



Using the science of influence to negotiate better deals in mediation

"To persuade me, you must think my thoughts, speak my words, and feel my feelings."

— Cicero, circa 50 BC

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The ability to persuade and influence others is one of the core competencies of effective advocacy when trying cases, negotiating deals and settling disputes. Most lawyers believe that the best way to persuade others is through well-reasoned, factually and legally documented presentations. This belief is based upon the erroneous perception that people are rational creatures and will make decisions based upon analysis of the facts, consideration of options and objective economic factors. This understanding of human reasoning and decision making has been generally replaced with a vast new science of human behavior and influence that supports the view that people make decisions

not so much on objective facts and rational analysis, but rather upon many subconscious factors that are influenced by our emotions, social relationships and intuitive judgments. As MIT economist Dan Ariely writes, "We are not only irrational, but *predictably irrational* – that our irrationality happens the same way, again and again." (*Predictably Irrational* (Harper 2008), p. xx.)

In other words, to persuade others, you must know how other people think, how they feel, how they make sense of their world, and how to interpret and respond to their perceptions and feelings by words and actions. The work of Dr. Robert Cialdini, one of the world's most noted authorities in the field of influence and persuasion, provides a useful framework for understanding the psychological factors that cause other people to agree with your proposals, requests and recommendations. Understanding the theory and practice of the science of influence not only allows us to predict behavior but also enables us to shape and influence the

behavior of others, including our clients, our colleagues, and our negotiating partners. (See, Dr. Robert Cialdini, *Influence; Science and Practice*, (Fourth Edition, Allyn & Bacon 2001) Professor Arizona State U.)

Dr. Cialdini discovered a systematic pragmatic approach to persuading others in every situation when you want to sell a product, seek compliance with your request, obtain acceptance of a proposal, or negotiate a favorable deal. This persuasion strategy is based on six principles of human behavior that are present in the influence context. Many of his findings were derived by observing "compliance professionals" in the marketplace, such as salespeople, fund raisers, recruiters, advertising executives and negotiators. He discovered a common thread that explained why professionals and business people from many diverse fields were successful and flourished or why they failed and went out of business. His conclusions are not simply based on personal experi-

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ences, but are confirmed by rigorous scientific studies, peer-reviewed, and have been well received in the scientific, academic and business communities.

This article will introduce you to Cialdini's innovative concepts that will enhance your advocacy skills and will increase the likelihood that you can obtain better results for your clients whether negotiating a deal, settling a dispute or litigating cases.

Understanding behavioral tendencies in negotiating disputes

The lawyer's role in negotiations, particularly when mediating disputes, is to satisfy their client's needs, goals and interests by maximizing benefits and reducing risks for their client. To achieve this objective, the lawyer must come prepared to the mediation with accurate information about the way people behave in negotiating sessions in order to get others to agree with their proposals and offers.

Some of these automatic behavioral tendencies or shortcuts are as follows:

- **Fixed Action Pattern.** People will act with automatic *fixed action patterns* when stimulated by certain cues. In a study by social psychologist Ellen Langer, people standing in line to make photocopies were asked for a favor to permit someone to go first to make their copies. One group of individuals were simply asked the question, "Excuse me, I have five pages. May I use the copier?" Only 60 percent of those asked allowed the subject to make copies. Another group of individuals were asked, "Excuse me, I have five pages. May I use the copier because I'm in a rush?" This time 94 percent (a 50 percent increase) of those who were asked for a favor granted the request because a reason was provided. What is most interesting is that in the third group, when individuals were asked for a favor, the reason given was in reality no reason at all: "Excuse me, I have five pages. May I use the copier, because I have to make some copies?" This time 93 percent of the individuals granted the request. What increased compliance wasn't so much the reason given, but rather the use of the word *because* had triggered an automatic

compliance response. The study confirmed the well-known behavioral rule that when we ask someone to do us a favor, we will be more successful if we provide a reason. People like to have a reason for what they do even if it makes no sense. Each principle of persuasion discussed below likewise can trigger such an automatic compliance response when applied appropriately.

