

THE ROLE OF ANGER IN MEDIATION

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THE ROLE OF ANGER IN MEDIATION

*"When angry, you will make the best speech you'll ever regret."*¹

William Ury
October, 2012

The role that anger plays in the mediation of legal disputes continues to be the subject of debate in the literature. A number of aspects of the matter remain controversial. There are competing theories as to whether or not anger is an obstacle to mediated settlement, or actually contributes in some positive manner. This preliminary question itself can be looked at from two different approaches. Firstly, does anger (or some other form of high emotion) perform a useful function in terms of one's own decision-making ability? Secondly, what is the impact of the expression of anger by a party on the opposing party?

An understanding of the impact of anger on a party's cognitive process, and the impact of the expression of anger on an opposing party is essential to anyone interested in assisting parties to resolve a legal dispute through mediation. Obviously, this would include a mediator. In theory at least, this should also include legal counsel.

Once the relevance of anger to negotiation is understood, mediators and counsel must develop the skills required to deal with both the influence of unexpressed anger and the impact of expressed anger on opposing parties.

This paper will attempt to explore these issues through a review of some of the literature, and to highlight some aspects that might deserve more detailed analysis in future.

¹ www.ted.com/talks/william_ury.html?fb_ref=talk

Anger as an Inescapable Element in Negotiation

Anger is almost an inevitable part of conflict. A party believing his position to be right generally will believe the other side to be wrong and unreasonable in refusing to meet his demands.² As a result, parties in mediation often blame each other and the resulting anger is one of the most commonly experienced emotions during a conflict.³

In dispute resolution, the parties usually begin with strongly felt emotions.⁴ Parties in lawsuits tend to be angry with the other side, the other side's lawyer, the court system itself, their own lawyer, innocent third parties for not taking sides, and others.⁵ As a result, the mere fact that parties are engaged in a legal action causes feelings of high emotion to emerge in a way that is very different, and often more extreme, than in the ordinary course of human interaction. Legal dispute negotiations are backward looking negotiation processes because they arise out of past encounters. They are all about historical events in which a malfunction has occurred, losses have been suffered, and the parties are now claiming that they have been wronged. The negotiation between parties to a conflict is not the same as a negotiation between parties seeking to establish future relationships or a mutually beneficial transaction.⁶

² Lieberman, Amy. "The 'A' List". In (February – April, 2006) Vol. 61 *Dispute Resolution Journal* at 48

³ Jameson, Jessica, Andrea M. Bodtker, and Tricia S. Jones. "In Practice – Like Talking to a Brick Wall: Implications of Emotion Metaphors for Mediation Practice". In (April, 2006) *Negotiation Journal* at 200

⁴ Friedman, Ray, Cameron Anderson, Jeanne Brett, Mara Olekalns, and Nathan Goates. "The Positive and Negative Effects of Anger on Dispute Resolution: Evidence from Electronically Mediated Disputes". In (2004) Vol. 89 No. 2, *Journal of Applied Psychology* at 370

⁵ Furlong, Gary T. *The Conflict of Resolution Toolbox*. Mississauga, Ontario: John Wiley & Sons Canada, Ltd., 2005 at 221

⁶ Adams, The Honourable George W. *Mediating Justice: Legal Dispute Negotiations*. Toronto, Ontario: CCH Canadian Limited, 2003 at 118

A lawsuit is not a mechanism to bring people together for a thoughtful examination of their problems. It is not meant as a therapeutic engagement.⁷ In fact, because parties feel wronged or wrongly accused, they are not predisposed to cooperate for their mutual benefit.⁸

The adversarial system provides ample opportunity for the expression of anger. In the ordinary course of a lawsuit, a party's anger is expressed in a formal, structured way through his or her lawyer.⁹ However, in a mediation, the only limits on the ability of a party to express his or her anger are those imposed by the mediator and possibly legal counsel.

In summary, high emotion, including anger, is an integral part of the human experience and therefore inherent in negotiation.¹⁰ One can certainly expect it to emerge in the context of a legal dispute.

Types and Sources of Anger

An understanding of the role of anger in mediation requires a brief review of the types of anger more commonly seen as well as the role of attribution as a source of anger or high emotion.

