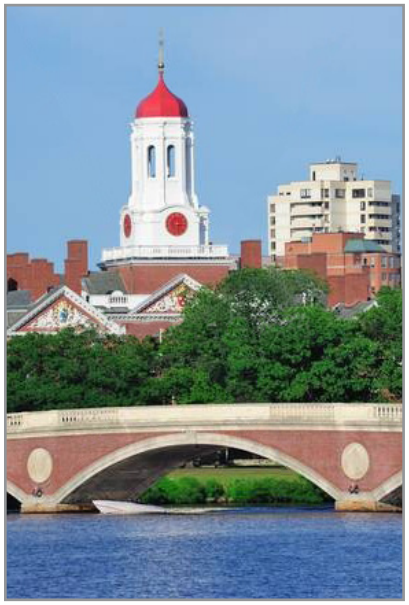
PROGRAM ON NEGOTIATION
HARVARD LAW SCHOOL

SPECIAL REPORT

Mediation Secrets for Better Business Negotiations

Top Mediator Techniques



www.pon.harvard.edu

Negotiation Special Report #7
$25 (US)

PROGRAM ON NEGOTIATION
HARVARD LAW SCHOOL

Published by
Program on Negotiation
Harvard Law School

Managing Director
Susan Hackley

Assistant Director
James Kerwin

About *Negotiation*

The articles in this Special Report were previously published in *Negotiation*, a monthly newsletter for leaders and business professionals in every field. *Negotiation* is published by the Program on Negotiation at Harvard Law School, an interdisciplinary consortium that works to connect rigorous research and scholarship on negotiation and dispute resolution with a deep understanding of practice. For more information about the Program on Negotiation, our Executive Training programs, and the *Negotiation* newsletter, please visit www.pon.harvard.edu.

To order additional copies of this Special Report for group distribution, or to order group subscriptions to the *Negotiation* newsletter, please call +1 800-391-8629 or +1 301-528-2676, or write to negotiation@law.harvard.edu.

For individual subscriptions to the *Negotiation* newsletter, please visit www.pon.harvard.edu/negotiation-monthly.

To order the full text of these articles, call +1 800-391-8629 or +1 301-528-2676, or write to negotiation@law.harvard.edu. Visit www.pon.harvard.edu to download other free *Negotiation* Special Reports.

1. Select the right process.

By the Editors

Consider the following disputes:

- Two business partners disagree about the best way to dissolve their firm.
- A manager accuses his former employer of firing him due to age discrimination.
- An electronics company accuses another company of patent infringement.

Suppose that in each case, the parties and their lawyers have exhausted their attempts to negotiate a resolution on their own. They're ready for outside help in ending their dispute, yet they don't know where to turn.

When it comes to dispute resolution, we now have many choices. Understandably, disputants are often confused about which process to use. Here's a review of the three basic types of dispute resolution handled by outside parties, adapted from Frank E. A. Sander and Lukasz Rozdeiczer's chapter on the topic in *The Handbook of Dispute Resolution* (Jossey-Bass, 2005).

Mediation. The goal of mediation is for a neutral third party to help disputants come to consensus on their own. Rather than imposing a solution, a professional mediator works with the conflicting sides to explore the underlying interests beneath their positions. Mediation can be effective at allowing parties to vent their feelings and fully explore their grievances. Working with parties together and sometimes separately, mediators try to help them hammer out a resolution that is sustainable, voluntary, and nonbinding.

Arbitration. In arbitration, a neutral third party serves as a judge who is responsible for resolving the dispute. The arbitrator listens as each side argues its case and presents relevant evidence, then renders a binding decision. The disputants can negotiate virtually any aspect of the arbitration process, including whether lawyers will be present and which standards of evidence will be used. Arbitrators

hand down decisions that are typically confidential and that cannot be appealed. Like mediation, arbitration tends to be much less expensive than litigation.

