

# Death of a Claim: The Impact of Loss Reactions on Bargaining

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"Mourning is...the reaction to the loss of a loved person, or to the loss of some abstraction which has taken the place of one, such as...an ideal...."

Sigmund Freud, Mourning and Melancholia

"It's hard...There's a finality about it.... When we sign, then it's done. He's really gone."

The widow of a victim of the 9-11 disaster, describing her reluctance to apply for compensation to which she is entitled

We have come to recognize that negotiation is not a fully rational process. People in conflict feel intense emotions, and many of these emotions are negative. As they bargain towards settlement, disputants must compromise, often accepting terms much less favorable than those they had expected to obtain at the outset of the process. The experience of giving up goals and settling below expectations is very painful (Birke and Fox 1999), and the predominant feeling of many disputants as they bargain toward resolution appears to be one of loss. (Folberg and Taylor 1984) Although feelings of loss appear in almost every negotiation, they sometimes take on unusual intensity. Consider the following example:

A sixty-year-old software engineer, James Evans, was terminated by his company. He filed suit, claiming that he had been fired simply because his young manager did not believe that an older employee could do cutting-edge work. Evans asked for more than two million dollars in damages. After more than a year of litigation the employer moved to dismiss Evans' claim, arguing that he had failed to file his charge with his state anti-discrimination agency. As the parties awaited a court hearing on the motion, the company proposed mediation and Evans agreed.

During the parties' initial session, Evans and his lawyer argued strongly that there could be no reason for his firing other than age. The employer, however, maintained that it had terminated Evans based on his performance, presenting mediocre reviews that he had received from the manager. The company also argued that Evans' failure to file charges with his state anti-discrimination agency would require the court to dismiss his lawsuit, regardless of merit. The mediator's private view was that the company's failure-to-file defense was very likely to prevail. However, the employer knew that the court might well delay ruling until trial and thus had an incentive to settle. She began to work with the parties, and made some initial progress.

In the late afternoon, as the negotiations reached the point at which the disputants confronted painful concessions, Evans began to act oddly. He had

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voiced anger all along at what he saw as his employer's duplicity and ingratitude, but now he began to act erratically. He would discuss legal risks rationally at one point, then a short time later refuse to talk about the case at all, exclaiming that he could not believe that this was happening to him. At one point Evans authorized the mediator to make a substantial concession, but when she returned with a counter-offer he became nearly hysterical, insisting that he had been "crazy" to make any move at all. At still other times Evans seemed deeply withdrawn, barely responding to the mediator or his counsel's suggestions. Eventually Evans' emotions subsided, he deferred to his lawyer's advice, and the case settled.

This mediation was unusual. While the typical money negotiation resembles an uphill slog, in this case the process felt more like a ride on a roller coaster. The employee's emotions were striking not merely because of their variation, but also because they followed a distinct pattern. Indeed, Mr. Evans seemed to go through phases similar to those observed in people mourning the loss of a close relative. In this case, however, the "death" was of something other than a human being. In this article I will describe strong emotional reactions that sometimes disrupt settlement discussions, explore the psychological processes that underlie them, and suggest approaches that negotiation advisors can use to prevent these reactions from disrupting the bargaining process.

## **Human responses to severe loss**

***The psychology of grieving.*** To understand how people deal with feelings of loss during settlement, it is helpful to consider how they respond to deprivations of a very personal nature, such as the termination of a close relationship. A number of theorists, in particular Sigmund Freud and Elizabeth Kubler-Ross, have developed models of human response to such traumas.

***Sigmund Freud.*** Freud provided the classic analysis of how people respond to the loss of a close relationship. He observed that a victim of serious loss typically goes through an initial period of shock and withdrawal in which he loses all interest in the outside world: At the outset, Freud said, mourners are marked by a "loss of capacity to adopt any new object of love (which would mean replacing [the lost one]), and...turning away from every activity that is not connected with thoughts of him." During this period the victim often clings to the fiction that the object of his affection – the lost or missing person – continues to exist. (Freud 1917: 244)

