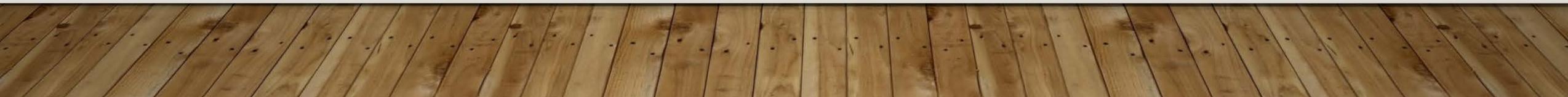


MARYLAND COUNCIL FOR DISPUTE RESOLUTION WINTER QUARTERLY MEETING

JUDICIAL TRAINING CENTER, ANNAPOLIS, MD
DECEMBER 6, 2017

**THE POWER OF PERSUASION IN MEDIATION:
TRAMPLING ON PARTY SELF DETERMINATION?**

JOYCE A. G. MITCHELL, ESQ.



AGENDA

- Define Persuasion, Self-Determination and List the Six Principles of Persuasion*
- Apply the Principles of Persuasion to Mediation and the Stages
- Identify Persuasive Techniques Employed by the Mediators and the Parties
- Interactive Sharing of Audience Persuasive Techniques
- Open Discussion; Questions
- **PERSUADE, PERSUASION DEFINED: Merriam-Webster Unabridged Dictionary**
- **1:** to move by argument, entreaty, or expostulation to a belief, position, or course of action; to cause (someone) to do something by asking, arguing, or giving reasons
- **2:** to plead with; urge; convince

MEDIATION

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- **MD Rules, Rule, 17-02(g).** “Mediation” means a process in which the parties work with one or more impartial mediators who, without providing legal advice, assist the parties in reaching their own voluntary agreement for the resolution of all or part of a dispute.
 - **MD Rule 17-103.** Role of Mediator. A mediator may help identify issues and options, assist the parties and their attorneys in exploring the needs underlying their respective positions, and, upon request, record points of agreement expressed and adopted by the parties. While acting as a mediator, the mediator does not engage in any other ADR process and does not recommend the terms of an agreement.

SELF-DETERMINATION

- **MPME, The Maryland Standards of Conduct for Mediators**
- Mediation is a process in which an impartial third party facilitates communication and negotiation and promotes voluntary decision making by the parties to the dispute.
- **Standard I.** A mediator shall conduct a mediation based on the principle of party self-determination. Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome. Parties may exercise self-determination at any stage of a mediation, including mediator selection, process design, participation in or withdrawal from the process and outcomes. **pp. 2-3**

SELF-DETERMINATION CONT.

- **Maryland Standards of Conduct for Mediators, Arbitrators, and Other ADR Practitioners**
- **Standards of Conduct I:** Self-Determination is the fundamental principle of mediation and it plays a more circumscribed role in other consensus-based ADR processes. In mediation, this principle requires that the mediation process rely upon the ability of the participants to reach their own voluntary, uncoerced agreement. Any party may withdraw from mediation at any time. Other ADR practices reflect this principle by giving the parties the ultimate decision-making power (FF, NE, SC), or by allowing them to define the scope of a process in which a decision is rendered (A). **pp. 1-2.**

PERSUASION

- **SIX PRINCIPLES:**
 - **RECIPROCITY**
 - **LIKING**
 - **CONSENSUS**
 - **AUTHORITY**
 - **CONSISTENCY**
 - **SCARCITY**

PRINCIPLE I: RECIPROCITY

- People feel obligated to give back to others who have given to them. Reciprocity recognizes that people feel indebted to those who do something for them or give them something which they value. A gift does not have to be monetary. It can be “good behavior”, a “thank you”, an “apology”, a recognition of “good work”. By giving to another, you invite back something in return that will eventually lead to a good result in a negotiation/mediation that is mutually beneficial or acceptable.

