

Importance of emotional intelligence in negotiation and mediation



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ABSTRACT

Emotions play a very important role in the search for dispute resolution, but very often are neither understood nor effectively addressed by the parties to the dispute, also not properly controlled and managed by the professionals that are helping the parties to reach peaceful dispute resolution. The effective negotiator or mediator must take into account not only the economic, political and physical aspects of the process, but also the emotional tenor of themselves as well as that of all of the parties.

This paper has three objectives: to define emotions and their role in solving legal disputes by the means of negotiation and mediation processes; to outline main elements of the process of developing emotional intelligence as they play out in the mediation and negotiation processes; and to explore some of the mechanisms for addressing and optimizing the emotional climate in negotiation and mediation processes. The object of the research – emotions in the processes of legal dispute resolution – negotiation and mediation.

The research is composed of introduction, three parts and conclusions. Introduction provides a brief overview of the object of that research and its goals, part one describes emotions and their roles in negotiation and mediation processes, in part two four elements to develop emotional intelligence are overviewed and in the third part analysis of mechanisms for addressing and optimizing the emotional climate of negotiations and mediation are presented. The conclusion gives main ideas of the assignment of that work in brief.

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1. Introduction

The conventional wisdom when entering into negotiation in previous decades was to “separate the people from the problem” (Fisher & Ury, 1983). Unfortunately, in many

negotiations and mediations, people in fact are an important part of the problem. Simply put, the fundamental basis of negotiation and mediation practice is not merely the cognitive analysis of competing interests and the rational development of the most efficient outcome, but also the acknowledgment of the underlying emotional factors at play. The emotional and the rational aspects of negotiation can be seen as *yin* and *yang* – complimentary rather than opposing forces. They interact to form a dynamic process, which can result in optimal results. The effective negotiator or mediator must take into account not only the

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economic, political and physical aspects of the process, but also the emotional tenor of themselves as well as that of all of the parties. Consider two examples where emotions act to destroy settlements:

A couple engaged in divorce settlement discussions. After a day of working with their attorneys, the parties agreed on issues of child support, allocation of residences, division of almost all property. The parties finally engaged in an extremely heated discussion involving allocation of a dog, which the couple had held for years. The failure of the settlement effort frustrated the attorneys and resulted in continuous, expensive and acrimonious litigation.

In a full day settlement discussion of a personal injury matter involving medical malpractice a mediator was able to reach what she considered an equitable settlement offer from the defendants, a physician, a nurse, a resident physician and the hospital where surgery had been performed. When she presented the settlement offer to the plaintiff, the plaintiff became quite agitated. In a rambling conversation, he asserted again and again that “no one ever said they were sorry!” The mediation failed. The case went to trial and appeals followed. Finally, three years after the mediation, the plaintiff received a recovery of less than half the amount offered at mediation, and all of the parties were saddled with excessive attorney fees.

No one could doubt that in both of the examples presented emotions played a very important role in the search for dispute resolution, but were neither understood nor effectively addressed by the parties to the dispute, also not properly controlled and managed by the professionals that were helping the parties to reach peaceful dispute resolution.

There are essentially three dimensions to the conflict element of negotiation: the emotional, the cognitive and the behavioral. Emotional part of any conflict is especially important for psychologists. But unlike psychologists very often lawyers-mediators prefer not to notice the emotional side of dispute resolution process or at least not to induce the parties to go deep into their emotions, believing it can complicate the process or result in their inability to control the behavior of the disputants. If it were possible, lawyers-mediators would prefer to mediate disputes that have no emotional charge at all. Lawyers typically believe that consistent, reasoned, objective, and rational decision-making is cornerstone of any dispute resolution processes. Here comes the question, is it possible to separate people from their emotions? To our opinion, that is “mission impossible”. Especially if we speak about family, medical malpractice disputes, victim-offender conflicts where emotion is sewn-in to the tissue of the conflict. Even in commercial disputes where parties tend to convince each other that there is nothing personal and it is just business, emotional element is obviously present. A small claim to the court to give “a good lesson” to negligent contractor is only one of everyday examples that prove existence of emotions even in those conflicts that are usually perceived as less emotional.

