

**“Out beyond ideas of wrong doing and right doing there is a field.
I'll meet you there.”**

Rumi



CENTER FOR ALTERNATIVE DISPUTE RESOLUTION

31st ANNUAL CONFERENCE

“Cognitive Barriers to Success in Mediation and Negotiation

Practical Suggestions to Overcome Them”

Joyce A. G. Mitchell, Esq.

June 21, 2018, 3 p.m. to 4:30 p.m.

I. COGNITIVE BARRIERS TO SUCCESS IN RESOLVING CONFLICTS*

Many disputants assess their likely risks and possibilities of success in negotiation and mediation based on limitations in their five senses and how information is processed. These cognitive barriers cause errors which should be avoided. They are:

- Unequal advocacy bias towards one's strengths

Most people assess risk by ignoring data which contradicts their viewpoint and choose data which justifies their own conduct, blames others, and denies certain information.

-Biases (Egocentric, Hindsight, Attributional, Assimilation)

Individuals often give themselves more credit and level of responsibility in team/joint efforts than would be given to their level of effort by another. Sometimes individuals overestimate the predictability of past events and fail to consider foresight. They move with a certainty bias that they are correct or are on the moral high ground. They behave as if adverse information was never presented to them.

-Overestimating things; Inattention blindness

Some individuals devalue an offer or proposal from another based on how they value the credibility or competence of the proposer. This occurs when all aspects of a proposal are not assessed.

-Mistaking, or over evaluating a small part of the truth for the whole truth

Often when there are many elements to be considered, individuals will assert their argument/perspective/version rather than giving credit to the whole story. Other times

they fail to “see the big picture” because they are focusing sharply on a limited aspect of what is being proposed or what is the conflict.

-Ignoring adverse information, and not knowing how risk aversion is categorized

The rejection of a sure thing in favor of a gamble of lower or equal expected value occurs when the hearer does not understand all aspects of a proposal and chooses in error what is being offered.

Sharing Circle: Small Group to Large Group Exercise

II. PRACTICAL SUGGESTIONS

One on One

Take it or Leave it Negotiation Strategy-Try ignoring it and focusing on the content of the offer instead; then make a counter-offer that meets both parties’ needs.

Personal Insults and Feather ruffling- Take a break if you feel yourself becoming flustered, and let the other party know that you will not tolerate insults and cheap ploys.

Non-commitment Tactics- Do not negotiate when the opponent claims limited authority. Probe to determine if the claim is genuine or there is authority in just one area. Ask for the identity of the person with full or other authority.

Propose a break until all parties can be available either in person, via phone, or video-conference. (Determine if time is of the essence to the opponent. Decide if time is of the essence to you. Proceed only after making this assessment.)

Stop, Engage and Reconnect/Bond with the opponent. Break the negotiations into segments. Choose who can work on which portion. Team with your opponent to develop a strategy for moving forward.

Use one of the powers of persuasion to change the other’s mind: Reciprocation, Social Proof, Commitment and Consistency, Liking, Authority and Scarcity

Puffing, Bluffing and Lying-Be skeptical about exaggerated or misrepresented facts. Investigate them closely. Break down the facts and go over the segments, one by one. Engage the other side.

Dealing with Difficult People

Dealing with difficult people involves negotiating with counterparts who are often mistrusted, disliked, or considered “evil.” Nonetheless, a skilled negotiator must seek and create value in any negotiation. When dealing with difficult people, integrative bargaining strategies, including knowledge of your BATNA (best alternative to a

negotiated agreement) and ZOPA (zone of possible agreement), will help overcome any perceived differences between oneself and the counterpart.

William Ury, author of ***Getting Past No: Negotiating with Difficult People***, describes his five-step strategy for dealing with hard bargainers and difficult people. He calls his method “**breakthrough negotiation**,” a way to “change the game from face-to-face confrontation into side-by-side problem-solving.” These steps are:

1. Don't react: Go to the balcony – or anywhere you can go to **step back from the brink**.
2. Disarm them by stepping to their side. One of the most powerful steps to take—and one of the most difficult—is to **try to understand the other person's point of view**. Ask questions and show genuine curiosity.
3. Change the game: Don't reject—**reframe**. Instead of locking into a battle of will or fixed positions, consider **putting a new frame on the negotiation**.
4. Make it easy to say yes. Look for ways to help your opponent **save face** and feel that he's getting his way, at least in some matters.
5. Make it hard to say no. Use your power and influence to help **educate your opponent** about the situation.

