
Kluwer Mediation Blog

The Broken Family

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The Central Valley of California, known for its good weather and rich soil, is considered the breadbasket of the country. The many people who live in this agricultural community work hard. They know that the literal fruits of their labors feed people, and are proud of their role in society. They are strong believers in family values. It is against this backdrop that a stunned community learned of the arrest and detention of local farmer Tom Locke for molesting his seven-year-old daughter Andrea.

Much has been written about the sociopathic behavior of child molesters, particularly if they are adults who molest their own children. Society has been plagued by such behavior both in the family and in the church. When this type of behavior surfaces in a sleepy agricultural town whose family values embody the very essence of its people, the alleged perpetrators are never able to regain their reputation. People begin to look over their shoulders and question whether their neighbors are who they think they are. The concepts of trust and faith are rocked to the bone. This is why few crimes carry as much social disgrace as child molestation. Most people would rather be accused of armed robbery.

Tom Locke has lived in the Central Valley his entire life. He married his high school sweetheart and continued to work on the family farm growing various crops that have sustained his family for over one hundred years. He was a deacon in his church and a member of the local city council. When folks needed help in the community, they knew they could count on the Locke family.

Tom and Mary Locke were married for fifteen years and had three children, ages 4, 7 and 11. The children were typical fun-loving kids. Annie was the four year old who was her sister's shadow and looked up to her in every way. Her sister was an imaginative seven year old who loved the family trips to Disneyland and enjoyed playing with her Barbie dolls. Charlie played Little League baseball, collected Pokémon cards and loved playing games on his Wii. All the children were healthy, well adjusted at school and did not exhibit any emotional problems.

Neither Tom nor his wife had any criminal record and had been considered model parents by their friends. Until the moment of Tom's arrest, the Locke family lived the American dream – they owned their own home, raised three children and were well respected in the community. All of that changed on September 1, 2006, when representatives of the County District Attorney's office came to Andrea and Charlie's school and interrogated them without their parents' knowledge or presence and removed both children from the school without obtaining any warrant whatsoever. According to witnesses at the scene, the law enforcement officials indicated to the school principal that the

children were in imminent danger of serious bodily injury and had to be taken into custody for their own protection.

Following the incident at the school, the District Attorney prevented the Lockes from entering their home while evidence could be accumulated. The children were taken for an interview at the examination center, where Andrea was questioned by social workers. Charlie was also interrogated in a separate room from Andrea. The purpose of the interrogation was to determine if the children were victims of sexual abuse by their father.

Thereafter, Andrea was subjected to an invasive forensic vaginal and anal exam without the knowledge, consent or presence of her parents. Photographs were taken to determine whether there had been any improper sexual activity, and the evidence was then put in a special evidence locker for the District Attorney to examine.

The facts that gave rise to this unusual set of circumstances are very simple. Andrea had an active imagination. She made unusual statements to family and friends about ghosts and goblins living in the neighborhood and recited to her mother her dreams of being strangled by snakes. One day she brought to school a teen magazine which ran some stories on sexual themes. Just like the game of telephone tag, the children who saw the magazine surmised and gossiped, until the message was that Andrea was playing sexually inappropriate games with her father. As a result, the teacher brought her to the principal's office to discuss the matter.

While at the principal's office, a social worker was contacted and immediately came to the school to interview Andrea with the principal. Mrs. Locke was not contacted during this entire procedure. Following the interview, the social worker, in a classic rush to judgment, removed Andrea from school and a meeting was convened between the social worker, the police and the District Attorney to discuss further investigation. The parties agreed to audio and videotape another interview with Andrea as well a separate interview with Charlie. The interviews were witnessed by a victim advocate watchdog who reviewed the interviews from a separate room via hidden camera equipment. Based on the interview, Andrea seemed to implicate her father, and, to a lesser extent, her mother in sexual assault. A collective decision was made to have Andrea undergo further forensic examination at public expense. The physical examination findings were normal, meaning there was no evidence to confirm or negate sexual abuse. Such findings were found to be inconclusive. Nevertheless, the children were placed in foster care immediately, and later with family friends. A juvenile court dependency petition was filed, and the allegation of sexual abuse began to wind its way through the legal system. The local newspaper published pictures of the family on the front page, which was tantamount to tarring and feathering the Lockes in their local community. Eventually the allegations were dismissed due to the fact that there was no corroborative evidence. Approximately forty-five days after the legal proceedings began, the children were given back to their parents. The cost to fight the legal proceedings exceeded \$50,000.00, but the emotional scars and embarrassment have never evaporated.

Despite the lack of evidence from multiple interrogations of the children, the forensic examination of Andrea and the search of the Locke home, as well as interviews with other children and parents, the County continued to detain the children from their parents and proceeded with legal dependency proceedings based on knowingly deficient and improper allegations of abuse. After exculpatory information finally surfaced, the legal proceedings were dismissed but the spirit and the reputation of the family who had been upstanding members of the community for over 100 years had been broken.

After the initial nightmare was over, the Lockes filed a lawsuit to seek compensation for violation of their civil rights and to protect other families in the future from this type of abuse.

