

**PERSUASION:
MEDIATOR INFLUENCE, MEDIATOR MANIPULATION
OR MEDIATOR COERCION?**

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FOR

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I am pleased and grateful to be able to be with you today at your 10th Bi-annual Swiss Federation of Mediation Association Congress – pleased to be in such a beautiful part of the world, to meet our European colleagues and even to reconnect with old friends. In the next 45 minutes, I will address a topic that fits within the purpose of this 10th Congress: to turn “to *introspection*, to the *person of the mediator*, the mediator’s coaching role.” I am particularly happy to be talking about this topic of persuasion in mediation, which raises some of the most interesting and problematic challenges that I face as a mediator: being aware of the influence I have on the parties to change their minds or change their behavior – at every moment of the mediation; appreciating the distinctions between influencing, manipulating and coercing the parties to think or act differently. And, most of all, paying attention to whether my persuasive behaviors are in line with my values and the standards of my profession.

I began thinking more deeply about this topic a couple of years ago, when I read an article by two American law professors, Douglas N. Frenkel and James H. Stark, “Changing Minds: The Work of Mediators and Empirical Studies of Persuasion.” The theoretical information about persuasion that I present today is taken from this article, which I commend to you. I cite it at the end of my paper.

In the next 45 minutes, we will explore persuasion – from the *external*, theoretical perspective – what it is, what forms it takes and how and why it

works (or does not work) – and also from the *internal*, introspective point of view – our own relationship to mediator persuasion and how congruent, or closely aligned, our actions are with our values, beliefs or philosophy on the topic.

Parties often come to mediation with a mindset that is not conducive to settling their disputes. Their response to conflict has resulted in fixed views about the other person, the problem and, often, the solution. This is good news for us – it means we have a job! But something needs to happen in mediation that changes the parties’ minds. They must be *persuaded* to shift their thinking, their attitudes, their positions – in short, their mindsets.

James Stark and Douglas Frenkel in their excellent article, “Changing Minds: The Work of Mediators and Empirical Studies of Persuasion,” that “If mediation is to become fully professionalized, it needs to overcome its squeamishness about the topic of persuasion. It needs to base its best practices and ethical norms on more than folklore, opinion or the official imprimatur of dispute resolution organizations.” I agree, and that is why we will first examine persuasion in its many forms.

Domains of Mediator Persuasion

Let’s first look at persuasion from a theoretical perspective. There are four areas in which we employ persuasion:

1. **Rapport** – influencing whether the parties (and lawyers) connect with us, like us, “emotionally hire” us
2. **Process** – influencing the nature, extent and quality of participation
3. **Attitude** – influencing the feelings, mindsets of participants toward one another, the conflict and potential resolutions and the process
4. **Substantive or outcome-oriented** – influencing the terms of parties’ agreement

Take a minute to think about your own mediations and when you have used persuasion in each of these four domains. Recall a mediation experience in which you used persuasion in a way you felt good about – and one in which you felt uncomfortable. Is there any correlation between your comfort level with persuasion and the domain in which you exerted it?

Approaches to Persuasion: Self-Persuasion v. Direct Persuasion

Before moving on the modes of persuasion – approaches mediators might use to persuade participants to take a certain course of action – it is important to distinguish two fundamental categories of persuasion: *self-persuasion* and *direct persuasion*. Direct persuasion involves a mediator’s efforts to induce participants to take a certain course of action. In self-persuasion, a mediator engages participants in activities that induce them to persuade themselves, activities that influence them to be more thoughtful or reflective about their own and the other party’s perspectives. In short, self-persuasion enables parties to overcome their biases – the cognitive traps that impede rational thought – and make more clear-headed decisions. The distinctions will become more obvious as we next explore the various approaches to persuasion.

