

Controlling Emotions: Setting the right Mood for Efficient and Effective Family Mediation

Dispute Settlement

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*"But to experience these emotions at the right times and on the right occasions and towards the right persons and for the right causes and in the right manner is the mean or the supreme good, which is characteristic of virtue."*¹

INTRODUCTION

Emotions play a major part in our daily lives often dictating how we feel, think and behave and yet "...emotions are one of the least studied areas in the field [of law]."² This paper will examine a very narrow scope of the study of emotions, namely the role that emotions play in mediation. First, this paper will survey two contending philosophical theories of emotion in an attempt to define emotion. Second, this essay will consider whether it is technically possible to have a mediation void of emotion altogether. Third, the body of this paper will present a fictional case study followed by arguments for why emotions *are and are not* a beneficial component of the mediation process. Ultimately, this paper will argue that mediators should seek to control the size of the role emotions play in mediation.

PART I

WHAT IS AN EMOTION?

Although there is not a universally accepted definition of emotion, there are two well-known philosophical theories of emotions: the feeling theory of emotion and the cognitive theory of emotion. The two theories differ greatly with respect to defining emotion. Therefore, it will be necessary to explain what definition of emotion this paper accepts to be true. First, this paper will briefly discuss the two different theories and then explain the implications that can be drawn from accepting each definition. It seems worth noting at the outset that the depiction of emotion that follows is not comprehensive and actually only presents a fraction of the debate on defining emotion. Nevertheless, the feeling and cognitive theories of emotion are certainly sufficient for the purposes of this paper, which is to ultimately explore the role emotions play in mediation.

FEELING THEORY OF EMOTION

Charles Darwin defines emotions as feelings and mere states of mind.³ For Darwin, we *feel* sad, we *feel* angry, we *feel* scared, and we *feel* happy. All of these *feelings* are emotions and since we cannot change the way we feel, (namely a feeling is a state of mine, it just "is") it follows that we cannot change the emotions we experience.⁴ Take an example of a baby that feels sad *because* she is hungry. In this case, hunger is the catalyst for the baby to feel a certain way and that feeling is classified as sadness. Through his study of emotions in their most primitive forms⁵, Darwin concludes that emotional expression serves the purpose of helping us achieve a desired

¹ Aristotle, *Ethical Questions East and West* ed by Bina Gupta, (Lanham, Maryland: Rowman & Littlefield Publishers Inc. 2002).

² Robert Adler, Susan Benson, & Elliot M Silverstein, "Emotions in Negotiation. How to Manage Fear and Anger" (1998) 14 *Negotiation Journal* 161 at 162.

³ Dr. Louis C Charland, "Charles Darwin & Emotion" (Lecture in The Introduction to the Philosophy of Emotions delivered at the University of Western Ontario, 15 September 2009), [unpublished].

⁴ *Ibid.*

⁵ Darwin studied the emotional expression of children and the mentally disabled.

result.⁶ Returning to the hungry baby example, Darwin would contend that it is easy to understand why the hungry baby begins to cry. Simply put, unless the baby *expresses* her sadness, the baby's parents will not know that she is hungry and subsequently will not necessarily feed her when she desires to be fed. For Darwin, emotional expression is a straightforward three-step process: a catalyst (hunger) triggers an emotion to be felt (sadness) which in turn causes the individual feeling that emotion to express it (cry).⁷

COGNITIVE THEORY OF EMOTION

Many have argued that the mechanics behind emotional experience are more complex than Darwin's conception. Adler, Rosenstein and Silver contend that while emotions might appear *prima facie* equivalent to feelings "... there is more--not only are emotions *impulses* to act, they are also the feelings that trigger the impulse to act"⁸ and as Robert Solomon argues those feelings are triggered by normative judgments.⁹ Although Solomon concedes that emotions might *involve* feelings, feelings alone are insufficient to differentiate emotions. Instead, Solomon argues that emotions are normative judgments, which are made up of attitudes, judgments and evaluative statements.¹⁰ However, what is most interesting about Solomon's position is that since emotions can be rational, we have the ability to control our emotions.¹¹ The following example will help clarify why Solomon has a complex characterization of emotions.