Gradually, however, most victims begin to reconcile with reality, realize that the object of their affection is truly lost, and withdraw their emotional attachment to it. As Freud put it, "[M]et by the verdict of reality that the object [of the lost relationship] no longer exists, ..the ego...is persuaded...to sever its attachment to the object...." Freud emphasized how difficult the process of accepting loss can be, commenting that, "Normally, respect for reality gains the day...bit by bit, under great expense of time and [emotional] energy....Why this compromise...should be so extraordinarily painful is not at all easy to explain in terms of economics." As these words suggest, Freud saw the process of grieving as an internal negotiation, in which the mind of the bereaved reluctantly works out a compromise between its wish that the prior relationship continue and the realization that it is irretrievably lost. As a grievant's psyche gradually accepts reality and severs its attachment to the lost person, Freud found, the victim acquires the ability to form new emotional attachments and go on with life. (Freud 1917: 244-45, 255)

*Elizabeth Kubler-Ross.* Other clinicians have developed models of human response to loss, including Helen Deutsch, Erich Lindemann, and John Bowlby. Perhaps the best-known of these is a model developed by Elizabeth Kubler-Ross to describe patients' response to being told that they are terminally ill. She reported that such patients typically go through five distinct stages: numbness/denial, anger, bargaining, depression and acceptance.

A person's first reaction to hearing that he or she will soon die is often numbness, followed by the urge to deny what is happening – similar to the belief of Freud's patients that their lost love will somehow return. A typical victim, for example, might exclaim, "No, not me, it cannot be true." Kubler-Ross suggested that patients use denial as a defense against the overwhelming feelings of shock that they experience upon hearing their diagnosis. This is particularly true, she found, when the news comes as a surprise. Bowlby saw similar behavior in persons reacting to the death of a loved one, reporting remarks such as "I couldn't believe it" or "It didn't seem real." (Bowlby 1980: 86) Kubler-Ross viewed numbness and denial as a condition that is only temporary, however, and that "will soon be replaced by partial acceptance." (Kubler-Ross 1969: 53-54)

Patients, she reported, usually then enter a second phase, in which they begin to feel anger or resentment at what is happening: "The cry 'Not me!' becomes 'Why me?'" In posing this question, however, the patient is not asking for an explanation, but instead is protesting her fate. The change from denial to anger is not necessarily a clean one. Patients are often able to see the truth "with one part of their mind but not the other." Bowlby also observed that victims of loss nearly always become angry, sometimes because they come to realize their loss but often because they continue irrationally to yearn for the return of the lost person. "[R]estless searching, intermittent hope, repeated disappointment, weeping, anger, accusation and ingratitude are all features of the second stage of mourning, and are to be understood as expressions of the strong urge to find and recover the lost person." (Bowlby 1980: 86-87, 92; see Lindemann 1944) Grievants may also use anger to maintain the lost relationship: By remaining angry with a lost person, mourners seem to feel that they are preserving a semblance of their connection with him. (Fleming and Altschul 1963)

Kubler-Ross wrote that many patients enter a third stage, in which they attempt to negotiate to avoid their fate. Since death cannot be avoided, this bargaining is not realistic but rather is another form of denial: A dying patient, for example, may offer to donate her body to science if she is allowed to extend her life. The fourth stage in Kubler-Ross's model is depression. When a patient comes to realize that he cannot avoid death, he is likely to become deeply morose. (Kubler-Ross 1969; see Deutsch 1937) Bowlby saw a similar reaction in mourners which he described as "despair and disorganization." He interpreted this as a reaction to the continuing conflict a mourner feels between understanding what has been lost and his persistent wish to avoid it.

Kubler-Ross's final stage, acceptance, occurs when people accede to the inevitability of their impending death. Patients in this phase do not necessarily regain a normal range of emotion. Indeed, they may exhibit few feelings of any kind. But they no longer appear depressed or angry. A patient at this point will either participate actively in her remaining life, or fade peacefully into a kind of prelude to death.

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**Figure One**  
**Comparison of Models of Grieving**

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Passage of time --->				
<b>Freud</b>	Shock and withdrawal	Gradual separation from the lost person or object		Recovery of the ability to form new attachments
<b>Kubler-Ross</b>	Numbness/Denial	Anger	Bargaining	Depression
Acceptance				

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Figure One compares Freud and Kubler-Ross's models of grieving. The models have strong similarities; Kubler-Ross can be understood as describing the symptoms that patients in a Freudian state of mourning often exhibit. A patient in shock and withdrawal, for example, is often numb and denies what has occurred. Similarly, as patients go through the difficult process of separating from a lost relationship, they often exhibit anger or depression. Differences between the two models are less significant because mourning is a fluid process that varies significantly from one person to another. Some people, for example, will pass through the stages more quickly than others, and grievants may skip over or repeat a particular phase of mourning. (Bowlby 1980) The existence of distinct phases of mourning is, however, common to all of these models.

