

## The Master Mediator/Part 2 of 3

# 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.

Effective mediators "do not attempt to manipulate or influence decisions of participants by theatrics or pulling the emotional strings attached to the surprise emotion. On the contrary, mediators attempt to avoid and diffuse surprises." See "No Surprise Party for Us! Here's What Happens When the Unexpected Arises at the Mediation Table," 35 *Alternatives* 123 (September 2017)(available at <https://bit.ly/2PHc4Ii>), and "Who Could Have Known? Dealing with the Emotion of Surprise in Mediation," 35 *Alternatives* 102 (July-August 2017)(available at <https://bit.ly/2wpg2Np>).

## The Middle Ground

**So far:** Master Mediator columnist Bob Creo is summarizing his study of emotions in mediation. Last month he gathered the mostly negative. This month focuses on what the author calls neutral emotions, ahead of the positives next month.

**The specific subjects:** Surprise, empathy, and humor aren't pluses or minuses for mediation ... until context defines them. Mediators need specific techniques to address these emotions at the negotiating table.

**Guidance for your work:** 'Effective mediators do not attempt to manipulate or influence decisions of participants by theatrics or pulling the emotional strings attached to the surprise emotion.'

## 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/2QiAWXq>). 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/1BUALop>. A box at the end of this article focuses on the particular articles relevant to this month's review, and includes direct links.

The author is a Pittsburgh attorney-neutral who has served since 1979 as an arbitrator and mediator in the United States and internationally handling thousands of cases. He conducts negotiation and decision behavior courses that focus on neuroscience and the study of decision-making. He is annually recognized by Best Lawyers in America and was named in both 2017 and 2014 as Pittsburgh Mediator of the Year. He is the author of numerous publications, including "Alternative Dispute Resolution: Law, Procedure and Commentary for the Pennsylvania Practitioner" (George T. Biesel Co. 2006). He is the principal of Happy Effective Lawyer LLC, an initiative focusing on lawyer contentment, core competencies, soft skills, and peak performance, which publishes The Effective Lawyer (<https://happyeffectivelawyer.org>) Blog. He is a long-time member of *Alternatives'* editorial board and of the CPR Institute's Panels of Distinguished Neutrals. His website is [www.robertcreo.com](http://www.robertcreo.com).

## The Master Mediator

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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.

Meantime, mediators need to be careful. Expressing empathy may work toward resolution, but its use is potentially dangerous to the appearance of impartiality. See “Bargaining Room Partners: Economics and Empathy at Work,” 35 *Alternatives* 51 (April 2017)(available at <https://bit.ly/2F2xag6>).

