

The Master Mediator

Be Kind ... Purposely, Not Randomly

BY ROBERT A. CREO

The fact is that people are good. Give people affection and security, and they will give affection and be secure in their behavior.

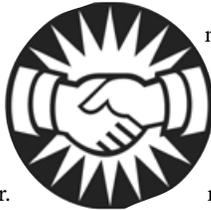
—Prof. Abraham Maslow

I was disappointed in 1970 when I arrived at Brandeis University for my freshman year to learn that Prof. Abraham Maslow had passed away a few months earlier.

Maslow had served on the Brandeis faculty from 1951 to 1969 before he moved to Menlo Park, Calif., after suffering an almost-fatal heart attack in 1967. So I learned about the Maslow Hierarchy of Needs, and Humanistic Psychology, a field he founded, from other excellent professors rather than the great thinker himself.

Despite outcries from the cynics trapped in the positive law dynamics of conflict resolution, the more experience I gain as a mediator, the more committed I became to the power of positive thinking, pro-social behavior, and personality traits.

As an alternative form of dispute resolution, mediation thrives by channeling empathy, compassion, benevolence, honesty, upright-



ness, and realistic expectations and risk assessments. In the early days of mediation, this was derisively referred to as “touchy-feely” by hard-nosed litigators.

Although the trend has been for mediation to evolve in a legalistic fashion guided by rights-based interests, let’s go back to the roots of mediation via an exploration of kindness as an appropriate tool on the path to resolution.

DISPUTANTS DECIDE

Participants come to mediation to solve a problem. Obviously, the more interpersonal the conflict, such as relationship-based conflict of family, employment, and small-business principals, and the longer prior history of the disputants, the less likely the outcome decisions will be made solely, or even primarily, on legal principles.

This includes claimants suffering personal injury or catastrophic economic losses from natural or other unforeseen disasters or trauma.

Decisions, and the risks people will take, arise from a holistic decision-making dynamic. Emotions, values, beliefs, resources, and both economic and non-economic motivations push and pull the deciders despite being boxed into the procedural mandates of litigation.

Even in large business-to-business commercial disputes, emotions, personalities, and principles are in play. Cognitive behavior research and behavioral economics have proven that people are not going to act solely upon a rational model of economic interests.

INNER TOOLKIT

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.

Mediation can settle cases and be a transformative process too. Building rapport, trust

(continued on next page)

THE THEME

Master Mediator Columnist Bob Creo is in the midst of a long-running series on emotions in mediation. Emotions are present in all participants in a mediation session, including the mediator. The dynamics of the overwhelming majority of litigated cases and interpersonal claims involve negative emotions. Many of these columns have focused on the negatives. (You can read the Master Mediator columns with a subscription at <http://bit.ly/1BUALop>.) But in more than three decades of serving as a neutral, notes Creo, there have been bright and shining moments of joy, serenity, hope, gratitude, grace, humility, kindness, humor, and cheerfulness. The examination of positive emotions continues here with kindness.

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. Bisel Co. 2006). He is the principal of Happy! Effective Lawyer (www.happy.lawyer), an initiative focusing on lawyer contentment, soft skills, and peak performance. 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)

and credibility is a human connection, not a technical skill. Kindness, treating people with civility and respect, comes from empathy and natural compassion to ease the problems and difficulties of others.

Although there are people who promote conflict to further goals of vengeance or to send messages, most people prefer to avoid conflict and confrontation. I start with the assumption that disputants prefer not to be in conflict and competition—they would just as soon end the hassle and move on with their lives.

I learned from colleagues many years ago that it is best practice to start each mediation session with separate orientation meetings with each party. In these introductory caucuses, we engage in a significant amount of small talk where I learn as much as possible about the lives and interests of the participants.

I ask people to tell me a little about their history, family, hobbies, and interests. I have also asked them if there are challenges or difficulties they face outside of the case they want to share with me.

Sometimes I do this in a later caucus. Many experienced mediators advocate direct questioning of what goals and outcomes the participants hope for from the process. I often set the stage for participants to share something about themselves in the joint session.