Litigation. The most familiar type of dispute resolution, civil litigation typically involves a defendant facing off against a plaintiff before either a judge or a judge and jury. The judge or the jury is responsible for weighing the evidence and making a ruling. Information conveyed in hearings and trials usually enters the public record. Lawyers typically dominate litigation, which often ends in a settlement agreement during a lengthy, costly pretrial period of discovery and preparation.

Adapted from "Trying to Resolve a Dispute? Choose the Right Process," *Negotiation*, August 2009.

2. Choose the right mediator.

BY **Stephen B. Goldberg, professor of law, Northwestern University**

When a negotiation escalates into a dispute, most managers understand the value of seeking out a mediator for professional assistance with the matter. The question of whom to hire, however, is less clear-cut. What type of expertise should your mediator have, and where should you look for him?

When choosing a mediator, keep in mind that you need not accept the proposals that he makes. In other words, you have total power to prevent mediation from leading to an undesirable outcome. As a result, the only risk of mediation is that you will expend time and money without reaching agreement. Indeed, one Fortune 100 company is so firmly convinced of the value of mediation that, as long as the other party seems to genuinely want a good-faith resolution, it will get a list of experienced mediators from a reputable and neutral mediation agency and let the other side select anyone on the list.

For those new to mediation, begin by getting a list of mediators from a reputable provider agency. You can find these agencies by searching under "dispute resolution" on the Internet and/or by inquiring with your organization's legal department. You should ask the mediators for the names of the chief negotiators for each party in the last three cases that they mediated. (The chief negotiator will typically have been the party's lawyer, although this is not always the case.)

Next, contact these chief negotiators and question them about their experiences with the mediators that you're considering. The results of my research on the talents of successful mediators can serve as guidelines during this process. I surveyed 30 of the top mediators in the United States. According to these expert mediators, their success comes from focusing on three key areas:

1. Rapport. The mediators agreed that the key skill of a successful mediator is the ability to develop rapport—a relationship of understanding, empathy, and trust—with each of the disputing parties. A sense of rapport can encourage parties to communicate fully with the mediator, often providing her with the information she needs to find a mutually acceptable settlement. One mediator said that rapport is essential to building the trust needed for parties to share "their interests, priorities, fears, weaknesses." "This information is often the key to settlement … their telling me what they haven't told the other party," the mediator said.

2. Creativity. Another key talent of successful mediators is creativity—the ability to generate novel solutions. This ability clearly springs from a focus on interests. Only by understanding each party's interests can a mediator generate creative solutions that satisfy each party. "It is vitally important to be able to think of new ways of dealing with issues," one mediator told me, "inventing options that acknowledge feelings, perceptions, and hurts that might otherwise block meaningful and fair resolution."

3. Patience. It is also important that your mediator be patient, giving you and your opponent as much time as you need to fully express emotions and ideas, while at the same time focusing intently on the primary task—dispute resolution. "I am tenacious," one mediator said. "I don't give up. I have sat with parties who have claimed they simply don't see a way to a resolution and said, 'Well, we'll just sit for a while and think more on it.' Most parties are loath to send the mediator packing, so they sit and usually think of something, especially if I occasionally throw out an idea."

Adapted from "Beyond Blame: Choosing a Mediator,"
***Negotiation*, January 2006.**

3. Learn the steps

BY the Editors

As compared with other forms of dispute resolution, mediation can have an informal, improvisational feel. Mediation can include some or all of the following six steps, writes Kimberlee K. Kovach in *The Handbook of Dispute Resolution* (Jossey-Bass, 2005):

1. Planning. Before mediation begins, the mediator helps the parties decide where they should meet and who should be present. Each side might have lawyers, coworkers, and/or family members on their team, depending on the context.

2. Mediator's introduction. With the parties gathered together in the same room, the mediator introduces the participants, outlines the mediation process, and lays out ground rules. She also presents her goal for the mediation—for example, to help the parties come to agreement on the issues under dispute and improve their relationship.

3. Opening remarks. Following the mediator's introduction, each side has the opportunity to present its view of the dispute without interruption. In addition to describing the issues they believe are at stake, they may also take time to vent their feelings.

