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ETHICAL COMPASS

The Power of Empathy

By Professor Elayne E. Greenberg

As colleagues in the dispute resolution field, we have likely participated in the ongoing, often heated debate about the role, if any, of empathy in dispute resolution. There are those colleagues who believe that empathy will only muck up what is really important, the bottom-line number and your evaluation about how to get there. On the other side of this controversy, there are seasoned colleagues who regularly use empathy as dispute resolution currency, often at the risk of being marginalized as “touchy feely” by those who don’t understand its value. To help us get past each other’s anecdotal justifications and shift to a more objective focus, I offer this column, highlighting objective research about the value of empathy in dispute resolution.



Elayne E. Greenberg

The research illuminates that empathy in dispute resolution offers three primary values. First, even-handed empathy for both parties enhances the ethical objectivity of mediators, arbitrators and advocates. Second, empathy helps satisfy participants’ procedural justice needs for fair and just dispute resolution processes. Third, empathy in dispute resolution enhances the perceived integrity of our broader legal system. Our discussion begins with an explanation of empathy as a conflict resolution resource before continuing with highlights from research that validate empathy’s benefits.

Empathy Is a Conflict Resolution Resource¹

Empathy as a conflict resolution resource has traditionally been shorthand for “putting yourself in the other’s shoes.” However, empathy is actually comprised of three components: cognitive, emotional and behavioral. The cognitive component of empathy is the recognition of the emotions and thoughts the other is feeling.² The affective or emotional component of empathy is actually the *emotional response* to the thoughts and the feelings of the other so that the other feels “got” and “understood.” Put together, the cognitive and emotional components are familiar to many as “perspective taking.”

What distinguishes perspective taking from empathy is the third component, the behavioral component. The behavioral component of empathy is the integration of both the cognitive and emotional components into an action that indicates to the other that the other’s experience is fully understood.³ As a conflict resolution

resource, empathy can be viewed as perspective taking on steroids. Empathy not only includes an understanding of the other person, but it also includes the affirmative actions, be it verbal or gestures, that demonstrate an understanding of the other’s experience.

Mediators’ interventions provide us rich examples of empathy in action. As one illustration of the value of empathy in a mediation, an otherwise sophisticated business investor is livid that he was sold cases of wine that weren’t what they were purported to be. Although the lawyer representing the wine dealer who sold the fraudulent wine kept talking about the restitution number that would resolve this dispute, the sophisticated business investor instead kept expressing with increasing volume his rage at being duped. The mediator intervened at appropriate times with an empathic support to each side. To the wine dealer, the mediator empathized, “*You are confused and frustrated, because you don’t know what this customer wants. You keep offering to make him financially whole, and he keeps getting angrier and angrier.*” To the disgruntled investor, the mediator empathized, “*You are livid that the wine distributor thought it could sell you fraudulent bottles of wine and get away with it. You are saying that, for you, this is not just about the money, but it is about them taking responsibility for what you view as a reprehensible action.*” The mediator’s empathetic support helped each of the parties’ feelings and perspectives be heard and understood by the other. It also allowed the wine dealer to begin to more effectively respond to the businessperson’s true interests and the investor to begin listening to what the wine dealer was offering. Yes, empathy used properly is a powerful conflict resolution resource.

The good news is that we all have empathy in varying degrees. The better news is that we can always expand our capacity to empathize. Mediation training, which focuses on expanding our perspective-taking ability, has been shown to increase our empathic abilities.⁴ Even reading books about stigmatized groups such as *One Flew Over the Cuckoo’s Nest* can also help us expand our range of empathic responses.⁵ And for those who need a quick empathy fix, there is even an empathy app to guide those empathically challenged into offering more empathic responses.⁶

Empathy Assists Arbitrators, Mediators, and Advocates to Maintain Their Objectivity

Empathic responses are one way for arbitrators, mediators and advocates to maintain their ethical obliga-

tion to remain objective. At a time when arbitrators,⁷ mediators⁸ or advocates⁹ in dispute resolution are reminded by our respective ethical codes about the importance of objectivity, at the same time we are also provided with conflicting and oft times dizzying messages that remind us that it is impossible to be objective because we are all influenced by our cognitive distortions and implicit biases, whether we like it or not. Help! In the midst of our angst, the research on empathy offers a life preserver, showing how empathy might actually help us maintain our objectivity by allowing us to fully understand each party's perspective.

