

The De-biasing Effect of Equity, Diversity, and Inclusivity Mediator Training

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This article explains how incorporating equity, diversity, and inclusivity instruction in mediator training increases the likelihood of successful mediated outcomes by reducing bias, improving the mediator's ability to use perspective-taking interventions, and fostering trust in the mediation process.

Mediators have an ethical obligation to be culturally competent and unbiased.¹ Training mediators in equity, diversity, and inclusivity (EDI) assists in ensuring a mediation process that is less prone to the influence of bias. This article provides an overview of empirical studies that show the de-biasing effect of mediation training and discusses how common perspective-taking interventions in mediation require literacy in EDI to be effective. It also explores how developing EDI literacy among mediators can expand mediation's de-biasing effect and improve consumer perceptions of mediation as a legitimate dispute resolution process.

Mediation Training Can Reduce Errors and Biases

Many skills needed for effective mediation, including the use of role reversal, perspective taking, and empathy development, help reduce bias by encouraging recognition and understanding of the parties' underlying needs and interests. Mediators are trained to analyze a dispute from multiple angles and help parties see each other's perspectives. Effective mediators must be able to recognize the parties' backgrounds, circumstances, obstacles, and emotions, many of which have an EDI component. EDI training raises awareness about biases based on age, race, gender, ethnicity, ability, sexual orientation, and other factors that make us all unique. EDI training can also help mediators further reduce their own biases and better facilitate mutual understanding and respect among the parties.

Attorneys Trained in Mediation Make Fewer Errors in Risk Assessment

Mediation training has been credited with reducing the types of biases that are associated

with attorney errors when advising clients on settlement offers during a mediation.² In 2008, Randall Kiser led a study that compared the last offers made in failed negotiations to the adjudicated outcomes in 2,054 cases involving 5,116 attorneys (the Kiser Study).³ The Kiser Study defined an attorney error in settlement advisement to occur when the adjudicated outcome was the same or worse than the last offer made in the failed negotiation.⁴ Attorneys not trained in mediation made more errors, and the errors had a measurable economic impact on disputants, costing clients in the study more than \$1 billion overall.⁵ Although the Kiser Study did not link the errors to biases, Douglas Frenkel and James Stark believed that positional bias diminishes an attorney's ability to make reasonable litigation risk assessments, which can have a detrimental financial effect on clients.⁶ Incorporating EDI training as part of mediator training programs could expand the de-biasing effect of traditional mediation training.

Mediation Techniques Can Reduce Biases and Improve Lawyers' Professional Judgment

Inspired by the Kiser Study, Frenkel and Stark hypothesized that mediation training had a de-biasing effect on attorneys because attorneys trained in mediation had a better ability to "consider the opposite" than their counterparts.⁷ They found that attorney-mediators could better counsel their clients on when to settle because they were less influenced by the cognitive and motivational biases that affect lawyers in a representative capacity.⁸ Cognitive biases arise when the brain cannot process complex information in the face of uncertainty.⁹ Cognitive biases are universal to all humans, and unlike motivational biases, they are not necessarily self-serving or emotionally driven;

they are simply errors in judgment.¹⁰ Two examples are fundamental attribution error and confirmation bias.¹¹ Motivational biases arise when there is a desire to believe something because you have a stake in the outcome or ideological commitment that distorts your perception.¹² They tend to be emotionally charged, irrational, and self-serving.¹³ Examples include egocentric (self-serving or partisan) bias, anchor bias, and zero-sum bias. Without mediator training, attorneys are more prone to both cognitive and motivational biases.¹⁴

Frenkel and Stark believed that attorney training in mediation mitigated the effects of these common biases because many of these biases arise when there is an inability to view a dispute from multiple angles.¹⁵ Mediators often use role-reversal and perspective-taking techniques to assist the parties in moving from entrenched positions. Role-reversal interventions ask each party to step into the other's shoes and consider how the situation might look if viewed from the other side. Perspective-taking interventions assist parties in understanding the psychological viewpoint of the other side.¹⁶ Attorney-mediators who understand role-reversal and perspective-taking interventions are better able to assess the risk of not settling.

