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Frequently Asked Questions about Mediation and Negotiation

By: Jim Melamed*

Q: What is Negotiation?

A: There are two principle negotiation theories and strategic approaches to negotiation:

- competitive or positional negotiation;
- integrative or problem-solving or interest-based negotiation.

Distinguish Strategic Approach from Personality

While there may be some correlation between negotiation approaches and personality style, the two do not necessarily go together. For example, a competitive negotiator may be very "pleasant" to work with in terms of demeanor, but utilize extremely competitive tactics. In fact, a negotiator's pleasantries may themselves be part of an overall manipulative approach! A problem-solving negotiator may, on the other hand, be rather ornery in terms of their personality, yet effectively utilize interest-based, problem-solving strategies in negotiation.

The Best Negotiators Will Have Both Sets of Skills

It is also important to appreciate that the most effective negotiators will have a wide array of negotiation skills, both competitive and problem-solving, and will effectively mix and match these approaches depending upon what the negotiator believes will work best with a particular "negotiating partner" depending on the specific issue being negotiated and depending on the nature of the overall negotiating relationship (one-time transaction or continuing relations).

Strategies to Create Value and Claim Value

Another view of negotiation is that certain strategies and behaviors are intended to "create value" (integrative approaches) whereas other strategies and behaviors are intended to "claim value" (be that by competition or principle).

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Dispute Negotiation and Transactional Negotiation

Also notice that negotiations may be divided into two types:

- dispute negotiation, focused on resolving past facts; and
- transaction negotiation, focused on reaching agreement for the future.

While it is often helpful to appreciate this difference between dispute negotiation and transaction negotiation, it is also beneficial to appreciate that many negotiation situations involve the resolution of both past issues as well as planning future relations.

The Competitive Approach

Competitive negotiation strategy is, essentially, a manipulative approach designed to intimidate the other party to lose confidence in their own case and to accept the competitor's demands. This approach is characterized by the following:

- High opening demands;
- Threats, Tension and Pressure;
- Stretching the facts;
- Sticking to positions;
- Being tight lipped;
- Wanting to outdo, outmaneuver the other side; and
- Wanting clear victory.

When a competitive negotiator is asked how they will know that they have reached a good agreement, they may reply that the agreement is "better than fair."

Assumptions of the Competitive Approach

- There are certain assumptions, a world view really, that lie behind the competitive approach to negotiation. This "distributive" world view includes the following assumptions: Negotiation is the division of limited resources;
- One side's gain is the other's side's loss; and
- A deal today will not materially affect choices available tomorrow.

Risks of the Competitive Approach

While competitive negotiation tactics are often effective in "claiming" already defined value, there are also certain risks to competitive negotiation. Foremost among these risks are damage to the negotiating relationship and a lessened overall likelihood of reaching agreement. Here is a list of the disadvantages of the competitive style:

- Confrontation leads to rigidity;
- There is limited analysis of merits of dispute and relevant criteria for resolving issues;
- There is limited development of solution alternatives;
- It is hard to predict the outcome of the competitive approach or control the process;
- Competitors are generally blind to joint gains;
- Competitors threaten their future relations; and
- Competitors are more likely to have impasse and increased costs.

The Integrative Approach

The integrative, collaborative or problem-solving approach to negotiation has been described as "enlightened self-interest," rather than the "egocentric variety."

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This approach consists of joint problem-solving, where gains are not necessarily viewed as at the expense of the other party.

Assumptions of the Integrative Approach

As one might expect, there is a different world view behind the integrative approach to negotiation. The primary assumptions of the integrative approach are the following:

- Some common interests exist between parties;
- Negotiation is benefited by a full discussion of each participant's perspective and interests; and
- We live in an integrated and complex world and our problems can be best resolved through application of our best intelligence and creativity.

Risks of the Integrative Approach

Risks of the integrative approach are based upon the common sense observation that "it takes two to collaborate." If one party is unwilling to participate in integrative, problem solving negotiation, the more collaborative negotiator may be at risk in the following ways:

- The negotiator will be forced to either "give in" or adopt a competitive stance;
- The negotiator may experience a failure if they do not reach agreement; and
- The negotiator is somewhat at risk in honestly disclosing information if that is not reciprocated.

Principled Negotiation

In their book, “Getting to Yes,” Fisher and Ury set forth their concept of "Principled Negotiation." Here is a brief summary of the main points of principled negotiation:

Separate the People from the Problem

Fisher and Ury suggest that we are all people first -- that there are always substantive and relational issues in negotiation and mediation. The authors describe means of dealing with relational issues, including considering each party's perception (for example by reversing roles); seeking to make negotiation proposals consistent with the other party's interests; making emotions explicit and legitimate; and through active listening.

Focus on Interests, Not Positions

Positions may be thought of as one dimensional points in a space of infinite possible solutions. Positions are symbolic representations of a participant's underlying interests. To find out interests, you may ask questions like: "What is motivating you here?" "What are you trying to satisfy" or "What would you like to accomplish?" You may also ask: "If you had what you are asking for (your position), what would that experientially get you - what interests would that satisfy?"

In negotiation, there are multiple, shared, compatible, and conflicting interests. Identifying shared and compatible interests as "common ground" or "points of agreement" is helpful in establishing a foundation for additional negotiation discussions. Principles can often be extrapolated from "points of agreement" to resolve other issues. Also note that focusing on interests tends to direct the discussion to the present and future, and away from the difficulties of the past. If we have learned anything about the past, it is that "we cannot change it." The past may help us to identify problems needing solution, but, other than that, it does not tend to yield the best solutions for the future.

Invent Options for Mutual Gain

Before seeking to reach agreement on solutions for the future, Fisher and Ury suggest that multiple solution options be developed prior to evaluation of those options.

