

Empathy In Mediation Offers A Soft Landing For Disputes

By **Eydyth Kaufman** (November 1, 2024)

As both a mediator and an attorney, I have always felt the need to portray my empathy for others, my strength and resilience, while seeking to hide or minimize any weaknesses or vulnerabilities. Just days ago, I could never imagine sharing personal details of my life — and my vulnerability — publicly. But now I realize that an important part of empathy is having the courage to share your humanity with others.



Eydyth Kaufman

On Saturday, Oct. 5, a Frontier Airlines plane landing in Las Vegas caught fire and crash-landed on the runway.[1] I was a passenger on that flight.

The experience was life-altering. With the uncertainty of what was happening, and the emergency crews lined up on the runway as the plane descended, I remember thinking, "Oh my God, this is how I die." As one might imagine, I have been overrun with thoughts since the incident — including how empathy makes a difference in times of crisis or stress.

As mediators, we constantly deal with matters that are significant events for the parties. Plaintiffs may have sustained physical and/or emotional injuries, and defendants may be anxious or stressed about being sued. While some attorneys downplay the importance of empathy, focusing only on the final outcome of the mediation, a skilled mediator uses empathy not only to get parties to settle, but also to help them appreciate their own unique and important reasons for settling.

Understanding another person's perception, or truth, is the key to creating empathy. There were 190 passengers on the airplane with me. We will all have a special connection due to the experience we shared, but we will each perceive what happened during the event differently. This may be due to where we were seated, whether we had headphones on or were otherwise distracted, and how much we understood about airplanes. Despite our different perceptions of what happened, my perception of the experience is now my truth, as is the case for others.

Mediate with empathy.

Listening actively and with compassion can lead a mediator to that person's truth. It can enable the neutral to truly understand the parties, to accurately convey positions when asked to do so, and to help bridge impasses through understanding where there are mental and emotional roadblocks to settlement. Parties who feel respected and heard are more likely to listen to the mediator who respects them.

The best mediators are those who become truly and genuinely curious, who seek to understand not just what the person may have seen or experienced, but also why they saw or experienced it the way they did. As mediators, we often grasp the story behind the dispute fairly quickly, but this can be so much more than just knowing a party's viewpoint.

Sometimes when I feel I know the parties' positions, I will stop and ask myself, "What more do I have to learn about this person, their feelings, their motivations, their stresses?" My genuine curiosity not only makes parties feel heard and understood, it also establishes

empathy by recognizing and respecting their humanity.

Offer a soft landing.

The benefits of mediation are well known: the ability to talk informally and confidentially, to expedite resolution of the case, and to create a mutually acceptable resolution to the case. But perhaps the most important and least appreciated benefit of mediating a dispute is that parties have an opportunity to be fully heard. Instead of a judge instructing witnesses on what they can and can't say, a skillful mediator asks open-ended questions of both parties and then listens.

There are no limits to what parties may say in the safe haven of the mediation setting, and they dictate what information is relayed to the other side. The more parties feel comfortable sharing their fears, feelings and concerns with the mediator — and with each other — the better the chances of successfully resolving their dispute. Parties should come through a successful mediation feeling unburdened, knowing that they have been heard. Mediators can provide an empathic approach that lets both sides move beyond the dispute.

As mediators, we are deemed "neutrals." We are impartial, do not take sides and do not judge one side over another. But we are also advocates for compromise and empathy — where possible and where the parties are willing. Our goal is never to manipulate anyone into settling, but rather to help guide the parties to the solution that will work best for them based on their unique set of circumstances.

Information is critical.

Failure to provide information can come across as defensive, evasive and lacking empathy. A plaintiff who is injured or had a business deal go south is trying to make sense of what happened to them, to understand why it happened. Without that knowledge, closure may be difficult.

In many medical malpractice cases, for example, lawsuits may be filed solely because there is a lack of information about what really happened to a patient. When doctors and nurses have kept the patient or the family well informed, there tends to be less criticism of the care. This is the power of empathy.

Attorneys who show respect for the other side's position at mediation tend to have better and more open negotiations. Attorneys and their clients who are serious about exploring the possibility of settlement should remember to provide key information to the mediator. While attorneys in mediation may wish to refrain from admitting to liability or revealing a trial strategy, sharing key information with the mediator can be an important step in showing empathy and moving settlement efforts forward.

Don't make assumptions.

Some say that the opposite of anger is empathy. Empathy can diminish the anger parties feel from demonizing one another — common during contentious litigation. A good mediator can help both sides understand and relate to one another, which facilitates reaching a mutual resolution that allows them to move forward in their lives without the continued stress or expense of litigation.

Assumptions are common in litigated cases. A defense attorney will question the motives of plaintiffs who retained counsel early after an accident, took videos or photographs at the

supposed injury scene, or saw attorney-referred doctors. A plaintiff's attorney may dismiss the harm and stress caused to a defendant by the lawsuit, justifying it as merely an insurance company payout. As advocates for compromise and empathy, mediators are in a position to help each side acknowledge and express empathy for the other party's truth.

A plaintiff who retained counsel right away and went only to lien-based doctors may have been exaggerating a mild injury in hopes of a payout. But they may also have been in shock, overwhelmed and unsure of how to get proper medical care after sustaining legitimate injuries, seeking to get help from an attorney.

A defendant may have failed to provide information to a plaintiff immediately after an incident because they were hiding something, but it could also be because they were unsure of how to respond to potential litigation, could not locate the information, or other reasons including attorney or insurer advice. A claims representative who will not offer more money may be answering to others or under pressure to obtain more documentation before recommending a payment amount.

Understanding the other side's position and the reasons for their position leads to greater collaboration.

Conclusion

Lawyers and mediators do not have to experience a stressful event in order to learn empathy. They can draw upon their own significant life experiences. Whether it is the death of a loved one, a business setback or a major illness, all legal professionals should learn from their own experiences to expand their listening and empathic skills.

Empathy is one of the greatest tools in a mediator's toolbox. When a mediator can help the parties have empathy for each other's position, then compromise, healing and resolution become possible.

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[1] <https://abcnews.go.com/US/frontier-airlines-jet-catches-fire-landing-las-vegas/story?id=114534255>.