Keeping Your Cool: The Power of Persuasion in Mediation
by Myer J. Sankary

Employment disputes often degenerate into highly charged, contentious and emotional conduct by the participants during each step of the litigation process, including discovery, motions and trial. Settlement negotiations between the parties become unproductive or impossible, and mediation offers the only hope for resolution of the problem. Claims are based upon alleged wrongdoings by an employer or other employees resulting in perceived injury which include emotional distress (sexual harassment), loss of self-confidence (wrongful discharge due to discrimination), breach of contract and invasion of privacy. Both plaintiffs and defendants are offended by the other’s behavior and each side feels a sense of betrayal. Even attorneys and mediators are not immune from the emotional aspects of the dispute.

Can professionals who litigate and mediate these cases become more effective helping the parties reach a settlement in such a highly charged atmosphere? The cultural bias of most attorneys is the belief that the more adversarial and competitive they are, the more effective they will be in satisfying their clients’ interests. Social science has found that this perception is incorrect. Professionals can be more effective advocates for their clients by skillful application of cooperation and persuasion.

One of the leading social scientists in the field of influence and persuasion is Dr. Robert Cialdini, Regents Professor of Social Psychology at Arizona State University. Not only has Dr. Cialdini researched this subject and written extensively in this field as an academic, but he has also developed a systematic approach to the science of persuasion based upon six universal principles that he discovered through observing “compliance professionals” in the market place. Indeed, Dr. Cialdini found a common thread that makes executives, managers, lawyers, politicians, fundraisers, recruiters, salesmen and other leaders in their field successful by their powers of persuasion. His findings are published in his popular book, “Influence, Science and Practice” (Fourth Edition, Allyn & Bacon) and his scientific approach can be learned and applied through his workshops.

This program will introduce you to Cialdini’s new breakthrough concepts based on the six
scientific principles of persuasion that will help guide you to become a more effective advocate and/or mediator and will increase the likelihood that you will be able to achieve your objectives (and those of your clients) in highly emotional employment disputes.

We first set forth the six principles of persuasion and then briefly show how to apply them in employment cases.

**CIALDINI’S SIX PRINCIPLES OF PERSUASION**

**PRINCIPLE 1: RECIPROCITY**
People feel obligated to give back to others who have given to them.

**PRINCIPLE 2: LIKING**
We prefer to say “yes” to those we know and like.

**PRINCIPLE 3: CONSENSUS**
People decide what’s appropriate for them to do in a situation by examining and following what others are doing.

**PRINCIPLE 4: AUTHORITY**
People rely on those with superior knowledge or perspective for guidance on how to respond AND what decision to make.

**PRINCIPLE 5: CONSISTENCY**
Once we make a choice/take a stand, we will encounter personal and interpersonal pressure to behave consistently with that commitment.

**PRINCIPLE 6: SCARCITY**
Opportunities appear more valuable when they are less available.

**PRINCIPLE 1: RECIPROCITY**

In every culture and in every generation, each new generation is taught that if you give a gift to another, you can expect that similar behavior will be returned to you. Likewise if someone gives a gift to you, you will be obligated to give a similar gift in return.

Indeed the Bible teaches: “Give, and ye shall receive.” “Do unto others as you would have them do unto you” is well known as the Golden Rule.
The Roman statesman, Seneca, put it well: “We should give as we would receive, cheerfully, quickly, and without hesitation; for there is no grace in a benefit that sticks to the fingers.”

"Life is 360 degrees. What you put out is what you get back." (Sign in Boston Metro Juvenile Detention Center– April, 2005)

Reciprocity is at the core of every negotiation and every social transaction. The human brain has been conditioned over eons of time to calculate exchanges of all types for survival. If good behavior is given to another, in general, it is expected that similar behavior will be returned. If bad behavior is given, the same will be received. Indeed, “tit for tat” is a well known negotiating tactic. More ominous is the biblical injunction of an “eye for an eye” which we see daily in vivid color on TV from the middle east. Reciprocity is a matter of life and death in cultures all over the world. (Think of the Hatfield and McCoys in America, and the Irish Protestants and Catholics, and on and on in every part of the world.)

