



Digging Deeper

First Mediation Corporation Newsletter

November 2007

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Greetings from the Editor!

Welcome to our bi-monthly Digging Deeper newsletter.

We hope you will join us at one or more of the following upcoming events where Jeff and/or I will be presenting.

- **Mariam Zadeh**

Calendar of Events:

January - March 2007: Advanced Mediation Class at the Straus Institute for Dispute Resolution at Pepperdine School of Law (Jeffrey Krivis & Mariam Zadeh)

March 14, 2007: Utah Bar Convention - Keynote Address by Jeffrey Krivis

May 14 - 16, 2007: International Academy of Mediators conference ([Coral Gables, Florida](#))

June 20 - 22, 2007: Improvisational Negotiation course three-day program at the Straus Institute for Dispute Resolution at Pepperdine School of Law (Jeffrey Krivis & Mariam Zadeh)

Spring 2008: Mediating the Litigated Case ([Irvine, California](#))

Expansion to the Carmel/Monterey Area ...



Jeff has expanded his practice to the Carmel/Monterey area. This move stems from his belief that parties working through litigated disputes can gain a fresh perspective and have an uncharacteristically pleasant experience when they are in a tranquil setting, removed from their usual familiar surroundings and the tensions of the city.

Join Jeff and soak up the ambiance of this lovely historic village while bringing closure to most complex litigation challenges.

The Daily Journal Profiles Mariam Zadeh Lawyer Finds Her Niche as Mediation Maven

[Los Angeles](#) - There are no coincidences in the world of Mariam Zadeh. This Buddhist sensibility, that everything happens for a reason, fuels both her dogged pursuit of resolution and her creative approach to mediation.



It also led the 34 year old attorney to her mentor, Jeffrey Krivis, whom she joined as an unexpected partner at First Mediation Corporation in 2005. Though their religions differ - Krivis is Jewish - their ideologies are lockstep. Zadeh sees him as a Zen master of mediation and a perfect model of her own developing mediation style.

"He has a very warm, inviting quality about him that puts people at ease," she said. "He' not confrontational or aggressive. People are just drawn to him; he doesn't have to force people to follow him. People just naturally want to be a part of what he is working on."

The pair speak about a holistic development and natural progressions when describing both their approach to dispute resolution and their blossoming partnership.

[Read the full Daily Journal Profile on Mariam ...](#)

The 5 Steps to Maximizing Mediation Dollars by Jeffrey Krivis and Mariam Zadeh



Parties come to mediation with different objectives. Some want closure, confidentiality, free discovery, while others were referred by the court and attend by obligation. Most however, participate because they want to maximize their recovery dollars. If you fall into this category, read on.

In the second edition of David Ball on Damages - The Essential Update, Dr .Ball presents ten basic principles that shape a juror's decision making

process on awarding money to the plaintiff. Like the Ball approach, this article synthesizes into 5 Steps the intangible elements that factor into the defense perspective when arriving at a settlement. This is important, as a key to settlement is having your adversary be your biggest advocate with their client. Once this occurs, you are on the road to success.

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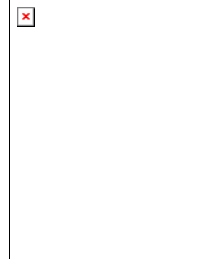
While nothing is foolproof, understanding and effectively applying these principles in settlement negotiations can dramatically increase the likelihood of a productive negotiation and lead to higher settlement figures at the bargaining table.

[Improvational Negotiation](#)

The Five Steps:

Step #1 - Ask for Help

From a strictly logical approach, how the plaintiff intends to spend the settlement proceeds is irrelevant to the evaluation of the case and not any business of the defense. However, from a humanistic approach, even insurance people want to feel needed. Being needed and asked for help, makes one feel important and part of a larger more noble purpose. If the plaintiff intends to use the settlement proceeds for a worthwhile purpose such as keeping their home out of foreclosure or tending to their special needs child, make a leap of faith and share this information with the defense. The key is to do so at the right time after the defense has offered most of what appears to be their settlement authority. Sharing this type of sensitive personal information, invites the defense to make a contribution and feel heroic, and who doesn't want to feel heroic? This doesn't mean that the defense will pay out \$120,000 if they evaluated the case for \$80,000, just to make themselves feel good and help your client. Rather, what this strategy does is provide positive encouragement to the defense to pay the \$80,000 when they were willing to leave the mediation having only offered \$70,000.



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Step #2 - Reduce Unknown Variables

Ambiguity arises from three main sources: novelty, complexity, and insolubility. When presented with unknown variables in an ambiguous situation, one's natural tendency is to overestimate the likelihood of positive versus negative outcomes. This finding has been corroborated by dozens of studies. In one straightforward experiment, all other things being equal, participants assigned a higher probability to picking a card that had a smiling face on its reverse side than one which had a frowning face. Similarly, when the defense is faced with making a decision in mediation without adequate information, unknowns will be assessed in their own favor even though there is no supporting evidence to substantiate that finding.