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

- “Tell the Participant: ‘You are Very Angry.’ Then Wait. That’s ‘Affect Labeling.’ And It Works,” 36 *Alternatives* 115 (September 2018)(available at <https://bit.ly/2OPvgmI>).
- Avoiding Isolation, and Creating a Connection, to Help Lonely Parties Settle their Cases, 36 *Alternatives* 103 (July/August, 2018)(available at <https://bit.ly/2E4ZcaA>).
- “Green: The Color of Money, and the Color of Envy,” 36 *Alternatives* 89 (June 2018)(available at <https://bit.ly/2y6WLyQ>).
- “The Humble Neutral, At Your Service,” 36 *Alternatives* 55 (April 2018)(available at <https://bit.ly/2RD3ub5>).
- “The Contagious Emotion: Gratitude Is Us,” 36 *Alternatives* 39 (March 2018)(available at <https://bit.ly/2qqFagU>).
- “Be Kind ... Purposely, Not Randomly,” 36 *Alternatives* 23 (February 2018)(available at <https://bit.ly/2Doy2ub>).
- “The Benefits and Pitfalls of Humor in the Bargaining Room,” 36 *Alternatives* 6 (January 2018)(available at <https://bit.ly/2QjCBsj>).
- “How Hope Can Confront Even the Most Hellish of Problems,” 35 *Alternatives* 163 (December 2017)(available at <https://bit.ly/2zC8gOL>).
- “Stay Positive: How and Why Joy and Serenity Emerge at the Bargaining Table,” 35 *Alternatives* 147 (November 2017)(available <https://bit.ly/2JD5htH>).
- “Fear and Anxiety as Tools of Hope,” 35 *Alternatives* 131 (October 2017)(available at <https://bit.ly/2Cw17o5>).
- “No Surprise Party of Us! Here’s What Happens When the Unexpected Arises at the Mediation Table,” 35 *Alternatives* 123 (September, 2017)(available at <https://bit.ly/2PHc4Ii>).
- “Who Could Have Known? Dealing with the Emotion of Surprise in Mediation,” 35 *Alternatives* 102 (July-August 2017)(available at <https://bit.ly/2wpg2Np>).
- “Emotional Legitimacy: The Choices We Make,” 35 *Alternatives* 87 (June, 2017)(available at <https://bit.ly/2zYBLvq>).
- “Having Second Thoughts? How Regret Motivates Settlement Decisions,” 35 *Alternatives* 72 (May 2017)(available at <http://bit.ly/2plNxZ3>).
- “Bargaining Room Partners: Economics and Empathy at Work,” 35 *Alternatives* 51 (April 2017)(available at <http://bit.ly/2pS1PDH>).
- “Coming to Grips with Sadness and Its Multicolored Manifestations,” 35 *Alternatives* 33 (March 2017)(available at <http://bit.ly/2mu08dC>).
- “Engaging Disgust: How to Settle, Contemptuously!” 35 *Alternatives* 21 (February 2017)(available at <http://bit.ly/2l624Ft>).
- “Coming to Grips with Disgust,” 35 *Alternatives* 9 (January 2017)(available at <http://bit.ly/2jgN2vP>).
- “Embracing and Using Anger in Mediation,” 34 *Alternatives* 166 (December 2016)(available at <http://bit.ly/2kqpmqD>).
- “On Emotional Processes, and Anger, in Two-Part Harmony: Where Decisions Really Come From,” 34 *Alternatives* 149 (November 2016)(available at <http://bit.ly/2jH129k>).
- “On Emotions and Decisions,” 34 *Alternatives* 122 (September 2016)(discussing the effect of participants’ shame in mediation)(available at <https://bit.ly/2Aaz2Oh>).
- “Getting Emotional: Where Closure May Mean Addressing Vengeance,” 31 *Alternatives* 145 (November 2013)(analyzing the effects of moves for revenge in mediation)(available at <http://bit.ly/2kqncaw>).
- “Retribution, Revenge, Justice, and Closure,” 31 *Alternatives* 138 (October 2013)(available at <http://bit.ly/2pS1wZx>).

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/2QjCBsj>).

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

or any other stakeholder could take offense at your remarks. When in doubt, don't.

3. 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.
4. Deprecate only yourself, not others.
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 media-

- tor, 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!

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*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.* 

## 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

## 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.’

to pursue trust-building, mediators report continuous failures to “establish trust” between disputants, which then results in mediation failures. ... ] And it goes deep to the core of negotiation psychology and negotiation processes.

Empathy, together with assertiveness, is essential in order to figure out and acknowledge the interests of the other side, to allow a

smoother process and, mainly in deal-making negotiations, to strengthen relationships.

However, psychological research shows the strong need of individuals, let alone groups, to define their own selves through distinguishing themselves from others, and they tend to define the “other” as an enemy.

Demonizing the other is a strong catalyst of building personal identity as well as group (national or organizational) identity. Complex conflict negotiations constantly encounter the gap between the fundamental psychological need to demonize the other and the traditional call to show empathy to your untrustworthy counterpart.

Differently from the work of O'Shea on Compassion [in this volume of the Negotiator's Desk Reference], another way of reconciling this gap is to rely on the difference between two related yet distinct social competencies—perspective-taking (the cognitive capacity to consider the world from another individual's viewpoint) and empathy (the ability to connect emotionally with another individual).

One line of research suggests that perspective-taking increased individuals' ability to discover hidden agreements, and to both create and claim resources at the bargaining table. Meanwhile, empathy did not prove nearly as advantageous, and at times was detrimental to discovering a possible deal and achieving individual profit.

In other words, although empathy is considered an essential tool in many aspects of social life, perspective-taking appears to be a more significant ability in negotiations.

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