

MATHIE MEDIATION SERVICES LLC

Take Advantage of Everything that Mediation Has to Offer.



USING YOUR CLIENT'S AUTHENTICITY IN MEDIATION

It's relatively easy to recall your trial victories when the jury identified with your client. They're probably some of your best results. How did that happen?

On a superficial level, there is a significant body of evidence showing that jurors are influenced by a party's physical characteristics.¹ At least one study found that attractive plaintiffs were awarded higher compensatory damages.² Maybe you had a cute client?

More likely though, the jury understood what your client and case were about. It's what I will call authenticity. Others might say you or your client was able to speak from the heart. However you phrase it, you know when it happens and sometimes even feel it because the hair on the back of your neck rises and you may even feel a shiver.

The truth is, if the jury identifies more with one party than the other, the verdict will likely reflect that.³ While you can't control the looks of your clients, you can play a role in how jurors connect with them.

Here's an example: Consider a food poisoning case: A family of four is sickened – the young children even need to be hospitalized for a couple of days – after eating tainted food from a grocery. Now you are representing the family and the only thing that the mother can express to you is her anger with the grocer.

The natural reaction to anger is defense – to recoil or fight back. Neither response is what you would want from a jury. And the jury is unlikely to simply adopt your client's anger against the grocer.

Anger is a secondary emotion. Every parent can recall a specific instance of having their child run across a street without looking and perhaps nearly be struck by a car. The immediate reaction may be anger directed toward the child, "Don't you ever do that again!" with perhaps a spank on the rear. But that outward emotion masks the underlying emotions of love, fear and the helplessness of seeing a disaster even if it was averted.

¹ Gunnell, Justin J., J.D. and Ceci, S.J., Ph.D., When Emotionality Trumps Reason: A Study of Individual Processing Style and Juror Bias. *Behavioral Science and the Law* 28: 850-877 (2010).

² Kulka, R.A., and Kessler, J.B. (1978). Is Justice Really Blind? – The Influence of Litigant Physical Attractiveness on Judicial Judgment. *Journal of Applied Social Psychology*, 8(4), 366-381.

³ See Feigenson, Neal, *Legal Blame – How Jurors Think and Talk About Accidents* (2000) American Psychological Assn., Ch. 3.

Back to your food poisoning case: You need to be able to open up the underlying emotions so that the jury can identify with those emotions and with your client.

Having worked through your client's anger to the underlying emotions, your client doesn't present as angry, but as the scared mother of small children who was helpless to soothe their pain and fearful of losing what she loved more than anything in the world. Every juror can identify with the fear and helplessness that accompanies having a very sick child and will know from their own experience that your client's emotions are authentic. And the jurors will likely identify with her. It's one of the keys to your case.

While it's great when something like that happens at trial, if the great majority of your cases are being resolved in mediation, you probably aren't usually getting the benefit of your client's authenticity.

To use client authenticity at mediation you need to consider changing your approach to and preparation for mediation in two ways. First, you will need to work through your client's emotions before or at mediation.

Lawyers aren't typically taught to find the emotion in their cases or in their clients. Often just the opposite is the case. Attorneys learn that emotions can be messy and difficult to control. If you're not comfortable with emotions, then you need to work with a mediator who can go "below the line"⁴ to address the emotions and interests that drive your client, and that ultimately underlie the dispute and its resolution.

Second, you need to be prepared for a joint session where your client may speak to the other side or speak to the mediator with the other side present.

If mediation always involves immediately retreating to separate rooms and remaining there until the mediation succeeds or fails, then you may never have the chance to use one of the keys to your case – your client's authenticity.

Here's why the joint session can be crucial: Attorneys, as a group, can be fairly characterized by strong uncertainty avoidance.⁵ The legal system is rife with rules (think discovery, motion practice and precedent) to limit the uncertainty of trial. Perhaps the best way to have the other side recognize the potential of your case is to increase the uncertainty – the anxiety – about trial. The best way to do that is by demonstrating the authenticity of your client.

In most cases, the only exposure that the other side will have to your client is at his or her deposition – probably not an optimal forum. Mediation presents a better opportunity.

Return again to your food poisoning case: Your goal in mediation is to have the person on the other side see and feel – ideally experience the hair rise on the back of his neck – when he recalls

⁴ Going "below the line" is a phrase used at the Straus Institute for Dispute Resolution at Pepperdine University School of Law for addressing the interests and emotions that underlie the issues.

⁵ Defined here as the extent to which a group feels threatened by ambiguous or unknown situations. *See* Cyert, R.M. and J. G. March (1963) *A Behavioral Theory of the Firm*. Englewood Cliffs, NJ: Prentice-Hall; and Hofstede, Geert, et al. (2010) *Cultures and Organizations: Software of the Mind*. McGraw Hill.

the same emotions that your client expresses. If you can do that, what should accompany that feeling are two things: (1) a feeling of identification with your client and (2) a realization that the jurors will likely feel the same thing. That identification increases uncertainty about how the jury will react. The increased anxiety encourages a negotiated resolution if one is possible.

Using authenticity at mediation provides you with the best opportunity to present your best case to the other side. Even if the case doesn't settle, you will still have a better sense of how your client will present at trial and she will likely be a better witness because of her presentation at mediation.

All of this means that you may need a new approach to mediation, but making that change will improve your presentation when it is most important – at mediation – where most of your cases are settled.

See you at mediation!

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