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DEALING WITH EMOTIONS IN THE RESOLUTION OF BUSINESS DISPUTES

This paper addresses the reality and impact of emotions in mediated settlement negotiations for the resolution of disputes in business cases. The author discusses some of the emotions commonly encountered in business disputes, even among sophisticated mediation participants, and offers suggestions on how to deal with those emotions.

By C. Edward Dobbs *

In domestic relations, personal injury, and job discrimination cases, strong emotions are anticipated to surface in the course of dispute resolution efforts. Disputants in business controversies, on the other hand, often believe that the path to resolution is an entirely rational process as “it’s all about the money,” and that open displays of emotion are a sign of weakness or loss of control.

EMOTIONS PERMEATE THE NEGOTIATION PROCESS

In the real world of settlement negotiations, emotions permeate the process.¹ Even though parties may appear

¹ See generally, Daniel L. Shapiro, “Emotions in Negotiation: Peril or Promise,” 87 MARQUETTE L. REV. 737 (2004). A highly evaluative mediator, who believes that the path to settlement is “talking sense” into the parties regarding the relative strengths and weaknesses of their respective cases, is also unlikely to appreciate (and therefore prone to overlook) the emotional underpinnings of a dispute and their effect on mediation participants.

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superficially to be entirely rational and outwardly calm, emotions affect each party’s perceptions, optionality analysis, judgment, and interaction with counterparts.² Emotions are frequently experienced in groups that may include a mix of the following – anxiety, fear, frustration, embarrassment/shame/guilt, and anger. Of those various emotions, the one most consistently exhibited in settlement negotiations is anger.

Participants in business disputes may be dismissive of the suggestion that emotions play a significant role in their bargaining. That perception may lead them to focus almost exclusively on the facts underlying the dispute and the applicable legal principles, and to ignore the impact of emotions. When emotions manifest themselves during the process, however, it will become all-too apparent that they play a pivotal role in reaching settlement closure. It is not uncommon to hear a

² See Jennifer K. Robbenolt and Jean R. Sternlight, PSYCHOLOGY FOR LAWYERS 65 (ABA 2012) (“Emotion inevitably influences how we attend to, perceive, construe, remember, and process information”).

mediation party, out of frustration or anger, make one or more of the following exclamations:

“It is already 3:00 o’clock and they’ve barely made a move – this is a waste of time!” or “Let’s cut to the chase and give each other our best and final offer!” or “That’s it, they are not negotiating in good faith, we’re done!”

There are three distinct features of emotion – physiological reactions, action tendencies, and subjective experience.³ Emotions are a “felt experience that affect our bodies and influence our thought process and behavior.”⁴ Because emotions can affect both the emotional party and a counterpart, they are sometimes categorized as intrapersonal or interpersonal – the former referring to the influence a person’s emotions has on her own negotiating behavior and the latter to the influence one’s emotions has on a counterpart’s behavior.⁵ A consequence of strong emotions is that they can prompt a party to act on impulse, even if contrary to the party’s own interests.⁶

Emotions can be either positive or negative, depending upon their impact on the party experiencing (intrapersonal) and the party witnessing (interpersonal) the emotion. Unlike positive emotions, which can facilitate mediation outcomes, negative emotions can have an adverse impact because they can lead to a spiral in the conflict by encouraging retaliation and competitive instincts in bargaining. Even though an outward expression of negative emotions can be suppressed, the emotion itself does not disappear and may fester.⁷ Nevertheless, even negative emotions can contribute to dispute resolution when they motivate the affected party to participate more earnestly in the bargaining process and with greater attention to detail.⁸

Like any human being, both the mediator and counsel are susceptible to the same emotions that affect the parties. Wading into someone else’s conflict can be both an intellectual and emotional challenge. The mediator should be sensitive to the effect that high emotions of parties may have on the mediator’s own disposition and resulting attitude toward and treatment of the mediation participants. If extreme emotions cause the mediator to judge a participant negatively, resist implementation of a party’s negotiating goals, or take sides, the mediator has

³ Gerben A. Van Kleef, Carsten K. W. De Dreu, and Antony S. R. Manstead, “Supplication and Appeasement in Conflict and Negotiation: The Interpersonal Effects of Disappointment, Worry, Guilt, and Regret,” 91 *J. OF PERSONALITY AND SOC. PSYCH.* No. 1, 124 (2006).

⁴ Roger Fisher and Daniel Shapiro, *BEYOND REASON* at 4 and 11 (Viking 2005). See also, Douglas E. Noll, *DE-ESCALATE* at 11 and 12 (Simon & Schuster, Inc. 2017) (noting that emotion has two physical attributes – “affect,” which is what happens in our brain, and “feeling,” which is what is happening in our body).

⁵ Gerben A. van Kleef, Carsten K. W. De Dreu, and Antony S. R. Manstead, “The Interpersonal Effects of Anger and Happiness in Negotiations,” 86 *J. OF PERSONALITY AND SOC. PSYCH.* No. 1, 57 (2004).

⁶ Daniel L. Shapiro, *supra* note 1, at 739. An example of irrationality in bargaining is the so-called “ultimatum game” experiment, which involves a party being given a sum of money on the condition that he share it with a counterpart. Werner Guth, Rolf Schmittberger, and Bernd Schwarze, “An Experimental Analysis of Ultimatum Bargaining,” 3 *J. ECON. BEHAV. and ORGAN.* 367-388 (1982). If the counterpart

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accepts the offer, the party may retain the balance; but if the offer is rejected, both parties end up with nothing. If logic prevailed, the counterpart would take any offer, however low, as an offer of something is better than nothing. Nevertheless, subjects in an experiment consistently rejected an offer that offended their sense of fairness. Martin A. Nowak, Karen M. Page, and Karl Sigmund, “Fairness Versus Reason in the Ultimatum Game,” *INTERNATIONAL INSTITUTE FOR APPLIED SYSTEMS ANALYSIS*, Interim Report IR-00-057, at 1 (noting that about half of the counterparts reject offers below 30%).

⁷ Suppression of emotions (such as resentment or anger) can sometimes cause more collateral damage than an outward expression of the emotion. Daniel L. Shapiro, *supra* note 1, at 740-741 (noting that “[w]hile emotions can be a barrier to a value-maximizing agreement, the common advice to ‘get rid of emotions’ is infeasible and unwise”).