Mike walks out of Osgoode on a Friday evening, excited to return home and have dinner when he quickly notices his car is missing from the parking lot. Suddenly, Mike remembers that his classmate Bobby threatened to steal his car if he did not email Bobby his notes, which he did not. Mike begins to experience the emotion of anger. He is angry *at* Bobby because of his assumption that Bobby has stolen his car and his ultimate judgment that Bobby has wronged him. This anger Mike is experiencing seems entirely rational. However, after searching in the parking lot for his car for another few minutes, Mike realizes that the car has been there all along and thus he was incorrect about his emotion. Mike still feels something, but it is no longer anger. In fact, Mike's anger at Bobby quickly dissipates.

This example illustrates why for Solomon emotions involve a lot *more* of our cognitive processes than perhaps Darwin was even willing to consider. Ultimately, Solomon suggests that since people are much more connected with their emotions, by making the "right" normative judgments individuals have the ability to control their emotions.¹²

PART II

THE UPSHOT: IT IS TECHNICALLY POSSIBLE TO HAVE AN EMOTION WITHOUT MEDIATION

Moving forward, this essay will operate under the assumption that the cognitive theory of emotion is the better theory. It also seems worth noting that the majority of scholarship pertaining to the study of emotion accepts the cognitive view as the more accurate definition of emotion

⁶ *Supra* note 3.

⁷ *Ibid.*

⁸ *Supra* note 2 at 163.

⁹ Robert Solomon, "Emotions, Thoughts and Feelings: What is a 'Cognitive Theory' of the Emotions and Does it Neglect Affectivity?" in Anthony Hatzimoysis, ed, *Philosophy and the Emotions* (Cambridge: Cambridge University Press, 2003) at 1-18.

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² *Ibid.*

given the inherent complexities of the emotions.¹³ The reason this paper must clarify which theory of emotion accepts as true is because a Darwinian conception of emotion makes “controlling emotion” a contradictory notion. Recall that for Darwin, unlike thoughts, views, opinion and judgments, we cannot change the way someone *feels* in a given situation.¹⁴ However, if emotions are taken to be normative judgments as Solomon suggests, then there is potential to change, limit or even restrict emotions from the mediation process. At the very least, *if we take it to be true that emotions are normative judgments and we have control over our normative judgments, then it logically follows that we can control our emotions in mediation practice.*

To recap, this part of the paper has merely attempted to demonstrate that while it is perfectly appropriate to reject an “emotionless mediation” on *moral grounds*, it is ill-informed to reject “emotionless” mediation on the basis that “emotions are unavoidable.”¹⁵ Laying the philosophical groundwork now allows this paper to advance to the much bigger question: *If we can limit or even restrict emotion in the mediation process, should we?*

PART III

WOULD IT BE A “GOOD THING” FOR MEDIATORS TO RESTRICT EMOTIONS FROM THE PROCESS?

To illustrate both the positive and negative features of having emotion in mediation, this paper will present a typical, albeit fictional backstory that causes a couple to undergo divorce/family mediation. Since family mediation is often considered to be “an emotion-laden experience for all involved,”¹⁶ this case study will serve as a springboard to the discussion about whether it is a “good thing” for certain mediations to be so focused on emotions.

Case Study- Sarah and Jim

Sarah and Jim, parents of three children and a formerly happily married couple have decided that after 20 years of marriage it is time to get a divorce. The couple has always had their difficulties, but none too great until Sarah’s recent discovery that Jim has been having an affair. The discovery has sent Sarah into a state of grief and she has asked for a divorce and subsequent mediation to settle her and Jim’s interests.

Sarah experiences a range of emotions. She is *sad* that her marriage is ending, *fearful* of life as a single-mother and *angry* that Jim would break their marriage covenant. Conversely, Jim experiences *guilt* from his own perceptions about his transgressions, *anger* at his wife’s distant nature over the past number years, and *joy* that his wife is “getting what she deserves.” It is fair to assume then that barring any interference from the mediator, both Sarah and Jim will enter the family mediation with these emotions and more importantly their decisions in the mediation will at least in part, be influenced by these emotions.

