

You can do it, put your emotions into it

By Patrick Mahoney

Civil litigators hate emotion, believing it interferes with the resolution of disputes. To the contrary, emotion is at the center of resolution. Understanding emotion and its effect on decision-making is an absolute necessity for civil litigators, regardless of the subject matter or the forum.

In his best-selling book, "Thinking Fast & Slow," Professor Herbert Kahneman explores the core qualities of the emotional mind and the rational mind in a myriad of settings. According to Kahneman, the mind is the product of one's experiences, both positive and negative. The key difference is that the emotional mind reacts rapidly and intuitively in contrast to the deliberative and logical rational mind. As a consequence, the emotional mind is the immediate reactive response that must be understood and tempered if the rational mind is to play a prominent role in decision-making.

Illustrative is how parties so often commence negotiations. Typically, each side comes to the mediation with an express or unstated belief in what is fair. Yet, the opening offer is extreme because the offering party is coming from a place of fear, i.e., that the other side is not here in good faith and cannot be trusted. The response elicits cries of bad faith, frustration and anger as well as the threat to leave before tendering an equally extreme position. Thus, little is accomplished except to solidify the parties' mutual feelings of distrust.

It is the task of the mediator to move the parties from their extreme positions to enable them to see that a resolution is possible. One does that by being keenly aware of each party's emotional needs. To gain this insight, the mediator must establish the trust of all by listening and demonstrating an understanding of the respective positions. The mediator hears words spoken, assesses their emotional content and notes what is not said. Then, the mediator must educate both sides on what may be achievable and motivate the parties to explore what is possible.

Central to the task is enabling both sides

to appreciate their emotional responses to the issues in the case. This begins before the mediation starts by gaining an understanding of who will be present and the obstacles to resolution. Determining whether the parties are from different personal and/or organizational cultures provides insight into the emotional mind of the participants and a pathway to the most effective way to convey information.

The mediation begins in either a joint or separate caucus. Increasingly, litigators are resistant to joint opening sessions because of the belief that emotions are likely to hinder resolution. In doing so, litigators and clients miss the opportunity to evaluate the emotions of the parties present and to diffuse those emotions. By having the mediator set boundaries on the joint session and insist that the parties' comments be soft on people and hard on the issues, the clients get a look at what the other side emotionally feels is compelling. Moreover for many parties, this is their day in court, an emotional step that facilitates closure.

The rational mind is engaged by asking a party to explain what it expects the other side to do with its offer; by discussing the personalities of the other side and what it is that party is perceived to be seeking; by articulating a resolution the other side could accept as distinguished from what it should accept; and by suggesting offers be framed in terms of a gain, not a loss, or as the mediator's idea so as to minimize skepticism especially when introducing new ideas.

By having the parties assess the strengths and weaknesses of their case, the rational mind comes into play. Often, this requires a great deal of probing and questioning and an increasing level of evaluation if the mediator is going to engage the rational mind in a realistic risk-reward analysis. However, there always is the emotional mind that resists showing weakness to the client as well as the client discounting risk in favor of reward. Remember an eight-ounce glass with four ounces of water is either half full or half empty. By framing the offer as a gain, the

emotional response is more likely to be half full; the rational mind knows four ounces is just that.

The mediator's challenge is to go beyond the parties' assertion that "I need X to resolve this dispute." Ascertain the broader interest the need seeks to satisfy provides a basis to fashion alternative solutions. If the stated need is for X dollars or a parcel of real estate, understanding what the party seeks to accomplish opens pathways to alternative solutions. Examples would include money over time or money and some other economic benefit, e.g., a lease or a lease and option to buy.

By understanding and accepting the parties' emotional interests, lawyers gain a skill that enables them to become far more effective negotiators. They will be attuned to use their rational mind to frame offers and responses that address the other side's emotional mind. This, in turn, will move the negotiations to a range of options where resolution is within reach. Once the parties perceive that resolution is possible, they, more often than not, will move beyond their preconceived vision of what is fair. Once the emotional mind becomes receptive, settlements happen.

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