Role-Reversal and Perspective-Taking Techniques Reduce Bias

In 2019, Stark and Maxim Milyavsky published an empirical study that showed that role reversal prompts reduce cognitive biases more than motivational biases (the Stark Study).¹⁷ The Stark Study included 492 law student participants who were given the same personal injury case study and randomly assigned the roles of counsel for plaintiff or defendant. Half of the students were asked to identify the weaknesses in their case, and the other half were not. All participants

COMMON BIASES AFFECTING ATTORNEYS REPRESENTING CLIENTS*

TYPE OF BIAS	DESCRIPTION
Confirmation bias	A cognitive bias displayed by the tendency to interpret information in a way that is partial to preconceived expectations
Fundamental attribution error	A cognitive bias that arises in conflict and attributes hostile meanings to actions of a counterpart; the hostile meanings of actions are conflated with the person's character
Motivational bias	A strong desire, based on entrenched beliefs and internal goals and desires, to believe in something despite contrary evidence—the “irrational persistent belief effect”
Egocentric, self-serving, or partisan-role bias	A type of motivational bias characterized by overconfidence in decision-making abilities and overconfidence in predicting future outcomes with a tendency to view their perspective more favorably
Zero-sum bias	A type of motivational bias often encountered in negotiations when attorneys assume that there is no possibility of future gain
Anchoring bias	A type of motivational bias displayed by the tendency to weigh subsequent negotiation offers by the first—often unreasonable—offer

*See Frenkel and Stark, “Improving Lawyers’ Judgment: Is Mediation Training De-Biasing?,” 21 *Harv. Negot. L. Rev.* 1, 13–16 (2015). See also Stark and Milyavsky, “Towards a Better Understanding of Lawyers’ Judgmental Biases in Client Representation: The Role of Need for Cognitive Closure,” 59 *Wash. Univ. J. L. & Pol’y* 173, 180 (2019).

were asked to provide (1) their best guess of the amount of the judge’s award to the plaintiff and (2) irrespective of the judge’s award, what amount they would consider a fair out-of-court settlement for the plaintiff.¹⁸

The study found that the consider-the-opposite prompt (asking students to consider the weaknesses in the case) reduced cognitive bias in predicting court outcomes, but it did not reduce motivational bias in perceptions of fairness to the same extent. In other words, the parties’ assessments of fair value were far more susceptible to egocentric, self-serving, or partisan-role bias than were their predictions of the most likely litigated outcome.¹⁹ The Stark Study suggests that motivational biases are better reduced through perspective-taking techniques that are more nuanced than role-reversal techniques because they explore how the counterpart’s actions might have a different, more innocent, subjective explanation.²⁰ Mediators can employ perspective-taking interventions to generate better understanding between parties, and

EDI training can help mediators develop the cultural competency needed to successfully carry out these interventions.

EDI Training for Mediators Is Essential for the Perspective-Taking and Empathy Development Techniques That Reduce Bias

The Model Standards of Conduct for Mediators (Model Standards) require mediators to be culturally competent.²¹

Culture is a set of values, beliefs, and expected behaviors that guides the lives of a group’s members. It provides meaning and purpose, and organizes lives and experiences. Cultures develop as a means of solving problems that groups experience over time, and cultures are different because their problems and experiences have been different.²²

“Competency must be a fluid concept with the intent that, when undertaking a journey to cultural and societal competence, there is no end, only continuous, relentless effort and

progress.”²³ Mediators also “should not act with partiality or prejudice based on any participant’s personal characteristics, background, values and beliefs, or performance at a mediation, or any other reason.”²⁴ The Model Standards further suggest that mediators foster diversity and strive to make mediation accessible to all.²⁵ EDI training for mediators focuses on increasing cultural competence, raising awareness about bias, and removing barriers that may impede historically marginalized groups from equitably participating in the mediation process.²⁶ These factors improve mediators’ ability to effectively engage in perspective-taking and empathy-building mediation interventions, which are often necessary to provide a fair mediation process to diverse populations.

