

The Master Mediator/Part 3 of 3

Good Luck Has Arrived: Positive Emotions Means Successful Mediation Is at Hand

BY ROBERT A. CREO

JOY & SERENITY

When you enter a state of mind dominated by joy, you usually feel all is right and good.

In this state, your body undergoes chemical changes with the release of specific neurotransmitters. As the complex mix of chemicals and context interact, and if there is no crisis or urgent need on the immediate horizon, people typically feel tranquility and peace of mind.

It is being in the state where you feel relaxed, and where you are calm, optimistic, and satisfied.

If you apply the mediation goals of transformation and, the ultimate success, the transcendence of the dispute, serenity is an outcome. Although serenity can be reached in life and mediation without the precondition of joy, my experience is that the joy following beating the challenges of conflict precedes serenity.

We as mediators and advocates generally use the term “closure” as our blunt tool. Although it can be surgical in the sense that specific positive consequences of resolution



have been elicited during facilitative questioning, closure provides unique benefits to each and every participant, including the mediator.

Everyone wants to be happy. No one wants to truly believe, and live, a ruined life without pleasure or serenity. These goals align with resolution.

Although there are many ways to open the door, here are some potential questions or comments:

1. If you could wave a magic wand, not to change the past, but to structure the future, what would happen? What would it look like?
2. Do you have any beliefs, spiritual practices, or community values that might be promoted by a resolution?
3. Is the resolution sufficient to provide a platform of security, contentment, growth, etc.?
4. Is seeking revenge or punishment of others important to you?
5. Will a resolution promote your own sense of self (identity) or reputation?
6. Is it important that you are perceived as a good person, or as having taken the high road?
7. Do you see where any good could come from a resolution?

See “Stay Positive: How and Why Joy and Serenity Emerge at the Bargaining Table,” 35 *Alternatives* 147 (November 2017)(available at <https://bit.ly/2JD5htH>).

HOPE

Hope is the incubator of resolution.

Although the mediator is often the silent cheerleader of hope, it is often translated into the basic mediator tool of persistence. Mere admonishments to the participants not to give

THE THEME

Master Mediator Columnist Bob Creo has concluded a long look at emotions in mediation, summarizing in three new articles the more than 20 columns in a series that stretches back to the July/August 2016 issue. This month's column is the final installment. The wrap-up trilogy began in November discussing negative emotions, with “A Roundup: The Emotional Journey Review,” 36 *Alternatives* 149 (November 2018)(available at <https://bit.ly/2QiAWXq>), and included Part 2 last month, focusing on neutral emotions in “It's No Surprise: Empathy and Humor Can Help—or Hurt—at the Mediation Bargaining Table,” 36 *Alternatives* 163 (December 2018)(available at <https://bit.ly/2Br6HEa>). The premise is that emotions are present in all participants in a mediation session, including the mediator, and regardless of setting. You can read the columns in the Wiley Online Library at <http://bit.ly/1BUALop>. A box at the end of this article provides additional resources; last month's feature included cites and links to the Master Mediator columns on emotions.

up hope and to “hang in there” must be accompanied along a realistic pathway with both short- and long-term goals.

Experienced mediators navigate interim goalposts, often starting at opposite ends of the path for each disputant, and flame hope by advancing a participant to the next hope-marker.

This also may involve maintaining hope for an acceptable outcome early in the process, dashing hope for an outlier outcome. It may involve imparting to participants their own

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The Master Mediator

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weaknesses in the context of the reality that they are unable to control the outcome once the final decision is relegated to the judicial system. See “How Hope Can Confront Even the Most Hellish of Problems,” 35 *Alternatives* 163 (December 2017)(available at <https://bit.ly/2zC8gOL>).

KINDNESS

Aristotle wrote that kindness involves “helpfulness towards someone in need, not in return for anything, nor for the advantage of the helper himself, but for that of the person helped.” Friedrich Wilhelm Nietzsche contended that kindness and love are the “most curative herbs and agents in human intercourse.”

The school of thought called “legal positivism” argues that kindness and sympathy have no role in interpreting and applying legal rights. Legal positivism views the legal system as based solely on logic, where correct outcomes are deduced from predetermined legal rules without input from social or moral considerations.

Mediation is not derivative of legal positivism, and is more aligned with natural law theories of jurisprudence, which contend that law and morality are interconnected.