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The typical way of doing this is called brainstorming. In brainstorming, the parties, with or without the mediator's participation, generate many possible solution before deciding which of those best fulfill the parties' joint interests. In developing options, parties look for mutual gains.

Select from Among Options by Using Objective Criteria
Using objective criteria (standards independent of the will of any party) is where the label "principled negotiation" comes from. Fisher and Ury suggest that solution selection be done according to concepts, standards or principles that the parties believe in and are not under the control of any single party. Fisher and Ury recommend that selections be based upon such objective criteria as precedent, tradition, a course of dealing, outside recommendations, or the flip of a coin.

What if They are More Powerful? - Developing a BATNA
In the event that the other party has some negotiating advantage, Fisher and Ury suggest that the answer is to improve the quality of your "best alternative to a negotiated agreement" (your “BATNA”). For example, if you are negotiating for a job and want to make a case for a higher wage, you improve your negotiating power by having another job offer available, or at least as a possibility.

What if They Won't Play or Use Dirty Tricks?
Fisher and Ury's answer to the resistant competitive negotiator is to "insist" on principled negotiation in a way that is most acceptable to the competitor. The principled negotiator might ask about the competitor's concerns, show he or she understands these concerns, and, in return, ask the competitor to recognize all concerns. Following the exploration of all interests, Fisher and Ury suggest inducing the competitive negotiator to brainstorm options and to think in terms of objective criteria for decision-making. Another way of thinking about encouraging principled or integrative bargaining is to think in terms of matching, pacing, leading and modeling. To get a negotiator to shift orientations, it is critical that they first experience themselves as fully heard in terms of content, intensity and emotion. By so matching and pacing with a negotiator (asking a few clarifying questions), the negotiator will become more open to your lead and modeling of productive means of negotiating. Negotiation Power.

Negotiation power
This can be defined as "the ability of the negotiator to influence the behavior of another. Commentators have observed a variety of aspects and qualities of negotiation power. It is important for the mediator to take note of these various aspects and qualities of negotiating power as a means of assisting each negotiating party to be at his or her best in representing his or her interests in mediation. Here are a number of aspects and qualities of negotiating power that have been identified:

- Negotiating power is relative between the parties;
- Negotiating power changes over time;

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- Negotiating power is always limited;
- Negotiating power can be either real or apparent;
- The exercise of negotiation power has both benefits and costs;
- Negotiating power relates to the ability to punish or benefit;
- Negotiating power is enhanced by legal support, personal knowledge, skill, resources and hard work;
- Negotiating power is increased by the ability to endure uncertainty and by commitment;
- Negotiating power is enhanced by a good negotiating relationship;
- Negotiating power depends on the perceived BATNA; and
- Negotiating power exists to the extent that it is accepted

Overall Problem-Solving Negotiation Structure

As an overall model for effective problem-solving negotiation, please consider the following:

- **Informed Consent** as to Process (the process is always negotiable)
- **Sharing Perspectives** (separate relational issues from substantive issues. Discuss both, just separately.)
- **Remember the Common Ground** (common interests, interdependence and easy points of agreement)
- **Establish a Problem-Solving Agenda** (questions seeking solutions: "How can we best . . .?" or "What is the best way for us to . . .?")
- **Identify Desired Information and Documentation Clarify Desired Outcomes, Interests and Positive Intentions Develop Options** (develop options based upon outcomes, interests and positive intentions)
- **Select from Options** (Easy agreements and package deals)
- **Integration and Finalization** (Any possible improvement? What else needs to be done?)

Q: What is mediation?

A: Facilitated Communications for Agreement or Facilitated Negotiation

Central to mediation is the concept of "informed consent." So long as participants understand the nature of a contemplated mediation process and effectively consent to participate in the described process, virtually any mediation process is possible and appropriate. In terms of generally describing the mediation process, the following concepts may be helpful.

Qualities:

Voluntary

You can end the process at any time for any reason, or no reason. If you are thinking of leaving, you are encouraged to speak up and let the mediator know why. The reasons that you are thinking of leaving can become conditions for your continued participation. For example, if you are thinking of leaving because you do not feel heard, presumably you would continue in mediation if you felt heard.

Collaborative

You are encouraged to work together to solve your problem(s) and to reach what you perceive to be your fairest and most constructive agreement.

Controlled

You have complete decision-making power. Each of you has a veto over each and every provision of any mediated agreement. Nothing can be imposed on you.

Confidential

Mediation is confidential, to the extent you desire, be that by statute, contract, rules of evidence or privilege. Mediation discussions and all materials developed for a mediation are not admissible in any subsequent court or contested proceedings, except for a finalized and signed mediated agreement for enforcement purposes.

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Informed

The mediation process offers a full opportunity to obtain and incorporate legal and other expert information and advice. Individual or mutual experts can be retained. Obtained expert information can be designated as either confidential to the mediation or, if you desire, as admissible in any subsequent contested proceeding. Expert advice is never determinative in mediation. You, as parties, always retain decision-making power. Mediators are bound to encourage parties to obtain legal counsel and to have any mediated agreement involving legal issues reviewed by independent legal counsel prior to signing. Whether legal advice is sought is, ultimately, a decision of each participant.

Impartial, Neutral, Balanced and Safe

The mediator has an equal and balanced responsibility to assist each mediating party and cannot favor the interests of any one party over another, nor should the mediator favor a particular result in the mediation. The mediator's role is to ensure that parties reach agreements in a voluntary and informed manner, and not as a result of coercion or intimidation. If you ever feel that the mediator is favoring one party over another, or any particular result over another, or if you should ever feel intimidated or otherwise unsafe in mediation, speak up. The mediation should not continue unless you come to be satisfied in all of these regards.

