

The Mediator as Moral Witness

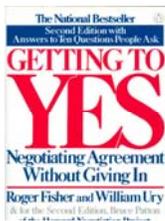
By David A. Hoffman

[The following is from a talk given at the March 2013 Harvard Negotiation Law Review symposium on the work of Roger Fisher. It is part of a longer article, in progress. Comments are welcome at DHoffman@BostonLawCollaborative.com.]

“You’re right from your side, and I’m right from mine.”
- Bob Dylan, “One Too Many Mornings”

“There’s a billion people on the planet – what does any one life really mean? We need a witness to our lives.”
- “Shall We Dance?” (movie, 2004)

Our task in this symposium is to describe how we use Roger Fisher’s ideas in our work. I hope Roger doesn’t roll over in his grave when he hears how *I’m* using them.



Roger was a fabulous storyteller, and so – honoring Roger’s spirit -- I have two stories for you. Both stories relate to lessons from “Getting to Yes” about distinguishing interests from positions – one of Roger’s most important themes. The fundamental lesson: positions are *what* we want; interests are *why* we want them.

Warning: this first story *may* sound familiar. Two children, Eric and Sally, are out in the backyard when their mother hears them arguing over an *orange*. *Each* of them wants the whole orange. Their mother rushes out and says “*Kids*, stop fighting. I have just read this *great* book – ‘Getting to Yes.’ I can *help* you. We don’t have to cut your orange in *half*. There may be a Pareto-optimal *solution* to this conflict.” First, *tell* me, she says, “*why* does each of you want the orange?”



Well, you guessed it: Eric wants the orange rind for a recipe that he found at www.Cooks.com (a *gateau a l’orange*), and Sally wants the pulp to make a gluten-free orange-carrot *smoothie*.

Mom says: “*Aha*, I *thought* so. There’s a *perfect* solution that meets both of your underlying *interests*.”

Sally says: “*Mom*, I *totally* get it. You’re a *genius*. Eric gets the *rind*, I get the *juice*. We *both* get what we want.”



Eric says: “Mom, you totally *don’t* get it. This dispute has gone *way* beyond oranges. Did you hear the despicable *names* that Sally called me? Did you see the smug, condescending *look* on her face? Do you see the contemptuous way that she’s rolling her eyes at me *right now*? She doesn’t deserve *any* part of this orange!” And with that, Eric *grabs* the orange, *throws* it on the pavement, and *smashes* the orange several times with his heel until the orange is utterly unusable.

Now, I realize that this is a *shocking* retelling of a familiar story, although perhaps more *realistic* than the story of the orange in “Getting to Yes” (which, by the way, was adapted from a similar story in the work of Mary Parker Follett). But there is a happy ending to this story. The mother is a gardener, and she *shovels* the smashed orange off the pavement, *adds* it to her compost pile, and says to the kids, “well, at least we can *recycle* the orange.” Both kids are still *seething* with rage, though now it is *Eric* who is looking a bit smug.



How many of you have been involved in a negotiation or a mediation in which one or both of the parties acted in ways that were *clearly contrary* to their material self-interest? Political commentators have frequently noted that many people vote in presidential elections for candidates who, if elected, will make the people who voted for them economically worse off. In his recent book, “The Righteous Mind,” social psychologist Jonathan Haidt explains why people behave in this way, and I will touch on one of these reasons in a moment.

For now, however, here’s my second and final story – taken from a case in which I was the mediator about a year ago. [I have changed the identifying information to protect the parties’ confidentiality.] Sam and Joe own a mail order gift business – the type of business that sells fruit baskets and ships them all over the world. Sam and Joe are brothers. They created the business together, but it was Sam’s idea, and so he wound up with 51% of the shares, and Joe owns 49%. As the older brother, Sam believes this is how it should be – he’s ultimately in charge. [By the way, as an older brother myself, I can totally relate to this feeling.]



