

The Master Mediator

Tell the Participant: 'You Are Very Angry.' Then Wait. That's 'Affect Labeling.' And It Works.

BY ROBERT A. CREO

Reacting in anger or annoyance will not advance one's ability to persuade.

— U.S. Supreme Court Justice
Ruth Bader Ginsberg

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Many people avoid and suppress emotion. This is common in the law, which seeks to resolve problems and regulate behavior on the basis of a reasonably prudent person.

Reason guides behavior and decision making. Logic trumps emotion in the legal arena, so often emotion is suppressed, discounted, or avoided entirely in the context of the law and legal processes. Clients are routinely advised not to make an "emotional decision."

Affect Labeling is putting feelings into words. It is identifying the emotion. This can be done either by the person experiencing the emotion, or by an observer, or both.

Social scientists have divided emotions into six primary categories that this Master Mediator column has explored for more than two years: anger, disgust, fear, happiness, sadness, and surprise. There are more specific

subcategories refining what is being felt and processed that have made their way into the common parlance.

Some feelings can be derivative of more than one prime category with triggering events causing more than one type of emotion. For example, when a trusted employee embezzles money from you, it is likely that you will feel emotions in four or five of the categories: anger, disgust, fear, sadness, and surprise.

After studying emotion valence, primacy, and Affect Labeling by reading studies conducted by Prof. Jennifer Lerner while at Pittsburgh's Carnegie Mellon University before moving to Harvard University's Kennedy School of Government, and work by UCLA Prof. Matthew Lieberman, I realized that I had adopted and practiced a less-than-artful form of Affect Labeling for many years.

After attending presentations and studying the model created by my longtime colleague and good friend, Clovis, Calif.-based mediator Doug Noll, my own understanding gelled and my practice tools improved. I appreciate having been able to learn from him as he has advanced the tool of Affect Labeling via years of field use in a variety of settings.

I believe that all successful mediators use some form of Affect Labeling, albeit without identifying it and employing a specific step-by-step methodology.

After reviewing the science immediately below, I will return to the model articulated and promoted by Noll for use in negotiation and mediation.

THE SCIENCE

Prof. Matthew Lieberman concludes that identifying and expressly addressing emotions can have beneficial effects. This expression can be oral or written.

EMOTIVE COLUMNS

Master Mediator columnist Bob Creo is examining emotions in mediation in a series of columns that stretch back to the July/August 2016 *Alternatives*. Emotions are present in all participants in a mediation session, including the mediator. Although the dynamics of the most litigated cases and interpersonal claims involve negative emotions, the series explored times of joy, serenity, hope, gratitude, kindness, humor, and humility. You can read these columns with a subscription at <http://bit.ly/1BUALop>. This month's focus is on a specific method to address intense emotions.

He notes that there is a body of research that shows when people are faced with chronic or acute distress, the act of seeing a therapist, talking with supportive people, or writing in a journal can be healing. His research demonstrates brain changes:

[P]utting feelings into words (affect labeling) is a form of unintentional emotion regulation that serves to diminish distress by dampening limbic responses and the physiological correlates that typically parallel limbic activity. Affect labeling is associated with increased activity in right ventrolateral prefrontal cortex (RVL PFC), diminished amygdala activity, and diminished self-reported distress, similar to the pattern of effects observed during intentional emotion regulation. Additionally, it is proposed that intentional and unintentional emotion regulation both rely on a more general inhibitory control mechanism associated with RVL PFC.

Matthew D. Lieberman, Affect Labeling Expressive Writing and Emotion Regula-

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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* (www.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.

The Master Mediator

(continued from previous page)

tion, National Institutes of Health Grantome abstract (available at <https://bit.ly/2P4Ycoj>).

There is a significant amount of research on the benefits of express identification of emotional states and self-regulating emotions. Talk therapy has long been a mainstay of treatment approaches to stress and other psychological issues.

USING THE AFFECT

Mediators may use Affect Labeling to de-escalate participants who are experiencing intense emotional states.

This likely would occur in a joint session as a deliberate strategy. But if a participant displayed intense anger during a narrative, the mediator may elect to use Affect Labeling to stabilize the situation before it devolves into a shouting match or other counterproductive debate.