Of these two forms of persuasion, self-persuasion is the more effective. Actually contemplating another’s point of view – as opposed to thinking about why it is wrong – causes us to integrate another perspective with our own. Ideas associated with “the other” are incorporated into our own thinking, thereby lowering the psychological resistance we have to ideas associated with our adversaries. Our own thoughts break down the barriers erected by our biases, for example biased assimilation, where we over-weigh evidence that confirms our biases and ignore or under-value evidence to the contrary. When we analyze the other perspective, this bias cannot operate as effectively, because we have internalized another view and to some extent are de-biased.

Self-persuasion is also effective because of another cognitive trap: cognitive dissonance. We are hardwired for internal *consistency*, and if our internal consistency is disrupted and we experience cognitive dissonance, there is a strong internal pull to reconcile the opposing forces. In conflict, it works as follows. We may hold a strong opinion – I am right and you are wrong – but when we are required to stand in the other party’s shoes and actually articulate the other perspective, we automatically soften our strong view to accommodate the opposite – we change our mind.

Ways to Persuade¹

Now let’s look at how we try to persuade parties in mediation, beginning with ways to induce self-persuasion. *As we do so, pay attention to how comfortable would you be implementing each of these approaches.*

Counter-attitudinal advocacy. Also referred to as role-reversal, counter-attitudinal advocacy requires a participant to “walk in another person’s shoes” and describe another’s experience, another’s interpretation of their *own* perspective/actions or an innocent interpretation of another’s actions. Self-persuasion is among the most effective tools available to mediators to help parties and lawyers change their minds about a dispute. It works so well because to articulate an opposing point of view, a party or lawyer is forced to engage personally with a conflicting perspective he or she is not otherwise psychologically predisposed to take in.

A variation of counter-attitudinal advocacy can render role-reversal even more effective in breaking down a party’s resistance to taking in an opposing view. Andy Little, author of *Making Money Talk* (ABA Publishing, 2007), suggests the 12 jurors exercise as a way to provide analytic input in the case evaluation of a legal dispute: the mediator invites a lawyer to consider the worst-case scenario

¹ The following discussion of modes of persuasion is, in part, excerpted from Brendon Ishikawa’s and my *Appellate Mediation: A Guidebook for Attorneys and Mediators* (ABA Publishing, 2016).

in which the client loses at trial, then imagine interviewing the jurors afterward to discover why the client lost and articulate, in the jurors' words, one reason each juror might give for why he or she voted against the client. Because the message the lawyer is asked to articulate is once-removed from the adversary, the lawyer is less likely to resist it and more easily able to resolve the cognitive dissonance by changing his or her own mind.

Multiple explanations exercise. Closely related to counter-attitudinal advocacy is the multiple explanations exercise. Research suggests that a multiple explanations analysis in the context of a legal dispute is one of the most effective ways to reduce unwarranted optimism or pessimism and prompt a much more realistic appraisal of the strengths and weaknesses of a party's case. It can also cause parties to re-appraise negative motivations or judgment of another's character. Multiple explanations provide an effective way to reduce the analytic traps that make us more certain that we are right than is objectively warranted, especially the mental trap of single-explanation bias, an error in estimation which causes us to overweigh what we imagine (how we can win or how we are right) and ignore risks or possibilities we do not imagine. The multiple-explanations approach has proven more effective than increased efforts to be objective or even financial rewards for making less biased estimates. This approach involves coming up with additional *and different* explanations for how an outcome will be achieved. It does not require admitting weakness. It merely involves identifying different plausible explanations for the outcome.

The multiple-explanations approach requires you to come up with at least one explanation for all of the following: (1) a *plausible but different* rationale the court can use to get to the result for which you already have figured out a rationale or approach, (2) a *plausible* approach that the court can take to reach the opposite result reluctantly or based on reasoning.

Induced cooperation. Another form of self-persuasion, induced cooperation occurs when parties work on a common task like brainstorming. Such activities reduce demonization, seem to increase group cohesion, improve attitudes and foster behavioral changes. In these activities, groups' communication improves: they demonstrate greater understanding and acceptance of the other views and generate an increased number of ideas. People show more friendliness and greater satisfaction with group processes. They are better able to coordinate their efforts and orient toward task achievement. They are less focused on differences and more focused on similarities and commonalities of viewpoints. They are more flexible in their thinking. And they are more likely to discover creative solutions. Finally, egocentrism diminishes and ability to understand the perspectives of others increases.

