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Engaging Disgust: How to Settle, Contemptuously!

BY ROBERT A. CREO

- *Hatred is an affair of the heart; contempt that of the head.*

—Arthur Schopenhauer

- *Contempt, n. the feeling of a prudent man for an enemy who is too formidable safely to be opposed.*

—Ambrose Bierce

- *Self-esteem and self-contempt have specific odors; they can be smelled.*

—Eric Hoffer

- *Contempt is not a thing to be despised.*

—Edmund Burke

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As addressed in last month's Part 1, disgust is primal as an emotion and motivator. Its fraternal twin, contempt, which is an attitude or belief, involves thought, conscious and unconscious, and can be modified by deliberative choices.

This nuance, however, is important—essential—for mediators to understand, identify, and effectively address during the course of the mediation process.

All disputes have a relational context. The participants have had a past or present economic or interpersonal relationship, or a one-off event, such as an incident resulting in a tort claim, which forms the factual basis of the dispute.

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There also may be a future relationship, even if it is only a tail or transition period, necessitated by any resolution, including verdicts.

As noted before in prior Master Mediator columns, my advice for mediator preparation is to explore the relationship dynamics with counsel in individual telephone calls with each advocate prior to the meeting session. I prefer to do this after I have read the formal documents and usually before they draft any confidential written submissions.

Many of your assumptions or understandings from the documents—such as that the parties were strangers before the vehicle or product liability accident, or the contractual dispute ended the business dealings years ago—will be obvious or easily confirmed by counsel.

In some types of cases, there are asymmetrical goals or strategies. In employment claims of current employees, the plaintiff may wish to continue employment while the employer is seeking a settlement involving the employee's resignation. A vendor may wish to continue providing a product line unrelated to the matter at issue, while the purchaser may be seeking to terminate all existing contracts with the supplier.

The motivation underpinning these different situations are often based upon a breach of trust leading to the failed expectations, and exacerbated by the polarization inherent in the claim and litigation process. Grievances become personalized to the decision makers. They escalate into disgust and contempt between the proponents responsible for navigating the litigation process.

CONTEMPT'S EFFECT

And once contempt gels, it is hard to dislodge. John M. Gottman, psychology professor emeritus of the University of Washington, studied marital stability and relationships for decades. His research consistently found that once contempt existed early in the marriage, it was one of the predictors of future divorce.

Gottman's four studies had accuracy rates between 80% and 94% in forecasting which marriages would fail within a specific number of years, varying from one to nine in each study. Although there are four predictors—criticism, defensiveness, stonewalling and contempt—Gottman concluded that contempt is the most important. See John Gottman & Nan Silver, The Seven Principles for Making Marriage Work: A Practical Guide from the Country's Foremost Relationship Expert (Three Rivers Press 1999), and John Gottman, The Science of Trust: Emotional Attunement for Couples (W.W. Norton & Co. 2011).

Although contempt is not a "silo" emotion, and is usually accompanied by betrayal, anger, and other negative emotions, it does have different characteristics that makes it more difficult to work with than anger.

Contempt has a high degree of stickiness. Unless there is a remarkable new interpretation of a past event, or new decision makers coming to the table, the ability to truly transform disgust and contempt is highly unlikely.

Although I am a proponent of transformative mediation, since there could be no resolutions without at least a minimal shift of beliefs, logic, emotions, or risk tolerance, my experience is to quickly abandon transformative goals in the face of entrenched contempt. The powerful drive of disgust/contempt makes this approach too difficult in a limited time frame to be truly workable.

My own mental model views my objectives in the form a hierarchy of aspiration on the following continuum:

- Transcending Resolution
- Transforming Resolution
- Happy Resolution
- Satisfied Resolution
- Risk/Cost Avoidance Resolution ("business decision")

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- Closure ("Good enough!" All walk away a little uncomfortable.)
- Impasse: Did No Harm
- Polarization (Parties moved further apart during the process.)

While mediating, I internally revisit this pyramid of goals on a continual basis. During the preparation and early stages of the mediation process, the aspiration may slide within a few notches of each goalpost, but rarely does it leapfrog up and down the spectrum.

Infrequently, there is a turning point where the momentum spurred by positive communication and concessions spurts the participants from the Satisfied/Happy zone to Transforming/Transcending, or Good Enough upward.