***Loss reactions in legal disputes.*** How do these theories apply to persons involved in legal disputes? Freud was clear that people can feel intense grief over the loss of an abstraction as well as another human being. Indeed, as has been noted, he observed that "Mourning is...the reaction to the loss of a loved person, or to the loss of *some abstraction which has taken the place of one, such as...liberty, an ideal, and so on.*" (Freud 1917: 243) (emphasis added)

Freud's observation that people can experience intense grief over the loss of an abstract concept applies readily to legal disputes. A worker who suddenly loses his job, for example, not only is deprived of income but may also forfeit social status and his personal identity as a breadwinner or professional. As one article comments, "From a grief perspective, the worker is saying, 'Two parts of me are about to die.'" (Evans and Evans 2002: 91) Defendants in legal disputes also feel loss. A manager charged with discrimination, for instance, might feel that she has lost her good reputation and prospects for advancement in her company. The feelings of loss inherent in a family dispute are equally easy to imagine; spouses faced with a demand for divorce, for instance, may feel that both their lifestyle and their core identity as a parent or marriage partner is in peril. Even when the disputants are organizations, decisionmakers on each side often feel threatened with personal loss. A corporate executive might experience a claim as a violation of his sense of justice; commercial litigants will sometimes say, for instance, that they cannot compromise because a contract dispute involves "a matter of principle."

Apart from threatening people's sense of personal identity or justice, the existence of a dispute is likely to disrupt their relationships. Almost all contract, employment and family disputes involve significant relationships between the parties, and even if the fact of conflict does not provoke a rupture, one side's decision to begin formal legal proceedings will almost

always do so. (Galanter 1984) In this way too, the existence of a dispute triggers a loss.

Freud's reasoning suggests that when a person suffers the loss of an "object" such as an important business relationship or an "ideal" such as her self-image, she is likely to react in much the same way as someone grieving over the loss of a personal relationship, going through what is sometimes termed a "loss reaction." That litigant, moreover, is likely to pass through at least some of the emotional stages described by Kubler-Ross.

***Examples from the field.*** Parties to law suits do, in fact, go through distinct phases of mourning. Almost all the reported examples arise from family disputes, perhaps because such cases involve disruptions of such intimate relationships. One Florida domestic relations lawyer, for example, reports that clients who are surprised by a spouse's demand for a divorce typically display feelings of denial; they may express incredulity that a demand has been made, and even suggest that their partner is suffering from mental illness. (Kochalka 1998) A Pennsylvania lawyer describes similar reactions among her clients: People who receive an unexpected demand for separation often respond with disbelief ("I feel like I'm caught in a nightmare"), and pretend that their spouse has not asked for a divorce despite clear evidence to the contrary. Such litigants have trouble making complex decisions. (Evans and Evans 2002) Indeed, it has been suggested that some divorce litigants are not competent to make settlement decisions. (See Folberg and Taylor 1984; Mnookin 1985, cited in Hoffman 1994)

Divorce litigants, of course, also become angry. Parties will demand that their lawyer use scorched-earth tactics "to crucify the offending spouse." As the legal process continues, these same clients may show signs of depression, such as loss of appetite and low self-esteem. (Kennedy 2001: 38) Some parties to divorce eventually reach an emotional state similar to acceptance, in which they come to terms with the fact of separation. Although such disputants may appear "cold," they describe having struggled with their situation and express a willingness to make the decisions needed to resolve it. (Kochalka 1998: 57) This said, the reactions of divorce litigants, like those of persons mourning a terminal illness, do not always follow a set order. Parties may skip over or mix phases together. One lawyer, for instance, reports that "In one appointment I have seen a client go from anger to sadness back to anger and finally to acceptance." (Kennedy 2001: 39)

Although there are virtually no published reports of litigants outside the divorce arena showing loss reactions, they certainly occur. The age discrimination claimant described at the outset of this article, for example, appeared to experience severe feelings of loss which led him to go through denial, anger, unrealistic bargaining and depression. Litigants in commercial disputes sometimes also display such feelings. In one case mediated by the author, for instance, a franchisor was suing a former franchisee for not making required payments. As the process reached a point that required difficult decisions, the franchisee began to show marked feelings of denial and depression.

