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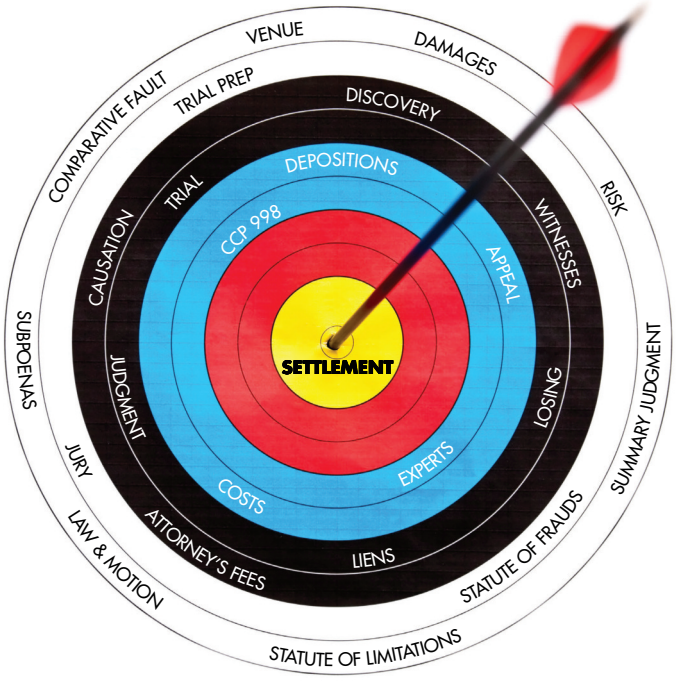
Mitchell M. Tarighati

Mediation: Playground for the "inner child"

Handling the emotion that can be triggered in clients during mediation and manifests as irrational behavior

Most attorneys can recall attending a mediation when, suddenly and usually without warning, it appears that the client's rationality and decision-making have been hijacked by an invisible force that is easily agitated and myopically focused on an outright victory. When this invisible force is in play, it limits your client's patience, capacity for listening, and ability for evaluating risk.

As a private mediator with an ongoing law practice representing both plaintiffs and insured defendants, I see this happen all the time, and I am certain that this is a near-universal experience among litigators. Given that the term "invisible force" rouses notions of sci-fi superpowers or paranormal activities, I have opted to use the term "inner child" as a means of describing some of the emotional, unproductive, and often mercurial responses that *your clients* may experience during mediation, how those emotions are triggered, and how they typically manifest. Once the inner child is seated at the negotiating table, the mediation itself becomes its playground, which serves only to sabotage the prospects of a deal being made. After analyzing the inner child's *modus operandi* in the context of mediation, I will also endeavor to present some possible solutions on how to deal with it and its intractable ways.



Understsanding the "inner child"

Since I will be focusing on the "inner child" of a hypothetical client of *yours*, I should first explain what I mean when referring to that term. By "inner," I mean dormant, inconspicuous, and often disguised; and by "child," I mean unpredictable and quick to react without consideration of all the facts or factors involved. To be clear, reference to the inner child in this article is not meant to cast a negative light as to one's age, maturity or intelligence, and there are no innuendos intended in that regard. Rather, I refer to the inner child as a concept to understand and explain certain emotions that your clients may experience during the course of mediation.

I began observing the inner child in the context of litigation and mediation very early in my legal career. Without a formal education in psychology or sociology, it occurred to me that in order to understand the inner child, I first had to define it. I was not content with adopting the terms "ego" or the "voice in your head" – terms that are often overused and frequently misused in the mainstream vernacular. Understanding the inner child required me to look beyond age, gender, nationality, socio-economics and other factors, because those concepts were too generic, lacked flexibility, and ultimately only scratched the surface of how the inner child often revealed itself during mediation. Even though every person has an inner child, it can be frustratingly elusive, and thus difficult to define by using rigid conventional parameters. Thus, rather than *defining* the inner child (a task for which I found myself wholly ill-equipped), I focused upon *describing* it. A fortuitous byproduct of observing and describing the inner child was that I began to notice patterns emerging during my mediations as to when, why, and how a client's inner child would show itself.

For the purposes of this discussion, consider the inner child as a force that: insists on being right, and in doing so seeks to make the other side wrong; wants to win, often just for the mere sake of winning; has a strong attachment to what it regards as its "morals and principles;" is not flexible and not willing to compromise; does not cope well with

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uncertainty or unpredictability; is impatient, controlling, and suspicious; is emotional; has a poor sense of timing; prefers to speak rather than to listen; and is quick to quit or balk as soon as things are not going its way. These are just some examples of the many characteristics of the inner child as I have observed them.

