

EMPLOYMENT MEDIATION

HARNESSING POWERFUL MOMENTS FOR RESOLUTION

Phyllis W. Cheng | John B. Golper | Cynthia S. Sandoval

U.S. District Court, Central District of California, Advanced Mediation Training | June 22, 2023

THE SPEAKERS



[Phyllis W. Cheng](#)



[John B. Golper](#)



[Cynthia S. Sandoval](#)

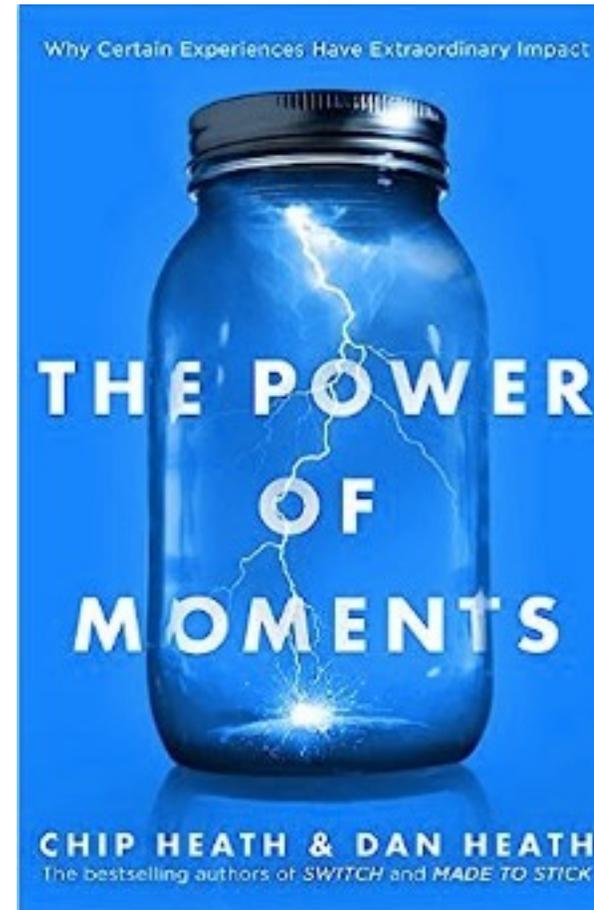


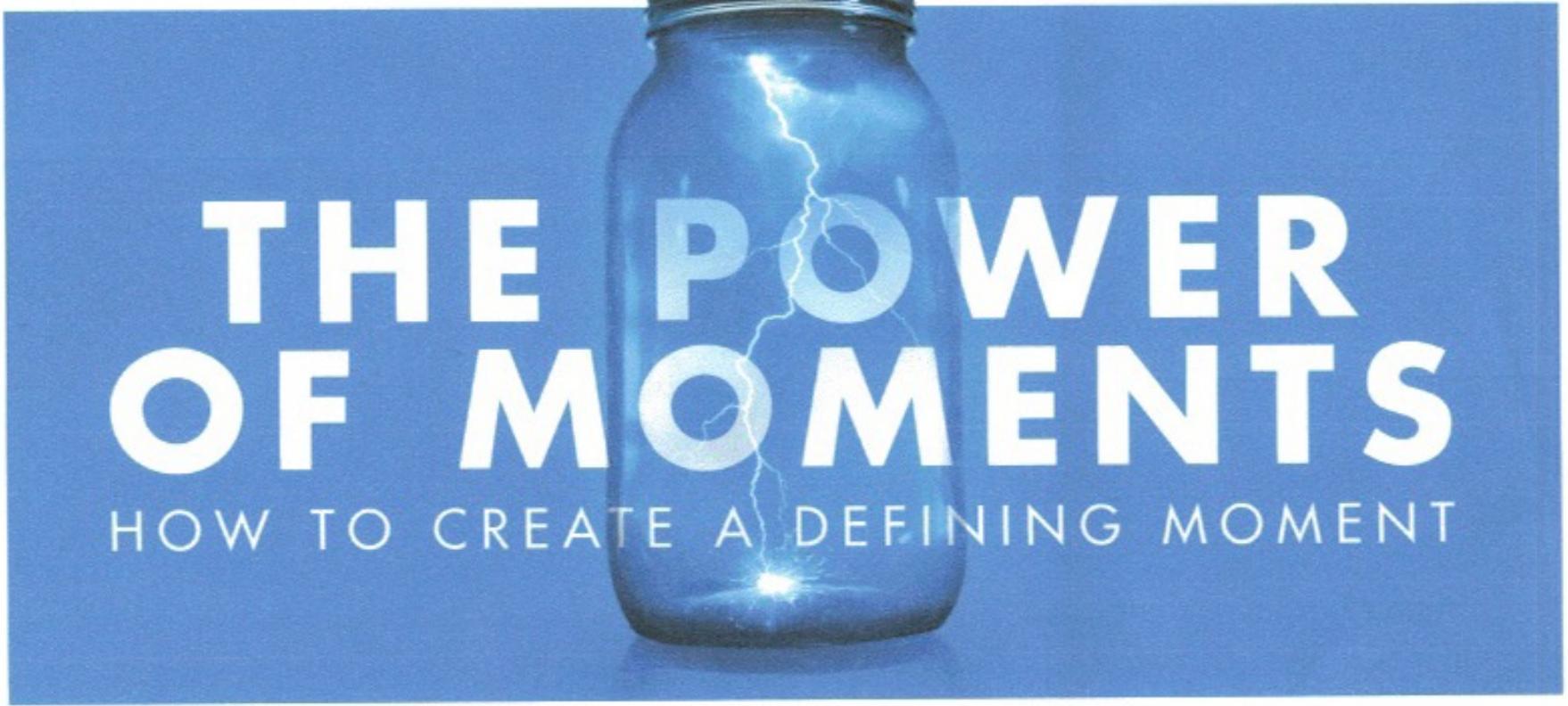
OVERVIEW

The Power Of Moments: Why Certain Experiences Have Extraordinary Impact

by Chip Heath and Dan Heath

- Why we tend to remember the best or worst moment of an experience, as well as the last moment, and forget the rest.
- Why “we feel most comfortable when things are certain, but we feel most alive when they’re not.”
- Why our most cherished memories are clustered into a brief period.





We all work to improve the experience of the people we care about: the patients we treat, the customers we serve, the students we teach, and the kids we raise. We want to create memories that matter.

Great experiences hinge on peak moments. We'll call them "defining moments": short experiences that are both meaningful and memorable.

WE CAN BE THE AUTHORS OF DEFINING MOMENTS BY BUILDING THEM FROM ONE OR MORE OF THE FOLLOWING FOUR ELEMENTS:

<https://heathbrothers.com/member-content/power-moments-1-page-summary-epic/>

Reprinted with permission of Dan Heath.

ELEVATION

Moments of elevation are experiences that rise above the routine. They make us feel engaged, joyful, surprised, motivated. To create them, we can (1) boost the sensory appeal (*Popsicle Hotline*); (2) raise the stakes (*The Trial of Human Nature*); and/or (3) break the script (*Joshie the Giraffe*). Research suggests that organizations dramatically under-invest in building peaks, choosing instead to fill potholes.

PRIDE

Moments of pride commemorate people's achievements. We can use three strategies to deliver pride: (1) Recognize others. A small investment of effort yields a huge reward for the recipient (middle school singer Kira Sloop); (2) Multiply meaningful milestones—reframe a long journey so that it features multiple “finish lines.” (*Couch to 5K program*); and (3) Practice courage by “preloading” our responses in advance, so we're ready when the right moment comes. (*Nashville counter sit-ins*)

INSIGHT

Moments of insight deliver realizations and transformations. To produce moments of insight for others, we can cause them to “trip over the truth” (*the shocking CLTS story*) by revealing (1) a clear insight; (2) compressed in time; and (3) discovered by the audience. To produce moments of self-insight, we must stretch, placing ourselves in situations that involve the risk of failure (*Lea Chadwell's Bakery*).