The Advantages of including Emotions in the Mediation Process

Adler, Rosen and Silverstein conclude their paper on *Emotions in Negotiation: How to Manage Fear and Anger* by making the bold claim that “the one thing we cannot do--nor should we try to--is eliminate emotions [from the mediation process.]”¹⁷ The advantages of involving

¹³ Ronald de Sousa, “Emotion”, online: (Spring 2010) The Stanford Encyclopedia of Philosophy <<http://plato.stanford.edu/archives/spr2010/entries/emotion/>>.

¹⁴ *Supra* note 3.

¹⁵ Daniel L Shapiro, “Emotions in Negotiation: Peril or Promise?” (2003-2004) 87 Marq L Rev 737 at 739.

¹⁶ Robert A DeMayo, “Practical and Ethical Concerns in Divorce Mediation. Attending to Emotional Factors Affecting Mediator Judgment” (2007) 13 Conflict Resolution Quarterly 217 at 217.

¹⁷ *Supra* note 2 at 177.

emotions in the mediation process can be divided into four categories: the educational benefit, the trust-building benefit, the long-term benefit and the self-healing benefit.

Educational Benefit

Pam Marshall suggests, "...Disputes are in the eyes or minds of the beholder. They do not have an independent definition or context."¹⁸ Therefore, encouraging emotional expression in the mediation process will allow each party to convey what is important to them and *learn* the position of their adversary. Adler, Rosen and Silverstein agree with Marshall and argue that one of the premiere benefits of including emotions in a process like mediation is that emotions "Give us values and goals and motivate us to pursue them."¹⁹ Returning to the case study then, if Sarah begins to express her emotions in the mediation, her *fear* of single-motherhood will tell us a lot about her values and motivation to pursue those values in the mediation.²⁰ For example, perhaps Sarah fears single-motherhood because she is unsure how she will be able to provide for her children. By allowing Sarah's emotions to become a focus both Jim and the mediator start to learn that one of her values is her children and perhaps one of her goals in the mediation is to ensure that Jim gives her enough child support so that she can adequately provide for the children.

In addition to emotions enabling the parties to learn about one another, "...emotion can serve as a mediator's lens into the ideology and morality of the disputants."²¹ This in turn might affect the techniques the mediator adopts in the mediation and thus is another way in which emotions contribute to an effective mediation.

Trust-Building Benefit

Susanne Terry contends that one of the key components to a successful mediation is the trust relationship that the mediator is able to establish with the parties.²² Further, Terry suggests that it is only when the mediator begins to grasp the emotions the parties are each experiencing that the mediator can build trust.²³ For example, on its face, it seems confusing that Jim can be happy that his wife is grieving or "getting what she deserves." However, if the mediator is able to recognize that Jim is experiencing a common, but complex emotion known as *schadenfreude*,²⁴ then the mediator can begin to understand Jim and develop a trust relationship where Jim feels comfortable enough to be himself and is not worried about the mediator judging his moral character.

Long-Term Benefits

Morna Barsky makes an interesting two-part argument about the long-term benefits that can be derived from emotions playing a role in mediation. First, Barsky contends that emotions are a necessary component of progressive communication.²⁵ Second, she explains that effective communication leads to a "more cooperative resolution of post-mediation issues..."²⁶ Returning to

¹⁸ Pam Marshall, "Would ADR Have Saved Romeo and Juliet" (1998) 36 Osgoode Hall LJ 771 at 775.

¹⁹ *Supra* note 2 at 167

²⁰ *Ibid.*

²¹ Tricia Jones & Andrea Bodtker, "Mediating With Heart in Mind: Addressing Emotion in Mediation Practice" (2001) 17(3) Negotiation Journal 217 at 223.

²² Susanne Terry, "Conciliation: Responses to the Emotional Content of Disputes" (1987) 16 Mediation Quarterly 45 at 46.

²³ *Ibid.*

²⁴ *Schadenfreude* is a concept of German dissent that characterizes a happiness derived from witnessing the misfortune of others.

²⁵ Morna Barsky, "Emotional Needs and Dysfunctional Communication as Blocks to Mediation" (1983) 2 Mediation Quarterly 55 at 57.

²⁶ *Ibid.*

the case study, for Sarah and Jim, an effective mediation can have immense positive implications on the couple's post-divorce relationship, which will determine how flexible each party is with respect to child arrangements as well as other challenges that require the couple to collaborate.²⁷ In that sense, it is understandable how maintaining a tolerant relationship will be important.