⁷ *Ibid.*, at 119

⁸ *Ibid.*, at 119

⁹ Grillo, Trina. "The Anger Alternative: Process Dangers for Women". In (April, 1991) 100 Yale L.J. at 1573

¹⁰ Fromm, Delee. "Emotion in Negotiation". In *The Theory and Practice of Representative Negotiation*. Colleen M. Hanycz, Trevor C.W. Farrow, and Frederick H. Zemans, (Toronto: Emond Montgomery Publications Limited, 2008) at 219

a. *Aggression*

If anger tends to elicit aggressive responses in the context of a conflict¹¹, this tendency may well be exacerbated when dealing with people who are aggressive by nature. The fact is that in the human experience, people come in all sorts of shapes, sizes and temperaments. Whether based on family influences derived from childhood or otherwise, some people are simply aggressive by nature. From time to time, every legal counsel and every mediator comes across someone who appears to genuinely enjoy the litigation process. While a detailed exploration of this remarkable phenomenon is well beyond the scope of this paper, it may be that aggressive people enjoy litigation because it provides them with a legitimate and organized outlet for the expression of their aggressive tendencies. The expression of anger appears to go hand in hand with those tendencies.

Aggressive people involved in legal disputes tend to be quick to blame others when things do not go precisely their way. Neuroscientists have suggested that blame provides a sense of temporary empowerment when expressed as anger given that the expression of anger gives rise to the production of adrenaline in the brain. The stimulating effect of adrenaline provides a sense of empowerment. However, this stimulation is only temporary. For at least that reason, in my experience, aggressive people tend to be highly unpredictable. Their moods and, therefore, their approaches to conflict will vary in proportion to the amount of adrenaline being generated in their brains.

¹¹ Tager, Michal, Christopher Federico, and Eran Halperin. "The Positive Effect of Negative Emotions in Protracted Conflict: The Case of Anger". In (2011) *Journal of Experimental Social Psychology* at 162

b. Anxiety

Another important element to consider in terms of the character traits of parties to a dispute relates to anxiety. As has been stated on numerous occasions by many judges, litigation is not a tea party. I have yet to see a party go through a litigation proceeding – even if he or she actually enjoys the experience – without exhibiting some elements of anxiety. Coupled with blame, anxiety translates quickly into anger and resentment. The fact is that when we are anxious, we blame others for our anxiety.

Anxiety appears to result, fairly commonly, in the need to control one's environment. This may be based on the erroneous belief that if one can control the environment, one can reduce one's anxiety levels. Behaviour in the course of a mediation that demonstrates a desire to control will frequently represent a trigger for anger in the opposing party. This is particularly so for an opposing party who has developed a resentment at the thought of having been controlled or manipulated by the other party during their business (or personal) relationship up to that point.

More commonly, anger is generally considered to be a secondary emotion. That is to say, anger is generally viewed as the result of a primary emotion such as fear or hurt. The idea that the hurt feelings may be expressed in anger requires no elaboration. With respect to fear, in the context of a legal dispute this may relate to a fear of financial disaster, a fear of inadequacy, or perhaps simply a fear of one's inability to control the outcome of any given situation.

c. *Attribution*

The notion of attribution, widely reviewed in the literature, may be viewed as a source of anger as well.¹² One interpretation as to why an opposing party behaves a certain way can lead to anger, while a different interpretation of the reason for the same behaviour (perhaps based on more information or more insight) can lead to understanding.¹³

As the literature establishes clearly, parties to a dispute may attribute the behaviour of the opposing party to either external circumstances or to disposition. Where one over attributes behaviour to disposition, the tendency may be referred to either as “fundamental attribution error”¹⁴ or perhaps “fundamental omission error”¹⁵. Either way, if a party believes for any one of a variety of reasons that the opposing party’s behaviour is intentional, he or she is most likely to attribute the behaviour to disposition as opposed to external circumstances. In that event, the situation is far more likely to give rise to anger than if the behaviour is attributed to external circumstances.