Even if we accept that parties to legal disputes may react like people confronting death or a deep personal loss, it is still not clear why these emotions sometimes do not appear until long after a dispute has arisen. Both the age discrimination claimant and the franchisee, for instance, displayed loss symptoms during settlement discussions that took place more than a year after the law suit had been filed. One might think that feelings of loss would appear at the outset of a dispute, and that by the time litigants discussed settlement they would be substantially resolved, or at least familiar. Why, in negotiations that do not occur until long after the fact, do some litigants suffer sudden loss reactions so severe that they cannot bargain effectively? To answer this question, it is necessary to consider the psychology of abnormal reactions to loss.

***Abnormal responses to loss.*** Freud found that while most mourners gradually work through the loss of an important relationship, some do not. This latter group remains "stuck," unable to deal with their feelings of deprivation and disabled from moving on to any new relationship. Studies of people who have lost loved ones to fire and war, for example, have found that while many victims are able to recover from their grief, others do not. Instead, they remain incapable of forming new attachments or experiencing a full range of emotion, often showing symptoms such as depression, anger and dysfunctional behavior. (See Lindemann 1944; Deutsch 1937) Thus some parents whose son or daughter has died will maintain their child's bedroom untouched for years, providing a poignant example of unresolved grief.

Freud posited that a key reason for the difficulty that some victims have in overcoming loss is that they maintain "a strong fixation to the [lost] love-object." Indeed, Freud described people who remain fixated on a lost object almost as disputants: "[They] always seem as though they felt slighted and had been treated with great injustice. All this is possible only because the reactions expressed in their behavior still proceed from a mental constellation of revolt...." (Freud 1917: 248-49) Other writers speak of patients who maintain themselves in denial over a loss by "the substitution of ...a fantasy or an action, or something of that sort...the defensive use of action in order to do away with something painful and unpleasant." (Sandler and A. Freud 1985: 337, 341) By adopting such a strategy, a victim can avoid much of the pain inherent in his loss, sometimes for years. (Lindemann 1944) The consequence, however, is that the victim does not go through the process of mourning and is at risk of developing other symptoms. Freud noted that such people often fall into a deeper "melancholia" that sometimes changes into mania (Freud 1917: 244, 253), and Helen Deutsch commented that "[U]nmanifested grief will be found expressed to the full in some way or other." (Deutsch 1937: 13)

It seems likely that some civil litigants also fall into this trap. They temporarily avoid the feelings of loss triggered by a dispute by investing another "object" with their feelings – in effect, they displace their difficult emotions onto this new object. Often the object is the lawsuit itself. A terminated employee, for example, might escape some of the pain of losing his job by convincing himself that a court will rule in his favor, compensate his economic injuries, and perhaps even order his reinstatement. In a psychological sense, the employee is replacing what he has lost through the termination with a legal claim for compensation: "[T]he existence of the lost object is psychically prolonged" through the lawsuit. (Freud 1917: 245) By doing so the employee insulates himself from the pain of losing his position, but at the price of not coming to terms emotionally with his loss.

This phenomenon is not, of course, limited to plaintiffs: Defendants may also avoid experiencing feelings of loss by clinging to the belief that they will be vindicated in court. They temporarily avoid taking responsibility for what has occurred, as well as the need to pay damages, by casting themselves as the victim of greed or sharp practices, and in this way delay the need to deal with their loss.

In practice, of course, most litigants do not win clear victories and must eventually accept only a fraction of what they had originally claimed, or pay a large sum to resolve allegations that they had argued were without merit. If a disputant has confronted the reality of her loss, and the negative feelings that it triggers, before negotiations begin, then she will be emotionally ready to compromise. If, by contrast, the litigant has clung to a claim or defense and pretended that the loss can be avoided, then she will not work through her feelings until she begins to negotiate seriously. At that point, the disputant will confront her loss for the first time and may be paralyzed by emotion. The situation of such disputants is exemplified by the

poignant words of the wife who would not claim compensation for the death of her husband in the 9-11 disaster: “When we sign, it’s done. He’s really gone.”