Rather than put the family through additional aggravation, the County decided that it would be in everyone's best interest to sit down privately and resolve the case quietly outside of the court system. Faced with this opportunity, the Lockes were encouraged that the County finally wanted to come clean and accepted the offer of mediation.

The mediation process itself was fairly uneventful. Tom and Mary spent most of the day deferring to their lawyers and politely listening to the mediator as he went through the subtleties of the case and current state of the law with regard to the County, which was currently in flux. Despite the efforts by the mediator to engage with them, they were somewhat distant and demonstratively quiet. The mediator decided to focus on a more conventional approach, exchanging offers and demands in the typical negotiation dance until he was able to obtain a sizeable offer which was thoroughly endorsed by the Lockes' counsel. The final offer from the County was so substantial that there was palpable excitement in the room from the Locke's legal team. It was at that moment that the real mediation began. Mary broke down crying and Tom looked at her quizzically as if he was confused as to what was going on. He gave her a nod and they stepped down the hall into a private room to talk without their counsel. After about 20 minutes, the attorneys were looking at the mediator to move things along so the mediator went down the hall to check on the Lockes. What he found was tantamount to a complete meltdown.

Evidently, Tom had notified Mary that as soon as the settlement was consummated he was going to leave the marriage. Knowing that was going to occur, Mary decided that she would not agree to the settlement terms as it was clear that reaching an agreement on the money would result in a dissolution of their marriage, which was something she desperately wanted to salvage. While the stress of the criminal case was over, the scars were deeply imbedded and, for reasons known only to Tom and Mary, Tom did not want the marriage to go forward. Clearly, this was information that was not presented to the mediator in the Plaintiffs' brief nor had it surfaced during any part of the day as the mediator tried to engage with the parties on various levels. To say that it came as a surprise to the mediator and even to the Lockes' counsel is an understatement.

At that moment the mediator realized he had made a terrible mistake by not identifying and addressing the emotional concerns of the family early on in the mediation. He accepted the Lockes' indifference and abstention from discussion as a willingness to put the conflict behind them and focus simply on the financial terms of the settlement. He failed to recognize how the strain of the criminal proceedings had built up a well of anger that was hidden beneath the surface of a rock-hard shell built around Tom Locke. What's more, he elevated the status of the lawyers above the clients for the purposes of processing the mediation so that he could get to the numbers as soon as possible and consummate the transaction known as settlement. Unfortunately, the pecking order in this case should have been reversed, with the Lockes placed at a higher level along with recognition of the impact that this set of events had on their lives.

The concept of 'status' is something derived from improvisational theatre. It is a social position which is defined by the behavior of the parties and the way they interact with each other. In this case, Tom and Mary took a low key approach to the mediation, acting like everything was fine. Following those cues, the mediator assumed they wanted to defer to their legal team and treated them as if they were low status, elevating the lawyers to a high status position. While status can shift during a situation, it requires interaction and changes in behavior to allow for the shift. Here,

the mediator maintained a consistent behavior throughout the proceedings, recognizing the high status of the lawyers and low status of the parties, until the actual moment settlement was on the table. At that point, the parties (Tom and Mary) shifted status on their own, completely changing the dynamics of the case.

The mediator had a sense early in the case that there might be an emotional roadblock with parties. After all, they had been through difficult criminal proceedings and almost lost their children to unwarranted allegations of child molestation. Nevertheless, he leap frogged over his own intuition in order to cut to the negotiation chase. In so doing, he missed the cues that were given by the clients which were ever so subtle but glaring in retrospect. Clearly, people who have been through this type of emotional trauma would not sit by idly while their situation is discussed inside and out by lawyers and claims examiners. At minimum, the mediator should have sat quietly with the clients and had them summarize what this trauma had done to the family and how the family had coped with the huge interference in their lives. By doing so, the mediator would have clearly identified the emotional barrier exhibited by the Lockes earlier in the session rather than after a settlement had been reached.

Anxious to rewind the tape, the mediator spent the next two hours with the Lockes exploring in detail all of the facts that led to this uncomfortable moment in their lives. The mediator gently prodded the Lockes to look to the future and confirm that, though he was no psychologist, perhaps some family counseling might be in order now that the financial side of their house would be secure. In short, the mediator used the skills he had acquired 20 years earlier to help the Lockes look toward the future and be grateful what they were about to receive in the settlement. While the emotional scars ran deep, litigating the case any longer would prevent the entire family from continuing the healing process. Mary recognized at that moment that it was important to put the children's concerns ahead of hers and she agreed to accept the settlement on the condition that Tom meet with the family counselor, which he agreed to do. A term sheet was prepared and the parties signed, but the family was broken. At least, the mediator thought, the settlement offered them a chance to look to the future.

The dynamics of this case presented a number of challenges on various levels. The primary issues which the mediator had to deal with were: 1) Status – recognizing the hierarchy in the room; 2) Intuition – trusting his gut to deal with the emotional roadblocks that would necessarily result from such a traumatic situation; 3) Identifying Barriers to settlement – looking for the strategic and/or emotional barriers that prevent a case from settlement; and 4) Managing the 'transaction v. transformation' components of the mediation – knowing when to focus on the financial terms of the deal while recognizing the personal healing that needs to take place.

