

HOW A 1990S SITCOM CAN HELP YOUR CLIENTS “WIN” IN MEDIATION

By: Joann Rezzo, Esq.

If you were a fan of the 1990s sitcom *Seinfeld*, you likely remember George Costanza’s idea for a new holiday called Festivus. Festivus involved some bizarre things like “feats of strength” (such as living room wrestling), but one of its more memorable features was the “airing of grievances,” in which celebrants sit around a dinner table taking turns telling each other all the ways their friends have disappointed them over the past year.

I’ve had great results incorporating a “Festivus Phase” into the mediation process. I’ve found that it works in a few different contexts. It’s not right for every mediation, but in some instances, having the opportunity to air one’s grievances can be cathartic and allow a litigant to focus on the real business of resolving their dispute. Not only do these concepts work well in mediation, but they can also help you be a better litigator when dealing with highly emotional people.

I often do pre-mediation calls with counsel a week or so before each mediation. In one such call, it became clear very quickly that both the parties and the attorneys on one side were so angry with the other side that they were having a hard time thinking like business people when it came to discussing settlement. This was a multi-million-dollar case that had been pending for years and had two prior failed mediations (one with a retired Federal District Judge, and one with a sitting Magistrate Judge). Our mediation was to be the “last shot” before the parties headed off to trial.

Given the palpable animosity, I decided to dedicate some time at the beginning of the mediation for a “Festivus” session. In separate sessions, I allowed the litigants and attorneys on each side, to tell me all of the things the other side had done in the course of the litigation that bothered them. They loved the idea and animatedly disclosed all of the “horrible” and “egregious” things both the parties and attorneys on the other side had done. It worked. I could see the tension dissipate as they blew off steam.

Once they’d gotten that out of their system, I turned the conversation back to the business of the day. We had reached an agreement by the end of the full-day session, but – given the bad blood between the attorneys – they asked me if I’d be willing to stay late to help them finalize a long form settlement agreement. By 11:00 p.m., after much back and forth on the details, we had a signed agreement. Festivus worked!

Clinical research bears out the benefits of a Festivus phase. As discussed by Daniel Goleman in his book titled *Emotional Intelligence: Why It Can Matter More Than IQ*, when a person is highly emotional about an issue, it can result in “amygdala hijack,” where the person loses access to the prefrontal cortex, the part of your brain responsible for rational thinking. The key is to help them retake control of the amygdala and start thinking clearly again. And one step people can take to help them regain that control is to express their strong emotions, because verbalizing those feelings does much to diffuse their power.

In my experience as a mediator, Festivus is also a great tool for non-litigation workplace disputes. Companies and non-profits often ask me to work with employees whose relationships have broken down due to an underlying workplace dispute. Sometimes it’s two junior employees bickering over something small. Other times it’s C-Suite executives who have had a fundamental disagreement about how the business should be run. When I do this type of mediation (which I like to refer to as a “guided discussion,” so it does not feel so intimidating), a good deal of time is spent in a Festivus-type session where each person tells the other person how their actions affected them.

Unlike when I'm mediating a litigated case, in these situations I actually have the disputants in the room together for almost the entire time, so I have to exercise a certain amount of control and "rule enforcement" during the Festivus phase. It may seem risky to do this, but I've found it to be very effective. I've had sessions where both sides cried and later laughed. Sometimes they get angry, and we have separate "cooling off" sessions, but at the end of the day, we always seem to reach a place of understanding and the employees leave with a specific, achievable plan for how they are going to work together going forward in a manner that is constructive, honest, and transparent.

Festivus is also helpful in cases involving highly emotional litigants; often times these litigants merely need to be heard. Letting them tell their own story, in their own voice, helps them to feel like they've had their "day in court." The "airing of grievances" phase allows them to move on and, as I like to encourage them, to put on their "business-person hat," and discuss possible settlement options clearly and rationally. That's something they may never have been able to do without first having a "Festivus" phase.

As litigators, you can work Festivus into your own client relations. In the course of my 27-year career as a litigator, I learned that when I had a client who was highly emotional, they would often have a very strong knee-jerk reaction to different things (whether it was discovery that felt overly intrusive or an "offensive" demand/offer during mediation). I found the best approach with this type of client was to let them blow off steam about how they felt. If I tried to cut them off and explain how, in the litigation process, what they were seeing is actually "normal," they would overreact and want to argue. On the other hand, if I let them have their say and get the anger off their chest - if I allowed them to feel heard - they would then be able to actually hear me when I explained that, while their initial reaction was understandable, what was happening was actually normal and expected in the litigation process. So, there's a place for Festivus not just in mediation, but in your daily practice.

Here are a few ways you can make headway with highly emotional clients in your own practice:

- (1) Pay attention to what the person is saying and particularly to what he / she seems to be feeling. Show that you are listening and showing genuine interest; be interested and "empathetic" regardless of whether or not you agree with what the person is saying.
- (2) If the person is angry or tearful, don't run away from or avoid the emotion. Rather than avoid or ignore the feelings, let the person know that you know he / she is upset.
- (3) Don't try to calm the other person down just to make yourself feel more comfortable. Remember that he / she has some good reason for being upset.
- (4) Don't get defensive. You did not cause the problem, but getting defensive will only make it worse. Work to keep things focused on the problem at hand. These skills may help you win the person's respect and trust.

We can all thank Seinfeld for illustrating for us just how powerful an "airing of grievances" can be! And we can leverage that power to be better advocates for our clients, whether in litigation or mediation.



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Joann Rezzo is a mediator with West Coast Resolution Group. Having represented both Defendants and Plaintiffs, Joann understands each side's unique perspective. Joann's balanced approach to the mediation process and her calm, engaging style bring parties together to the all-important "Yes." During her 25+ year career as a trial attorney, Joann's client base covered the spectrum from blue-collar workers to executives in Fortune 500 companies, from small start-ups to multi-national corporations. Joann's ability to relate to people from all walks of life wins the trust of lawyers and clients alike. Contact Joann at jrezzo@westcoastresolution.com.