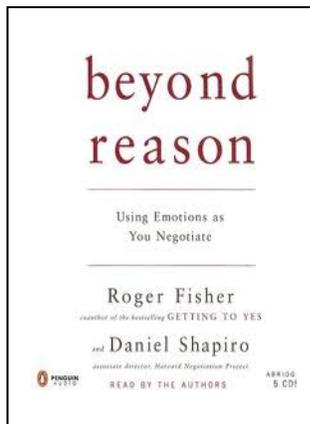
Unfortunately, the working relationship between Sam and Joe is in bad shape. *Sam* thinks *Joe* is slacking; *Joe* seldom comes to work, and so *Sam* has to cover for

him. Joe thinks that Sam is trying to marginalize him, cut him out of the loop, and in fact, Sam has recently cut off Joe's access to the company's financial records. So, Joe hacks through the firewall in the company's computer, downloads all of the company's financial records, *and* deletes the original records. Sam is furious – totally beside himself – because the company's computer back-up system does not have all of the most recent records. He confronts Joe, who readily admits what he did, and says that he will return the records after he has had a chance to analyze them. Sam summarily fires Joe and warns him that if the records are not returned *immediately*, he'll be hearing from the company's lawyers.

Joe then begins an *Internet* campaign against Sam, telling the world that Sam is mismanaging the company and urging people to instead buy their oranges and other fruit from Joe, who has created a rival business. Both sides lawyer up, and the lawyers have to *drag* their clients to mediation, because neither party is in the mood to negotiate.



Do you remember the famous quote from the Vietnam War, attributed to a U.S. military official: “we had to destroy the village in order to save it.” This is what Joe was doing. This is what we see so often in business, family, and employment disputes.



Roger Fisher gave us valuable tools to help the parties in such disputes identify their underlying interests and achieve rational solutions. And he also pointed us in the direction of *psychological* interests, which may (in some cases) be far more important, and far more powerful as drivers, than the parties' *material* interests. In the book, “Beyond Reason,” Roger and his co-author Dan Shapiro call these interests “concerns,” but, in my view, they amount to the same thing. The need for autonomy, affiliation, appreciation, role, and status – all five of these interests (discussed in "Beyond Reason") can be seen in the story of Sam and Joe.

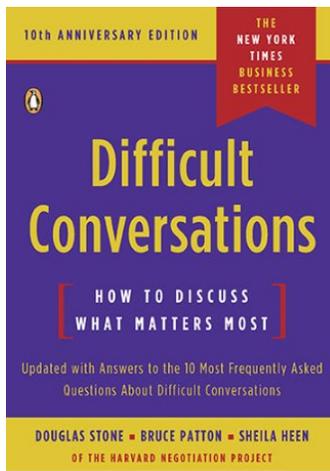
It was not until the later years of Roger's career that the role of emotion in negotiation came prominently to the fore in his work. However, from my vantage point, his interest in emotion points the way to some important horizons for our field.

As much as Roger prized clear thinking and rational persuasion, he frequently encountered *irrational* bargainers. Recent advances in behavioral economics, neuroscience, and social psychology have identified persistent patterns of distorted thinking that are typical in all of us, regardless of whether we are high-functioning and psychologically stable -- or the opposite.

I would like to focus on one of those patterns of distorted thinking, which I see every week – sometimes, every day – in my work as a mediator and negotiator. That pattern is the need to feel that we are *right* – and its corollary, that the other side is *wrong*. I don't mean wanting to feel that we have our *facts* right, and they have *their facts wrong*. What I mean is that we are *morally* right, and the other side is *morally culpable*.



In focusing on this issue of moral culpability, I may be offering you perspectives that Roger would disagree with, but I believe that they follow logically from his focus on underlying interests.



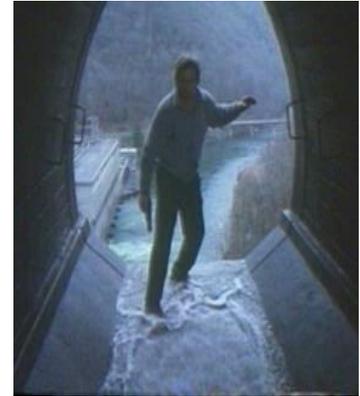
I attended a lecture about a year and a half ago in which a psychotherapist, Mike Elkin, asked the following question: what do we want most in life? What do we cherish most? One might answer: love, respect. Viktor Frankl argued that “meaning” is human kind’s greatest need. Mike Elkin’s answer? Innocence. Most people have an intense desire to feel that they are *good*. If we are in an intense, protracted dispute, we tend all too often to believe that the other side is trying to *hurt* us, while we are pursuing *legitimate* and *virtuous* goals. (Notice, by the way, the close relationship between these ideas about identity and those articulated in the fabulous book *Difficult Conversations*, authored by three of Roger’s colleagues, Doug Stone, Bruce Patton, and Sheila Heen.)

