It’s No Surprise: Empathy and Humor Can Help—Or Hurt—at the Mediation Bargaining Table

BY ROBERT A. CREO

The Master Mediator series focusing on how emotions work at the bargaining table, dragging positive steps from the worst to maximizing the best to encourage agreement, also included columns exploring the impact of mixed emotions—the ones that can be positive or negative, depending on the circumstances.

The middle ground is this month’s focus: surprise, empathy, and humor.

SURPRISE

Surprise qualifies as an emotion, with potential emotional responses, and has distinct mental and physical characteristics.

It’s tricky. Surprise, like confusion, is initially neutral, not positive or negative. That, in part, is why most people, if asked to name emotions, miss it.

As a result of its distinct qualities, surprise’s effect at the bargaining table is felt less as an emotion and more as an often-familiar tactic and strategy.

Not only litigators, but transactional lawyers and negotiators use elements of surprise to keep the opponents off-balance or to obtain concessions. Surprise can be weaponized. Litigators look to the past, while transactions occur in the future. This creates different dynamics in communications.

It takes time, and some openness, for individuals to process new information that changes set beliefs. Rather than convey new information by surprise, i.e., ambush, from the opposition, mediators can diffuse the impact of unexpected documents or arguments.

Having “surprise” information being filtered and being delivered from the mediator avoids or minimizes reactive devaluation—that is, the effect of minimizing an offer from an antagonist because of the source of the initiative, not the substance.


EMPATHY

There are distinctions between empathy and sympathy.

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THE THEME

Master Mediator Columnist Bob Creo has concluded a long look at emotions in mediation, summarizing in three concluding articles the more than 20 columns in a series that stretches back to the July/August 2016 issue. The final trilogy began last month, and will conclude next month. See Part 1 at Robert A. Creo, A Roundup: The Emotional Journey Review,” 36 Alternatives 149 (November 2018) (available at https://bit.ly/2QrAWXq). Emotions are present in all participants in a mediation session, including the mediator, and regardless of setting. The series addressed both negative and positive emotions in the decision making process. You can read the full columns in the Wiley Online Library at http://bit.ly/IBUALop. A box at the end of this article focuses on the particular articles relevant to this month’s review, and includes direct links.
You feel empathy directly; it is your own natural, and usually not premeditated, response to a situation or a person.

Sympathy involves your feeling badly for another person or group based upon your understanding and caring about what happened to them. It is often a response conditioned by culture or other social cues.

One common framing is to say that empathy is “I feel with you” while sympathy is “I feel for you.”

Empathy may provoke unexpected emotional responses since empathy is based upon us having the feelings ourselves. Empathy sticks with you longer—you may lose sleep over a situation, while sympathy passes more quickly.


Specifically, when a mediator consoles or otherwise identifies via an empathetic response to a participant in the process, opposing participants may feel that the mediator is “taking their side” and become doubtful or resentful of any information or recommendation that stems from the mediator.

If it is done in caucus, there may be process concerns about transparency or perceptions of manipulation of people. This potential for distrust can be counterproductive.

Compassion and empathy, however, are often the platforms mediators build upon to resolve personal injury, employment, family, business, and interpersonal conflicts. If the story told is moving, the mediator can explain how it affects them as an impartial and objective listener.

Presumably, it can be conveyed that if the mediator was affected, it is likely other neutral people, the judge or jury, will also be empathetic, or sympathetic, to the tale.

Like all tools in the mediator kit box, empathy must be used thoughtfully and in a manner that enhances rapport and trust.

HUMOR
Laughing with someone in any setting engages dynamics which creates bonds and interpersonal connections.

But there are downsides. Humor can be distracting. Participants come to solve a problem and not to be entertained.

“Storytelling can also be educational when

### LIST OF MASTER MEDIATOR COLUMNS ADDRESSING MEDIATION EMOTIONS

the moral of the humor—its point—teaches us about the benefits of the positive virtues and the value of honorable character traits. Self-deprecating humor can make us more human, build rapport, and allow us to bond with others.” For more, see “The Benefits and Pitfalls of Humor in the Bargaining Room,” 36 Alternatives 6 (January 2018)(available at https://bit.ly/2QjCBJs).

And for now, here is a brief checklist and guidelines for the mediator:

1. Don’t force humor. Effective humor is ad-libbed and flows from the situation.
2. Be extremely confident that no one present
3. Be extremely confident that no one present or any other stakeholder could take offense at your remarks. When in doubt, don’t.
4. If anyone’s humor offends a participant, deal with it privately in caucus mode, including addressing it with those offended; use acknowledgement or apology as appropriate, but sparingly.
5. First-person stories are better than structured jokes, especially if you are repeating a joke you have heard.
6. Acknowledge or laugh at the humor of others only if sincere. A fake grin may suffice. Try to avoid eye contact!
7. It’s really, really not about you the mediator, especially your settlement rate, an apparent favorite light-remark subject of neutrals along the lines of attorneys fees jokes.
8. Respect that mediators serve at the privilege of the participants.
9. Effective humor may correlate inversely to the severity of the loss or trauma.
10. You are not as funny as you think you are!

The final word on emotions in mediation in the long-running Master Mediator series will appear next month, summarizing positive emotions during the bargaining process. January will look at gratitude, humility, kindness, hope, joy, and serenity.

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**How We Relate**

**The study:** The science and the practice of negotiating.

**The context:** In this Part 2 of 3, the authors introduce excerpts from their massive work updating a seminal negotiation treatise with expertise for modern times. This month, the focus is on negotiating as individuals. Next month, organizational strategies are under examination.

**Hot topic:** ‘The deep level of mutual distrust does not allow true resolution; but if the process is led in the right direction, a stable conflict management might be achieved.’

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**ADR Techniques**

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NEGOTIATING IN A LOW-TO-NO TRUST ENVIRONMENT

BY MOTY CRISTAL

An Alternative Paradigm

If not trust, then what? If parties’ pasts and presents do not allow establishing trust, what can the negotiation process … be built on?

The alternative paradigm that we offer includes three elements which constantly intertwine. First, allowing for the emotional component of “freedom to hate.” Second, replacing trust with respect, a significantly different value structure, and third, building trust in the process, rather than trusting the other side. This involves trust in a process which both parties, directly, or with a mediator’s assistance, jointly build.

The Psychological Dimension:
The Freedom To Hate

Classic negotiation literature emphasizes the need to show empathy to the other side. Empathy is defined as the cognitive awareness of another person’s internal state (his thoughts, feelings, perceptions and intentions) and most important, the ability to share someone else’s feelings.

Showing empathy, or bringing an offended party to demonstrate empathy, or creating this sense of “understanding your counterpart’s emotions,” let alone those of a person you do not trust, is probably one of the most challenging phases, or tasks, in any conflict negotiation. [Having been “forced” by custom, social or professional norms...]

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