Two-sided refutational statements. Although quite firmly on the evaluative spectrum of mediator efforts to persuade, the two-sided refutational statements approach (a form of direct persuasion) is an effective way to convey a persuasive message by (1) articulating in detail the arguments of *each* party and (2) providing detailed, explicit reasons why in your view one side is more likely to prevail. If you are inclined to enter the evaluation arena, this approach is a most effective way to do so.

Research confirms that “explicit arguments – arguments that state explicit reasons for a conclusion and describe those conclusions in detail – are much more persuasive than arguments with implicit reasons and/or implicit (or no) conclusions.”² And the more detailed the reasons for your conclusions, more persuasive the message will be. The detailed reasoning imbedded in this analysis gives them greater credibility and, importantly, inclines parties to have more confidence in their mediator.

² Douglas N. Frenkel and James H. Stark, “Changing Minds: The Work of Mediators and Empirical Studies of Persuasion,” 28 Ohio St. J. on Disp. Resol. 263 (2013), note 6 at 306.

Rhetorical questions and cross-examination. We warn you to steer clear of rhetorical questions – questions that strongly suggest an answer. Anyone who has endured or inflicted cross-examination in a deposition or at trial undoubtedly recalls how unpleasant it is to have answers extracted in this manner – and if you were the recipient of rhetorical questions how much you resented the questioner. Not surprisingly, rhetorical questioning and cross-examination are poor ways to get people to change their minds or even consider new information. Moreover, they are highly problematic for a mediator who depends on rapport and empathetic listening skills to ask questions not intended to be answered or genuinely to elicit information.

Orchestrating apologies. Helping disputants separate past “harmful” acts from a positive self-image may be a highly effective form of self-persuasion, which works in large part because apologies help resolve cognitive dissonance – the tension between a negative view due to past acts perceived to have been done by a bad person and the present apology, which is consistent with being a good person. For the same reasons, cognitive dissonance resolves the tension. Apologies have significant power to change minds, including as follows:

- Apologies – in particular, apologies in which a party accepted responsibility for causing injury – favorably influenced attributions by the other party, including beliefs about the offender’s character, the extent of the offender’s regret, assumptions about the offender’s future behavior, and expectations for the future relationship between the parties.³
- Apologies affected emotions by decreasing anger toward the offending person and increasing sympathy for the offender’s perspective. This result was especially strong when the offender accepted full responsibility, in which

³ Robbenolt, Jennifer K., “Apologies and Settlement,” 45 Ct. Rev. 90 (2010) at 92.

case anger toward the offender consistently decreased and sympathy for the offender's view consistently increased.⁴

- The effects of mere expressions of sympathy were more dependent on the context, influencing the offended person's attributions favorably in some situations but not in others.⁵
- The presence or absence of apology affects an offended party's "bottom line" in a legal negotiation, as well as the party's aspirations and opinion about what constitutes a "fair" settlement.⁶ In one study, claimants who received an apology had lower aspirations and set lower values for their judgments about a fair settlement value.⁷
- Recipients of apology reported less need to punish the other party and greater willingness to forgive than those who did not receive apologies.⁸
- Insincere apologies may actually cause people to react negatively.⁹

A genuine apology facilitates closure and opens the door to forgiveness and reconciliation. It can be a powerful event that allows parties to settle their legal war. However, a botched apology – one that is ill timed, half-hearted, or motivated solely to achieve a more favorable settlement – can derail the mediation and worsen the conflict. For this reason and others, before you tinker with apology in mediation, we recommend you read about it and consider getting advanced training.¹⁰

Given the delicate and potentially high-stakes nature of apology, mediators need to tread lightly and be prepared to allocate the time and effort

⁴ *Id.*

⁵ *Id.*

⁶ *Id.* at 92–93

⁷ *Id.* at 93.