As mediators and dispute resolvers, how do we deal with these moral claims? The most common answer in the literature of mediation is to re-direct the parties’ attention *away* from these conflicting moral claims, and focus their attention *instead* on their underlying material interests.

For example, we might talk with *Sam* and *Joe* about whether they want to preserve the value of the business that they own together. We might talk to them about saving legal fees and other transaction costs. We might talk with them about restoring family harmony.

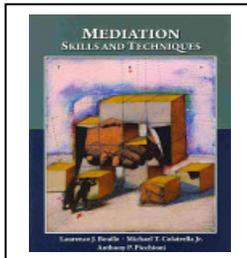
However, in my experience, what they *most* want to talk about is who’s *right* and who’s *wrong*.

This dilemma for mediators reminds me of a scene from the movie “The Fugitive,” in which a U.S. Marshall played by Tommy Lee Jones relentlessly tracks down the fugitive, played by Harrison Ford, who is accused of killing his wife. Their first face-to-face encounter occurs inside a drainage tunnel. With water rushing past them, Jones slips and accidentally drops his pistol. Ford picks it up, aims it at Jones to hold him at bay, protesting his innocence over the roar of the water. “I didn’t kill my wife!!” Ford shouts. Jones calmly but emphatically shouts back: “*I don’t care.*” At that point Ford turns and makes another of his daring escapes – this time diving into an impossibly tall waterfall at the mouth of the tunnel. See <http://www.youtube.com/watch?v=ZQ11Ws3tqP0>.



Ultimately Harrison Ford proves his innocence. Tommy Lee Jones meanwhile proves that he is such a consummate professional that he cannot be distracted by claims of innocence. It is simply not his role to decide – or even *care* about – who is innocent and who is guilty. *All* he cares about is returning the fugitive to custody and thus closing the case.

It occurred to me recently that we mediators often find ourselves in a situation similar to that of the U.S. Marshall in this film. In our cases, the parties often espouse their innocence passionately. We hear this from both plaintiffs and defendants: the plaintiffs feel like they are the innocent victims, and the defendants feel wrongly accused. What they have in *common* is their desire for moral vindication.



The last thing in the world that they want to hear from the mediator is some version of “I don’t care.” Or, “let’s talk about other things.” (One mediation text, “Mediation: Skills and Techniques,” by Michael Colatrella and Anthony Picchioni, advises: “It’s the mediator’s task to *shift the focus* of the participants away from their own polarized viewpoints toward a more generalized interest-based definition of the issue” (emphasis added).

We do care, of course. We care about the parties as people. But do we really care who is innocent and who is not? We are trained as professionals *not* to judge the parties and, even if we secretly *do*, we are trained to refrain from sharing those judgments with the parties. Yet each party in a dispute wants *validation* of their perspective. The mediator, being the only neutral person in the room, is uniquely situated to provide it.

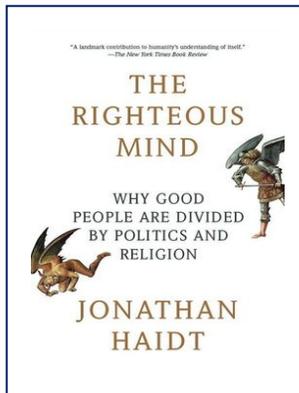
So what does this have to do with Roger Fisher and the concept of the parties’ underlying interests? *Everything*, in my view. If the subject that the parties are *most* interested in talking about is the moral dimension of the conflict, they may be telling us that they care more about moral justification than they care about saving transaction costs.

As a mediator, I cannot say to *either* party “you’re right, and the other side is wrong.” That would violate the principle of impartiality, which is not only an ethical requirement but a practical requirement as well.

What I *can* do as a mediator, in an appropriate case, is this: I can say to each party that I understand that they were *trying to do the right thing*. Sam thought he had no choice other than to fire Joe. And Joe felt that he had no choice other than to grab the company’s financial records. They *both* thought they were doing the right thing.

Of course, Sam and Joe are probably each hearing from their respective *lawyers* that they did the right thing. But what they really *want* is to hear that from the other party. Chances are, they never will. [Footnote: many of us have had cases where one party or the other ceded the moral high ground, at least in part, an *apologized* for what they did, and such apologies – particularly when authentic – sometimes result in a settlement with no payment of money, or only a modest payment.]