The good news is that the principle of reciprocity can be used to encourage the kind of behavior you want from your negotiating partner. By giving to the other first, you can get back something in return that eventually will lead to a good result that is mutually beneficial.

Reciprocity is generally activated by making a gift to another that is significant and personal, and when given unexpectedly, it has the power of creating an obligation in the other person to reciprocate in a similar manner. When you invite friends for dinner, you expect your friends will reciprocate. If they fail to invite you over, soon you will stop inviting your friends. In negotiations, concessions have a similar affect as a gift.

To be effective, a gift does not have to be monetary. Think of the many exchanges that are “gifts” of positive behavior given to others that could initiate a similar response. Simple gestures, such as a “thank you,” doing a favor, giving compliments for good work, showing a “smile,” expressing “empathy” and “understanding” are also non-monetary gifts that are ways to get similar behavior in return. Showing respect and concern for other individuals in the negotiations is more than a nice gesture – it can have huge rewards. Indeed in the recent publication of the Harvard Negotiation Journal (April 2005), an article set forth the results of a study of participants after a mediation indicating that
communication of one’s understanding of the interest of the other side in a dispute is a major factor that allows a cooperative effort to emerge from an otherwise contentious negotiation and that the atmosphere of cooperation leads most often to a satisfactory resolution of the dispute.

On a cautionary note, in government or in business, one must be careful not to give gifts to persons with decision making power of such a nature that is a violation of law. One of the reasons significant gifts to government officials are generally banned is because of the power of reciprocity. People who receive gifts are beholden to persons or companies who give such gifts. Governor Schwarzenegger was quoted recently in the LA Times, “You can’t take money from special interests, because you are always obligated to return the favor.”

Recently, Connecticut Governor John Rowland, pleaded guilty to taking bribes, because the construction firm that received favorable state contracts remodeled his home and paid for lavish trips. Governor Rowland resigned in disgrace and will spend time in jail for accepting these types of gifts. This is an example of the power of reciprocity – once an official receives a gift from a constituent, he is obligated to give something of value in return. In this case, the award of favorable construction contracts by the state resulted in a violation of law because the award was preceded by gifts to the governor.

Reciprocity works in conjunction with the principle of liking, as will be illustrated below. Obviously, if you receive a gift from someone, you will be more inclined to favor the donor in making decisions in which you are able to reciprocate.

The principle of reciprocity is an important one that governs human behavior. Be aware of its power and effectiveness, but also be aware of the line that should not be crossed legally or ethically when applying this principle.

In employment disputes, to the extent that you are able to give a non-monetary “gift” such as acknowledgment of the other side’s interests, or a concession to your opposing attorney or to the claimant without appearing to be giving in or giving up, you will engage the reciprocity principle that will permit similar behavior in return. Indeed, at the core of every satisfactory mediation, as cited in the Harvard article, is the emergence of cooperation, and the suppression of antagonism.

**PRINCIPLE 2: LIKING**
Most people would agree from personal experience that we tend to say yes to people whom we like.

Scientific studies confirm that people will follow and are more influenced by others whom they like and who are like them. This is not surprising that we tend to get along better with our own national, ethnic and religious groups than with strangers. We tend to be more open to suggestions from people who have similar background and experiences.

But similarity and liking are not limited to religion, race, national origin and gender. People are also influenced by others who have similar values and interests. For example, you might be inclined to be persuaded by others who enjoy similar movies, sports, social activities, and politics, even though the person is not of your same religious or ethnic background. Scientific studies have found for example that people who share similar backgrounds, experiences, attitudes and values will be more influential with similar others.

Another obvious but overlooked factor within the liking principle is that people will more often be convinced by someone they believe is attractive or good looking – based solely on appearance. We know why advertisers use beautiful models to sell their client’s products? Between two competing candidates running for office, which one is more likely to get elected? Think of the recent California election to recall the governor! Who won? The movie star who never held office beat a politician whose entire life was dedicated to holding public office. Interview the voters and they will tell you that they liked the candidate who won and deeply disliked the sitting governor (even though he had recently won his second election).