Though its presence during a mediation session can rapidly derail the negotiations, the inner child itself is neither inherently good nor bad, neither desirable nor undesirable. The goal is not, and should never be, to destroy or control your client's inner child, but rather to be aware of it and to have its fingerprints, so to speak, on your radar so that you are ready to timely and appropriately respond when it shows itself. Most importantly, a client must never feel judged because his or her inner child has been triggered. If you observe your client displaying any of the foregoing behaviors or reactions, or otherwise acting in ways that are commonly associated with the mainstream notions of the ego or pride, then there is a good chance that the inner child is trying to turn the mediation into its playground. And in case you ever miss an appearance by your client's inner child during a mediation session, some tell-tale signs are when your client tells you (or the mediator): "I don't care how much it will cost to go to trial," or "I'll take my chances with the jury," or "they don't know who they are messing with. We'll show them." Fortunately, there are a number of methods that you can use to direct your clients away from their inner child's mischievous intentions and towards the deal points that will settle the case. The following three scenarios illustrate the inner child's playbook when it comes to settlement negotiations.

The insulting offer

At some mediation sessions, opening offers or demands are exchanged within the first hour. At others, it takes several hours just to pin down the facts, the contentions, and the applicable laws. In either situation, your client will at some point during the mediation be presented with the adversary's initial demand or offer. If that offer is outside of your client's expectations such that it causes your client to be surprised, threatened, or even worse, insulted, then be sure that your client's inner child is about to rear its head. Some common inner child reactions to what is perceived as an insulting offer are: "Are we mediating the same case?" "Looks like the other side is on another planet;" "They are not taking us seriously;" or "They are playing games." Such responses become more intense and exaggerated when the case involves a serious personal injury, a familial relationship, large sums of money, or other types of cases that involve both emotions and money. Invariably thereafter, the client's inner child decides to send a message to the other side by giving them a disproportionate and overly aggressive counter offer. "I'll show you!" says the inner child, "you will not do that again!" In the short-run, such responses momentarily make your client feel good because he or she feels fully engaged in what is perceived to be the sport of litigation and negotiation. However, in the long-run, such reactions do nothing but perpetuate the cycle of perceived insults which, if not immediately addressed (by you or the mediator), can diminish the credibility of the parties, as well as lead to entrenchment and a breakdown in communication.

Situations like these can be prevented by counseling your clients prior to the mediation so as to manage their expectations, especially as to what can happen during the initial rounds of negotiations. This will reduce the element of surprise when the first offer or demand is received. Sharing with your client your predictions about the adversary's opening offer often serves to soften the first blow. You can also share your prior experiences in mediations involving similar facts and issues, as well as your prior experiences with the particular lawyer or law firm attending the mediation. As the mediator, I tell the parties that opening offers, or even subsequent offers, are rarely intended to *insult*, but rather are intended to relay a *message* about the other side's valuation of the case. Thus, the offer should be viewed objectively. I often explain to the parties that the offer is a fact in and of itself, and it must be addressed as it is, and without the interference of one's personal feelings and emotions.

Another approach in dealing with a perceived insulting offer is to advise your clients that while they should take seriously every offer that is made, they should also look beyond just the amount of the offer (as well as their feelings about that amount). Rather, your clients should focus on presenting to the mediator facts and evidence that either supports their case or negates their adversary's case – facts and evidence increase or decrease the value of a case significantly more than does posturing and creative negotiation techniques. Frequently during a mediation, I advise clients that they should not be distracted by their adversary's opening offer or the increments in which the adversary's offers are moving (either up or down). Instead, I advise each party to remain equanimous and to negotiate the deal that *they* want, as opposed to negotiating the deal that *their adversary* is trying to advance.

When things don't go as planned

Frequently during mediation, one or more unexpected events occur – that is to say, an occurrence for which one cannot prepare or anticipate. For example, a new piece of evidence comes to light that is adverse to your client's position, or a new theory of liability or damages is advanced. For some clients, the inner child may be brought out by the slightest deviation from their anticipated game plan, while others are more resilient in the face of the unexpected. In either case, a new development may cause your client to be caught off-guard, and in looking for someone or something to blame, your client may conclude that you are not adequately prepared even though you have dotted every "i" and crossed every "t." The inner child is quickly triggered in these situations, and it immediately goes into self-defense mode in

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order to cope with the stress and uncertainty that comes with a new or unexpected event.

Your clients may also be distracted by certain logistical issues for which they may not have been prepared. These include questions such as: who goes first in extending an offer; when one side's monetary concessions are not perceived by the other side as having been rewarded; when the negotiations are taking too long; or when the increments in which the offers and counter-offers are moving do not telegraph that a settlement is likely. Irrespective of the *thing* that is not going as planned, the inner child feels blind-sided and becomes suspicious of trickery or other underhanded tactics. The inner child says, "They have been holding back information from us," "They are trying to scare us," or "Let's throw new allegations and evidence at them and see how they like it." Rather than working through the new development – which is usually more challenging – the inner child first builds a wall around itself and then proceeds to engage in futile tit-for-tat exchanges.

In these types of situation, a productive approach is to direct the client's attention on whether the new development or fact is even relevant to the resolution of the case. Your client can be put at ease, and thus will be less guarded, if he or she is advised that new developments often turn out to be red herrings upon which little energy and time should be expended. As for new developments that are material to the case, the preferred plan of action for your client should be to accept the new piece of information and to formulate a response without generating a *feeling* about the whole process.

