

A frightening flight: The power of empathy in mediation

By Eydith Kaufman

“I think we all have empathy. We may not have enough courage to display it.” Maya Angelou.

At the end of last month, we were all shocked and saddened by news of two horrible airplane accidents. A commercial airline crashed in Washington D.C. during its approach to an airport I used regularly while attending college at The George Washington University. The second accident involved a medical transport plane that crashed into a neighborhood in nearby Pennsylvania. They were very different circumstances, but both were incredibly tragic.

As both a mediator and an attorney, I have always believed in showing empathy for others. I have also tried to demonstrate strength and resilience while minimizing my own personal weaknesses or vulnerabilities. Until recently, I could not have imagined sharing personal details of my life - and evidence of my vulnerability - publicly. Over the past few months, however, I have learned that a critical part of being empathetic is having the courage to share your own humanity - including your weaknesses and vulnerabilities - with others.

My airplane story

On Sat., Oct. 5, 2024, a Frontier Airlines plane landing in Las Vegas caught fire and crash landed on the runway. I was a passenger on that flight. As our plane came down, with flames caught on camera by an onlooker and emergency crews lining the runway, I recall thinking, “Oh my God, this is how I die.”

Watching the most recent airplane accidents, which were far more severe than what happened on my own flight, I nonetheless felt as if I was back on that Frontier Airlines plane, listening to the wheels burst on impact as we skidded, hearing the sounds of scraping metal and smelling the burning. My heart aches for those impacted by these incidents.

Although many airlines deal with such incidents well, I saw no help or guidance being offered by the airline to passengers during or after the incident on our flight. I don't know the reasons for this absence of support or guidance with my flight, but I saw it as a lack of empathy. This ultimately heightened my stress and concern about the incident.

My flight experience was life-altering. It led me to explore the meaning and importance of empathy, to reach a deeper understanding of just how important empathy can be in times of crisis or stress. I learned that a little empathy can go a long way, not just in resolving disputes, but also in helping individuals feel that they are heard. Empathy can help people who are dealing with crisis or stress move toward meaningful recovery.

The importance of empathy

As mediators, we constantly deal with matters that are significant emotional events for 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.

Empathy is not the same as sympathy. We can show empathy to others even when we don't agree with them. The key to being empathetic is simply the willingness to recognize and respect another person's unique perception, or “truth.”

There were 190 passengers on the airplane with me. We will all have a special connection due to the experience we shared, but each of us perceived what happened during the event differently - because of 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 the experience, each unique perception is valid and legitimate. My perception is now my truth; the same is true for all of the other passengers.

Mediating with empathy

Listening actively and with compassion to a party in a mediation can help a mediator understand that person's unique 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 where there are mental and emotional roadblocks to settlement. Parties who feel respected and heard are more likely to listen to a mediator who understands them.

Empathy is a skill that can be learned, practiced and improved. When legal professionals expand their listening and empathy skills, they can help others experience less stress, better outcomes and a

greater awareness of themselves and others. When a mediator can help parties have empathy for each other's position, compromise, healing and resolution become possible.

The best mediators are truly and genuinely curious; they 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. Mediators may quickly grasp the story behind a

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dispute, as well as the parties' different viewpoints, but if they want to truly help everyone move forward, they should also understand and appreciate why the parties have their particular viewpoints.

When I am feeling fairly confident that I know parties' positions, I will do a double-check and ask myself, "What more do I have to learn about this person, their feelings, their motivations, their stresses?" By showing genuine curiosity, I am also helping parties feel heard and understood, establishing empathy by recognizing and respecting their humanity.

Offering a soft landing

The benefits of mediation are well known: the ability to talk informally and confidentially, to expedite settlement of a case, and to create a mutually acceptable resolution to a dispute. 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.

The confidential nature of mediation provides a safe space for parties to speak openly to the mediator, knowing that they dictate what information is relayed to the other

side. When parties feel comfortable sharing their fears, feelings, and concerns with the mediator - and, when appropriate, with each other - there is a better chance for a successful resolution of the dispute. Parties should come through a successful mediation feeling respected and heard.

Mediators are considered 'neutrals.' They do not take sides nor do they judge one side over another. But my belief is that mediators are also advocates for compromise and empathy - wherever possible, if parties are willing. Instead of forcing parties to settle, we strive to guide them to a solution that works for them based on their unique circumstances.

Information is critical

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

Attorneys who represent parties in mediation can often best serve their clients by showing respect for the other side and their position. This can help open lines of communication and encourage negotiations. Attorneys who can respect-

fully recognize and honor the other side's position, including the reasons, feelings and experiences that led to that position, can be more effective and efficient in litigation even when they vigorously disagree with that position. Conversely, attorneys who approach another side's positions with impatience, hostility or a lack of empathy may trigger defensiveness, leading to unnecessary increase in risks, costs and fees.

Attorneys and parties who are serious about exploring the possibility of settlement should remember to provide key information to the mediator. Without admitting to liability or revealing their ultimate trial strategy, a party who shares key information with the mediator can help move settlement efforts forward.

Don't make assumptions

Assumptions are common in litigated cases. A defense attorney may question the motives of a plaintiff 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 acknowl-

edge and understand the other party's truth. A plaintiff who retained counsel early and went to lien-based doctors may have been hoping for a big payout, but he may also have been overwhelmed and unsure about how to get proper medical care for legitimate injuries. A defendant who failed to provide information to a plaintiff immediately after an incident may have been hiding something, but she might also have been unsure how to respond to potential litigation. Perhaps she couldn't locate information or was acting on attorney or insurer advice. When parties understand the reasons behind each other's positions, there is more opportunity for collaboration.

Empathy is an important skill

My October flight experience was terrifying. It helped me appreciate that people come to attorneys and mediators with significant experiences in their backgrounds. Those experiences will define how they think and feel and react.

There will, most certainly, be a tremendous need for empathy as parties litigate and mediate recent tragic events such as wildfires and airplane crashes. The lawyers and mediators who handle these cases can learn more and show empathy, even if they themselves have not lived through a traumatic or stressful event.