Barsky furthers her discussion on the long-term benefits by explaining that good communication can also have the affect of bettering the communication skills parties employ with their loved ones.²⁸ For example, even if it is hurtful for Sarah in the short term to learn of Jim's *anger, joy* and *guilt*, these emotions will allow for a more successful mediation which in turn will help Sarah with her own personal relationships.

Self-Healing Benefit

One of the most common contentions pertaining to the benefits of involving emotions in the mediation process is that catharsis or emotional venting can "clear the air" and allow the parties to focus on the substance of the important issues. Fisher and Ury argue, "Freed from the burden of unexpressed emotions, people will become more likely to work on the problem."²⁹ The supporters of the catharsis method do not focus on what emotional venting does for the mediation, but rather what it does for the parties themselves. By "dam[ming] the flow of feeling"³⁰ catharsis gives parties the ability to express deep emotions that if repressed would eventually lead to an escalation in conflict.³¹ Returning to the case study, it is conceivable that Sarah and Jim would both be benefitted by venting their emotions especially considering the weight of the "emotional flooding" they are both experiencing.³²

Summary on the Benefits

Adler, Rosen, and Silverstein offer a very respectable summary of the benefits of including emotions and emotional expression in the mediation process. They argue that

Those who would eliminate emotions in negotiation wrongly focus on the negatives, missing the critical nature of emotion--after all, emotions are what give vitality to the values and goals that negotiators [or "the mediating parties"] bring to the table...Emotions give us our values and motivate us to pursue them. Moreover, the emotions that we display help us signal to the other party about our intentions and give us critical feedback about the other side's mood and willingness to agree.³³

Ultimately, involving emotions in the process provides the parties and the mediator with an opportunity to learn, build trust, develop better long-term relationships and better their mental health.

The Disadvantages of including Emotions in the Mediation Process

Daniel Shapiro, generally an advocate for including emotions in mediation, suggests, "There are a number of ways in which emotions can hinder the ability of negotiators to reach a wise agreement in a fair and amicable way."³⁴ Similarly, Adler, Benson and Rosen argue, "When

²⁷ *Ibid.*

²⁸ *Ibid.*

²⁹ Roger Fisher & William Ury, *Getting to Yes: Negotiating Agreement without Giving in* (Boston: Houghton Mifflin, 1981) at 31.

³⁰ *Supra* note 25 at 56.

³¹ *Supra* note 21 at 227.

³² *Supra* note 21 at 228.

³³ *Supra* note 2 at 167.

³⁴ *Supra* note 7 at 738.

emotions run amok, negotiators lose perspective and make serious mistakes or perform poorly.”³⁵ This part of the paper will examine the disadvantages associated with involving emotions in the mediation process. The drawbacks can be divided into five categories: the creation of new conflicts, the mediator’s incapacity, the negative role that anger plays, the myth of emotional venting and “emotional contagion.”³⁶

The Creation or Escalation of Conflict

Jones and Bodtker argue, “Emotional expression can create conflict as well as reflect conflict.”³⁷ There are a number of ways in which Jim and Sarah’s expression of their respective emotions might lead to conflict. For example, when Sarah articulates to Jim how sad she is about his affair, it would be socially appropriate for Jim to exhibit emotions of guilt and perhaps even attempt to comfort Sarah. However, if Jim laughs or exhibits happiness in response to Sarah’s grief, his emotional expression might cause conflict between the two parties and actually constrain the mediation. Similarly, when Jim expresses his anger at how distant Sarah has been in their marriage, Sarah’s lack of response might send a message to Jim that she does not care about his anger, which in turn might escalate the conflict between the two parties.