CONNECTION

Moments of connection bond us together. Groups unite when they struggle together toward a meaningful goal; they often begin their work with a “synchronized moment” (*Sharp HealthCare*). In individual relationships, it's responsiveness that deepens our ties. A responsive interaction can bring people together very quickly (*Stanton's teacher/parent meetings; Art Aron's 36 questions*).

<https://heathbrothers.com/member-content/power-moments-1-page-summary-epic/>

Reprinted with permission of Dan Heath.



MOMENTS OF ELEVATION

ELEVATE BEYOND EVERYDAY EXPERIENCE

Elevation: Self-actualizing people are capable of experiencing “transcendent” moments, or moments elevated above the everyday experience that create a sense of delight, wonder, and surprise.

EXAMPLE 1: MOMENT OF ELEVATION

TRADE SECRETS, SEX DISCRIMINATION, RIGHT OF PUBLICITY

Action by company alleging that its founder, chairperson of its board of directors, and former CEO breached her employment contract, violated trade secrets, breached her duty of loyalty, and breached payment of her promissory note.

Founder counterclaimed alleging that company discriminated against her on the basis of gender, failed to prevent sex discrimination, retaliated against her after she complained, wrongfully terminated her in violation of public policy, violated her right of publicity, and misappropriated her name and likeness.



EXAMPLE 2: MOMENT OF ELEVATION

RACE DISCRIMINATION

Appeal by general manager after the trial court sustained demurrers on various counts and removed co-defendants on his race discrimination in employment action.

General manager alleged that his former employer, a production company, violated the FEHA by discriminating against him on the basis of race, retaliated against him after he filed his DFEH complaints, breached his employment contract, and wrongfully terminated him in violation of public policy.

Employer denied the charges, alleging that general manager had bullied employees in violation of company policy, and that customers had complained about his performance.





MOMENTS OF PRIDE

VALIDATE ACHIEVEMENT AND PRIDE IN CAREER OR ENTERPRISE

Pride: Pride is the core of the esteem tier of the hierarchy. Pride helps you feel achievement and respect and increases your sense of self-worth.

EXAMPLE 1: MOMENT OF PRIDE

PREGNANCY & CFRA LEAVES

Plaintiff worked for defendant as an assistant manager for a casual counter service restaurant. Plaintiff had no performance issues and worked significant overtime.

Defendant experienced high turnover in its manager position which resulted in a lack of continuity and shared institutional and employee knowledge.

Plaintiff became pregnant and took pregnancy leave prior to her delivery. During her leave, plaintiff kept her managers (which changed during her leave) informed of the status of her leave and requested additional time off.

Plaintiff believed her managers passed on the information to human resources.

When plaintiff was ready to return to work, defendant informed her that her employment had been terminated due to her failure to return to work.



EXAMPLE 2: MOMENT OF PRIDE

MISCLASSIFICATION | WAGE & HOUR

This involved two separate lawsuits brought by two plaintiff professors against the same defendant, an accredited online academic institution known for computer science and business management courses.

Both professors separately raised complaints over the number of hours they were working and raised issues about their exempt status. After each professor complained, the university separately refused to offer them future teaching assignment contracts and essentially terminated them from future contracts.

With one of the professors, the university president wrote that due to the professor's clear unhappiness with the pay structure, it was best to terminate the professors' services. The university claimed the other professor had been teaching classes no longer in demand by students and that she was not qualified to teach the intense computer science now in high demand.

The professors each filed claims that disputed their exempt status and sought damages for unpaid wages and overtime under state and federal laws and various statutory penalty provision. They also claimed retaliatory termination in violation of public policy and statute.

Both professors alleged they had well-recognized reputations and had received accolades from their students and one had even been recognized as teacher of the year twice.





MOMENTS OF INSIGHT

DISCOVER A NEW, TRANSFORMATIVE AND INFLUENTIAL VISION

Insight: Insight is the core of the self-actualization tier of the hierarchy. Insight leads to personal growth, discovery, and a realization of your potential.

EXAMPLE 1: MOMENT OF INSIGHT

DISABILITY DISCRIMINATION

Single plaintiff disability discrimination case.

