

When BATNA Equals the Unthinkable: Business Mediations and Provocation

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In business disputes, the often-overlooked emotional aspects of conflicts present a special challenge. The roots of conflict between parties often extend well beyond the issues laid out on the meeting table, regardless of whether the potential rewards of agreement involve money, status, security, or any combination thereof. And as the parties reveal their views of the issues in dispute, they expose those roots of conflict, and strong emotions often come into play. In mediation, we can see positive emotions expressed, such as enthusiasm for the business and passion for the work at hand. The emotions expressed can also be negative, such as anger at, or disappointment in, a person's partners or others, including the mediator. Even those quick to display anger are rarely ready for the genuine emotional heat that can be generated over a seemingly mundane matter. Indeed, parties may enter mediation disarmed by the impersonal nature of the issues at hand. Many different events can bring "heat" to a business discussion, as to any discussion; for example, one party feeling as if they are not being heard by the neutral, displays of anger, or accusations by one party toward another. At a minimum, the tools and methods of mediation have taught us how to work through impasses in a respectful manner. Most of the time, these emotional displays can be managed or reduced; for example, the neutral can reframe a party's statement to remove the toxicity of specific language while retaining the strength of the speaker's emotion, or they may simply call for a break in the proceedings. Other practitioners have gone further, deliberately seeking to delve "beneath the conflict" and actively reveal emotional currents, with the purpose of each party achieving a deeper understanding of the other, and thereby paving a way to a lasting resolution.

As a negotiator and mediator working in finance for over twenty years, I have worked most closely with parties who, in most cases, had known each other and had worked together for some substantial length of time before a particular negotiation or mediated dispute arose. And, at the conclusion of any negotiation or mediation, the parties expected their relationship and their

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work to continue. With respect to these types of parties, the real value of any agreement between them derives both from an ongoing and meaningful relationship, and the particular combination of skills or resources that the parties bring to the enterprise, usually far beyond that of a capital contribution. For example, someone with knowledge of how to structure financial transactions to take advantage of value offered by a specific market or industry, paired with an entrepreneur who has built successful businesses in that same market or industry. If the course of the negotiation or mediation uncovers real difficulties in the relationship, any resolution would include the development of processes or guidelines by which the parties could continue to work together in a meaningful fashion (or, at least, without the continuing need for intervention).

While in the majority of cases, emotionally charged disputes were resolved with mutually acceptable agreements, periodically, a very different outcome occurred. At times, during business mediations, parties to a dispute experienced severely negative emotional states, which could not be assuaged with inquiry or exposure by a neutral. These emotional states appear to represent a deeper, more fraught level of emotional conflict, a level at which a party feels “provoked.” In this case, I define “provocation” as a state in which a party feels (i) completely in opposition to the position of the other party, without any sight of common ground, and (ii) a sense of a threat to a person’s core self. This perception of threat is one that far surpasses the type of anger or frustration that occurs when one party acts—adventently or inadvertently—to push the “hot buttons” of another. In this context, provocation involves a set of circumstances which triggers issues of self-worth or security, and that threat, as perceived by the party, is real; in the eyes of the person provoked, the conflict has reordered reality, however temporarily. Any number of sources may trigger this kind of provocation: specific facts revealed during the course of the dispute, the interplay of personalities involved or the history of the parties, any of which can constitute “ghosts” in the room. This heightened state of provocation may be indicated by the language of a party, their posture, or their expression. When a party is experiencing feelings of provocation in this manner, a neutral will be unable to highlight, talk through, or reframe the issue. It is critical for a neutral to understand that these “provocation points” are a signal that any tangible, attainable offerings, once seen as positive outcomes to be negotiated, have now changed drastically for the provoked party. At this juncture, the only reward for the provoked party is survival of the core self. While these “provocation points” certainly may occur in any type of mediation, they can be amplified in business disputes, in which parties are more likely to believe that the goals or potential outcomes of the mediation

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are largely “objective” (for example, closing a deal and/or specific monetary benefits), which can leave them unprepared for the intensity of emotions that can arise.

