

OUTLINE OF METHOD OF MEDIATION

Based on "Getting to Yes", by Fisher and Ury

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OUTLINE OF METHOD OF MEDIATION

Taken from the National Bestseller, "Getting to Yes", by
Fisher and Ury

I. Separate the People from the Problem.

A. Recognize that those involved in the conflict have emotions, deeply held values, different backgrounds and viewpoints, and they are unpredictable.

1. People get angry, depressed, fearful, hostile, frustrated and offended. They have egos that are easily threatened.

2. They frequently confuse their perceptions with reality.

3. They fail to interpret what is said in the way it is intended.

4. Misunderstanding can reinforce prejudice and lead to reactions that produce counterractions in a vicious circle so that rational exploration of possible solutions becomes impossible.

5. At all stages of the negotiation, the negotiator should be sensitive to whether enough attention is being paid to the persons involved in the presenting problem.

B. Usually those involved in negotiation or resolving a problem also want to maintain a relationship with the other side.

1. Most negotiations take place in the context of an ongoing relationship where it is important to carry on each session in a way that will help rather than hinder future relations and future negotiations.

2. Actually, with family members, friends, business partners, customers or long-term clients, the ongoing relationship is far more important than the outcome of any particular negotiation.

C. Realizing that each side has a different perception is critical to negotiation.

1. Whether in making a deal or settling a dispute, differences are defined by the difference between each side's thinking. The ultimate conflict usually does not lie in objective reality, but in people's minds.

2. Fears, even if ill-founded, are real fears and need to be addressed. Often, even if the facts are clearly established, that does not solve the problem.

3. Understanding the other side's point of view is not the same as agreeing with it. But a better understanding of their thinking may lead one to revise their own views about the merits of a situation.

D. Blaming the other side should be avoided.

1. Even if blaming is justified, it is usually counterproductive. The side being attacked will become defensive, stop listening, and strike back with their own attack.

2. The problem and its symptoms should be kept separate from the person. The problem can be described, followed by a question: "What do you think we can do about this situation?"

E. Each side's perceptions should be discussed.

1. One way to deal with differing perceptions of the same problem is to make the perceptions explicit and discuss them openly with the other side.

2. Such discussions which are conducted in a frank, honest manner, without either side blaming the other for the problem as each sees it, often lead to an understanding of the relative merits of each side's position.

F. Face-Saving is an important element of a proposal.

1. Face-saving reflects a person's need to reconcile the stand taken in negotiation or in an agreement with his principles and with his past words and actions.

2. Even the judicial process concerns itself with face-saving. You will rarely if ever hear a Judge state in an opinion that one party "wins" or "loses". Rather, his decision is supported by case law, statutory law and precedent.

3. Often, a person will refuse a proposal only to avoid the feeling or the appearance of backing down. If the proposal can, therefore, be phrased or conceptualized differently so that it seems fair, it will be accepted.

G. The parties' emotions cannot be ignored.

1. Many times, especially in family mediations, a person's feelings may be more important than what is stated. Strong emotions on one side will generate emotions on the other.

2. Fear often breeds anger, and anger breeds fear. Such emotions can quickly bring a negotiation session to an end.

3. It is best to make emotions explicit and acknowledge them as legitimate. Encourage the participants to talk about their emotions, as once they are free from unexpressed emotions they will become more likely to work on the problem.

4. Allow the parties to let off steam in the safe environment of negotiation. People obtain psychological release through the simple process of telling their grievances. In the divorce context, we call this a "blood-letting", and often it is critical before a settlement can be reached.

5. Safe ground-rules should be established to avoid such outbursts of emotion causing a violent emotional reaction. One technique is to adopt a rule that everyone else must listen quietly and that only one person can get angry at a time. Those listening will know that they will get their turn. Such a rule also often helps people control their emotions.

H. Communication is essential. Without communication there is no negotiation.

1. Communication is not easy. Couples live together for years and still have misunderstandings every day. How much so for strangers or persons who are not so familiar with each other?

2. Often, parties are not talking to each other in a way as to be understood. They may have already given up on negotiation and are talking merely to impress third parties. Rather than trying to work toward a mutually agreeable solution, they try to trip up the other side.

3. Even if one side is talking directly and clearly, the other may not be hearing what is said. Often a person is so busy thinking about what to say next that they do not listen to what the other side is presently saying.

4. A major stumbling block to communication is misunderstanding. What one says, the other may misinterpret.

5. The parties should be encouraged to listen actively and acknowledge what is being said. It is difficult to listen well under the stress of an ongoing negotiation. However, active listening enables a person to understand the other's perceptions, emotions and hear what they are saying. It is helpful to interject a question, at times, such as, "Did I understand correctly that you are saying that...?" or "you are suggesting that....?"

6. Standard techniques of good listening are to pay close attention to what is said, to ask the other party to spell out carefully and clearly exactly what they mean, and to request that ideas be repeated if there is any ambiguity or uncertainty.

7. Understanding is not agreeing. A person can, at the same time, understand perfectly and disagree completely with what the other side is saying. But if one side can state the other's case better than they can, and then refute it, the chances of beginning a constructive dialogue on the merits is greatly improved.

I. Negotiation is not a debate or a trial.

1. It is helpful to think of a negotiation as two judges trying to reach an agreement on how to decide a case and work out a joint opinion. Obviously, in such a situation it would be senseless to blame the other person for the problem, to engage in name-calling or be highly emotional. It is two (or more) persons who see a situation differently trying to go forward to resolve it as their joint problem.