Attribution theory may also be considered in the context of simple misperception. When an opposing party’s behaviour, either through speech or action, is misinterpreted, the speech or action may be perceived as hostile or adversarial (whether arising from that party’s disposition or otherwise). A typical response will be based in anger as well, particularly for individuals who are themselves inherently aggressive. Additional information or clarification may cause a party to realize that he or she has misperceived

¹² Allred, K.G. “Anger and Retaliation in Conflict: The Role of Attribution” in M. Deutsch and P. Coleman, eds. *The Handbook of Conflict Resolution* (San Francisco: Jossey-Bass, 2000) at 236

¹³ *Ibid.*, at 33

¹⁴ *Ibid.*, at 34

¹⁵ Blum, G. and R.H. Mnookin. “When Not to Negotiate” in A. Schneider and C. Honeyman, eds. *The Negotiator’s Fieldbook* (Washington, DC: American Bar Association, Section on Dispute Resolution, 2006), at 101

the other party's motivations. A skillful mediator will assist in that connection. In the meantime, however, the anger created as a function of that misperception will have to be dealt with in order to get to the point at which the surrounding circumstances are illuminated and the parties become open to the possibility of resolution.

In fact, I would suggest that even where the source of a party's anger would appear to be self-evident, a mediator (as well as that party's legal counsel) will likely be far more effective in helping parties resolve their dispute if he or she has an understanding of both the type and the source of that party's anger. It is important to try to understand the different motivations behind anger because that single emotion can serve different goals in different contexts.

Anger as a Factor in Decision-Making

While it is normal and natural for a party to a legal dispute to feel anger whether expressed or suppressed, it would appear clear that such feelings represent an obstacle to settlement at least in the sense that angry people are less likely to make decisions in their own best interests.

Feelings of anger generally begin with a triggering event which causes a party to assess the relevance of a given situation to his own aspirations and the likelihood of achieving his own goals. The party will then focus on who is to blame for the problem and assess whether or not the person will be able to cope with the situation as well as the likelihood

that the situation will improve.¹⁶ In the meantime, however, the party dealing with feelings of anger – especially when they are expressed – will be subject to an excessive amount of adrenaline produced in the brain. This hormone is produced by the adrenal glands when the body is in a state of high anxiety, fear or excitement. While it enhances alertness¹⁷, and while neuroscience teaches us that emotion of this nature is an integral part of reason and the decision-making process, anger will affect cognitive processing and interfere with the ability to solve complex problems.¹⁸ It has even been suggested that regardless of personal levels of intelligence, during anger arousal, we perform generally as if we have a learning disability. Even subtle forms of anger impair problem-solving and general performances. In addition to increasing error rates, anger narrows and rigidifies mental focus obscuring alternative perspectives. The angry person has one “right way” of doing things, which, if selected in anger, is seldom the best way.¹⁹ It has been suggested that suppressing high emotion can result in an impaired cognitive ability.²⁰ Based on the literature (and my own experience), emotion will impact cognitive ability whether suppressed or expressed.

Should Anger be Expressed or Suppressed?

There is literature that suggests that the expression of anger should be discouraged by mediators.²¹ In one study, the authors concluded that the amount of verbal

¹⁶ Jameson, Jessica, Andrea M. Bodtker, and Tim Linker. “Facilitating Conflict Transformation: Mediator Strategies for Eliciting Emotional Communication in a Workplace Conflict”. In (January, 2010) *Negotiation Journal* at 29

¹⁷ Lieberman, *supra*, at 49

¹⁸ Friedman, *supra*, at 371

¹⁹ Stosny, Steven. “Anger as Adversary”. In (1997) *Legal Times* at 1

²⁰ Fromm, *supra*, at 220

²¹ Grillo, Trina. “The Anger Alternative: Process Dangers for Women”. In (April, 1991) 100 *Yale L.J.*, at 1574

communication between the parties during a mediation has little impact on the outcome of the mediation.²² As a result, those authors suggested that communication should be circumscribed in mediation, since "a complainant who dwells on negative feelings caused by past events may find it hard to look toward a constructive relationship with the respondent in the future".²³

Fortunately for those mediators and counsel who might favour this approach, it is one that comes naturally to many legal practitioners, who appear to believe that emotions are irrelevant to parties who are only interested in reaching a settlement. Those mediators argue that exploring emotions simply escalates tension and derails productive discussion.²⁴

The impact of the external expression of anger in a mediation should be considered from two perspectives, namely the impact on the party expressing anger and the impact on the opposing party.

