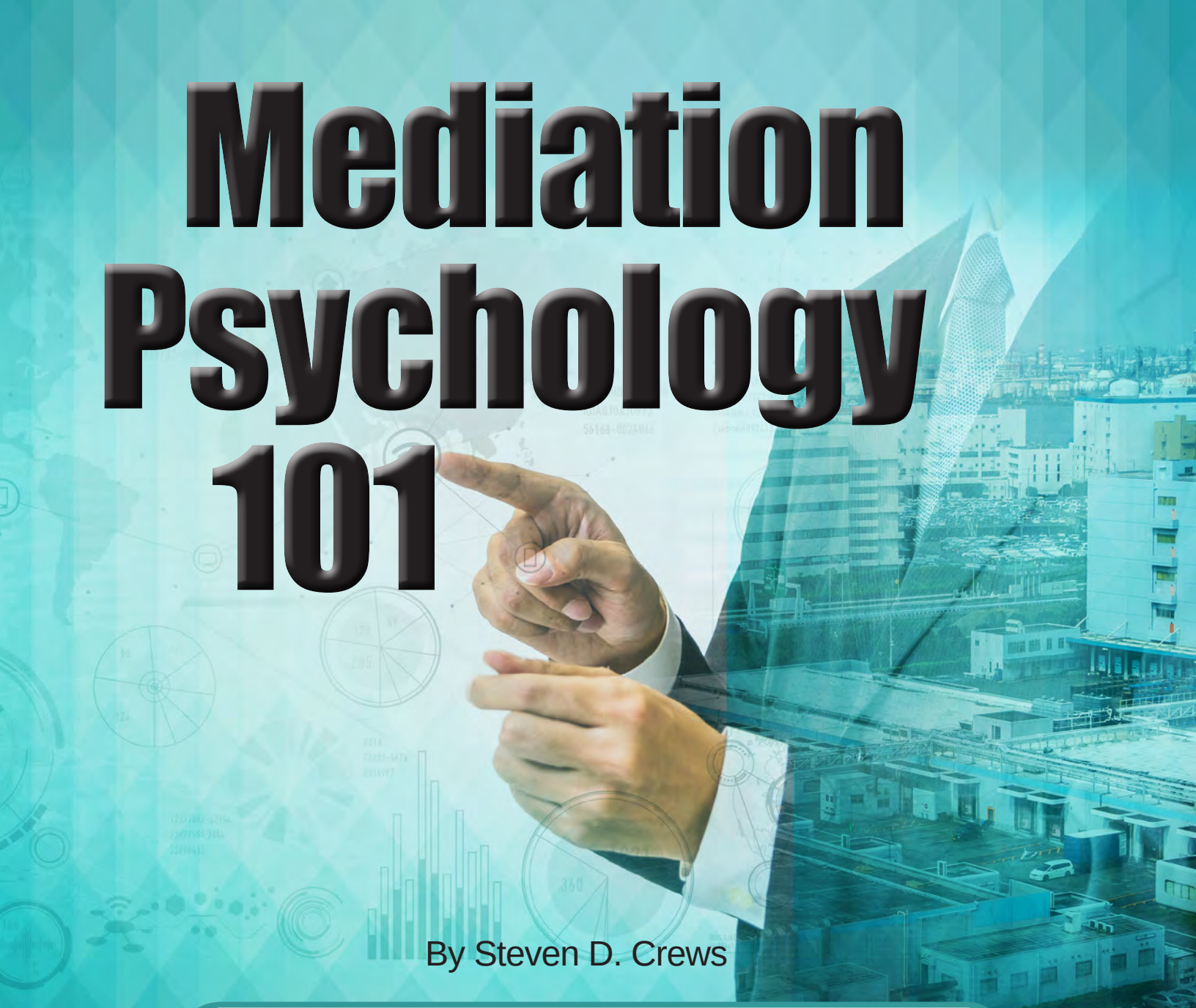
Mediation Psychology 101



By Steven D. Crews

I read an article in college stating the top three majors for people wanting to go to law school were accounting, history and psychology. I could understand accounting since it required you to analyze a set of facts. I also could understand history since it required a great deal of reading. I could never understand psychology until I actually earned my law degree. I have always been fascinated by watching the psychology prevalent throughout the litigation process and, in particular, during the settlement phase of litigation.

In most cases, there is a desire to resolve the case before trial. It obviously avoids the risk of an unfavorable decision, saves wear and tear on our mind and body, and saves our clients from the unpleasantries of cross-examination.