Mediator:

- Be polite during intense discussions guard against body language which is inconsistent with your words; Create opportunity for reciprocity with statements like: “How do you anticipate they will respond to your statement/behavior/offer?” **

PRINCIPLE 2: LIKING

- People prefer to say “Yes” to those we know and like. We tend to be more open to suggestions from people who have similar backgrounds and experience. We often consider the attractiveness of an individual, how they look, groom themselves and what they do that is similar to us. In the mediation and legal field, we often give deference to those who have respected positions of leadership and who are known for their incredible ability to persuade others.
- Build relationships before one tries to engage in negotiation. Get to know your opponent.
- **Mediator:**
 - Listen carefully; Reflect what you have heard;
 - Show respect; Go slow to go fast; Ask a lot of questions, especially ones which reflect the party’s perspective;
 - Subtly or overtly suggest or encourage attendance or non-attendance of various persons at various segments of the mediation; Recommend isolated rooms; where there are multiple parts suggest coalition building based on mutual interests**

PRINCIPLE 3: CONSENSUS

- People often decide what is appropriate for them to do in a situation by examining and following what others are doing. Lawyers typically rely on jury verdict research to determine what is a good measure of what is appropriate in a particular situation. They often get a mediator to encourage this to their client and the opposing side. We follow condominium rules, purchase houses using comparable data on houses sold and buy cars based on standards in “Kelly Blue Book”.
- **Mediator:**
- Prepare summary consensus statements after various stages and get by-in; Observe any hold-outs on the agreement; Find ways to include in the mini- consensus statements some of their needs; Coach the team on potential options and ways you have seen others move forward**

PRINCIPLE 4: AUTHORITY

- People rely on those with superior knowledge or perspective for guidance on how to respond AND what decision to make. Likewise, lawyers, judges, jurors, public officials are likely to be persuaded by someone who appears to be an authority on the matter which is the subject of the dispute or negotiation. Telling others about the authorities who have looked at your matter, elevates your position and often gives an advantage to your perspective. Trustworthiness comes with being an authority.

Mediator:

- Encourage parties to utilize experts to speak on designated subject areas of the mediation; write an opinion based on everyone's fact; Share experience results from similar mediations**

PRINCIPLE 5: CONSISTENCY

- Once people take a stand, they experience 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 consistent with the commitment. We sign contracts; we negotiate in a mediation and sign settlements in front of people. Some data says that the agreement which we negotiate are kept more often than the one's imposed on us. People are more likely to live up to what they create and sign. Mediators get small commitments in each stage of the negotiation.

Mediator:

- Encourage all to talk and participate; Frame the caucus agenda in line with other's principles; Enable swaps: What if I help you with what is important to you, will you reconsider "x" which the other side is asking? Extract and summarize commitments continuously**

PRINCIPLE 6: SCARCITY

- Opportunities appear more valuable when they are less available. Human behavioral patterns suggest that one's desire for a service or product increases and there is a willingness to spend more on the product or service. People do not like to be deprived of their ability to choose. Mediators who identify and honestly present the unique and special benefits of various settlement proposals as well as explain the loss that might genuinely occur by the failure of a party to take immediate action, can increase the likelihood of settlement (reality testing).

Mediator:

- Have acceptable alternatives; Beware of spending too much time with the resisters (find out what they really want); Include any tribal members who may have some influence of the parties; Do not be deluded some people may have nothing to lose; Is the trail their best alternative?*

“WHAT HAVE WE LEARNED FROM THE GLOBAL POUND CONFERENCES?”

THOMAS J. STIPANOWICH, PEPPERDINE UNIV. SCHOOL OF LAW

- **Party control is a priority;**
- **Advice from counsel, guidance from dispute resolution providers and educational programs are all potential sources of information on process choices;**
- **Outcomes reflect an interplay between rule of law, consensus/party interests, and general concepts of fairness; and**
- **The most effective approaches may rely on multiple processes.**
- <http://mediationblog.kluwerarbitration.com/2017/11/27/learned-global-pound-conferences/>

OPPORTUNITIES FOR PERSUASION IN MEDIATION

- In the Dec. 3, 2017 issue of The Sunday Minute with Lawrence Susskind from the Program on Negotiation at Harvard Univ., Susskind states that **a joint fact-finding process** provides a better route to value creation and claiming by helping the other side win as much for themselves as possible. Number one on his four steps for joint fact-finding is to **NEGOTIATE AN AGENDA with a professional facilitator or mediator to help with agreement on an agenda and ground rules for the talks.**
- <http://reply.pon.harvard.edu/dm?id=84A0C6C3519F097184D227E1749EE9A73B17A1C93DA87120>

OPPORTUNITIES, CONT.