All of this is dependent on the context of the case, the attorneys, and other specifics circumstances. There are no formulas, mechanics or tactics, just human conversations.

These conversations are frequently restarted in a later caucus when I return to the themes, values or goals expressed earlier in the day. The tone of the questions are not, however, prosecutorial, or accusatory when pointing out inconsistencies or choices which appear to retard progress or undermine goals. Challenges do not have to be “gotcha” in nature.

This is where kindness, in both tone, body language, and words is effective for the mediator. Here are a few samples of approaches that have proved successful in transforming disputants by fueling voices, and choices, from a place of compassion.

The mediator can ask, “Your interests and perspectives are understandable and legitimate

[Pause! But do not use the word “but”! See guideline below.]—do you think that by doing ‘YYY,’ or taking position ‘ABC,’ that it may:

- ... make “John Doe” more or less likely to accept the resolution?
- ... change how your adversary views you or your case?
- ... be productive or counterproductive?
- ... cause you to sleep better or worse tonight?
- ... give rise to negative emotions such as shame/ guilt/ anger/hate?
- ... make you feel pride/joy/humility?”

People respond to kindness. Mediators can draw out the best in people with positivity.

Beyond Economics

The aspiration: Mediation as a safe harbor and empowering voice grounded in a purposeful compassion arising from natural empathy.

The positive emotion examined here: Kindness is a counter-intuitive tool for the commercial advocate despite it being a core attribute of classic “old-school” mediators in their use of empathy and compassion.

The bottom line: People respond to kindness. Use it and see the results.

People are resilient and can make good decisions under stress and uncertainty.

A PROFILE OF KINDNESS

I draw a substantial amount of inspiration from everyday heroes and acts of kindness and altruism. The large, multi-million dollar gifts of the super-rich do not move me, even when they are giving all, or most, of their fortunes away upon their deaths.

What I admire is those who face their own daily challenges and still have gratitude and kindness in their hearts to help others. I am

pleased to share my brief friendship with a special young man who lived a life full of daily kindness.

Ryan Cenk was diagnosed shortly after birth with a brain tumor, with a grim prognosis for surviving past childhood. He died in April 2017, at age 22. He left us with a lifetime of accomplishments well beyond his years, despite his constant health challenges and multiple disabilities resulting from his tumor and its treatments.

He was a tireless advocate for employing the disabled through the social media #IWantToWork campaign. He never lost sight of the essential goodness and kindness of mankind and went full steam ahead in everything. He never expressed self-pity or considered himself victimized by his limitations.

Ryan, at age 10, earned his way into the Guinness Book of World Records KIDS for selling the most popcorn for the Cub Scouts. His Eagle Scout project was raising funds and installing park benches in the Remember Me

SOURCES AND ADDITIONAL READING

- Aristotle, (translated by Lee Hon-eycutt). “Kindness.” Rhetoric, Book 2, Ch. 7(available at <http://bit.ly/2ErQDld>).
- Abraham Maslow, Motivation and Personality (1st edition: 1954, 2nd edition: 1970, 3rd edition 1987) (2nd edition available at <http://bit.ly/2ISxIb5>).
- Abraham Maslow, Toward a Psychology of Being (1st edition, 1962; 2nd edition, 1968).
- Friedrich Wilhelm Nietzsche, “On the History of Moral Feelings,” in Human, All Too Human: A Book for Free Spirits (available at <http://bit.ly/2CX0LW6>).
- “Forget Survival of the Fittest: It Is Kindness That Counts,” *Scientific American* (January 2017)(available at <http://bit.ly/1crjAz2>)(“A psychologist probes how altruism, Darwinism and neurobiology mean that we can succeed by *not* being cutthroat.”)
- Social media hashtag: #BeKind LikeRyan 

Rose Garden near the Flight 93 Memorial in Shanksville, Pa. There will soon be a trail named for him there.

Part of his legacy is the continuing hashtag #BeKindLikeRyan, involving random acts of kindness to strangers such as buying them meals or handing them gift cards. Ryan was constantly engaged in charitable and humanitarian activities via his church and other community groups.

His actions are legend in the Pittsburgh area. I met him late in his life when his father, Bill, became my neighbor and friend. I am privileged to have learned so much from Ryan in such a short time.

