

CHAPTER 5 - SKILLS & COMMUNICATION

Cognitive Barriers To Success In Mediation: Irrational Attachments to Positions and Other Errors of Perception That Impact Settlement Decisions¹

Definition: "Cognitive Barriers" are assessments that are unconsciously influenced by limitations in our five senses AND the way information is processed.

Type	Description	Effect/Behavior	Example
Cognitive Dissonance	When it is psychologically uncomfortable to consider information that contradicts one's viewpoint.	Tend to justify own conduct, blame others, deny, downplay, or ignore conflicting data.	
Advocacy Bias	Self-serving judgments about the likelihood of success on the merits in litigation resulting from (1) selective perception and (2) substantial time spent identifying strengths while paying insufficient attention to or discrediting weaknesses.	Where one has an interest in the outcome of a dispute, s/he is unable to make a completely objective settlement assessment.	
Assimilation Bias	Tendency of individuals to see or hear only that information that favors their position.	Behave as if adverse information was never presented to them.	
Endowment Effect	Tendency to over-value things in which one has a property interest.		The value of claims in dispute.
Certainty Bias	Overestimation of degree of certainty when assessing the probable outcomes in litigation.		Overestimate degree of certainty regarding trial results.
Egocentric Bias	Tendency to claim for themselves greater responsibility for a joint action than would be given by an outside observer.		
Inattentional Blindness	Tendency to see/hear only that which we are focused on.		Basketball/gorilla suit observation study.

¹ Picker, Bennett G. and Relyea, Gregg.

http://www.mediate.com//articles/PR_CognitiveBarriers.cfm. January 2011.

Mistaking a Small Part of the Truth for the Whole	Tendency to forcefully assert own arguments (small part) while losing sight of the bigger picture (themes of case).		
Reactive Devaluation	Tendency to minimize the value of an offer or proposal from another party due to concerns about the credibility or competence of its source.		
Competitive Arousal	Tendency to lose sight of the bottom line ("reservation price") due to the drama of the negotiation ("auctioneer's effect"). May also tend to "grandstand" for the other party.		
Change Blindness	Tendency to fail to detect large changes to objects and scenes because of the mind's tendency to fixate on the first image.		
Risk Aversion (Loss Aversion)	Tendency to make different decisions about risk depending on whether they categorize (or "frame") the risk as a gain or a loss.	Generally risk-averse when protecting settlements regarded as current "gains" and risk-seeking when making decisions involving results regarded as current "losses."	
Hindsight Bias	Tendency to overestimate the predictability of past events and failure to recognize that when making predictions, hindsight is twenty-twenty.	Different assessment of conduct before the fact versus after the fact.	

A Sampling of the Great, Wide World of Social, Cognitive, and Memory Biases and Blindnesses That May Inform Our Views of Conflict

- **Selective Perception**
 - A term used to describe a broad range of circumstances in which people perceive some parts of their environment, but filter out or are blind to others.
- **Loss Aversion and the Endowment Effect**
 - Tendency to attach greater value to something we already possess. Tendency to feel that losses are of greater consequence than gains.
- **Reactive Devaluation**
 - The tendency to devalue the proposals because of their source, when they come from an adversary.
- **Lake Wobegon Effect (Superiority Bias)**
 - A strong tendency to view oneself as "above average" in desirable traits.
- **Trait Ascription Bias or Fundamental Attribution Error**
 - Tendency to explain others' behavior as a consequence of personal traits, but one's own behavior as a rational response to circumstance. An example of an *attributional bias*.
- **Introspection Illusion**
 - people tend to use general theories of behavior when evaluating others but use introspection when appraising themselves. People do not believe that others can be trusted to do the same: okay for me but not for thee.
- **Misinformation Effect**
 - A tendency for people to reconstruct their memories after an event to conform with false cues.
- **Omission Bias**
 - The tendency to find bad consequences more acceptable if they result from one's inaction, rather than action.
- **Ambiguity Effect**
 - The preference for the option that appears more certain over one that appears less certain.
- **Planning Fallacy**
 - The tendency to underestimate how long it will take to complete a task. An example of the "Valence Effect" (wishful thinking).
- **Bias Blind Spot**
 - The tendency to recognize cognitive biases in others, but not ourselves.

Decision-making and behavioral biases

- **Anchoring** – the common human tendency to rely too heavily, or "anchor," on one trait or piece of information when making decisions.
- **Attentional Bias** – implicit cognitive bias defined as the tendency of emotionally salient stimuli in one's environment to preferentially draw and hold attention.
- **Bandwagon effect** – the tendency to do (or believe) things because many other people do (or believe) the same. Related to groupthink and herd behavior.
- **Bias blind spot** – the tendency to see oneself as less biased than other people.
- **Choice-supportive bias** – the tendency to remember one's choices as better than they actually were.
- **Confirmation bias** – the tendency to search for or interpret information in a way that confirms one's preconceptions.
- **Congruence bias** – the tendency to test hypotheses exclusively through direct testing, in contrast to tests of possible alternative hypotheses.
- **Contrast effect** – the enhancement or diminishing of a weight or other measurement when compared with a recently observed contrasting object.
- **Denomination effect** – the tendency to spend more money when it is denominated in small amounts (e.g. coins) rather than large amounts (e.g. bills).
- **Distinction bias** – the tendency to view two options as more dissimilar when evaluating them simultaneously than when evaluating them separately.
- **Endowment effect** – "the fact that people often demand much more to give up an object than they would be willing to pay to acquire it".
- **Experimenter's or Expectation bias** – the tendency for experimenters to believe, certify, and publish data that agree with their expectations for the outcome of an experiment, and to disbelieve, discard, or downgrade the corresponding weightings for data that appear to conflict with those expectations.

- **Focusing effect** – the tendency to place too much importance on one aspect of an event; causes error in accurately predicting the utility of a future outcome.
- **Framing effect** – drawing different conclusions from the same information, depending on how that information is presented.
- **Hostile media effect** - the tendency to see a media report as being biased due to one's own strong partisan views.
- **Hyperbolic discounting** – the tendency for people to have a stronger preference for more immediate payoffs relative to later payoffs, where the tendency increases the closer to the present both payoffs are.
- **Illusion of control** – the tendency to overestimate one's degree of influence over other external events.
- **Impact bias** – the tendency to overestimate the length or the intensity of the impact of future feeling states.
- **Information bias** – the tendency to seek information even when it cannot affect action.
- **Irrational escalation** – the phenomenon where people justify increased investment in a decision, based on the cumulative prior investment, despite new evidence suggesting that the decision was probably wrong.
- **Loss aversion** – "the disutility of giving up an object is greater than the utility associated with acquiring it". (see also Sunk cost effects and Endowment effect).
- **Mere exposure effect** – the tendency to express undue liking for things merely because of familiarity with them.
- **Money illusion** – the tendency to concentrate on the nominal (face value) of money rather than its value in terms of purchasing power.
- **Moral credential effect** – the tendency of a track record of non-prejudice to increase subsequent prejudice.
- **Negativity bias** – the tendency to pay more attention and give more weight to negative than positive experiences or other kinds of information.
- **Neglect of probability** – the tendency to completely disregard probability when making a decision under uncertainty.
- **Normalcy bias** – the refusal to plan for, or react to, a disaster which has never happened before.
- **Omission bias** – the tendency to judge harmful actions as worse, or less moral, than equally harmful omissions (inactions).