Mediator’s Incapacity

One of the most interesting objections to including emotions in the mediation process concerns the mediator’s lack of training to deal with the emotions of the parties. Chris Guthrie explains,

My first intuition is that lawyers are unlikely to possess the personalities, predispositions, skills, and training necessary to mediate in a purely facilitative, non-evaluative way...The professionals who seem best-suited to mediate according to the purist model are psychotherapists, social workers, school counselors, clergy, and others who are inclined toward, and thoroughly trained in, the use of such skills.³⁸

Jones and Bodtker second Guthrie’s position and argue, “While mediators are trained to ‘listen for feelings’ they usually do not learn how to enable the disputant to talk through feelings. Thus, mediators may acknowledge emotion but not appreciate it as a conflict management tool.”³⁹ Surely, this is a valid concern. A mediator is placed in a very uncomfortable position if emotions become any sort of focus in the mediation if the mediator feels as though they are ill-equipped to handle these emotions. Furthermore, even if mediators feel capable of dealing with emotions, allowing for emotions to take part in mediation places an unnecessary burden on the mediator to go beyond their call of duty. Returning to our case study, it is understandable how the typical mediator might not be able to dissect the complexity of the schadenfreude emotion that Jim is experiencing or how to best handle Sarah’s sadness.

The Negative Role that Anger Plays

One of the more straightforward objections to allowing emotions to play a role in mediation is that anger, a common emotion, can be very damaging to progress between the parties. Adler, Rosen and Silverstein worry about anger arising in mediation because anger “clouds objectivity,” “narrows the focus of the parties” and “misdirects the goals of the parties.”⁴⁰

³⁵ *Supra* note 2 at 161.

³⁶ *Supra* note 15 at 738.

³⁷ *Supra* note 21 at 225.

³⁸ Chris Guthrie, “The Lawyer’s Philosophical Map and the Disputant’s Perceptual Map: Impediments to Facilitative Mediation and Lawyering” (2001) 6 *Harv Negotiation L Rev* 145 at 147.

³⁹ *Supra* note 21 at 236.

⁴⁰ *Supra* note 2 at 169.

In our case study, both Jim and Sarah have their personal reasons for being angry at one another and thus if anger is permitted to play a role in the mediation, it can distract from mediation making it *about the emotion* and not *about the real issues* that need to be resolved.

The Myth of Emotional Venting

Jones and Bodtker counter Fisher and Ury's assumption that emotional venting leads to a more cooperative mediation.⁴¹ Instead, they argue that the

...get-it-out-of-your-system mentality does not realize that expression of negative feelings is only adaptive to the extent that it leads to some kind of a resolution of distress. Venting without reflection (that leads to coping) only increases the negative emotional experience. Mediators can do more harm than good by simplistic application of the venting admonition.⁴²

In other words, if Sarah or Jim use catharsis as a mechanism in order to "purge themselves,"⁴³ but do so without a reflection period, their negative emotions will be increased and will adversely affect the effectiveness of the mediation.

Emotional Contagion

Emotional contagion is the notion that the emotions that one party experiences are contagious to *all* of the other parties in the room.⁴⁴ Although this theory implies that both good and bad emotions are contagious, Peter Reilly is particularly concerned about negative emotions and the possibility that a party experiencing and exhibiting negative emotions will infect the other party with the negative emotion and ultimately thwart the mediation.

People 'catch' negative emotions as well as positive emotions. For example, when people talk to depressed people, they feel sad and anxious themselves. In fact, one study found that in seventy work teams across diverse industries, people in meetings together ended up sharing the same mood (in some cases good moods, in some cases bad) within two hours after the meeting started.⁴⁵

Emotional contagion is particularly worrisome in our case study because of the intensity of the emotions being experienced by the parties. It would be discernibly problematic if Jim's anger was transmitted to Sarah or conversely if Sarah's sadness infected Jim because neither scenario would advance the mediation.

Jones and Bodtker worry about emotional contagion affecting the mediator as well and potentially leading to mediator bias. They explain, "Most mediators can recall sessions where they felt emotionally reactive due to the intensity of one or both disputants' behavior."⁴⁶ For example, in our case study, Jones and Bodtker might worry about the mediator sympathizing with Sarah. In other words, if Sarah has the ability to transmit her sadness to the mediator and the mediator is unable to remain impartial then the entire mediation is jeopardized.

Summary of the Disadvantages

Even though it is conceivable that the benefits of including emotions in the mediation process might outweigh the disadvantages proposed, there are still very valid concerns regarding

⁴¹ *Supra* note 21 at 227.

⁴² *Ibid.*

⁴³ *Ibid.*

⁴⁴ *Supra* note 21 at 232.