II. Focus on Interests, Not Positions.

A. A wise solution will reconcile the parties' interests, not their stated positions.

1. An example of how this works: One person wants the window open and the other wants it closed. This is hard to resolve without knowing why. The first wants fresh air. The other wants to avoid a draft. The problem is then easily solved; the window in the next room is open bringing in fresh air without a draft. Think also of the two children fighting over an orange. After it is cut in half, they learn that one wanted it for its juice and the other for its peeling. There are many illustrations of this in family law.

2. A person's interests define the problem for him or her. The basic problem in a negotiation is not each person's conflicting positions, but the conflicts in their needs, desires, concerns and fears.

3. For every interest, there usually exists several possible positions which could satisfy it. But, rather than defining their underlying interest, persons often adopt a position and do not want to budge from it. When you look behind opposed positions for the underlying interests, you can often find an alternative position which meets both parties' interests.

B. It is important to remember that behind opposing positions lie shared and compatible interests.

1. This is especially true in family issues. Therefore, it is a good starting place to have each party list what they feel are the most important interests in providing for the well-being of their child. Invariably the parents have the same interests for their children, only different positions on how those can best be achieved.

2. Often, persons' interests are not in conflict but are simply different. Agreement is possible precisely because interests are different. Example: purchase and sale.

C. While a position is usually clearly stated, the underlying interests may be unexpressed, intangible, and sometimes inconsistent.

1. One method to assist in determining underlying interests is to ask why a person is taking a particular position. The question should be asked for an understanding of the needs, hopes, fears, etc, not for justification of the position.

2. Realize that each side has multiple interests. For example, when persons are negotiating the terms of a lease they want to obtain a favorable rental agreement, to be reached quickly, and to maintain a good relationship with the landlord. By identifying these interests each can pursue their independent as well as shared interests in reaching an agreement.

D. The most powerful interests are basic human needs. In searching for the basic interests behind a person's declared position, look to the primary concerns of all people.

1. Basic human needs are:

- a. Security
- b. Economic well-being
- c. A sense of belonging
- d. Recognition
- e. Control over one's life

2. It would be helpful during a mediation session to keep these written out as a reminder. For example, in mediating the sum of money a wife will receive in alimony payments at the time of divorce, it is easy to think that the only thing involved is money. Yet much more is usually involved. In addition to her economic well-being the woman may want money to feel psychologically secure. She may want it for recognition. She may want a certain amount to feel that she has been treated fairly and as a equal or so that she can have control over her life.

3. As the various interests are sorted out, the mediator should keep a list of the respective interests. Such a list can help place the interests in their order of importance and may stimulate ideas for how to meet those interests.

E. The parties should be encouraged to talk about their interests.

1. A person has a better chance of having their interests served if such interests are communicated to the other side. The other side may not know what those interests are.

2. Often one or both parties may be focusing on past grievances instead of on future concerns.

3. One suggestion would be to encourage the parties to make the description of their interests very specific. Concrete details often make their description credible and add impact.

4. In having the the parties describe their respective interests, it is important to remind them of the importance of establishing the legitimacy of those interests. They should carefully avoid attacking the other person personally but state that the problem legitimately demands attention.

5. It is important to have each party acknowledge the interests of the other as a part of the problem. People listen better if they feel they have been understood. They tend to think that those who understand them are intelligent and sympathetic people whose own opinions may be worth listening to. So, if a person wants the other side to appreciate his interests, he should begin by demonstrating that he appreciates theirs.

F. Keep the parties looking forward not back.

1. Many negotiations have the tendency to turn into a reaction to what someone else has said or done. A pattern of talking will develop that has no purpose at all except to go back and forth as a ritual, or a pastime. Each is engaged in scoring points against the other or in gathering evidence to confirm views about the other that have long been held and are not about to be changed. Neither party is seeking agreement or is even trying to influence the other.

2. The negotiator should move the dialogue to where the parties would like to go rather than where they have come from. Instead of prolonging the arguments about what the other side did last week or yesterday, have them talk about what they want to happen in the future. "Who should do what tomorrow?"

HELPFUL PHRASES IN MEDIATION

“Maybe the two of you could discuss....”

“Your anger is understandable. How are you going to handle that anger now?”

“Do any of you have possibilities about how you might.....?”

“I’m sorry, I phrased that poorly.”

“So, your concern is.....”

“What would be helpful from your point of view?”

“Have any of you thought about....?”

“Bob, I want to ask you a difficult question.”

“Mary, I feel as though you do not like that option. Let’s find something that will work for all of you.”

“Mary and Bob, is there anything here you might want to try to see how it might work for at least a trial period?”

HELPFUL STRATEGIES

What’s Fair to you? Most people believe in fair play, even if they define it differently. By asking the question, you might find the seeds for an agreement.

Find out priorities. What issues are most important to whom? Are there issues that can be dropped from the agenda? Are there issues that can be addressed later?

Structure the communication. As the mediator, be a role model on good communication skills, such as active listening and showing respect for ideas. When appropriate, soften the parties’ harsh language if you are restating their positions.

Expand the possibilities. Encourage the parties to think creatively—to think beyond the obvious. Create an atmosphere where it is safe to consider options tentatively. Brainstorm possible resolutions which can meet both parties’ needs and interests.

Allow tentative considerations. Allow the parties to consider options tentatively. The hypothetical mode is helpful, such as “If she were willing to not practice the piano after 11:00 PM, would that meet your need for quiet time to study?”