Hence, we should recognize existence of emotions and their influence on the dispute resolution process (positive or negative) and deal with them constructively. As Oscar Wild said: “I do not want to be at the mercy of my

emotions. I want to use them, to enjoy them, and to dominate them” (Wild, 2015). The capacity to be aware of, control and express one's emotions and to handle interpersonal relationships judiciously and empathetically is known as emotional intelligence, EQ or EI (Goleman, 2005). As long as we believe that both emotions and their control while solving legal disputes is inevitable process, we dedicate this paper to the topic of emotional intelligence in negotiation and mediation.

Hence, this paper has three objectives: to define emotions and their role in solving legal disputes by the means of negotiation and mediation processes; to outline main elements of the process of developing emotional intelligence as they play out in the mediation and negotiation processes; and to explore some of the mechanisms for addressing and optimizing the emotional climate in negotiation and mediation processes.

The object of the research – to explore emotions in the processes of legal dispute resolution.

The authors present their research based on the following classical methods of social research: analytical, logical, systematic method and method of generalization.

2. Emotions and their roles in negotiation and mediation processes

An emotion is a conscious mental reaction (for example, anger or fear) subjectively experienced as a strong feeling, usually directed toward a specific object, and typically accompanied by physiological and behavioral changes in the body (Merriam and Webster). Roger Fisher interprets emotion as “...a felt experience. You feel an emotion; you do not just think it. When someone says or does something that is personally significant to you, your emotions respond, usually along with associated physiological changes, and a desire to do something.” (Fisher & Ury, 1983).

“In a recent survey, mediation trainers rated addressing emotional issues as generally more important than addressing substantive issues in a mediation session. Failure to adequately address the emotional issues can result in ineffective mediation. Close to half those surveyed, including two thirds of the most experienced mediators thought mediation training does not sufficiently teach mediators how to address the parties’ emotional reactions.” (Schreier, 2002).

In their work on emotions in negotiation “Beyond Reason: Using Emotions as You Negotiate” (Shapiro & Fisher, 2005). Fisher and Shapiro demonstrate not only how negative emotions can impede integrative negotiations, but also how positive emotions can enhance the negotiation process, pointing out that emotions play a role in all negotiation.

Shapiro presents very interesting classification of possible negative and positive influences emotions may have on negotiators (Shapiro, 2009). The negative ones are: (1) emotions may divert our attention from substantive matters; (2) revelation of emotions can open us to being manipulated; (3) emotions hinder thinking; (4) emotions may take charge of us. The positive ones are: (1) awareness

of emotions provides with understanding of person's needs and interests; (2) through emotions we communicate the other important information about ourselves, our position, how we want to be treated.

Thus, emotions are always present, and always hard to handle. Frankly whether in negotiation or mediation, emotion is a defining characteristic. Eliminate the emotional aspects of negotiation and we are left with nothing more than a dry transaction.

Some may see emotions as a hindrance to the achievement of positive outcomes in negotiation. The fact is that emotions can be used to create a positive climate leading to enhanced outcomes. These emotions, such as happiness, joy, and acceptance, enhance decision making, stimulate creative problem solving, increase joint gains, and reduce the use of contentious tactics. Negative emotions such as anger, fear and disgust can foster win-lose bargaining, promote the rejection of offers, present fewer opportunities for joint gains and decrease the desire to work together.

3. Developing emotional intelligence: four elements

Bowling and Hoffmann define emotional intelligence (EI) as “the capacity for recognizing our own feelings and those of others, for motivating ourselves, and for managing emotions well in ourselves and in our relationships” (Bowling & Hoffman, 2000). The model introduced by Daniel Goleman, focuses on EI as a wide array of competencies and skills that drive leadership performance. The model (Bradberry & Greaves, 2009) outlines four main EI constructs:

3.1. Self-awareness

Self-awareness is the ability to read one's own emotions and recognize the role that those feelings might play in decision-making. It is an essential first step in becoming an integrated negotiator or mediator. Mastering this step is no small achievement, as it is often easier to gain awareness of emotions in others than in ourselves. However if we do not achieve self-awareness, we run the risk of projecting our own unrecognized emotions onto others. The negotiator or mediator must objectively assess his or her own personal emotional roadmap and develop a base of legitimate self-confidence, allowing for self-management.