⁸ Jennifer K. Robbennolt and Jean R. Sternlight, *supra* note 2, at 61 and 62.

been unduly influenced by her own emotions.⁹ Counsel, too, may react with emotion (often anger) to attacks on her client's integrity or bargaining position. When the client reacts angrily to a counterpart's personal attack or bargaining tactics in mediation, counsel may feel obliged to mirror the same response (or may do so impulsively). If the target of criticism, counsel will need to be in control of his emotions so that he does not become the cause of impasse.

SOME CONTEXTS IN WHICH EMOTIONS MAY SURFACE

Emotions that surface in the mediation of a business dispute are frequently triggered by one or more of the following:

- First, by the events that precipitated the dispute, which may be unpleasant and their recollection can rekindle feelings of victimhood and a desire for revenge (often confused by the supposed "victim" as a quest for "justice").
- Second, by averments in a pleading, such as allegations of fraud in a fraudulent transfer case; lender liability suits that assert lack of "good faith and fair dealing" by a lender's agent; malpractice accusations leveled at professionals; or breach of fiduciary duty claims that impugn the judgment of officers and directors.
- Third, by the conduct of the litigation itself, including anger at an opponent's counsel in waging what is perceived to be "scorched earth" litigation tactics; or court rulings that are perceived to be unjust or the product of judicial bias in favor of a party or counsel.
- Fourth, by a party's belief that the justice system has failed to deliver an expeditious and decisive

⁹ When a mediator's service is criticized by one or more participants, the mediator can be expected to have a negative reaction. If those feelings come to the fore, the reaction may jeopardize the appearance of impartiality and give rise to party concern that the mediator's impartiality has been compromised. One study undertook an analysis of the importance of a disputant's perception of mediator emotions to the process of mediation; whether positive or negative mediator emotions were more prevalent; and the relative significance of mediator body language or verbal displays of emotion. Joshua Smilovitz, "Emotions in Mediation: Disputant Perception of the Mediator," at 3 and 10 in *DISCUSSION PAPERS IN DIPLOMACY* of the Netherlands Institute of International Relations "Clingendael," ISN 1569-2981 (January 2008).

judgment in her favor; she is the victim of a wrong that the system was designed to rectify; and she is now being urged to compromise on economics (and perhaps principle), forego obtaining a "just" outcome, and yield to the "hostage tactics" of a litigious adversary.

- Fifth, by emotions prevalent in "high stakes" litigation, such as fear for the survivability of a defendant's business (and the potential for bankruptcy in the event of an adverse judgment); apprehension over job security; or angst over the adverse impact of the litigation on similar suits that are pending or may be filed.¹⁰
- Finally, by the mediation process itself, such as a party's frustration at a process impasse over who is to make the "first offer;" negative reaction to a perceived low-ball offer, unrealistically high settlement demand, or an ultimatum¹¹; taking offense at demeaning treatment by a counterpart; or frustration stemming from tedious negotiations in a protracted tit-for-tat bargaining approach.¹²

EMOTIONAL INTELLIGENCE

Repeat participants in bargaining should attempt to develop their emotional intelligence. Emotional intelligence (sometimes referred to as "Emotional IQ") is an individual's capacity to be attentive to, control, and express emotions and to handle interpersonal

¹⁰ Robert S. Adler, Benson Rosen, and Elliot M. Silverstein, "Emotions in Negotiation: How to Manage Fear and Anger," 14 *NEGOTIATION JOURNAL*, Issue 2, at 161, 162 (April 1998) (noting that "In negotiations where large-scale financial stakes are involved, one would assume that the parties would take particular care to guarantee that irrational behavior not control the bargaining. Yet, the larger the stakes, often the more intense and uncontrollable the feelings . . . [T]he key to a successful deal lies not in technical details or even in a favorable price, but in the proper treatment of the emotions that drive the parties to a negotiation.").

¹¹ Elizabeth E. Bader, "The Psychology of Mediation: Issues of Self and Identity and the IDR Cycle," 10 *PEPPERDINE DISP. RESOL.* L. J. 183, 206 (noting that the "first real assault on a party's overconfident hopes and expectations is the opening offer or the first counteroffer" with the disappointment being intense).

¹² For a discussion of tit-for-tat bargaining, see Robert Axelrod, *THE EVOLUTION OF COOPERATION* (Basic Books 1984).

relationships with empathy.¹³ Emotional IQ enables you to put yourself in someone else's shoes, assess a stressful and highly emotional situation before responding, and be cognizant of your own feelings and the stimuli that arouse those feelings.¹⁴

The capacity to place oneself in someone else's shoes is called "empathy"¹⁵ and is sometimes distinguished from sympathy, which is a feeling of sadness for someone who is undergoing hardship.¹⁶ According to some psychologists, empathy has three forms – cognitive, emotional, and compassionate. Cognitive empathy (occasionally referred to as "perspective-taking") is our ability to understand how another person feels and what they may be going through and thinking.¹⁷ Emotional empathy is the capacity to feel another's emotions and to build emotional connections with others.¹⁸ Compassionate empathy not only enables us to understand another's predicament and to experience the same or similar emotions, but also may

move us to provide needed assistance (such as delivering a meal to a friend who has lost a loved one).¹⁹

Persons with high Emotional IQ appreciate that communication is frequently non-verbal and that emotions can be conveyed through an individual's body language. Voice tone (and volume), hand gestures, facial expressions (eyes and mouth), body posture, laughing, and blushing are examples of non-verbal communications.²⁰ Facial expressions, in particular, can be revealing, as emotions are predominantly displayed in the face.²¹ Body language can be a valuable source of information as it provides clues to a party's disposition, sensitivities, aspirations (including "walk-away" points), and reactions to interpersonal engagement.

It is unclear whether (or to what extent) an individual's high Emotional IQ will enhance her bargaining outcomes. While empathy can foster rapport, which in turn can lead to the development of trust among bargainers and cultivate long-term relationships, there is some evidence that individuals with an excess of compassionate empathy make needless concessions and thereby compromise gains.²²

MOOD

A person's moods are to be distinguished from his emotions, although the distinction may not always be clear.²³ Emotions are provoked by a particular

¹³ See generally, Daniel Goleman, *EMOTIONAL INTELLIGENCE: WHY IT CAN MATTER MORE THAN IQ* (Bloomsbury Publishing 1996).

¹⁴ *Id.*

¹⁵ Empathy has been described as requiring three distinct skills – the ability to share another person's feelings; the cognitive ability to apprehend what another person is feeling; and a socially beneficial intention to respond with compassion to a person's distress. Elaine Hatfield, Richard L. Rapson, and Yen-Chi L. Le, "Emotional Contagion and Empathy," in *THE SOCIAL NEUROSCIENCE OF EMPATHY* (Edited by Jean Decety and William Ickes, MIT Press 2009) at 19.