Other strategies for handling hard bargainers or unpleasant people include:

- Sandwiching the “no” between two “yeses” to express your difference of opinion in a more positive light;
- Building a golden bridge to help your opponent view the outcome as a **partial victory**;
- **Listening actively** to disarm your opponent by asking open-ended questions; and
- Say “**no**” **firmly, clearly**, and in a way that **respects** the opponent's position; **active listening** and **asking open-ended questions**; and allowing the opponent at least a partial victory to save face.

Team or Joint Efforts***

When faced with an opponent who exhibits some of the cognitive biases above, consider joint fact-finding for value creation, evaluation and claiming. Then follow these four steps:

Negotiate an Agenda-Jointly agree on an agenda and ground rules for your talks. Be clear about the amount of time and money you will spend gathering and analyzing data.

Choose Advisers Together- Rather than each hiring your own experts to present opposing versions of the facts, work together to select technical advisers and analytic methods that will help you arrive at a shared understanding of a dispute's likely costs and benefits.

Jointly Assess Data- After the advisers present their results, jointly negotiate with your counterpart about how to proceed, taking time to share the findings with your constituents, if any, as well.

Correct Misperceptions- Once you have agreed upon facts and forecasts, both sides should become more receptive to one another's concerns. Jointly generated forecasts also allow you to correct faulty perceptions held by either of you, while encouraging your counterpart to reconsider unreasonable assumptions and demands.

Sample Mediator Catch Phrases – (Source a mediator blog)

- Don't waste your time trying to convince me of the merits of your position - your job is to persuade the other side, not me.
- Perfection is the enemy of the good when it comes to reaching an agreement.
- I hear you say it's a matter of "principle." Just wait until you get your lawyer's fifth and sixth bill and you will spell that word differently.
- Mediation is an opportunity to shift from being adversaries to partners in resolution.
- I'm a mediator, not a magician.
- The more you try to get the best price the more you risk the deal.
- Let's avoid finding yourself in the shower tomorrow morning wondering why you did not ask the question which is now running in your head.
- You have to hang the meat low enough to make the dog jump.
- When an attorney says that s/he is going to prevail in 7 or 8 out of 10 trials, I ask: But you don't know what order those 10 juries will be called, do you?
- El He Fat Mat. (Arabic for "The past is dead.")
- You know that the only ones guaranteed to come out ahead after a trial are your attorneys, don't you?
- I hope you're here to find a solution because outside of coffee and cookies, I have nothing else to offer.
- Mediation is an opportunity for you to trade hope for certainty.
- The only ones who win lawsuits are the attorneys.
- Everybody's story makes sense to them
- Any lawyer who tells you he has never lost a jury case has never tried a jury case.
- You can't negotiate with the jury.
- The words 'Silent' and 'Listen' are comprised of the same letters. Coincidence? I think not.
- I can't understand it when two people are talking at once. I'm not that good of a mediator.
- A bad settlement is better than a good judgment.
- No offer, no lunch.

Sharing Circle: Small Group to Large Group Exercise

III. THE QUALITY OF THE MEDIATOR IN THE ROOM

OPERATE FROM AUTHENTIC POWER***

-CONSCIOUS COMMUNICATIONS and ACTIONS: Make your interactions conscious and loving:

Consult your **intuition**, what does your gut say?
Choose your **intention** before you act or speak

Act from the healthiest part of your **personality** above judging, blaming, gossiping, etc.

Speak personally, clearly, and specifically

-COMMITMENT-Make spiritual growth your highest power

Focus on what you can **learn** about yourself when angry, fearful, jealous, impatient

Pay attention to your **emotions** by feeling the physical sensations in your energy centers

Pay attention to your **thoughts** such as planning your reply, contentment, resentment

Pay attention to your intention

-COURAGE- Strengthen yourself beyond the limited perspectives of your frightened personality

Take **responsibility**

Practice **integrity**

Say or **do** what is most difficult about what you notice, what others say or do, share what bothers you and know what you need to say or do.

-COMPASSION-See yourself and others who sometimes have frightened parts of their personality

Use **empathy**

Release any distance between yourself and others

Be Present. Listen. Hear. Feel. Honor. Show Respect. Make Eye Contact.

*Based on "Cognitive Barriers to Success in Mediation: Irrational Attachments to Positions and Other Errors of Perception that Impact Settlement", by Bennett G. Picker, Esq., IAM and Gregg Relyea

**Based on The Sunday Minute with Lawrence Susskind from the Program on Negotiation at Harvard, May 13, 2018, "Sunday Minute Tip"

Based on ***Getting Past No: Negotiating with Difficult People, by William Ury

****Based on Principles from ***The Seat of the Soul*** by Gary Zukav

Thank you, Joyce

Joyce A. Mitchell & Assoc., P.C.

P.O. Box 2112

Rockville, MD 20847-2112

jamitchesq@gmail.com, 301 589-7113