Self-Responsible and Satisfying

Based upon having actively resolved your own conflict, participant satisfaction, likelihood of compliance and self-esteem are found by research to be elevated through mediation.

Q: What Are the Benefits of Mediation?

A: People in disputes who are considering using mediation as a way to resolve their differences often want to know what the process offers. While mediation cannot guarantee specific results, there are trends that are characteristic of mediation. Below is a list of some of the benefits of mediation, broadly considered. Mediation generally produces or promotes:

Economical Decisions

Mediation is generally less expensive when contrasted to the expense of litigation or other forms of fighting.

Rapid Settlements

In an era when it may take as long as a year to get a court date, and multiple years if a case is appealed, the mediation alternative often provides a more timely way of resolving disputes. When parties want to get on with business or their lives, mediation may be desirable as a means of producing rapid results.

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Some Thoughts

"Meet me in the middle, Well c'mon let's make up a dance, And we'll agree to call it the compromise."

The Compromise, by The Format

"Let us never negotiate out of fear. But let us never fear to negotiate."

John F. Kennedy

"I will never compromise truth for the sake of getting along with people who can only get along when we agree."

D.R. Silva

"Compromise, if not the spice of life, is its solidity. It is what makes nations great and marriages happy."

Phyllis McGinley

"Ideology knows the answer before the question has been asked. Principles are something different: a set of values that have to be adapted to circumstances but not compromised away."

George Packer

"Compromise is what binds people together. Compromise is sharing and conciliatory, it is loving and kind and unselfish."

Ali Harris, *The First Last Kiss*

"When the final result is expected to be a compromise, it is often prudent to start from an extreme position."

John Maynard Keynes, *The Economic Consequences of the Peace*

"Sometimes in life, you do things you don't want to. Sometimes you sacrifice, sometimes you compromise. Sometimes you let go and sometimes you fight. It's all about deciding what's worth losing and what's worth keeping."

Lindy Zart, *Complete*

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Mutually Satisfactory Outcomes

Parties are generally more satisfied with solutions that have been mutually agreed upon, as opposed to solutions that are imposed by a third party decision-maker.

High Rate of Compliance

Parties who have reached their own agreement in mediation are also generally more likely to follow through and comply with its terms than those whose resolution has been imposed by a third party decision-maker.

Comprehensive and Customized Agreements

Mediated settlements are able to address both legal and extralegal issues. Mediated agreements often cover procedural and psychological issues that are not necessarily susceptible to legal determination. The parties can tailor their settlement to their particular situation.

Greater Degree of Control and Predictability of Outcome

Parties who negotiate their own settlements have more control over the outcome of their dispute. Gains and losses are more predictable in a mediated settlement than they would be if a case is arbitrated or adjudicated.

Personal Empowerment

People who negotiate their own settlements often feel more powerful than those who use surrogate advocates, such as lawyers, to represent them. Mediation negotiations can provide a forum for learning about and exercising personal power or influence.

Preservation of an Ongoing Relationship or Termination of a Relationship in a More Amicable Way

Many disputes occur in the context of relationships that will continue over future years. A mediated settlement that addresses all parties' interests can often preserve a working relationship in ways that would not be possible in a win/lose decision-making procedure. Mediation can also make the termination of a relationship more amicable.

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Workable and Implementable Decisions

Parties who mediate their differences are able to attend to the fine details of implementation. Negotiated or mediated agreements can include specially tailored procedures for how the decisions will be carried out. This fact often enhances the likelihood that parties will actually comply with the terms of the settlement.

Agreements that are Better than Simple Compromises or Win/Lose Outcomes

Interest-based mediated negotiations can result in settlements that are more satisfactory to all parties than simple compromise decisions.

Decisions that Hold Up Over Time

Mediated settlements tend to hold up over time, and if a later dispute results, the parties are more likely to utilize a cooperative forum of problem-solving to resolve their differences than to pursue an adversarial approach.

Q: What is the role of the mediator?

A: The mediator's ultimate role is to do anything and everything necessary to assist parties to reach agreement. In serving this ultimate end, the mediator may take on any or all of the following roles:

Convener

The mediator may assist in contacting the other party(ies) to arrange for an introductory meeting.

Educator

The mediator educates the parties about the mediation process, other conflict resolution alternatives, issues that are typically addressed, options and principles that may be considered, research, court standards, etc.

Communication Facilitator

The mediator seeks to ensure that each party is fully heard in the mediation process.

Translator

When necessary, the mediator can help by rephrasing or reframing communications so that they are better understood and received.

Questioner and Clarifier

The mediator probes issues and confirms understandings to ensure that the participants and the mediator have a full understanding.

Process Advisor

The mediator comes to be trusted to suggest procedures for making progress in mediation discussions, which may include caucus meetings, consultation with outside legal counsel and consultation with substantive experts.

Angel of Realities

The mediator may exercise his or her discretion to play devil's advocate with one or both parties as to the practicality of solutions they are considering or the extent to which certain options are consistent with participants' stated goals, interests and positive intentions.

Catalyst

By offering options for considerations, stimulating new perspectives and offering reference points for consideration, the mediator serves as a stimulant for the parties reaching agreement.

Responsible Detail Person

The mediator manages and keeps track of all necessary information, writes up the parties' agreement, and may assist the parties to implement their agreement.

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Q:What is Arbitration?

A: Arbitration is an adversarial system of justice designed to present a disputed case to a neutral and impartial third party for decision. It is very much like the adjudicatory (court) process, but a bit less formal. Arbitration is, however, even more binding than a court decision in that, in arbitration, you give up our rights to appeal in favor of getting the matter resolved.