But my experience is that this rarely occurs when disgust and contempt are drivers of decision making. Contempt is an ingredient of morality and decisions based upon values and principles. No one wants to reward a person or business entity for extremely bad or harmful behavior. Disgust and contempt fuel the desire to punish or send messages to the community.

Once these are present, they need to be addressed as a legitimate interest in the conflict that has to be balanced, and affirmatively chosen, or abandoned, in favor of participants' economic or other legitimate interests.

Contempt is not a patch of common ground relegated to an inconspicuous spot on the settlement landscape. Wise mediators recognize it as a barrier rather than a gateway emotion that can be converted or used in a beneficial manner.

A PATH TO RESOLUTION

So what should we actually do as mediators? My simple steps are as follows:

1. Identify it expressly.
2. Confirm it in caucus with the participants using the language of disgust and contempt.
3. Legitimize it as a motivating primal feeling.
4. Be transparent about mediation's goals.
5. Acknowledge that morality, principles and values are unlikely to be advanced by settlement.
6. Explore the possibility of apology or other non-economic conduct by the opposition as possible lubricants to resolution.
7. Explore how adjudication or impasse affects the principles, values or respective identities of the participants. Ask parties if there is an outcome unfavorable to their positions, and if that will change their core beliefs of the fairness, righteousness, or justice of their positions.

Unemotional Rescue

The tough, tough mediation factor: Disgust in the bargaining room.

Compounding the problem: It pairs with contempt.

Head-on confrontation: In the second of two parts, the Master Mediator provides a resolution path. One idea: Align counsel, or other participants, in a transparent manner, as allies for settlement on a non-emotional, let-it-go, basis.

8. Ask the parties to choose between advancing "principle versus principal"—see how this concept is used in the sample dialog below—and cost versus closure.
9. Be explicit about working in the lower end of the spectrum discussed above, emphasizing expediency over contentment. Do not ask or expect the parties to change their views of the other participants.
10. If contempt trumps economics or reason, respect it and move on to impasse. Ask them if you, as mediator, can contact them in a couple days after everyone has had a chance to reflect upon it more, away from the pressure of being present with the opposition.

SAMPLE DIALOG

Here is an example of the language of a discussion during a caucus. It is a long block of narrative, but in practice it would occur in the form of a discussion with participants in caucus, rather than as a monologue.

Mediator to Disputant(s):

"I thank you for honoring my request to speak from your heart. I understand, and respect, your feelings of hostility, anger, contempt or disgust for the others. Perhaps what you most desire is to enter into a duel to the death, and you instead must go into a courtroom with its procedures and evidentiary rules, which generally work to suppress emotions. Trials give answers, almost always limited to an economic decision. A verdict in your favor might be public vindication, or injurious and punish the other side. If this is the prime goal, then no settlement terms will meet these needs since the settlement is confidential. There is also likely to be a non-disparagement clause in the release documents limiting what each of you can say about each other. Settlement may or may not advance any values or principles that are important to you.

"As noted in my opening meeting with you, my goal, my prime purpose, is to reach a resolution of this case. If that happens with everyone walking away feeling better not only about themselves, but also their adversaries, that is great. I go home with a smile on my face and when I hit the pillow, I say to myself: Today was a great day; Today I had the privilege of participating in a wonderful transformation of a dispute—This day I did my job to perfection!

"I am not, however, asking that you revise your core beliefs, opinions or emotions in order to achieve a transformative mediation outcome. On the contrary, it is best to have resolutions that align or are consistent with who you are and your values, or have you reconsider your positions or interests based upon the interactions of today.

"Not every mediation process results in outcomes that revise the core or fundamental thinking of disputants. Although not optimal, reluctant settlements are productive and serve a good purpose. People make practical business decisions all the time involving compromise of something, or abandonment of motivating objectives. It is also a prime function of the mediation process to educate participants on the continuing, and often escalating, costs and emotional impact of continued conflict. An economic outcome that you can live with, avoidance of future cost and risk, and closure are legitimate, and significant, reasons to engage in a compromise. This involves a deliberate choice between principal, AL, over

principle, LE. I respect either choice provided it is with full understanding of all of the consequences of continued conflict.

