

State of the Art: Negotiation & Mediation



Welcome to the Session!

8:30 – 10:00 a.m.

Topics:

**Strategies for engaging opposing counsel in direct
and facilitated negotiations.**

How to handle difficult negotiations.

**Is there anything to negotiation beyond tactics
and strategies?**

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‘Win As Much as You Can’

Step 1 - find a playmate

Step 2 - decide your play

Step 3 - play and reveal

Step 4 – score

(Two X’s lose 1 pt. each)

(Two Y’s win 1 pt. each)

(One X and One Y – X wins 1 pt. Y loses 3 pts.)

Step 5 – listen for further instructions

*adapted from Gerald R. Williams, Legal Negotiation and Settlement 1983

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Two competitive negotiators meet:

“You” inclusive = -12

“You” exclusive -6 and -6

A competitive negotiator meets a cooperative negotiator:

“You” inclusive = -12

“You” exclusive 6 and -18

Two cooperative negotiators meet:

“You” inclusive = +12

“You” exclusive 6 and 6

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Case Evaluation Tools

the Paradigm

decision trees

heuristics / protocols

negotiating planning

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A Paradigm for Judicial Assessment of Reasonableness of Settlement

Refer to Judge's Handout

- **FACTS**

Are the facts undisputed?

Is there an obvious victim or offender?

Were the acts intentional?

Is there a pattern of behavior?

- **CREDIBILITY**

Is the claim/defense feasible in view of the facts?

Is it believable?

Is the claim/defense singular?

Have the pl's/def's statements been consistent?

Is the claim/defense corroborated?

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- **RELIABILITY**

Is the pl/def known to be honest and truthful?

What is the historical relationship between the parties?

Are the wrongdoing and the injuries parallel?

Are the injuries and the damages parallel?

- **SYMPATHY**

How familiar is any juror with the wrongdoing, the injuries, or the damages?

Are the parties on parity?

Are the injuries life-altering?

Does the plaintiff evoke pity?

Are the losses out-of-pocket?

- RENEWABILITY

Can the verdict undo the injury?

Could the pl/def be transformed by a favorable verdict?

Could a favorable verdict be enduring beyond this case?

Caveat:

The Paradigm for Judicial Assessment of Reasonableness of Settlement is designed to assist lawyers in screening cases before mediation. It is not designed, and should not be used, as a format for pre-trying the substantive issues or assigning liability. Rather, the paradigm is an instrument for negotiation of the process, to facilitate negotiation of the claims; the success of the former is critical to the achievement of the latter.

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Read aloud the phrases in each triangle.

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How many words are in each triangle?

Is this the same number of words you said aloud?



Many people do not notice the extra article until it is pointed out to them.

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connect. explore. energize.

Memorize as many as possible:

Bed

Stars

Wake

Nap

Night

Caffeine

Slippers

Toss

R.E.M.

Milk

Rest

Blanket

Dreams

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**Write down as many as you
can without looking back.**

Hint: 13 words on the list

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Does your list include the word “SLEEP”?

This exercise reveals whether you are a “big picture” or “detail”
thinker.

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The preceding two exercises help explain how both sides in a mediation can be telling the truth to the mediator when one says “we never said that” and other says “yes they did!”

Further exploration usually confirms the misunderstanding.

However, even if one party concedes that the specific words at issue were never used, and the other acknowledges that they see how it was possible that the other came to that conclusion, their future negotiations are often plagued by mutual mistrust and concerns of bad-faith. Although well documented as a common cognitive bias, to the specific negotiators involved, it somehow still “feels” deliberate.

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If you did not see the extra words in each triangle in the first exercise and you included sleep on your list in the second exercise, and vice versa, you now know that honest misunderstandings are likely to occur. Slow down!

If you don't know how their "mind works" or if your counterpart is a linear rather than a conceptual thinker (and vice versa), you must protect your negotiation by confirming and reconfirming the messages you intend to communicate to you counterpart and by doing the same for your understanding of what has been communicated to you by your counterpart.

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Theory / Style / Strategy

- Theory: positional $\leftarrow \rightarrow$ principled;
distributive $\leftarrow \rightarrow$ integrative.
- Style: competitive; collaborative;
avoidant, or accommodating.
- Strategy: = behavior and technique
(start high, stay high approach; agreement in principle approach; bargaining zone approach).

Part II - Hard Bargaining

Distributive Approaches

+

Competitive Styles

+

Tactics and Strategies

refer to Marc's and Mike's handouts

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Tit For Tat—A Rap

Tit for tat, tit for tat, tit for tat

If you negotiate with a competitive cat

The studies all say if you want to get Phat

You can't do better than Tit For Tat

When you're bargaining with the defense crew

You'll sure find out that they just like you

- *We ask no quarter and we give you none*

But your client calls and it ain't no fun

I GOT BILLS TO PAY AND A SHORTY TO FEED

CASH RIGHT NOW IS WHAT I REALLY NEEDED

I'm doing what I can but I'm sorry, honey

The tightwad defendant has all the money.

Parts:

Mediator

Employee Lawyer

Defense Lawyer

CLIENT

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You want to make a deal and make it quick

- **But what bargaining strategy will do the trick?**

Tit For Tat is what it's called

Cafarelli says it's like training a dog

You start with a move conciliatory

If they reciprocate, it's a happy story

- *You gave me a Y, so I'll give one to you*
This case is bad news, what else can I do?

But most of the time it's not like that

- *Giving you X's goes with this black hat*

So when he gives you an X move don't you quaver

Retaliate and return the favor

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Here's an X in your face, how 'bout that?
I'm as tough as you and I'll just stand pat
I'll do the same over and over

- *These billings are going to keep me in clover*
 - I'm happy to give you X's all day
But the case will never settle this way.
How do I get this game off the dime?