- **Outcome bias** – the tendency to judge a decision by its eventual outcome instead of based on the quality of the decision at the time it was made.
- **Planning fallacy** – the tendency to underestimate task-completion times.
- **Post-purchase rationalization** – the tendency to persuade oneself through rational argument that a purchase was a good value.
- **Pseudocertainty effect** – the tendency to make risk-averse choices if the expected outcome is positive, but make risk-seeking choices to avoid negative outcomes.
- **Reactance**: – the urge to do the opposite of what someone wants you to do out of a need to resist a perceived attempt to constrain your freedom of choice.
- **Restraint bias** – the tendency to overestimate one's ability to show restraint in the face of temptation.
- **Selective perception** – the tendency for expectations to affect perception.
- **Semmelweis reflex** – the tendency to reject new evidence that contradicts an established paradigm.
- **Social comparison bias** – the tendency, when making hiring decisions, to favour potential candidates who don't compete with one's own particular strengths.
- **Status quo bias** – the tendency to stay relatively the same (see also loss aversion, endowment effect, and system justification).
- **Unit bias** – the tendency to want to finish a given unit of a task or an item. Strong effects on the consumption of food in particular.
- **Wishful thinking** – the formation of beliefs and the making of decisions according to what is pleasing to imagine instead of by appeal to evidence or rationality.
- **Zero-risk bias** – preference for reducing a small risk to zero over a greater reduction in a larger risk.

Biases in probability and belief

- **Ambiguity effect** – the tendency to avoid options for which missing information makes the probability seem "unknown."

- **Anchoring effect** – the tendency to rely too heavily, or "anchor," on a past reference or on one trait or piece of information when making decisions (also called "insufficient adjustment").
- **Attentional bias** – the tendency to neglect relevant data when making judgments of a correlation or association.
- **Availability heuristic** – estimating what is more likely by what is more available in memory, which is biased toward vivid, unusual, or emotionally charged examples.
- **Availability cascade** – a self-reinforcing process in which a collective belief gains more and more plausibility through its increasing repetition in public discourse (or "repeat something long enough and it will become true").
- **Base rate neglect or Base rate fallacy** – the tendency to base judgments on specifics, ignoring general statistical information.
- **Belief bias** – an effect where someone's evaluation of the logical strength of an argument is biased by the believability of the conclusion.
- **Clustering illusion** – the tendency to see patterns where actually none exist.
- **Conjunction fallacy** – the tendency to assume that specific conditions are more probable than general ones. [29]
- **Forward Bias** - the tendency to create models based on past data which are validated only against that past data.
- **Gambler's fallacy** – the tendency to think that future probabilities are altered by past events, when in reality they are unchanged. Results from an erroneous conceptualization of the Law of large numbers. For example, "I've flipped heads with this coin five times consecutively, so the chance of tails coming out on the sixth flip is much greater than heads."
- **Hindsight bias** – sometimes called the "I-knew-it-all-along" effect, the tendency to see past events as being predictable^[30] at the time those events happened.
- **Illusory correlation** – inaccurately perceiving a relationship between two events, either because of prejudice or selective processing of information.
- **Observer-expectancy effect** – when a researcher expects a given result and therefore unconsciously manipulates an experiment or misinterprets data in order to find it (see also subject-expectancy effect).

Optimism bias – the tendency to be over-optimistic about the outcome of planned actions.

Ostrich effect – ignoring an obvious (negative) situation.

Overconfidence effect – excessive confidence in one's own answers to questions. For example, for certain types of questions, answers that people rate as "99% certain" turn out to be wrong 40% of the time.

Positive outcome bias – the tendency of one to overestimate the probability of a favorable outcome coming to pass in a given situation (see also wishful thinking, optimism bias, and valence effect).

Pareidolia – a vague and random stimulus (often an image or sound) is perceived as significant, e.g., seeing images of animals or faces in clouds, the man in the moon, and hearing hidden messages on records played in reverse.

Pessimism bias – the tendency for some people, especially those suffering from depression, to overestimate the likelihood of negative things happening to them.

Primacy effect – the tendency to weigh initial events more than subsequent events.

Recency effect – the tendency to weigh recent events more than earlier events (see also peak-end rule).

Disregard of regression toward the mean – the tendency to expect extreme performance to continue.

Stereotyping – expecting a member of a group to have certain characteristics without having actual information about that individual.

Subadditivity effect – the tendency to judge probability of the whole to be less than the probabilities of the parts.

Subjective validation – perception that something is true if a subject's belief demands it to be true. Also assigns perceived connections between coincidences.

Well travelled road effect – underestimation of the duration taken to traverse off-traveled routes and over-estimate the duration taken to traverse less familiar routes.

Social biases

Most of these biases are labeled as attributional biases.

- **Actor-observer bias** – the tendency for explanations of other individuals' behaviors to overemphasize the influence of their personality and underemphasize the influence of their situation (see also Fundamental attribution error), and for explanations of one's own behaviors to do the opposite (that is, to overemphasize the influence of our situation and underemphasize the influence of our own personality).
- **Dunning-Kruger effect** – a twofold bias. On one hand the lack of metacognitive ability deludes people, who overrate their capabilities. On the other hand, skilled people underrate their abilities, as they assume the others have a similar understanding.
- **Egocentric bias** – occurs when people claim more responsibility for themselves for the results of a joint action than an outside observer would.
- **Forer effect** (aka Barnum effect) – the tendency to give high accuracy ratings to descriptions of their personality that supposedly are tailored specifically for them, but are in fact vague and general enough to apply to a wide range of people. For example, horoscopes.
- **False consensus effect** – the tendency for people to overestimate the degree to which others agree with them.
- **Fundamental attribution error** – the tendency for people to over-emphasize personality-based explanations for behaviors observed in others while under-emphasizing the role and power of situational influences on the same behavior (such as actor-observer bias, group attribution error, positivity effect, and negativity effect).
- **Halo effect** – the tendency for a person's positive or negative traits to "spill over" from one area of their personality to another in others' perceptions of them (see also physical attractiveness stereotype).
- **Illusion of asymmetric insight** – people perceive their knowledge of their peers to surpass their peers' knowledge of them.
- **Illusion of transparency** – people overestimate others' ability to know them, and they also overestimate their ability to know others.
- **Illusory superiority** – overestimating one's desirable qualities, and underestimating undesirable qualities, relative to other people. (Also

- known as "Lake Wobegon effect," "better-than-average effect," or "superiority bias").
- **Ingroup bias** – the tendency for people to give preferential treatment to others they perceive to be members of their own groups.
 - **Just-world phenomenon** – the tendency for people to believe that the world is just and therefore people "get what they deserve."
 - **Moral luck** – the tendency for people to ascribe greater or lesser moral standing based on the outcome of an event rather than the intention
 - **Outgroup homogeneity bias** – individuals see members of their own group as being relatively more varied than members of other groups.
 - **Projection bias** – the tendency to unconsciously assume that others (or one's future selves) share one's current emotional states, thoughts and values.
 - **Self-serving bias** – the tendency to claim more responsibility for successes than failures. It may also manifest itself as a tendency for people to evaluate ambiguous information in a way beneficial to their interests (see also group-serving bias).
 - **System justification** – the tendency to defend and bolster the status quo. Existing social, economic, and political arrangements tend to be preferred, and alternatives disparaged sometimes even at the expense of individual and collective self-interest. (See also status quo bias.)
 - **Trait ascription bias** – the tendency for people to view themselves as relatively variable in terms of personality, behavior and mood while viewing others as much more predictable.
 - **Ultimate attribution error** – similar to the fundamental attribution error, in this error a person is likely to make an internal attribution to an entire group instead of the individuals within the group.