The following story will help to illustrate the “provocation proposition” in action. Two young men, Adam and Bob, meet as classmates in business school. After being paired on a class project, they become friends. Over the course of two years, numerous assignments and team projects, they develop an idea for a business, which would involve investing in construction projects in developing countries, and making related equity investments. They continue to refine their ideas for another two years after business school ends. At that time, Adam starts the business with investments from family and friends, while Bob continues to work for another company, honing skills that both he and Adam believe he will need for their company. When Bob’s job winds down, Adam invites Bob to join the business. They work together to refine their marketing plan, to call on potential investors and to identify preliminary portfolio investments for close to a year. During this time, neither believes that they need an operating agreement, as they have birthed the idea together, feel equally responsible for creating the business around it, and “agree on everything.” The company’s potential value grows as Bob convinces his old employer to make an initial investment of two million dollars, and another person is invited to join the firm as chief financial officer. As a pre-condition to completing the investment, the investor requires that Adam and Bob execute a formal operating agreement in order to address how decisions will be made day-to-day, as well as what would happen in the event of a deadlock between the principals. As they sit down to hammer out the agreement, Adam and Bob find themselves in disagreement over numerous matters that they had not considered previously, including how best to share authority over investment decisions. In the interests of resolving their issues quickly, they elect to bring in a mediator to assist them.

During the mediation discussions, while many issues are quickly resolved, Adam continually expresses resistance to the idea of joint decision-making power over portfolio investments. For his part, Bob is equally firm in his assertion that this was “always” their intent. During a joint session, Adam mentions to Bob that he asked Bob to join the business not for Bob’s investing or management skills, as Bob understood, but because of Bob’s extensive industry contacts; in Adam’s words, because Bob knows how to “shake hands and sell.” Bob asks for a break and, without inquiring whether anyone else agrees, leaves the room. He returns ten minutes later, seemingly calm, but with little to say. Ten minutes thereafter, Bob states plainly that he no longer wants to be a part of the business, and leaves their office. Over the

next two days, Adam reaches out to Bob numerous times, attempting to invite him back to the table. Each time, Bob simply responds that things have changed and the situation is not working out. Soon after, the primary investor becomes aware of the rift; having made his investment based on his prior relationship with Bob, he withdraws his commitment. Without the funding, Adam has little choice but to shutter the business shortly thereafter.

What happened here?

There are certain elements that are key to the “provocation proposition.” In this context, a “business dispute” is defined as a dispute related to a business transaction, where the parties have an ongoing relationship; examples of this type of relationship would be a merger, a partnership or a joint venture. The definition would exclude parties in a romantic or marital relationship, and those of family members, even if they are in business together. This is not to say that this type of provocation does not occur with disputes between spouses or families. However, in a family disputes, the parties are likely more aware of the potential for strong emotional reactions during a session, from similar emotional experiences among the parties outside of mediation.

However, the parties do have what could best be called an “intimate” relationship in a business context. Here, the specific qualities of “intimacy” are (i) the business relationship has lasted for some substantial length of time, (ii) the parties have worked closely together as peers, and (iii) because of the duration as well as the closeness of their working relationship, each party believes that they have some genuine understanding of the other, and how the other will respond in a given situation. As a part of this intimacy, there may also be a longstanding personal connection. The parties are often similar in age, status, and may have gained their skills and experience in similar settings, even to the extent that they and their spouses socialize outside of the work environment.

Next, during the mediation, one party reveals some critical information which challenges some central facet of the other’s identity, or “self-concept.”¹ For example, someone who believes that they are generous, and

¹ See generally HEINZ KOHUT, *THE RESTORATION OF THE SELF* 252–55 (University of Chicago Press ed., 2009) (In this paper, I use Kohut’s idea of empathy not in the long-term, intricate context of the psychoanalytic relationship, but because Kohut’s therapeutic model presented a manner of expressing empathy that often went beyond the scope of the traditional professional/client model. At the time when Kohut began forming his therapeutic model, the best practices of psychoanalysis emphasized neutrality and detachment, in order to best support patient growth and self-determination. I believe this

has a part of themselves vested in that generosity (whether this view is an accurate or idealized one), is told by someone close to them that they are miserly; or someone who prides themselves on being a skilled professional is called a hack by someone whose opinion they respect. The party on the receiving end of this information becomes the “provoked” party, although the other party may not have intended to cause any such response. The information itself could have been provided for numerous reasons. The other party may view their statements as simply telling the truth, or coming clean about what was on their minds. If Bob’s trading skills are not as solid as his marketing skills, Adam’s statements could represent an expression of genuine concern for the health of the business.² Alternatively, the information may have been offered deliberately to shift the direction of the negotiation. In this particular instance, placing Bob in the role of salesman reduces his status to less than that of a trader, and paves the way for Adam to keep authority over investment decisions. However, the information could also have been offered to introduce a new structure for the business with equivalent authority for both parties over different areas of the firm.