In the November 2017 issue of Mediation News, Keith Seat, writes: “*Mediation can be a powerful tool for resolving serious conflicts, and often saves important business and personal relationships as well. **But it’s not magic and requires deep engagement by the parties and competent guidance by an experienced mediator.***”

QUALITIES AND SKILLS OF A MEDIATOR

Good Character

Trustworthy

Dependable

Fair; Caring, Neutral, Patient, Attentive

Exercises Good Citizenship

Leadership Skills

Uses Sophisticated, Competitive and Cooperative Negotiating Strategies

Demonstrates Oral and Written Communication Skills; Observes Body Language

Takes Calculated Risks, Accepts Responsibility

Recommends Courses of Action

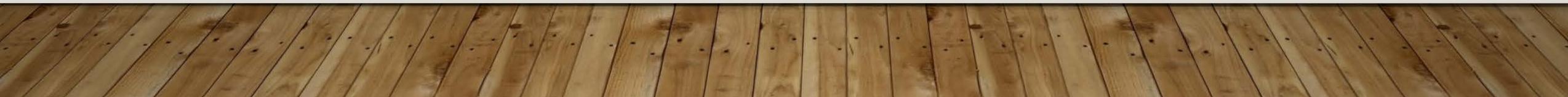
Patient; Good Listener

Intuitive

Great Negotiator

Ethical

Subject Matter Expertise



EXAMPLES OF PERSUASION IN MEDIATION

Excerpts from a Nov 2017 Mediate.com article, “It Happened in Mediation - Believe It or Not”, by Daniel Ben-Zvi, Michael Young:

THEY SETTLED FOR A SONG: *A mediator of a long-term boundary dispute between neighbors managed to get all parties together for a joint session limited to introductions and a meet and greet. Once gathered, the mediator first confirmed that those there had seen the movie Casablanca. He then belted out in a passable baritone the movie’s iconic theme song, “As Time Goes By”. Expressions around the table ranged from disbelief and worry to muffled laughter and enjoyment. The mediator then quizzed the parties about the movie. What does it mean that they will “always have Paris” or that their problems “didn’t amount to a hill of beans?” The discussion elicited personal stories of the parties and lawyers, leading the neighbors to discover that they had much more in common than an inability to carry a tune. Their long simmering feud ended that afternoon with warm handshakes and a promise to go to the movies together once a month. (Okay, we made that last part up, but it sounded good.)*



THEY SETTLED WITH A SONG: *Since we are on the subject of songs, the members of a popular band found themselves, as so many of them do, at odds over creative differences, the kind of creative differences that rhyme with “honey.” Tired of the sound (and expense) of litigation, they tried a different tune, mediation (we know, too many bad music puns). By 4:00 p.m., with the four bandmates still far apart, the mediator prevailed upon them to do her a great favor – sing one of their earliest hits. With a little coaxing, they finally agreed, and together they sang a cappella several of their most beautiful and memorable songs. What followed (with a little subtle guidance by the clever mediator) was a sharing of the band’s history, allowing the members to harken back to when they all liked each other and were excited to create music together, to tour, and to play. The good vibrations led to a settlement. The mediator got paid, and has the memory of a free private concert to cherish for a lifetime.*



NOW:

What are your accounts of “IT HAPPENED IN MEDIATION!!!” and what principle(s) of persuasion do your accounts represent?

What words/phrase have you or a party used during a mediation which greatly influenced the settlement/conclusion of the mediation?