¹⁶ Dwight Golann, *MEDIATING LEGAL DISPUTES* at 98-99 (ABA 2008). But see C. Daniel Batson, "These Things Called Empathy: Eight Related But Distinct Phenomena," in *THE SOCIAL NEUROSCIENCE OF EMPATHY* (edited by Jean Decety and William Ickes, MIT Press 2009) at 8 (noting that sympathy and empathy are similar and often used interchangeably).

¹⁷ Justin Bariso, "There Are Actually 3 Types of Empathy," at <https://www.inc.com/justin-bariso/there-are-actually-3-types-of-empathy-heres-how-they-differ-and-how-you-can-develop-them-all.html> (excerpted from Justin Bariso, *EQ APPLIED: THE REAL-WORLD GUIDE TO EMOTIONAL INTELLIGENCE* (Brough Hall 2018)); Taya R. Cohen, "Moral Emotions and Unethical Bargaining: The Differential Effects of Empathy and Perspective Taking in Deterring Deceitful Negotiation," 94 *JOURNAL OF BUSINESS ETHICS* 569 (2010).

¹⁸ Justin Bariso, *supra* note 17.

¹⁹ *Id.* Adam Lindsay Gordon, a 19th century Australian poet, captured the essence of compassionate empathy in the following lines:

Life is mostly froth and bubble,
Two things stand like stone.
Kindness in another's trouble,
Courage in your own.

²⁰ Daniel L. Shapiro, *supra* note 1, at 739.

²¹ See generally, Brian Knutson, "Facial Expressions of Emotion Influence Interpersonal Trait Inferences," 20 *J. OF NONVERBAL BEHAVIOR* 165 (1996).

Of course, an accurate assessment of facial expressions of emotions must take into account the effect of cultural influences. David Matsumoto, "Cultural Influences on Facial Expressions of Emotion," 56 *SOUTHERN JOURNAL OF COMMUNICATION* No. 2, 128 (1991).

²² Katie Shonk, "Emotional Intelligence as a Negotiating Skill" (July 25, 2019) at <https://www.pon.harvard.edu/daily/negotiation-skills-daily/the-limits-of-emotional-intelligence-as-a-negotiation-skill/>.

²³ See generally, Christopher J. Beedie, Peter C. Terry, and Andrew M. Eng, "Distinctions Between Emotion and Mood," 6

circumstance (such as an offensive statement made in our presence) and are directed at a specific object (such as the person who uttered the statement). Moods are abstract, less likely to be sparked by a discrete event, are said to be “background music” to our thoughts and actions, and are shaped by a variety of factors, including the environment (such as the weather), our physical condition (poor nutrition, lack of sleep, or overall poor health), and our mental state.²⁴

Moods and emotions overlap and can influence each other. Therefore, just as emotions may alter mood, emotions may be susceptible to the mood that we are in.²⁵ For example, a “bad” or “irritable” mood can precipitate an angrier response to an irritant than might otherwise have occurred. Unlike emotions, which may be momentarily experienced and then dissipate, a mood is generally a longer-term state of mind or being.²⁶ While a person can usually describe an emotion and the genesis of it, she may not be able to explain precisely why she is in a particular mood.²⁷ Emotions come in multiple varieties (such as anxiety, fear, frustration, and anger), and may be experienced in succession (*e.g.*, anxiety may turn to fear, and frustration may lead to anger), but moods are more nebulous and generally labeled simply as “good” or “bad.” Except for mood disorders, such as clinical depression, emotions tend to be more intense than moods, which have been described as a “persistent state of low level emotion.”²⁸

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COGNITION AND EMOTION at 847 (Psychology Press Ltd. 2005). While happiness is a state of being that can be calming, welcoming to others, and highly infectious (as it broadcasts a cheery disposition and an optimistic outlook), it may be difficult to determine whether a party’s apparent happiness is a mood that will persist for a period of time or a temporary emotion triggered by a recent event.

²⁴ Daniel L. Shapiro, *supra* note 1, at 740, 863; Tim Hill, “Moods and Emotions: What’s the Difference Anyway?” at timhillpsychotherapy.com/moods-vs-emotions/; Paul Thagard, “What are Moods?” in *PSYCHOLOGY TODAY* (May 23, 2018) at <https://www.psychologytoday.com/us/blog/hot-thought/201805/what-are-moods> (noting that “a mood is a general feeling, not a reaction to a particular situation” and not as intense as emotions, which can be strong feelings).

²⁵ Tim Hill, *supra* note 24.

²⁶ Christopher J. Beedie, Peter C. Terry, and Andrew M. Lane, *supra* note 23, at 868.

²⁷ *Id.* at 869.

²⁸ *Id.*

The mood of a mediation participant is often induced by factors unrelated to the dispute. For example, a participant who for some time has been in the throes of a contentious divorce may be in a dour mood. Such a participant is likely to be distracted, distant, less rational, quickly dismissive of any proposal from a counterpart or advice from counsel, anxious, and even depressed. On the other hand, a participant who feels exhilaration from the recent birth of a child may come to the mediation in an optimistic frame of mind, believing that anything is possible (including resolution of an intractable dispute), but perhaps prone to make too generous concessions in a spirit that “all is right in the world.”²⁹

Good moods and positive emotions can facilitate cognitive processing by amplifying problem-solving skills, creativity, and motivation.³⁰ Individuals in a good mood tend to be more optimistic about, and therefore have greater confidence in, their ability to meet a challenge than those in negative moods.³¹ Mood may affect judgment and incline one to visceral decision-making, although less so when the available information and objective criteria discredit a mood-based decision.³²

²⁹ Some believe that good and bad weather can affect mood. Norbet Schwarz and Gerald L. Clore, “Mood, Misattribution, and Judgments of Well-Being: Informative and Directive Functions of Affective States,” 45 *J. PERSONALITY AND SOC. PSYCH.* 513-523 (1983).

³⁰ Alice M. Isen, Kimberly A. Daubman, and Gary P. Nowicki, “Positive Affect Facilitates Creative Problem Solving,” 52 *J. OF PERSONALITY AND SOC. PSYCH.* No. 6, at 1122-1131 (1987) (experiments indicated positive affect induced by viewing comedy film or receiving small bag of candy); Alice M. Isen, “An Influence of Positive Affect on Decision Making in Complex Situations: Theoretical Issues with Practical Implications,” 11 *J. OF CONSUMER PSYCH.* No. 2 at 75-85 (2001) (noting evidence that, “as long as the situation is one that is either interesting or important to the decision maker, positive affect facilitates systematic, careful, cognitive processing, tending to make it both more efficient and more thorough, as well as more flexible and innovative”).