Standard Arbitration Clauses

Parties can provide for arbitration of future disputes by inserting the following clause into their contracts:

> Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by a mutually acceptable arbitrator, under the rules of the American Arbitration Association. The award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.

Arbitration of existing disputes may be accomplished by use of the following:

> We, the undersigned parties, hereby agree to submit to arbitration administered by a mutually acceptable arbitrator, under the rules of the American Arbitration Association. We further agree that the above controversy be submitted to an(one) (three) arbitrator(s). We further agree that we will faithfully observe this agreement and the rules, that we will abide by and perform any award rendered by the arbitrator(s), and that a judgment of any court having jurisdiction may be entered on the award.

The arbitration, unless the matter otherwise first settles, will be concluded with the transmittal of the award. Although there is voluntary compliance with the majority of awards, judgment on the award can be entered in a court having appropriate jurisdiction if necessary.

Q: What is Litigation?

A: Litigation involves either hiring an attorney or prosecuting a legal case yourself in court. Litigation begins with the filing of a complaint or petition and involves discovery, motions, a possible trail and, if desired, at least two rounds of appeals.

Litigation may be a preferred alternative when nothing else seems like it will work. The problems with litigation include that it is time consuming, costly and very high stress. If one side "wins" big, then that decision may well be appealed or there may be problems with enforcement.

All of this being said, if you can afford a good attorney and if you need the clout of the court to catch the other side's attention and/or give you a meaningful chance of true relief, then litigation and the courts may be for you.

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Mediator Resources

Professional Mediation Institute
www.pmi360.com

Mediate.com
http://www.mediate.com/

ADR Resources
http://www.adrr.com/

National Institute for Advanced Conflict Resolution
http://www.niacr.org/pages/mediation_resources.htm

Mediation Resource Center
http://mediationresourcescenter.com/CT

Mediation Center
http://ctmediationcenter.com/mediation-resources.php

Mediation Channel
http://mediationchannel.com/

World Directory of ADR Blogs
http://adrblogs.com/

Mediation's Place
http://www.mediate-la.com/

"Wisely and slow; they stumble that run fast."

William Shakespeare
Romeo and Juliet

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Interesting Mediation Blogs

Negotiation Law Blog
http://www.negotiationlawblog.com/

ADR Prof Blog
http://www.indisputably.org/

Disputing
http://www.disputingblog.com/

Mediation's Place
http://www.disputingblog.com/

Schau's Mediation Insights
http://schausmediationinsights.blogspot.com/

Conflict Zen
http://lenski.com/

The Strategic Mediator
http://uwwm.blogspot.com/

Eye on Conflict
http://eyeonconflict.com/

Kluwer Mediation Blog
http://kluwermediationblog.com/

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Q: What is Collaborative Law?

A: The essence of "Collaborative Law" is the shared belief of the participants that it is in the best interests of parties to commit themselves to resolving their differences with minimal conflict and no litigation. They seek to adopt a conflict resolution process that does not rely on a Court imposed resolution. The process does rely, however, on an atmosphere of honesty, cooperation, integrity and professionalism geared toward the future well-being of the parties.

The Adversary System

Law school training and the real world attorney work experience combine in a well-established and powerful institutionalization of the adversarial-representative model of conflict resolution. While it is not the only model for negotiating and resolving issues, it is the one which becomes ingrained in anyone who works in a litigation system. Most attorneys who regularly handle litigation work, fantasized, in the days before being admitted to practice, about standing at the bar of justice making an impassioned and eloquent argument which wins the case or surgically dissecting a hostile witness with a brilliant cross-examination. The daily grist of the litigator's mill, however, is the stress and frustration of trying to achieve the client's objectives against the impediments and opposition of the parties on the other side of the case.

The costs of this process are usually observed as being both outrageously high and inevitable. Both are true statements about the adversarial model. What is also true is that this model is ill-suited for the purposes of resolving family law conflicts. Rather than assuming the conflict must adapt to the traditional adversarial litigation model, the collaborative approach is based on the idea that the process should adapt to the actual needs of the parties in conflict in reaching agreement. In the traditional competitive approach, where the parties' objectives or strategies collide, it is assumed that the only way to move past, through, around or over the opposition, is to employ the power of the law-based procedures to make something happen. In the face of opposition from the other side, a lawyer looks to the power of the process and often overlooks the reverberating impact that process will have on the daily lives of the clients and their children. Furthermore, this power-based, competitive approach nurtures continued resistance as the participants have little or no reason to view the other side as anything but a threat and something to fear.

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Collaborative Negotiating

The collaborative approach is both pragmatic and grounded in its focus on the needs of the parties. Initially, those needs fall into two categories: process needs and outcome needs. The process needs are determined by accepting the party in the emotional state in which they enter the process. That person may be experiencing a wide range of emotions such as, anger, hurt, distrust, bitterness, guilt and grief. These emotions may come with a wide range of personality characteristics such as, intelligent, unsophisticated, analytical, visual, needy or codependent. A good process begins by accepting the participant as who he or she is at the outset. The outcome needs describe the desired goals and objectives of the party which will allow that person to feel the issues are resolved. As we will see, these outcome needs are developed by analyzing the interests of the party and moving beyond the stated positions which have sustained the conflict.

The core of the collaborative process is to facilitate the making of agreements. To be effective in this role, it is necessary to make a mental shift in the mindset that one brings to viewing both the nature of the conflict and the elements inherent in the personalities, characteristics and resources of the parties.

Q: What if I want to know more about Mediation?

A: Please be sure to visit the following Sections of Mediate.com:
www.mediate.com/about
www.mediate.com/resolution.cfm
www.mediate.com/articles

Q: What If I want to be a mediator?