Memory errors

- **Cryptomnesia** – a form of *misattribution* where a memory is mistaken for imagination.
- **Egocentric bias** – recalling the past in a self-serving manner, e.g. remembering one's exam grades as being better than they were, or remembering a caught fish as being bigger than it was.

- **False memory** – confusion of imagination with memory, or the confusion of true memories with false memories.
- **Hindsight bias** – filtering memory of past events through present knowledge, so that those events look more predictable than they actually were; also known as the "I-knew-it-all-along effect."
- **Reminiscence bump** – the effect that people tend to recall more personal events from adolescence and early adulthood than from other lifetime periods.
- **Rosy retrospection** – the tendency to rate past events more positively than they had actually rated them when the event occurred.
- **Self-serving bias** – perceiving oneself responsible for desirable outcomes but not responsible for undesirable ones.
- **Suggestibility** – a form of *misattribution* where ideas suggested by a questioner are mistaken for memory.
- **Telescoping effect** – the effect that recent events appear to have occurred more remotely and remote events appear to have occurred more recently.
- **Von Restorff effect** – the tendency for an item that "stands out like a sore thumb" to be more likely to be remembered than other items.

Windows on Diversity: Lawyers, Culture, and Mediation Practice¹

“Culture is what everyone in a group knows that those outside the group do not know; it relates to the symbolic aspects of our lives, those places where we are constantly making meaning and composing our identities.”

INTRODUCTION

Mediation fulfills its potential when it is adaptable and flexible enough to function well for people from a range of cultural backgrounds.

Three important factors to pass this “diversity test”:

Mediation processes themselves must reflect a range of values about how disputes are named, understood, and addressed.

Mediators need to be trained in and apply cultural competence to their work.

The influence of legal culture on mediation processes and mediator behavior should be investigated since its pervasive influence affects process design, mediator behavior, and the inclusiveness of mediation processes.

Culture is complex and multidimensional; mediation training and process design initiatives that incorporate broad understandings of culture help participants develop cultural competence and contribute to a more accessible dispute resolution field.

CONNECTIONS BETWEEN CULTURE AND DISPUTING

Culture shapes what we *call* disputes, how we *think of and relate to* them, whether and how we *address* them, and the *range* of acceptable *outcomes*.

Culture informs the framing of and responses to disputes. For example, fewer disputants may be identified by people from more individualist settings (that value autonomy and independence) whereas people from more collectivist settings may define parties more widely.

CULTURAL COMPETENCE

“Cultural Competence” means familiarity with culture as a powerful underground river that shapes expectations, understandings, and actions in mediation.

Mediators can begin the process of developing cultural competence by surveying and acknowledging the influence of their own “starting points” and “currencies.”

¹ LeBaron, Michelle and Zumeta, Zena D. Conflict Resolution Quarterly, vol. 20, no. 4, Summer 2003.

	Starting Points	Currencies
Definition	Those places where it feels natural to begin.	Those things that are valued.
Example		

CULTURAL COMPETENCE AND TRAINING

Cultural competence development is an ongoing process.

Steps to develop cultural competence:

Ask yourself questions that consider the effect of identity differences on your mediation work, such as:

“How do my various identities (race, gender class, etc.) affect the way I interpret the experiences of people who are like me and not like me?”

“How can I make myself aware of the ways in which these various identities affect my understanding of my role?”

“What, if anything should/could I do to limit these effects (or expand my awareness so that I am not limited by them)?”

Uncover assumptions and consider a range of cultural contexts and how these unnamed assumptions might function to promote a sense of comfort or discomfort for parties.

Develop responses that address the range of meanings you and the disputants attach to elements of the mediation process.

Consider how flexibility, comfort with ambiguity, and creativity can contribute to culturally competent mediation practices.

LEGAL CULTURE AND MEDIATOR AWARENESS

Mediation is heavily influenced by the orientations and assumptions of legal culture. Exploring legal culture is a “door” into examining the impact of other types of cultures on mediation.

Legal Culture is an important influence on mediation in 4 ways:

1. Many mediators are lawyers and their cultural mode of being and behaving is shaped in multiple ways by their training in law and their association with other legal professionals.

2. Most mediation is conducted in the shadow of the law, whether or not it is carried out in a court-attached program; law remains an important touchstone and yardstick for shaping issues and communication during mediation as well as for measuring options and outcomes.
3. Mediation as a practice arose in part from dissatisfaction with complicated legal processes and the aspects of law associated with depersonalization.
4. Mediators are frequently lawyers or familiar with legal culture and their clients are often not; legal culture may operate to exclude or alienate people in ways outside mediators' awareness.

Legal culture "starting points" and "currencies": Lawyers are taught as law students to place value in: logical analysis, the importance of rules, written words, adversarial skills, attention to detail, sequential order, and maximizing client gains.

Reflecting the influence of dominant culture values on legal training, lawyers tend to be oriented to individualist perspectives, expecting clients and others to act in autonomous, self-interested ways.

When the influence of legal culture in mediation shapes and alters disputes in ways that exclude important aspects of worldviews, context, relationships, or the full range of human experiences, mediation becomes a venue that reproduces some of the limitations ADR was designed to address.

Culturally competent mediators:

Make room for various starting points,

Recognize the need to translate worldviews and currencies back and forth among parties who may have conflated cultural differences with bad intentions or character flaws, and

Recognize that legal culture as it influences mediation may filter out some elements essential to satisfying processes and durable outcomes.

The Top Ten Reasons Why Mediators Should Not Evaluate¹

An “**evaluative**” mediator gives advice, makes assessments, states opinions – including opinions on the likely court outcome, proposes a fair or workable resolution to an issue or the dispute, or presses the parties to accept a particular resolution.

These activities are inconsistent with the role of a mediator because:

- I. THE ROLES AND RELATED TASKS OF EVALUATORS AND FACILITATORS ARE AT ODDS.
- II. EVALUATION PROMOTES POSITIONING AND POLARIZATION, WHICH ARE ANTI-THETICAL TO THE GOALS OF MEDIATION.
- III. ETHICAL CODES CAUTION MEDIATORS – AND OTHER NEUTRALS – AGAINST ASSUMING ADDITIONAL ROLES.
- IV. IF MEDIATORS EVALUATE LEGAL CLAIMS AND DEFENSES, THEY MUST BE LAWYERS; ELIMINATING NONLAWYERS WILL WEAKEN THE FIELD.
- V. THERE ARE INSUFFICIENT PROTECTIONS AGAINST INCORRECT MEDIATOR EVALUATIONS.
- VI. EVALUATION ABOUNDS: THE DISPUTING WORLD NEEDS ALTERNATIVE PARADIGMS.
- VII. MEDIATOR EVALUATION DESTRUCTS FROM THE FOCUS ON PARTY RESPONSIBILITY FOR CRITICAL EVALUATION, RE-EVALUATION AND CREATIVE PROBLEM-SOLVING.
- VIII. EVALUATION CAN STOP NEGOTIATION.
- IX. A UNIFORM UNDERSTANDING OF MEDIATION IS CRITICAL TO THE DEVELOPMENT OF THE FIELD.
- X. MIXED PROCESSES CAN BE USEFUL, BUT CALL THEM WHAT THEY ARE!