³¹ That is not to say that a negative mood will necessarily scuttle a negotiation. It has been suggested that a party may create the appearance of having a negative mood (like anger), while remaining positive in actuality, and thereby potentially gain an advantage in the bargaining. Robert B. Lount, Jr., “The Impact of Positive Mood on Trust in Interpersonal and Intergroup Interactions,” 98 *J. OF PERSONALITY AND SOCIAL PSYCHOLOGY* No. 3, at 420-433 (2010).

³² Norbet Schwarz and Gerald L. Clore, “Mood as Information: 20 Years Later,” 14 *PSYCHOLOGICAL INQUIRY* No. 3 and 4, 296, 299 (2003).

It is not unusual for a party to be invited by her counsel or the mediator to mood-assess an offer by how it “strikes them” or “makes them feel.”

Some believe that moods can be transferred from one person to another, like a cold. Referred to as emotional (or mood) contagion,³³ this theory posits that, when we detect someone’s mood through non-verbal cues, we are prone to mimic their behavior and ultimately adopt their mood as our own.³⁴ Our awareness of the contagion prompts us to avoid people in bad moods for fear that their mood will take hold in us.³⁵ The contagion phenomenon may enable an individual to shape the emotions or behavior of others through the conscious or unconscious influence of emotional states and behavioral attitudes.³⁶ Thus, knowledge of the propensity of mood to induce similar moods in others can be useful to a mediator in attempting to influence the atmospherics at a mediation conference. A mediator’s outwardly happy, optimistic, and positive mood can be reassuring and induce others to embrace a positive perspective.

ANXIETY

An emotion commonly experienced by mediation participants is anxiety. Anxiety has been characterized

as a state of distress in response to an external circumstance that is perceived to be threatening, particularly in a new or unusual situation, or one that may result in an adverse outcome.³⁷ A common impulse of an anxious person is to be rid of the anxiety-causing condition, such as a nervous public speaker’s desire to walk away from the podium.

Anxiety is felt to some degree by all mediation participants, including the mediator. A client may feel anxious, particularly if she has not previously been through a mediation, as she will be confronting her adversary (sometimes for the first time), will hear perspectives (on culpability and damages) in conflict with her own, and may be skeptical about the outcome of the mediation process. Advising a client of the high success rate of mediated settlement negotiations and the small percentage of cases that actually proceed to trial³⁸ may have a calming influence and increase optimism. The client might also be reminded that mediation is far less stressful than several days in a combative court environment, with heated cross-examination, pointed questions from the judge, and often inscrutable facial expressions of jurors.

Lawyers, too, may feel anxious over how their performance in the mediation will be evaluated.³⁹ Counsel may worry that his client expects a compelling presentation during a group session that will cow the adversary into submission; and when that hoped-for result does not eventuate, the client will view him as unprepared or ineffective. The mediator, too, may feel a degree of nervousness over party perceptions of his effectiveness, and worry that an aborted settlement effort will be ascribed to a deficiency in his experience or approach.⁴⁰

³³ See generally, Lauren Englert, “The Impact of Emotional Contagion and Its Relationship to Mood” *at* <https://www.mckendree.edu/academics/scholars/englert-issue-25.pdf>; Elaine Hatfield, John T. Cacioppo and Richard L. Rapson, “Emotional Contagion,” 2 CURRENT DIRECTIONS IN PSYCHOLOGICAL SCIENCE No. 3 at 96-99 (June 1993).

³⁴ Studies indicate that emotional contagion operates in the following ways – in conversation, people mimic and synchronize their facial expressions, voices, postures, movements, and other behaviors with those of others; subjective emotional experience is affected continuously by the feedback from such mimicry/synchrony; and, as a result, people tend to “catch” others’ emotions. Lauren Englert, *supra* note 33. See also, Ursula Hess and Sylvie Blairy, “Facial Mimicry and Emotional Contagion to Dynamic Emotional Facial Expressions and Their Influence on Decoding Accuracy,” 40 INT’L J. OF PSYCHOPHYSIOLOGY 129 (2001).

³⁵ Elaine Hatfield, John T. Cacioppo, and Richard L. Rapson, *supra* note 15, at 96-99; Sherrie Bourg Carter, “Emotions are Contagious – Choose Your Company Wisely” in PSYCHOLOGY TODAY, *at* <https://www.psychologytoday.com/us/blog/high-octane-women/201210/emotions-are-contagious-choose-you-company-wisely> (October 20, 2012).

³⁶ G. Schoenewolf, “Emotional Contagion: Behavioral Induction in Individuals and Groups,” 15 MODERN PSYCHOANALYSIS at 49-61 (1990).

³⁷ See generally, Alison Wood Brooks, “Emotion and the Art of Negotiation,” HARV. BUS. REV. (December 2015) *at* [hbr/org/2015/12/emotion-and-the-art-of-negotiation](http://hbr.org/2015/12/emotion-and-the-art-of-negotiation).

³⁸ See generally, Patricia Lee Refo, “Opening Statement – The Vanishing Trial,” 30 J. SECTION OF LITIG., No. 2, at 1-4 (2004); Marc Galanter and Mia Cahill, “Most Cases Settle: Judicial Promotion and Regulation of Settlements” 46 STANFORD L. REV., No. 6, at 1339-1391 (1994); Robert P. Burns, “What Will We Lose If the Trial Vanishes?” 37 OHIO N. U. L. REV. 575, 576-577 (2011).

³⁹ See generally, John Lande, “Escaping from Lawyers’ Prison of Fear,” 82 UMKC L. REV. 485 (2014).

