

Reflections for Mediation – Part II

By Joe Epstein, Esq. and Susan Epstein, Esq.

Introduction

Several months ago we wrote Part I in our series of “reflections” related to conflict resolution in which we noted that the world was in the grip of conflict. With the historical election of Barack Obama as the 44th President of the United States we would urge “partners in conflict” and their advocates to focus on the hope that we can find positive ways to deal with conflict. We ask you, too, to focus on the positive potential embedded in conflict as you ponder our second offering of “reflections” that comes into play during the course of mediation.

I. Climate

In sum, the hurdles you face are the other side’s suspicion and hostility, closed ears, and lack of respect. Your best strategy is to go to their side. It is harder to be hostile to someone who hears you out and acknowledges what you say and how you feel. It is easier to listen to someone who has listened to you. And respect breeds respect.¹

“Climate” is not a term frequently used in mediation, but recognizing the

“climate” when you walk into a mediation is of critically important. Typically, at the beginning of a mediation the tone is, as Ury suggests, overcast with suspicion, hostility, and disrespect. There is also distrust and apprehension. How can we do to help parties in conflict to come in from the cold of conflict?

The first step for a participant in mediation is to get in touch with his or her feelings and emotions. The second step is to check out the “climate” on the other side. Hearing the other side out, giving them the time and space to express their views and feelings about the conflict is a critical second step. Acknowledgement and expressed appreciation for another’s view, feelings, and emotions is the third critical step in bringing people in from the cold of conflict. When the chilly atmosphere of conflict is defrosted then an honest exchange of views becomes possible.

Mediators can play an important role in creating a positive climate for conflict resolution. This can be done by building trust via pre-mediation meetings. It can be done, as was done recently, when a mediator embraced a scared party and said reassuringly, “I have one mission today and that’s a settlement of this

case.” Optimism, acknowledgment, respect, fairness, and trust can all be modeled and established by mediators who are willing to mediate assertively and dangerously.

II. Closure

Fulfillment or ‘closure’ can’t be experienced as a comparison because there are no degrees of closure. Either we feel complete, or there still is something missing.²

One of the goals at mediation is to end the conflict and to resolve the dispute. Participants at mediation often urge parties at mediation to settle so there will be “closure.” Some disputes can bring the parties together in unique ways that allow for a new beginning, a new venture, a new enterprise. Sometimes this occurs when businesses are able to forge a new “deal” after they end an old dispute. Closure also occurs when old adversaries find a new way to work with each other.

Yet, can a mother who has lost a child at the hands of a drunk driver reach “closure” in this manner? Can a black man who has been hounded off a job with nooses, epitaphs, etc. ever really reach closure? Can a person

rendered a quadriplegic as the result of a defective product reach closure? What we have learned from years of mediation and thousands of mediations is that given some pain, reaching closure in the traditional sense is not possible. What is more realistic is for people to reach a point when they can turn a page in their book of life and move onto another chapter. Thus, in some circumstances the best that we can hope for is a level of acceptance of changed circumstances and a willingness to move ahead.

III. Compassion

When you begin to see the suffering in the other person, compassion is born, and you no longer consider that person as your enemy... The moment you realize that your so-called enemy suffers, and you want to help him stop suffering, he ceases to be your enemy.³

In the midst of a conflict – business, professional, and family – it is usually difficult to appreciate the emotional investment or involvement of your partner in conflict. The parties are generally so caught up in their own emotional turmoil that it is hard to absorb much less appreciate the feelings of their opponent.

It is necessary to travel to the other side, to begin to appreciate the focus, passions, grief, tension, and pain of their counter part. This appreciation is an open sense of compassion which can lead to insight and appreciation for the underlying needs, interests, and motivation of others.

An example of a CEO opening herself to being compassionate occurred in the context of a professional dissolution. A physician, who was a cancer survivor, was leaving a professional group along with her female business partner. This physician, upon leaving the professional group, was forced to leave her home, her family, physician group and town to

sign on as a pro tem physician in order to survive financially. A joint session was held where the trials and tribulations of the departing physicians were shared and apologies given, the tenacious CEO allowed compassion to influence her negotiation stance. This, in turn, allowed the costly litigation to end and permitted the one “pro tem physician to return to her family and her home.

IV. Connection

We are most effective when we offer ourselves in ways that are authentic and genuine. Authenticity deepens our relationships with others.⁴

At times mediators fall into the trap of an opening monologue that involves speaking to the parties rather than engaging in a dialogue that encourages a connection between the parties and the mediator. Rather than connecting in an intimate way with fragile parties, they establish a barrier to dispute resolution.

Rather than building walls that separate parties from each other and the parties from the mediator, the mediator who is mindful of modeling will conduct the mediation by inviting people to visit with each other and with the mediator at his “home.” Compassionate mediators will forge a connection with parties by encouraging parties to speak while they utilize active listening skills. Listened to parties feel appreciated and respected. This wet “mud” is carefully placed in a kiln that forges a sturdy brick of trust when the mediator and the opposing negotiator offer themselves in ways that are authentic and genuine. Self-disclosure, when neutral and appropriate to the occasion, allows a person to know that he does not walk alone in the valley of conflict, that someone understands him. Thus, rather than creating barriers mediators and negotiators should look for ways to create connections between the participants.

