

ACTIVATE YOUR NEGOTIATION SUPER POWERS

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1. Introduction

- a. Similarities between mediations and negotiations
 - i. Conflicting positions
 - ii. Trying to get the best for your client
 - iii. Ongoing relationships – opposing counsel, parties, neutral
- b. Both situations cause uncertainties
 - i. Experience
 - ii. Subject matter
 - iii. Client relationship
- c. You can increase your power by what you do before, during and after the session

2. Before the session

- a. Selecting the neutral
 - i. Knowledge and experience—ADR, life, business, and legal
 - ii. Attitude—calmly optimistic, compassionate, empathetic, open to all points of view
 - iii. Listening skills
 - iv. Ability to deliver hard messages
 - v. Willingness to work the case
 - vi. Ability to close

- vii. Rate/fee structure
- viii. Include women in your list of potential neutrals
 - 1. See Brown, Gina Viola and Schneider, Andrea Kupfer (2014) "Gender Differences in Dispute Resolution Practice: Report on the ABA Section of Dispute Resolution Practice Snapshot Survey," *Akron Law Review*: Vol. 47: Iss. 4, Article 3. Available at <http://ideaexchange.usakron.edu/akronlawreview/vol47/iss4/3>.
 - 2. Women neutrals are underutilized in certain high-end areas including corporate, construction, insurance, financial, and intellectual property disputes.
 - 3. Women are selected to serve as neutrals much more often in cases with no money in dispute or in disputes under \$100,000.
- b. Setting up the session for success
 - i. Choosing the location
 - 1. Adequate space
 - 2. Convenience of parties/counsel
 - 3. Access to information/documents
 - 4. Neutral turf
 - ii. Deciding who should attend
 - 1. Decision-maker
 - 2. Influential/support persons
 - 3. Sources of funds
 - iii. Remote site participation
 - 1. Pros/cons of using technology
 - 2. Ensuring availability of offsite participants

c. Preparing your position

i. Case evaluation

1. Prepare as if for depositions or trial
2. Assemble necessary facts, case law, jury verdict research, etc.
3. Consider strengths and weaknesses—factual, legal, and practical
4. Understand operative documents
5. Be sure both sides have the information they need
6. Consult experts if necessary
7. Assess evidence
8. File/respond to appropriate motions
9. Think of BATNA (Best Alternative to a Negotiated Agreement) and WATNA (Worst Alternative to a Negotiated Agreement)
 - a. Recoverable damages
 - b. Litigation risk
 - c. Litigation budget
 - d. Operational costs and business exposure
 - e. Availability of insurance
10. Think about common interests and drivers/obstacles to settlement
11. Prepare a concise, persuasive and informative mediation statement
 - a. Include case history and settlement position
 - b. Consider preparing one to give to both mediator and opposition, plus a confidential supplement for mediator only
 - c. Submit it timely
 - d. Avoid data dumping and voluminous attachments

- ii. Deal preparation
 - 1. Determine goals of the transaction
 - 2. Gather necessary input/information
 - 3. Take drafting responsibility
 - 4. Evaluate key deal points
 - 5. Anticipate areas of disagreement
 - 6. Consider areas of potential compromise
 - 7. Evaluate relative bargaining power
 - iii. Pre-negotiation information exchange
 - iv. Prepare draft agreement(s)
- d. Preparing your client
- i. The mediation/negotiation process
 - 1. Don't need to be the loudest voice in the room
 - 2. Involves both advocacy and searching for common ground
 - ii. Strengths and weaknesses of position
 - iii. Areas of potential compromise
 - iv. Client goals and priorities - BATNA and WATNA
 - v. Consider creative alternatives together
 - vi. Foster a realistic idea about possible outcomes
 - vii. Review the draft agreement(s) you plan to bring to session
- e. Preparing yourself
- i. Consider your implicit biases—e.g., race, gender, age, class
 - ii. Consider how you are perceived and how you perceive yourself
 - 1. Traditional characterizations of masculine and feminine styles may or may not apply to you

- a. Numerous views are found in the Gender section of Mediate.com, particularly articles by Victoria Pynchon, Jan Frankel Schau, and Nina Meierding. For example, see
 - i. Pynchon, Victoria, “Differences in Men’s and Women’s Conflict Negotiation Styles,” www.mediate.com/articles/PynchonVbl20100322c.cfm;
 - ii. Schau, Jan Frankel and Meierding, Nina, “Negotiating Like a Woman – How Gender Impacts Communication between the Sexes,” www.mediate.com/articles/SchauMeierding.cfm;
- b. *Also see* Turner, Caroline, “‘Masculine’ and ‘Feminine’ Styles of Handling Conflict,” https://www.huffingtonpost.com/caroline-turner/masculine-and-feminine-st_b_6633896.html

2. For a throughout discussion of gender issues in ADR and negotiation, see “Women in ADR,” Spring 2012 edition of *Dispute Resolution Magazine*, Vol. 18, No. 3, published by the ABA Section of Dispute Resolution.
3. *Also see* Eurich, Tasha, *Insight: Why We’re Not as Self-Aware as We Think, and How Seeing Ourselves Clearly Helps Us Succeed at Work and in Life*, Crown Business, 2017.

iii. Value your strengths

1. A 2014 study showed that while stress undermines empathetic abilities in men, including the abilities to recognize other people’s emotions and perspectives and to detect deception, it increases these abilities in women. See “‘Old, White and Male’: Increasing Gender Diversity in Arbitration Panels,” March 3, 2015, International Institute for Conflict Prevention & Resolution, available at <https://www.cpradr.org/news-publications/articles/2015-03-03--old-white-and-male-increasing-gender-diversity-in-arbitration-panels> .
2. The same study showed that stress made men become more self-centered, less able to distinguish their own emotions and intentions from those of other people, and more likely to take high risks.

- iv. Understand your conflict resolution and processing styles
 - 1. Avoid, accommodate, compromise, collaborate, or compete
 - 2. Process v. bottom line
 - v. Anticipate negotiating styles/strategies of opposing counsel and neutral
 - vi. Prepare to proceed mindfully and flexibly
3. During the session
- a. Meet and greet
 - b. Be gracious and patient
 - c. Listen and be mindfully present
 - d. Pay attention to emotions
 - e. Distinguish between your roles as advocate and counselor
 - f. Support the client
 - g. Keep the focus on your client's goals
 - h. Maintain open and flexible thinking
 - i. Your resolution style may need to change based on:
 - 1. Stages of your negotiation
 - 2. Style of opposing party and neutral
 - 3. Whether your team has the advantage or disadvantage
 - 4. Strategic goals
 - j. Refuse to be bullied
 - i. Consider a quiet but firm response to overbearing counsel
 - ii. Maintain your professionalism and dignity
 - iii. Ask for a caucus/time out
 - k. Listen for new, creative alternatives

- I. Look for opportunities to close
4. After the session
 - a. Check in with your client
 - b. Reach out to opposing counsel
 - c. Follow up on assigned tasks
 - d. Continue to try to reach a deal
 - e. Utilize your neutral to facilitate a resolution

Julie Williamson is a mediator and arbitrator with AB Conflict Resolution Services. She concentrates on the resolution of business, contract, employment, real estate, financial and probate disputes. With a background of more than thirty years of complex commercial litigation experience, Julie is committed to resolving disputes outside of the courtroom whenever possible to minimize costs—time, money, emotions, and distraction—and enable parties to return to pursuing productive lives and profitable endeavors. Julie’s full bio may be found at <http://crs-adr.com/julie-williamson/>. She may be reached at AB/Conflict Resolution Services [303-355-2314] or julie@crs-adr.com.

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