4. Joint discussion. After each side presents its opening remarks, the mediator and the disputants are free to ask questions with the goal of arriving at a better understanding of each party's needs and concerns. Because disputing sides often have difficulty listening to each other, mediators act like translators, repeating back what they have heard and asking for clarification when necessary. If parties reach an impasse, mediators diagnose the obstacles that lie in their path and work to get the discussion back on track.

5. Caucuses. If emotions run high during a joint session, the mediator might split the two sides into separate rooms for private meetings, or caucuses. Often, but not always, the mediator tells each side that the information they share in caucus will remain confidential. The promise of confidentiality can encourage disputants to share new information about their interests and concerns.

6. Negotiation. At this point, it's time to begin formulating ideas and proposals that meet each party's core interests—familiar ground for any experienced negotiator.

The mediator can lead the negotiation with all parties in the same room, or she can engage in "shuttle diplomacy," moving back and forth between the teams, gathering ideas, proposals, and counterproposals.

When putting together your settlement proposal, professor Stephen B. Goldberg of Northwestern University recommends that you ask the mediator for her advice. Her conversations with the other side have probably given her knowledge of its interests that you can use when packaging your proposal.

About 80% of dispute mediations lead to resolution, according to Goldberg. Depending on the complexity of the issues, mediation might last mere hours, or it could take days, weeks, or months to resolve. Some resolutions will truly be "win-win"; others will be just barely acceptable to one or both sides—but better than the prospect of a continued fight or court battle. If the parties come to consensus, the mediator will outline the terms and may write up a draft agreement. If you fail to reach agreement, the mediator will sum up where you have left off and may engage you in a discussion of your nonsettlement alternatives.

Adapted from "Make the Most of Mediation,"
***Negotiation*, October 2009.**

4. Enhance your outcomes.

By Stephen B. Golberg, professor of law, Northwestern University

NEGOTIATIONS HAVE REACHED AN IMPASSE. You contend that your firm, which distributes office equipment throughout Eastern Europe, suffered a $10 million loss when one of your suppliers delivered laptop computers to your Warsaw warehouse that are too fragile to be sold. Denying that the computers are defective, the manufacturer has offered you only $100,000 in settlement, an amount it characterizes as the "nuisance value" of your $10 million claim. Both sides agree on one thing: you need help resolving the dispute. You engage a neutral mediator to do just that.

Now that you know how mediation works, here are some tips aimed at ensuring that you emerge from the process with a great deal.

1. Solicit the mediator's opinion. The mediator's private conversations with each party are likely to lead him toward a settlement framework that will please everyone involved. Some mediators volunteer settlement ideas; others, who are less activist, will not. Consider asking the mediator for suggestions regarding your own settlement proposal. This tactic not only assists you in identifying a proposal that would suit you but also takes advantage of the mediator's knowledge of the other side's interests—and helps you avoid making a proposal the other side will find offensive.

Suppose you plan to initially demand $9.5 million from the computer manufacturer and gradually reduce your demand to as little as $2 million. Rather than simply asking the mediator to convey this offer to the other party, you ask what he thinks of it.

"The other side thinks your current $10 million claim is outrageous," he tells you. "An opening proposal of $9.5 million could make serious negotiations impossible. Here's a suggestion. If you open at $7.5 million, I can point out the substantial amount by which you've moderated your claim. I'll suggest that if the other side's next offer is similarly moderate, each side will have demonstrated a good-faith desire to settle, and we should be able to do so."

Although you're under no obligation to accept the mediator's advice, recognize that his private conversations with the other side have given him considerable knowledge about the other side's interests. Taking advantage of that knowledge may lead to a settlement that's high enough to satisfy you.

2. Give the mediator your great ideas. When talks escalate into a dispute, negotiators often develop negative opinions about each other. If only the other side was bargaining in good faith, you might think, we would have resolved this issue long ago. Such views can lead each side to respond to the other side's settlement proposals with skepticism—a tendency that psychologists have termed *reactive devaluation.* Obviously, skepticism does not bode well for agreement.