Perspective Taking and Perceptions of Fairness

To consider subjective perspectives of mediation participants, the mediator must be literate in EDI principles because these principles are

often central driving forces that influence decision making during conflict. Many of the psychological biases that can impede a mediation's success involve EDI factors.²⁷ Disputes are often intertwined with culture, and cultural knowledge is essential to competently assist parties in resolving their disputes.²⁸ Mediators must be able to respect the cultures of mediation participants.

In addition to developing cultural literacy, mediators must recognize that cultural and racial differences may affect the perception of fairness of the mediation process. When public institutions like the court system incorporate mediation services as part of the court process, mediators have a heightened obligation to ensure that the mediation process is free from embedded racism.²⁹ Ignoring cultural and racial differences during mediation increases the chance that the mediator will not be perceived as neutral to a non-majority participant. By minimizing the importance of racial and cultural differences, a mediator may be perceived as gaslighting participants into believing that they are imagining discrepancies that may arise from racial or cultural oppression during a mediation.³⁰ Mediators who approach a mediation as culture-blind are also at a greater risk of failing to recognize how their own implicit biases may affect the mediation process. These implicit biases “affect how the mediator hears and interprets a participant’s account—as well as what the mediator believes.”³¹

Improving mediator literacy in EDI can increase cultural competency and therefore improve mediation practice by making mediators more effective at perspective-taking interventions. Mediators are agents of change who “need to understand various strategic, structural, cultural, psychological and cognitive barriers to resolution, and [who need] to devise appropriate interventions for overcoming them when they are presented.”³² A quality mediation requires mutual understanding between all mediation participants, including the mediator.³³ Mediators who do not make concerted efforts to educate themselves on EDI principles may fail to develop the necessary mutual understanding and empathy required to conduct an impartial, fair process that promotes positive change.

Fostering Empathy

Effective mediators help participants develop empathy for one another. Empathy is a light emotional response that conveys compassion and understanding, differentiated from sympathy, which conveys a heightened emotional identification with another.³⁴ Empathy can be both emotional and cognitive. Emotional empathy occurs when “perceiving another’s behavior automatically activates one’s own representations for that behavior.”³⁵ Cognitive empathy occurs when “individuals can make cognitive deductions about other individuals’ emotions depending on the context.”³⁶ Empathy development assists mediators in generating movement toward settlement because it helps participants develop mutual understanding that removes biases.³⁷

Culturally competent mediators understand that we are all humans, and, as humans, we all have fundamental needs. Abraham Maslow’s hierarchy of needs is a motivational theory in psychology comprising five tiers of human needs that can assist with empathy development during mediation.³⁸ Maslow’s hierarchy of needs is a great starting point for new mediators who are learning how to identify underlying interests and motivations of mediation participants. At the base of the pyramid are psychological needs (survival); then, moving up the pyramid are safety and security, love and belonging, and self-esteem; and at the top is self-actualization (intellectual).³⁹ Psychological needs are defined as “biological requirements for human survival, e.g. air, food, drink, shelter, clothing, warmth, sex, and sleep.”⁴⁰ Maslow’s hierarchy explains why disputes involving housing and food insecurity (survival) and relationships with children and loved ones (affiliations) often invoke heightened emotional responses.

Emotions can be an asset to a mediation as much as they can be an obstacle.⁴¹ If mediators can identify the emotions motivating decision making at the mediation table, they place themselves in a better position to address or temper them, as needed, and are better able to help the parties to find a middle ground.⁴² Empathy can be developed by identifying and addressing the core concerns of the mediation participants.

Roger Fisher and Daniel Shapiro identified five core concerns that are important in every relationship: appreciation, affiliation, autonomy, status, and role.⁴³ They summarized how the five core concerns are either ignored or met as follows: (1) appreciation is met when your thoughts, feelings, and actions are acknowledged as having merit and ignored when your thoughts, feelings, or actions are undervalued; (2) affiliation is met when you are treated like a colleague and ignored when you are treated like an outsider; (3) autonomy is met when others respect your ability to make decisions and ignored when your ability to make decisions is limited; (4) status is met when you are given full recognition and ignored when you are given less recognition than you deserve; and (5) role is met when participation in your role’s activities is personally fulfilling and ignored when participation in your role’s activities is personally unfulfilling.⁴⁴

