

Coping with Loss, Retribution and Closure in Mediation

By Craig Lichtman

Mediators are sometimes confronted with situations in which the emotional aspects of a dispute impede progress. The frustrated mediator may regard these situations as intractable and label the parties as “difficult people”. Cases that involve loss, especially loss of life, may be fraught with unresolved grief that may hamper personal closure and resolution. As a mediator with psychiatric and psychoanalytic training, I will present a view of understanding loss during a mediation process by weaving together psychoanalytic principles with ideas from the disciplines of finance and the law. This article grew out of my experiences as both a student and an educator during Medical Liability Mediation Training led by Robert A. Creo, my reading of Robert A. Creo’s *Mediation 2004: The Art and the Artist* (*Penn State Law Review*, 2004), as well as my participation on an interactive panel discussion on “Coping with Loss” at the May 2005 meeting of the International Academy of Mediators.

In 1966, the *Psychoanalytic Quarterly* published a paper by a lawyer, C.G. Schoenfeld, entitled “In Defense of Retribution in the Law” (*Psychoanalytic Quarterly*, 1966). His original intent appears to have been to convince psychiatrists that their views of the law were naïve. Mr. Schoenfeld wrote, “the psychiatrist whose training and experience have convinced him that vengeful, retributive punishments are utterly useless, and who regards the lawyer’s insistence upon retribu-



utive justice as indefensibly stubborn and stupid, may fail to realize what the lawyer is really worried about: the danger that if the law were insufficiently retributive, men would seek revenge outside the law and thereby undermine the law’s effectiveness as a major—indeed, *the* major peace-preserving social institution.”

Schoenfeld went on to review ancient Anglo-Saxon and Norman histories of attempts to limit self-redress by setting conditions for private combat to reduce unrestrained warfare, such as by feud and vendetta. This evolved into “the practice of ‘composition’: the payment of a sum of money by the wrongdoer to the victim (or his family) as a means of forestalling retaliation.” Although Schoenfeld asserted

that “today’s law provides compensation for an injury (and) ancient law provided composition for *the desire to be avenged*”, he added, “modern American law goes to considerable lengths to help *express* vengeful strivings” (e.g., exemplary damages and criminal punishments).

Schoenfeld drew on Freud’s view of human nature and argued that American law needs to contain retribution, although perhaps in a softened form, rather than naively ignoring it. He quoted from Freud’s “Civilization and its Discontents (1930)” (*The Standard Edition of the Complete Works of Sigmund Freud*, Vol. 21, Hogarth Press, London), stating that “...men are not gentle, friendly creatures wishing for love, who simply defend themselves if they are attacked, but...a powerful

measure of desire for aggression has to be reckoned (with) as part of their instinctual endowment.” As a psychoanalyst, I believe the urge to exact retribution is ubiquitous and must be recognized, respected, and reckoned with, even in the mediation context.

A powerful example of this desire for retribution can be seen in the movie “The Confession” (Lions Gate Films, 1999). In this film, the protagonist is a father who invokes the “law of God” as his explanation for exacting direct retribution. The father murders an emergency room receptionist, a triage nurse and the emergency room physician, all of whom he holds responsible for the death of his son. In discussions with his criminal defense attorney,

the father refuses to use an insanity plea in an attempt to defend himself and instead argues that the murder was justified, direct retribution. In psychoanalysis, this reasoning is called *the talion principle*, examples of which can be found in the Old Testament and the Code of Hammurabi, and is frequently summarized as ‘an eye for an eye, and a tooth for a tooth’.

How does the desire for retribution relate to grief, bereavement and mourning? In our day-to-day work as mediators, we deal with people who are challenged by the tremendous stress of dealing with loss in a civilized way. Freud argued that mourning is the adaptive work done to emotionally relinquish attachments to a lost object or person and melancholia is evidence of inadequate internal mediation of vengeful impulses resulting in psychological self-punishment and an incomplete mourning process. (Freud first published his ideas about the challenge of mourning in 1917 in “Mourning and Melancholia”, *The Standard Edition of the Complete Psychological Works of Sigmund Freud*, Vol. 14, Hogarth Press, London).

A relatively contemporary review of clinical perspectives dealing with loss is elaborated by Aaron Lazare, M.D. in a chapter entitled “Bereavement and Unresolved Grief”, in *Outpatient Psychiatry: Diagnosis and Treatment*. (Williams and Wilkins, 1989). Lazare summarizes the phases of uncomplicated bereavement as beginning with shock, numbness, and disbelief, evolving to physical distress with full realization of the loss and progressing to full preoccupation with the deceased. There may be anger, bitterness, resentment, and rage directed toward the deceased, one’s own family and friends, and oneself—often, with attempts to focus blame on others. Moving on involves mourning, the attempt to gradually give up the lost person through the internal emotional

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review of hundreds of separate memories, which leads to a modification of the role of these memories and emotional ties, and the formation of new ties.

What does all this have to do with mediation? If one of the major tasks of surviving the loss of a loved one is the resolution of grief, we have to consider how litigation impacts grief and the mourning process. From my understanding of current mediation practice, one aim is the accomplishment of restorative justice. But this may be an ideal that does not acknowledge and respect the challenges of retributive impulses. I propose that just as mourning involves the internal mediation of aggressive impulses, mediators of disputes must give due respect to ‘vindictive passions’ (a term used by Jeffrie G. Murphy to refer to emotions of anger, resentment, and hatred manifesting as retributive impulses in *Getting Even: Forgiveness and Its Limits* (Oxford University Press, 2003)). Restorative justice within the mediation process is complicated by the challenges of attempting to contain retributive impulses in a way that is acceptable to all parties. In other words, I am expanding upon Schoenfeld’s defense of retribution in the law. Settlement of a case may not be feasible if interests in retribution are suppressed or ignored. For a mediation process to be successful, it may be necessary to transform vindictive passions into a mourning process by facilitating adaptive acceptance, resigna-

tion and forgiveness, in order to lead to closure. I am trying to emphasize that the transformative effects of mourning are more restorative than composition.

There are various models for the multidisciplinary study of these kinds of emotional and psychological aspects of a dispute. One model is the Mental Health Dispute Resolution Professionals Study Group, which began as an initiative of the Program on Negotiation at the Harvard Law School in 2002. Another model is Balint Groups, a format developed by psychoanalysts Michael and Enid Balint in the 1950s in London. In this format, general medical practice physicians meet with a psychoanalyst in a study group format to enhance their awareness of emotional and psychological aspects of clinical situations and their repertoire of possible interventions. When I adapted this model for the use of mediators, discussions of the obstacles to settlement in challenging mediation cases frequently involve unrelenting retributive impulses in response to loss. It may be difficult for mediators in such circumstances to refrain from thinking of the parties as difficult people when there continues to be lack of agreement to a settlement that seems otherwise reasonable. However, I am hopeful that greater interest in these non-financial aspects of conflicts and greater multidisciplinary collaboration will lead to closures that are more acceptable to all parties involved in disputes. 



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