For example, I often ask people to speak their own truth from their heart in a joint session. This may include harsh words toward participants on the other side of the table.

If it becomes a rant, or other threatening or abusive language, then the mediator can intervene by acknowledging the speaker's anger, frustration, and sincere feelings using the Affect Labeling technique.

But the more likely use of Affect Labeling will be in caucus when the mediator explores the interests and motivations of the lay decision maker. It is important to ask counsel to step back, and to assume the role of listener and observer during the process.

The starting point is obtain buy-in for the expression by the participant of how they feel. While the participant talks, the mediator hears, but focuses on the tone and voice rather than listening to the content of the words.

This permits the mediator to concentrate on the emotional content and experiences of the participant. It eliminates the processing and judging of the words, decisions, and actions of the participant. We don't get bogged down in interpretation or planning the next mediator move.

The goal is to experience the emotions of the other person without involving your own ego, values, beliefs, or assessments. Doug Noll frames it as "guessing" at the emotion of the speaker, but I think it is more than a guess.

By the time this activity happens, the mediator is well into the case and its interpersonal dynamics. The mediator's expectation of emotions that will emerge is likely to be met. These generally will be anger, disappointment, frustration, and sometimes fear based upon the expense or uncertainty of litigation.

Moving Anger Out

The technique: Affect Labeling.

What's it for? Usually anger or grief resulting from failed relationships or unmet expectations.

In practice: The approach is an integral aspect of emotional intelligence. It defuses intense emotion and de-escalates anger.

The model moves to the next stages:

- (1) Verify;
- (2) Clarify; and
- (3) Reflect the feelings.

Verification is usually a short, declarative statement which is not framed as a question. Although so much of mediation training and technique involves the mediator playing an advanced form of the Jeopardy game, in this case, the mediator does not twist the thought into a question. The mediator, keeping it short, states:

- "You are angry."
- "You are disappointed."
- "You are betrayed."

Clarification often involves the mediator substituting "you" for the "I" word or amplifying the sentiments.

- "You are feeling betrayal by Mr. X."
- "You are responding to how he violated trust."

It is not good technique to query the participant at this point by posing a question—i.e., "Are you angry?"

Do not use preambles or extra verbiage, or otherwise insert yourself into the mix by speaking in terms of "I" statements—for example, "What I hear you saying is: You're angry."

For maximum effectiveness, the focus must remain on the participant's emotions. No one else in the room should speak or intervene. The participant is completely empowered, centered, and in control. This validates a core tenet of mediation, empowering the disputant by expression of their own voice.

My experience confirms that of Noll: After about 30-45 seconds of this emotional reflecting, the participant likely engages in an unconscious, biophysical response, such as a head nod or dropping shoulders with a sigh of relief.

Noll urges mediators to recognize they are done with this phase when these occur. The moment is complete. Stop reflecting. Stop talking and pause. Silence is golden.

The objective is to allow the participant sufficient time to reflect and to process his or her venting. The participant needs to be ready for what will be the decision-making part of the mediation.

Doug Noll's advice is if it is not flowing as expected, repeat the reflection period for about another 90 seconds. If it fails again, then perhaps the person is blocking the emotions and it is time to retreat and move onto another path.

CASE PROFILE

I served as a mediator on a case involving a group of landowners making a nuisance claim against a gas production company that had obtained the mineral rights and easements.

The claim was for specific alleged violations and incidents happening over a period of years. It was obvious that that this matter was critical to the landowners' daily lives and that any resolution had to respect the continuing nature of the contractual relationship between the parties.

I asked one landowner if I could sit next to her so she could explain in her own words how she felt about the gas company and the issues without the others chiming in or offering additional information. She understood she was to express how she felt—not recount events or point fingers.