A: Be sure to visit our Careers Section at www.mediate.com/careers

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*Jim Melamed co-founded Mediate.com in 1996 and has served as CEO of Mediate.com ever since. Mediate.com received the American Bar Association's 2010 Institutional Problem Solver Award. Before Mediate.com, Jim founded The Mediation Center in Eugene, Oregon in 1983 and served as Executive Director of the Academy of Family Mediators (AFM) from 1987 to 1993. Jim was also the first President and Executive Director of the Oregon Mediation Association (1985-86). Jim's undergraduate degree is in in psychology from Stanford University and his law degree is from the University of Oregon. Jim has received the following awards: The Oregon Mediation Association's 2003 Award for Excellence; The Oregon State Bar's 2006 Sidney Lezak Award of Excellence; The Association for Conflict Resolution (ACR) 2007 John Haynes Distinguished Mediator Award; and the 2012 Academy of Professional Family Mediators (APFM) "Getting To Yes" Award.

16 Social Media Marketing Tips from the Pros

#1: Host Social Media Events

#2: Use LinkedIn's "Your Day" Feature

#3: Use Images to Amplify Your Facebook Updates

#4: Go Deep, Not Broad

#5: Get the Attention of Influencers

#6: Focus on the Platforms Where Your Customers Are

#7: Choose Your Image Wisely

#8: Communicate With Your LinkedIn Connections

#9: Optimize Your Facebook Ads for Your Intended Action

#10: Make Real Life Connections

#11: Build Online Influence

#12: Use "Here on Biz" to Connect With People in Person

#13: Make Following/Follower Management Part of Your Daily Routine

#14: Use Live Internet Broadcast to Connect With Your Audience

#15: Get Social Media Metrics From Google Analytics

#16: Create Loyalty by Participating in One-on-One Dialog

From 16 Social Media Marketing Tips From the Pros, by Cindy King, http://www.socialmediaexaminer.com/16-social-media-marketing-tips-from-the-pros/

What If the Gender Studies are Wrong?

By: Victoria Pynchon*

As more men hire me as a negotiation consultant, I realize that they have all the same fears and hesitancies as my female clients when asking for promotions, raises and better business deals. Anecdotal experience tends to be tremendously misleading for anyone who wants to generalize about any group of people: men, women, people of color, gays, straights, Christians, Jews, Muslims, immigrants, Asians, you name it.

So I'm hesitant to use my own experience in saying "men have just as much difficulty as women when it comes to negotiating a great business deal."

Maybe My Male Clients Were Outliers

Maybe it's just the insecure men who hire me, I began to rationalize. Maybe the men who negotiate better compensation packages and those who do so four to seven times more than women don't need my services. My thoughts have run in these directions because my professional experience is increasingly at odds with the gospel of "women don't ask."

The fact that men are four times more likely to negotiate their starting salary has been reported so many times by so many reputable sources, that no one even bothers to look at the evidence anymore. If they ever did. And shame on me for accepting these truisms. As a litigator and trial attorney, the only gospel truth is evidence, not hearsay.

The House is Blue

"The house is blue," says the witness.
"How do you know that?" asks the attorney.
"Because I drove past it every day on my way to work."
"Was it painted blue all over?" the lawyer asks.
"Sure it was," the witness responds, beginning to get irritable, wondering why the attorney is even bothering with the color of the damn house.
"Did you ever see the back of the house?"
"No."
"Then why do you believe it was "blue all over"?"
"Well, I just assumed it was," stammers the red-faced woman on the witness stand. "Anyone would. Who would paint their house different colors?"

How Could Everyone Be Wrong?

I hadn't formed my opinions about women's hesitance to negotiate lightly. I'd relied on the authority of the academics that did the studies and published their results in peer-reviewed academic journals. I depended on the credibility of the business pages of the Los Angeles and New York Times. I even relied on the wisdom of crowds. Everyone said it. How could it be wrong? I've been taking a closer look at all these studies for several months now and the results can be found in my posts "Confidence is Not the Cure for Workplace Bias," "Now There's a Feminine Face Penalty" and "Women's Confidence Gap, an Urban Myth."

What's wrong with too many recent studies blaming the pay gap on women's failure to ask is their reliance on self-reports which are notoriously unreliable. I should have known that. I spent two and a half decades listening to my law partners report their performance in court back to their clients, performances I'd personally witnessed only minutes to hours before. Reports that only vaguely resembled what my partners had actually said in the courtroom.

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I did it too, sorry to say, made myself look better in the re-telling than I had been in the telling. It's so well known a phenomenon that the French have a name for it: l'esprit de l'escalier, the spirit of the escalator. What you wish you'd been witty enough to say before you climbed back into your Hyundai to drive home.

The Carnegie Melon professors who wrote the ground-breaking "Women Don't Ask: Negotiation and the Gender Divide," for instance, asked respondents to write about the most recent negotiations they had attempted or initiated. For the men, the most recent negotiation had taken place an average of two weeks earlier. For women, their most recent negotiation occurred a full month earlier. The authors drew the conclusion that men were initiating negotiations more often than women, two to three times more often. See "Do Women and Men Negotiate Differently."

This is the kind of information the business press and bloggers love to report, myself unfortunately included. Professors Babcock and Laschever, however, unlike the business press, hedged their bets rather than reporting just one plausible interpretation as holy writ. According to "Negotiate Differently," they also suggest[ed] another possible explanation for the gender differential: that men may not really be doing more negotiating but rather that the women were defining negotiations differently than the men. The self-reports were not intentionally misleading in the spirit of the elevator, but they may well have been misleading because women didn't think they'd been negotiating, something we keep being told we simply don't do.