We should all remember, first and foremost, that mediation is not about a case but about a person. Most of the time there is someone who has been genuinely injured or wronged. We tend to lose some of the compassion necessary for successful mediation. Most parties in mediation just want to know there is someone who cares and is willing to listen and understand what they are going through. Some lawyers may get "numb" to the litigation process, but we have to stay forever mindful that most of these people are unfamiliar with litigation.

I encourage all plaintiffs' attorneys to have a pre-mediation conference with their clients. You need to fully discuss realistic expectations and the good points and bad points of the case. I had a recent mediation and I was very impressed in that the plaintiff's attorney had reviewed everything with the client in a pre-mediation conference. Every solid point I brought back from the defendant during the private caucus had already been fully discussed and, consequently, the clients were mentally prepared to deal with the bad facts. The comprehensive pre-mediation conference had a big role in bringing about a successful resolution.

Mediators do understand that, in some cases, they are being requested to be the bearer of the bad news. We understand that this is part of the job and comes with the territory. However, in most cases, the attorney should be the one who prepares the client prior to mediation. If you were the client, would you want to hear the bad news from a mediator you just met or from your own attorney? Also, I do not encourage establishing hard-line numbers at a pre-mediation conference. Sometimes that only creates unrealistic expectations for the client. Facts might be developed during the mediation which could significantly impact the settlement value of the case. I would advise the client to keep an open mind and consider any reasonable settlement offer, and you, along with the mediator, will analyze the reasonableness of the offers throughout the mediation process.

When the day of mediation arrives, hopefully, all sides have had an adequate pre-mediation conference. This is where I have the benefit and enjoyment of watching the actual psychology of the mediation process. It starts by looking at the various personalities. Some people are timid and some are strong. Some are quiet and some are loud. There are all types and that is why I absolutely love mediation. Attorneys, their clients and the claims people are all different. It is fascinating to watch everyone approach the different cases. They all have different life experiences and, consequently, all mediations are different.

It is always good psychology for all attorneys and parties to be respectful. We need to get back to statesmanship. We can have disagreements but still do it in a respectful manner. It is never good psychology to be offensive during your opening remarks or to say things that will cause people to retract or dig in. One hundred percent of the time it is best to be respectful, open and honest during the opening session. That sets the right tone and gets everything on the table. Admittedly there are some mediations where bad information needs to come out bit by bit but it can still be handled in a respectful manner at the opening.

After the opening comments, the mediation then shifts into what I call the "monopoly money" phase. Most of the offers are unrealistic and I do everything I can to prepare both sides for this reality. I have had to chuckle over the years when I pounded as hard as I could during the opening statement that we need to be "reasonable early" and then, when the process begins, we still go through the same monopoly money phase. It is just part of the process and most of the time it only impacts the speed of the mediation and not the final result.

After several rounds of the monopoly phase, the mediation actually begins. It is always interesting to watch people as they respond to pressure. As the numbers approach the more realistic values, you can see the reactions change. When under stress, the body reacts by going to stress-relieving behavior. Suddenly people start tapping the pencils more on the desk, wringing their fingers more or tapping their feet faster. This is also the part of the mediation where I have to take a deep breath and relax. My compulsion is to push fast and bring it to the resolution everyone is beginning to see. However, everyone, myself included, needs to slow down and let the process work. Sometimes the facts and the numbers have to "percolate." I enjoy being part of the psychology of the true mediation phase. My demeanor, tone and comments play a direct role as well. For that reason, I need to always represent total confidence in the process and in the chance of resolution.

Assuming the mediation was successful and the case resolved, all parties need to stay calm and collected, unless everyone has the same state of euphoria. Most of the time, everyone is a little disappointed so it is not hard for everyone to have a solemn face. However, there is the occasion when everyone has a reason to celebrate and that is a great moment. The mediation needs to conclude, just as it began, being respectful of everyone as you never know when the adjuster or attorney will be on the other side of the table.

For the occasional mediation that does not end in a settlement, it does not mean that the mediation was not successful. Certain parameters are created and information is exchanged. I have seen numerous cases resolve after the mediation when the facts continue to develop and the risk increases for one side or the other.

All lawyers want to know, as early as possible, if this is a case that is going to have to be tried or if there was a potential for settlement. Litigation attorneys recognize there is a distinct difference between "settlement mode" and "trial mode." Mediation allows all the parties to place a case in one of these two categories. We all know that the mindset changes when we recognize that a case is going to have to be tried.

In summary, never lose sight of the psychology involved in helping bring about a just result. 1) Be prepared. 2) Be sympathetic. 3) Be courteous. 4) Be reasonable.

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