⁴⁰ A mediator should remind herself, and may wish to remind the parties, that the mediator does not settle disputes, the disputants do; and that the mediator’s role is to champion the process and

A modest dose of anxiety (one that does not lead to debilitating fear or depression) can actually assist parties in focusing their attention and redoubling their efforts in the bargaining session. If under control, anxiety can motivate a party to overcome it by preparation, commitment, and attention to detail. But if a party's anxiety is discernable, such as through body language indicative of that emotion, a counterpart may view the party as malleable in the negotiation and instinctively move to extract greater concessions. That instinct may be warranted, as anxious parties are apt to make liberal concessions in the hopes of concluding the negotiations quickly and ridding themselves of the emotion.⁴¹

If in preparation for mediation a client appears to be overly anxious, counsel should consider anxiety mitigants, such as acknowledging that anxiety is normal and experienced to some degree by all participants; familiarizing the client with the mediation process so that she is prepared and understands it; examining various bargaining strategies; focusing the client on her needs and interests to be addressed in a settlement; and noting that there is not a single "right" settlement decision or pathway to dispute resolution.⁴²

FEAR

Fear is a form of apprehension or dread, and is the first cousin of anxiety. Fear is said to be a survival

instinct that triggers the "fight or flight" response.⁴³ Instilling fear in an adversary to undermine confidence in bargaining power and exploit the adversary's fear of loss is a tactic often utilized in both litigation and competitive bargaining.

Fear may proceed from concern about what the future may hold if the dispute is unresolved, and the lack of predictability of and control over the outcome.⁴⁴ A party's fear may be existential and result from a foreboding of financial ruin if settlement is not concluded.⁴⁵

All mediation participants (including counsel) may have some degree of fear, including fear of failure, criticism, ridicule, or financial harm.⁴⁶ A fearful party may feel powerless, assume a counterpart holds all the cards, and believe he has little influence over the outcome of the mediation. A party's perception of a power imbalance may be confirmed by observation of a seemingly self-assured counterpart who appears less under the influence of fear, more persistent (and

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urge the parties to make decisions, as free of biases as possible, that they determine are in their best interests, irrespective of whether those decisions ultimately lead to settlement.

⁴¹ See generally, Alison Wood Brooks and Maurice E. Schweitzer, "Can Nervous Nelly Negotiate? How Anxiety Causes Negotiators to Make Low First Offers, Exit Early, And Earn Less Profit," 115 ORGANIZATIONAL BEHAVIOR AND HUMAN DECISION PROCESSES No. 1, 43-54 (2011).

⁴² The discussion might also address whether to allow a neutral third party (such as counsel) to manage some or all of the negotiations on the client's behalf. One reason to have a skilled negotiator who is not involved in the dispute carry on the negotiation on the client's behalf is they are not emotionally invested in the outcome of the negotiation. As a famed negotiator, and lecturer on the subject, repeatedly observes, "I care, but not that much." Herb Cohen "Care, Really Care, But Not THAT Much," at <https://www.coursera.org/lecture/negotiation/care-really-care-but-not-that-much-lyls7> (August 3, 2015); Herb Cohen, NEGOTIATE THIS!: BY CARING, BUT NOT T-H-A-T MUCH (Herb Cohen/Grand Central Publishing 2003).

⁴³ Walter Bradford Cannon, BODILY CHANGES IN PAIN, HUNGER, FEAR AND RAGE: AN ACCOUNT OF RECENT RESEARCHES INTO THE FUNCTION OF EMOTIONAL EXCITEMENT (Appleton-Century-Crofts 1915).

⁴⁴ Joe Epstein and Susan Epstein, "Grief, Anger, and Fear in Mediation" at <https://www.mediate.com/articles/epsteinJS10.cfm> at 10 (September 2010); John Lande, *supra* note 39, at 493 (noting that "people who feel that they have more control over their situation are likely to feel less fear than those who feel that they have less control").

⁴⁵ It is not atypical for a person to fear the negotiation process itself, particularly if inexperienced in negotiation. John Lande, *supra* note 39, at 495 (noting that fear can be overcome by experiencing the "fear-inducing stimulus often enough that fear no longer emerges").

⁴⁶ One commentator noted that lawyers have a "distinctive set of fears" related to negotiation, which include insecurity about their negotiation or trial skills, which can undermine their confidence in negotiation; being dominated or exploited by their counterpart; making an incorrect assessment of their case and tactical errors in negotiation; recommending acceptance of offers the client will not like; or failing to reach agreement. John Lande, *supra* note 39, at 495. See also, Joseph M. Epstein, "The Powers of Psychodynamics in Shaping Mediation Outcomes," COLO. LAW. 45, 46 (Jan. 2004) (noting that "[p]arties, counsel, and claims adjustors fear failure, embarrassment, ridicule, loss of face, and financial harms" and that these fears "may motivate a negotiator to settle or accept less than the fair value of a case rather than risk going to trial").

aggressive) in bargaining, and less disposed to surrender when confronted with temporary negotiating setbacks. Those qualities often enable a person in power to garner better bargaining results and successfully overcome an impasse when continued negotiation is deemed beneficial.⁴⁷

Fear may be either paralyzing or motivating. If paralyzing, fear can hamper thought, cloud judgment, and delay action; become all-consuming and debilitating; and ultimately lead to sub-optimal negotiation outcomes.⁴⁸ Motivating fear, on the other hand, can be constructive by prompting a fearful party to manage the fear through careful preparation, strategic planning, and focused effort.⁴⁹ That is why fear of failing an exam can incentivize a student to study longer and harder; and fear of striking out when the bases are loaded may increase a batter's concentration and resolve to get a base hit or, better still, a grand slam home run.

A party in fear may elicit sympathetic and supportive responses from other mediation participants. That reaction, in turn, may incline a counterpart to be conciliatory and offer more generous concessions.⁵⁰ Other counterparts, however, may seek to take advantage of a party's fear by hard bargaining and attempts to ratchet up the level of fear.

An antidote to fear is courage, and courage can be enabled by hope – hope that a positive outcome is possible and achievable.⁵¹ Counsel and the mediator

might attempt to moderate a party's fear by observing that favorable outcomes may be achieved from settlement negotiations and are not beyond reach.

FRUSTRATION

Frustration is an emotion that regularly crops up during the course of a mediation, especially in the later stages when departure times draw near and the parties have not as yet reached the zone of settlement.⁵² Frustration is a feeling of annoyance or lack of confidence when a person believes he cannot achieve a desired result. It may stem from bargaining tactics of a counterpart, perceived lack of progress in the mediation, or the absence from the mediation of a counterpart's key decision-maker. Frustration may also result from a party's strong belief in the rightness of her position and disappointment that the legitimacy of that position is not readily acknowledged by an adversary or the mediator. When frustration morphs into anger, a party may throw up her hands, view the situation as hopeless, declare an end to the bargaining session, and abruptly walk away from the conference venue.