Status, Not Gender?

The proposition that men negotiate far more than women has also been challenged by research that controls for differences in goals or status in addition to gender. One study using law students as social science lab rats found no negotiation performance differences based on gender. Being a law student, it seems, eliminates a woman's purported hesitancy to negotiate. Could it be that other studies also failed to control for status? That fewer women negotiated because fewer than 20% of all leadership positions in the U.S. are filled by women? Because women, by and large, have lower status jobs than most men?

In *Yet Another Study Depresses Professional Women Nationwide*, I discussed another reason the "women don't ask" meme might be wrong. As Harvard's Program on Negotiation reported, participants in a study about the benefits of small talk read a transcript and evaluated a negotiator named either JoAnna or Andrew who either did or did not engage in small talk . . . before negotiating with a business counterpart for control of a scarce resource. [They] judged Andrew to be more communal and likable when he engaged in small talk before negotiating than when he did not, and the chit-chatting Andrew also was rewarded with better final offers from participants than was the all-business Andrew. JoAnna, on the other hand, was judged the same whether or not she chatted informally with her counterpart.

Though conclusions about gender-related negotiation outcomes are drawn from this study, no negotiation ever took place. Rather, the "participants" graded Andrew and JoAnna on likability based on what we lawyers call a "cold record" - the transcript of a hypothetical negotiation conducted either by an ageless, faceless, voiceless, entirely disembodied "Andrew" or "JoAnna." Based on that transcript, the participants "rewarded [Andrew] with better final offers."

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This study may well demonstrate that a cardboard cutout of a woman is presumed to be both less likable and entitled to fewer rewards than a bloodless stereotypic man. It does not, by any stretch of the imagination, prove that a living breathing woman will produce worse negotiation results than a living breathing man nor that she will fail to obtain similar benefits from pre-negotiation small talk than a male counterpart.

Why It Matters

Aside from the fact that an entire industry has grown up around the proposition that women fail to negotiate as often as men and produce worse outcomes when they do so, these academic "findings" about the differences in the genders are destined to become self-fulfilling prophesies just as "girls are bad at math" once did.

I will personally make a practice of reviewing the actual methodologies used by the social scientists whose findings on gender and negotiation are so blithely reported by the business media. In the meantime, let's proceed as if training, education and experience are better predictors of negotiated outcomes than the gender of the negotiator. Not, I imagine, a radical idea.

Both men and women are challenged when their bargaining partners yell, threaten, and, demean. If you'd like to learn some new strategies and tactics for dealing with these toxic people, check out "How to Effectively Respond to Anger and How to Negotiate with Bullies."

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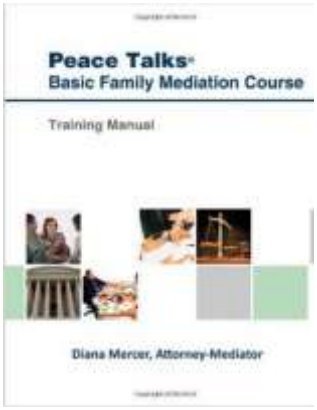
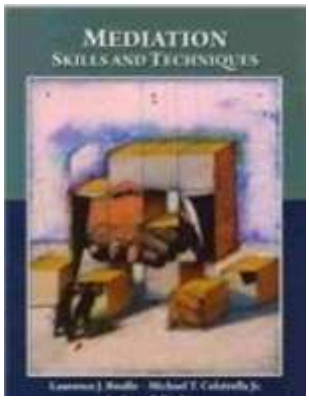
* Victoria Pynchon is the Co-founder of She Negotiates, a training workshop for women which presents today's most effective negotiation strategies and tactics in the context of the gender culture in which women do business. Although Pynchon's focus is now on closing the wage and income gap for women, she has been training lawyers and business people of both genders in mutual benefit negotiation strategies since 2005. The work of She Negotiates has been featured on NPR's "All Things Considered," the New York Times, CNN, the Wall Street Journal, and dozens of smaller news outlets. As a lawyer, mediator and author, Pynchon turns 25 years of commercial litigation into the collaborative possibilities of interest-based negotiation. Since earning her legal masters degree in dispute resolution, she has published two books, "The Grownups' ABCs of Conflict Resolution" and "Success as a Mediator for Dummies." She is working on her third book, "Getting What You Want, Scripts for Conversations Leading to Agreement."

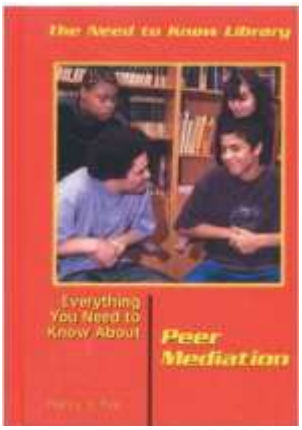
Some Books:



From intake to agreement: a complete overview of the mediation process, role-plays of each step of the process, demonstrations of advanced techniques and interventions, conflict resolution theory, and concrete tools to use in the mediation room.



This is an essential and comprehensive addition to the professional library of all mediators. It provides a thorough course of study of the mediation process, from convening the mediation to formalizing the settlement agreement.



A book that offers broad coverage of a timely issue; the author uses scenarios involving teens to illustrate her points. The book concludes with a directory of help resources.

Just what exactly did you expect?

By: David Langham

"Handsome is as handsome does" is an adage that has been attributed to author J.R.R. Tolkien, among others. In an adaptation of this idiom, Forrest Gump reminded us that likewise "stupid is as stupid does." These are but reminders that what we are and how we are perceived are more about our actions and our treatment of others than about anything intrinsic in ourselves. If one is to be perceived as "handsome" or as "stupid" the idioms counsel that behavior will influence and perhaps control that perception.

