

## ***Navigating the Landscape of Emotions on the Path To Resolution*** by Marla J. Moss, Esq.



**A**s a practicing attorney for 30 years and an experienced professional mediator, I am passionate about my work in conflict resolution. This case study illustrates how the mediation process was used to de-escalate an emotionally volatile violent conflict, allow the parties to be heard, and ultimately resolve a seemingly impossible dispute. The effective ADR “tools” utilized included:

- (1) connecting with the parties and counsels on a personal level;
- (2) active listening;
- (3) having knowledge of the subject matter of the dispute and being able to converse in the language of the parties about the legal issues;
- (4) eliciting the underlying interests and expectations of the parties; and
- (5) moving the participants to a fair/balanced discussion and a collaborative resolution.

### **CASE STUDY – A Love Triangle: Assault, Negligent Supervision by Employer, False Arrest and Imprisonment**

**FACTUAL BACKGROUND:** Two men were involved with the same woman. All three individuals were married. The Plaintiff “boyfriend” was a former bouncer. The Defendant “boyfriend” was a law enforcement officer. The other defendants included: the local police department that arrested and detained Plaintiff (dismissed from the case on motion); defendant boyfriend’s former employer and defendant boyfriend’s homeowner’s insurance company.

The issues involved allegations of personal injury and infliction of emotional distress; negligent supervision by defendant’s employer; and false arrest and imprisonment.

The gist of the matter was that the boyfriends had several heated interactions, first at the marital home of the “girlfriend” and later at the marital home of the primary defendant. On the second occasion the Plaintiff, under the influence of alcohol, rang the doorbell of the Defendant around midnight to tell the Defendant’s wife of the affair. The Defendant fired shots out the window towards Plaintiff.

Defendant then called the local police and told them Plaintiff attempted to run him over. The police arrested the Plaintiff and detained him for questioning. After the Plaintiff advised the police that shots were fired, the police investigated and recovered a bullet at the scene and the Plaintiff was released. The local police department notified Defendant’s employer of the incident; they performed an investigation and determined that the weapon was not registered with them as required. Subsequently, they terminated the Defendant for conduct unbecoming of a law enforcement officer.

After more than a year of legal maneuvering and numerous mediator-counsel communications, the parties were ready for a mediation session.

**THE MEDIATION SESSION:** The mediation was held at the Plaintiff’s counsel’s office. The Plaintiff was visibly distressed. The Defendant chose not to attend. His counsel, provided by his homeowner’s insurance policy, was present. The first discussion was whether it would be necessary or productive to compel the Defendant to appear. It was clear that he would not cooperate and the parties agreed that discussions should move forward.

I began with private caucuses which allowed the parties to vent and to tell me their expectations for the day. The Plaintiff was seeking a significant amount of monetary damages for emotional distress. The former employer was in a “no pay” position since the Defendant was “off duty”. The homeowner’s insurance company denied liability based on a policy exclusion for Defendant’s intentional acts, but offered a low nuisance value offer to avoid protracted litigation costs. I asked the defense counsels to be open to empathetic listening and to acknowledge to Plaintiff that they understood his pain and suffering.

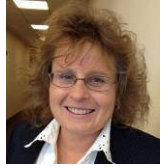
At the joint session, the Plaintiff’s counsel gave a compelling opening statement and spoke particularly about the Plaintiff’s PTSD from military service that had been exacerbated by the violence in this dispute. The counsel for the former employer told Plaintiff that they were sympathetic regarding his distress, but that Defendant was “off duty” and as soon as they were notified of the incident with an unauthorized weapon, he was terminated. They would not pay anything to Plaintiff on the negligent supervision claim. The counsel for the homeowners insurance company acknowledged that living with PTSD is difficult and that many former military personnel who have been in battle are suffering. He thanked Plaintiff for his service. The Plaintiff thanked him tearfully.

**RESOLUTION:** It took several hours of negotiations with a very emotional Plaintiff and the homeowner’s insurance carrier. The case finally resolved at a number more than three times the original nuisance

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## Secrets from Sandy

by Donna Bahnck, Esq., APM



In 2012, New Jersey Gov. Christie and his administration created a mediation process that provided consumers with an option to settle their Superstorm Sandy insurance disputes without resorting to time-consuming and expensive litigation. Having served in the mediation program from its inception, here are suggestions that mediators might find helpful for their Sandy mediations:

**Allow the Client to Vent in Caucus:** A common complaint by participants is that it is the fault of one particular group why people are still trying to get into their houses and put the storm from over three years ago behind them. They say that it is the fault of the lawyers, public adjusters, inspectors, contractors, mortgage companies, insurance companies, ex-spouses, and FEMA. They indicate with a broad stroke whom they detest the most. Likewise, each of these groups have their own complaints against the homeowners and other participants.

In mediations however, I find that the answer is a mixture of any of the above for why they are sitting there. It is always interesting to see where things went awry. Stay neutral and listen until the blame game is over. Somewhere in the venting is a solution. Use your private caucuses. I tend to see people get to the “sigh moment” faster when they can “tell on” the other party. What is the “sigh

moment”? It’s that point when the emotion has been released and people settle down into committing to the task of getting something done. By allowing venting within a private and confidential caucus, you reduce the chance of the other parties being incited by the parties emotional outbursts — thus setting the stage for a more productive mediation process.

**Pictures Are Worth a Thousand Words:** Mediations are more about communicating than anything else. Good photographs with a description of where and when they were taken, speed the communication and decision-making process. For example, insurance companies use the term “like kind and quality” in making repair or replacement decisions. Pictures that take a broader angle of the area for context and then close ups are invaluable in deciding which to use, and allow the nature and extent of damages to be easily explained.

**Have Them Show Their Work:** Probably the most baffling to all sides is figuring out the math. So, like our teachers always said, show your work. If both sides can’t agree on the math, then you know there is a problem. Sometimes you can use the differences as areas of compromise. Once people start dealing in numbers, they switch from emotions to getting down to work, focusing

on the piece of paper to see who got the numbers right. Use that brief moment to then move them to the next step in the process.

**Mediations Process Provides a Forum for Education:** Parties solve Sandy problems differently with their own terminology and methods of reaching a decision. It is the job of the mediator to build consensus for the result by figuring out which areas require the parties to educate each other and which decision making process best matches the result the parties are trying to achieve. For example, there is a concept within the insurance industry that one cannot recover for a known loss. (i.e., one cannot buy a policy to pay for a loss that already occurred). The industry has been using aerial pictures and property audits to show the conditions of properties. If a roof was in disrepair prior to Sandy, they’ll disclaim, and the homeowner is left with wondering why after Sandy they can’t get a new roof. Here’s where an explanation of the concept and pictures are especially helpful in figuring out whether the known loss exception applies.

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value offer. All parties told me that they were pleased with the mediation process. The session was cathartic for the Plaintiff. He was relieved that he did not have to go forward with a stressful trial. Plaintiff’s counsel was delighted that the case settled since he had a emotional client with a difficult case.

This case illustrates how complex matters with emotional distress claims can be resolved with good faith efforts of counsels who are willing to actively listen. It also highlights how trust can be established by the mediator, and the balancing of competing interests, all of which are essential to reaching a successful resolution

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