Within your own profession, consider the attractiveness of those individuals who have reached respected positions of leadership and who are known for their incredible ability to persuade others. What are those qualities that make them so attractive? A pleasing personality? Well groomed and professionally dressed? Ask apparel professionals who specialize in advising people about the color and style of garments they should wear about why it is so important to wear appropriate clothes when you want to sell anything. Not only does it employ the principle of liking, but it also engages the principle of “authority” which we will discuss below.

The principle of liking is fundamentally about building interpersonal relationships before one tries to engage in negotiations of any type. One particular study revealed that spending time to get to know your negotiating partner will result in agreement more often than those
who do not spend time “schmoozing.” Indeed, comparing the results of two groups of online negotiators, scientists found that those who started the negotiations with a “strictly business” approach resulted in 30% more deadlocked transactions (unable to reach agreement) as compared to only 6% of those who spent time to get know each other so they were able to discover similarities of interests, values, and attitudes before they started to discuss the merits of the deal.

Learning from these studies can help lawyers and mediators to become more effective in dealing with difficult and emotional issues that arise in employment disputes. By spending time to get to know the person whom you are dealing with – learning about their background, their interests, their needs, their likes and dislikes, and their objectives – will make you much more effective in persuading or influencing your negotiating partner to follow your direction. For example, when dealing with opposing counsel and his or her client, the effective professional would do well to spend time learning about the other persons, so that he can find similarities with his or her own interests and values. Talking about small personal things before getting down to business is more likely to engage the “liking” principle that will lead to the desired outcome.

**PRINCIPLE 3: CONSENSUS**

People decide what’s appropriate for them to do in a situation by examining and following what others are doing.

Based on extensive studies over the past fifty years, social scientists have found that whenever a person is uncertain about what option or course of action to take, he or she will tend to look around to find out what others are doing, thinking and feeling, and choose the course of action that many others have taken. Certainly, there are a few non-conformists who do their own research and follow their own direction. But they are few and far between!

Applying this principle will take some creative thinking for lawyers. You need to look around to see whether you can demonstrate to the object of your persuasive efforts that there are many others who are doing things the way you are advocating. Lawyers typically rely on many other jury verdicts and appellate cases with similar facts to persuade opponents to accept a similar outcome in the pending case. Try to enlist other people to advocate and substantiate your points – this is the role of the mediator who can be very effective in demonstrating this point. In this way you can enlist the principle of consensus.
to influence others. Knowing the limitation of your own persuasive abilities and enlisting the help of others is good advice to a wise advocate.

**PRINCIPLE 4: AUTHORITY**

People rely on those with superior knowledge or perspective for guidance on how to respond AND what decision to make.

The principle of authority is also one that is rather obvious – we tend to rely on people with expert knowledge and experience for guidance on how to respond when making a decision. Studies have shown that people will follow the lead of someone who appears to be an authority even though that person may not be an expert on the topic which requires your decision. What is not obvious is how this principle can be employed by the manager to increase his or her effectiveness.

For example, Robert Young was an actor who played the role of Dr. Marcus Welby on television for many years. He also played the role of the head of a family in Father Knows Best. Robert Young is also known as the spokesman for Sanka coffee. It was one of the best commercials ever made and increased the sales of Sanka coffee over all other decaffeinated coffees. Why? Robert Young was not an expert or an authority about coffee, but he had a huge reputation for the TV roles he played both as a doctor and as a father. He had the trappings of authority that convinced people to buy Sanka coffee.

Within the legal profession, you will find evidence that those professionals who appear to be experts and who have a reputation as an authority on a specific legal matters are more successful because of their ability to persuade and influence others. Generally, other professionals, judges, jurors, public officials, as well as members of the public are more likely to be persuaded by someone who appears to be an authority on the matter which is the subject of the negotiations. To achieve the reputation of one who is an authority on the matter in discussion gives a clear advantage to that person.

