
RECOGNIZING EMOTIONAL DEMONS FOR A MORE EFFECTIVE NEGOTIATION

By Max Factor III



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It's a recession. You are working longer hours and your clients are slower to pay. In addition, your secretary has read about the "wage and hours" laws and expects some additional compensation for her frequently working 9 A.M to 7 P.M. Simply put, your income is down; and the future looks worse.

You are thinking of borrowing from your pension funds or your daughter's medical and educational savings accounts, but the value of the equity in your pension is well below your retirement goal. Moreover, you and your spouse, who is a professor at the Claremont Colleges, have each solemnly promised not to go further in debt or borrow from your daughter's savings accounts.

You angrily tell your secretary that you really like his work, but that with the current financial situation, he is making you choose between his need to make more money and your need to protect your daughter's college education. Then, you storm out of the office, jump into your Prius, and demonstrate it is possible, without realizing it, to go 39 miles per hour in a 30 mph zone.

A police officer pulls up slowly alongside your car and looks at you. Although you are unaware you are speeding, you are certain you will get a moving violation and have to pay more for car insurance. When he passes you by, you silently say to yourself, "He must already have his quota, or he would have found a reason to give me a ticket."

You arrive at the dentist for your annual teeth cleaning. The dental hygienist tells you that it would be wise to schedule a second cleaning in four months because your plaque buildup is substantial. You immediately feel she is simply trying to generate more income from you; and you let her know she is not going to double her income from cleaning

your teeth. "Try that line on someone else's teeth."

When you get home you tell your spouse about your stressful encounters with the police officer who slowed down and stared at you, the dental hygienist who wanted to make extra money by seeing you more frequently, and your secretary who now wants to make more money for working the same hours he has worked for the past 18 months.

It doesn't occur to you to mention you were feeling very anxious about the situation at work and how you're going to fund your daughter's education. Instead, you got "relief" by splitting off that anxiety about finances from yourself and projecting it into the minds of the police officer and the dental hygienist—who were probably just doing their jobs, not looking for extra money.

In litigated cases, it is common for our client to assure his or her counsel that the opposing litigant is "a liar," "a true scoundrel," or simply and elegantly, "venal." Yet, we attorneys know that neither our clients nor the opposing litigant is likely to be anywhere near as untruthful, as wicked, or as venal as our clients initially describe them; and further, we sometimes discover that our accusing clients often have the very same nasty characteristics as the accused opposing litigant. Sometimes our clients' charges against another party more accurately describe our own clients than they describe the accused adversary.

In fact, sometimes we need to be extra careful in working with a client who describes the opposing side as passive-aggressive or as extraordinarily shrewd and manipulative because it is possible that our client may be describing her or his own self and will turn on us when the going gets difficult. Why is this so?

Most of the matters I handle are real estate, employment and business disputes in which one participant frequently “demonizes” the other. Legal counsel are more effective in negotiation and in representing their client’s interests when they understand whether the demon(s) one’s own client sees on the other side are, in whole or in part, actually the devil inside the client.

I will illustrate the process of “splitting and projective identification” which so often results in demonizing the opposing litigant or counsel, by using a recent real estate case between Buyer Bob and Seller Sam.

“This will NEVER settle,” counsel for Sam emphatically advises the mediator. “Bob the Buyer is a housing speculator and a cheap sneak who concealed material facts and refuses to acknowledge accountability for his own bad behavior. You can tell Bob, ‘We are only attending the mediation because the Purchase and Sale Agreement provides that we must mediate first or we are not entitled when we win to full reimbursement of our attorneys’ fees and costs.’”

“Tell me,” the mediator asks, “why does your client Sam believe Buyer Bob is a sneak who conceals material facts and denies accountability?”

“My client Sam bought another and larger house at a real bargain price shortly after he signed a 150-day escrow with Bob. So, Sam asked Bob for an earlier closing date and offered a \$25,000 price reduction so he and his pregnant wife Sarah wouldn’t be paying two mortgages at the same time.”

Sam’s counsel continued, “In response, Bob readily agreed that he’d close in 30 days, provided that Sam would pay Buyer Bob whatever it cost to correct any significant problems in the House Inspection Report that was expected shortly. The amendment to escrow was signed by Sam and Sarah, as Sellers, and Bob, as Buyer.”

“Just one day later, Bob presented Sam and Sarah with a House Inspection Report that was dated three days earlier. The Report stated that the area below the upstairs shower pan showed years of plumbing leaks and that the header over the living room entrance was full of dry rot and could collapse in the event of a significant earthquake. Estimated repair costs of \$15,000.”

“INDIVIDUALS SEEK TO MAKE RATIONAL DECISIONS, WEIGHING COSTS AND BENEFITS, AND RISKS AND REWARDS, IN RELATIONSHIP TO THEIR OWN PERCEIVED INTERESTS”

His voice rising in anger, Sam interrupted his counsel to announce, “Bob told Sarah and me that we had two choices: One, we could deduct another \$15,000 from the sales price and he’d fix it at his expense; or two, we needed to extend the escrow back to 150 days so that there can be time for the repairs to be made at our expense after proper plans and permits are issued.”