- **The Contrast Principle.** Cialdini observed that "there is a principle in human perception, the contrast principle, that affects the way we see the difference between two things that are presented one after another. Simply put, if the second item is fairly different from the first, we will tend to see it as *more* different than it actually is." Sales people are masters of this principle. Real estate brokers will show a prospective customer a home that is overpriced and not desirable before showing a home that is more suitable in price and appearance. By comparison, the second home looks like a bargain and is more aesthetically pleasing. Car salesmen will show higher price models before showing a modestly priced car, and before the deal is closed, they will offer additional features and accessories that by comparison to the price of the car seem like a bargain. Compliance (the sale) is easier when the subject is offered a comparison of choices, one more favorable than the other. Negotiators can benefit from this knowledge when making proposals and counterproposals, by offering multiple simultaneous offers, which permits the other side to make a choice. Another psychological principle that applies here is that people prefer to have choices rather than being forced to take the one proposal or demand offered by the other side. The more you can offer options for the other side to choose, the more likely they will agree to one of your suggestions.

Applying the six principles of persuasion

- **Reciprocity**

People feel obligated to give back to others who have given to them.

The principle of reciprocity is pervasive in all human cultures. Societies devel-

oped by means of creating a web of social indebtedness that allowed for division of labor and exchanges of diverse forms of goods and services. The sense of future obligation allowed for human social evolution, because "it meant that one person could give something (for example, food, energy, care) to another with confidence that the gift was not being lost." In effect, one could give away a variety of resources without actually giving them away — they could expect the recipient to return the favor in the future. The rule evolved that if you receive a gift, favor or other positive behavior, there is an obligation to return a similar favor, gift or good behavior in the future.

Reciprocity is at the core of every negotiation and every social transaction. Darwin noted that the human brain has been conditioned over eons of time to calculate exchanges of all types for survival. Human societies derive a significant competitive advantage from the reciprocity rule and, therefore they train their members to comply with and believe in it. Anyone who fails to live up to the rule by always taking and making no effort to give in return acquires the reputation of a moocher, sponge or freeloader.

Tit for tat; an eye for an eye

Lawyers are keenly aware of the negotiating strategy of "tit for tat." When you are treated respectfully by your opponent, you generally respond in a similar cooperative manner. However, when an attorney fails to extend a courtesy to you (such as not granting an extension of time to respond or making unnecessary objections to discovery requests), you will automatically tend to withhold a courtesy in return; you might even escalate the negative responses. Evolutionary biologists believe that "tit for tat" is hard wired in all human beings as a survival mechanism. Examples of "tit for tat" are found in acts of revenge as ancient as the biblical injunction "*an eye for an eye*." Both positive reciprocity such as providing aid to people in distress from natural disasters as well as negative reciprocity that can trigger wars are matters of life and death in cultures all over the world.

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The principle of reciprocity can be applied in mediation to encourage positive behavior from your negotiating partner. Studies show that using collaborative techniques such as sharing information, and willingness to compromise and make concessions, as well as showing respect and courtesy to opposing counsel and their clients, will increase the likelihood of getting a better deal for your client. In one mediation session where plaintiff was seeking punitive damages because of the claimed bad-faith conduct of the insurance adjuster in settling a claim for damages under a homeowner's policy, defense attorney highly praised the work of the plaintiff's lawyer in front of his client and acknowledged that plaintiff's attorney had a good reputation for integrity and honesty.

When defense counsel apologized for the bad behavior of the adjuster, plaintiff's counsel was so moved that he acknowledged that the punitive damage claim was unlikely to succeed and withdrew the claim from the negotiation. This is a prime example of how reciprocity can obtain excellent results by an exchange of non-monetary gifts of positive behavior.

Should you make the first offer or concession?

Negotiators are always faced with the question whether they should be the first to make an offer or a demand or whether to be the first to make a concession. Studies have shown that if you make an optimistic and aggressive opening proposal, you will take advantage of the "anchoring" or "framing" effect. This means that the other side will be negotiating against your estimation of what the case is worth and even experienced negotiators are influenced by such a strategy that will result in a better outcome for the one who makes the best opening proposal. If the opening demand or offer is accompanied by an appropriate reason, the automatic compliance response will have an effect on the next steps of the negotiation.

