

The psychology of mediation

An atmosphere that instills fairness and understanding is more likely to lead to resolution



Hon. Jamie Jacobs-May (Ret.)

As sure as thunder follows lightning, the battle cry, “It’s not the money, it’s the principle,” follows a seemingly irrational position taken during the course of mediation. Some believe it is always the money. But there is much evidence to suggest that perceptions of fairness drive decision making. Standing on principle can be seen across all case types, from siblings spending more money fighting over an asset than the asset is worth, to an insurance company willing to pay “x” amount of money to settle a case, but only if the insurance company representing a co-defendant will contribute the same amount of money.

This article explores perceptions of fairness, where they come from, how they affect decision making and how to get past the impasse created by such perceptions.

If you are typical, you, too, will sacrifice your own financial gain in order to punish another for being unfair. Imagine that you are in a continuing education course and are paired up with another classmate. Your classmate is given \$20 and is told to divide it between the two of you. Each of you can keep the money once divided, as long as you agree with your classmate’s division. If you were economically rational, you would accept any amount above

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zero — something is always better than nothing. Yet, thousands of studies of this now famous “Ultimatum Game” demonstrate that if you are like most others, you will routinely reject low offers and will not accept the split until it is at least 30 percent of the original amount.

Returning to our insurance adjuster: Is the refusal to make a contribution to settle a case unless there are matching funds from another carrier a variation of the Ultimatum Game? Is that stubborn persistence personality driven or something more deeply rooted and universal?

This hardwired reaction to perceived unfairness can be a particular source of trouble in mediation. Parties express outrage, hopelessness and resentment. Agreements are lost, even when an agreement would ultimately inure to the benefit of all.

Neuroscientists are learning that fairness is hardwired. Researchers at UCLA scanned the brains of Ultimatum Game participants and found that the region of the brain associated with reward was activated during fair treatment, while the region associated with moral disgust was activated during unfair treatment.

Arguably, this sense of fairness is part of our evolutionary makeup. Primatologists trained capuchin monkeys to perform a task for which they were rewarded with

cucumbers. The monkeys were willing to “work” for long periods of time with this exchange. Then the experimenters took half the monkeys and paid them with grapes. Capuchins like cucumbers, but they love grapes. The result was that the monkeys who were paid with cucumbers screamed in protest, refused to perform the task, and threw the cucumbers away in disgust upon seeing their counterparts paid with grapes.

This hardwired reaction to perceived unfairness can be a particular source of trouble in mediation. Parties express outrage, hopelessness and resentment. Agreements are lost, even when an agreement would ultimately inure to the benefit of all. How can impasse be avoided when the sense of what is fair is so subjective? Here are some approaches to consider as you prepare for your next mediation.

UNDERSTAND THE PARTIES

Before we can know how to solve a problem, we need to understand what the problem is. This requires the mediator and counsel to listen attentively, ask open-ended questions and sincerely seek to understand the thinking, feelings and emotions at play. Encourage your client to share openly with the mediator, and model for them the capacity to understand your opponent’s point of view. Understanding your opponent’s position is not the same as agreeing with it. But a better understanding of their thinking may help you revise your own. There are additional benefits to active listening: people obtain some psychological release and are better able to talk rationally. Even better, if they feel understood, a most basic human need is met, and a sense of gratitude and the desire to understand your client often ensues.

MEET THEIR NEEDS

Oftentimes, the refusal to accept a monetary offer has nothing to do with the money. One sibling, fighting with the other over the division of an inheritance, may care very little about the division and more about the failure to be acknowledged and thanked for the caretaking function of the now-deceased parent. A heartfelt expression of gratitude and acknowledgement of that sibling's sacrifice can go a long way. A spouse, demanding a certain sum as support, may be more interested in being shown respect, or in exercising a level of control. Even CEOs care about apologies. In a well-publicized defamation case, a public apology that ran in several newspapers resolved the lawsuit brought by the CEO of a publicly traded company. Basic human needs include safety, status, autonomy, affection, fairness and economic well-being. Looking for ways to satisfy these needs can be low in economic cost but high in benefit.

ASSESSING VALUE

Differences in how parties arrive at valuation frequently contribute to the perception of unfairness. If parties can agree on an objective standard — industry norms, comparable sales, the opinion of a jointly selected expert — the problem is solved.

Sometimes, valuation is fuzzy and not easily measurable. How we decide on value includes both conscious and unconscious variables. For example, anchoring is the phenomenon where the number we

first hear dominates our thinking (perhaps the attorney's first optimistic take on what the case is worth). The anchoring effect can often be overcome by pointing it out, and by consciously considering new information that is inconsistent with the validity of the anchor.

By contrast, another phenomenon, the egocentric interpretation of fairness, is more resistant to change. Given a number of facts, some that support a position and some that do not, we have a tendency to focus on the data we find most helpful while minimizing information that undermines our position. Sometimes, the existence of precedent helps, whether it is case law, or other settlements and verdicts. However, it is very hard to convince people that they evaluated a situation incorrectly. Almost no one likes to be inconsistent with prior beliefs. Reasoning with a person who is not receptive is counterproductive and will only result in a hardening of position. In these circumstances, after having listened, acknowledged and agreed where you can, if nothing has shifted, parties are left with agreeing to disagree, and moving on to the steps that follow.

RESOLUTION IS A TEAM SPORT

The more all parties participate in the generation of options to reach a solution, the greater the likelihood one will be found. People see things differently when they become involved in the creative process, and they make allowances they otherwise might not make. As parties participate in generating options and de-

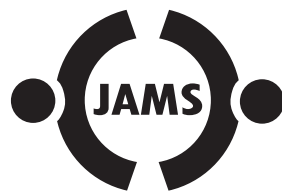
termining on how to meet needs, they begin to own the proposal and have a stake in a successful outcome. Oftentimes, a sense of unfairness can be overcome with creative solutions. For example, costs can be shifted, tax consequences or payment plans explored, or contributions to a college fund or favorite charity made. The creative process produces solutions that are limited only by one's imagination.

MEDIATOR'S PROPOSAL

When all else fails, a proposal from a mediator often allows both parties to save face, and enter an agreement that neither is willing to propose. This is especially true if there is trust and rapport between the mediator and the parties, and if the mediator's proposal is in striking range of both parties.

CONCLUSION

Scientists have confirmed that cooperation is linked with reward-related neural activity. When we experience our adversaries as cooperative, generous and trustworthy, the reward centers of our brain are activated, and we generally reciprocate in kind. Conversely, when we are distrustful and believe we are being treated unfairly, we retaliate, causing the same reward centers of the brain to be activated as we punish the offender. Negotiations fall apart and resolution becomes impossible. Reaching a successful resolution requires us to recognize the hardwired nature of fairness and employ approaches that address the perceptions at play.



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