How do I feel about upcoming negotiation or mediation session? Worried and non-confident, because it is my first serious case; disappointed, because parties are stubborn and irreconcilable; irritated, because my car had flat tire; optimistic and positive, because the day is warm and my neighbor smiled to me? Any of these emotions effect the way we feel and behave. Being in good moods may make miracle during mediation because you may infect parties with your believe in possibility to settle any disagreement. Mediator's bad mood may ruin even the most settlement-perspective dispute.

Perhaps the preliminary negotiation we have before a negotiation or mediation is the one we have with

ourselves. In his most recent work, “Getting to Yes with Yourself: And Other Worthy Opponents”, William Ury refers to the first and most important negotiation one faces is with his or her self. He points out that “Gradually, over the decades of mediating in a variety of difficult conflicts, from family feuds and boardroom battles to labor strikes and civil wars, I have come to the conclusion that the greatest obstacle to getting what we really want in life is not the other party, as difficult as he or she can be. The biggest obstacle is ourselves. We get in our own way.” (Ury, 2014).

3.2. Self-management

Self-management is the ability to control one's emotions and impulses and to adapt to changing circumstances. The self-aware person must be able to recognize their own emotions and develop mechanisms to minimize the effect of negative emotions while leveraging the impact of positive emotions. The emotions cannot be ignored. Some people tend to hide their true emotions. However, suppressing emotions can make things worse. Suppressing resentment, anger, or other strong emotions can debilitate a negotiator's cognitive and behavioral functioning in several ways (Gross, 2002): the negative emotional experience remains, leaving the negotiator in an internal state of tension; the effort to suppress the display of emotions consumes important cognitive energy; negotiator, who suppress emotions may be more likely to stereotype the opponent as an “adversary”, leading to competitive behavior. That is why the emotionally competent mediator or negotiator is able to choose proper responses instead of being led by emotion or suppressing it. With self-management, one can choose the proper response to outbursts of emotion from other parties.

3.3. Social awareness

Social awareness is the ability to sense, understand, and react to other people's emotions while comprehending social networks. This quality focuses on the “other” in the process and includes the development of empathy, organizational awareness and a service mentality. “If you know the enemy and know yourself, you need not fear the result of a hundred battles. If you know yourself but not the enemy, for every victory gained you will also suffer a defeat. If you know neither the enemy nor yourself, you will succumb in every battle.” (Sun Tzu, 2005). Two of the most important skills that negotiators require for effective social awareness are active listening and reading nonverbal cues. These skills foster empathy.

3.4. Relationship management

Relationship management is the ability to inspire, influence, and develop others while managing conflict. The emotionally intelligent negotiator or mediator must develop four skills: the ability to identify one's own emotions and those of others; the ability to harness emotions and apply them to tasks such as thinking and problems solving; the ability to manage emotions, including the ability

to regulate the negotiator's or mediator's own emotions, and the ability to effect the emotions of the others in the negotiation. Goleman identifies the competencies associated with relationship management as influence, inspirational leadership, and ability to be a change-catalyst, ability to create and maintain networks, and where appropriate the ability to build effective constituencies (Goleman, 2005).

Relationship management is even more challenging when we attempt to negotiate in a multi-cultural or global context. Some cultures are more or less emotionally expressive, or have different positions on confrontation or confrontation avoidance. This dynamic may affect the way disagreement is expressed, the role and range of acceptable emotional expression, the need for or extent of written contracts, or the building of trust. In some cultures, cognitive trust – the trust established by confidence in a party's accomplishments, skills and reliability – is secondary to what is called affective trust – the trust arising from emotional closeness, empathy, or friendship (Meyer, 2015).

Gender also plays a role in relationship management, and the effective negotiator must be aware of communication styles and negotiating frames as they are impacted by gender (Babcock & Laschever, 2007).

4. Mechanisms for addressing and optimizing the emotional climate of negotiations

The negotiator must find ways to inspire and motivate people, adversaries as well as clients, to tap into the values and desires people have and to find ways to align these with common interests. In dealing with the emotions of others, Rogers and Shapiro posit that dealing directly with emotions is not the best way to achieve progress. We have neither the expertise nor the duty to “fix” emotional situations in most cases (Shapiro & Fisher, 2005). In their work, they recommend addressing five “core concerns” that appear directly related to emotional dissonance. Basing actions on these five core concerns – as a lens as it relates to negative emotions and as a lever to maximize the benefits of positive emotions – is the most productive way to deal with emotions in the negotiation setting. These five core concerns are – appreciation, affiliation, acceptance, status and role. Let us further discuss these concerns in detail.