The impact of the expression of anger on the opposing party should not be underestimated. If one begins with the assumption that both parties to a legal dispute possess strongly felt emotions, the opposing party witnessing the expression of anger may well feel compelled to express his or her own anger, by way of response. This may be done in a manner that is more extreme or confrontational than might otherwise had been the case. Studies have shown that when one person expresses negative

²² *Ibid.*, at 1574 – see reference in her footnote 132

²³ *Ibid.*, at 1575 – see her footnote 133. Query whether or not the same conclusion would have been drawn had the study focused on a dispute in which the resolution did not contemplate a future relationship.

²⁴ Jameson, *supra*, at 199

²⁵ Friedman, *supra*, at 371

emotions such as anger, it can evoke similar negative emotional expressions in others. Feelings of anger cause people to focus less on their own interests and more on retaliating against the other party. Therefore, where expressions of anger by one party will generate an expression of anger by the respondent, the possibility of settlement will be negatively impacted.²⁵

Put another way, parties tend to become angry when confronted with an angry opponent and happy when confronted with a happy opponent.²⁶ When a person feels anger, he or she tends to attack. When people are under attack, they do not listen. They simply become defensive. When anger is met with anger, the situation will simply become escalated and neither party will be able to think clearly about the best way to approach the situation.²⁷ Angry people expressing their anger tend to lose control and fail to recognize the damage each is inflicting on the other. They cannot see the big picture, reducing their ability to manage cognitive complexity, see nuance, or perceive the other person's point of view.²⁸

As a practical matter, anger expressed between parties will lead to more errors as a result of bigger risk taking, with the attendant opportunity for greater financial loss. Parties negotiating in this atmosphere tend automatically to reject ultimatum offers,

²⁶ van Dijk, Eric, Gergen A. van Kleef, Wolfgang Steinel and Ilja van Beest. "A Social Functional Approach to Emotions in Bargaining: When Communicating Anger Pays and When It Backfires". In (2008) *Journal of Personality and Social Psychology* at 601

²⁷ Calloway, Deborah. "Using Mindfulness Practice to Work with Emotions". In (2009 – 2010) *10 Nev. L.J.* at 359 - 360

²⁸ Jameson, *supra*, at 200 – 201

decrease their initial offers, refuse good offers, and decrease or eliminate any desire to work together in the future.²⁹

As discussed more fully below, a party who declines to express anger may be contributing to the likelihood of settlement, at least theoretically, by avoiding the incitement of anger in the opposing party. However, it does not appear that proponents of this approach have addressed the internal effect of suppressed anger on the party himself. Venting may have a cathartic effect for an angry party, potentially opening the door to an exchange which, however unpleasant, might lead to understanding and resolution. At the very least, that party will feel that he or she has had the opportunity to be heard and understood. This is an important first step towards reconciliation. There are those that would go so far as to say that pent up emotion represents a roadblock to a successful negotiation.³⁰

Furthermore, thoroughly suppressing anger will do nothing to alleviate that party's anxiety. In other words, suppressing anger may resolve the concern about the impact on the opposing party in, but it will only contribute to the build up of anger, resentment and anxiety internally. As a result, the negative impact of anger on one's own cognitive abilities will continue to prevail.

This gives rise to something of a conundrum. On the one hand, expressing anger will likely give rise to reciprocal anger, which may reasonably be assumed to represent an obstacle to settlement. On the other hand, suppressing anger will inhibit a party's ability

²⁹ Fromm, *supra*, at 241

³⁰ Duffy, James. "Empathy, Neutrality, and Emotional Intelligence: A Balancing Act for the Emotional Einstein". In (April, 2010) 10 Queensland U. Tech. L. & Just. J. at 46

to understand the opposing party's point of view and address the competing interests at hand in a sufficiently objective and dispassionate manner so as to achieve resolution on a reasonable and principled basis.