In mediation, when core concerns are not met, people react negatively. When any of these five concerns are not met, conflict results. “The power of the five core concerns comes from the fact that they can be used as both a lens to understand the emotional experience of each party and as a lever to stimulate positive emotions in yourself and in others.”⁴⁵ For example, when someone does not feel appreciated, they feel devalued. If a person’s affiliation is reduced or negatively affected, they begin to act like adversaries. When a person’s identity or culture is demeaned, it can trigger an emotional response.⁴⁶ The ability to recognize the emotional nuances within conflict increase the chances that a mediator will be able to remediate them and focus the parties on building rapport, encouraging positive emotions, and generating movement toward mutual understanding and, perhaps, settlement of the dispute.⁴⁷

Below is a sample dialogue between a mediator and a participant in a high-conflict custody dispute that illustrates how a mediator explores the core concerns to generate movement toward settlement. Imagine a father at one side of the mediation table and a mother at the other. This young couple shares a 4-year-old daughter. When the father is asked what his interests are, he answers that the most important thing to

him is to be a good father. His primary concerns include affiliation, status, and role. The father is frustrated and resentful and insists that he should not have to pay his ex-wife a dime since she comes from a wealthy family. He says that even if the court orders him to pay maintenance, he will not pay. The mediator needs to acknowledge the financial inequities that exist before getting the father to see the dispute from a different perspective.

Mediator: *I understand that you believe it is unfair for you to pay child support when your ex-wife has family wealth that may provide her a financial safety net—is that correct?*

Father: *Yes, that is exactly how I feel.*

Mediator: *I would like to focus on your relationship with your daughter. You said earlier that you wanted to be a good father to her. What does it look like to be a good father to your daughter?*

Father: *To me, a good father is present for his daughter, attends her school activities, has a room for her in his home, helps with her homework, teaches her to drive, and even helps purchase her first car.*

Mediator: *What might happen if you refuse to make child support payments?*

Father: *My attorney told me that the court could garnish my wages, and that I could be held in contempt of court.*

Mediator: *How would a court judgment affect your credit score and your ability to buy the residence that you envision enjoying with your daughter?*

Father: *I suppose a judgment could reduce my credit score and make it harder for me to move into a larger residence.*

Mediator: *How else would nonpayment negatively affect your ability to purchase a car, get a job, help with tuition, or assist with other needs your daughter may have in the future?*

Father: *I appreciate you asking me these questions so I can see it from this perspective. I had not thought about those implications.*

Mediators routinely disrupt conflict by exploring core concerns and finding common ground. They can do this by asking questions that model empathy and prompt the parties to

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demonstrate empathy for one another. In the example above, the father’s emotions were preventing him from protecting his primary concerns: the relationship with his daughter, his status as a parent, and his role as a father. This example illustrates how mediators can identify and address core concerns through carefully constructed questions based on interests that can help parties recognize when emotions are preventing them from accomplishing their ultimate goals.

Often, finding common ground or mutual understanding amounts to the parties sharing the *feeling* of a particular emotion. This is where empathy becomes critical. Empathy does not require us to have experienced the same situation; it asks us to connect to the emotion that another person is experiencing.⁴⁸ In *Dare to Lead*, Dr. Brown points out that empathy requires us to recall or reflect on feelings that are uncomfortable.⁴⁹ A mediator can employ empathy as a tool to help the parties relate

to one another. If the parties feel emotionally connected, they may feel more comfortable being candid and vulnerable and begin to trust the process. Trust develops when parties find commonalities and feel that the other party has made an effort to understand them.⁵⁰

Mediators must address various biases in negotiations to help the parties feel empathy and understand each other’s core concerns.⁵¹ The de-biasing effect that comes from developing EDI literacy may help mediators mitigate the effect of party biases that stem from individual and societal identities. A mediator who demonstrates an understanding of EDI principles is more likely to gain the trust and respect of the parties involved and help them find solutions to their problems.⁵²

Recognizing Implicit Biases Is the First Step in EDI Education

EDI education may entail a myriad of experiences that are different for everyone, but for most people, it begins with introspection into one’s own biases. In the words of Don Miguel Ruiz, “awareness is always the first step because if you are not aware there is nothing you can change.”⁵³ When people examine their own social circles, they often observe distinct similarities in physical resemblance, backgrounds, and ideologies of those with whom they regularly interact. People tend to attract people who are physically similar to them and who think like them.⁵⁴ Finding similarity “increases the chance for a stable, suitable environment, which can promote well-being.”⁵⁵ Similarity affects relationship development, self-disclosure, trust, and reciprocity.⁵⁶ Our natural predisposition to search for similarity can also have the negative effect of forming unconscious or implicit biases.