4.1. Appreciation

The party's discomfort, whether based on fear, anger or another emotion, is often based on the feeling that the party is simply not appreciated. Perhaps the most effective way to show this appreciation is by listening carefully to the party, demonstrating that you value their input and time, and acknowledge their concerns and feelings. To show appreciation the negotiator must make every effort to find common ground, to avoid criticizing the person but rather focus on the ideas. Appreciation is defined as a “thankful recognition.” The effective negotiator finds and acknowledges merit in what the other thinks, feels or does,

signals an understanding, even if there is not agreement, in the other person's point of view, and demonstrates that he understands the other person's positions, interests and feelings and is prepared to learn more.

4.2. Affiliation

The verb “affiliate” means to bring or receive into close connection as a member or branch or to associate as a member (Merriam and Webster). This involves the creation of a relationship. Seeing the other party as a “you” rather than as an “it” requires the creation of some affiliation. In his work “Social Intelligence”, Goleman points out: “Our sense of well-being depends to some extent on others recognizing us as a YOU; our yearning for connections is a primal human need; minimally as a cushion of survival. Today the neural echo of that need heightens our sensitivity to the difference between *It* and *YOU* and makes us feel rejection as deeply as physical pain.” (Goleman, 2005).

In simple terms the objective of affiliation is to turn the other from adversary to colleague. Sometimes this is established by finding structural connections, such as school ties, or common professional recreational or social interests. Links can be built by something as simple as a handshake, ice-breaking activities, sincere compliments or gifts.

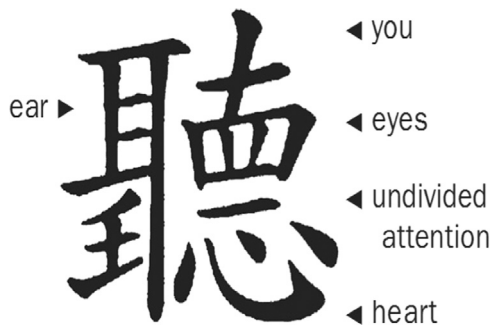
4.3. Autonomy

A common cause of unease and frustration in negotiation is the feeling of loss of control, of being intimidated or controlled, perhaps by their own client or by the other party. In a negotiation there is a need for consultation and input throughout. Rogers and Shapiro recommend close consultation with the other party regarding the internal rules of the negotiation, when parties feel obligated to inform, to consult or to negotiate (Shapiro & Fisher, 2005). It is important for relevant stakeholders in negotiations to bond and perceive themselves as an actor in the process.

4.4. Status

Status is the position of rank that a person holds. Failure to recognize status can exacerbate a difficult situation particularly where there might be a perception of status differential between the parties as a result of relative bargaining power, cultural or language differences, or the history of past relations.

The important thing is to recognize status. The formal recognition of indicia of status is important. This is particularly important where the parties may come from different cultures. Generally, the parties are best to begin the negotiation with the formal recognition of status and to move to informal address as the negotiations progress. Even where people lack actual status in negotiations, it is beneficial to extend courtesy and communicate with deference to enhance relationships.



Picture 1. Chinese symbol “to listen”.

4.5. Role

People have roles in negotiations. Identifying and becoming comfortable with the role you play in a negotiation and recognizing and appreciating the roles that others play can go a long way toward relieving emotions such as anxiety, fear and anger and can go a long way to establishing a positive and comfortable atmosphere.

Based on the five core concerns in each negotiation and mediation the negotiator may use the following skills to build empathy and trust improving the emotional aspects of a negotiation. A good negotiator identifies and addresses emotional roadblocks at the negotiation table. A great negotiator addresses them across all dimensions of a negotiation. Lax and Sebenius describe the negotiation process as one encompassing three dimensions, the setup, the deal design and the tactics (Lax & Sebenius, 2006). The capacity to recognize and address emotional contours of a negotiation in the very earliest phases of the process are an extremely important. Research to understand emotional nuance, as a result of power differential, cultural nuance, or past experience must be researched and addressed.

Process issues must be addressed with the same vigor as substance issues, to set and establish reasonable expectations, and to clearly identify all of the relevant parties and stakeholders in the process (Malhotra, 2015).

