

The Master Mediator

Stay Positive: How and Why Joy and Serenity Emerge at the Bargaining Table

BY ROBERT A. CREO

There is no pain so great as the memory of joy in present grief.

— *Aeschylus, Greek poet, 525 BC–456 BC*

Find a place inside where there's joy, and the joy will burn out the pain.

— *Joseph Campbell, author, 1904-1987*

Joy is the simplest form of gratitude.

— *Karl Barth, Swiss theologian, 1886 -1968*

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Emotions are present in all mediation-session participants, including the mediator. The dynamics of the overwhelming majority of litigated cases and interpersonal claims involve negative emotions.

But in more than three decades of serving as a neutral, there have been bright and shining moments of joy, hope, gratitude, humor, kindness, pride, admiration, grace and humility. In the Master Mediator columns over the next few months, each of these will be explored in the context of mediation.

WHAT CONSTITUTES JOY?

There are many definitions of what constitutes

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joy. The definition in Merriam-Webster online is helpful to launching our consideration of joy and happiness in mediation. It states that the definition of joy is

1 a: the emotion evoked by well-being, success, or good fortune or by the prospect of possessing what one desires: delight.

b: the expression or exhibition of such emotion: gaiety.

2: a state of happiness or felicity: bliss.

3: a source or cause of delight.

See <https://www.merriam-webster.com/dictionary/joy>.

Many researchers and commentators couple serenity with joy, and contend that joy can be a threshold to periods of serenity.

We often think of joy as existing in those events triggered by a pleasant experience, a surprising event, recognition of achievement of a longstanding goal, or as a reaction to the good fortune of others.

When you enter a state of mind dominated by joy, you usually feel all is right and good. Your body undergoes chemical changes with the release of specific neurotransmitters. As the complex mix of chemicals and context interact, and if there is no crisis or urgent need on the immediate horizon, people typically feel tranquility and peace of mind. It is being in the state where you feel relaxed, and where you are calm, optimistic, and satisfied.

If you apply the mediation goals of transformation and, the ultimate success, the transcendence of the dispute, serenity is an outcome. Although serenity can be reached in life and mediation without the precondition of joy, my experience is that the joy following overcoming the challenges of conflict precedes serenity.

We as mediators and advocates generally use the term "closure" as our blunt tool. Although it can be surgical in the sense that

specific positive consequences of resolution have been elicited during facilitative questioning, closure provides unique benefits to each and every participant, including the mediator.

Although I do not keep statistics of my "settlement rate" and disdain the term itself, I do derive pleasure and satisfaction when a case I mediated resolves. It reinforces and defines my identity as a mediator. It is "Who I Am" for that day.

Closure is our serenity card, with the joy being in another suit. Experienced mediators may be throwing up their hands by now, reading this contesting the appearance, let alone the idea, that "joy" is in the mediator toolbox.

For those of you thinking that, you are correct, this is why I frame "closure" as our tool. Joy can arise in the hearts and minds of others during the course of a mediation day only if the mediator recognizes the potential in a participant or participants, and provides the environment for it to flourish. It can even be contagious and spread by the end of the day.

I acknowledge it is rare. And the more mediators operate on the legalistic/money side of the continuum, versus the "touchy-feely" end, the less joy is present. It takes time, excellent rapport, and mutual trust to reach joy's potential.

AFFECT LABELING

It happens in deep and direct dialogue, and affective labeling/listening, not active listening, between mediator and disputants. Note that active listening involves the traditional concept of reframing or parroting back what is being said by the participant.

Affect labeling is a deeper listening—it
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goes to the actual emotions and ignores some of the words as the core message is absorbed. It does not involve “I” statements by the mediator, but instead short “you” comments, not questions.