You forgive them about every third time.
But you got to be clear and leave no doubt
Make sure they get it if you have to shout

I'm makin' a big move, that's a fact
But you won't get more unless you give it back
Suppose he goes X against my Y?

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Retaliate again, it's worth a try
Then forgive again later to get them in the mood
To give you a Y move and not be rude

- **This means I'm giving more than I'm getting**

But you'll make a deal in the end is what I'm betting

It's not about whether you lose or win

It's all about the Benjamins!

Tit for tat, tit for tat, tit for tat

When you negotiate with a competitive cat

The studies all say if you want to get phat

You can't do better than tit for tat!

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Part III – Problem Solving

Integrative Approaches

+

Cooperative Styles

+

Tactics and Strategies

refer to Michelle's handout

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**Negotiation is essentially a conversation
with another for the purpose of gaining
mutual understanding or reaching
agreement.**

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Mediation is an assisted conversation.

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**The ability to be a successful conversationalist
rests on a combination of analytical and
interpersonal skills.**

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Analysis is important because:

A conversationalist cannot develop promising strategies without a deep understanding of the context of the situation, the interests of the other parties, and the range of possible moves and countermoves.

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Interpersonal skills are important because:

**A conversation is a process of mutual persuasion
through trust building or trust breaking.**

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connect. explore. energize.

When the conversation results in a mutual agreement or an understanding, how do you (or the parties you are assisting) know it's a good result?

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- **The needs of the client are met.**
- **It is the best practicable combination of choices.**
- **The alternatives are not as desirable.**
- **It will withstand scrutiny.**
- **Resources have not been wasted.**
- **Appropriate relationships are formed.**
- **The commitments made can and will be honored.**

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**Now we know where we are going; how do we
get there?**

- Analytical Tools
- Interpersonal Skills

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* From Fisher and Ury "Getting to Yes" 1983

Analytical Tools

- 1. Interests**
- 2. Options**
- 3. Alternatives**
- 4. Legitimacy**
- 5. Communication**
- 6. Relationship**
- 7. Commitment**

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AKA

- 1. needs**
- 2. choices**
- 3. possible outcomes**
- 4. consistent with objective standards**
- 5. being understood**
- 6. connections strengthened, maintained
or severed**
- 7. willingness and ability**

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* From Lowry and Robinson - Pepperdine 1994

S.T.A.R. (Stage, Task, Action, Result)

- 1. Convening**
- 2. Opening**
- 3. Communication**
- 4. Negotiation**
- 5. Closure**

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Adapted from Col. John Boyd's OODA Loop
(observe, orient, decide, act and do it again)

S.T.E.P. I.N.

Shape the Environment for Risk

Trade Knowledge for Instinct

Examine Uncertainty

Paint a Canvas Creatively

Illuminate the Landscape

Nurture Synergy

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Interpersonal Skills

The most important skill in negotiation is listening.

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Interpersonal Skills

**The next most important skill in negotiation is
questioning.**

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Active Listening:

- **Reflecting** – Choose a key word / phrase and use it in your response.
- **Validation** – Demonstrate respect for the speaker’s point of view.
- **Reframing** – Restate the speaker’s position in neutral language.
- **Showing Empathy** – Share in the speaker’s thoughts and feelings.
- **Summarize** – Confirm the message received and your understanding.

Effective Questioning

- **Legitimate** – to gather necessary information.
to understand the circumstances.
to understand consequences.
to provide direction to the conversation.
to explore possibilities.
to send transition signals.

Effective Questioning

- **Illegitimate – to attack.**
to irritate.
to shut down the conversation.

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Is Conflict Good or Bad?

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What's Your Style?

Do you tend to be cooperative or assertive?

Lets find out.

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Conflict Management Styles

- Avoidance
- Accommodation
- Compromise
- Competitive
- Collaborative

Appropriate Uses of Each Style

- Avoidance – unimportant issue / others should be taking responsibility
- Accommodation – pick your battles / consequence v. benefit / compassion
- Compromise – equal power situations / horse trade preserves relationship
- Competitive - means-end / relationship costs / supreme importance
- Collaboration - long term / planning / multiple groups involved

How Does Conflict Become a Dispute?

- Identification
- Assignment
- Confrontation
- Dispute

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You have a dispute. Congratulations!

Now what?

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**Can you control how
your counterpart
engages you in the dispute?**

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Adapted from: Ury – “Getting Past No” 1995

Difficult People / Hostile Starts

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Three Common Behaviors

1. Stonewalling

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Three Common Behaviors

2. Attacks

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Three Common Behaviors

3. Tricks

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Common Reactions

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Three Common Reactions

1. Act Difficult

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Three Common Reactions

2. Give In

Three Common Reactions

3. Break Off

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Why Don't People Want to Cooperate?

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Four Common Motivations Underlying a Decision Not to Cooperate

1. They are afraid.

Four Common Motivations Underlying a Decision Not to Cooperate

2. They don't know better.

Four Common Motivations Underlying a Decision Not to Cooperate

3. They don't see what's in it for them.

Four Common Motivations Underlying a Decision Not to Cooperate

4. They think they can win.

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How Can You Break Through Resistance?

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Breaking Through Resistance

1. Avoid Reacting

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Breaking Through Resistance

2. Diffuse Fears

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Breaking Through Resistance

3. Educate

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Breaking Through Resistance

4. Entice

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Breaking Through Resistance

5. Impress

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It Didn't Work, Now What?

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Adapted from Ury, 2007

The Power of a Positive ‘No’

- Use a positive no when you need to assert and defend your key interests; show strength; resist aggression and manipulation; and still eventually getting to Yes.
- Three steps: Yes to some conceptual aspect of the proposal, no to proposal, and yes to still working toward an agreement that meets both parties interests.