



ON MEDIATION: Using your client's authenticity in mediation

By: James J. Mathie February 28, 2017 10:01 am

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. At least one study found that attractive plaintiffs were awarded higher compensatory damages. 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, spoke from the heart. No matter how you describe 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. Although you can't control your clients' looks, 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 response to anger is to defend yourself — 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 seeing their child run across a street without looking and perhaps being nearly struck by a car. The immediate response might be anger directed toward the child, saying: "Don't you ever do that again!" But that outward emotion masks the underlying emotions of love, fear and the helplessness you probably felt while witnessing a disaster narrowly averted.

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

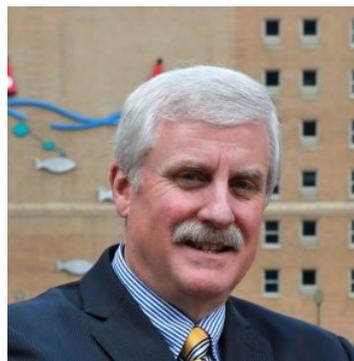
Once you work through the anger to the underlying emotions, your client won't come across as being angry, but rather as the scared mother of small children who was helpless to soothe their pain and afraid of losing what she loved more than anything in the world. Jurors can understand the fear and helplessness that accompanies having a very sick child and will know from their own experience that your client's emotions are authentic.

Although 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 and preparations in two ways. First, you 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, it's just the opposite.

Lawyers 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 deal with the emotions and interests that drive your client, and that ultimately underlie the dispute and its resolution.



Following a 30-year career as a litigator, Jim Mathie now mediates cases full time both from his offices in downtown Milwaukee and throughout the state. He can be reached at jmathie@mathiemediation.com.

Second, you need to be prepared for a joint session in which your client may speak to the other side or speak to the mediator when the other side is 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: Lawyers, as a group, can be fairly characterized by strong uncertainty avoidance. Here, this is defined as the extent to which a group feels threatened by ambiguous or unknown situations. The legal system is rife with rules (think discovery, motion practice and precedent) to limit the uncertainty inherent in trials. Perhaps the best way to have the other side recognize the strength of your case is to increase the uncertainty — the anxiety — they feel about the prospect of going to trial. The best way to do that is by demonstrating your client’s authenticity.

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 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 most likely feel the same thing. That identification increases the uncertainty about how the jury will respond. 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 come across at trial and she will most 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 the needed changes will improve your presentation when it is most important — at mediation — where most of your cases will be settled.

See you at mediation!

Tagged with: JIM MATHIE ON MEDIATION

RELATED ARTICLES



A second opinion can be helpful ... or not
⌚ December 20, 2016
10:16 am



ON MEDIATION:
Attorneys are confident. That’s a good thing, right?
⌚ December 12, 2016
1:51 pm



ON MEDIATION:
What’s your BATNA?
⌚ October 24, 2016
10:43 am