How can a lawyer or mediator increase his or her persuasiveness by demonstrating that he or she is an authority? As in any other profession, the first step in becoming an authority is to acquire expert knowledge and experience in your area of work. It is important to demonstrate that expertise to others and to let others know the extent of your learning as well as your practical experience. This information should be given to the target of your persuasive efforts before your first meeting. Telling others about your expertise and
credentials at the first meeting is not as effective as giving the information before the meeting, because others may tend to look at you as a braggard. It can have a negative effect.

Perhaps the most important quality that makes an authority persuasive in addition to his knowledge and expertise is his trustworthiness. One of the challenges for any expert witness, for example, is to demonstrate his trustworthiness particularly when the jury knows that the expert is being paid by the party to give her testimony. One of the interesting discoveries by social scientists that tends to enhance the trustworthiness of an authority is the willingness of an expert to acknowledge some relatively minor weakness in his case. Indeed, good trial lawyers will always acknowledge a weakness in their case, if one exists, before the other side has an opportunity to point it out, because the admission of the weakness strengthens the lawyer’s credibility and trustworthiness.

But it is important to always immediately follow the admission of a weakness by pointing out your strongest point in support of your claim. This approach minimizes the weakness in your position while enhancing your credibility so that the person you are trying to persuade will be more willing to accept the argument in your favor. A good reminder of this principle can be found in a well known advertising commercial. Avis acknowledges that it is not the number one rental car company in the market place, but emphasizes in its well known slogan that it provides better service. When you are thinking about how to enhance your credibility as an authority, remember how Avis does it - “We’re number two, but we try harder.”

It is important to make every effort to enhance your position as an authority by employing the strategies set forth here – 1. acquire knowledge and experience, 2. give an appearance of authority by being well groomed and by wearing clothes that show success; 3. inform your prospects in advance of any meeting about your expertise by using brochure or letter of referral; and 4. increase your credibility as a trustworthy authority by your willingness to acknowledge some weakness in your position followed by your strongest argument.

Application of this principle in employment disputes can be very effective in reaching a settlement. When an attorney has a reputation for expertise and integrity, he or she will be much more effective as an advocate for his client than one whose honesty and knowledge in the field is suspect. Lawyers who have obtained substantial jury verdicts in other employment cases are likely to be respected by the opponent which can lead to a better settlement for their clients through mediation. Likewise a mediator who has a reputation
for expertise and integrity will be more effective in helping the parties reach a settlement.

PRINCIPLE 5: CONSISTENCY

Once we make a choice/take a stand, we will encounter personal and interpersonal pressure to behave consistently with that commitment.

When a commitment is made by an individual to another in a manner which involves the person actively, voluntarily and publicly, it increases the likelihood that the person will behave in a manner that is consistent with that commitment.

Researchers discovered an interesting phenomenon about people who make bets at a racetrack. People were much more confident of their chances for their horse winning after they made a bet than before they placed the bet. This is particularly interesting because nothing about the conditions of the race changed – the horses were the same, the jockeys were the same, the conditions of the track were the same – the only thing that changed was the placing of a bet. The scientists concluded that the mere placement of the bet – an open, active and voluntary commitment of funds to the belief that a horse would win, actually increased the bettor’s confidence that his horse would win.

Think about wedding ceremonies. Why are they so elaborate and public? Why are such solemn vows exchanged in a religious setting and in front of family and friends? Why does society require a marriage certificate or contract signed by both parties? The ritualization of the marriage ceremony where vows are exchanged is an obvious example of the principle of consistency – it is done to increase the likelihood that the promises will be kept, because the internal and external pressures will require the married couple to live up to the vows they exchanged in public. Many people renew their vows over time so that they will act consistently with their commitments.

Consider the new year’s resolution that we rarely keep. Why is it so difficult? Most resolutions are made to ourselves and are never written down. But if your resolution is made openly and voluntarily to a spouse or a friend, with specific timetables and goals, you are more likely to follow through because of the internal and external pressures of wanting to be consistent with your commitments.