THE ROLES AND RELATED TASKS OF EVALUATORS AND FACILITATORS ARE AT ODDS.

Evaluators and mediators use different skills, techniques, competencies, training norms, and ethical guidelines.

¹ Love, Lena P. 24 Fla. St. U. L. Rev. 937 - 948. 1996 - 1997.

Evaluative tasks can compromise a mediator's neutrality in actuality AND in the eyes of the parties.

Evaluation can diminish a mediator's capacity to achieve his primary goal by diverting focus to another task.

Other Differences between Evaluation and Mediation

	Evaluators	Mediators
Role	Uses predetermined criteria to evaluate evidence and arguments presented by adverse parties to assess and decide the issue at hand.	Assists disputing parties in making their own decisions and evaluate their own situations.
Activities	<ul style="list-style-type: none"> -Finds "the facts" by properly weighing evidence; -Judges credibility and allocates the burden of proof; -Determines and applies the relevant law, rule or custom to the specific situation; -Makes an award or rendering an opinion. 	<ul style="list-style-type: none"> -Facilitates communications; -Promotes understanding; -Focuses the parties on their interests; -Seeks creative problem solving to enable parties to reach their own agreement. -Pushes disputing parties to question their assumptions, reconsider their positions, and listen to each other's perspectives and arguments. -Urges parties to consider relevant law, weigh their values, principles, and priorities; and develop an optimal outcome.
The parties:	EXPRESSLY ask the evaluator to resolve the conflict.	Request that the mediator FACILITATES parties' evaluation.

EVALUATION PROMOTES POSITIONING AND POLARIZATION, WHICH ARE ANTITHETICAL TO THE GOALS OF MEDIATION.

Disputing parties act differently in front of an evaluator than in the presence of a mediator because they are in a competitive mind-set and seeking to capture the evaluator's favor and win the case.

EVALUATION ABOUNDS: THE DISPUTING WORLD NEEDS ALTERNATIVE PARADIGMS.

The legal community needs a model from among the array of dispute resolution processes that will assist parties to evolve in their understandings, relationships, and arrangements.

Integrating evaluation into mediation will cause a shift towards an adversarial framework where mediators will "trash and bash" to get parties to settle.

"Trash and bash" is accomplished by telling parties how bad their case is, and then attempting to reach a settlement by aggressively countering/decreasing a party's offer.

MEDIATOR EVALUATION DESTRUCTS FROM THE FOCUS ON PARTY RESPONSIBILITY FOR CRITICAL EVALUATION, RE-EVALUATION AND CREATIVE PROBLEM-SOLVING.

Conflicts represent true crises for the individuals, communities or institutions involved and hold the potential for doing extreme harm OR for creative changes and restructuring.

A mediator's task is to elevate the dialogue of conflict from recriminations and blame to the generation of possibilities and breakthrough ideas.

"Evaluative mediation" pulls mediation away from creativity and into the adversarial frame.

EVALUATION CAN STOP NEGOTIATION.

Opinions have consequences. They can damage:

The mediation process itself, and

The perception by the parties of the mediator's impartiality.

If a party has an unrealistic assessment of its case, a mediator can remain impartial by encouraging parties to re-evaluate through:

Enabling each side to present its best case and strongest arguments,

Seeking professional advice,

Questioning conclusions of the parties, and

Urging neutral evaluation to break a stalemate.

Adversarial behaviors run counter to a mediator's efforts to move parties towards a different perception of their own situation and of each other because it hinders an atmosphere of respectful collaboration that is a necessary foundation for creative problem solving.

ETHICAL CODES CAUTION MEDIATORS – AND OTHER NEUTRALS – AGAINST ASSUMING ADDITIONAL ROLES

Mediation ethical codes include a preference to keep processes “pure” and note that party self-determination is a fundamental principle of mediation.

Arbitrator ethical codes discourage neutrals from participating in settlement discussions unless requested to do so by all parties because:

The arbitrator may be improperly influenced by the settlement discussions,

The arbitrator may impede the discussions by her presence and,

The arbitrator's questions and suggestions while acting as a mediator can create improper pressure to settle.

Where processes become “mixed” (the arbitrator assumes mediation tasks or the mediator assumes arbitration tasks), the mediator or arbitrator should:

Define her new role,

Alert parties to the impact it may have on her ability to facilitate discussions, and

Obtain informed consent from all parties.

IF MEDIATORS EVALUATE LEGAL CLAIMS AND DEFENSES, THEY MUST BE LAWYERS; ELIMINATING NONLAWYERS WILL WEAKEN THE FIELD.

Mediators fall under legal Model Standards once they provide legal opinions, thus limiting the pool of mediators to lawyers.

The loss of the talents and perspectives of nonlawyer mediators would weaken mediation and pull it into an adversarial paradigm.

THERE ARE INSUFFICIENT PROTECTIONS AGAINST INCORRECT MEDIATOR EVALUATIONS.

There are insufficient due process protections in place for disputants to appeal decisions made on the inadequately informed opinion of a mediator.

A UNIFORM UNDERSTANDING OF MEDIATION IS CRITICAL TO THE DEVELOPMENT OF THE FIELD.

To combat the confusion of the different types and consequences of alternative dispute resolution processes, it is necessary to promulgate statewide standards and the subscription of neutrals to a specific code of ethics.

MIXED PROCESSES CAN BE USEFUL, BUT CALL THEM WHAT THEY ARE!

Parties sometimes request that neutrals assume a variety of roles.

These mixed processes can address particular needs of a situation and can be very helpful.

If a neutral takes on the multiple roles of a mixed process, she is:

Bound by more than one code of ethics,

Charged with separate goals and tasks, and

Should inform the parties of these responsibilities.

A Primer on Successful Negotiation

By David A. Hoffman

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Bibliography

I. Introduction

Negotiation has a bad name in our culture.¹ Recall one of the opening scenes in the recent film "Air Force One," in which the President of the United States, played by Harrison Ford, castigates himself and other foreign policy makers for their willingness to negotiate with terrorists and vows never to negotiate again. Or, recall the hero of the science fiction film "The Fifth Element," played by Bruce Willis, who offers to negotiate with one of the villainous Mangalors who have captured the control room of the spaceship and then, when face to face with the chief Mangalor, quickly shoots him

¹ My frame of reference, for purposes of this article, is the mainstream culture of the United States, as depicted in the popular media. The culture of the United States is, of course, composed of many sub-cultures, including many that differ in significant respects from that of the mainstream.

squarely between the eyes, while an impressed colleague asks: "where did he learn to negotiate like that?"²

In these films, and in much of our culture, negotiation is treated as an activity suitable only for unprincipled wimps ("Air Force One") or indecisive fools ("The Fifth Element"). Moral: real men and women don't negotiate.