The planning phase of the negotiation can be the decisive factor in any negotiation. “The general who wins the battle makes many calculations in his temple before the battle is fought. The general who loses makes but few calculations beforehand.” (Sun Tzu).

A good negotiator encourages all the participants to speak. A great negotiator encourages all the parties to listen. Earlier we discussed that negotiation has not only cognitive and behavioral aspects but also an emotional dimension, which must be recognized and addressed for a negotiation to be successful. The ability to recognize emotions requires development of active listening skills. Thus, listening is the key to negotiation effectiveness. Too often in negotiation and mediation we “listen” to the words and fail to see the verbal language, the cultural context, the hidden meanings, the levels of emphasis of the various parties, sometimes including even our own

clients. There is no coincidence that the Chinese symbol “to listen” contains not only the symbol for ears, but also the symbol for “eyes”, “undivided attention”, “heart” and “you” (Picture 1). This symbol illustrates the vision of proper active listening during negotiation and mediation.

Our responsibility as a negotiator involves more than mere opening of dialogue. Such dialogue too often results in people speaking past each other. We reinforce without question our own positions, beliefs and prejudices. Meaningful discourse requires the hard work of active listening. Our duty to the others in negotiation and mediation, even the party seems unpleasant or offensive, is to in effect say “I give you my ears, eyes, heart and undivided attention.”

5. Conclusions

The fundamental basis of negotiation and mediation practice is not merely the cognitive analysis of competing interests and the rational development of the most efficient outcome, but also the acknowledgment of the underlying emotional factors at play.

Negotiation is a complex process calling on cognitive, behavioral and emotional competencies. For too long the emotional aspect of the process has been minimized or passed over, often to the serious detriment of processes involving domestic, personal injury, transaction and international political and commercial issues. The effective negotiator in the twenty-first century must be able to address the emotional dynamic not only by recognizing and managing his or her own emotional self but also by recognizing and addressing the emotional aspects of all relevant parties.

The most productive way to deal with emotions in the negotiation and mediation setting is to address concerns of appreciation, affiliation, acceptance, status and role. Based on the five core concerns the negotiator may use the following skills to build empathy and trust improving the emotional aspects of a negotiation: to work with emotions across all dimensions of a negotiation; to understand emotional nuance, as a result of power differential, cultural nuance, or past experience; to address process issues with the same vigor as substance issues; to actively listen and to encourage all the parties to listen to each other.

References

- Babcock, L., & Laschever, S. (2007). *Women don't ask: the high cost of avoiding negotiation – and positive strategies for change*. New York: Bantam Dell Publishing Group.
- Bowling, D., & Hoffman, D. (2000). Bringing peace into the room: the personal qualities of the mediator and their impact on the mediation. *Negotiation Journal*, 16(1), 5–28.
- Bradberry, T., & Greaves, J. (2009). *Emotional intelligence 2.0*. San Diego: Talentsmart.
- Fisher, R., & Ury, W. (1983). *Getting to yes: negotiating agreement without giving in*. New York: Penguin Books.
- Goleman, D. (2005). *Emotional intelligence*. New York: Bantam.
- Gross, J. (2002). *Emotion regulation: affective cognitive and social*

- consequences. *Psychophysiology*, 39, 281–291.
- Lax, D., & Sebenius, J. (2006). *3D negotiation-powerful tools to change the game in strategic negotiations*. Boston: Harvard Way.
- Malhotra, D. (2015). Control the negotiation before it begins. *Harvard Business Review*, 66–72.
- Meyer, E. (2015). Getting to Si, Ja, Oui, Hai and Da: how to negotiate across cultures. *Harvard Business Review*, 74–80.
- Schreier, L. (2002). Emotional intelligence and mediation training. *Conflict Resolution Quarterly*, 20(1), 99–119.
- Shapiro, D., & Fisher, R. (2005). *Beyond reason: using emotions as you negotiate*. New York: Penguin Books.
- Shapiro, D. (2009). Untapped power: emotions in negotiation. In *Negotiation: readings, exercises and cases* (pp. 139–146). New York: McGraw-Hill.
- Sun Tzu. (2005). *The art of war*. Boston: Shambhalla Publications, Inc.
- Ury, W. (2014). *Getting to yes with yourself: and other worthy opponents*. New York: Harper Collins.
- Wild, O. (2015). *The picture of Dorian Gray*. New York: Millenium Publications.
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