An effective mediator will anticipate and attempt to blunt the impact of that emotion by noting that frustration with the process is not uncommon; negotiations can start at a slow pace, but the pace quickens as parties approach the zone of settlement; the mediation participants should trust the process (which has a proven track record) and allow it to play out; even unacceptable offers signify progress; and a party rarely achieves complete victory in a settlement and ordinarily must yield to the other side something the party wants and believes he is entitled to.⁵³

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only thing we have to fear is . . . fear itself – nameless, unreasoning, unjustified terror which paralyzes needed efforts to convert retreat into advance.”

⁵² In this paper, parties are deemed to be in the “zone of settlement” when their negotiations have progressed to a point where they have significantly narrowed the bid-ask from the early rounds of bargaining, are willing to continue their bargaining (they still have “dry powder” and “room to move”), and mutually sense that settlement is in reach or at least possible.

⁵³ A mediator, too, may become frustrated – by a party's unwillingness to adopt a realistic assessment of litigation risks, resistance to exploring creative alternatives to dispute resolution, or dismissiveness of any proposal from a counterpart. A mediator who views settlement as the “holy

⁴⁷ Pon Staff “Power in Negotiation: The Impact on Negotiators and the Negotiation Process,” Harvard Law School Program on Negotiation, Daily Blog (July 25, 2019) at <https://www.pon.harvard.edu/daily-negotiation-skills-daily/how-power-affects-negotiators>. See generally, Robert S. Adler and Elliot M. Silverstein, “When David Meets Goliath: Dealing with Power Differentials in Negotiations,” 5 HARV. NEGOT. L. REV. 1 (2000).

⁴⁸ John Lande, *supra* note 39, at 491 (2014) (“Excessive fear can manifest in debilitating conditions such as phobias, excessive-compulsive disorders, panic attacks, and post-traumatic stress disorder.”).

⁴⁹ *Id.* at 512 (“Lawyers’ fears can lead them to give outstanding performances because they prepare to avoid feared consequences”); Jennifer K. Robbennolt and Jean R. Sternlight, *supra* note 2, at 62 (noting that emotions can be a source of motivation).

⁵⁰ Gerben A. van Kleef, Carsten K. W. De Dreu, and Antony S. R. Manstead, *supra* note 3, at 136.

⁵¹ Joe Epstein and Susan Epstein, *supra* note 44. As President Franklin D. Roosevelt observed in his inaugural address, “[T]he

EMBARRASSMENT, SHAME, AND GUILT

Embarrassment and shame are sometimes used interchangeably, but have different causes and different effects on parties. Embarrassment is a feeling of unease in response to an action (sometimes inadvertent) that a party feels will reflect negatively on her self-image and lead to unfavorable evaluations by others. Shame is a feeling of being flawed, deficient, or unfit, and therefore unworthy.⁵⁴ Unlike a shame-induced perception of unworthiness,⁵⁵ guilt entails a feeling of self-reproach resulting from a belief that one has done something wrong.⁵⁶ All three emotions can affect, to varying degrees, the mood of a mediation participant, her attitude towards counterparts, and the nature of her engagement in the mediation process.

Company representatives are often embarrassed (and may feel a sense of shame) that their business foundered and were compelled to seek bankruptcy relief⁵⁷; a relationship manager at a securities concern may be ashamed of embarrassing e-mails that confirm allegations of “churning” or inept investment advice; directors of an insolvent business may feel embarrassment over a highly publicized lawsuit charging them with dereliction of duty in the ultimate demise of a business; and an outside auditor of a public company’s financial statements may be embarrassed (and feel a sense of guilt) by investor litigation over a restatement of company earnings attributable to alleged auditor malpractice.

Although the effect of embarrassment, shame, and guilt on mediation participants varies, experience

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grail” of mediation is more susceptible to frustration when, after considerable efforts to broker a deal, signs do not portend that settlement is likely.

⁵⁴ Brené Brown, *THE GIFTS OF IMPERFECTION* at 39 (Minnesota: Hazelden 2010).

⁵⁵ Helen Block Lewis, *SHAME AND GUILT IN NEUROSI* 419-38 (N.Y.: International Universities Press, Inc., 1971).

⁵⁶ Gerben A. van Kleef, Carsten K. W. De Dreu, and Antony S. R. Manstead, *supra* note 3, at 125.

⁵⁷ Thus, a farmer who is the third generation to operate the family’s farming business may experience shame or guilt over the failure of the business on his watch; and the president of a corporation may be embarrassed that, under his stewardship, a previously profitable enterprise failed due to poor strategic decision-making and feel guilty that his misjudgments have harmed employees and co-owners.

confirms that the impact can be considerable. Individuals who are ashamed sometimes withdraw, remain silent, refuse to engage, and become reluctant to discuss the interests and needs that they hope will be addressed in a settlement. As a result, a guilt-ridden individual may appear weak in a bargaining session, thereby ceding bargaining leverage to a counterpart.

At times, a party’s open display of embarrassment, shame, or admission of guilt, when accompanied by a desire to make amends, may elicit sympathy or forgiveness from a counterpart. While a clearly remorseful party is more prone to be liked and trusted, it is far from certain that a counterpart will reward such emotions with concessions. Indeed, there is evidence that a counterpart may stand firm in his demands and expect the party affected by feelings of embarrassment, shame or guilt to offer more liberal compromises.⁵⁸

ANGER

Anger may be the so-called “presenting emotion” from which other emotions evolve. At other times, anger is the “residue emotion” left over after a person has experienced one or more other, initial emotions, such as anxiety or frustration. Almost all negative emotions in bargaining can find a pathway to anger.

Anger often proceeds from a feeling of victimization or an assignment of blame to a counterpart. A party who feels victimized may resort to litigation as a means to seek vengeance, vindication (prove he is right and has been wronged), and validation (to restore self-esteem, honor and dignity).⁵⁹ When a party attributes a counterpart’s injurious conduct to the counterpart’s ill will or malicious intent, that “attribution bias” can provoke anger.⁶⁰ Attribution bias disposes a party to believe that an adversary’s actions are the result of internal disposition (“They have no regard for the safety of others when they speed like that”) rather than external circumstances (in truth, the driver was rushing to the hospital as his wife was about to deliver).

The negative effects of anger in a bargaining session are two-fold – first, anger may impede rational thought

⁵⁸ Gerben A. van Kleef, Carsten K. W. De Dreu, and Antony S. R. Manstead, *supra* note 3, at 125 and 126.

⁵⁹ Douglas E. Noll, *supra* note 4, at 127-130 (discussing these and other “needs” of victims).