Another approach to the issue stems from the notion that the expression of anger may actually contribute to settlement, depending on the circumstances. Firstly, it has been suggested that anger can be conducive to reconciliation and relationship improvement after some time has passed from the original offence.³¹ More specifically, notwithstanding the fact that parties in mediation may reciprocate their opponent's emotion³², the expression of anger or high emotion may well serve to transmit valuable information, namely the expressing party's bargaining limits. At the very least, it will impact the other party's perception of those limits. The expression of emotions may provide the other party with crucial information about what behaviour they might expect of their opponent. That information may form the basis of the party's own bargaining behaviour. Accordingly, communicated emotions lead to informational inferences and those inferences have behavioural consequences.³³

There are studies that suggest that under certain circumstances, the chances of settlement are very clearly enhanced by the expression of anger. It appears that in some circumstances, parties make lower demands and higher concessions to angry opponents than to happy opponents. People give in to angry opponents because they assume that the limits of angry opponents are higher. They may then reason that a

³¹ Tager, *supra*, at 158

³² van Dijk, *supra*, at 604

³³ *Ibid.*, at 600

settlement can only be reached if they concede.³⁴ Parties ascribe higher limits to angry opponents and accommodate those higher limits by offering a better deal. Additionally, parties seem to fear that low offers are more likely to be rejected by angry opponents than by happy opponents.³⁵

Having said that, the same studies indicate that when fear of rejection is removed, communicating anger may backfire in the sense that an angry party may end up with a lower outcome. In certain cases, a party will be more deceptive towards an angry opponent and by deceiving the angry opponent, the party may lower the limits of the opponent which “allows” the party to make low offers without having to fear the consequences.³⁶ In the case of a dispute in which a failure to settle is of little consequence to a party, that party will make lower offers to an opponent who communicates anger than to an opponent who communicates happiness. Again, the consequences of rejection play an important role in shaping the effect of emotions as bargaining behaviour. Where the consequences are low, parties are less bothered by the possibility of their offers being rejected. In those circumstances, the communication of anger will backfire and result in lower offers.³⁷

It should be noted that a mediator may not be privy to either a party's BATNA, his perception as to the consequences of a failure to settle, or the extent to which he fears that his best offer will be rejected. A mediator is even more likely to be unaware of any deception, in terms of misinformation or failure to disclose information, on the part of a

³⁴ *Ibid.*, at 601

³⁵ *Ibid.*, at 605

³⁶ *Ibid.*, at 608

³⁷ *Ibid.*, at 610

party to a mediation. Legal counsel, however, is in a much better position to assess these factors. They must be taken into account by counsel in considering the appropriate way in which to manage the client's emotional state in the mediation setting.

Finally, if pent up anger or high emotion represents a roadblock to successful negotiation, the party dealing with self-justifying emotions that are the basis for his position by expressing them may assist that party to shift his focus from his position to his interests³⁸.

All of this leads us to the rather inevitable conclusion that while anger may represent an obstacle to resolution, it must be assumed ordinarily that a party's anger is going to have to be expressed, where it exists to any substantial extent, in order for the parties to have a hope of reaching a settlement. Certainly, there are enough good reasons to encourage the expression of negative feelings to justify doing so.

The challenge for the mediator is to recognize a party's emotional state, assess it in the context of the dispute and make an appropriate decision as to the circumstances under which that party is to be encouraged to express those emotions. Needless to say, that analysis can only be undertaken after the mediator has acquainted himself with the emotional state of both parties to the dispute. At the very least, that investigation is critical to the decision as to whether to permit venting or any other expression of emotion in the presence of the opposing party or merely in caucus.

³⁸ Duffy, *supra*, at 46

Self-Regulation and Emotional Intelligence

As a general principle, a mediator is not going to be able to assist a party to manage anger or strongly felt emotions without first coming to grips with his own emotions. Simply put, a mediator must know his own trigger points and be able to anticipate when negative emotions arise within himself. A mediator must acquire the tools necessary to assess his own emotions and reduce their intensity as quickly as possible.³⁹ This is because mediators, needless to say, are human. As such, they are subject to the same pressures and influences that give rise to emotional reactions as any party. Having said that, while it may be necessary and perhaps desirable for parties to be able to express those emotions under circumstances established or controlled by the mediator, the mediator will not be able to create the environment suitable for that to happen without the ability to approach the parties objectively and dispassionately. As such, the mediator must first manage his or her own emotions.