Having made a proposal that significantly exceeds your reserve value (the lowest amount that you believe you must obtain by settlement negotiation or the amount that you estimate can be achieved

at trial), you have created an opportunity for a series of concessions that will allow you to reach your desired outcome. Studies by social scientists confirm that you can often negotiate a better deal by being the first to offer a concession; if done properly, it can create an obligation for the other party to reciprocate with a similar concession that will eventually lead to a mutually beneficial optimal result.

American lawyers tend to follow a contrary rule — leaving the other side to make the first concession. But studies have shown that strategy is not as effective as taking the initiative by making the first offer and first concession with the clear indication that a reciprocal concession is expected. If your negotiating partner does not make a reciprocal concession, you are forewarned that the negotiations may not likely be mutually beneficial, and you may want to reconsider whether you or your client will want to do business.

When is it ok to negotiate against yourself?

Another rule most lawyers use in mediation is that they never want to "negotiate against themselves." In effect this is a tit for tat strategy. If you make a demand and the other side does not respond with a counteroffer, then you are not likely to make any concession until the other side responds favorably. If plaintiff demands \$500,000 for a rear-end soft-tissue injury, and the insurance company believes the demand is unrealistic and will not respond with any counter-offer, further negotiations will stall. The insurance adjuster will often state to the mediator that until plaintiff makes a realistic offer, they will not respond or they may open with a dismissive \$1,000 counteroffer. If plaintiff's counsel strictly adheres to the principle that "I'm not going to negotiate against myself," the ability to get to a settlement may be doomed.

Door in the face; rejection and retreat strategies

However, if plaintiff is serious about settling the case, then the opening demand should be in a range that would encourage defendant to respond with a reasonable opening offer. Plaintiff should not expect that his opening demand will be accepted. If he does, then he has understated his opening demand. The correct opening demand (significantly

higher than his reserve value) will give plaintiff an advantage even if it is rejected. In that moment of rejection by the other side, plaintiff can effectively engage the reciprocity rule by making the first concession (thereby creating an obligation for a reciprocal concession by the other side). (This is also known as the "door in the face" or "rejection and retreat" technique.) This concession, if viewed by the other side as a good faith concession (the other side perceives that you are giving up something of value), will increase the likelihood that the defense will make a good faith counterproposal because of the rule of reciprocity. One must be careful that this strategy is not misinterpreted by the other side as an acknowledgement on your part that your opening demand was totally unrealistic, creating an impression that you are not competent in valuing the case.

• Liking

People say "yes" to people they like.

Most people would agree from personal experience that we tend to say "yes" more often to people whom we like than those we do not like.

Scientific studies confirm that people will follow and are more influenced by others whom they like and who are like them. This is not surprising that we tend to get along better with our own national, ethnic and religious groups than with strangers. We are more willing to listen to people who went to the same schools, belong to the same organizations, and attend the same church or synagogue. We tend to be more open to suggestions from people who have similar background and experiences.

The importance of schmoozing. Establish rapport by showing similarities.

But similarity and liking are not limited to religion, race, national origin and gender. People are also influenced by others who have similar values and interests. For example, you might be more likely persuaded by others who enjoy similar movies, sports, social activities and politics, even though the person is not of your same religious or ethnic background. Studies have found, for example, that people who share similar backgrounds,

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experiences, attitudes and values will be more influential with similar others.

The principle of liking is about building interpersonal relationships before one tries to engage in negotiations of any type. One particular study revealed that spending time to get to know your negotiating partner will result in agreement more often than those who do not spend time "schmoozing." Comparing the results of two groups of on-line negotiators, researchers found that those who started the negotiations with a "strictly business" approach resulted in 30 percent more deadlocked transactions (unable to reach agreement) as compared to only six percent of those who spent time to get to know each other so they were able to discover similarities of interests, values and attitudes before they started to discuss the merits of the deal.

Spending time to get to know the person with whom you are dealing — by learning about their background, their interests, their needs, their likes and dislikes and their objectives — will enable you to become more effective in persuading or influencing your negotiating partners to follow your suggestions, proposals and solutions. The most effective negotiators spend more time than those less experienced in investigating the background, interests, needs, hobbies and objectives of their counterpart. As Cicero stated more than 2000 years ago, "to persuade me, you must think my thoughts, speak my words, and feel my feelings."