Implicit bias is a human phenomenon that “may be defined as positive or negative attitudes or stereotypes that affect our understanding, actions, and decisions in an unconscious manner, as compared to explicit bias, defined as self-reported, conscious bias or prejudice.”⁵⁷ We all experience implicit bias, which is thought to be shaped by experience and based on learned associations between particular qualities and social categories, including race and gender.⁵⁸ Our lived experiences provide our brains with

information, and that information is naturally categorized, catalogued, condensed, and regurgitated so our brains can process incredible amounts of data. Human brains generate stereotypes and make assumptions in milliseconds as a way of processing the world around us.⁵⁹ Individuals' perceptions and behaviors can be influenced by the implicit biases they hold, even if they are unaware that they hold such biases. Psychologists note that people of all backgrounds deny that they have implicit biases, yet broad patterns of discrimination exist in real-world systems such as healthcare, finance, and access to justice.⁶⁰

Although our biases affect all aspects of our lives, mediators have a duty to facilitate a mediation process free from bias. Mediators who are educated in EDI are better equipped to recognize their own biases. This self-awareness is crucial to maintaining impartiality and ensuring that personal biases do not affect the mediation process.⁶¹ "By challenging ourselves to identify and overcome our own implicit biases, and to help others recognize their biases, we can begin to lay the foundation for harmonious and productive work and personal environments."⁶² Likewise, challenging mediators to overcome their own implicit biases will lay the foundation for more productive mediations.

When a mediator explores their own assumptions and biases and is curious about how they are affected by unconscious bias, they are better able to identify and uncover the parties' underlying needs and interests, many of which will have an EDI component. The continuous practice of reflecting upon one's own unconscious biases organically develops an awareness of the importance of modeling and cultivating empathy between parties at odds. EDI education will assist mediators in identifying and reducing the effects of bias at the mediation table and simultaneously "promote public confidence in mediation as a process for resolving disputes."⁶³

EDI Training Can Expand Mediation's Reach


EDI training gives mediators additional tools that can help parties from different backgrounds

find similarity necessary to build trust and increase the chance of settlement. The way people think is shaped by their experiences, by the information they gather, and through language and the humanities—in other words, culture.⁶⁴ EDI training can promote cultural humility (acknowledging that we do not know everything about everyone) at the mediation table. Mediators aspire to expand the accessibility of mediation and alternative dispute resolution services as a way of increasing access to justice. This increase will naturally diversify the population of individuals who benefit from conflict management professionals. By exercising cultural humility and promoting understanding despite differences, mediators can reduce interpersonal conflict, aid in trust-building, and promote self-determination.⁶⁵ Participants all have unmet needs at the center of their disputes. Mediators are charged with uncovering those needs and exploring whether they can be met through creative solutions. This requires competency in EDI principles.

Mediators trained in EDI are better equipped to communicate across cultural and identity differences. With EDI training, mediators can better facilitate productive conversations that are respectful of the differences of the populations they serve. When parties feel heard, feel like they have been treated with dignity and respect, and feel like they have been treated fairly, they tend to view the mediation process as fair, and they tend to view the mediation outcomes as fair.⁶⁶ EDI training will increase perceptions of mediation as a fair and legitimate dispute resolution process. As we promote the

advancement of mediation as a profession, mediators should be mindful that we also have an ethical duty to promote diversity within the profession.⁶⁷ Advancement of the practice of mediation includes "[f]ostering diversity in the mediation field."⁶⁸ This will naturally promote public confidence in our profession, increase access to justice, and expand the use of mediation by underserved communities.