Why do the laws of every state require certain transactions be in writing signed by the parties – the statute of frauds? It is necessary to have written documentation to confirm the
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terms of the transaction so that there will not be uncertainty and confusion about the mutual obligations. From the perspective of willing and voluntary compliance, it is a sociological phenomenon that people are more likely to live up to what they write down. Requiring a written contract also prevents fraudulent claims about whether or not there an agreement.

Likewise, it is important to get small commitments during a negotiations, which can lead to larger ones that will end the dispute. Mediators and lawyers know that if an agreement is reached during the mediation, it is essential to put it in writing and signed by the parties – to engage the principle of consistency. **PRINCIPLE 6: SCARCITY**

Opportunities appear more valuable when they are less available.

Social scientists have observed a fascinating phenomena tracking sales of merchants who offer discount coupons for their products or services. As one would expect, sales do increase when such discount coupons are offered to the public. But scientists were put to the challenge of also explaining why sales increased even more dramatically when the discount coupons contained an additional statement that the offer was for a limited time or that the quantity of merchandise was limited. Why would sales increase substantially when the offer to buy products at a discount is limited by time or quantity? Herein lies the principle of Scarcity. People want and value more highly that which there is less of. When people are told that something is rare or is dwindling in availability, there is an increased desire to acquire the item. A product or service is deemed even more valuable when the buyer knows there are others competing for the limited supply.

There are many examples of this principle. By controlling the supply of diamonds, the DeBeers Syndicate has increased demand and maintained their high value. When Coca Cola removed classic Coke from the market in order to replace it with a new flavor, there was a customer revolt, requiring the reinstatement of classic Coke. How many car manufacturers have made their product sell at or above list price by making a limited quantity? This limitation or scarcity of the product creates an immediate increased demand for the product because it appears to be more desirable. Think popular toys and children products at Christmas! Now you know why you may find it difficult to find that special toy you promised your child.

The underlying human behavioral aspect that increases one’s desire for a scarce product or service and thereby increases one’s willingness to spend more for the product or service is
that people do not want to be deprived of the opportunity or freedom to choose and acquire whatever they want. Social scientists have found that the reason for this is not so much about how people can benefit from acquiring the product or service, but more about the negative consequences of not getting what they want. Indeed, by showing a customer how he stands to lose by not buying the product or service can be a much more effective approach to persuasion than simply emphasizing the benefits. One should use caution not to create an artificial scarcity or mislead customers about the limited supply, because the temptation to increase sales by deception would clearly be unethical and can have serious repercussions to your organization. You don’t want a disgruntled customer to complain to a local news reporter about the use of misleading tactics by your organization.

If lawyers and mediators can identify and honestly present the unique and special benefits of their settlement proposals as well as explain the loss that might genuinely occur by the failure of a party to take immediate action to agree to the settlement terms, they can increase the likelihood that their opponent will want to settle the dispute and not take the risk of loss that might occur if the case proceeds to trial.

Conclusion

The Principles of Persuasion are based upon the life long work of Dr. Cialdini of Arizona State and the research of hundreds of social scientists in the field of influence. At the root of each of these principles is the behavior that makes people want to comply with another’s request by the ethical use of persuasion. And what makes someone more persuasive is his or her ability to understand and apply the rules of human behavior that build relationships and trust. The ethical use of the principles of persuasion can definitely make lawyers and mediators more effective and productive professionals who will be able to provide better services to their clients, to the courts and to their community, and who will be more respected and cooperative with their colleagues and friends.

Biography

Myer J. Sankary is a leading authority in the application and use of the principles of persuasion in legal advocacy and mediating disputes. Myer received his law degree at Harvard Law School in 1965 and his BA in Philosophy (summa cum laude) at Texas Christian University in 1962. In 2004, he was the only attorney and mediator trained by Dr. Cialdini to present the Principles of Persuasion Workshop and earned the Cialdini Method Certified Trainer Certificate after presenting the two day workshop under the
supervision of Dr. Gregory Neidert, professor of social science and colleague of Dr. Cialdini at Arizona State.

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