⁶⁰ K.G. Allred, “Anger and Retaliation in Conflict: The Role of Attribution” at 33 in *THE HANDBOOK OF CONFLICT RESOLUTION* (San Francisco: Jossey-Bass 2000).

and prompt an angry party to act or make choices that are ill-advised and opposed to his best interests; and second, anger outwardly manifested may spark a retaliatory response from a counterpart, thereby focusing party attention on past events that spawned the dispute rather than dispute resolution.⁶¹ Angry parties may exhibit impatience, adopt extreme or irrational positions, draw lines in the sand, be quick to take offense, be less receptive to advice,⁶² misread their adversary's intentions, and be prone to lay down ultimatums and walk away from the bargaining table.

Displays of anger can at times tilt the bargaining table in favor of an angry party, who may be perceived as "tough."⁶³ Negotiators have a tendency to make greater concessions to angry (and tough) counterparts, whether as a result of intimidation or a belief that concession is necessary to forge a deal with an entrenched opponent.⁶⁴ Yet, high intensity anger may be perceived as offensive, precipitate competitive bargaining, and jeopardize restoration of a business relationship.⁶⁵ Further, when a party views his position as strong and the adverse effects of an aborted settlement effort as inconsequential, anger may be counterproductive. In a business dispute with sophisticated parties, table pounding may be viewed as unprofessional, amateurish, and unjustified, and may cause a counterpart to prefer the status quo over compromise to a party regarded as undeserving.

DEALING WITH AN ANGRY PARTY

Counsel should alert the mediator in advance of the mediation conference to the potential for strong expressions of anger by a client. In addition, counsel and the mediator might discuss whether, when, and

under what circumstances to allow that anger to be expressed and for the client to "vent."

Commentators differ on whether anger should be openly expressed or suppressed during a settlement conference. Some believe that venting merely serves to perpetuate anger and potentially intensify it.⁶⁶ They discourage opening statements in mediation out of concern that such statements may elicit an angry response and lead to a confrontation that poisons prospects for collaboration. According to that school of thought, anger should be controlled and hidden, so that parties are not induced to counter with angry feelings, dwell on past events that occasioned the dispute, and divert attention away from collaborative problem-solving.⁶⁷ A contrary view holds that emotions are a natural part of human interaction; anger is to be expected when parties have hurled accusations against one another in litigation; suppression of anger creates an artificial atmosphere of cooperativeness and respect, when in reality suppression may cause the angered party to harbor resentment; venting can be cathartic and may remove barriers to repairing relationships; and expressions of emotion often convey helpful information to a counterpart about a party's state of mind, limits in bargaining, and interests and needs that must be addressed for resolution to occur.⁶⁸

It is possible that anger may be simulated as a negotiation ploy. That tactic may proceed from a belief that anger can intimidate and sway a counterpart to compromise out of concern that the angered party is at his walk-away point in the negotiation. When anger is feigned, and the supposedly angered party's bluff is called, that party risks losing credibility. Feigned tactics signal a lack of sincerity, honesty, and respect that can induce a counterpart to harden her position or dissuade

⁶¹ Gerben A. van Kleef and Carsten K. W. De Dreu, and Antony S. R. Manstead, *supra* note 5, at 57, 71 (noting that anger of a party in response to an opponent's anger may originate from frustration by a party having to make relatively large concessions during the negotiation to the angry opponent).

⁶² Jennifer K. Robbennolt and Jean R. Sternlight, *supra* note 2, at 54.

⁶³ Hajo Adam and Jeanne M. Brett, "Everything in Moderation," 76 *J. EXPERI. SOCI. PSYCH.* 12-18 (May 2018).

⁶⁴ Jennifer K. Robbennolt and Jean R. Sternlight, *supra* note 2, at 64; A. Irvin Schein, "The Role of Anger in Mediation" at <https://irvinschein.files.wordpress.com/2013/02/the-role-of-anger-in-mediation.pdf>; Gerben A. van Kleef and Carsten K. W. De Dreu, and Antony S. R. Manstead, *supra* note 5, at 71.

⁶⁵ Hajo Adam and Jeanne M. Brett, *supra* note 63, at 12-18.

⁶⁶ Jennifer K. Robbennolt and Jean R. Sternlight, *supra* note 2, at 58.

⁶⁷ Counsel for an emotional client may be concerned that an opponent's trial attorney who witnesses the anger can assess how the emotion will likely be viewed by a judge or jury, and how easily the emotion can be triggered in cross-examination.

⁶⁸ Jennifer K. Robbennolt and Jean R. Sternlight, *supra* note 2, at 59; Daniel L. Shapiro, *supra* note 1, at 740 (noting that suppressing anger and other strong emotions "can debilitate a negotiator's cognitive and behavioral functioning" by leaving the negotiator in an "agitated state"; consumes important cognitive energy through the suppression of emotional displays; and leaves a negotiator more likely to stereotype a counterpart as an "adversary," leading to competitive behavior).

her from continued interaction with a disingenuous party.⁶⁹ When a party or counsel develops a reputation for the use of feigned anger, they are less likely to be trusted in future negotiations, which, in some specialized areas of business litigation, may involve the same parties or counsel. Not only is inauthentic anger unlikely to have the desired effect, but genuine anger at a later date may be misinterpreted as insincere (like the boy in the fable who falsely cried “wolf”).

There are multiple strategies that might be pursued to deal with a party prone to anger. The mediation participants might seek to build rapport prior to and during the mediation session in order to reduce the prospects that any participant will become angry; attempt to frame the mediation conference as a collaborative effort, rather than competition for the largest slice of a fixed pie, to allay concerns that the process will be unduly rancorous; and listen (attentively and with empathy) to an expression of anger, which can have a calming effect when the emotion is allowed to run its course, uninterrupted and unjudged.⁷⁰ Further, a party’s being told that emotions are a normal part of litigation and dispute resolution can itself be reassuring.

In addition, a mediator may utilize the technique of reframing by which the mediator repeats back to the angry party the essence of the party’s verbalization of anger in a manner that invites a more objective interpretation of the events that are central to the dispute. By acknowledging the emotion (without necessarily conceding justification for it) and “labeling” it, the mediator confirms to the emotional party that she has heard and understands the emotion.⁷¹

⁶⁹ Rachel L. Campagna, Alexandria A. Mislin, Dejun Tony Kong, and William P. Bottom, “Strategic Consequences of Emotional Misrepresentation in Negotiation: The Blowback Effect,” 101 J. OF APPLIED PSYCH. No. 5, 605 (2016); Han-Yingng and Al K. C. Au, “Strategic Display of Anger and Happiness in Negotiation: The Moderating Role of Perceived Authenticity,” 30 HARVARD LAW SCHOOL NEGOT. J. No. 3, at 301-327 (July 2014).