In most cases, this involves stating “You are very angry,” or “You are suffering with grief” or “You are frustrated by the other side.” Prof. Daniel E. Lieberman, of Harvard University’s Department of Human Evolutionary Biology, and his colleagues say we can put a label on a thought or an emotion as a pro-social tool (noting it is part of vipassana meditation, which involves a focus on reality). The theory contends it is more productive for an individual to draw it closer by feeling it, identifying it, and putting a label on it. The goal is to acknowledge the emotion in order to avoid it impeding or crippling progress.

This is what mediators mean by “embracing” emotion, so one approach is to embrace the negative while moving forward to explore the positive.

SUBTLE CLUES

For happiness and joy, the clues are much more subtle, since these words will not usually be spoken themselves.

Disputants who speak in terms of apology, forgiveness, reconciliation, best interests of themselves or their families, and, most important, prevention of harm to others, may have some “joy” potential lurking within them.

Everyone wants to be happy. No one wants to truly believe, and live, a ruined life without pleasure or serenity. These goals align with resolution.

Although there are many ways to open the door, here are some potential questions or comments:

1. If you could wave a magic wand, not to change the past, but to structure the future, what would happen? What would it look like?
2. Do you have any beliefs, spiritual practices, or community values that might be promoted by a resolution?

3. Is the resolution sufficient to provide a platform of security, contentment, growth, etc.?
4. Is seeking revenge or punishment of others important to you?
5. Will a resolution promote your own sense of self (identity) or reputation?

Get Happy

This month’s mediation emotions topics: Happiness, joy and serenity.

The assessment: What roles do positive emotions play in conflict resolution? The Master Mediator is spending a year looking at the effects personal feelings have at the negotiating table.

The application: ‘The big challenge for the mediator is to obtain the indulgence of counsel to explore the emotional dynamics which are driving the holistic decision-making process.’

6. Is it important that you are perceived as a good person, or as having taken the high road?
7. Do you see where any good could come from a resolution?

Counsel has to step aside and observe much of what is irrelevant and inadmissible. The big challenge for the mediator is to obtain the indulgence of counsel to explore the emotional dynamics which are driving the holistic decision-making process.

Many lawyers are also caught in a suppressed emotional vortex, and may have integrated some of the emotions from working on the client’s cause for many months into their own attitudes and beliefs. Lawyers are impatient about delays in getting to the auction house to determine fair-market value.

IT HAPPENS!

Years ago in Philadelphia, I served as mediator in a trauma birth injury claim involving a

single mother who emigrated from Africa.

The child suffered lifetime cognitive limitations which impeded her physically. Although she was ambulatory, she had to have 24/7 care. The young child attended at the start to be introduced and be seen by everyone. She was beautiful and dressed in her Easter finest. It seemed everyone in the room, including me, wanted to care for her and protect her forever.

The liability was clear and uncontested. The plaintiff began her narrative by not only thanking everyone for being there for her child, but forgiving the doctors and everyone, and stating she had no malice or negative feelings for anyone in the room.

She was joyous to have such a loving daughter and stated that it was a gift from God she happily accepted. She was going to lead a joyful and happy life with her child and was hoping that the economics from a settlement would make that easier.

My job was mostly to get out of the way of the settlement potential, and keep it moving forward despite the huge disparity in demands and offers. With each offer taken to the plaintiff, the mother thanked me and said to make sure I thanked the other side for making the offer. She did so from her heart with a smile

REFERENCES AND ADDITIONAL READING

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on her face.

A package was agreed upon, which I believed was higher because of her positive approach to the “others.” The coup de grace was when I reconvened the joint session to

confirm the details and to have everyone say farewells. She walked up to each and every person, including the doctors, to embrace them, thank them and wish them well. She did so with joy in her voice.

The lawyers and risk managers melted and responded with genuine hugs and well wishes. I detected a tear in the eye of one of the defendant doctors. It returns with the joy I feel every time I think about the experience. 

Mediation

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Negotiated Agreement, the bargaining concept from “Getting to Yes: How to Negotiate Agreement Without Giving In,” by Roger Fisher, William Ury and Bruce Patton. For, it seems evident, a well-advised party will not accept an agreement in mediation if it views that agreement as inferior to its BATNA.