Consider the following situation: Defense counsel performs a verdict and settlement search on plaintiff's counsel, whom he has never encountered before. The search does not produce any results and counsel therefore assumes that the plaintiff attorney does not try cases and has not had any settlements that were large enough to report. Defense counsel concludes, based on this assumption, that the settlement value should be reduced since plaintiff's attorney is a minor player who will settle sooner or later. Amazingly, this situation presents itself with relative frequency.

Identifying the unknown variables confronting the defense and addressing each one in the order of relative importance requires proactivity and a sense of wanting to know all the information that is being used by the defense to evaluate the case. In the case of the lawyer who is perceived as not being prepared to go to trial, having identified through the mediator that he may not receive full value because of how he is perceived by the defense, he should be prepared at the mediation to either demonstrate that he intends to try the case himself and is a worthy opponent or name trial counsel who will substitute into the case at trial.

Step #3 - Accentuate the Positive

There is something to be said for the lyrics of the 1945 hit song, "Accentuate the Positive" by artist Johnny Mercer, which brought hope to listeners in the midst of the turmoil and devastation of WWII. In the chorus, Mercer sings, "You've got to accentuate the positive. Eliminate the negative. And latch on to the affirmative. Don't mess with Mister In-Between."

Infusing positive energy into any negative situation automatically changes the dynamics and direction of the elements at work. In the mediation setting, the more we focus on the positive, the longer we can retain the spirit of inquiry and cooperation within the negotiation. Start by finding ways to show the defense that the plaintiff is a responsible, likeable, presentable and credible individual. By doing so, the plaintiff will be removed from the status of a "file" to that of a "person" and will appear to be more deserving. If the defense is aware or likely to become aware of negative information about the plaintiff, diffuse its impact by

presenting it first yourself and addressing how it will be kept out of evidence or explained away at trial.

Step #4 - Address Monetary Barriers

There exists conspicuous and inconspicuous barriers that, if ignored, are likely to prevent the plaintiff from maximizing their settlement in mediation. The more monetary barriers that can be identified and addressed early on in the case, the greater the success in settlement.

Here are a few examples of the type of defense groupthink that should be addressed if the case is to have a chance at settling for its true value in mediation: · "If we pay on this case, we'll be setting a precedent with this plaintiff's attorney and will be flooded with similar cases because he/she knows we will settle." · "If we continue to take a hard line position on these types of injuries, the plaintiff's bar will get the signal and eventually stop bringing these lawsuits." · "By paying more than nuisance on this case, we are conceding that we did something wrong."

At times there are also personal motivations driving the negotiation, which are not shared by everyone on the defense team. These motives are generally not easily recognizable but will continue to serve as a monetary barrier if left unaddressed. Consider the defense attorney, who wants to settle the case below their authority to look good in front of their client or the insurance adjuster who set the reserves too low at the beginning of the case and now doesn't have a way out to settle and save face. Picture also the adjuster who is concerned that if they settle the case without proper documentation, it will be held against them by their manager when the case is reviewed or audited. And of course, recall the situation where the case would and should have settled but did not because it had become a personal battle between counsel and representatives for both sides.

Step #5 - Manage Your Reputation

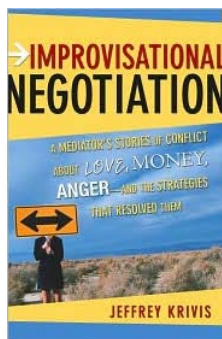
Warren Buffet once said, "It takes 20 years to build a reputation and five minutes to ruin it. If you think about that, you'll do things differently." It is critical in this day and age with the rise of the Internet, blogs, professional networks and message boards, to actively manage one's reputation. Whether good or bad, a plaintiff attorney's reputation as a litigator and negotiator are a critical factor in how the defense values a case both for trial and at the mediation. If you want to find out how you're perceived, ask someone you can trust and listen carefully to their comments, without taking offense. Being honest with oneself is often much harder than being honest with others. Generally speaking, cases are valued higher when the defense has an adversary who is known to try (or substitute in trial counsel) rather than settle cases, maintain a cordial rather than hostile working relationship, and is more of a risk taker than risk averse. Keep in mind that each mediation is an opportunity for reputation management and that how one handles this negotiation will have a direct impact on all future negotiations with that party.

Improvisational Negotiation: A Mediator's Stories of Conflict About Love, Money, Anger and the Strategies That Resolved Them

From the Publisher:

Improvisational Negotiation presents an original approach for mediators, negotiators, and other dispute resolution professionals. Drawing on his own experience plus those of his colleagues, Jeffrey Krivis offers the reader dramatic, well-crafted, and highly instructive stories about people in conflict - families, organizations, corporations - and shows how mediated negotiations help them to reach a successful resolution.

Unlike most books on the topic, Improvisational Negotiation does not focus on theory, philosophy, or formulaic procedures. The book highlights entertaining true stories that illuminate the skills and tools a good mediator uses to direct a successful negotiation and then asks the questions: What happened? and What strategies can we learn?



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