## **Implications for negotiation and settlement**

What are the implications of loss reactions for a negotiator or mediator? Many teachers of negotiation and mediation – including this author – view expressions of emotion as generally positive events. For disputants to be able to show their feelings is valuable; indeed, as psychologists suggest, doing so is often a precondition to being able to work through the emotion. Disputants who express feelings also reveal some of their deepest interests, creating a foundation for productive bargaining. Emotional expression is also important when negotiators seek to restore ruptured relationships; without drawing out and resolving their negative emotions, disputants are likely to have problems relating well in the future. Even when emotions are seen merely as obstacles to settlement, it is still useful to surface them, on the principle that identifying a barrier is the first step to overcoming it. It would seem, then, that loss reactions might be seen as a problem only by those negotiators – including many litigators and business executives – who wish to exclude emotion from bargaining entirely.

Still, there are reasons why even bargainers who are open to dealing with difficult emotions might see a loss reaction as a problem. One is that loss reactions are difficult to diagnose and open to misinterpretation. The second is that such reactions often arise unexpectedly, late in the bargaining process, and have the potential to seriously disrupt negotiations.

The first issue is one of interpretation. It stems from the fact that the behavior of disputants suffering from loss reactions closely resembles tactics that adversarial bargainers engage in intentionally in order to obtain a strategic advantage. Such negotiators, for example, will often present the facts of a case in a distorted manner and cling stubbornly to their version of the truth despite strong evidence to the contrary. They do so not because they believe in their perspective, but in the hope that they can persuade their opponent to acquiesce at least partially to their unbalanced viewpoint, thus giving them an advantage in the substantive bargaining that follows. Unfortunately, disputants in denial behave in much the same way as adversarial bargainers, clinging to distorted views of reality, and making unrealistic settlement proposals.

Another example of potential misinterpretation involves methods of bargaining. Adversarial bargainers sometimes trick opponents into revealing their preferences by feigning agreement to terms, then reneging once the other side has accepted them. Disputants suffering from a loss reaction sometimes engage in very similar behavior. They make proposals sincerely, but then fall prey to sudden feelings of anger or denial and withdraw them. This, for example, is what happened in the age discrimination mediation: The plaintiff authorized the mediator to make an offer, only later to denounce the same proposal as “crazy.” A negotiator who encounters someone in the throes of a loss reaction may become understandably irritated, interpreting his behavior as an adversarial tactic when in fact it is driven by strong emotions.

Sometimes the problem lies in a failure to respond at all. A person who becomes depressed by a loss reaction, for instance, will refuse to make decisions, thus disrupting the bargaining process. To a degree, depression can be an adaptive emotion: Depressed people, for instance, are less prone to over-optimism about their chances of prevailing in a dispute. But when a party drops out of the bargaining process entirely, opponents are likely to interpret it as evidence of bad faith, or at the least as a lack of interest in continuing.

The risk that loss reactions will be misinterpreted as intentional behavior is compounded

by other factors. First, disputants in the midst of reaction do not act consistently, but rather move illogically from one emotional phase to another. Such inconsistent behavior is likely, at a minimum, to confuse their bargaining partners. Second, because negotiators tend to place negative interpretations on ambiguous actions by anyone whom they see as an adversary (Allred 2000), negotiators confronted with such behavior are likely conclude that the disputant is acting intentionally, and become angry themselves.

A second problem arises from the fact that loss reactions tend to occur unexpectedly, late in a negotiation. Texts suggest that mediators should strive to identify emotional issues as early as possible in the process, as an aspect of gathering information about the disputants' needs and interests and possible obstacles to settlement. (Golann 1996; Moore 1996) Many legal mediators appear to follow a progression, in which they begin by focusing on gathering and promoting exchanges of information, arguments and interests, and then gradually shift to focus on bargaining and generating options for settlement. (Golann 2000) Texts discuss this progression. (see, e.g., Golann 1996) and leading videos about legal mediation demonstrate it. (See, e.g., CPR Institute 1994; Program on Negotiation 1999). If legal mediators expect such a progression to occur, they may strive to identify and treat emotional issues in the early stages of a case, but become less willing to make such efforts late in the process.

Loss reactions, however, are most likely to be triggered not at the outset of a negotiation but much later, when disputants must confront painful compromises. In the discrimination mediation described above, for example, the plaintiff did not begin behaving oddly until several hours into the process, when he felt pressure to make a realistic offer of settlement. Loss reactions, and the problematic behavior they trigger, thus are likely to appear when disputants are feeling frustrated, tired, and under pressure to reach agreement, and when the mediator may feel that the "listening to feelings" stage of the process is, or should be, largely over. As a result both mediators and other disputants are at risk of either ignoring loss reactions or becoming annoyed by them.

