

The Master Mediator

Bargaining Room Partners: Economics and Empathy at Work

BY ROBERT A. CREO

Tears are words that need to be written.

—Paulo Coelho

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There are distinctions between empathy and sympathy.

You feel empathy directly. It is your own natural—and usually not premeditated—response to a situation or a person.

Sympathy involves your feeling badly for another person or group based upon your understanding and caring about what happened to them. It is often a response conditioned by culture or other social cues.

One common framing is to say that empathy is “I feel with you,” while sympathy is “I feel for you.”

Empathy may provoke unexpected emotional responses since empathy is based upon us having the feelings ourselves. Empathy sticks with you longer—you may lose sleep over it, while sympathy passes more quickly.

Star Trek fans, like me, appreciate the use of empathy in the series. During a mind meld, Mr. Spock is the recipient of feeling from the other, despite his Vulcan half being devoid of emotional contexts.

My own mediator training, much like that of all mediators, punctuated the importance of impartiality. We, like the Vulcan-bred Spock, were thrust into a legalistic world with the expectation of emotion being unable to penetrate the thick cloak of impartiality.

I have told often the story about my crying during an opening session presentation by the plaintiff counsel in a product-liability mediation session. When the mediator cries, it is legitimate to view it as a career low point. Or a highlight. Or both!



TRANSFORMATIVE MOMENTS

Mine was one of those transformative moments when clarity emerged from the fog of mediation training, expectations, tactics, moves and countermoves. Inadvertently, mediator neutrality was sacrificed that day on the altar of objectivity. Legal positivism clashed with human authenticity, and it actually all worked out rather well.

In the case, William, a dentist, in the prime of his life, with three children, had a farm in the New England countryside where the family retreated weekends and holidays. Doing small maintenance projects was a form of relaxation and created a sense of accomplishment for him. William enjoyed viewing the product of his labor that was generally missing from the routine of teeth cleaning and repair. He stocked his barn with the best farming equipment and tools from the brand-name manufacturers.

William loved working outside with his children nearby, especially his youngest son, Benjamin. On a sunny day filled with life, William was working on building a fence with an automatic wiring machine. In front of the 8-year-old, William was impaled on the fence-post while the wire tangled around him, as he, and his young son, screamed for help.

William died in front of his whole family before he could be extricated by the emergency responders. His widow, Barbara, filed suit against the manufacturer alleging a product defect.

I went to New England to serve as mediator. I had served as mediator in dozens of cases by this time across the country with this same manufacturing company, which had one of the first, and most encompassing, mediation programs.

Product liability claims arising from farming accidents usually involve catastrophic losses: death, loss of limbs, blinding, or injury to the head and nervous systems. Many times the injured are children, often with an adult family member involved as an operator of the equipment.

These are complex cases where the toll is high. There are emotional traps, and springs, along the entire path.

The photos are always gruesome; the family real, and always sympathetic. The liability law, however, speaks of reason—not emotion. Yet, here I was, impartial, and a hardened professional, responding emotionally and, trying to process it all in my own mind.

TEARING EFFECT

No one said a word about my tears in the joint session. I always start my caucus in a catastrophic loss case with the plaintiff team, so when the joint-session presentations were completed, we took a break while the parties settled into their designated caucus rooms.

I started the plaintiff caucus with a discussion of my own emotional response. It was as an acknowledgement, not an apology. We discussed the fact that lawyers, judges, and mediators are all human, and that mediation, unlike a courtroom, intentionally provides an alternative way to approach what the law has pigeonholed into a class or category of cases to process.

The plaintiffs' lawyer said that he believed this was a compelling case that would go to a jury since there was zero chance of summary judgment in the local state trial court.

The caucus was brief. I intentionally shook everyone's hands as I exited in the room. This is not uncommon for me to do in catastrophic loss claims.

I confess that I approached the defense caucus with trepidation not knowing what to expect. I had decided on transparency and to have an open dialogue about my emotive reaction. I anticipated that the defense lawyers,

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especially local counsel, would chastise me for increasing the expectations, and the value of the case, for the plaintiffs and their counsel.

A demand had already been made, and prior to leaving the plaintiff caucus, I confirmed the demand amount with counsel. Even though the demand had not been revised, I would not have been surprised to hear from the defendant that my behavior had made it less likely for the plaintiff to move much, despite it being a weak liability case.

