**Death of A Claim: Delayed Loss Reactions**

**By Dwight Golann[[1]](#footnote-1)**

 *“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 delay in applying for compensation to which she was clearly entitled

A sixty-year-old software engineer, James Evans, was terminated by his company. He filed suit, claiming he had been fired simply because his manager did not believe an older employee could do cutting-edge work. Evans asked for more than $2 million 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 it had terminated Evans based on his performance, and presented as evidence mediocre reviews he had received from his manager. The company also argued that Evans’ failure to file charges with the 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 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 voiced anger all along at what he saw as his employer’s duplicity and ingratitude, but his behavior now changed. He alternated between discussing legal risks rationally, then suddenly refusing to deal with the process at all, exclaiming “I can’t believe this is happening to me!” At one point Evans authorized the mediator to make a substantial concession, but when she returned with a counteroffer became nearly hysterical, insisting that he had been “crazy” to make any move at all. At still other times he seemed deeply withdrawn, barely responding to the mediator or his counsel’s suggestions.

The mediation of this case was unusual. The typical money negotiation resembles an uphill slog, but here the process was more like a ride on a roller coaster. The employee’s emotions were striking not merely because of their variation, but also because he 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 a claim rather than a human being. This phenomenon, a “delayed loss reaction,” poses special problems in resolving legal cases.

***The psychology of grieving***

To understand how people deal with feelings of loss during settlement negotiations, it is helpful to think about how they respond to very personal losses such as the end of a close relationship. Sigmund Freud, Elisabeth Kübler-Ross, and others developed models of human response to such traumas. Kübler-Ross, for instance, wrote that patients told they are terminally ill typically experience five distinct stages: numbness/denial, anger, bargaining, depression, and acceptance. This series of emotions might be called a “loss reaction.”

When a person in a legal dispute suffers the loss of a claim or a defense important to his self-image, he often reacts in the same way as someone grieving over the loss of a personal relationship. This is what seemed to happen to Mr. Evans.

***Delayed responses to loss***

This still does not explain, though, why such emotions arise suddenly and vehemently during mediation. Mr. Evans, for instance, began to display these symptoms more than a year after he lost his job. Why is this?

Freud found that while most mourners gradually work through their loss, some do not. They remain “stuck,” unable to deal with their feelings and disabled from moving on. Some civil litigants fall into this trap. They avoid feeling the loss caused by an event like being fired by suing and invest their lawsuit with their lost hopes. Evans, for example, may have been escaping a severe blow to his self-image as a valuable employee asking a court to fully compensate and perhaps even reinstate him. Defendants may similarly cling to the belief that they will be fully vindicated at trial.

In mediation, however, disputants are required to make serious compromises not compatible with illusions of victory. A litigant who has been pretending that a court will vindicate him suddenly confronts the reality that it will not, and may respond with reactions similar to someone who has just lost a loved one.

***Implications for bargaining***

What are the implications of delayed loss reactions for mediation? The problem is hard to recognize, because disputants suffering from this behave very much like adversarial bargainers, presenting distorted arguments, clinging stubbornly to positions, and/or reneging on offers. Mr. Evans, for instance, authorized an offer but later denounced it as “crazy.” An opposing party who encounters someone in the throes of a loss reaction could easily mistake such behavior for unethical bargaining, when in fact it is driven by strong feelings.

A second problem arises from the fact that loss reactions are likely to occur unexpectedly. They arise not at the outset of a mediation but late in the process, often catching other participants at a point when they are frustrated and ready to wind up the bargaining. Even the mediator may feel that the “listening to feelings” stage is, or should be, over.

***Potential responses***

How can you deal with a disputant who is acting out because of a delayed loss reaction? The most useful lesson is to be ready for such reactions and recognize them when they occur. If you realize feelings of loss are causing a client to behave in an inconsistent, even offensive manner, suggest to the mediator what is happening and perhaps ask her to warn the other side (“Mr. Evans seems pretty emotional at the moment; I think we have to wait a little while to pursue that issue . . . .”)

Expect a mediator to deal with loss reactions with techniques similar to those used with emotional issues. Bear in mind also that the process of working through a reaction may take longer than a single day, and be ready if necessary to adjourn to allow someone to recover. In the *Evans* case, the parties had to adjourn for ten days, but when they came back Mr. Evans was able to weigh the risks and accept a reasonable settlement. Delayed loss reactions are one of the many factors that make resolving disputes a less than fully rational experience.

To deal with emotional and psychological issues:

* *Look for hidden feelings that may be affecting decision making.*
* *Be aware of parties’ feelings of loss from compromising, and be prepared for irrational behavior.*
* *Alert the mediator to emotional issues, and support her as she uses non-legal techniques to address them.*
1. This is a condensed version of the article by Professor Golann, “Death of a Claim: The Impact of Loss Reactions in Bargaining,” *Negotiation Journal*, Vol. 20, No.4 (October 2004). [↑](#footnote-ref-1)