In mediation, as in many things, the behavior is a dynamic. As with all dynamics, the behavior of various mediation participants will be dependent upon each person's intent, personality, and mood. However, the participants cannot act in a vacuum, and the interactions of the mediation process will each potentially affect the intentions and mood of other participants. The variations of perception and the credibility of positions will play an evolving role in the process on any given day. At the end of several mediations over the years, some have commiserated and analyzed and asked the simple question "what did he/she/you expect?"

The opening session of a mediation process is critical. Those in conflict have likely reached this point, in part, because at some prior stage communications have become strained. Conflict is resolved through communication. When people quit listening to one another, or quit hearing one another, conflict is emboldened. Often, parties to a conflict will retain counsel. Counsel's job is to seek resolution for the conflict, but is focused in large part on protection of the individual client as well. Thus, the attorney becomes a filter through which communication must travel. Anyone who as a child played "post office" knows that the more iterations there are of any message, the more chance there is for miscommunication or misinterpretation.

What did you expect? You arrived at the mediation with minutes to spare. Traffic was not what you anticipated, or there was an accident on the highway, or parking was more congested than normal. You therefore have less than adequate time to discuss the mediation with your side of the conflict. In this complication, it is irrelevant if you are the party or the attorney or the representative. Whoever is delayed has lost the opportunity to meaningfully confer with the team. This affects the team. Substantive information that might be leveraged or exploited is not adequately discussed before-hand. The team does not have an adequate time to conform ideas and strategy before-hand. The mood on the team has been impacted, through the stress on the person who is delayed and on the stress of the rest of the team whose preparation time has instead been spent on anxiety and anticipation of that person's arrival. Certainly the mediation will go on, and any deficit can be recovered. However, that recovery will require resources and energy that could otherwise have been invested in progress instead of into recovery from a deficit, emotional or substantive.

What did you expect? The attorneys are standing around the mediation setting enjoying a cup of coffee and telling war stories or jokes or football prognostications when one of the parties enters the suite. There is a perception of frivolity, casualness, or ambivalence. The mediator may also be engaged in the friendly banter. One of the attorneys may not be present yet, and this scene is just of the mediator and some of the attorneys. The party entering the scene will form her or his own perceptions of the situation. These will likely be influenced by what they already know of the process, whether from prior experience or from what her/his own attorney has done to prepare her/him for the process. The party is likely to be influenced by their own mood that morning, which could include the level of anxiety about the process, whether a good night's sleep was had, whether getting the kids off to school that day was uneventful, or a literal plethora of other outside influences about which no one else at the mediation will know. Here again, it is likely that resources will be required to overcome any negative perceptions and reinvest that party into the business of the day.

What did you expect? It is the opening session, and each representative has had a say. The mediator graciously concludes with "does anyone else have anything to say before we break into groups?" A party interjects and wants to share something. Did her/his attorney know this was coming? If not, there is anxiety for the attorney. Did the attorney counsel and prepare the party before-hand so that the party is acting in an anticipated and methodical plan? Without preparation, someone is likely to be anxious.

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What Did You Expect from page 15.

The cautious attorney surprised by this announcement may advise against commenting, may seem unprepared, and therefore may misstep. Having cautioned against sharing that something, the attorney may prevent the one thing that will actually make the client feel better, that is telling her/his story. It is possible there would be nothing in that monologue to which the prepared and forewarned attorney would object. The sharing might be the catalyst to a better understanding by all involved, and thereby a path to a solution.

What did you expect? One party pulls the proverbial rabbit from her/his hat in the course of the day. It is that "smoking gun" by which she/he believes the other party or parties will be cowed into submission and hopefully capitulation. The "shock and awe" factor can be enticing and alluring. But, how likely is it that the other parties will see the smoking gun and simply admit that they must concede? In the vast majority of cases it is not at all likely. Springing the "smoking gun" without predicate or preparation is as likely, perhaps more, to cause the other parties to entrench, to quit listening, and to begin leaning towards the impasse. Few people like surprises. Fewer still like unpleasant surprises. That is not to say that the ""smoking gun" should not be revealed at mediation, but preparing the other parties in advance that "I have something persuasive to share with you at mediation" or "we will have some contradictory evidence for your client to consider" might allow an opposing attorney to prepare the party for the process. Perhaps holding back the details, but foreshadowing the issues will make for more fertile soil than the "shock and awe."

What did you expect? The opening session began with a jury trial style opening statement and a demand for a huge number or other significant relief. Intent may have been to allow room for negotiation, or to scare the opponents, or to signal the presenter's perception of the importance of this dispute. However, the unprepared and not forewarned party instinctively seizes that figure or relief. The rest of the day is spent by counsel trying to pull her/his own client away from the unrealistic expectation thus created.

What did you expect? It has been a long process. Issues have been discussed, emotions have fluctuated in each caucus room. Resolution thought to be unattainable seems to be inching into everyone's grasp. Then a party decides that this is the time to raise a new issue, damage, complication that has eluded mention for the entire day. The other parties are surprised, and perhaps even hurt. Was this an oversight or a deception? If this issue is now addressed, is there another lurking behind it? Can the party raising it be trusted overall?

What did you expect? Handsome is as handsome does. The solution to these and so many inhibitions to mediation success is simply communication, preparation, and anticipation of how others mood, emotion and intellect may be affected by each of our actions, statements, and reactions. If you don't prepare, what exactly do you expect?

Mediation Institute

PMI Board Member Clem Hyland lectured at the 2014 PMI Institute in Orlando. With Donna Doyle, he addressed the challenges of working with people of all backgrounds and perspectives.

