

What forgiveness offers plaintiffs in ADR

Forgiveness can have a role in many mediations and can be the missing element in reaching settlement

By Barbara Monty & Eileen Barker

Barbara

Any discussion of forgiveness must start with at least a brief summary of what we are talking about when using the term, "Forgiveness." (For additional discussion, see our previous article, "Forgiveness," published in Plaintiff, May 2018.)

What forgiveness is

- Being willing to drop the narrative about something unjust that happened, to stop going over and over the story of how unfair it is and how "bad" the other party is.
- Letting go of resentment, indignation, or anger related to what occurred.
- Realizing the past cannot be changed and making a decision to accept what happened.
- Focusing on the present and maximizing the future.
- Turning one's attention away from the other party and from what they did; letting go of the need to change them, or to punish them.
- Turning one's attention to oneself and what is needed to move on.
- For the benefit of the one doing the forgiving, not the person being forgiven.

What forgiveness is not

- Seeing what happened as unimportant.
- Diminishing the damage caused.
- Forgetting what happened.
- Ignoring or minimizing the pain caused by the other party.
- Requiring an apology.
- Necessarily a spiritual or religious act.
- Easy.

Eileen

When money isn't enough

One of the main focal points of the legal system, including mediation, is determining the appropriate amount of compensation, if any, for a plaintiff. Lawyers, insurance adjusters and mediators square off against this task and are often uncomfortable discussing anything else, including issues that may be of great importance to the parties.



Plaintiffs certainly need legal and financial solutions, but they may also have non-monetary needs such as healing, peace and closure. Forgiveness provides a vehicle for achieving all of these, while also enabling parties to release intense feelings, such as anger and resentment, that can make mediation of the monetary issues difficult to impossible.

In contemporary jurisprudence, we say damages are intended to "make the plaintiff whole." This is surely the quintessential legal fiction, a convenient story we tell even though we know it's not true. Aside from cases that solely involve monetary injury, how many plaintiffs really feel "made whole?" The question is: Can we do better, at least in *some cases*? And if we can, should we try?

Forgiveness in mediation

Consider the case of a woman who was struck by an automobile while crossing the street, and is crippled for life. In mediation, the driver's insurance carrier made a settlement

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offer which the woman's attorney advised her to accept. She was reluctant but eventually agreed she would take the offer on one condition: The insurance carrier had to arrange for her to meet the driver of the car that hit her.

The attorneys on both sides tried to explain to her that this isn't how it works, that the parties do not generally ever meet. But the plaintiff stood her ground. It was important to her to be able to meet the driver face-to-face. While the insurance carrier was skeptical that the meeting could be arranged or that it would be a good idea, he agreed he would try to set it up. To his surprise, the driver readily agreed to meet with the plaintiff. The accident had weighed heavily on her and she too needed closure.

When the two women met, the plaintiff had the opportunity to fully explain what had happened to her, how it impacted her and how it forever altered the course of her life. The driver listened attentively, and let the woman know she understood the consequences of the accident and how difficult life was for the plaintiff as a result. The driver apologized and asked the woman to forgive her, which she did. The two women cried together, hugged and said they would pray for each other.

Through this meeting – initiated by the plaintiff herself – the parties were able to fully acknowledge the events that connected them on a human level. And this helped them achieve closure.

Barbara

Put forgiveness on the menu

As a mediator, I speak not only with the lawyers but also with the parties beforehand. I try to get the "back story" of the dispute to identify the emotional hot spots. The pain and outrage and sense of injustice are often driving the conflict. Depending on the type of dispute and the character of the parties and lawyers, I may openly discuss with them the benefits of forgiveness. I consider the role the emotions may play in fueling the litigation, and make sure they are addressed in mediation.

With plaintiffs, I make sure that their pain is acknowledged and legitimized, not only in the beginning, but also throughout the process. It is also important to focus in on when that pain is driving the mediation and getting in the way of resolution. If plaintiffs can see that the defendants may not have had an "evil" intent in causing the harm, or may not have meant the harm as a personal affront, this can help not only in reaching a resolution, but also in providing some peace to both sides.