It follows that the mediator’s goal is not to assist the parties in reaching agreement, but rather to assist them in finding the best agreement possible in mediation, leaving it to each of them to decide if that agreement is better than its BATNA.

The mediator can assist each party in finding the best agreement possible in mediation by helping each to (1) understand its interests and priorities, as well as those of the other party, and (2) develop the best settlement proposal it is willing to make.

Once each party has received the other’s best settlement proposal, each knows the best agreement it can reach in mediation. At that point, it is for each party to compare the best agreement available in mediation with its BATNA, and decide which it should choose.

The mediator may aid the parties in making that comparison, and may, as discussed elsewhere in “How Mediation Works: Theory, Research, and Practice,” offer advice. But even if the mediator thinks the best agreement available in mediation is superior to the parties’ BATNA, his success as a mediator does not depend on whether or not the parties accept that agreement.

The mediator’s role in this respect is not unlike that of a doctor treating an ill patient. The doctor’s task is to provide a sound diagnosis of the illness and to recommend a course of treatment. If the patient decides not to follow that treatment, despite being advised of

the risks of his decision, the doctor has not failed; the patient has exercised his right of free choice.

So it is with mediation.

If the mediator has done what he should to assist the parties in determining the best agreement possible in mediation, but one party prefers its BATNA, the mediator has not failed; the parties have exercised their right of free choice.

Acceptance of this more nuanced view of the mediator’s role should have little effect on what the mediator actually does. The mediator techniques discussed in “How Mediation Works: Theory, Research, and Practice,” are equally appropriate for the mediator who believes it is her role to bring about agreement as they are for the mediator who views her role solely as assisting the parties to see if they can reach an agreement that is better than their BATNA, whether or not they choose to enter into that agreement.

The techniques we recommend to all mediators, regardless of whether they view their goal as bringing about an agreement, consist of (1) aiding the parties in understanding their interests and priorities, as well as those of the other party; (2) using those interests and priorities to assist the parties in developing potential settlements; (3) encouraging the parties to make the best settlement offers possible; and (4) aiding each party in comparing the best agreement available in mediation with the best outcome it can reasonably expect outside mediation (BATNA).

Even though this alternative view of the mediator’s goal may not affect the techniques she uses in a mediation, it should have a profound effect on how the mediator evaluates her success. The mediator who views her work as successful if she uses each of the techniques described above, without regard to whether the parties reach agreement, is free of self-imposed pressure to reach agreement.

As former U.S. Magistrate Judge Wayne

Brazil has pointed out, such a mediator is not subject to the temptation to manipulate the parties in order to obtain an agreement. The mediator should not, for example, be tempted to exaggerate the weakness of each party’s legal arguments, hoping thereby to make the potential agreement in mediation appear superior to court resolution.

Nor should the mediator be tempted to overstate the advantages of the best agreement available in mediation so as to encourage acceptance of that agreement.

Some mediators may be concerned that this approach will have a negative impact on their settlement rate, making them less attractive to parties selecting a mediator. That concern is unwarranted.

Settlements obtained through mediator manipulation of the parties, even if they increase the mediator’s settlement rate, are unlikely to increase the mediator’s attractiveness. The parties to a mediation and/or their lawyers or other representatives often engage in post-mediation discussion of the mediation and the mediator.

If they discover that the mediator has engaged in the manipulative practice of telling each party that its case was a likely loser if the dispute were to go to trial, or that the mediator misstated his view of the advantages of settlement, they will not hesitate to criticize the mediator’s behavior to others who ask whether they should use that mediator (See Model Standards of Conduct for Mediators (2005)(available at <http://bit.ly/2xO1VzY>). The mediator will thus have gained little by his manipulative behavior.

In sum, our view that the goal of the mediation process and the mediator is to assist each party in determining the best agreement available in mediation and whether that agreement is superior to its BATNA should have no effect on what the mediator does or how the mediator is viewed in the marketplace.

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