Conclusion

EDI training makes better mediators and improves the mediation process for all participants. Applying EDI principles to the mediation process increases cultural awareness, improves the mediator's ability to recognize implicit biases, and helps the mediator foster empathy among the parties. These factors promote effective perspective-taking techniques and increase party perceptions of self-determination and process fairness, thereby promoting mediation as a legitimate venue to pursue justice. Mediators routinely mediate conflict rife with discrimination, harassment, or other equity-related issues. By employing empathy along with EDI education, mediators are better equipped to ensure that agreements reached in mediation do not perpetuate existing inequalities. Education in EDI enhances a mediator's ability to remain neutral. The de-biasing effects of EDI training, mediation training, and the effective use of empathy allow mediators to be sensitive to issues related to bias, power, and identity. Ultimately, this will lead to more effective and equitable outcomes and a profession that is viewed as legitimate and valued by its consumers. 



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NOTES

1. See, e.g., American Arbitration Association et al., *Model Standards of Conduct for Mediators* (Model Standards) Standard II(B)(1) and IV(A)(1) (2005).
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4. *Id.* at 553.
5. *Id.* at 566–67.
6. *Id.*
7. Frenkel and Stark, *supra* note 2 at 7.
8. *Id.* at 8.
9. *Id.*
10. Korteling et al., “Cognitive Bias and How to Improve Sustainable Decision Making,” 14 *Front. Psychol.* 1, 2 (Feb. 2023), <https://www.frontiersin.org/journals/psychology/articles/10.3389/fpsyg.2023.1129835/full>.
11. *Id.* at 2.
12. Frenkel and Stark, *supra* note 2 at 9.
13. Fisher and Shapiro, *Beyond Reason: Using Emotions as You Negotiate* 15–19 (Penguin 2005); Frenkel and Stark, *supra* note 2 at 9.
14. Frenkel and Stark, *supra* note 2 at 9–17.
15. *Id.* at 45.
16. *Id.* at 20.
17. Stark and Milyavsky, “Towards a Better Understanding of Lawyers’ Judgmental Biases in Client Representation: The Role of Need for Cognitive Closure,” 59 *Wash. Univ. J. L. & Pol’y* 173, 180 (2019) (“Motivational biases are judgmental distortions caused by a person’s desire to *believe* in something, whether because of ego investment, ideological commitment, or a stake in the outcome.”).
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19. *Id.* at 195.
20. *Id.* at 208.
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24. Model Standard II(B)(1).
25. See Model Standard IX (A)(1)–(2).
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30. *Id.* at 465.
31. *Id.* at 472–73.
32. Frenkel and Stark, *supra* note 2 at 18.
33. Model Standard VI(A).
34. Douglas, “Ethics in Mediation: Centralising Relationships of Trust,” 35 *Law Context: A Socio-Legal J.* 44, 55 (2017).
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36. *Id.*
37. See *id.* at 278 (“[W]hen mediators gave more attention to disputants’ emotions, relationships, and sources of conflict, settlement could be more likely.”).
38. Taormina and Gao, “Maslow and the Motivation Hierarchy: Measuring the Satisfaction of the Needs,” 126 *Am. J. of Psych.* 155, 156 (Summer 2013).
39. *Id.*
40. *Id.*
41. Fisher and Shapiro, *supra* note 13 at 4–7.
42. *Id.* at 8–14.
43. *Id.* at 17.
44. *Id.* at 17.
45. *Id.* at 18.
46. Francis, *supra* note 28 at 196.
47. Fisher and Shapiro, *supra* note 13 at 152–54.
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49. *Id.* at 142.
50. Reece, *supra* note 23 at 790–91.
51. Frenkel and Stark, *supra* note 2 at 13–16.
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56. *Id.* at 341.
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59. Fisher and Shapiro, *supra* note 13 at 18.
60. See Banaji et al., “Systemic Racism: Individuals and Interactions, Institutions and Society,” 82(6) *Cognitive Rsch.: Principles and Implications* 3, 8–10 (2021).
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64. Francis, *supra* note 28 at 181–84.
65. *Id.* at 209–13.
66. See Welsh, “Perceptions of Fairness in Negotiation,” 87 *Marq. L. Rev.* 753, 761–64 (2003–04).
67. See Model Standard IX(A)(1).
68. *Id.*