In Rebecca K. Lee's research, she explains how expressing empathy for each side, also known as evenly applied empathy, can actually help reinforce objectivity.¹⁰ By empathizing for each side, an arbitrator or lawyer can develop a deeper understanding of the presenting problem, an appreciation of what each party has experienced and bring greater objectivity in their decision making about how to resolve the matter at hand. In the area of arbitration, arbitrators could demonstrate their objectivity in their decision making by including in their reasoned awards an empathetic description of each party's perspective about the case.

In another example, my esteemed colleagues Frenkel and Stark conducted in-depth social research about the value of Consider the Opposite prompts (hereinafter CTO), also known as perspective-taking, as a tool to train lawyers. Frenkel and Stark extol the value of CTO prompts to help lawyers maintain a more objective perspective, be more effective advocates and achieve better outcomes.¹¹ For example, CTO prompts can help advocates overcome such cognitive biases as optimistic overconfidence and instead allow the advocate to make a more balanced assessment of his or her case.¹² Moreover, CTO prompts also help advocates weaken the pulls of an opponent who tries to gain an advantage by anchoring with a first number, by in turn responding with more reasonable alternate numbers and accompanying rationales that were considered because of their broader perspective.¹³ Finally, CTO prompts can minimize the partisan viewpoint that blinds some advocates to see only evidence that confirms their point of view and can instead broaden the lawyer's information processing.¹⁴

In another series of experiments, a team of researchers showed how assisting a party to take perspective can actually de-bias the biased individual and allow him or her to feel empathy for the previously implicitly discriminated against person.¹⁵ In these experiments, perspective takers were asked to write a variety of perspective-taking essays such as a day-in-the-life of a targeted outgroup such as blacks or Latinos.¹⁶ These perspective-taking activities resulted in whites having less bias and more relatedness to the targeted groups.¹⁷ Applying these findings to dispute resolution

processes, we may mitigate some of the influences of our implicit biases or assist the parties by engaging in perspective taking.

Empathy Enhances Parties' Perception of Procedural Justice in Dispute Resolution Processes¹⁸

An important by-product of including empathic responses in dispute resolution is that it enhances participants' perception that they have received procedural justice in that dispute resolution process. When parties opt for a dispute resolution process, they expect and deserve a fair and just process. In fact, even when the outcome does not go the way a party had wished, they are more likely to be satisfied with the process if they perceive they have received their procedural justice. Participants in dispute resolution use four criteria to assess if the dispute resolution process is a fair and just one. First, parties want an opportunity to tell their story and be heard.¹⁹ Second, parties want to know that the neutral is making decisions in a fair and impartial way.²⁰ Third, parties want to know that their neutral is trustworthy and desires to do the right thing.²¹ Fourth, parties want to be treated with respect by the neutral and all who administer the dispute resolution process.²²

Therefore, when advocates and neutrals empathize, participants are more likely to satisfactorily experience all four components that contribute to their assessment of procedural justice.

Empathy Enhances Participants' Perceived Legitimacy of the Rest of the Legal System

Another important by-product of including empathy in dispute resolution processes is that it enhances the perceived legitimacy of our entire legal system.²³ Yes, our dispute resolution programs are actually adjuncts to our legal system. Participants' satisfaction with the quality of dispute resolution programs affects their perception of our legal system. Thus, if empathic supports cause greater participant satisfaction with dispute resolution processes, participants are also likely to have greater confidence in our legal system.