Regardless of the intent of the party providing the critical information, a provoked party experiences a loss³: a perceived loss of power, status, privilege or face, which literally “shakes their faith” in what they believe to be most true about themselves. A provoked party can feel deflated, reduced⁴. This state of deflation, in turn, can create a power shift, from a feeling of being in control, or at least on equal footing, to a feeling of being “out of power,” due to this new view of themselves, however temporary that view may be.

Once a person feels “provoked” under these circumstances, their view of the mediation process seems to shift without warning⁵: first, any goals or desired outcomes that were once on the table are now gone, no matter how substantial those outcomes might be for both parties. For Adam and Bob,

to be analogous to the situation of a neutral to a “provoked” party, where something beyond reflection, moving toward reassurance, may be needed).

² See generally ROGER FISHER & DANIEL SHAPIRO, *BEYOND REASON: USING EMOTIONS AS YOU NEGOTIATE* 19–21 (Penguin ed., 2005) (focusing on “core concerns”).

³ See generally David J. Arkush, *Situating Emotion: A Critical Realist View of Emotion and Nonconscious Cognitive Processes for Law and Legal Theory*, 2008 *BYU L. Rev.* 1275, 1314 (2008) (discussing influences of priming on behavior and perception).

⁴ Mark I. Sirkin, *Managing Your Brain: Lessons From Neuroscience*, 82 *N.Y. ST. B.A.J.* 38, 41–42 (2010).

⁵ Richard Birke, *Neuroscience and Negotiation: What the New Science of Mind May Offer the Practicing Attorney*, 17 *DISP. RESOL. MAG.* 4, 6 (2010–2011).

they have the potential to secure millions of dollars in investment money, grow their company and achieve the kind of success they had envisioned for years. But, after Adam reveals his motivation for bringing Bob into the business, Bob no longer saw any point in completing the agreement. Nor was his departure presented as a negotiation tactic; Bob made no counteroffer of any kind, nor did he present any conditions under which he would be willing to return to the table. Second, the provoked party literally feels threatened. Bob's entire view of himself, as a brilliant trader and strategist had just been dashed by someone whose opinion he cared deeply about. Bob may also be feeling more subtle forms of loss, aside from that of his personal identity. He may experience a temporary shift in his status as a group member, in this case being part of a successful business venture⁶, but also in the larger context of membership in their cohort of business school classmates. In addition, Bob may feel pressure or a sense of failure for not living up to the expectations of his family or spouse.

At this point, a provoked party moves fully into defensive mode:

(1) They literally need to escape to "save themselves": they might suddenly withdraw from the mediation suddenly; alternatively, they might capitulate, and simply give up their demands. This capitulation might be seen by the other parties as a newly opened road to an agreement, while, in actuality, it is another form of withdrawal, as the terms are unlikely ever to be completed.

This type of withdrawal leads to some larger questions related to the scope of this discussion: does a party's withdrawal create an ethical issue, if the neutral believes that a party has not had a shift in perspective, but has simply withdrawn? Does a provoked party's lawyer also have a similar issue, if he or she believes that the party is no longer acting in their own best interests?

(2) The body language of the provoked person changes: they become stiff, closed and/or reserved, where they might previously have been open.

(3) The expression of emotion by the provoked person, other than anger, may suddenly feel awkward or inappropriate to them, which can lead to shut down.

A number of emotional and psychological processes appear to underlay the "provoked" state. A simplistic explanation might include "fight or flight," literally the systemic hardwiring that primes us to do battle or flee in the face

⁶ See generally R.J. LEWICKI & B.B. BUNKER, *Trust in Relationships: A Model of Development and Decline*, in CONFLICT, COOPERATION AND JUSTICE 135-39 (B.B. Bunker & J.Z. Rubin eds., 1995).