WHAT HAPPENED?

A mediator that is on auto pilot can get a case settled, but often misses opportunities to use the instruments available to him to create a positive experience for the participants. The most obvious instrument that was underutilized here was listening to what was not said, as opposed to what was being said in the negotiation. Had the mediator been sensitive to the lack of client involvement he would have been able to identify the emotional impediments earlier in the day instead of having a complete breakdown when closure time arrived. Staying fresh and engaged as a mediator instead of simply closing the transaction early creates an opportunity to see and manage the entire dispute, not just the parts that deal with the amount in controversy.

One option that could have been utilized would have been a pre-mediation meeting with the plaintiffs and their lawyers before the defense showed up for the mediation. This type of meeting would have focused solely on addressing the objectives of the plaintiffs, identifying the emotional concerns that might get in the way of the negotiation, and setting the stage for the ultimate transaction that would take place in the negotiation. Simply starting the mediation without front loading the client centered issues can sometimes direct attention away from important concerns of the clients that could prove problematic later on.

Luckily, the mediator was able to salvage the settlement late in the day, but only after an artificial impasse was created by the clients. It was at this point that the mediator went from auto pilot to full engagement, allowing the process to unfold for all parties involved, not just the people interested in the financial outcome.

WHAT STRATEGIES CAN WE LEARN?

1. Be aware of ‘status’ early on in the mediation

Status addresses the behavior of characters in a scene. It also relates to a person’s self worth. It is often established through the parties social position i.e. boss-employee, mother and daughter, but also how the parties interact with each other. If you interact in a way that demonstrates you are not interested in the other person, you have created a high status situation for yourself which reduces the other person to a low status or lower self worth on the pecking order. By not paying attention to the key players in the case until final monetary figures were exchanged, the mediator reduced the status of the plaintiffs which enabled them to continue to feel slighted by the system. Status is established in every line and gesture and changes continuously, and different behaviors can be used to raise or lower another person’s status. A better approach in this case would have been to recognize the high status of the plaintiffs early on, going through the process by shifting status as the negotiation unfolded.

2. Say yes, and ...

Every negotiation is a communication process built on a story. To begin with, the players have to agree to the basic set-up; the who, what and where have to be developed so that the stage is properly set for the negotiation. After that, each idea should be met with ‘yes, and.’ By saying ‘yes, and’ we are not necessarily agreeing with the principles presented by our partners. We are simply developing the scene. First we accept the reality created by our partners, and then we add new information, so that we can ultimately determine what realistic options are available for settlement. Using this principle early on in the mediation with the plaintiffs would have allowed the mediator to address the emotional roadblocks way before the impasse occurred at the end of the negotiation.

3. Consider the formula for improvising when in a negotiation

Every negotiation involves a tension between four competing forces: Instinct, Intuition, Information and Knowledge. That tension, when blended together, creates an opportunity for the mediator to improvise in such a way as to allow the story to unfold systematically and without ignoring critical concerns of the parties.

The competing forces can be defined as follows: Instinct describes inherent dispositions towards particular actions; an inherited pattern of responses or reactions to certain kinds of situations that serve to set in motion mechanisms that evoke an organism to action. Intuition is the ability to

interpret tones of voice, facial expressions, body language and other symptoms of the internal condition of the speaker. Information represents a message, something to be communicated from the sender to the receiver; it does not have to be accurate. It may be a truth or a lie, or just a sound. Strangely it may even be a disruptive noise used to inhibit the flow of communication and create misunderstanding. Knowledge is the confident understanding of a subject, with the ability to use it for a specific purpose. It is commonly shared by groups of people and in this context it can be manipulated and managed in various ways.

The way a mediator manages these forces is by interpreting the environment you are in by using your INSTINCT and the INFORMATION gathered from the people in conflict; then, encourage teamwork by building rapport and keeping the conversation going by saying, ‘Yes, and....’ The formula itself can be viewed as follows:

Instinct + Information = Intuition
Intuition + Knowledge = Improvisation

4. Gain your transaction dollars by being transformative

Negotiations of litigated disputes often have an over arching principle of horse-trading, operating within a set routine or pattern, designed to maintain rather than change the relationship of the parties. This ‘transactional’ approach to mediation is highly successful but ignores the ‘transformative’ nature of the process. The latter engages the parties in sometimes risky but usually positive work that prompts change in the parties and their positions. The former focuses solely on the exchange of numbers. While a garden variety personal injury case is a perfect dispute to be handled in a transactional way, when adding potential emotional hurdles to the case its important to utilize the transformational strategy.

5. Keep an eye out for strategic and emotional barriers

People hold private information they want to hide or to use to mislead the other parties in order to get a bigger piece of the pie. These would be ‘strategic’ barriers that need to be identified in order to manage the negotiation transaction, particularly when horse trading is approach to settlement. The bigger problem is when people depart from rational behavior, leading to a distortion and misinterpretation of information, resulting in artificial impasse of a case. This is known as ‘emotional or cognitive’ barriers that are just as critical to address as strategic barriers. These emotional barriers were ignored in this case until it was almost too late to salvage the deal.

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