⁸ *Id.*

⁹ *Id.*

¹⁰ I recommend Lee Taft's article, "Apology Subverted: The Commodification of Apology," *Yale Law Journal* (2000), 1135–60 (in part on the elements of genuine apology and the moral dimension of apology).

required to educate themselves about it and ensure the apology will be a full one that accepts responsibility for the harm and expresses remorse. Some researchers of apology believe that a statement of intent to change may also be necessary. An apology is strong medicine: it can be very healing or very harmful. Plan accordingly.

Appeals to Negative Emotions – Fear and Guilt. Before dismissing the idea that you would ever intentionally try to instill fear or induce guilt to persuade someone in a mediation, consider whether you believe a mediator may ever sow doubt into the mind of a party to encourage the acceptability of a great settlement offer. Also consider this question: Should a mediator ever tell parties they “owe it to themselves” to follow through on their commitment to accept a logical solution to a problem that has worried them to the point of depression? Doubt and fear are different shades of the same color. Obligation and guilt are close relatives. Fear and guilt (and – by extension – doubt and a sense of moral obligation) rely on creating an uncomfortable internal experience that is sufficiently powerful to compel the sufferer to escape the problem by fleeing to an immediately available solution.

Resorts to fear and guilt. Resorts to fear and guilt are relatively ineffective and problematic modes of persuasion. Appeals to fear and guilt may result in “[r]esentment, anger, and a desire to lash out against the message and the messenger are often the result.”¹¹ Reasonable mediators may differ as to whether doubt and moral obligation are fair game in mediation when they allow comparison of an ongoing problem with a less-than-ideal settlement solution.

A form of direct persuasion, in appealing to fear, a mediator describes a threat in detail and offers assurance that the party can avoid the threat by a mediated agreement. Appeals that trigger the most intense fear and immediately

¹¹ Stark and Frenkel, *supra* at note 2, at 323.

available solutions can be very effective. For example, a reasonable fear of a devastating result at trial coupled with an immediately available settlement offer.

Fear appeals are effective because they initiate thoughtful appraisal of the risks and the potential solution, rather than trigger an emotional reaction, in part, because they reduce defensiveness, such as anger, overconfidence or denial.

Guilt appeals point out inconsistencies between behaviors and standards of a party. They predict how the other will be affected if the person fails to take a particular action and they propose a solution that will avoid that result. Guilt triggers unpleasant feelings, which motivate us to seek relief. Appeals to guilt name the bad behavior, inspiring guilt, *and* provide an immediate suggestion about how to get relief from the bad feelings.

As guilt becomes more intense or explicit, it becomes less persuasive. Additionally guilt appeals can easily backfire, triggering anger toward the mediator. This risk, especially in light of the relatively low effectiveness, make guilt appeals a poor choice for a mediator.

When we began to explore the approaches to persuasion, I asked you to consider which of these above-approaches, you were more or less comfortable with. *Can you see any patterns to the ones you are attracted to or the ones you are repelled by? What else did you notice about your reactions to them?*

Congruence

Now that we have explored various ways mediators might persuade parties to change their minds, let's turn to an exploration of persuasion from an *internal* perspective, that is our personal relationship to persuasion – what we believe, what we think, how we feel about it. *Take a minute to consider – and then talk with your neighbor about – where you draw the line between acceptable and unacceptable uses of persuasion. What guides your assessment? How aligned is your*

inward experience with your outward practice. Are they congruent, having the quality of agreeing or coinciding?

Professional Values. As mediators, we all sign on to uphold the values of our profession. For mediation, those core values constitute our standards of practice, composed of the following ethical standards:

1. Self-determination and voluntariness
2. Impartiality
3. Competence
4. Confidentiality
5. Quality of the process

The standards that most inform our practices regarding persuasion are self-determination, voluntariness and impartiality. *Consider your practices regarding persuasion. How congruent are they with the standards of our profession?*

Internal compass. Another crucial reference point is our personal internal compass – our personal values and moral/ethical stance toward life and our work. *Take a minute to answer this question: How do I want to be known as a mediator? Are there other needs or values that are in tension with my values? Do I employ persuasion in a way I am not so comfortable with - the need to be right, to get a settlement, to enhance my reputation as a mediator who gets the job done?*

Self-awareness. Congruence between what we believe and how we want to see ourselves – or how we want to *be* – and what we *do* requires us to be aware of our internal state, especially our *intentions*. Intentions are different from goals. When it comes to taking action, goals reside in the *external* realm of action – they are what we want to *do*. Intentions, on the other hand, reside in the *inward* realm – how we want to *be*.