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of what our automatic brain perceives as a dangerous situation. There may also be feelings of shame at the loss, humiliation, or “public” exposure of insecurity that the party may have been harboring about their own self.⁷ The provoked party may in their “retreat” show signs of regression, in the form of loss of reason, or black/white, or all or nothing thinking.⁸

When a party is feeling provoked, how can a mediator help to keep the discussion going? The first step in dealing with—and defusing—this state of provocation involves the neutral reflecting the concerns of the provoked party back to them, showing the neutral’s understanding of those concerns,⁹ without recasting or reshaping those feelings.¹⁰ This reflection is best described as a kind of empathetic response, similar to the concept of psychoanalyst Heinz Kohut’s empathy or “experience near.” It is critically important for the neutral not to question, or to attempt to examine, the feelings that may be driving the provoked party, nor should they dismiss or defend those feelings. The neutral must understand, and perhaps acknowledge, that the mediation might need to break at this point. This goal of this acknowledgement by the neutral is to promote a sense of safety for the provoked individual, and allowed the individual to “stand down.” The moment of “experience near”¹¹ allows the provoked party to feel as if they have been heard or acknowledged, without the neutral having to agree with the feelings driving the provoked party.¹² This type of reflection is a somewhat different technique from working a particular emotional issue directly into the mediation process at hand.¹³

Similar to Kohut’s concept of empathy, the methods of transformative mediation might work here to further grant feelings of safety. Specifically, a neutral might ask the provoked party exactly what is on their mind at the time,¹⁴ or to put into words what their body language is currently revealing.¹⁵

⁷ Robert Karen, *Shame*, THE ATLANTIC, Feb. 1992, at 40, 42–43.

⁸ DONALD L. NATHANSON, SHAME AND PRIDE: AFFECT, SEX AND THE BIRTH OF THE SELF 312–13 (W.W. Norton ed., 1992) (describing the “compass of shame”).

⁹ GARY FRIEDMAN & JACK HIMMELSTEIN, CHALLENGING CONFLICT: MEDIATION THROUGH UNDERSTANDING 73 (American Bar Association ed., 2008).

¹⁰ KOHUT, *supra* note 1, at 252.

¹¹ *Id.*

¹² FRIEDMAN & HIMMELSTEIN, *supra* note 8, at 65–66.

¹³ *Id.*

¹⁴ FISHER & SHAPIRO, *supra* note 2, at 2.

¹⁵ ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, THE PROMISE OF MEDIATION 131–32 (John Wiley & Sons ed., 2005).

However, a neutral would need to be cautious here, as they might be perceived as being intrusive or putting undue pressure on the provoked party, who may not recognize how sudden or dramatic their emotional and/or physical withdrawal might appear to the others at the table.

In a good outcome, as a result of the neutral's expression of understanding—but not redirecting—of the provocative feelings, the provoked party can decide if, or in what manner, they are capable of proceeding with the mediation. However, if in the face of this heightened state of provocation, a neutral does not convey understanding and reflection, a provoked party is likely to respond as though his core self is in danger, however irrational that belief might be.¹⁶ A provoked party in search of “safety” is much more likely to walk away from the table, do further damage to a business relationship already under stress, or push for unworkable outcomes.¹⁷

The most promising part of an emphasis on this type understanding and reflection by the neutral is the potential for a change in the provoked party's understanding of their own feelings. The most important part of that understanding is that those feelings are transient, however intense they might be, and that the party is safe to pursue other solutions and outcomes.

In order to shed more light on the most effective practices for neutrals in the face of the provocative situations I have described in this paper, I am currently working on creating a series of interview questions to be asked shortly after the conclusion of a mediation, as well as a follow up questionnaire. The interview questions will be structured to obtain information about what, if any, expectations the parties had before the mediation about how emotional an experience mediation would be for them, and to see how those expectations compared to what they actually experienced. The questions might also explore if there were particular thoughts or feelings that were surprising to the parties in some way. The follow up questionnaire, which would be completed within two months of the end of the mediation, would explore whether the parties' perceptions changed during the intervening period, and whether they had any additional thoughts about what feelings were evoked during the mediation.

¹⁶ KOHUT, *supra* note 1, at 80.

¹⁷ Paul Slovic, *Affect, Reason, and Mere Hunches*, 4 J.L. ECON. & POL'Y 191, 200 (2007).