"I am going to leave the room and let your team confer in private so you can make the best decision possible under these circumstances. If you think there are non-economic terms or conditions—that is, things that the other side can do besides money—be creative and put them on the table too. If you have any questions or need to hear more from me before making a decision, please come get me."

This is the point when I stand-up and shake the hands of the decision makers and smile and nod at them.

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My hope is that this approach of declining to transform disgust and contempt furthers the pillars of sound mediator practice by engaging and empowering the voice of the disputants.

Self-determinative decisions are made in a holistic manner, and emotions, including negative ones, have legitimacy in their impact upon choices. In the cases where the parties fail to reach a settlement, I tell them I will follow-up with the parties and their counsel in a few days. My hope is that counsel will work with them in my absence as a strong ally for resolution.

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Accompanying Master Mediator Part 1 on disgust last month—see Robert A. Creo, Coming to Grips with Disgust, 35 Alternatives *9 (January 2017)(available at http://bit.ly/2jgN2vP)—the author provided a useful bibliography of seven references as well as citations to five previous columns analyzing associated emotions and their effects on mediation.*

ADR Practice

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As a mediator, I often get involved in identifying what information may well be essential to settlement, and then urging the parties to exchange it in the mediation. For this exercise, let's assume I've been successful in that regard.

Author Picker's factor involving a failure to identify and understand the other side's feelings, motivation, perspectives and perceptions, described above, is a little trickier. This is often an accurate description of how the parties start out in the mediation—showing little interest in the other side, other than to complain bitterly about their actions and words.

But I see this as a vital role for the mediator to play—opening the eyes of each side to the other's motivations, perceptions, etc. I'll assume for purpose of the exercise that this has been adequately handled, too.

KEY FACTORS IN SUCCESS—OR FAILURE

So, putting these various factors aside, here's what I consider the two most significant determinants of whether the mediation of a commercial controversy—particularly, although not exclusively, a one-shot dollar dispute—will prove successful or fail:

- The attitudes of the parties regarding the desirability of reaching a settlement, and
- The degrees of reality the parties exhibit.

It should come as no surprise that the more indifferent a party is to settling the case—and thus more disposed to pursuing the alternative course of litigation or arbitration—the more difficult it is to achieve resolution through the mediation. (I include here, as a prime font of indifference, the participation of an intransigent lawyer single-mindedly seeking total victory.)

This is especially problematic when the parties aren't engaged in the mediation on a totally voluntary basis, but rather have been directed there by a judge or arbitrator, or they are participating as the result of a previous contractual requirement to mediate before litigating.

Every mediator has been exposed to wide variances between the parties—especially in a one-shot dollar dispute—in terms of how realistic they are about the kind of compromise settlement the mediation has a reasonable chance of producing.

Getting It Done

The pregame task: Assessing the likelihood of settlement in your mediation.

The methodology: Use the odds to bring the parties together by identifying their inclinations, then act on the potential strong points.

The mediator's moves: Easier said than done, as neutrals well know. But before you get too wrapped up in a reality check for the parties, conduct one for your own efforts, before you begin.

In the summary compilation above, the blame for unrealistic expectations can be laid upon a communication failure between lawyer and client. That's one possible reason, but what's even worse is when *both* lawyer and client are unrealistic, lending mutual support to each other's misreading of the situation.

I'll have more details to offer regarding each of these barriers to settlement after I've introduced you to the main subject of this piece.

It's clear that a mediation has the best chance of succeeding when both parties are committed to the process and both are realistic about the possible outcome.

Conversely, the slimmest possibility of success occurs when each of the parties is indifferent as to whether a settlement will be achieved—put another way, they are just as willing to litigate—and both are unrealistic regarding the potential terms on which a settlement could eventually occur.

The in-between cases involve splits on the realistic/unrealistic and committed/indifferent scales. And, of course, there can be a wide range in the degrees of reality and commitment displayed, which serves to muddle the impact of these factors on success and failure.

A RACING ANALOGY

In the world of horse racing, there's something called "The Morning Line," which refers to the pre-race betting odds that appear in racing programs and other publications.

It represents the predictions of various handicappers, provided as much as 48 hours prior to post-time, as to what the public ulti-

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