Shortly after plaintiff was hired, a new supervisor stepped in overseeing plaintiff's work. Plaintiff and the new supervisor did not get along. Plaintiff complained to the CEO that the new supervisor was bullying and belittling her and that this conduct was triggering her anxiety and affecting her mental health.

During this same time period, plaintiff experienced performance issues. Ultimately, plaintiff took a leave of absence which she alleged was due to disability harassment.

Defendant terminated plaintiff's employment when she returned to work.



EXAMPLE 2: MOMENT OF INSIGHT

PENSION PLAN | ERISA & LMRA

Plaintiff was the health and welfare pension plan trust of one of the guilds in the movie industry.

Defendants were several different multinational production companies, which co-produced an acclaimed movie.

The lawsuit was brought pursuant to ERISA and the LMRA alleging unpaid residual contributions based on gross receipts when the movie moved to supplemental markets (cable TV, streaming services, etc.).

The amount claimed in unpaid contributions had been determined by one of the major industry forensic accounting firms.

The lawsuit involved disputes over the licensing agreements and “minimum guarantees” set forth in a prior settlement agreement.

The lawsuit had major implications impacting future industry-wide collective bargaining agreements.



The top half of the slide features a dark blue background with several bright, jagged lightning bolts striking downwards. The text is centered over this background.

MOMENTS OF CONNECTION

CONNECT MORE DEEPLY AND STRENGTHEN RELATIONSHIP

Connection: Connection is the core of the belonging tier of the hierarchy. As we'll discuss, connection can strengthen your bonds with groups or in personal relationships.

EXAMPLE 1: MOMENT OF CONNECTION

ASSOCIATIONAL DISABILITY DISCRIMINATION

Individual disability, race and sexual orientation discrimination claim.

Plaintiff was hired as a recruiter. When the pandemic hit, plaintiff began working from home. Upon being asked to return to work, along with other employees, plaintiff requested an accommodation of continuing to work from home as an accommodation due to his minor child's disability.

The defendant accommodated plaintiff's request.

Plaintiff began experiencing performance issues and expressed his desire to change positions. Defendant moved plaintiff to a human resources representative position.

Ultimately, plaintiff went on a leave of absence and was terminated for failing to return to work.



EXAMPLE 2: MOMENT OF CONNECTION

THIRD-PARTY SEXUAL HARASSMENT

Plaintiff worked as a technician for a well known disaster relief organization. She claimed she had been sexually harassed (touching as well as verbal and leers) by a generous donor who often came to the facility at which she worked to make his donations. She had alerted her supervisors to the claimed misconduct and alleged nothing was done to counsel the donor or prevent its recurrence. She alleged significant emotional distress damages and claimed she was was traumatized by the experiences which cause long-term injuries.

Plaintiff ultimately brought suit against the organization and also against the individual defendant. The organization was represented at the mediation by a major firm.

The individual defendant donor was represented by a law firm hired by his homeowner insurance company, which was defending under a reservation of rights. The carrier had also brought a separate lawsuit against its insured for declaratory relief arguing intentional torts were not covered.

Unbeknownst to the mediator, the coverage counsel for the carrier in its declaratory relief lawsuit had been forwarded the Zoom invitation by the lawyer representing the individual defendant in the primary case. Counsel just showed up at the mediation wanting to be admitted and to participate.



EMPLOYMENT MEDIATION

HARNESSING POWERFUL MOMENTS FOR RESOLUTION

THANK YOU

Phyllis W. Cheng, Esq.
ADR Services, Inc.
915 Wilshire Blvd., Suite 1900
Los Angeles, CA 90017
213.683.1600
haward@adrservices.com
www.adrservices.com

John B. Golper, Esq.
Ballard Rosenberg Golper & Savitt, LLP
15760 Ventura Blvd., 18th Floor
Encino, CA 91436
818.508.3700
JGolper@brgslaw.com
www.brgslaw.com

Cynthia S. Sandoval, Esq.
Ares Law Group, P.C.
23 Corporate Plaza, Suite 150G
Newport Beach, CA 92660
949.629.2519
cynthia@areslawgroup.com
www.areslawgroup.com