For those attorneys that habitually take their entire case file with them to the mediation, new developments can quickly be addressed by accessing the file to either find counter arguments, or to confirm the substance of the new development. Other attorneys quickly enroll the assistance of their colleagues and staff back at the office to do the same. In either case, a new development should be viewed by your client as something that happens all of the time and which can be addressed, rather than an occurrence that is unique to them or their case or otherwise proof of bad faith negotiation techniques.

I have observed parties receive and analyze a new development without creating any drama about the situation or otherwise getting emotional. These individuals view the situation as a call to action and they continue to move the settlement talks forward. However, I have also observed the opposite, wherein a new development is viewed by the client as gamesmanship, which serves only to thwart any meaningful progress towards settlement. My view on handling a new development at a mediation is: the party advancing it should not view it as a deal maker (or a smoking gun); the party receiving it should not view it as a deal breaker (or a nail in the coffin); and both sides should see it as just another issue in the case which, with the assistance of the mediator, can be discarded if irrelevant or be monetized if material to the valuation of the case.

Reluctance to accept a "last and final" offer

Towards the end of a mediation session, the parties exchange their respective bottom lines, or what is commonly referred to as the "last and final" offer. At this stage, your client, who is likely tired but still doing his or her best to remain engaged in the process, is presented with the proverbial fork in the road: is the adversary's last and final offer *really* just that or is there more wiggle room for further negotiation?; or will further litigation, including going to trial, end with an outcome that will be better than the deal that is on the table at the mediation? These are difficult questions for clients to address, especially given that they have "lived" the case more closely and more personally than anyone else, including their counsel. When one or both of the parties are close to accepting a deal that is outside of their comfort zone, the inner child invariably says: "Don't give in;" "They don't mean it, they have more;" "They will take less, they always do;" or "They will not turn away a settlement because of a couple thousand dollars." The inner child doesn't want to concede a penny, and because of the emotional value of a symbolic victory, it will hold out for everything that it wants, even if it means risking the best deal that the client can reasonably expect.

What your client usually needs in such a circumstance is an objective cost-benefit or risk-reward analysis, i.e., whether a mediated settlement is indeed the best possible outcome for him or her or, at least, a better outcome than continued litigation. A great example of this is when counsel informs the client about the upside and downside risks associated with going to trial, or when counsel calculates (or estimates) the costs of further litigation. I have also observed counsel effectively deal with this issue by providing their client with the amount that their client will "net" from a settlement.

To assist a client in deciding whether to settle or proceed with litigation, I have found the following inquiries to be helpful: What is the ultimate monetary outcome for you if you settle the case today? How about if you proceed to trial and win? How about if you proceed to trial and lose?

These examples represent only a few of the possible approaches to assist your client to decide whether to accept or reject a so-called "last and final offer." However, I have observed one common element in every case, i.e., if a last and final offer is not properly explained to the client, his or her inner child may get cold feet and balk at what is otherwise a good (or the best possible) deal in light of the facts of the case, or the inner child might become fearful or distracted and thus enticed to accept what may turn out to be a less than optimal offer.

Ideally, once both sides exchange their respective last and final offers, your client's attention should not be upon receiving a higher amount or paying a lower amount. Rather, your client should focus on whether the considerations exchanged are worth the benefits of relinquishing their attachment to the litigation. At times during mediation,

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I make reference to the benefits and stresses associated with further litigation as well as those associated with the finality that a settlement brings to the case. It has been my experience that the inner child is pacified by this type of objective evaluation, and as a result it becomes less likely to present an obstacle to rational decision-making.

Turning down the volume on the inner child

Many of the issues addressed in this article may appear as common sense, especially to seasoned litigators who have sharpened their skills and their intuition in handling both predictable and unpredictable events that commonly transpire during mediation. Nevertheless, even for a veteran litigator, the obvious can in fact become obscured in the heat of a negotiation. This is the exact time (when pressures are intense, and tensions are high) that the opportunistic inner child creeps into the mediation, turning it into its playground. Being aware of your client's inner child, understanding its motivations and agenda, and having a strategy ready for dealing with it, should it emerge, will greatly increase the probability of reaching a fair and mutually agreeable resolution.

When you realize your client's inner child is seated at the negotiating table and is trying to govern or even dictate both the process and the outcome of the mediation, I offer the following advice: First, assume that the inner child will make itself heard at some stage during the mediation. Second, recognize that suppressing, ignoring or combating the inner child only serves to engage and agitate it even further. Third, acknowledge that the interests of the inner child are largely emotional and not aligned with the best interest of your client. And fourth, be aware, and make your client aware, of the things that will likely trigger his or her inner child at the mediation, and be ready to respond quickly so that the inner child can be pacified.

Mitchell M. Tarighati is a founding partner at Sepassi & Tarighati, LLP*, based in Encino, California. In addition to conducting private mediations in the areas of personal injury, employment, and real estate matters, he also manages a balanced law practice representing both plaintiffs and insured defendants. Mr. Tarighati holds a BS degree from California State University Northridge, with a major in Business Law, as well as JD from Albany Law School, New York, with a concentration in Business Law, and an MBA from Union College, New York, with a concentration in Finance.*