This requirement for emotional self-awareness, sometimes referred to as emotional intelligence, first involves the recognition of one's bodily responses so that strong negative emotions can be identified early on. The mediator must become aware of his emotions as they arise by tuning in to what his body is telling him.⁴⁰ Self-awareness will alert the mediator to feelings that might otherwise threaten his impartiality. Emotional self-regulation prevents these feelings from becoming expressed and acted upon in a manner that undermines the mediation.⁴¹

³⁹ Fromm, *supra*, at 229

⁴⁰ *Ibid.*, at 224

⁴¹ Duffy, *supra*, at 60

Emotional self-awareness is the necessary pre-condition to a mediator's ability to recognize and respond to expressions of emotions by parties. This is based on the theory that emotions lead to confrontation because people are blind to the triggers that lead to the expression of high emotion. When the mediator controls his own emotions, he can learn to distance himself from a party's emotional reactions. Seeing his own triggers makes it possible for the mediator to see what is happening when others react emotionally. The mediator is able to point out what is going on, walk the party back to the trigger point, and hopefully deescalate the situation.⁴²

As a result, mediation techniques or tools to recognize and work with emotions expressed by parties will not work unless the mediator has practiced working with his own emotions consistently in his ordinary life. Otherwise, if a mediator permits his own emotions to come to the fore, he will forget these techniques and tools⁴³ and, more than likely, lose credibility with both parties to the mediation.

Put another way, accessing one's own emotional intelligence will enable a mediator to assess what a party needs to see, hear and do during a mediation.⁴⁴

The importance of emotional intelligence and self-awareness is as relevant to counsel as it is to mediators.

In a sense, the task is somewhat more difficult for counsel. Unlike the third party neutral mediator, counsel has been immersed in his client's case, likely from the outset. Counsel has been exposed primarily to his own client's side of the story, subject only to

⁴² Calloway, Deborah. "Using Mindfulness Practice to Work with Emotions". In (2009 – 2010) *10 Nev. L.J.* at 339

⁴³ *Ibid.*, at 339

⁴⁴ Duffy, *supra*, at 45

whatever documentary and oral discovery may have taken place by the time of the mediation. While any counsel will recognize the importance of providing advice that is as objective as possible, the fact remains that many counsel will, either deliberately or subconsciously, adopt their client's cause as their own. As a result, it may be more likely for the negotiations at mediation to give rise to emotional upset for counsel than for the mediator. This is particularly true if counsel for the opposing side is able to press the right triggers, for example by challenging counsel's integrity, pride, ego, or skill level. In that event, the need for counsel to regulate his own emotions becomes even more important but at the same time, be more difficult than for the mediator.

Furthermore, unlike the mediator, legal counsel acting on behalf of an angry client in an emotionally charged dispute may find himself in a different predicament. Angry clients have a rather disturbing tendency to turn their anger upon their own lawyers, sometimes at the drop of a hat. Whether that is a function of the often irrational behaviour that characterizes angry outbursts and attitudes filled with blame and resentment is beyond the scope of this paper. However, experienced counsel will have gone through this experience and may well have to confront it once again at or after mediation. This will particularly be so if the mediation does not go well for the client, either because of hostility created by the opponent's expressions of anger or for any other reason.

A lawyer confronted by his own angry client, and possibly confronted by attacks on his own integrity and threats to his own ego, will have to manage his own emotions in order to respond appropriately and constructively. This reality will represent a very real challenge to counsel. Counsel will approach the negotiation, presumably, with a view to obtaining the best result reasonably available to his client given the strengths and

weaknesses of his case, the likely outcome and costs of trial, and the other usual considerations. It may well be that this objective would be best served by permitting his client to express anger and high emotion, although presumably under controlled circumstances. On the other hand, permitting a client free rein with his emotions may result in a backlash against the party's own lawyer if the desired result is not achieved. Furthermore, there are clients who seem to feel that their counsel ought to share their anger, particularly if it is based in righteous indignation. Counsel who join in with their clients in expressing those sorts of sentiments may ingratiate themselves with their clients but, I would submit, their doing so rarely contributes to the cause of settlement.

There is an additional reason why the need for counsel to help regulate his client's conduct is even more significant than that of the mediator. The mediator's involvement in the matter will conclude at the end of the mediation whether the case has settled or not. If the case has not settled, the action will proceed, counsel will continue to be involved, and counsel will next face the task of assisting the client to regulate his emotions when the matter reaches the courtroom. In the courtroom, of course, the consequences of failure are far greater than they are at mediation, the atmosphere is likely to be even more emotionally charged, the need to regulate emotion is even higher, and the difficulty of doing so is even greater.

