

WHAT'S FAIR? WHO'S RIGHT? IT DOESN'T MATTER: HOW TO APPROACH INTEREST-BASED BARGAINING IN MEDIATION

By Andrea M. Eichorn, JD

- 1) Speak Respectfully**
- 2) Listen Carefully**
- 3) Just Say It**
- 4) Remember Your Values**

When clients new to the divorce mediation process contemplate what's going to happen in a mediation session, many of them project negotiating their own divorce in a hostile, difficult atmosphere where there's ultimately going to be some notion of who's right and who's wrong decided.

In an interest-based mediation environment that daunting image disappears into the reality of meetings where the clients' sense of safety and responsibility shape an experience that is bearable and productive. In the interest-based model of mediation the concepts of who is right and what is "fair" are explicitly rejected in favor of a non-confrontational exchange of information to craft win/win solutions.

1) Speak Respectfully: No tirades allowed

The first rule of interest-based bargaining is: Speak Respectfully. That means no tirades, no sarcasm, no labeling. No behavior that could be interpreted as demeaning to the other, or blaming. This rule leaves space for people to speak candidly, directly, and even with emotion.

Both words of this rule are equally weighted in importance; yes, you need to be respectful to the other person, but it's just as important for you to speak. In mediation, you need to be prepared to be responsible for your view of things, and also responsible for communicating it.

It's the mediator's responsibility to help you maintain a respectful tone and also to help you articulate your point of view.

2) Listen Carefully: Agreement takes two

The second rule of interest-based bargaining is: Listen Carefully. That means no sighing, no looking at your watch, no rolling your eyes. But most importantly, no interrupting, and no negative shake of the head while the other person speaks. It's challenging to remember this rule when what the other person is saying directly contradicts how you see things or what would be acceptable to you.

It's human nature to feel threatened when people are saying something we find unpalatable. It's almost a fear that aired thoughts will somehow grow, take over, and manifest themselves. A fear that any minute the mediator will produce an agreement with those undesirable terms and you'll be asked to sign on the dotted line.

Fortunately, that is not the case, and sometimes it takes a few mediation sessions to realize that thoughts do not have that kind of power. Listening carefully to the other person does not make their point of view a default, but instead gives you more information on how they see things, and why. And the more you know about how they see things, the more information you have to brainstorm solutions that are acceptable to both of you.

Your mediator, as long as they are of the facilitative bent and not evaluative, is never going to listen to the other person and adopt their perspective. Your mediator is neutral and their only priority is facilitating resolution that's acceptable to you both.

3) Just Say It: Don't hide the ball

The third rule of interest-based bargaining is: Just Say It. Most of us have been exposed to position-bargaining techniques. For instance, when you're buying a house: there's the advertised price, the price you first tell them you'll pay, the second price you tell them you'll pay, the price they'll actually accept, the price you'll actually pay, and on and on.

In mediation, the go-high, go-low approach creates an unnecessarily fearful environment by giving both people an inaccurate impression of what the other person finds acceptable. Visions of bankruptcy or destitution could be haunting people when really neither of the clients would want that for the other. Both people might hold realistic views about what an acceptable financial settlement could look like, but when the go-high, go-low approach is taken, clients are more likely to feel under attack by those first proposals.

Have the confidence to say directly what you want and why. The mediator will encourage the other person to do the same. When the clients' views are different, resolution is still on the table because the clients' actual interests are being worked with, rather than shadows from positional-bargaining strategy.

4) Remember Your Values: Be that admirable person

The fourth rule of positional bargaining is: Remember Your Values. Asking someone to be generous and kind during a divorce mediation session can sometimes be asking too much. Divorce is a stressful event. But generally most people can at least try to be the best person they can be—maybe for their own sense of self-respect, maybe for the benefit of their family or children.

In mediation there's no right/wrong and no fair/not fair. This means that when you have a negative gut reaction to the other person's proposal—feeling that it's not fair to you—you have to decide what has the most value for you. Sometimes reflection brings up images of happy kids, with nice, communicative co-parents, or being able to send your ex-in-laws a Christmas card, or just being able to look in the mirror and say, “I was a good person during my divorce.” Sometimes, when we start to consider the high value of peace and integrity in our lives, and decide to use the one thing in life we can control—ourselves—to make them happen, that's when resolution can appear in the midst of a mediation session.

Many mediators have their clients articulate values that the clients want to be reminded of in times of difficulty during a mediation session, as it can be productive to remember the things in life that have value beyond the material.