Yet the reality is that we negotiate all the time. If we have young children, we are engaged in negotiation from the minute they wake up -- over such weighty subjects as what they are going to eat for breakfast or wear to school. If we drive to work, we are "negotiating" the traffic to get there. If we are married or in a domestic partnership, negotiation is how we decide what videos to rent and when the refrigerator needs cleaning. Virtually every aspect of our lives involves negotiation -- even negotiations with ourselves (over what we will eat, or not eat, how we will spend our time, etc.)

In the workplace, negotiation is likewise ubiquitous. Almost every aspect of workplace activity requires coordination and teamwork, and negotiation lies at the core of those activities. A company's relationship with its employees is the product of a series of negotiations over the terms and conditions of employment and other issues relating to the employee's responsibilities. The satisfactory resolution of those issues depends on the ability of both management and employees to negotiate productively. Thus, effective negotiation can make the difference between a successful company and one that is not.

What is effective negotiation? Lawyers and social scientists who have studied negotiation behavior offer several answers to this question, and their answers have evolved rapidly in the last twenty-five years. Sections II - IV below briefly describe that evolution, and Section V suggests some future directions.³

II. Positional Bargaining - Negotiation Tactics

The early 1980s represent a watershed in the literature of negotiation. In 1981, Roger Fisher and William Ury published *Getting to YES: Negotiating Agreement Without Giving In*, arguably the most influential book ever written about negotiation.⁴ *Getting to YES*, which has been translated into 18 languages and has guided the

² Thanks to Robert Benjamin and Peter Adler, whose 1999 SPIDR conference workshop on negotiation and film highlighted these films, and others, as a window into our culture's ambivalence about negotiation.

³ The following description of recent developments in the field of negotiation touches on only some of the major themes and is not intended as a comprehensive survey of the field.

⁴ An expanded second edition was published in 1991 by Fisher, Ury, and Bruce Patton. In 1982, Howard Raiffa published *The Art and Science of Negotiation*, which applied game theory and economic analysis to the study of negotiation and which was also influential.

training offered to world leaders through the Program on Negotiation at Harvard Law School, offers a vision of negotiation as a principled activity in which the participants can each be made better off.

However, prior to the publication of *Getting to YES*, negotiation was typically viewed as an activity in which two or more parties each vied for advantage at the other's expense. The best negotiators were those who succeeded in obtaining the largest slice of the pie, with little attention paid to whether the pie could be expanded in some way.

A. Hardball Tactics

Typical of the literature of the pre-*Getting to YES* era is the advice given to legal services lawyers by Michael Meltsner and P.G. Schrag in their book *Public Interest Advocacy: Materials for Clinical Legal Education*.⁵ Their suggestions for negotiators combine such common sense advice as thorough preparation with a set of techniques designed to manipulate, deceive, or intimidate the opponent. The unspoken assumption in these suggestions is that the opponent is willing to take advantage of the negotiator -- fairly or unfairly -- and therefore success requires using competitive negotiation techniques, and using them more effectively than the opponent. The following is a short list of the techniques Meltsner and Schrag recommend:

- Arrange to negotiate on your own turf.
- Balance or slightly outnumber the other side.
- Time the negotiations to advantage.
- Lock yourself in.
- Designate one of your demands a "precondition."
- When it is in your interest, make the other side tender the first offer.
- Make your first demand very high.
- Place your major demands at the beginning of the agenda.
- Make the other side make the first compromise.
- Use two negotiators who play different roles.
- Be tough — especially against a patsy.
- Appear irrational where it seems helpful.
- Raise some of your demands as the negotiations progress.

⁵ A similar orientation can be found in G. Bellow & B. Moulton, *The Lawyering Process: Negotiation* (1981), which focuses on the skills needed for successful negotiation.

- Claim that you do not have authority to compromise.

Many of these techniques are as repugnant as they are common. Like the behavior all too many of us experience when we buy a car in an auto showroom, negotiation tactics of this kind involve treating the other party in a negotiation as a de-personalized enemy. They reflect an individualistic world view in which negotiation is merely the more civilized version of an otherwise vicious competitive struggle for advantage.

One of the hallmarks of this style of negotiation is the manipulation of the other party's point of view. For example, lecturers on the subject of negotiation like to tell the story of a mistake made by organizers of the presidential campaign of Theodore Roosevelt who printed up thousands of copies of a campaign flyer with a photograph of Roosevelt lifted from the popular press. Unfortunately, no one had asked the photographer for permission to use the photo. The campaigners anticipated having to pay the photographer a fortune because reprinting the flyers would be costly. Instead of negotiating the price, however, they sent him a telegram informing him that his photograph had been selected from among several others, but that he would have to pay a modest fee in order for his photograph to be used. He forwarded the money, and the flyers were distributed.

Obviously, there are disadvantages to negotiating in this way with employees, who would resent being deceived or treated like the enemy. Behavior which is the norm in the commercial marketplace or the auto showroom, where buyer and seller are unlikely to meet again, is unsuitable for workplace settings, where the employer and employee maintain an ongoing relationship. Clearly, a more collaborative mode of negotiation is needed in that setting.

B. Cooperative vs. Competitive Bargainers

In the late 1970s and early 1980s, Prof. Gerald R. Williams began a series of experiments to determine whether cooperative styles of negotiation could be as successful as competitive styles.⁶ He videotaped mock negotiations involving experienced lawyers from across the United States, and he polled the lawyers about the characteristics and effectiveness of the attorneys with whom they routinely negotiate. His findings showed that 65% of the lawyers were viewed as cooperative, while only 24% were considered competitive. Williams also found that the perceived effectiveness of negotiators did not correlate with their competitive or cooperative orientation. In other words, there were effective cooperative negotiators, just as there were ineffective competitive negotiators, and vice versa.

One of the goals of this exercise was to identify the characteristics of effective negotiators -- regardless of whether they were cooperative or competitive in style. Williams found the following characteristics (among others) were common to both

⁶ See G. Williams, *Legal Negotiation and Settlement* (1983).

types of effective negotiators: rational, experienced, perceptive, creative, analytical, self-controlled, intelligent, honest. The import of Williams' research was to counteract the view that the most successful negotiators are those that use competitive techniques, such as those recommended by Meltsner and Schrag. The meaning of these studies for the employment field was that managers could adopt more cooperative styles of negotiation without necessarily giving up any advantage to the employees.⁷

III. Interest-Based Bargaining - Principled Negotiation

As noted above, with the publication of *Getting to YES*, Roger Fisher and William Ury introduced a fundamentally different approach to negotiation. Instead of examining the personal characteristics of negotiators, or even the specific techniques they used (i.e., competitive vs. cooperative), Fisher and Ury argued that the most successful negotiators will focus on interests rather than positions.