“We were suckered by Bob—that sneaky low life speculator, who doesn’t care that Sarah is pregnant and we can’t afford two mortgages. He tried to profit off his fraud by concealing intentionally the Inspection Report until after receiving the first price reduction of \$25,000.”

Sarah added, “It’s a matter of principle, we won’t be extorted by this lawsuit. We won’t pay that cheap sneak Bob a single penny.” Sam and Sarah’s attorney added, “And, we’ll get punitive damages, too.”

Four hours later, the case settled. Surprisingly, Sam and Sarah agreed that Buyer Bob would close the escrow immediately in exchange for a \$35,000 reduction in the initial purchase price and an agreement that Buyer Bob, and not Sam and Sarah, would make the repairs at Bob’s cost and risk.

So, what happened such that Sam and Sarah decided so that “It’s a matter of principle” turned into “We’ll reduce the purchase price by \$35,000 of principal?”

“A pragmatist would probably conclude that when Sam and Sarah weighed their options, which most certainly had to account for the fact that the house that they were selling had significant structural damage,

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they concluded that it was probably an efficient economic choice to pay the \$35,000,” according to E. Jane Arnault, Ph.D., President of JurEcon, Inc. a consulting firm that provides experts in economics, finance, and accounting.

From the perspective of an economist and most business attorneys, Dr. Arnault is correct in her assumption that “individuals seek to make rational decisions, weighing costs and benefits, and risks and rewards, in relationship to their own perceived interests.”

Yet, that is not the whole story. It does not tell us why Sam and Sarah came to the mediation with the attitude expressed by their counsel: “This will NEVER settle.” “Buyer is a cheap sneak, who conceals material facts and denies accountability.”

ONE REASON WHY MEDIATION SHORTENS LITIGATION AND PREPARES FOR DISPUTE RESOLUTION IS THAT A NEUTRAL IS NOT LIKELY TO PROJECT FALSE PERSONALITY CHARACTERISTICS ONTO EITHER LITIGANT

In the instant case, it turns out that Bob is not a cheap sneak avoiding responsibility for his obligations. He is a contractor looking for a small one-bedroom house he could fix up over time. Bob did not immediately turn over the adverse Inspection Report because he was uncertain he could afford to spend any additional money on immediate repairs and wanted to think about how to proceed with Sam and Sarah. It was just then that Sam had asked for the greatly shortened escrow period and gave Bob the opportunity to protect his pocketbook and still purchase Sam and Sarah’s home.

If any party was “cheap,” it was probably Sam the Seller who was so reluctant to pay for the structural damage caused by the dry rot in the home he had lived in. Also, it was quite possible that Sam was “a sneak” because during prior plumbing repairs he received notice of the extensive dry rot damage. Finally, it was Sam who was “not taking responsibility” for his choice to buy a new home before he sold his old one.

Some years ago, I turned to a leading psychotherapist, Dr. Judith Gondell, for the answer to why all these damning (and ironically “self-describing”) characterizations of and by litigants occur. I was hopeful that a better psychological understanding of these heightened emotional charges by litigants such as Sam about Bob would be quite instructive for those who seek to be more effective as negotiators and as catalysts for resolving disputes.

Dr. Gondell explained, “We see this frequently in high stakes situations,” adding that by high stakes she meant “periods of high dependency and concomitant anxiety.” She went on to say, “People in this kind of situation commonly regress to utilizing an infantile understanding of the world around them. Simply put, by taking negative aspects of themselves and attributing those characteristics to the other, the litigants maintain a view of themselves as ‘the good one’ and the other as ‘the bad one’ . . . allowing them to blame the other for the current difficulties. We call this process “Splitting and Projective Identification.”

Dr. Gondell says that this is an important developmental process, which occurs in everyone almost from the time of birth. She advises, “When a person becomes angry, hostile or simply frightened, they may regress to an infantile, emotional state and split off their anxieties, fears or fantasies about doing violence, for example, and imagine or project these negative feelings and motivations onto the other person who seems to have caused the conflict to arise. The angry or worried person is then relating only to the characteristic, the part they projected into the other guy, failing to see the whole person on the other side of the table, while not being able to tolerate within themselves the feelings of being ‘fighting mad’ or the feelings of guilt or fear (of losing or failing).”

Dr. Gondell concludes: “I would guess Sam, faced with having to pay on two mortgages, would be suffering a great deal of anxiety about having placed himself and Sarah in a potential financial bind. Add to that the guilt Sam feels about concealing the structural damage and you have a perfect setup—that is, to rid him of these intolerable feelings by attributing them to Bob. Bob, who in reality is a person with his own troubles, becomes identified in their minds, by their own projections and is now seen by them as the ‘Cheap’ the ‘Sneak’ and the ‘Irresponsible.’”

Unfortunately, hiding our own nature from ourselves by accusing another may make one feel better in the very short term, but it is a dreadful error in the negotiation process to accuse falsely another of one's own wrongdoings.

Acted out in litigation, splitting off from and projecting negative parts of oneself is a destructive form of self-deception. Ultimately self-defeating, it falsely demonizes the adversary and prevents one from really listening to or learning important facts about or from him.