She spoke for about 10 minutes with all ears intently listening. I employed the Affect Labeling technique and listened to her voice

and tone for part of the narrative. I was surprised that all six primary emotions were present in her. She was:

1. Angry at the gas company representatives who were rude to all of them.
2. Disgusted they had to hire lawyers to file suit.
3. Fearful that the problems would reoccur.
4. Happy that a resolution involving better communication procedures could be implemented.
5. Sad for the breakdown in the business relationship.
6. Surprised the top gas company regional representative lived in the area with them and wanted to personally meet on a regular basis to troubleshoot and engage in preventive measures.

It was time well spent on her sentiments. And her attitudes were contagious to create goodwill among the other landowners. The case moved smoothly to a global settlement.

My practice is to end the mediation day with a joint session. As everyone was leaving the room, she came up to me and asked if she could hug me! I responded, "Of course," and announced to those remaining, that to pro-

mote impartiality, if anyone else wanted to line up for a hug "to come on down."

These are the days mediators love.

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With the increasing substitute of electronic means of communication for face-to-face dialogue, many participants may not have taken the time to explore and assess the emotional aspects of the conflict.

Expressing emotions orally is natural. People are not limited by the length of a tweet, the format of an app or email, or the ability to type in a way that promotes accurate depiction of feelings.

Affect Labeling is very different from conversation. The participant is in their own lane and traveling at their own pace. There is no flipping back and forth on speaker-listener lanes and no multitasking as one hears and thinks about the words of the other.

Here is a brief checklist of the Affect Labeling tool for the mediator based upon Doug Noll's model.

1. Ignore the words for 90 seconds.
2. Pay attention to emotional experience of the speaker.

SOURCES AND ADDITIONAL READING

- Jennifer S. Lerner, Ye Li, Piercarlo Valdesolo, Karim S. Kassam, "Emotion and Decision Making," 66 *Annual Rev. Psychol.* 799 (2015)(available at <https://bit.ly/2B3IsPf>).
- Matthew D. Lieberman, Naomi I. Eisenberger, Molly J. Crockett, Sabrina M. Tom, Jennifer H. Pfeifer, & Baldwin M. Way, "Putting feelings into words: affect labeling disrupts amygdala activity in response to affective stimuli," 18(5) *Psychol. Sci.* 421 (May, 2007)(available <https://bit.ly/2B5fRsP>).
- Douglas E. Noll, You Tube Video on Affect Labeling: <https://www.youtube.com/watch?v=KKXs22MWlow>
- Douglas E. Noll, "De-Escalate: How to Calm an Angry Person in 90 Seconds or Less" (Atria, 2017).

3. Reflect back emotions to speaker as validation.
4. Mediators "lend" their own prefrontal cortex to the emotional disputant.
5. Mediator stops reflecting when the participant's head nods.

In-House ADR

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ship between corporate and outside counsel is only as good as the quality of communication between the two.

This article offers a brief overview of the importance of a successful relationship between corporate and outside counsel, and provides tips for building such a relationship through communication.

IT TAKES TWO

While a successful relationship between corporate and outside counsel is always important, it is particularly important in alternative dispute resolution for at least two reasons.

First, a commercial dispute can be a long and emotional process. While outside *transactional* counsel may simply act as a punctual service provider, outside *dispute*

Let's Talk

Who? This article drills down to the particulars of the inside counsel-outside lawyer relationship.

The issue: Everyone who has worked as or with either brand of attorney knows that communication is the answer to and the cause of nearly every problem, including fees.

The answer: You know it already. This is about managing expectations. But this award-winning article (see the sidebar on the next page) has fresh new advice on getting there, including what must be covered on alternative dispute resolution matters.

counsel follows the client through this difficult process, acting as both advocate and adviser. In order to successfully perform each of these roles, outside counsel must have a full understanding of the client's business objectives and a complete picture of the relevant facts and law.

Although corporate counsel is not the client itself, that contact is the outside counsel's client interlocutor; the corporate counsel can provide critical institutional knowledge and help align the outside counsel's strategy with the client's commercial goals.

As advocate and adviser to the client, outside counsel must have a strong relationship with the client interlocutor. Outside counsel must inspire the confidence that he or she can safeguard the client's interests.

Oftentimes the client's fate lies in the success or failure of the outside counsel's advocacy. Moreover, corporate counsel must trust that sensitive information or documents will

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