Practically, I may say in the beginning of a mediation that our goal is to resolve the conflict, which may require compromise. The focus is not punishment, but on helping all parties move on with their lives.

When representing plaintiffs, I find that I am sometimes tempted to be drawn into the "we good, them bad" mentality. Sometimes plaintiffs want their attorneys to share their outrage and do everything possible to punish the defendant. I have had numerous clients over 32 years of litigating who wanted a "pit bull" attorney to "go after" the other side for "blood." I must admit, for years I accepted that role and succeeded, in that we achieved what we thought were good results.

In recent years, as I integrate elements of forgiveness into my practice, I find that I listen more carefully to plaintiffs for the hurt they are feeling. I step into it and acknowledge their pain and avoid demonizing the other side. If I can stay focused on what is really in the best interest of my clients, I see that de-escalating the conflict does not mean my client won't "win" the lawsuit. I now refuse to be vicious with opposing counsel. I take thorough but kinder depositions. I know I do not need to personally decimate opposing witnesses on the stand to make my case. In many ways, it is more challenging for me to acknowledge the feelings of my clients and of opposing parties, to focus on making our case, and to remain professional and courteous with opposing counsel.

What does this have to do with forgiveness? It keeps the focus on what is most beneficial to my client. It moves away from punishing the other side, opening up the pathway to resolution. When plaintiffs can acknowledge their hurt and suffering and keep the focus on themselves rather than on the other party, it will be much easier for them to move on, whether or not the other side apologizes or acknowledges wrongdoing.

Forgiveness-infused mediation

In a neighbor dispute over trees and views, the uphill neighbor wanted her view opened up, but the downhill neighbor refused to prune his trees. He valued his privacy and his heritage trees and criticized his uphill neighbor for not being a "nature lover."

As the mediator, I discovered that the uphill neighbor bought her home because she loved the view of the hillside and felt her downhill neighbor had never been friendly, failing to even greet her when she said hello. She felt that the "tree-hugger recluse" did not belong in what she wanted to be a friendly neighborhood. She wanted him to remove most of his trees, so that she could have a panoramic view, and open up his yard so that they could interact. She told her lawyer that she was prepared to go to trial and take her chances no matter what it cost her.

We were able to resolve this dispute but only after having several joint sessions with the parties where they were able to explain their positions to one another. It was not just about the trees. This conflict was about each party taking the actions of the other personally. My work in this case was to help the parties depersonalize the actions of the other and have the willingness to let go of the old story about how "bad" the opposing party was.

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We did not talk specifically about forgiveness, but I kept in mind some of the elements – especially not taking the acts of other people personally and seeing the other as just doing what they thought was best for themselves. We talked about how the neighbors could live together in peace and that how that might be worth more than actually "winning" the case. We worked on not being offended by the other's actions, and instead collaborated as a team to resolve the conflict.

Eileen

Sometimes it only takes one

In some cases, only one person is willing to forgive and it can still make a tremendous difference in the outcome of mediation.

A few years ago I was contacted by a woman who was about to attend a second mediation to negotiate the settlement of a business partnership. Her future well-being depended on the outcome of the mediation and she was scared. Her ex-partner was a wealthy and powerful man, used to getting his way. The first mediation had not gone well and she did not feel her lawyer or the mediator would be successful in negotiating with this man the second time and she feared they would pressure her into accepting a weak offer.

Here, my work as a forgiveness specialist was helping her prepare for mediation. She needed to find her inner strength, which had been beaten down during the partnership. She had to forgive herself for giving her power away to her former partner, and find acceptance for difficult things that happened in the partnership. In the process, she took back her power and found her voice. When she attended the mediation, she stood her ground and the matter successfully settled that day.

Ethical issues

Forgiveness can raise concerns for lawyers about how it meshes with their professional obligations. On one hand, lawyers sometimes question whether forgiveness falls within the scope of their training and expertise. On the other hand, some lawyers express concern that they will have no work left if their clients forgive.