⁷⁰ Deborah Calloway, “Using Mindfulness Practice to Work With Emotions,” 10 NEV. L. J. 339, 358 and 363 (2009-10) (describing the essence of empathy as listening without judgment, which has “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.”).

⁷¹ See generally, Douglas E. Noll, *supra* note 4 (referring to the process as “affect labeling”).

It is not unusual for emotional flooding (*i.e.*, being overwhelmed by emotion) to hinder ongoing negotiations during the mediation. The parties can always adjourn and reschedule a later session when tempers (and resulting flooding) may have subsided.

POST-SETTLEMENT “BUYER’S REMORSE”

On occasion, a party may regret his settlement decision and experience what is sometimes referred to as “buyer’s remorse.” When a party backs out of a non-binding agreement in principle to settle due to buyer’s remorse, the prospects for concluding a settlement may be damaged, potentially beyond repair. However, courts to date have shown little inclination to vitiate an otherwise binding settlement agreement on the grounds of buyer’s remorse and have even been reluctant to do so on the more traditional grounds of mutual mistake, duress, or ineffective assistance of counsel.⁷²

Buyer’s remorse may stem from a party’s insecurity and lack of self-confidence, fear of having made a wrong decision, or suspicion of having been unduly influenced (or poorly advised) in the negotiation process. A perception of undue influence by a counterpart in reality may simply be the product of greater skill or experience of a counterpart’s counsel or a counterpart’s greater sophistication in the dispute resolution process. Sometimes a party may believe that she was pressured by the mediator (or her own counsel) to settle on terms that were ill-advised.⁷³

⁷² See, e.g., *Jaroh v. Jaroh*, 2017 WL 4655275 (Mich. Ct. App. Oct. 17, 2017) (unpublished) (spouse’s unsuccessful attempts to set aside settlement through mediation of a domestic relations case on grounds that settlement was reached through duress, she signed settlement agreement against her will, her husband falsely represented information, and mediation conference spanned nine hours without food or snacks); *Pierce v. Pierce*, 128 So. 3d 204 (Fla. Dist. Ct. App. 2013) (within hours after signing settlement agreement, party sought unsuccessfully to vacate settlement on grounds of coercion after mediator allegedly denied her request to take draft settlement agreement home over the weekend to study it); *Rachid v. Perez*, 26 So. 3d 70 (Fla. Dist. Ct. App. 2010) (spouse unsuccessfully sought to be excused from mediated settlement agreement on grounds of ineffective advice of counsel and unilateral mistake).

⁷³ A party who believes counsel has pressured her into making an ill-advised settlement decision may be the subject of a later “settle and sue” claim of malpractice regardless of whether the client seeks to rescind the settlement. It may come as a surprise to some attorneys that the fact that a dispute has settled does

A party's second guessing the wisdom of a settlement may be in reaction to an assessment of a third party (such as a family member, business associate, or friend) that the settlement was not a "good deal." When a third party questions whether better terms could have been achieved, it may be helpful to remind the client that those who did not participate in the mediation may not fully appreciate settlement dynamics (risk analysis, trade-offs, and bargaining give-and-take) and rarely are in a position to have a fully informed view. It is difficult to put a price tag on the emotional components that shape a settlement, and third parties who are not "on the firing line" are less capable of appreciating the significant influence that such considerations may have had on a party. Because no two cases are exactly alike, the notion that the level of concessions negotiated in one case compares unfavorably with another is often a false comparison.

To reduce the likelihood (or at least the intensity) of buyer's remorse, counsel should discuss with the client in advance of the mediation possibility of buyer's remorse and its causes; the settlement terms that would be acceptable and concessions that may have to be made to a counterpart; and the likelihood that, in the process of bargaining, settlement goals and perspectives change and a reassessment of litigation risks and the benefits of settlement can be expected to occur. Otherwise, a client with a fixed idea of what a "good settlement" looks like may become frustrated when many of his preferred settlement terms are "nibbled away" during the mediation and fault counsel for any suggestion that they be conceded.

After a settlement is reached, the mediator typically congratulates the parties and reminds them of the benefits of settlement, such as dispensing with further discovery, cutting off future litigation costs, avoiding a protracted litigation process, eliminating stress from

ongoing litigation, and restoring a damaged relationship. Confirmation of the benefits the parties achieve through settlement can reduce a party's insecurities over whether she made the "right decision."

SOME TAKEAWAYS

- Human beings are exceedingly complex animals and cannot be separated from their emotions. Mediation participants should appreciate that emotions (and mood) permeate the process of mediation, which is not solely an exercise of reason.
- Counsel's preparation for a mediation should include not only the customary risk-weighted analysis of potential litigation outcomes, but also an anticipation of emotions that may be experienced by mediation participants and strategies for dealing with those emotions (and one's own).
- The mediator and counsel should discuss in advance of the mediation the emotional underpinnings of the dispute, the likelihood that expressions of anger may occur at the mediation, and whether the outward expression of emotions should occur in joint session or in private caucus.
- Especially in business cases where time is of the essence and settlement is the "coin of the realm," counsel should cultivate their bargaining skills, which include heightened sensitivity to their own moods and emotions, and the impact such factors can have on their effectiveness.⁷⁴
- Empathetic listening, patience with the process, and understanding (without necessarily agreeing with) another's perspective are Emotional IQ skills that should be practiced and developed as they will be catalysts for closure. ■

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not necessarily bar a malpractice action against counsel in many jurisdictions. *See, e.g., Edmondson v. Dressman*, 469 So. 2d 571 (Ala. 1985); *Freeman v. Pittman*, 469 S.E. 2d 543 (Ga. App. 1996); *Meyer v. Wagner*, 709 N.E. 2d 783 (Mass. 1991); *Collins v. Perrine*, 778 P.2d 912 (N.M. App. 1989).

⁷⁴ Some have asserted that the so-called "mindfulness practice" (a form of meditation) can make lawyers healthier, happier, and better negotiators based on mood effects (the improvement of mood due to meditation), mood-success effects (the association of more successful negotiation with better moods), awareness effects (due to seeing things in more effective ways), and freedom effects (the ability to make choices due to seeing things in more effective ways). Leonard L. Riskin, "The Contemplative Lawyer: On the Potential Contributions of Mindfulness Meditation to Law Students, Lawyers, and Their Clients," 7 HARV. NEGOT. L. REV. 1 (2002).