• **Authority**

People rely on those with superior knowledge or perspective for guidance on how to respond and what decision to make.

The principle of authority is also an intuitive one that evokes an automatic compliance response: when we are uncertain about choosing a course of action, we tend to rely on people with expert knowledge and experience for guidance on what to do. Studies have shown that people will follow the lead of someone who appears to be an authority even though that person may not be an expert on the topic which requires your decision.

Within the legal profession, those who appear to be knowledgeable experts, who have a reputation for outstanding trial skills, and who are known as an

authority in a specific area of law are usually more successful in their ability to persuade and influence others. Generally, even judges, jurors, public officials, as well as your opponents are more likely to be persuaded if you appear to be an authority on the matter that is in dispute. Such a reputation gives one a clear advantage.

To be a credible authority requires more than knowledge and expertise — you must also be trustworthy.

Possessing knowledge and expertise are not the only qualities that are needed to be persuasive. More importantly is the reputation for *trustworthiness*. An expert witness must demonstrate her trustworthiness even though she is being paid by the party to give her testimony. A proven technique to enhance an authority's trustworthiness is her readiness to acknowledge a relatively minor weakness in her case but immediately followed by her strongest point. This strategy reveals the expert's honesty and integrity. Effective trial lawyers will want to acknowledge a weakness in their case, if one exists, before the other side has an opportunity to point it out, because the admission of the weakness strengthens the lawyer's credibility and trustworthiness.

Admitting a weakness to enhance credibility

Be sure to follow the admission of a weakness by pointing out your strongest point in support of your claim. This approach minimizes the weakness in your position while enhancing your credibility so that the person you are trying to persuade will be more willing to accept the argument in your favor. A good reminder of this principle can be found in a well-known advertising commercial. Avis acknowledges that it is not the number one rental car company in the market place, but emphasizes in its well-known slogan that it provides better service. When you are thinking about how to enhance your credibility as an authority, remember how Avis does it: "We're number two, but we try harder."

• **Consensus**

People decide what's appropriate for them to do in a situation by examining and following what others are doing.

Based on extensive studies over the past 50 years, social scientists have found

that whenever a person is uncertain about what option or course of action to take, he or she will tend to consider what others are doing, thinking and feeling, and choose the course of action that many others have taken. Certainly, there are a few non-conformists who do their own research and follow their own direction. But they are few and far between!

Studies of why teenagers smoke show that of the many factors that influence teenager smoking, they are more likely to become regular smokers if two or more of their peers are smokers. Advertising executives often use consensus principles to sell products by showing that large numbers of people use their product. Indeed, the J. D. Powers Survey of customer satisfaction is based on the principle that people are influenced to buy products or use services if polls show that large numbers of customers are satisfied. Politicians and political parties use polls not only to find out what voters are thinking, but also to persuade undecided voters to support their legislation or candidates.

Demonstrate that your proposal has been accepted by many other similar people.

Applying this principle in negotiations requires some careful thought and practice for lawyers. Demonstrating that many other individuals in similar situations are doing things the way you are advocating is a powerful influence technique. Using a property appraisal to establish value is showing consensus — the price that other buyers are paying for similar property in the area. Citing similar other jury verdicts and appellate cases that support your position also engages the consensus principle. Enlisting other influential people to advocate and substantiate your points can be very effective by demonstrating how many others support this solution. In this way you can enlist the principle of consensus to influence others. Knowing the limitation of your own persuasive abilities and enlisting the help of others is good advice for a savvy negotiator.

• **Commitment and consistency**

Once we make a choice or take a stand, we will encounter personal and interpersonal pressure to behave consistently with that commitment.

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When a commitment is made by an individual to another in a manner that is active, voluntary and public, it increases the likelihood that the person will behave in a manner that is consistent with that commitment.

This principle was illustrated in the racetrack study. Those who placed bets on a horse were more confident of the likelihood that their horse would win after they made a bet. Nothing about the conditions of the race changed – the horses were the same, the jockeys were the same, the conditions of the track were the same – the only thing that changed was the placing of a bet. Researchers concluded that merely placing the bet – viewed as an open, active and voluntary commitment of funds to the belief that a horse will win, actually increased the bettor's confidence that his horse would win.

People live up to what they write down.