So, one reason why mediation shortens litigation and prepares for dispute resolution is that a neutral is not likely to project false personality characteristics onto either litigant. Instead, the mediator works with legal counsel to eliminate false demons and restore the negotiations to a healthy state by listening, probing respectfully, and communicating within a framework that frequently modifies the litigants' perceptions and refocuses the litigants on what is realistic in best meeting their own particular interests in the light of the resources, risks, and rewards of each.

A client left on his or her own may negotiate in a self-destructive fashion by splitting off one's own dreaded fears and aggressive feelings and projecting these onto the opposing litigant, thereby demonizing him or her. Legal counsel unable to be highly skeptical of the existence of demons present in the opposing litigant will not be negotiating in the true interests of the client, and may drive away potentially wise and durable resolutions by demonizing the opposition.

Kids in a playground can be heard to say: "Anything you call me bounces off me and sticks to you!" Maybe our children instinctively know that the name caller

is often really describing the name caller's very own faults (or demons).

We are well served as employers and as legal counsel to our clients to be as intuitive as kids in a playground. Otherwise, we will infect those with whom we are hoping to have good relationships with the virus of our own fears and anxieties.

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QUESTIONS: MORE EFFECTIVE NEGOTIATION



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| <p>1. The opposing litigants are likely to be as untruthful as our clients initially describe them, considering that our clients know them better.</p> <p style="text-align: center;">True False</p> <p>2. A client who describes the opposing side as passive-aggressive, extraordinarily shrewd, or manipulative may be raising a red flag about the client's own personality traits.</p> <p style="text-align: center;">True False</p> <p>3. "Splitting and projective identification" helps prevent demonizing the opposing litigant or counsel.</p> <p style="text-align: center;">True False</p> <p>4. A pragmatist would not agree that, when Sam and Sarah decided to reduce the purchase price by \$35,000, they had concluded that it was probably an efficient economic choice.</p> <p style="text-align: center;">True False</p> <p>5. From the perspective of many economists and business attorneys, individuals seek to make rational decisions, weighing costs and benefits, and risks and rewards, in relationship to their own perceived interests.</p> <p style="text-align: center;">True False</p> <p>6. In the hypothetical with Sam and Sarah Seller and Bob Buyer, Sam and Sarah assumed that Bob was a cheap sneak avoiding responsibility for his obligations because they knew what Bob was thinking.</p> <p style="text-align: center;">True False</p> <p>7. A better psychological understanding of the heightened emotional state of parties in litigation is of little help in being a more effective negotiator and mediator.</p> <p style="text-align: center;">True False</p> <p>8. According to Dr. Judith Gondell, high stakes situations are frequently marked by periods of high dependency and concomitant anxiety.</p> <p style="text-align: center;">True False</p> <p>9. In the process of "Splitting and Projective Identification," one takes positive aspects of oneself and attributes those characteristics to the other, allowing one to blame the other for the current difficulties.</p> <p style="text-align: center;">True False</p> <p>10. As part of the process of "Splitting and Projective Identification," litigants can maintain a view of themselves as "the good one" and the other as "the bad one."</p> <p style="text-align: center;">True False</p> <p>11. When one becomes angry, hostile, or simply frightened, one may regress to an infantile, emotional state and split off one's anxieties,</p> | <p>fears, or fantasies about doing violence.</p> <p style="text-align: center;">True False</p> <p>12. As a response to the negative feelings arising from conflict, one may try to imagine or project positive feelings and motivations onto the other person.</p> <p style="text-align: center;">True False</p> <p>13. An angry or worried person may relate only to the part projected onto the other person, failing to see the whole person on the other side of the table.</p> <p style="text-align: center;">True False</p> <p>14. Assuming, as Dr. Gondell does based on the hypothetical, Sam would be suffering a great deal of anxiety and guilt, one way for him to rid himself of these intolerable feelings is to define Bob as a bad person.</p> <p style="text-align: center;">True False</p> <p>15. Instead of considering one's adversary in completely negative terms—which may actually embody aspects of one's own personality—it would be more productive to see one's adversary as a real person with his or her own troubles.</p> <p style="text-align: center;">True False</p> <p>16. According to Factor, hiding our own nature from ourselves by accusing another may make one feel better and is an appropriate response in the negotiation process.</p> <p style="text-align: center;">True False</p> <p>17. Demonizing one's adversary prevents one from really listening to or learning important facts about or from him or her.</p> <p style="text-align: center;">True False</p> <p>18. One reason why mediation lengthens the course of litigation is that a mediator comes with his or her own biases and self interest.</p> <p style="text-align: center;">True False</p> <p>19. A mediator, by reducing the demonization of each party by the other, can help restore the negotiations to a healthy state by listening, probing respectfully, and communicating within a framework that refocuses the litigants on what is realistic in best meeting their own particular interests.</p> <p style="text-align: center;">True False</p> <p>20. A client left on his or her own may negotiate in a self-destructive fashion by splitting off one's own dreaded fears and aggressive feelings and projecting these onto the opposing litigant, thereby demonizing him or her.</p> <p style="text-align: center;">True False</p> |
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