⁴⁵ Peter Reilly, "Mindfulness, Emotions, And Mental Models: Theory That Leads To More Effective Dispute Resolution" (2009-2010) 10 Nev LJ 433 at 447.

⁴⁶ *Supra* note 21 at 233.

the role emotions play in the mediation process. At the very least, we must seriously consider the extent to which the creation of new conflicts, the mediator's incapacity, the negative role that anger plays, the myth of emotional venting and "emotional contagion," all play a role in impacting the mediation.

THE CONUNDRUM

It seems as though there is a conundrum whether or not emotions are included in the mediation. On the one hand, mediation *with* emotion opens the parties up to receiving *all of the benefits* but also makes the parties susceptible to *all of the harms* associated with including emotions in the process. Alternatively, rejecting emotions from the process forgoes all of the benefits, but also safeguards the parties from all of the potential harms that can arise.

PART IV

THEORETICALLY, A HYBRID SOLUTION EXISTS

The next natural step of this paper would be to synthesize the advantages and disadvantages of including emotions in the mediation process and propose a hybrid solution that allows for parties to obtain the benefits from including emotion in mediation without incurring the implicit harms of doing so. This paper hypothesizes that an "emotionally controlled mediation," whereby mediators facilitate the precise extent to which emotions play a role in the process would be the ideal solution to the conundrum posed by this paper. However, the best way of testing the validity of this hypothesis would be to survey a number of mediators that use this approach or approaches of a similar nature, and ascertain whether "emotionally controlled mediation" actually works. This project, while interesting, goes well beyond the scope of this paper, but certainly belongs in a much longer paper, one that considers the practicality of having an "emotionally controlled mediation." To reiterate, the goal of *this* paper is to present the theory that since there are demonstrated benefits and disadvantages to including emotion in the mediation process, the ideal mediation would be a process where mediators control the precise size of the role emotions play in the mediation.

The Objection to my Proposition

The obvious, but worthy objection to this theory of "emotionally controlled mediation" is that it is not a pragmatic solution. Remarkably, the downfall of many "groundbreaking" philosophical theories is that they are nice in theory, but lacking in practical application. In other words, the skeptic might ask:

How are you *actually* going to control the emotions of the parties in a mediation? Even if we accept that emotions are normative judgments, it still seems difficult for example to change the judgments couples will have of one another at the beginning of a family mediator. *Regardless of the approach a mediator takes*, Sarah is still going to be sad, angry and fearful, and Jim is going to remain guilty, joyful and angry.

PART IV

ANSWERING THE SKEPTIC: INTERVIEW WITH A SENIOR FAMILY MEDIATOR

I had the opportunity to interview a senior family law mediator who has been practicing family law and litigation for 30 years and I wanted to discuss her experiences dealing with emotion in mediation--specifically whether she believed emotions were a benefit or a distraction to mediation and whether she had a strategy to manage her own emotions as well as the emotions of the parties. The following is a true story the mediator shared with me regarding her

experience with emotions in mediation.⁴⁷ Most importantly, the interview challenges the skeptic's objection and demonstrates that *it is possible* to have an "emotionally controlled mediation."

Interview Synopsis

Two spouses came to see the mediator to mediate their family law issues. As per policy, the mediator met with each party independently in order to establish trust between the parties and ultimately satisfy the parties that she is impartial in the entire process. In her first independent meeting with the male, the mediator noticed how "emotional" the man was. No matter what substantive question he was asked in their private meeting, the man immediately proceeded to discuss his feelings. It was as if every question unlocked a floodgate of emotion, sometimes even leading the man to experience extreme swings in emotion, from *sadness* that he was in the mediation, to *anger* at the injustices of the legal system. Considering the volume and intensity of the emotion, the mediator started to experience an internal dilemma. On the one hand, it was important for her to fully understand this man's perspective and feelings, so that she could manage the mediation effectively. She needed to know the answer to questions such as: Who initiated the mediation? And she also did not want to seem "emotionless." However, on the other hand, she did not believe forcing all of the emotions out of the parties was the objective of the mediation and furthermore it certainly was not the role of the mediator to deal directly with the emotions of the parties. Instead, she believed that the most appropriate forum for emotions to be dealt with was with a therapist or psychiatrist, a professional that has the requisite experience needed to handle, manage and ultimately advise people who are experiencing several simultaneous emotions.⁴⁸

With this experience in mind, in conjunction with other past occurrences, the mediator decided to try something new. Rather than permit emotions to become a focus of the mediation, which they often do (in fact she described the typical mediation as "2/3 emotions and 1/3 law"), she decided to list "Venting and Emotion" as one of the topics on the next mediation agenda, the document that indicates to parties how the mediation will transpire.