Here is a checklist with guidelines for the practitioner:

1. Don't force kindness. It flows naturally from authenticity and transparency.
2. Don't fear showing kindness in joint session or caucus.
3. Acts of kindness do not erode neutrality or mediator impartiality.
4. Kindness should not be self-aggrandizing or a strategic tool.
5. Kindness creates a safe environment for successful decision making.
6. Self-determination is a form of risk-aversion from uncertainty and the unforgiving, and often unkind, procedures and dictates of the litigation process.
7. Small talk about the disputants, not the mediator, is healthy and creates a platform for acts of kindness.
8. Use pauses, the word “and,” or other con-

ventions in place of the natural usage of “but.”

9. Daily acts of compassion cultivate and hone the naturalness of empathy and kindness.

See “Be Kind ... Purposely, Not Randomly,” 36 *Alternatives* 23 (February 2018) (available at <https://bit.ly/2Doy2ub>).

The Good Stuff

So far: Master Mediator columnist Bob Creo is summarizing a two-year study of emotions. Last month he reviewed the neutral emotions, like surprise, which need context to tilt one way or the other at the bargaining table. Part 1 was the negatives. This is the wrap: The feel-good feelings.

How does this work in a business setting? Here's the good news: Regardless of the matter, this is where people want to be. If there are contented feelings to be found, then it's the neutral's job to bring them out.

Are good feelings an actual mediation goal? Put it this way: Positive emotions are a precursor to settlement.

GRATITUDE

Gratitude implicates a number of concepts, including selfless action, reciprocity and “paying it forward.”

Gratitude can be contagious, which is a huge benefit in the mediation room. It can serve as a catharsis that permits people to “let it go” and move onward.

This is the proverbial “venting” touted in basic mediation training as a core element of alternatives to litigation—a procedure that suppresses feelings and other irrelevant evidence.

Gratitude may form a core element of a disputant's identity, which drives major decisions.

Here is a brief checklist and guidelines for

the practitioner:


1. Gratitude, even if expressed as a vulnerability, can be a strength.
2. Gratitude should be sincere and not be self-aggrandizing or a strategic tool.
3. Gratitude shows respect for the other participants.
4. Gratitude begets gratitude, and furthers a positive atmosphere for constructive dialogue.
5. Gratitude and apology go hand-in-hand.

At our best, mediators foster attitudes of forgiveness, gratitude, and grace that can lead to reconciliation, or settlement, that closes the case by the hands of the participants. Our job is their accomplishment. See “The Contagious Emotion: Gratitude Is Us,” 36 *Alternatives* 39 (March 2018)(available at <https://bit.ly/2qqFagU>).

HUMILITY

Researchers conclude that humility includes a self-awareness and openness that leads to critical thinking and perspective-taking. The lack of humility, which is often characterized as

SOURCES AND ADDITIONAL READING

- Brene Brown, “Daring Greatly, How the Courage to be Vulnerable Transforms the Way We Live, Love, Parent, and Lead” (Avery Reprint 2015).
- Antonio Damasio, “Looking for Spinoza: Joy, Sorrow, and the Feeling Brain” (Harvest 2003).
- Antonio R. Damasio, “Descartes' Error: Emotion, Reason, and the Human Brain” (Penguin Books Reprint Edition 2005).
- Joseph Epstein, “Envy: The Seven Deadly Sins” (New York Public Library Lectures in Humanities)(Oxford University Press 2003).
- Nachman Ben-Yehuda, “Betrayals and Treason: Violations of Trust and Loyalty” (Perseus 2001).
- Daniel Shapiro with Roger Fisher. “Beyond Reason: Using Emotions as You Negotiate” (Penguin Books 2006). 

pride, results in a number of cognitive biases. These are defects in thinking or rational decision making.

A false sense of self-depreciation comes off as exactly that—false. Disputants want experienced and credentialed mediators. The mediators have to quickly build rapport and trust without singing their own praises, either in falsetto or aggressively.

I believe that when mediators focus on the people and problem at hand, and are guided by their own positive emotions and virtues, especially kindness, gratitude, and humility, the authenticity creating the connections between people arises in an organic and natural manner. See “The Humble Neutral, at Your Service,” 36 *Alternatives* 55 (April 2018)(available at <https://bit.ly/2RD3ub5>).

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Even the driest of cases have emotional content.