In our society, lawyers are seen as experts in resolving conflict. They are the ones people turn to for help in resolving difficult conflict. And yet, legal education does not adequately train lawyers to fully address the needs of clients who are beset by difficult conflict. We suggest *every lawyer* should be conversant in what forgiveness is and is not, and how it can benefit his or her clients. Without this information, lawyers cannot meaningfully assess or serve their clients' best interests, which is, after all, the primary ethical obligation of every lawyer. This doesn't mean every lawyer needs to be a forgiveness expert. But it does mean that in appropriate cases, lawyers should be able to counsel their clients, help them make an informed choice and refer them to a forgiveness specialist.

The crux of the matter, however, may be that some plaintiffs "might" be willing to settle for less money than they otherwise would take, once their anger and hostility are defused. Does this present a conflict of interest for an attorney working on a contingency fee basis? You bet it does.

Many years ago, I mediated an age-discrimination case in which an elderly woman lost her job because her position was terminated. She was crushed by feeling unwanted and unappreciated after working 35 years with the company. When this was discussed with the company representatives in a separate caucus, they were adamant that the termination was not personal and was solely due to the business need to terminate the position. They offered to talk to the woman to explain this and they were open to finding her another job at the company. Surely this would be good news for this plaintiff. Yet, when I shared this with the plaintiff's attorney, he admonished me that under no circumstances was I to say anything about this to the woman. To underscore the point, he emphasized: "We are only here to talk about money." He refused to even discuss it with his client.

Please do not be that lawyer!

For additional discussion of the role forgiveness can play in mediation and ethical issues raised, see Eileen's law review article, *The Case for Forgiveness in Legal Disputes*, 13 Pepperdine Dispute Resolution Journal 205 (2013), available at www.thepathofforgiveness.com/lawyers/.

Barbara

In summary

While applying elements of forgiveness in one's practice can change the way we work, conflict is unlikely to evaporate any time soon. There will always be disputes and people will always need lawyers. However, with a forgiveness-infused approach to conflict resolution, clients are likely to achieve better results and be happier with their lawyers. Lawyers have as much or more to gain in personal and career satisfaction.

Elements of forgiveness I keep in mind include:

- Forgiveness is always possible, regardless of the gravity of the wrong.
- A person must choose to forgive and cannot ever be forced to do so.
- We, as lawyers and mediators, can set the tone of our work and not allow our clients to set the tone for us. We can be ambassadors of peace and healing regardless of what's going on around us.
- Removing ego from our work and focusing on being of service may be difficult, but it is key. This may be a fundamental paradigm change for some.

We have been trained to achieve and to succeed, and may have been drawn to legal work because we enjoy competing. However, if we can let go of our egos, and

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focus on what's best for the parties involved, we can be more creative and, ultimately, more effective.

Join the forgiveness movement

This growing international movement includes lawyers, mediators and judges who are consciously incorporating forgiveness into their work. In the ADR arena, Resolution Remedies in Northern California recently added a Forgiveness Specialist to its mediation panel, in recognition of the powerful role forgiveness can play in dispute resolution. www.resolutionremedies.com.

Join this movement by learning more about forgiveness and practicing it in your own life! Resources are available at www.ThePathofForgiveness.com and www.ForgivenessTrainingInstitute.com

The authors of this article are gathering accounts of practical applications of using forgiveness in law. If you would like your stories to be included in our forthcoming book, please send them to Barbara Monty at bmonty@montywhitelaw.com.


Barker

Eileen Barker is an internationally-acclaimed forgiveness teacher and a pioneer in the movement to integrate forgiveness into the resolution of legal disputes. Eileen is the founder of The Path of Forgiveness, *dedicated to teaching people how to forgive, and the Forgiveness Training Institute which trains lawyers, mediators and other professionals how to help their clients forgive. In 2016, Eileen received a lifetime achievement award from the Worldwide Forgiveness Alliance, along with Nelson Mandela and Archbishop Desmond Tutu.*


Monty

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