During the next meeting when the mediator assembled the two parties together and discussed the topics on the agenda when she got to "Venting and Emotion" and proposed an idea: "How would you both feel about giving me permission to cut off either of you if you begin to vent during the mediation, and if the venting is not progressing the mediation, but rather detracting from it?" It seems like a basic tactic, however it is one that is not often used considering most mediators either allow emotions to become a focus of the mediation or restrict emotion altogether from the process.

In the end, the mediator's technique of discussing emotion and asking the parties if she could interfere when things got off track turned out to be effective because she was never invalidating emotion from the mediation process, but rather was committed to staying on track. In other words, her chosen technique allowed her to adjourn the expression of a particular emotion when it was counter-productive to the mediation. Ultimately, the mediator explained to me that "It was not the emotions themselves, but rather *the discussion about emotions* that turned out to be fundamental to the process [emphasis added]." She explained that it was all about valuing the place emotions have in mediation and naming that place as a part of the process. She referred to it as "naming the emotion in the room."⁴⁹

⁴⁷ There have been minor alterations to the story including the absence of names and dates in order to preserve the anonymity of the mediator and the parties involved, but I have received permission to include the content of our conversation in this paper.

⁴⁸ See "Mediator Incapacity" pg. 11, 12.

⁴⁹ Anonymous. Personal interview. 21, November, 2011.

IMPLICATIONS

Perhaps by discussing emotions with the parties from the outset of the mediation and setting out processes for how the mediator will manage these emotions, we solve the conundrum. Even Fisher and Ury consider that “making the feelings an explicit focus of discussion helps the negotiations to be less reactive and more proactive.”⁵⁰

CONCLUSION

This paper has attempted to achieve a few tasks. First, the paper laid the groundwork by defining emotion in order to demonstrate that a cognitive view of emotions allows for individuals to have control over their emotions and ultimately grants us the ability to control emotion in mediation. The paper then went on to explore the scholarship on the topic and considered the four major benefits to including emotion in mediation. To counter the benefits, this paper also offered a critique of emotion in the mediation process by considering five major disadvantages to including emotion in the mediation process. Although this paper has not declared whether the benefits outweigh the disadvantages or vice versa, there are at the very least serious challenges for those who advocate for emotion to play a role in mediation. On the one hand, it is ignorant to reject emotion from the mediation process altogether. A cold and calculated mediation misses a fundamental concept of mediation, which is that mediation deals with real people, with real feelings, thoughts, opinions, and values. However, on the other hand, it would be inefficient and unproductive to allow emotion to become a focus of the mediation because emotions can become a distraction and major obstacle to the objective of the mediation. The paper then suggests that a hybrid approach would be ideal, one that essentially allows for emotion to have a “controlled role” in the mediation process. This solution though is vulnerable to the skeptic who will argue that while in theory a hybrid option is ideal, pragmatically it would be impossible to entirely control the role emotions played in the mediation process. This is an interesting discussion, but one that belongs in a much longer paper that considers the practicality of having an “emotionally controlled mediation.” However, suffice it to say that the senior mediator’s experience lends an *air of reality* to the idea that it is possible for emotions to be controlled in mediation.

The goal of this paper *is not* to introduce the “ideal” method of meditation but rather to outline a definition of emotion that explains why it would be *possible* to control the type of role emotions play in a mediation. Furthermore, the interview with the senior family mediator is meant to demonstrate one (of a possibly many) method(s) in which this practice of “emotionally controlled mediation” has been shown to work. “[Ultimately], depending on how we approach emotions...we may be either slaves or masters to them...”⁵¹ Perhaps, if we effectively control emotions in mediation, the latter will be true.

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⁵⁰ *Supra* note 29 at 31.

⁵¹ *Supra* note 2 at 177.

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