It is a common adage that mediators

should walk the talk. Nothing could be truer when applied to the empathy, compassion, and kindness tools inherent in human nature.

SUMMARY AND CHECKLIST

Here is a brief checklist and 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 conventions in place of the natural usage of "but."
9. Daily acts of compassion cultivate and hone the natural nature of empathy and kindness.

Sports ADR

(continued from front page)

which he operates. Furthermore, these same owners will eventually consider renewing or terminating the commissioner's contract.

The Court inferred the specific terms of arbitration from applicable statutes in Missouri's Uniform Arbitration Act and directed the parties to proceed with a neutral arbitrator. *State ex rel. Hewitt v. Kerr*, 461 S.W.3d 798, 803 (Mo. 2015)(en banc)(available at <http://bit.ly/2Ade0kK>).

The Court was correct in determining that the commissioner should not act as an arbitrator for these claims. This article analyzes the commissioner's bias. Next month, it will explore how other professional sport leagues handle arbitration claims, and provide recommendations for NFL players and employees.

HEWITT'S CAREER

Todd Hewitt started with the Rams during college as a summer equipment department employee. He joined the organization full-time in 1978, and became the equipment manager in 1985. He held the position until early 2011.

During his tenure with the Rams, Hewitt signed a number of employment contracts with the organization. In November 2008, Hewitt signed his final contract, covering both the 2009 to 2010, and 2010 to 2011, football seasons.

The contract contained an arbitration clause binding Hewitt to the NFL Constitution and By-Laws, and the league's rules and regulations. He also was bound to the decisions of the NFL Commissioner if a dispute arose, as the commissioner is granted "full, complete, and final jurisdiction and authority to arbitrate" through the Constitution and By-Laws.

In January 2011, head coach Steve Spagnuolo informed 54-year-old Hewitt that the organization would not renew his employment contract. In May 2012, Hewitt filed suit in the 21st Judicial Circuit in St. Louis County, Missouri, against the St. Louis Rams Partnership and three affiliated companies—the Rams Football Co., ITB Football Co. LLC, and the St. Louis Rams LLC. (collectively, the Rams)—asserting age discrimination claims in violation of the Missouri Human Rights Act, Sec. 213.010 et seq.

The defendants moved to compel arbitration and dismiss or stay the court proceedings, citing the arbitration provision in Hewitt's employment contract. Hewitt opposed arbitration for five reasons.

First, three of the four defendants did not sign the agreement. Second, the parties came to no meeting of the minds as to the essential terms of the arbitration agreement. Third, the arbitration agreement lacked consideration. Fourth, the agreement did not contain a clear and unmistakable waiver of Hewitt's right to bring a statutory violation claim in court. Fifth, Hewitt claimed several provisions of the arbitration agreement

were unconscionable, including the provision naming the NFL Commissioner as the arbitrator.

The Rams' motion to compel arbitration was granted by the trial court with the action to be stayed pending the arbitration. Upon the rejection of an appeal, Hewitt petitioned the Missouri Court of Appeals for a writ of mandamus or prohibition, which issued a preliminary order. Both parties sought and were granted transfer to the Missouri Supreme Court, and Hewitt asked the Supreme Court to issue a writ of mandamus preventing the trial court from compelling arbitration of the dispute.

The Supreme Court recognized that a writ of mandamus was the appropriate mechanism to review whether a motion to compel arbitration was improperly sustained. *State ex rel. Vincent v. Schneider*, 194 S.W.3d 853, 855 (Mo. 2006)(en banc). In order to qualify for a writ of mandamus, a litigant "must allege and prove that he has a clear, unequivocal, specific right to a thing claimed." *Furlong Cos. v. City of Kansas City*, 189 S.W.3d 157, 166 (Mo. 2006) (en banc).

The Court found the arbitration provisions within Hewitt's contractual agreement were unconscionable because the NFL Commissioner controls every part of the process and there is no third party, independent review of his decisions.

The Court, implying the specific arbitration terms from applicable statutes in Missouri's Uniform Arbitration Act, then issued

(continued on next page)