But, if unilateral or mutual apologies are *not* forthcoming, what if Sam and Joe each heard from the *mediator* the following: “I understand that you were *trying* to do the right thing.” This is not the same as saying “I think you’re right,” but from the parties’ perspective, it might be the *next best thing*.



Why? Because social psychology teaches that we human beings are quick to judge other people’s *intentions*, and we are hyper-vigilant about other people challenging *our* motives. If people impugn our motives, we have lost their *trust*, and endangered our *reputations*, which means we have lost valuable *social capital*, which is critical to our acceptance in the communities in which we operate. As Jonathan Haidt has written in “The Righteous Mind,” quoting Charles Darwin, “people are passionately concerned with ‘the praise and blame of our fellow-men.’” It is part of our genetic hard-wiring.

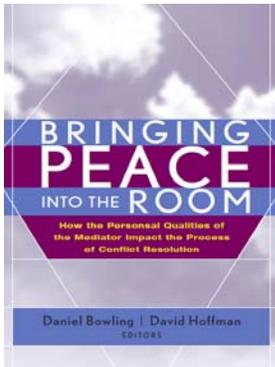
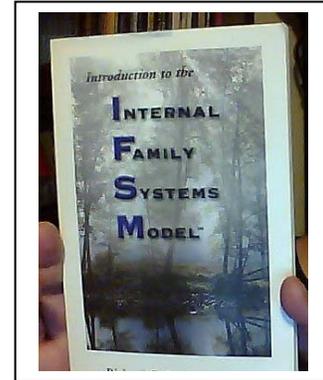
Accordingly, when the parties in conflict are castigating each other’s *motives*, they are chipping away at one of our most precious resources – our social capital, our reputations, our claim on the loyalty and affections of those around us.

What could be a more compelling underlying interest?

Thus, even if we mediators cannot get the disputing parties to one of those fabulous reconciliations in which they hug, they cry, and we all sing “Kumbaya” together [and by the way, I have *had* a few of these, minus the Kumbaya], we *can* give the parties the next best thing. And that is the feeling of being heard in a deep way about their intentions and their motives, and their desire to do the right thing, their aspiration to innocence.

Any sophisticated understanding of human character must acknowledge that none of us is truly *innocent* -- none of us is without blame. We *all* have many parts. We have motives that we are *proud of*, and some that we are *not* proud of. But I believe that most of us are trying to do the very best that we can. As a mediator and negotiator, I can *acknowledge* that in the people that I work with and, by doing so, address an underlying interest in social capital that may be more *powerful* than money and more *valuable* than oranges.

(For an excellent introduction to a school of psychological thinking about our internal parts and the negotiation within, see Richard Schwartz's book, "Introduction to the Internal Family Systems Model." This is the model that Mike Elkin was using in his discussion of our need to feel "innocent." And for a discussion of the applicability of this model in mediation, see David Hoffman, "Mediation, Multiple Minds, and Managing the Negotiation Within," 16 Harv. Negot. L. Rev. 297 (2011).)



One other reference on the subject of mediator as moral witness: Sara Cobb's excellent essay "Creating Sacred Space: Toward a Second Generation Dispute Resolution Practice," in which she focuses on the powerful role mediators play in creating a safe space for accounts of suffering. She writes: "A sacred place is one that . . . does more than simply recount the victimization, in the presence of others; it elevates violation of an individual to the level of the collective." (This essay can be found Daniel Bowling & David Hoffman, eds. "Bringing Peace into the Room: How the Personal Qualities of the Mediator Impact the Process of Dispute Resolution.")

Mediators unavoidably contribute to creating a *moral frame* for the conversations that we facilitate. In addition to the moral witnessing that Cobb describes (in which people's suffering is witnessed), mediators can add value, in my opinion, by witnessing of people's "goodness" – particularly when their motives, integrity, and "innocence" are being attacked. We can validate, when it is appropriate, what they are trying to communicate about their good intentions.