V. Courage

You must do the thing you think you cannot do.⁵

Courage is a commodity that is much needed in mediation and negotiations and yet it is often lacking. It takes courage to break with your “pack” and voice weaknesses in your side of the dispute; it takes courage to walk to the other side to make a connection and to show compassion. It takes courage to be creative in developing a unique design for your mediation and to be open for creative techniques of impasse breaking. It takes courage for a mediator to patiently “peel the onion” and allow parties “autonomy” in their decision making. It takes courage to risk self-disclosure, to share emotions, and to trust others.

For some it takes courage to say no to an unfair mediated resolution and accept the risks of trial. For others it takes courage to ask a superior for more authority to accept a known loss than to risk a still greater but uncertain future loss. For many the greatest act of courage is to trust the mediator, the opposing negotiator, or the opposing party.

Consider that the most courageous people may be those who, intimate with fear, have the fortitude to go ahead and encounter the thing they fear the most.

V. Creativity

Still the question recurs ‘can we do better?’ The dogmas of the quite past, are inadequate to the stormy present. The occasion is piled high with difficulty, and we must rise with the occasion. As our case is new, so must think anew, and act anew.⁶

Mediators and negotiators usually conduct the mediation of litigated cases in a typical format of a general statement with a mediator’s monologue, opening statements, party caucuses, and shuttle diplomacy. Then the gamesmanship begins by seeing who can manipulate

the mediator most successfully and who can utilize power and fear with the greatest facility. Then, when necessary, control is ceded to the mediator to get the case closed. This approach may work just fine in settings where there are no on-going relationships and low emotions. It may not be the best approach when there are on-going relationships and high emotions.

With each mediation the challenge is to think “anew” and be aware that people are different, problems are different, needs are individualized, interests vary, and motivations run a wide gamut. Most importantly emotions are as unique as each individual snowflake – each a treasure. Thus, we must have both the courage and the creativity to think “anew” to match the mediation to fit the parties and the conflict.

With the vast array of subject matters, should we be surprised that different emotions and feelings prevail in different cases? Should we be surprised with differing goals, objectives, needs, interests, and motivations?

As each case is unique, we must consider our mediation process “anew,” design and conduct the mediation process “anew.” Some cases may call for keeping the parties together throughout while others may require no direct contact. Some may call for complete opening statements, while others may call for brief focused openings. Some may warrant having the clients do the talking while others require that the talking be done by the trained negotiators. Some cases may require pre-mediation caucuses, pre-mediation meetings, pre-mediation site visitation, or pre-mediation product introduction.

Simply put, creativity is a force that can help people face and deal successfully with the most difficult and challenging conflicts.

VI. Deafness

Often we create our own deafness and then grow so familiar with our deafness that the thought of hearing becomes frightening.⁷

Deafness is not an often discussed word in the world of mediation and negotiation. Yet we witness deafness all too often in the midst of mediation. How often have we listened but not heard a thing? How often has a mediation participant come with a preconceived first impression that he or she refused to revisit?

Often an advocate will have worked so hard at selling his client’s case that he is deaf to his own doubts, much less the doubts of others. Just as frequently an adjuster who has taken a case to “committee” will come with marching orders, not discretion; so he is rendered institutionally deaf. In other instances emotions will render us deaf to the questions, the message, the opinion, the views, the feelings, and emotions of others. The question is how do we remove the earplugs of deafness to facilitate dialogue and communication?

A preferred method for creating a climate that opens parties to the peaceful music of dialogue and debate rather than “deafness” is to model connection, creativity, and compassion. Mediators and negotiators must lead the way in engaging in active listening, openness, and thoughtful analysis. Let us suggest that mediators and negotiators should be willing to reflect humility and empower the participants to shed their “deafness.”

VII. Dignity

I hold my value, honor, and dignity regardless of circumstances. I do not allow the thoughtless or unwarranted behavior of others to cause me to doubt or forget my own worth.⁸

Often commentators on the mediation process discuss the importance of giving parties dignity; an

important concern and a notable goal of sophisticated negotiators. Parties, lawyers, adjusters, and mediators alike – do better when they feel that they have been acknowledged and engaged in a positive fashion. These are critically important goals.

Yet, as mediators, we are often buffeted by the winds of advocacy. Often parties and advocates seek to manipulate us, to shape our perspective to theirs so we become their advocate. Truth be known, in many instances parties seek to have us be their fear mongers. After all, clever advocates realize that fear is the most dominant pervasive factor.

In the midst of conflict, when battered by the strong winds of advocacy and the waves of emotions and feelings a mediator must be self-actualizing, balanced, calm and patient as he steers the ship of conflict to a safe and satisfying peaceful harbor.