Legal entities are comprised of sentient human beings. Conflicts are driven by decisions people make, either individually or as a group.

Unless artificial intelligence completely takes over, emotions will drive aspects of the decision making process. Maybe. Even the HAL 9000 computer in Stanley Kubrick’s 2001: A Space Odyssey displayed a range of emotions, and made a very human course of choices motivated by self-survival.

There is no right or wrong way to address emotions as they arise in the mediation room, including the mediator’s emotional reaction and response. The reality is that being tuned

into the current understanding of the science of emotion is helpful in our daily work.

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With the conclusion of the series of mediation emotions and this three-part summary, Master Mediator columnist Robert A. Creo moves this long-running monthly feature to every other month in Alternatives. He returns in March with a look at how “The Overconfidence Effect” operates in mediation. The archive of his monthly columns, beginning in November 2012, as well as earlier Alternatives articles, are available at altnewsletter.com. His previous CPR Institute Master Mediator columns, published on CPR’s website, are archived at www.cpradr.org and can be found by using the search function. 

ADR Processes

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and teams contained reserve clauses—provisions that essentially bound players to the team they originally signed with for as long as the team wanted to keep them.

Once these clauses were pulled back, and free agency was adopted, Major League Baseball and its players sought a new method for making sure players were receiving fair market value for their salaries—and, likewise, that the teams were paying these players at the fair market rate. See Benjamin A. Tulis, Final Offer “Baseball” Arbitration: Contexts, Mechanics and Applications, 20 *Seton Hall J. Sports & Ent. L.* 85 (2010)(available at <https://bit.ly/2Pc2edp>).

FOA was adopted as a means for resolving these salary disputes. The MLB and MLB Players Association negotiated a system in which players’ arbitration rights were tied to their years of service.

For example, players who had been with a team for at least six years were entitled to free agency. But during their third through sixth years with a team, they are entitled to participate in an FOA process. Before the third year, the team mostly holds contract rights.

In this version of FOA, the player and his team submit proposed salary figures to a panel of arbitrators if the two sides cannot agree upon that figure among themselves. Based on

party presentations at a hearing, the tribunal selects the salary figure that is closest to fair market value as the arbitration award.

In collective bargaining disputes (baseball or otherwise), FOA was viewed as a fair way to address power imbalances that had arisen in negotiations. But it was also seen as a way of stemming the risks associated with allowing an arbitrator to render awards without specific direction from the parties.

In 1975, Peter Feuille wrote about the “chilling effect” of baseball arbitration—a theme that is common in our discussions of arbitration even now. In the literature of the time, it was posited that the insertion of an arbitration process would “chill” any potential for sensible negotiations between parties. See Peter Feuille, “Final Offer Arbitration and the Chilling Effect,” *Industrial Relations: A Journal of Economy and Society*, 14: 302-310 (1975) (available at <https://bit.ly/2zIKj9l>).

The theory was that parties would lobby for the respectively highest or lowest award in attempts to moderate the ultimate wild card in arbitration: the perceived whims of the arbitrator and the likelihood that the arbitrator’s award would always split the difference between the parties’ valuations.

It was almost necessarily assumed that an arbitral award would result in splitting the difference between two numbers, another common concern expressed today despite numerous studies that have disproven this urban legend. See Ana Carolina Weber et al.,

Challenging the “Splitting the Baby” Myth in International Arbitration, Vol. 31 *Journal of Int’l Arbitration* No. 6: 719 (2014)(available at <https://bit.ly/2rh9N8N>).

The introduction of FOA processes sought to eliminate these risks. With FOA, parties could add controls to a process that otherwise felt too susceptible to corruption and inefficiency. It also came with the added incentive for parties to think more critically about making more concerted efforts towards fruitful negotiations prior to hearing—thus obviating the need for the arbitral process altogether.

This point is most intriguing—creating an arbitral process that was seemingly founded in order to avoid arbitration altogether. In nearly every sector that has been studied, the result of introducing FOA has been the same: the presence of a FOA clause often leads to a negotiated settlement prior to the need for a hearing.

THE PSYCHOLOGY OF FOA

In the years after FOA was introduced to Major League Baseball, its practice was studied by lawyers, psychologists and sociologists alike. The fascination with this process primarily stems from the effect that it has on the decision-making processes of the parties and the arbitrators.

For example, take early studies conducted by Henry Farber and Max Bazerman in the

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