Conclusion

Returning to where we began, arbitrators, mediators and advocates cannot ignore the research that demonstrates the importance of empathy in our work. To those who question the role of empathy in dispute resolution, *You are concerned that empathy will detract from participants' real reason for using dispute resolution: to resolve the case at the right number. Besides, you're not a psychologist and don't think it is your role to deal with emotions.* To those who already include empathy in their dispute resolution processes, *You do not want to be marginalized because you*

include empathy in dispute resolution. You regularly see the benefits of empathy and want to see those benefits legitimized.

Empathy is a powerful conflict resource that has a positive ripple effect on the neutrals, advocates and participants. For advocates, arbitrators and mediators who strive to ethically achieve that oftentimes elusive goal of objectivity, even-handed empathy toward both parties is an effective de-biasing tool. As a de-biasing tool, empathy helps us make better deals because we can²⁴ then garner quality information less shackled by cognitive biases. For participants in dispute resolution processes, empathy enhances their perception of procedural justice, their perception of the legitimacy of the process and their esteem for our legal system as a whole. Now that the value of empathy is undisputed, let's go forward and include this conflict resolution resource in our work, our trainings and our professional education.

Endnotes

1. Simon Baron-Cohen, *The Science of Evil* 183 (Basic Books, 2011).
2. *Id.* at 16.
3. *Id.*
4. See, e.g., Douglas N. Frenkel & James H. Stark, *Improving Lawyers' Judgment: Is Mediation Training De-Biasing*, 21 Harv. Negot. L. Rev. 1 (2016); see also Leslie Jamison, *The Empathy Exams* (Graywolf Press, 2014).
5. *Id.*
6. iTunes Preview, <https://itunes.apple.com/us/app/peace-process/id572130315?mt=8> (last visited June 12, 2016).
7. See, e.g., *The Code of Ethics for Arbitrators in Commercial Disputes* Canon 1 (2004), available at http://www.americanbar.org/content/dam/aba/migrated/dispute/commercial_disputes.authcheckdam.pdf ("Canon I: An arbitrator should uphold the integrity and fairness of the arbitration process.").
8. See, e.g., *Model Standards of Conduct for Mediators* Standard 2 (2005), available at https://www.adr.org/aaa/ShowProperty?noDeId=%2FUCM%2FADRSTG_010409&revision=latestreleased ("A mediator shall decline a mediation if the mediator cannot conduct it in an impartial manner. Impartiality means freedom from favoritism, bias or prejudice.").
9. See, e.g., N.Y. Rules of Prof'l Conduct: Conflict of Interest: Current Client Rule 1.7; N.Y. Rules of Prof'l Conduct: Advisor Rule 2.1 ("In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social, psychological, and political factors that may be relevant to the client's situation.").
10. Rebecca K. Lee, *Judging Judges: Empathy as the Litmus Test for Impartiality*, 82 U. Cin. L. Rev. 145, 167-170 (2013).
11. Douglas N. Frenkel & James H. Stark, *Improving Lawyers' Judgment: Is Mediation Training De-Biasing*, 21 Harv. Negot. L. Rev. 1, 34 (2015) (explaining that although they say the terms empathy and perspective-taking are used interchangeably, they consider empathy is more heartfelt and perspective-taking is more cognitive).
12. *Id.* at 21.
13. *Id.* at 40.
14. *Id.* at 33.
15. See generally Andrew R. Todd, Galen V. Bodenhausen & Adam D. Galinsky, *Perspective taking combats the denial of intergroup discrimination*, 48 J. of Experimental Soc. Psych. 738 (2012).
16. *Id.*
17. *Id.* at 723.
18. See generally Rebecca Hollander-Blumoff & Tom R. Tyler, *Procedural Justice and the Rule of Law: Fostering Legitimacy in Alternative Dispute Resolution*, 2011 J. Disp. Resol. 1 (2011).
19. *Id.* at 5.
20. *Id.* at 5.
21. *Id.* at 5.
22. *Id.* at 6.
23. See, e.g. Nancy Welsh, *Making Deals in Court-Connected Mediation: What's Justice Got to Do With It?*, 79 Wash U. Q. 787 (2001).

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