There was calm on the faces of counsel and their structured settlement representative as I took my seat in the room. No one said a word for what seemed like an eternity. Relying on Basic Mediation 101 training, I said nothing to break the silence. I waited it out until someone else spoke first.

The in-house counsel, Steve, grinned at me, and said, "Good work so far." The grin did not seem sarcastic, and having worked with Steve on many cases, I took it as a sincere statement.

I responded with something like, "I try to give it my authentic all, even when I am not 100% sure where my all is taking me."

Steve then responded to the effect that he has fought with his claims committee on the level of authority given to him to settle because he had thought that it was far too low. As soon as they went into caucus, he called back to the home office and explained what had happened in the joint session.

The home office knew who I was, that crying was not my norm, and that it wasn't a cheap tactic or trick. Steve said they had now given him blanket authority to settle the case within the prior demand because they were now concerned about a runaway jury. By late afternoon the case settled.

Because of the infrequent flights, and to accommodate working into the evening if that

had been necessary, we were all staying overnight at a local hotel, including the plaintiff widow and her children.

Steve said that he wanted to dine with his local counsel so they could focus on the business relationship, and the plaintiff's counsel was going home to his family. Steve suggested that I invite the plaintiff family to dinner, add the amount to my invoice, and then all meet for a nightcap in the hotel bar.

All of us sitting before a warm fireplace on a cold New England night affirmed the healing

Banishing Sorrow

The emotional categories: Empathy, sympathy, grief, and catastrophic loss.

The challenge: The legal system's inability to remedy irrevocable loss.

Addressing the issue: Cry not for me, but with me! The Master Mediator continues his examination of emotions in mediation after analyzing sadness last month. Next month, the column details the role of regret. June will provide Mediator Kit tools dealing with sadness and other negative emotions discussed in this series.

impact of the work done by lawyers and mediators in the midst of loss and sorrow. Empathy was victorious that day.

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Next month, columnist Bob Creo will look at the partnership of economics and emotions and how that works with decision making under uncertainty and stress. Subsequent

REFERENCES AND RELATED READING

- David A. Hoffman & Richard N. Wollman, "The Psychology of Mediation," 14 *Cardozo L.J.* 759 (2013)(available at <http://bit.ly/2mbn9iO>).
- Daniel Goleman, *The Brain and Emotional Intelligence: New Insights* (More than Sound 2011).
- Nicole M. McDonald & Daniel S. Messinger. "The Development of Empathy: How, When, and Why," *Free will, Emotions, and Moral Actions: Philosophy and Neuroscience in Dialogue* 341-368 (IF-Press (2011)(available at <http://bit.ly/2mrwhRn>).
- Robert A. Creo, "The Effective Lawyer: We Feel, We Choose: Pathos, Decisions and Persuasion," *PA Lawyer* 58 (January-February 2016).
- Brene Brown, "Listening to Shame," *TED.com* (March 2012)(available at <http://bit.ly/1HjkZae>).

For a list of *Alternatives* Master Mediator columns focusing on emotions, see the References and Related Reading box accompanying Robert A. Creo, "Coming to Grips with Sadness and Its Multicolored Manifestations," 35 *Alternatives* 33 (March 2017)(resource list including direct links to the articles available with a subscription at <http://bit.ly/2mu08dC>). In addition, see also:

- Robert A. Creo, "You, Me, & Me—and You! An Exploration of Unconscious Imitation," 31 *Alternatives* 35 (March 2013) (available at <http://bit.ly/2nnfH4o>). 

columns will detail the role of regret and cognitive biases in mediation and, ultimately, provide tools for a "Mediator Kit" to promote better decisions. 

Process Design

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Workplace Reform, 49 *B.C. L. Rev.* 367, 367-68 (2008)(available at <http://bit.ly/2l0oVTI>).

The class-action mechanism allows potentially aggrieved individuals to aggregate claims

in order to challenge systemic wrongdoing, illustrate patterns of discrimination, and efficiently allow their voices to be heard.

Class actions have been an important tool for civil rights lawyers to effect change. In the employment discrimination context, the Civil Rights Act of 1991 called for jury trials as a matter of right and expanded the recov-

ery available to plaintiffs, thus making class actions more economically worthwhile. Mitsubishi Motors Corp., Coca Cola Co., Texaco Inc., Boeing Co., Home Depot Inc., Smith Barney (now Morgan Stanley Wealth Management), Abercrombie & Fitch, and Sprint Corp. have settled class-action litigation that requires them to fund multimillion dollar settlements