Along with Ross Stoddard, PMI Board Member Robert Dietz presented "A Funny Thing Happened on the Way to Settlement" at PMI Institute 2014.

Gender and Decision-Making

By: Maria Simpson

The media are focusing a lot on women in the workplace lately, with stories on National Public Radio, articles in a variety of publications, and a whole issue of Fortune magazine devoted to the 50 most powerful women (Oct. 6). One article explored whether women were better decision-makers than men. Turns out, it depends on the stress level, something important to consider in any negotiation, no matter what the topic being negotiated.

Men and women are pretty much equally good decision-makers when under low stress levels, but "When stressed, men are more prone to taking risky bets with little payoff."(NYT, 10/19, SR9). A series of experiments showed that:

- Men took more risks when stressed, focusing on "big wins, even when they were more costly," while women took smaller risks, "looking for smaller, surer successes."
- Men were less likely to recognize the risk level of their choices. "Women were more likely to recognize their losing strategy as a losing one."
- Women under stress were likely to be more attuned to others and how they might feel than men.
- How does this difference play out in the workplace? What is the implication for management, especially if you are negotiating a contract or settling a dispute? It's significant.
- One study showed that during times of significant stress, such as the financial crisis, boards of directors with at least one woman on the board "out-performed comparable companies with all-male boards by 26 percent."
- Another study showed that the "stock performance of companies with at least one woman on their boards essentially matched performance of companies with all-male board members."

Maybe the less risky approach used by women during times of stress dampens the tendency toward riskier decisions made by men under stress. In difficult situations, the smaller, more successful steps suggested by women can keep failure at bay. And when there isn't any significant stress, women's approach to decision-making doesn't slow the company down, either.

There are, of course, upsides and downsides to this information. Many women, like Mary Barra of General Motors, are brought in only after a crisis and hit what has been called the "glass cliff," the one they fall off because they don't see the edge amid all the damage caused by the risky decisions that were made. I'm sure Mary Barra thought herself over the cliff when she was hammered at Congressional hearings for decisions that had been made decades before she got to her position.

Although men and women seem to use the same criteria in making decisions when under little stress, women may be seen during that process as less aggressive and more timid, and therefore, less able to lead and make hard decisions during difficult times. This evaluation might hold them back in their careers. It's only after the damage has been done that women are called in to make the careful decisions and look for a series of less risky successes that might have kept the danger away in the first place.

In any situation, you want people at the table who have different ideas about how to solve a problem and can communicate the benefit of those ideas persuasively. Styles of communication as well as degrees of risk-taking come into play here, and the lesson is that everyone, no matter the gender, ethnicity, age or other variable all have to be trained in the art of communication, especially when under stress. In addition, if you are facilitating the negotiation, you might want to do a few more reality checks on the riskiness of the alternatives being presented as the stress levels increase.

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Practical Tips from Page 18

Maria Simpson, Ph.D. is an executive coach, consultant, trainer and mediator who has worked extensively with the corporate, non-profit and conflict resolution communities to promote incorporating conflict resolution into organizational systems and training people in the skills and approaches of mediation.

Some Thoughts

"Never ruin an apology with an excuse."
Benjamin Franklin

"Would 'sorry' have made any difference? Does it ever? It's just a word; one word against a thousand actions."
Sarah Ockler, Bittersweet

"Never apologize for showing your feelings. When you do, you are apologizing for the truth."
José N. Harris, MI VIDA:
A Story of Faith, Hope and Love

"Never apologize, mister, it's a sign of weakness."
John Wayne

"It is always so simple, and so complicating, to accept an apology."
Michael Chabon

"An apology is the super glue of life. It can repair just about anything."
Lynn Johnston

"Never put off repairing a relationship you value. If sorry needs to be said, say it now. Tomorrow isn't guaranteed to any of us."
Toni Sorenson

"Apology doesn't mean that you were wrong, or other person was right. It means that your relationship is more valuable than your ego."
Ain Eineziz

Six Important Characteristics to Remember about the Mediation Process

1. Volition. Both parties hire the mediator by their own free will, and they are free to leave the mediation or end the process whenever they desire.
2. Collaboration. All three parties work together to find a solution.
3. Control. Both parties involved in the disagreement share power in the decision-making process. No one can be forced to accept terms with which they don't agree.
4. Confidentiality. The process is confidential, and materials assembled for mediation are usually not admissible in court should the matter in question come up again. The mediator will always describe the exact terms of confidentiality.
5. Impartiality. A mediator will always remain impartial and not favor one party over another. Decisions are made without bias.
6. Smart spending. Mediation is an extremely cost-effective alternative to court proceedings.

From "Six Important Characteristics of the Mediation Process," by Marie Westerhof at Modernlegalmarketing.com, http://www.modernlegalmarketing.com/six-important-characteristics-of-the-mediation-process/

"I am the wisest man alive, for I know one thing, and that is that I know nothing."
Plato, *The Republic*

Tips for Your Family Court Mediation

Confidential
The fact that mediation is confidential should allow you and your spouse the opportunity to discuss openly and honestly.

Fairness
The mediator is there to make sure the process is fair and that both parties are heard.

Honesty and Truthfulness
Mediation only works if both parties are honest and truthful about the case.

Custody
It is important that both parents are respectful of the other and that they never make negative remarks about the other parent.

Commitment to Success
In order for mediation to succeed, spouses must be committed to working towards an out-of-court resolution.

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Adapted from Tips for Your Family Court Mediation, by Molly Rosenblum, Las Vegas, Nevada, on avvo.com, http://www.avvo.com/legal-guides/ugc/tips-for-your-family-court-mediation

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