

EMOTIONS AT THE MEDIATION TABLE

The study and practice of law is often an exercise in rational, deductive thinking. Popular images of law school, such as the TV show “*The Paper Chase*,” glorify the training of law students as non-emotional, reasoning, linear professionals - unencumbered by messy and “touchy-feely” emotions. Recently a student said to me “Law students are not supposed to have feelings.” Clients believe lawyers are able to think critically, speak persuasively and exert intellectual power, even though the client feels helpless, victimized, impotent or outraged. Early research on the use of emotions in problem solving tended to support the approach of law schools: emotions get in the way of clear thinking and should be eliminated from the search for the right answer. More recent discoveries in the related fields of cognitive neuroscience and negotiation, however, point to a very different truth. Not only are emotions inescapable in conflict resolution, they are actually *helpful!* So how can lawyers, mediators and parties use them productively?

Surprisingly, human beings are in a state of perpetual emotions. We continually experience affective states such as anger, nostalgia, revulsion, excitement, or anxiety. In many situations, when a threat is perceived, our bodies respond before our minds even become aware of the stress. In anger, the action tendency is to strike out or attack, and before that behavior is executed, our bodies have already pumped the blood into our arms. In fear, the action tendency is to escape, and the blood is already in our legs before we even know we want to flee. Even though lawyers are well schooled in “keeping a poker face,” recent local research on emotional contagion shows that *mediators* unconsciously reflect on their face the intense and negative emotions expressed by the parties. It happened to me. In the midst of a heated exchange between a husband and a wife, the husband, who happened to be sitting right next to me, unexpectedly shouted “You know that many things I do are because when I was five years old my father shot my mother right in front of me before shooting himself!” Then he started to cry. We broke into caucus a few minutes later, and when I came back into the room the wife said to me “I saw the look on your face when he talked about his father shooting his mother. You feel sorry for him and that is just why he did it. He always uses that to get sympathy. I have no pity for him!” I knew about emotional contagion but until that moment I had never been confronted with my own contagion! I wrote down “Watch face when parties say highly emotional things!”

It can happen in trial. It can happen in negotiation. It happens when we don’t realize it and the unconscious part of our brain triggers a micro-expression that is noticed by others. So how do we promote the positive power of emotions to facilitate settlement in mediation while avoiding the negative emotions that can derail it?

Several recent articles have touched on the ways mediators can channel negative emotions and also promote the positive mind-set that promotes creative brainstorming and collaborative problem solving. Research shows that every “anger provoking thought or perception becomes a minitri trigger for amygdala-driven surges of catecholamines, each building on the hormonal momentum of those that went before. A second comes before the first has subsided, and a third on top of these, and so on...Anger builds on anger.” (Dispute Resolution Journal, November 07-January, 08, page 31, quoted from D. Goleman, *Emotional Intelligence: Why It Can Matter More Than IQ*. 61 Bantam Books 1995.) After arousal, it can take up to **48**

hours to restore the body to its original state of calm. In a state of agitation, creativity and cooperative behaviors virtually disappear. How does this fit with the widespread belief that people need to vent their anger in order to get rid of it? Does this mean parties should not speak in mediation?

Anger experts now say that neither repressing nor venting anger are helpful in reducing it and are harmful to the body. What can help is changing our reaction to stressors-particularly if the cause of our anger is another person's behavior (after all we can't change them, we can only change our reaction to them). Mediators can time and choreograph the telling of the "conflict story" in a way that does not hinder collaboration and creativity. Instead of having negative storytelling (either by the attorney or the party) immediately follow a mediator's opening statement (whether in joint or private session), the mediator can caucus with each side early and direct questions that promote appreciation of the other party - particularly when the parties have previously had a good or at least not conflicted relationship and have an opportunity to restore that for the future.

Mediator What was it about Jim that caused you to become his business partner:
Can you describe for me a time when you and Jim were able to work
through a problem successfully when conflict arose?
What do you know about Jim that gives you confidence that you two can
get a win-win solution today?
After we resolve this problem today, help me picture what your future
relationship could be like?

Advocates can employ those same tactics in an employee dispute, a family case, a probate matter or any conflict where a previous relationship occurred. The questions will encourage the parties to think more positively about the person they will be negotiating with in mediation. This triggers positive effects and reduces tension and defensiveness. Telling the negative, or conflict story, after that type of inquiry, can considerably diminish the negative effects. The mediator can also establish and enforce ground rules that respect the positive context that was established by the questions above. I have seen this work in mediations, even when the parties were originally very angry and pessimistic about settlement.

In the book The Power of a Positive No, William Ury warns about maladaptive responses (attacking, accommodating or avoiding) and gives specific ways to help the parties see what negative emotions are going on underneath. Once the fear, sadness or anxiety is acknowledged and brought into the frontal cortex, the parties can move into problem solving without being derailed by negative emotions. There is much that attorneys and mediators can do to guide the parties through the process in a more positive way: being soft on the people must always precede being tough on the problem if the problem is to be solved.

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