*For example, imagine having a goal to persuade parties to consider the risks of failing to reach an agreement. This is what you want to **do**. Now, imagine various intentions with which I might approach this goal – how you want to **be** as you try to*

persuade parties to appreciate the risks? What are some? Compassionate? What is the internal conversation of compassion? If you approached this task with compassion, what might you say? How might you say it?

*Did you imagine any unsavory intentions? Probably not. We are generally unaware of those intentions. They form **us**. We do not form **them**. Examples are the intentions to be judgmental, critical or punitive. If you approached this task with judgment, what might you say? How might you say it?*

In the words of the Buddhist teacher Sharon Salzberg, “Each decision we make, each action we take, is born out of intention.” Mostly, we are unaware of our intentions. They are unconscious, which makes sense in most of what we do. Unless we are doing mindfulness meditation, we need not be aware of our every intention, walking for example, although practitioners of mindfulness might argue otherwise. However, when we employ persuasion skillfully, our actions must be congruent with our intentions. The process of choosing one’s intentions with awareness, gives rise to congruency, allowing us to bring awareness to how we employ persuasion. Do we intend to influence, to manipulate or to coerce?

When my goal is to help the parties reach agreement, I can approach it with different intentions. For example, I can intend to convince a party of my view in order to persuade him or her to change a settlement position. I can even intend to prove that I am right in my predictions – or I know better. In each of these cases, I will be attached to the outcome. In contrast, I can intend to help a party understand the risks he or she faces in order to make a good decision, in which case I am more focused on the *process* necessary to assist the party to reach a new level of understand, than I am on the actually outcome-based decisions s/he might make.

Conclusion. From the moment mediators enter the picture, we begin to influence the nature of the parties’ dispute, and we face constant choices around how or whether to persuade. We mostly are unconscious of our choices and their

impact. I hope this workshop raised your awareness of the options available to persuade, so we can employ them – or avoid them – with skill, but more importantly with wisdom and insight, appreciating their power while insuring what we do is congruent with who we want to be.

I end with a quotation by Dag Hammarskjold, the Swedish diplomat, economist, author and Nobel Laureate who served in the mid-twentieth century as the second – and youngest – Secretary-General of the United Nations. Mr. Hammarskjold stated eloquently the experience and importance of congruence between what we believe, and profess, and how we act.

At every moment you choose yourself. But do you choose “your” self? Body and soul contain a thousand possibilities out of which you can build many I's. But in one of them is there a congruence of the elector and the elected. Only one – which you will never find until you have excluded all those superficial and fleeting possibilities of being and doing with which you toy, out of curiosity or wonder or greed, and which hinder you from casting anchor in the experience of the mystery of life, and the consciousness of the talent entrusted to you which is your “I”.

Thank you.

Resources

- Richard Birke, "Neuroscience and Settlement: An Examination of Scientific Innovations and Practical Applications." 25 Ohio State Journal on Dispute Resolution 477-529 (2010), available at http://www.cpradr.org/Portals/0/Awards/Annual%20Award/2010/RichBirkeEntryIntoCPRScholarshipCompetition%20_4_%20_3_.pdf
- Douglas N. Frenkel and James H. Stark, "Changing Minds: The Work of Mediators and Empirical Studies of Persuasion," 28 Ohio St. J. on Disp. Resol. 263 (2013), available at http://www.law.yale.edu/documents/pdf/Intellectual_Life/112409_ChangingMindsQuinnipiac_ver.pdf