A. Getting to YES

One of the important insights of *Getting to YES* is that successful negotiation often requires separating the people from the problem. In other words, reactions to proposals (particularly critical reactions) should be couched in such a way that the criticism is not taken personally by the other party. Fisher and Ury also advocate the use of principled benchmarks for resolving contested issues -- e.g., the fair market value of a car or house. By seeking out objective criteria for the resolution of disputes, the parties can be spared to some degree from the intense struggle over whose view shall prevail. A third vital insight offered by Fisher and Ury is that effective preparation for negotiation requires careful consideration of each party's BATNA -- their best alternative to a negotiated agreement. Unless and until each party knows their respective BATNA's, they will lack a principled basis for determining whether they should accept any given proposal or set of proposals. Finally, Fisher and Ury emphasize the importance of using negotiation to communicate about underlying interests so that mutually advantageous exchanges can occur. Using this technique, negotiating parties can expand the pie and thus create "win-win" results in which each of the parties is made better off than either could be in positional non-interest-based bargaining.⁸

⁷ In addition to the important perspective added by Williams' research on personality characteristics, a wealth of other descriptive studies of negotiation explore the ways in which race, culture, and gender (among other traits) affect bargaining. See, e.g., D. Tannen, *You Just Don't Understand: Women and Men in Conversation* (1988).

⁸ Fisher and Ury use the example of two children negotiating over an orange. They decide to cut the orange in half, which leaves each of them dissatisfied, but at least equally so. If they had employed interest-based negotiation, they would have learned that one of them wanted the orange rind for baking, while the other wanted only the pulp of the orange for juice. In other words, had they communicated about their interests, each could have had the equivalent of a whole orange.

Example: In a negotiation with a prospective sales manager, the company offers a salary and bonus package that is similar to that available in other firms of comparable size. The company says its goal is rapid expansion of its market. The prospective employee says that she does not need much of a guaranteed salary but wants to participate in the growth of the company and therefore offers to take a much lower salary in exchange for a bonus based on a fixed percentage of sales beyond the company's currently projected targets. Each side assesses its BATNA -- for the prospect, going to another firm; for the employer, looking for another sales manager -- and concludes this deal is better than the available alternatives. They sign an employment agreement incorporating these terms.

B. The Critique of Getting to YES

Critics of *Getting to YES*⁹ have assailed its optimistic assumption that negotiators will be candid about their true interests. Critics also pointed out that, with their emphasis on expanding the pie, Fisher and Ury had paid insufficient attention to the techniques bargainers use to maximize their share of the pie. Some critics questioned whether using Fisher and Ury's value-creating techniques might leave a negotiator vulnerable to the value-claiming techniques of the competitive bargainer. Moreover, while the Fisher-Ury approach may hold promise in settings where the parties have an ongoing relationship, its value seemed less obvious in settings (such as tort litigation) where the parties have no relationship, there are few if any opportunities for joint gains, and the goal is simply welfare maximization.

The Fisher-Ury techniques do not appear to have not been widely adopted in the workplace. Indeed, except in the area of compensation (where bonuses and commissions create opportunities for joint gains), it is unusual to see true "win-win" bargaining between management and employees; most decision-making is done hierarchically.

⁹ See, e.g., J. White, "The Pros and Cons of "Getting to YES," 34 J. Legal Ed. 114 (1984).

IV. Integrating Positional and Interest-Based Bargaining

The arrival of *Getting to YES* and its critique of positional negotiation turned the attention of negotiation scholars, researchers, and practitioners from the refinements of technique to the question of which fundamental orientation to negotiation is best. The Fisher-Ury analysis suggested an irreducible tension between integrative and distributive approaches to bargaining:

- | <u>Interest-Based/Integrative</u> | <u>Positional/Distributive</u> |
|-----------------------------------|--------------------------------|
| • Creating value | • Claiming value |
| • Cooperative | • Competitive |
| • Win-win solutions | • Win-lose outcomes |
| • Joint gains | • Zero sum |
| • Expand the pie | • Claim the biggest piece |

The next challenge, then, for those seeking to find the most promising methods of negotiation, was to reconcile, or at least develop strategies for managing, the tension between these two fundamentally different orientations to negotiation.

A. Game Theory

An experiment with computer programs, described in Robert Axelrod's book, *The Evolution of Cooperation*, in 1984, sought to determine the best method of handling a type of negotiation called the Prisoner's Dilemma. In the Prisoner's Dilemma, the negotiators communicate with each other only through their behavior.¹⁰ They are rewarded or punished for their behavior according to the following matrix, which is used to score each round of either cooperative or competitive moves:

		A's Behavior	
		A Cooperates	A Competes
B's Behavior	B Cooperates	A and B win	A wins big; B loses big
	B Competes	B wins big; A loses big	A and B lose

¹⁰ For a description of the Prisoner's Dilemma, see R. Fisher & S. Brown, *Getting Together: Building Relationships as We Negotiate* 198 (1988).

In this matrix, it is possible for one party to take advantage of the other party's cooperative moves, but not for long. Once it becomes apparent that one party is going to make competitive moves, the other party will do so as well. The winning computer program employed a simple tit-for-tat strategy: the program always began with a cooperative move but then mimicked the competing program's move on the previous round.

In the context of a real-life negotiation, this strategy suggests the value of disaggregating any negotiation into a series of moves so that the bargainer can determine whether the other party is willing to make a cooperative, value-creating move, or a competitive value-claiming move.

Example: In a negotiation over a severance package, the Human Resources manager refrains from making an initial offer; instead, she begins by asking the former employee what he is looking for. The employee responds by asking what the company's typical severance packages have been in recent years. They agree to exchange information about these two subjects before making any offers or counter-offers. They also agree on a time to do so. They then discuss arrangements for giving the ex-employee access to his personnel file. By the time they begin discussing the severance terms, each feels more trusting of the other because they have been able to cooperate on the preliminary steps in the negotiation.

The bottom line is that every negotiation has not only the potential for integrative and distributive moves, but also a need for such moves. At least in theory, the most successful negotiations would involve efforts by the parties to expand the pie to the greatest extent possible and then divide it without mutually destructive conflict. Accomplishing such an objective, however, requires overcoming a number of barriers.

B. Overcoming Barriers to Settlement

One of the barriers to optimal results in bargaining concerns communication. The Prisoner's Dilemma game, which radically oversimplifies real-life bargaining, does not permit communication. In ordinary, day-to-day settings, negotiators can communicate with each other between rounds of bargaining and thus attempt to secure agreements on bargaining behavior. Even so, negotiators will often fail to make optimal deals because of flawed communication, or barriers to effective communication.¹¹ One example is the phenomenon of reactive devaluation, a process in which our perceptions are influenced by the source of the information.

¹¹ For a fuller discussion of this phenomenon, see R. Mnookin, "Why Negotiations Fail: An Exploration of Barriers to the Resolution of Conflict," 8 Ohio State Journal of Dispute Resolution 235 (1993).

Example: A manager looks at the strong resume and excellent salary history of a prospective employee and concludes that she will probably have to offer him a salary of \$50,000/year. The company could afford to do so but wants to pay as little as possible. The employee asks for \$45,000/year. The manager is puzzled, mentally devalues the prospect, and concludes there must be something about him or the market that she does not know. Under these circumstances, the manager offers the employee \$42,000, and he decides to go elsewhere. In this situation, the employee and the company could have struck a deal at a salary of \$45,000 - \$50,000 and both would have been better off.