## **General responses to loss reactions**

How should a negotiator or mediator deal with a disputant who appears to be in the midst of a loss reaction? I will suggest some overall approaches, as well as techniques that respond to specific behaviors. Although I will make suggestions from the perspective of a mediator, the ideas can be implemented by negotiators as well.

The first and most useful lesson is the importance of recognizing and being willing to deal with a loss reaction when it occurs. If a mediator realizes that a disputant is going through such a reaction, she will better understand why the party has suddenly begun to behave in an inconsistent, irrational, and even offensive manner. And someone who understands that loss reactions are a natural consequence of painful settlement decisions will also be prepared to tolerate and even support a person suffering from a loss reaction when one occurs.

A mediator can diagnose loss reactions with the same techniques that are used to identify other emotional problems. These include careful observation, tactful questioning, and inquiries to associates or friends. (Golann 1996) As noted, neutrals should be particularly on guard for reactions at the points in the bargaining process when disputants are asked to make painful adjustments to reality. If a mediator suspects from her preliminary briefing that one of the disputants will be emotionally attached to an unrealistic position, she should make an effort to meet with the person before the bargaining begins, in order to begin the process of diagnosis and adjustment. (See Aaron 2002)



When a loss reaction does occur, neutrals can delay or adjourn the process temporarily and help the party to work through his feelings. Adjournment is not always necessary – a short recess may be enough to allow a disputant to regain his composure. The goal, after all, is ordinarily not that a disputant come fully to terms with his loss, merely that he regain the ability to make sensible settlement decisions. Opposing parties often are willing to agree to a delay, especially if a mediator indicates that a disputant is having difficulty due to strong feelings. Defendants in particular are prone to over-attribute plaintiffs' refusal to compromise to "emotionalism," and often are willing to adjourn so that a claimant can "get over it."

A mediator can treat loss reactions with techniques similar to those applied to emotional disputants generally. A neutral might, for instance, invite a disputant to describe the facts of the case and explain the losses she has suffered, listening actively and empathizing when appropriate. The mediator might also work to re-frame how a disputant views the situation; if, for example, a party is determined to recover past attorneys' fees, the mediator might suggest that these expenses could be seen as "water over the dam" and that it might be better to focus on avoiding future expenses by settling. Both techniques were used in the age discrimination mediation: When the plaintiff began to show symptoms of a loss reaction, the mediator temporarily suspended the exchange of offers and helped the employee to work through some of his feelings, eventually freeing him to accept his attorney's advice to settle.

Some caveats should be kept in mind about the process of dealing with feelings of loss. First the goal is not to "fix" a disputant's emotional problem, but rather to facilitate his ability to work through feelings on his own. (Evans and Evans 2002) Second, even the kind of incomplete healing process described above may take longer than a single day. This may explain why divorce mediations, in contrast to the typical civil mediation, often extend over weeks or months. It may also explain why mediations of disputes arising from a partnership or other close business relationship sometimes require more than one session to complete.

### **Specific responses to loss reactions**

In addition to these general approaches, mediators can apply techniques that respond to specific phases of reactions to loss.

*Numbness.* As we have seen, persons who experience a severe personal loss often first react by going into withdrawal or numbness. Someone in this condition is unlikely to be able to make the decisions required to resolve a dispute. Such numbness, however, typically lasts for only a few hours to a week. (Bowlby 1980) As a result, by the time that a mediation is convened in a legal dispute the parties will ordinarily have passed beyond this phase. The most likely situation in which disputants would be too numb to negotiate is if they are forced to work out agreements immediately after a dispute arises. In a divorce case, for example, parties might have to decide very quickly who will leave the family home, while in an employment case a departed executive might be asked to cease a competitive activity immediately. Neighborhood programs that provide emergency mediation services might also encounter disputes so recent that the participants are still numb.

Given the likelihood that disputants will move out of numbness quickly, the appropriate response is usually to adjourn the process. Another option is to ask the disabled party to authorize an agent to make decisions on his behalf, but some disputants are too incapacitated even to do this much.