As Elkin observed in his workshop, one of our most painful experiences in life is "*shame*," which he defines as our "*badness*" being witnessed. This is what happens when one party in a mediation accuses the other not just of wrongdoing, but what's worse: *intentionally* harming the other person. *Validation* – the experience of our "goodness" or "innocence" being witnessed – can be an

"I'm just a soul whose intentions are good.
Oh Lord, please don't let me be misunderstood."
- Nina Simone (1964)

equally powerful feeling, and can be a particularly helpful intervention when we validate people's *intentions*.

I am indebted to Roger Fisher, and thank him, for opening my eyes to the need for

- looking deep into the human heart to find what our most compelling needs and interests are
- talking with people about what they care about most, and thus
- helping them to bring peace into the room.

I have two postscripts: First, Sam and Joe settled their case in the mediation. Although there was no “Kumbaya” moment, they did agree on an amicable buy-out of Joe’s interest and a mutual non-disparagement clause, and each party has moved on with their lives. Second, in the story below, a fellow mediator reports success with these methods in a court-connected mediation.



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Mediator as Moral Witness – A Case Study

A few months ago, I gave a talk on the subject of "Mediator as Moral Witness" to a group of mediators, and received a call the next day. One of the mediators who attended the talk had used the approach I recommended, and it worked!! Here’s a description of the mediation (with identifying information disguised to protect privacy and the confidentiality of the process).

In the Worcester District Court, a mediator met with Sheldon and Rick, two former friends, one now suing the other. They had been friends for at least thirty years – they played poker together each week, and lived in the same neighborhood until two years ago, when Rick moved to Los

Angeles. “I was sick of the New England winters,” Rick explained to the mediator, but he kept coming back once a year to visit family. “I had no idea I was going to be served with papers!”

Sheldon told the mediator that he had sued Rick for the return of \$4,200 that Rick had borrowed a few months after settling in California. “He said he was having trouble finding work and needed the money to go to a locksmith school, which had a good track record of placing graduates in jobs. I said ‘sure’ without really thinking about it.”

For the past two years, Sheldon had been calling Rick and sending him emails – no response. Neither of them had written up the loan; it was just a long-distance ‘handshake’ deal.

But Rick had felt mortified by his inability to return the money. He had tried, unsuccessfully, to find a good job. He occasionally found some construction work, but nothing that paid well enough to get ahead of his debts. He was also deeply ashamed of lying to Sheldon about going to locksmith school. Yes, he had thought about it, he had checked out the web sites of several locksmith schools, but never took any concrete steps to do it, and meanwhile the \$4,200 got spent on rent and day-to-day necessities. Rick wanted with all his heart to pull together the \$4,200 – actually, he wanted to make it \$4,500. But one setback after another – his car died, he had no medical insurance, and he needed various prescriptions – kept him from making any financial headway.

Meanwhile, Sheldon had run out of patience. He was enraged that Rick was stonewalling him. He heard in the neighborhood that Rick would be back for Thanksgiving, filed court papers, and arranged to have them served on Rick as soon as he returned to Worcester.

The mediator gave Rick plenty of time to tell his story, and to describe his desire to repay the loan. “I felt like my identity depended on repaying this money,” Rick said. “I felt like my identity as a good person was slipping away from me, with every passing day. I would have done anything to get my head above water and send Sheldon his money.”

“It sounds like you were trying to do the right thing,” the mediator said to Rick.

Rick looked up at the mediator with tears in his eyes. “Very much so,” Rick said. “I just wanted to . . .” and he just began to weep.

Sheldon was taking this all in, and waited a moment before saying, “Rick, I had no idea . . . you really want to pay me back, don’t you.” Then Sheldon, taken aback by Rick’s tears, started crying. “I need the money,” Sheldon said, “but we can definitely work this out. I am so sorry about what you’ve been through.”

Rick, pulling himself together, looked relieved. “I’m the one who should be apologizing here – not you,” Rick said.

The mediator asked a few questions about what sort of gradual repayment plan Sheldon had in mind, and asked Rick whether he could manage it. In a few minutes, they had written a short agreement with a payment schedule and signed it.

Rick and Sheldon waited in a long line with the mediator to file their agreement with the Court clerk, and while they waited, the mediator heard them sharing stories, laughing occasionally, and making plans for Sheldon to come to Los Angeles for a visit.

After they filed the agreement, the mediator congratulated them on what they had accomplished, and asked them for permission to tell about their success, but without their actual names. “Of course,” Rick said. And Sheldon added, “if telling about our case helps other friends bury their hatchets, we’re definitely OK with that.”