Negotiation theorists have identified other barriers to successful negotiation, such as cognitive dissonance, loss aversion, and strategic bargaining. According to Robert Mnookin, each of these barriers can, in theory, be overcome by improved communication and more rational methods of option assessment. He points, in particular, to the use of mediation as one method of overcoming such barriers to successful negotiation.

V. Successful Bargaining - Lessons from the Field of Mediation

The process of mediation -- in which a neutral third party facilitates negotiation -- provides a useful lens through which to assess the effectiveness of negotiation. An intermediary can often provide a useful buffer for communications which might otherwise be devalued or go unheard. (For example, in the salary negotiation described above, an intermediary could have communicated separately with the company and prospective employee and made a proposal that would have been accepted by both sides.) There are other lessons, however, that the practice of mediation teaches.

A. Empowerment and Recognition

In their recent book, *The Promise of Mediation*, Robert Baruch Bush and Joseph Folger articulate a new rationale for the practice of mediation. Previous discussions of the subject had taken as their premise that the settlement of disputes was the primary reason for employing mediation. According to Bush and Folger, however, the primary value of the process is its ability to (a) empower participants to identify and articulate their needs and perspectives; and (b) provide opportunities for mutual recognition. Bush and Folger describe their model as based on a "relational," as opposed to an individualistic, world view. From their perspective personal transformation is a more valuable goal than solving problems. Within the world of mediation, this hypothesis is considered controversial.¹² However, it is instructive as a perspective on the meaning of "effective" negotiation.

¹² For a critique of *The Promise of Mediation*, see C. Menkel-Meadow, "The Many Ways of Mediation: The Transformation of Traditions, Ideologies, Paradigms, and Practices," 11 *Negotiation Journal* 217 (1995). For a critique of the concept of empowerment as a feature of

For purposes of negotiation in the workplace, for example, this perspective suggests that even in those settings where management is unable (for one reason or another) to approve a particular request from an employee, the manner in which the employee is treated may satisfy certain needs for empowerment and recognition that are at least as important as the substantive issue under discussion.¹³

The study of mediation and communication theory provides a set of tools for such empowerment and recognition, such as active listening and reframing. However, these tools cannot be employed in a mechanical way. Empathetic listening is as much a discipline of heart as of mind, just as thoughtful reframing requires intuition as much as intellect.

In a negotiation, these techniques may be valuable in and of themselves, because they demonstrate genuine concern, and that may be one of the other party's underlying objectives. However, they may also provide a broader window on the parties' respective interests -- i.e., as part of a conversation in which each negotiator understands more fully the wide range of interests that the other party brings to the table.

B. Conflict as Opportunity

Mediators are trained to think of conflict not as a social evil to be eradicated but rather as an inevitable part of life in any society. Conflict, from this standpoint, may often be a healthy expression of disagreement -- the soil from which a democratic and pluralistic society gains its strength. Indeed, mediators often invoke the image, first popularized in an inaugural address by President John F. Kennedy, of the Chinese character for "crisis" which contains within it the character meaning "danger" and the character for "opportunity."

The opportunity that exists in crisis also exists in every negotiation: the opportunity to maximize joint gains and distribute those gains fairly, to overcome barriers to communication, to develop a deeper understanding of the other person's needs and interests, and to create a setting in which people feel empowered rather than stifled.

mediation, see S. Cobb, "Empowerment and Mediation: A Narrative Perspective," 9 *Negotiation Journal* 245 (1993).

¹³ Another important and useful perspective on the psycho-social dimensions of negotiation comes from the recently published book by Doug Stone, Bruce Patton & Sheila Heen, *Difficult Conversations: How to Discuss What Matters Most* (1999), in which the authors explore (among other things) the ways in which an individual's self-image and self-esteem are impacted by the process of negotiation.

VI. Conclusion

Learning how to negotiate successfully depends on how one defines success. Twenty years ago, successful negotiation was defined primarily as the effective deployment of techniques designed to accomplish the negotiator's objectives by persuasion or manipulation. Success was measured solely by the extent to which the negotiator's objectives were met.

With the advent of principled, interest-based negotiation came a broader focus on welfare maximization: the successful negotiator looks for opportunities to make both sides better off, instead of seeing negotiation as a competitive, zero-sum exercise. Because of the risk that cooperative, interest-based negotiators would be vulnerable to negotiators who sought only to claim value (rather than participate in creating it), negotiation theorists developed the technique of tit-for-tat bargaining. To make effective use of this technique, however, negotiators must communicate their intentions and perspectives. Mediation offers an opportunity to do that more effectively, especially in those settings where cognitive or other barriers to effective communication exist. Mediation also shows, by example, the ways in which the deeper underlying interests of negotiators -- for empowerment and recognition -- may be met in the process of negotiation. Meeting those needs, while at the same time pursuing the welfare maximization goals attainable through principled, interest-based negotiation, may be seen as a worthwhile definition of successful negotiation.

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David A. Hoffman is an attorney, mediator, and arbitrator at the Boston Law Collaborative, LLC, a multi-disciplinary firm devoted to conflict resolution and the practice of collaborative law. He is chair-elect of the American Bar Association Section of Dispute Resolution and has taught mediation, negotiation, and family law at Northeastern University Law School and Harvard Law School. He is a certified divorce mediator with the Massachusetts Council on Family Mediation.

Tips on Asking Questions

1. **Identify the reasoning behind questions.**
A single question can cause defensiveness. A series of questions can feel like an interrogation. To avoid defensive reactions to any form of questioning, let the other person know the reasoning behind your line of questioning.
2. **Use open-ended prompts.**
Use open-ended questions as much as possible. The best way to start those questions includes "Could you tell me how that came about", "Can you tell me more about that", "What made you react that way" or anything that just leaves room for the other person to talk instead of answer "yes" or "no".
3. **Give acknowledgement responses.**
Brief, one to three word statements or nonverbal gestures demonstrate that you are following the conversation. Try a nod of the head or "Um-hmmmm", "I see", etc. If a person's comments become repetitious, summarize what has been said to indicate that you understand, and then follow with a statement that encourages closure such as, "Now that I understand that point, can we talk about....(new subject)?" or an invitation to expand.
4. **Value Silence.**
Sometimes silence for a few moments can be very powerful. It gives you and the other person a chance to think.
5. **Offer invitations to expand.**
Brief phrases or prompts will signal the other person that you hear what they have said and you can encourage the other person to talk even more by asking them if there's anything else, or if there is anything more they want to add.
6. **Offer opportunities for the other to clarify or be more specific.**
Often people make general statements like "you always interrupt me" or "you never pay attention when I'm talking". Encourage that person to be more specific. You could use phrases like "Could you give me an example of what you mean?" or "In what situation does this happen?".
7. **Make checks for accuracy.**
Many times you must check to make sure that you have understood a single thought correctly. You may also want to summarize what you think the other person has said. This will help them to feel as though you really are listening and will make sure you are both talking the same "language".
8. **Encourage problem-solving.**
Once the concerns have become clear you can start brainstorming ways that both your needs can be met. Be as creative as possible when searching for ways to resolve the issues and only settle on those things that both can be satisfied with.