*Denial.* Whether or not disputants go through numbness, they are likely at first to deny

key facts about their situation. How should a mediator respond to this? Elizabeth Kubler-Ross recommended that patients be allowed to remain in denial temporarily and that caregivers watch for signals that the patient is regaining the ability to deal with reality. Negotiators may be reluctant to take this approach for fear that by failing to challenge an opponent's distorted perspective, they will encourage him to persist in it.

This strategy is more feasible, however, in mediation. Mediators usually allow disputants free rein at the outset of the process to express unrealistic views. They are trained to tolerate lack of realism both during their joint sessions with the disputants and in their early private meetings with each side. (Golann 1996) The process of waiting out a party in denial can be frustrating, however. Lawyers and others who pride themselves on their ability to "cut to the chase" are often tempted to intervene prematurely. As the process goes on, even skilled mediators are likely to become increasingly active, using "reality testing" techniques such as evaluation to help disputants confront necessary choices. (Golann and Aaron 1997) In carrying out these strategies, mediators are implementing classic therapeutic principles; as Freud observed long ago, "Mourning originates under the influence of reality testing...." (Freud 1936:159)

When dealing with unrealistic disputants, mediators should keep in mind the need to distinguish between "private" and "public" denial. A party might, for example, privately understand that his initial viewpoint was incorrect, but for reasons of pride or consistency cling to a distorted perspective in conversations with a mediator or opponent. As long as a disputant is willing to make the compromises needed to settle, there is usually no reason to push him to admit a prior error. Indeed, mediators often work to find reasons, such as a business consideration unrelated to the merits, that will allow a disputant to change position without having to admit that his prior viewpoint was unrealistic. In a sense mediators are helping such disputants replace denial with rationalization.

*Anger.* As people begin to realize that they must accept a severe loss in order to settle, they often become angry. Anger is in some ways easier to deal with than denial, in part because it is relatively easy to diagnose. Disputants often feel the need to conceal feelings such as sadness and grief, but they are usually more willing to display anger. The problem with anger induced by a loss reaction is, again, its intensity and timing. Other participants may believe that the disputant is simply faking anger to create a "tyranny of the unreasonable" that will force them into an unfair compromise. When this occurs, one disputant's anger risks triggering reactive anger in other participants.

In addition to applying techniques such as listening, empathy and re-framing, mediators may opt to tell other bargainers that a disputant is angry because of feelings of loss. Perversely, disputants are sometimes willing to accommodate such anger, because it emphasizes how painful the bargaining process has become for their adversary.

*Unrealistic bargaining.* Denial also leads disputants to engage in unrealistic bargaining, and it can be dealt with through similar techniques. A mediator might, for example, accommodate the feeling temporarily, then work to change the disputant's view of the situation or at least to persuade him of the risk inherent in his bargaining approach. Thus a neutral might ask a party making an unrealistic offer to consider how his "unreasonable" opponent will respond to the denier's proposal, or warn about the likely impact of the proposal on the other side. The neutral could go on to talk with the denier about whether it makes sense to adjust the strategy to the "limitations" of his opponent – and by doing to, to make it more realistic as well. Again, mediators might consider telling disputants that what they see as an unrealistic proposal is motivated in part by the other side's anger and frustration over the situation.

*Depression/despair.* Disputants who are depressed by a loss reaction will often refuse to respond to an opponent's offers and arguments at all, effectively withdrawing from the process. In such situations bargaining advisors can apply techniques similar to those used to deal with numbness.

## **Conclusion**

We have come to realize that bargaining is not a completely logical activity. Yet it is often hard, especially for lawyers, executives and others trained to approach problems with rigorous logic, to appreciate the extent to which disputants may be driven by intense and unpredictable emotions. Mediators and other negotiation specialists need to understand that parties confronting difficult concessions often struggle with intense feelings of loss. Some disputants push away their feelings for a time by fixating on a legal claim or defense, and as a result do not experience the emotions until late in the bargaining process. At this point disputants may behave like persons in deep mourning, acting irrationally and in ways that resemble the tactics used by adversarial bargainers.

Professionals who encounter erratic behavior during a negotiation need to keep in mind the possibility that disputants are going through a loss reaction. They should be prepared to deal with these emotions, or at least allow them an opportunity to dissipate. Reactions to loss are one of the many factors that make bargaining a less-than-fully-rational experience.

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