Your mediator can help you overcome this barrier. Imagine that your conversations with the mediator have led you to a novel settlement plan: you propose

a joint donation of the fragile laptops to public school systems (which can bolt them down to make their fragility less of an issue) in the countries where you do business. This move could generate favorable publicity for the manufacturer and for you while also introducing schoolchildren (future computer buyers) to both companies.

Rather than taking the risk that the manufacturer will reactively devalue your idea, suggest to the mediator that he propose it as his own idea. If the mediator believes your plan is fair and has merit, he may help you refine it—and present it in a way that minimizes the other side's skepticism.

3. Take a reality test. Sometimes the unrealistic views of your own team members will turn out to be the major barrier to settlement. If they fail to understand the other side's interests or priorities, they may advocate standing firm and waiting for concessions. Or perhaps certain members of your team have an exaggerated view of the likelihood that in the absence of a resolution, a court will rule in your favor.

Your ability to persuade your colleagues of the unrealistic nature of their views is limited; after all, if you contradict them too strongly, they may doubt your loyalty. Therefore, when negotiating within your team, use the mediator to bolster your position by asking for his views on the internal debate: "How likely is the other side to concede? How likely are we to prevail in court?" Your team members are apt to accord special status to the mediator's neutrality and experience.

Adapted from "Get the Best Possible Deal in Mediation,"
***Negotiation*, November 2006.**

CONTINUE YOUR NEGOTIATION LEARNING

PROGRAM ON NEGOTIATION
HARVARD LAW SCHOOL
EXECUTIVE EDUCATION

ATTEND an upcoming Executive Education program

Negotiation and Leadership: Dealing with Difficult People and Problems

Designed to accelerate your negotiation capabilities, this three-day offering examines core decision-making challenges, analyzes complex negotiation scenarios, and provides a range of competitive and cooperative negotiation strategies. You will emerge well prepared to achieve better outcomes at the bargaining table, every time.

In-Depth, One-Day Author Sessions

Groundbreaking ideas, global insights, and innovative strategies — all taught by the experts who literally wrote the book on them.

Harvard Negotiation Institute's Summer Programs

Ranging in duration from two to five days, each program focuses on a critical aspect of negotiation.

- Mediating Disputes
- Negotiation: Strategies, Tools, and Skills for Success
- Improving Negotiation Effectiveness
- Dealing with Difficult Conversations
- Advanced Negotiation: Deal Set-Up, Design, and Implementation
- Intensive Negotiations for Lawyers and Executives

For an updated listing of programs, including dates and locations, or to download a complete program guide, visit www.pon.harvard.edu.

SUBSCRIBE to *Negotiation*, the monthly newsletter

Drawing on ideas from leading authorities and scholars in the field of negotiation, this timely publication provides proven strategies and techniques aimed at improving your ability to get deals done, solve problems, preserve relationships, and manage conflict.

To learn more or subscribe, call +1 800-391-8629 (outside the U.S., dial +1 301-528-2676), email negotiation@law.harvard.edu, or visit www.pon.harvard.edu/negotiation-monthly.

EDUCATE yourself and others on key negotiation topics

Access teaching materials and publications in the Program on Negotiation's Clearinghouse, including role-play simulations, videos, books, periodicals, and case studies. Most Clearinghouse materials are designed for use by college faculty, corporate trainers, mediators, and facilitators, as well as individuals who seek to enhance their negotiation skills and knowledge.

To view all Clearinghouse teaching materials and publications, visit www.pon.harvard.edu/shop/home/.

READ the *Negotiation* Journal

This quarterly publication is committed to the development of better strategies for resolving differences through the give-and-take process of negotiation. *Negotiation Journal*'s eclectic, multidisciplinary approach reinforces its reputation as an invaluable international resource for anyone interested in the practice and analysis of negotiation, mediation, and conflict resolution.

To learn more or subscribe, visit www.pon.harvard.edu/publications/.