiff's right-brain concerns.

So, to be effective in these negotiation situations, we need to go beyond our own gut instincts and develop different tactics. One source of ideas is UCLA Business Psychiatrist Mark Goulston, who, as a consultant to Los Angeles-Based Sherwood Partners, assists in all manner of business turnaround and crisis situations. Mr. Goulston's insights are profound.

The essential point, as he sees it, is to prevent a certain degree of anxiety over potential future illnesses, “anticipatory anxiety” as he calls it, from crossing the line and becoming “paralyzing panic.” While it is good to be focused, with the normal degree of anxiety that the focus may bring, it is not good to become obsessed, and thereby fixated on one issue. The problem with our not-so-hypothetical plaintiff is that he has lost a balanced perspective and broken off his investment in life in favor of his investment in the lawsuit as a panacea for his problems. And when the lawsuit does not pan out as panacea, we get panic, and paralysis.

Mr. Goulston notes that some people have a tendency to obsess. Once such a person becomes a plaintiff, he increasingly banks on the lawsuit to provide a remedy for the obsession, both for psychological vindication—“It’s not just my imagination!”—and for reparation for the harm from the assault that, to the plaintiff, is all too real.

The longer the litigation lasts, Mr. Goulston says, the more challenging the negotiation situation becomes. The longer the plaintiff has been fixated with the lawsuit as a central concern, the longer he neglects and the further behind the plaintiff falls in other aspects of life such as personal relationships and career. Accordingly, the plaintiff feels more pressure “to make this thing pay off,” as Goulston puts it, to make up for the harm they feel and for how far behind they have fallen in life by obsessing on this singular concern.

So what is likely to work? Mr. Goulston suggests giving the plaintiff an experience he can feel, to counterbalance and override the experience with the asbestos, tobacco, mold, or whatever else it is that has turned the plaintiff into a prisoner. Getting people to talk in detail about emotionally charged incidents in their life, Mr. Goulston has discovered, gets people to go back and feel what they felt in that event all over again. While lawyers and insurance professionals ought not try to practice psychiatry, we can try to turn conversations in more positive directions.

For example, Mr. Goulston notes, if you ask a parent to describe a time when a child exhibited poise, you may well see the parent’s eyes well up in pride. But if you ask that same person to describe the time a close friend or relative died, you will see eyes get watery for a different reason. Using these principles, Mr. Goulston recommends techniques for times when logic just doesn’t work.

Recognizing and Avoiding Obsession Regret

Mr. Goulston recommends asking the plaintiff to talk about other times in their lives when they focused on one thing to the exclusion of all else. Before long, it generally will not be difficult to begin talking about what a waste of time and energy it was, and how it needlessly prolongs suffering when you can’t let go. Most of us have had such situations in our lives, in many cases revolving around a job or relationship where we stayed too long. And for most of us, when it ended, and

despite the upset, we felt relief and wished that we had ended it sooner. When the conversation turns this way, even though the plaintiff may not say that much, he'll be thinking, and that's a big step.

The goal is to get the plaintiff to think about previous episodes of "obsession regret," those instances when the plaintiff obsessed on one thing to the exclusion of all else and, in hindsight, how damaging that was to the plaintiff's physical, emotional and financial well-being. "Trust me," Mr. Goulston says with a sadly knowing look, "in most cases, the lawsuit is not the first thing the plaintiff has ever obsessed about. Once enough examples come to the plaintiff's mind, he will probably be able to draw a parallel between the prior incidents where he had been able to let go, and this one. That's what you really need to generate some progress."

Mediation Tactics

As others involved in the negotiations, mediators can help. When delivering disappointing news to the plaintiff as part of the conversation, Mr. Goulston advises to "wince a little." Why? "It shows that it causes you pain to disappoint them. A cold, 'just get over it' approach will not work. The plaintiff feels so backed into a corner that his personality has become rigid. He will literally fragment and psychologically fall apart in front of you if you stick with the hard, rational approach."

A little wince, Mr. Goulston continues, "shows that you understand that, to the plaintiff, this is a letdown. By doing this, you minimize the risk that the plaintiff will disregard you as 'just another person who doesn't understand and doesn't care.'"

Mr. Goulston suggests lines like the following for mediators and plaintiff's counsel, and encourages defense counsel to suggest that mediators and plaintiff's counsel consider approaching plaintiff this way, with a bit of a wince: "Mr. Plaintiff, I am here to be the agent of objective reality, to tell you what's possible and what's not possible in this negotiation. There's no good way to tell you this reality, which is, it is not possible to get everything you want."

The plaintiff may reply by saying, "Are you saying impossible, or just unlikely? Is it just your opinion? Maybe I should find another lawyer who will really be willing to fight for me." To respond, Mr. Goulston advises that a mediator might say: "It is always your option. We are meeting this way because people not so caught up in the situation, like your own lawyer here, believe this settlement is best for you on a cost-benefit basis, to let you get on with the rest of your life, which is on hold right now because of this situation."

The Magical Paradox Technique

To deepen the connection and the convincing power of the conversation, Mr. Goulston has developed the “magical paradox” technique, to turn an inappropriate “no” into a more appropriate “yes.” He has used this technique to train FBI hostage negotiators, and it ought to work well with plaintiffs who are hostages to their own lawsuits as well. The magical question goes something like this.

I bet you feel that nobody knows what this situation has done to you, how it has broken you up inside, and made it difficult for you to believe that you will ever be able to have a normal life again. Isn't that so?

The magic, as he describes it, is that you have articulated what the plaintiff is thinking and the plaintiff can agree with you. But, critically, you have not agreed with the plaintiff! You have just expressed an understanding of how the plaintiff feels. You have not said that you agree, that you believe it to be true, or even that you believe it to be reasonable. Remarkably, the ability finally to be able to agree with someone, to make that bond, starts to allow the plaintiff to pull himself out of the hole into which he has dug himself.

Conclusion

It's a self-deception that “life is over” for a plaintiff in a case such as this. That's why a settlement that everyone else sees as reasonable is initially unsatisfying to him. Getting a plaintiff out of the self-deception is key to achieving a settlement that is objectively reasonable, even to the plaintiff's own lawyer. Establishing human connectedness is key. The plaintiff must be made to feel not so alone. Mark Goulston's “magical paradox” often works wonders, and is a magical tool for mediators and lawyers alike to have available for their use.