

Addressing a client's trauma when mediating their employment case



By Andrew Horowitz

Plaintiffs in employment disputes often suffer from trauma, which can include trauma caused by the events giving rise to the case, past trauma, or a combination of the two. It is important for counsel to recognize that a client is affected by trauma and strategize in advance about how to address that trauma in a compassionate and effective manner throughout the mediation process.

It is important for the mediator to recognize what trauma looks like in a mediation and how it can affect the process. Like all parties, persons suffering from trauma want to be heard. Mediation can feel like getting their day in court. By lending a nonjudgmental ear, the mediator builds trust and rapport. It is important to allocate enough time at the beginning of the session to allow for this.

At the same time, a person suffering from trauma can be triggered by having to retell their story and especially by having their story questioned. They sometimes need to make decisions more slowly. They can become emotionally detached and less flexible as a mediation drags on and stress levels rise.

It is also important to emphasize ways in which the client has control at the mediation – while you expect them to carefully consider counsel's advice, nobody can make them settle for any particular amount, and even the choice to stay in the mediation is theirs. It is important to present them with choices throughout the day and in the lead-up to mediation as this will add to their sense of empowerment – even about small things like where to eat lunch. This starts in the early planning stages of mediation: ask the client how you can help to manage their trauma at the mediation, and where possible, give them a choice as to whether to participate in person from your office versus on videoconference from their home.

It is advisable to consult privately with the mediator as soon as possible in advance of mediation to explore ways in which the mediator may be able to assist in managing your client's trauma. For example, it may help to schedule a meeting in advance of mediation day for the mediator to listen to the client's story and start building rapport. That way, the client will be less stressed going into the mediation because they are already familiar with the mediator and will have more capacity available when the mediation transitions from sharing positions to a back-and-forth exchange of counters.

While opening statements by a plaintiff can sometimes have a cathartic effect, I've found that opening statements by defendants almost always land badly.

When the plaintiff is traumatized, there is a much greater risk that this will entirely sour the plaintiff on the process. Even seeing opposing counsel and the defendant's representative in an initial joint session may be triggering. I therefore recommend exploring with the client whether they would prefer not to engage in a joint session and addressing this, along with your request that the defendant not make an opening statement, with the mediator in advance of mediation day.

As a mediator, I have observed that some counsel are accustomed to performing for their clients by expressing outrage at the opposing party's offers. This is always counterproductive, but especially so when your client is a victim of trauma. The client will absorb this outrage and process it through their stress response, which will accelerate their shutting down. Instead, convey calm resolve and the client will follow your lead. Remind the client that the only number that matters is the one the case eventually settles for, early numbers are just posturing, and that the other side is trying to get the best deal possible – their low offers and the fact that they are pointing out technical issues with the client's case are merely how defense lawyers do their job; not attacks on the client or their story.

If you sense that your client is running out of capacity to flexibly participate in the process, pull the mediator aside and confer about whether it makes sense to give them a break. There are multiple options for this: 1) the entire

mediation can be continued to another day; 2) the parties can take a break; or 3) the mediation can continue as discussions between counsel with the traumatized party having a more limited role. While none of these options are ideal, they are better than trying to force a client who is burning out to continue with a process that they have no capacity to engage in productively. Where possible, raise this with the mediator sooner rather than later.

It can also be beneficial in some cases to allow the client to have a support person present. Unlike the attorney-client privilege, mediation confidentiality attaches in many jurisdictions to present non-parties – even for preparatory meetings with the client without the mediator present. This includes, but is not limited to, Pennsylvania and states that have enacted the Uniform Mediation Act (Illinois, Iowa, Nebraska, New Jersey, Ohio, Utah, Washington, Idaho, South Dakota, District of Columbia, California, New York, Texas, and Florida). ■

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