The Management of Emotions in Mediation

Once a mediator identifies a party as being under the influence of high emotion, either by a clear and obvious expression of anger or by a more subtle manifestation such as facial expressions, speech, tone of voice or body language, the mediator must be able

to determine the appropriate way or ways in which to effectively lower the temperature. At this point, the mediator's task is to create an environment in which the party feels safe enough to express himself but sufficiently comfortable that the party does so in a manner that is as non-confrontational as possible. In fact, in the ideal environment, the likelihood that strong, negative emotions will be expressed in an intemperate manner will be minimized.⁴⁵

Perhaps the first decision for the mediator to make is whether or not to encourage or even permit discussion likely to lead to emotional outbursts in general session. Indeed, some experienced mediators have adopted the practice of moving directly into caucus immediately after the mediator has made his or her introductory remarks, on the assumption that opening statements by counsel, whether supplemented by remarks from the parties or not, are likely to be inflammatory. Presumably, this is a determination that the mediator will have made after having reviewed mediation briefs and before the commencement of the mediation itself. In that manner, if the client feels the need to unburden himself of his highly emotional state by venting, or indeed if the mediator wishes to encourage the party to do so, the negative impact upon the opposing party and therefore the negative consequences for the mediation can be avoided. Of course, any benefit from both sides hearing what the other has to say, however expressed, will also be lost. This is a difficult but necessary decision for the mediator to make.

The primary tool employed by successful mediators in managing the parties' high emotional state is that of empathy. Once a party has released what may have been

⁴⁵ Fromm, *supra*, at 232

previously unexpressed emotions and communicated unmet needs, the task of the mediator is to respond with empathy.⁴⁶ The essence of empathy is listening without judgment.⁴⁷ Listening without judgment has been described as having “an amazing power to heal conflict because listening allows misperceptions to be clarified and relieves fear and hurt by humanizing both sides of the confrontation”.⁴⁸ In this manner, the mediator may be able to decode the parties’ emotional experience, help the party understand his own emotions, and help the party reappraise his own emotions in an effort to remove them as an obstacle to settlement.⁴⁹ Through the demonstration of empathy, a mediator may be able to reorient a party to focus on what he can reasonably expect rather than on what the party desires.⁵⁰

An important aspect of empathy, or the acknowledgment of emotion, is active listening. An active listener will identify the emotion and find a way to restate the substance back to the party in order to clarify the message and the emotion.⁵¹ If the mediator can recognize the pain or other root cause of the party’s anger, and communicate to the party that the party has been heard and understood, the mediator will likely be successful in establishing a rapport with the party. By so doing, the mediator will gain the party’s trust and confidence, the emotional temperature will have been reduced, and

⁴⁶ Duffy, *supra*, at 45

⁴⁷ Calloway, *supra* at 358

⁴⁸ *Ibid.*, at 363

⁴⁹ Jameson, *supra*, at 31⁵⁰ Gehris, Melinda S. “Good Mediators Don’t Ignore Emotion”. In (2005) 46 N.H.B.J. at 33

⁵¹ *Ibid.*, at 34

the party's ability to make reasoned and appropriate decisions in the course of the mediation may be enhanced.⁵²

Empathy can be a critical component of conflict resolution in another way. Experienced mediators will transmit expressions of regret by one party to another in order to interrupt the parties' demonization of each other.⁵³ If a party can be encouraged by the mediator to show empathy for the opposing party's situation, this is almost certain to enhance the possibilities of settlement. Showing empathy for an opponent's situation is difficult but nevertheless, it is a powerful communication device. It is difficult because parties are subject to stereotypical thinking, but it is powerful because of its potential to overcome those stereotypes.⁵⁴

Another important tool in the mediator's arsenal to show empathy is reframing. By repeating the essence of the message back to the party who has expressed high emotion, but in a manner which encourages an objective and fact-based interpretation of events, the mediator demonstrates that the party has been heard but also assists the party to gain a new perspective.

At this point, it is useful to contrast the notions of empathy and sympathy. Simply put, empathy is a critical aspect of the mediator's work. On the other hand, sympathy is simply inappropriate and usually dangerous to the process.