VIII. Dialogue

Dialogue holds the potential to enable us to perceive and use our ignorance because it helps us to reflect in ways we would not on our own. And it holds the potential of helping us gain insight as we see past existing knowledge to new possibilities.⁹

Too often during mediation participants listen only for the purpose of reloading for advocacy rather than for reasoning together, reevaluating, and reconsidering. More often that not, parties come to the mediations polarized and prepared to stay that way. The purpose of mediation is to foster true dialogue that takes us from polarization to common sense and to common ground.

Mediators and negotiators, who are seeking conflict resolution, should take care to remove the venom from speech that will shut others down. Candor in

the acknowledgment of positional weaknesses will go further than fake puffery and loud posturing. Seeking mutual or consistent interests and goals can only occur if parties are open to meaningful dialogue. Even when one party wants money from another whom would rather not part with it, both want safety and security, both want to reduce their risk, and both want closure.

Wise mediators and negotiators facilitate dialogue. They do so by being respectful, by being dignified and by being patient. They create a climate that allows participants to learn from each other.

IX. Emotions

Life is a comedy for those who think and a tragedy for those who feel.¹⁰

Emotions are tangled up into virtually all mediations. What experience tells us and what this delightful Walpole metaphor suggests is that those who believe that mediation is all about logic and the law will find that neither logic and the law or emotions will necessarily rain supreme. Thus, negotiators, parties, and mediators must be prepared to address emotions during the mediation process.

Daniel Goleman, Ph.D., the worldwide best selling author defines emotions as “a feeling and its distinctive thoughts, psychological and biological state, and range of propensities to act.”¹¹ He has identified the main families of emotions as (1) anger, (2) sadness, (3) fear, (4) enjoyment, (5) love, (6) surprise, (7) disgust, and (8) shame.¹² What he and others understand is the importance of bringing “intelligence” to our range of emotions.

X. Empathy

In order to heal someone else, healers must be able to empathize and connect with the pain or problem they seek to heal in another. Being truly empathetic demands that one contin-

ually tap into one’s own reservoir of pain in order to sense the pain of others...¹³

Estelle Frankel, who suffered the pain of divorce while living in a closed Orthodox Jewish community in Israel, “re-started” her life in the U.S. and became a psychotherapist and a teacher of Jewish mysticism and meditation. She speaks of reaching one’s own pain in order to understand another’s pain. Tapping into your own “reservoir of pain” enables you to draw on a deeper reservoir of compassion and understanding than when one attempts to walk in another’s shoes. Walking in another’s shoes requires one to imagine another’s feelings and emotions while tapping into your own pain has a truer and more realistic dimension. Thus, the transference of one’s pain to compassion for another’s pain (emotions and feelings) has more resonance than imagined pain. It allows appreciation, understanding, and compassion that are often the key empathic connection that is the core of resolution in mediation.

Conclusion

Just as the body politic is engaged in community altering change; we who are enmeshed in conflict resolution, go through life altering change. It our hope that our stepping stones of “reflections” will enable “partners in conflict” and their advocates to make their way safely across the turbulent waters of conflict.

Joe Epstein is the President of Conflict Resolution Services, Inc. (CRS), 5445 DTC Parkway, Ste. 770, Greenwood Village, CO 80111; 303-355-2314; 888-355-2314; www.crs-adr.com. Mr. Epstein has mediated over 3500 cases and works throughout the United States. He may be reached at CRS or joe@crs-adr.com.

Susan L. Epstein is a CRS panelist who focuses her mediation practice in the areas of Health Care, Business,

and Employment. She may be reached at CRS or susan@crs-adr.com.

**© 2009 Joe Epstein
Conflict Resolution Services, Inc.
All Rights Reserved**

Endnotes

- 1 WILLIAM URY, *GETTING PAST NO* (Bantam Books 1993) at 73.
- 2 HUGH PRATHER, *SPIRITUAL NOTES TO MYSELF* (Conari Press 1998) at 92.
- 3 THICH NHAT HANBR, *TAMING THE TIGER WITHIN* (Riverhead Books 2004) at 165.
- 4 MICHELLE LEBARRON, *BRIDGING TROUBLED WATERS* (Jossey-Bass 2002) at 40 – 41.
- 5 JULIA CAMERON, *TRANSITIONS, QUOTING Eleanor Roosevelt* (Jeremy P. Tarcher/ Putnam 1999) at 102.
- 6 DONALD T. PHILLIPS, *LINCOLN ON LEADERSHIP*, quoting from Abraham Lincoln’s Annual Message to Congress, December 1, 1862 (Warner Books 1992) at 137.
- 7 NOAH BEN SHEA, *JACOB THE BAKER* (Ballantine Books 1989) at 49.
- 8 JULIA CAMERON, *HEART STEPS* (Jeremy P. Tarcher/Putnam 1997) at 28.
- 9 WILLIAM ISAACS, *DIALOGUE* (Currency, 1999) at 334.
- 10 DANIEL GOLMAN, *EMOTIONAL INTELLIGENCE, quoting Horace Walpole* (Bantam Dell 1995) at 13.
- 11 *Id.* at 289.
- 12 *Id.* 289-290.
- 13 Estelle Frankel, *Sacred Therapy* (Shambhala 2005) at 194.