Active Listening Techniques

ments that help the other person talk

Statement	Purpose	To do this...	Examples
Encourage	<ol style="list-style-type: none"> 1. To convey interest 2. To encourage the other to keep talking 	<ul style="list-style-type: none"> ...don't agree or disagree ...use neutral words ...use varying voices intonations 	<ol style="list-style-type: none"> 1. "Can you tell me more...?" 2.
Clarifying	<ol style="list-style-type: none"> 1. To help you clarify what is said 2. To get more information 3. To help the speaker see other points of view 	<ul style="list-style-type: none"> ...ask questions ...Restate wrong interpretation to force the speaker to explain further 	<ol style="list-style-type: none"> 1. "When did this happen?" 2.
Restating	<ol style="list-style-type: none"> 1. To show you are listening and understanding what is being said 2. To check your meaning and interpretation. 	<ul style="list-style-type: none"> ...restate basic ideas and facts 	<ol style="list-style-type: none"> 1. "So you would like your parents to trust you more, is that right?" 2.
Reflecting	<ol style="list-style-type: none"> 1. To show that you understand how the person feels 2. To help the person evaluate his or her own feelings after hearing them expressed by someone else 	<ul style="list-style-type: none"> ...reflect the speaker's basic feelings 	<ol style="list-style-type: none"> 1. "You seem very upset." 2.
Summarizing	<ol style="list-style-type: none"> 1. To review progress 2. To pull together important ideas and facts 3. To establish a basis for further discussion 	<ul style="list-style-type: none"> ...restate major ideas expressed including feelings 	<ol style="list-style-type: none"> 1. "These seem to be the key ideas you've expressed..." 2.
Validating	<ol style="list-style-type: none"> 1. To acknowledge the worthiness of the other person 	<ul style="list-style-type: none"> ...acknowledge the value of their issues and feelings ...show appreciation for their efforts and actions 	<ol style="list-style-type: none"> 1. "I appreciate your willingness to resolve this matter." 2.

INTERVIEWING

AVOID

TRY INSTEAD

INTERROGATING

Rapid Fire Questions:

- "Who was there?"
- "What time did this happen?"
- "What were you doing at the time?"

Open Ended Questions:

- "Would you describe what happened?"
- "What is troubling you about that?"
- "How did that affect...?"

INTERRUPTING SILENCE

Three second pause....mediator jumps in.

Let the silence be.
Give the parties time for reflecting and evaluating.

Ask yourself: what is this silence saying?
Speak only when you have a clear purpose.

MULTIPLE OR SERIAL QUESTIONS

Different questions strung together.

Same question in different ways.

- "In other words..."
- "What I mean is..."
- "For example..."

Ask one question and wait.

EMBEDDED ANSWERS

"You don't think they meant that, do you?"

"That couldn't be in his mind, could it?"

"Do you think... or do you think....?"

More open-ended questions:

"Tell me more about that."

"What else has been happening?"

"What led up to that?"

GOOD LISTENING SKILLS

- ◆ Stop talking. Do not interrupt.
- ◆ Put yourself in the other's place: Empathize.
- ◆ Look at the other person's facial expressions and body language.
- ◆ Concentrate on what is being said. Do not let your mind wander.
- ◆ Push away your own worries and fears -- suspend your own thoughts.
- ◆ Convey nonthreatening facial expression and body language.
- ◆ React to the ideas, not the person.
- ◆ Do not conduct a mental argument with the other person while he/she is speaking.
- ◆ Listen for what is not said as well as what is said.
- ◆ Avoid jumping to conclusions.
- ◆ Always check yourself for your own prejudices.
- ◆ Evaluate the facts, not your feelings.
- ◆ When the person has finished speaking, paraphrase what they said starting with "I hear you say...."
- ◆ Look at the person, or ask the other person to make sure you paraphrased correctly. If not, try again.
- ◆ Ask the other person to do the same when it is your turn to speak.

How to Win Arguments, As It Were

by DAVE BARRY

I argue very well. Ask any of my remaining friends. I can win an argument on any topic, against any opponent. People know this, and steer clear of me at parties. Often, as a sign of their great respect, they don't even invite me. You too can win arguments. Simply follow these rules:

- Drink Liquor.

Suppose you're at a party and some hotshot intellectual is expounding on the economy of Peru, a subject you know nothing about. If you're drinking some health-fanatic drink like grapefruit juice, you'll hang back, afraid to display your ignorance, while the hotshot enthralls your date. But if you drink several large martinis, you'll discover you have **STRONG VIEWS** about the Peruvian economy. You'll be a **WEALTH** of information. You'll argue forcefully, offering searing insights and possibly upsetting furniture. People will be impressed. Some may leave the room.

- Make things up.

Suppose, in the Peruvian economy argument, you are trying to prove Peruvians are underpaid, a position you base solely on the fact that YOU are underpaid, and you're damned if you're going to let a bunch of Peruvians be better off. **DON'T** say: "I think Peruvians are underpaid." Say: "The average Peruvian's salary in 1981 dollars adjusted for the revised tax base is \$1,452.81 per annum, which is \$836.07 before the mean gross poverty level."

NOTE: Always make up exact figures.

If an opponent asks you where you got your information, make **THAT** up, too. Say: "This information comes from Dr. Hovel T. Moon's study for the Buford Commission published May 9, 1982. Didn't you read it?" Say this in the same tone of voice you would use to say "You left your soiled underwear in my bath house."

- Use meaning/less but weightily-sounding words and phrases.

Memorize this list:

- Let me put it this way
- In terms of
- Vis-a-vis
- Per se
- As it were
- Qua
- So to speak

You should also memorize some Latin abbreviations such as "Q.E.D.," "e.g.," and "i.e." These are all short for "I speak Latin, and you do not."

Here's how to use these words and phrases. Suppose you want to say: "Peruvians would like to order appetizers more often, but they don't have enough money."

You never win arguments talking like that. But you **WILL** win if you say: "Let me put it this way. In terms of appetizers vis-a-vis Peruvians qua Peruvians, they would like to order them more often, so to speak, but they do not have enough money per se, as it were. Q.E.D."

Only a fool would challenge that statement.

- Use snappy and irrelevant comebacks.

You need an arsenal of all-purpose irrelevant phrases to fire back at your opponents when they make valid points. The best are:

- You're begging the question.
- You're being defensive.
- Don't compare apples and oranges.
- What are your parameters?

This last one is especially valuable. Nobody, other than mathematicians, has the vaguest idea what "parameters" means.

Here's how to use your comebacks:

- You say: "As Abraham Lincoln said in 1873..."
Your opponent says: "Lincoln died in 1865."
You say: "You're begging the question."

OR

- You say: "Liberians, like most Asians..."
Your opponent says: "Liberia is in Africa."
You say: "You're being defensive."

- Compare your opponent to Adolf Hitler.

This is your heavy artillery, for when your opponent is obviously right and you are spectacularly wrong. Bring Hitler up subtly. Say: "That sounds suspiciously like something Adolf Hitler might say" or "You certainly do remind me of Adolf Hitler."

So that's it: you now know how to out-argue anybody. Do not try to pull this on people who generally carry weapons.

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