The statute of frauds law was developed not only as a means of proving the existence of a contract but also as a way to ensure compliance. **People are more likely to live up to what they write down.** Requiring a contract to be in writing, signed by the parties, prevents fraudulent claims about the existence of an agreement, reduces disputes over the terms and engages the commitment principle.

Mediators often seek commitment from the participants in the opening joint session to the mediation process by asking whether participants will keep an open mind and negotiate in good faith. Exploring the interests of the parties and getting a commitment that certain interests are primary can lead to the following: "If I can get a commitment from the other side that will meet your interest in getting paid within the next two weeks, will you be ready to accept something less than your last demand?" Another example is the use of the consistency principle by lawyers in closing argument to remind jurors of their earlier commitments in voir dire that they will make a fair, unbiased judgment and will uphold the law. It is an effective strategy to get small commitments during a negotiation that can lead to larger ones that will end the dispute. Lawyers also know that if an agreement is reached during

the mediation, it is essential to put it in writing and signed by the parties, an act that is active, public, and voluntary – an act that engages the principle of consistency and assures performance.

• **Scarcity and loss framing**

Opportunities appear more valuable when they are less available. Loss framing shows how someone will stand to lose rather than gain if they do not follow your proposal.

When discount coupons for consumer products are offered by merchants, studies confirm that sales increase. Researchers found, however, that when the discount coupons stated there are limited quantities and the offer would expire after a limited time, sales would increase even further! Why would sales increase substantially when the offer to buy products at a discount is limited by time or quantity? *Herein is the principle of scarcity.* People want and value more highly that which there is less of. When people are told that something is rare or is dwindling in availability, there is an increased desire to acquire the item. A product or service is deemed even more valuable when the buyer knows there are others *competing* for the limited supply. When a person believes his or her choice will be limited by diminishing supplies, there is a natural reaction to believe that the product is more desirable, and they are often willing to pay higher prices. ***Loss framing and loss aversion motivates others to decide in your favor.***

Another use of the scarcity principle is showing how failure to accept the proposal will result in a loss to the recipient. Studies have shown that people are more likely to accept a proposal when shown how it will prevent them from suffering a loss as opposed to showing how they will gain from the offer. This is known as loss framing and loss aversion. People are more motivated to say "yes" if they believe they will suffer a loss if they do not accept the proposal. At the end of the day of mediation, one often hears the loss framing principle stated, "If this final offer or demand is not accepted today, it will not be available tomorrow. The offer will be withdrawn, and you will be spending a lot of time and legal expense going to trial and you won't get the money that you have been offered. Do

you want the deal now, or not?" Engaging the loss framing or loss aversion principle in this manner is very effective in getting acceptance of the last best offer.

When lawyers can identify and honestly present the unique and special benefits of their settlement proposals as well as explain the losses that might genuinely result by the failure of a party to agree to the settlement terms, they can increase the likelihood that their opponent will want to settle the dispute and avoid the risk of loss that might result if the case proceeds to trial.

Conclusion

Lawyers who spend much of their efforts advocating for their clients in settling disputes, negotiating deals or trying cases can increase their effectiveness by understanding and applying the principles of persuasion based on scientific research and theory. Each of these principles activates automatic intuitive responses that evolved for human survival over thousands of years. Appropriate and ethical use of these principles can increase trust and confidence among negotiators and reduce fear. They can create mutually beneficial relationships with others. Ethical use of the principles can increase a lawyer's effectiveness in representing clients, but can also increase his reputation for fairness and expertise in negotiating and gain respect from his colleagues. Applying the scientific principles of persuasion to negotiation strategies in mediation can enhance the effectiveness of every lawyer and can lead to consistently better results.

Myer Sankary graduated from Harvard Law School in 1965 and has practiced more than 40 years in many areas of law. He started mediating cases in 1996 and is now a full-time mediator with ADR Services, Inc. He is president-elect of Southern California Mediation Association. He has served on the LASC ADR committee for the past three years, and is chairman of the Mandatory Fee Arbitration committee of the San Fernando Bar Association. He is the only attorney who has been trained and certified by Dr. Robert Cialdini to present the Principles of Persuasion workshop. Visit his Web site, www.sankary-mediate.com.