⁵² Curtis, Dana. "Reconciliation and the Role of Empathy". In James J. Alfani, and Eric R. Galton, eds. *ADR Personalities and Practice Tips*. (Washington, D.C.: American Bar Association, Section of Dispute Resolution, 1998) at 61

⁵³ Adams, *supra*, at 218

⁵⁴ *Ibid.*, at 102

This is because an expression of sympathy, or an attitude that suggests that the mediator is sympathetic to a party's position, will likely compromise the mediator's neutrality. By definition, a mediator is a third party neutral. A loss of neutrality will cripple the mediation and likely cause it to fail. It is impossible to establish trust, confidence and rapport with a party where the mediator is seen by that party as being biased in favour of the opponent.

The difference between empathy and sympathy is subtle but critical. An empathetic mediator acknowledges each party's feelings as being equally important. The mediator must be sensitive to both parties who probably have a different perspective on the same set of events. The mediator must show that he understands and acknowledges the feelings of each party, so that each party feels validated.

A mediator expressing sympathy will appear to agree with the party. Indeed, an emotionally intelligent mediator will immediately recognize when he is over committing to a particular party in this manner.⁵⁵ Sympathy will lead a mediator into showing different degrees of acceptance to each party and, in the worst case, acting as an advocate for one or the other party. If nothing else, this causes serious prejudice to the ability of the mediator to generate options in a fair and objective manner.⁵⁶

Sympathy also makes effective reframing impossible. In order to be effective, a situation must be reframed by a mediator in an objective and impartial manner. Otherwise, it will not accomplish the goal of providing a party with a different, objective

⁵⁵ Duffy, *supra*, at 55

⁵⁶ *Ibid.*, at. 55

perspective on a given situation.⁵⁷ The parties' emotional temperature will not be lowered, the parties' cognitive thinking abilities will not be restored, and the mediator will lose the trust and confidence of the other party.

The role of counsel in this context should not be minimized. Experienced counsel will likely have engaged in the process of demonstrating empathy and encouraging a dispassionate and objective view of the situation long before his client has reached the mediation table. In the course of the mediation, where it appears appropriate or helpful for a party to feel that he has been heard and understood by the other side, it may be more palatable to the opposing party to have his counsel express empathy than for the party himself to do so. Again, counsel will not be in a position to do so effectively without a substantial amount of emotional intelligence on his own part.

This may be a difficult task for counsel. Some experts theorize that lawyers are particularly vulnerable to feelings of anger and resentment compared to members of other professions. The practice of law requires attention to many details that are simply not inherently interesting. To maintain the intense focus and energy required to accomplish the task in the frequent absence of excitement or interest, the brain may seek the required energy and focus through the jolt of adrenaline provided by either the fear of failure or the fantasy of victory or dominance. In other words, the brain may seek out something with which to become angry so as to achieve the arousal necessary to complete the task at hand.⁵⁸ In this manner, anger can provide energy and motivation. It can give rise to self-confidence in those who only feel certain when they are criticizing

⁵⁷ Adams, *supra*, at 248

⁵⁸ Stosny, *supra*, at 1

someone or being angry with someone. Furthermore, a brain that habitually engages in this type of activity will compulsively justify the anger that it craves ignoring all contrary evidence in the process. As result, judgment and reasoning are greatly impaired during anger arousal.⁵⁹

Obviously, none of this is going to enhance counsel's performance at a mediation. As a matter of fact, it is exactly the opposite of what is required. That is why it can be particularly important for counsel to self-regulate emotion, however difficult. Nevertheless, if counsel is able to demonstrate that he cares about an opponent's concerns, it will be easier for that opponent to reciprocate and show regard for counsel's client's interests. Advocacy in this form will open up the channels of communication necessary for both sides to hear and accommodate each other's respective interests.⁶⁰

Conclusion

In this paper, I have attempted to demonstrate the importance of the recognition of anger and high emotion in mediation including the positive and negative effects of anger on dispute resolution. I have also attempted to explore the role to be played by a mediator and by counsel in that connection, and the skills required by mediators and counsel in order to manage negotiations that involve highly emotional parties. As this paper will indicate, there are different approaches advocated in the literature, and it is probably fair to say that no one approach will be appropriate in every case. The challenge for the mediator will be to train himself to achieve a high level of emotional

⁵⁹ *Ibid.*, at 1

⁶⁰ Adams, *supra*, at 248

self-awareness and then identify and adopt the appropriate strategy to deal with the parties.

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