Like a football game, even when you’ve advanced the ball with relative ease, there comes a point in every mediation where neither side can or will make another move – a classic “goal line stance.” Facilitating negotiations after the parties reach a stalemate takes special skills and techniques. This program takes a look at settlement building and impasse breaking techniques that work.

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5 minutes
Experience: More than 25 years as an AV rated litigation lawyer with experience in complex business disputes involving multiple parties. Mediator in over 500 mediations conducted since 1995. Has spent over 20 years working in the field of insolvency and restructuring, and has had extensive experience with the purchase and sale of assets out of bankruptcy and the settlement of disputes against a backdrop. Due to the nature of practice, has encountered a broad cross-section of businesses and industries, including automobile dealerships, commercial lending, commercial real estate, healthcare (hospital and physician providers), hotels, inheritance, insurance, intellectual property, law firms and partnerships, various types of manufacturing, real estate bonding and insurance, residential real estate, trust administration and workplace issues.


Education: University of Southern California (BA, Psychology, cum laude-1974); University of California at Berkeley (JD-1982); Pepperdine University, School of Law, Straus Institute (LLM in Alternative Dispute Resolution-2007).
Faculty & Staff

Faculty

Lynne Stern

New Orleans, LA

After serving as a law clerk to the Honorable Frederick J.R. Heebe of the United States District Court for the Eastern District of Louisiana, Ms. Stern was an associate and later a partner in the law firm of Nelson, Nelson, Garetson, Lombard and Stern. She was engaged in federal litigation with an emphasis on racial and sexual job discrimination. Ms. Stern has been a part-time associate with Phelps, Dunbar, Marks, Claverie and Sims and the Louisiana World Exposition. She has served as a consultant for other attorneys in various areas of federal litigation including Title VII and flood insurance. Ms. Stern was admitted to the Louisiana Bar in 1971 and is admitted to practice in the Eastern District of Louisiana and the Fifth Circuit. From 2009 to 2010 she was Of Counsel with Frilot, LLC.

Ms. Stern has been a mediator and arbitrator since 1993. Her mediation experience includes numerous multi-party cases as well as sexual harassment, employment discrimination, commercial and personal injury matters. She is on the approved list of mediators for Orleans Parish Civil District Court, the Louisiana Register of Mediators, Equal Employment Opportunity Commission, Resolute Systems and American Arbitration Association (AAA). She is on the arbitration panels for FINRA and AAA. Ms. Stern has arbitrated employment, commercial, insurance and personal injury matters. She was a Gulf Coast Claims Facility Appeals Judge for matters relating to the 2010 BP oil spill in the Gulf of Mexico. She has also conducted mediation training workshops.

EDUCATION: Ms. Stern received her JD from Columbia University School of Law in 1971 and her BA magna cum laude and Phi Beta Kappa from the University of Michigan in 1968.

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Reservation Points: A Perspective on Where the “Real” Negotiation Begins
By Rebecca Callahan

One goal of mediation is to get disputants to the point of having “problem-solving” discussions in the form of exchanging settlement offers. In the context of the litigated dispute where parties are represented by attorneys, the disputants usually come to mediation with a defined range of what they think constitutes a “reasonable settlement” and that range is usually determined by the attorney’s analysis of what he/she predicts the judgment after trial will be discounted by some percentage. For example, plaintiff’s counsel might say that the case is worth between $X and $Y based on prior experience taking such matters to trial and/or based upon research relating to jury verdicts, judgments and settlements of similar such cases, and may believe that the plaintiff has a “good” case defined as a 75% to 80% chance of winning. Defendant’s counsel, on the other hand, might say that the defendant should prevail, but has a 20% to 25% chance of losing and estimates that potential liability could be between $A and $B based on prior experience taking such matters to trial and/or based upon research relating to jury verdicts, judgments and settlements of similar such cases. If you were to graph what the parties’ pre-mediation ranges looked like, it would look something like the following:

This is where the “real” negotiation begins.

It is the rare case where parties’ pre-defined settlement ranges overlap. As a result, settlements achieved during a mediation feel like and are perceived as
“compromises” because the parties are required to move beyond their pre-defined reservation points. In the example above, defendant’s reservation point was $300,000 as the most it would offer and plaintiff’s reservation point was $650,000 as the least amount it would accept. It does not too much matter what the basis of each party’s pre-defined reservation point is, the fact remains that their negotiation challenge is to stay at the table and negotiate within the gap between their respective reservation points. Some thoughts about points to be included in that “gap filling” discussion:

- There are numerous procedural hurdles that can be put in the path of both parties in the hopes of eliminating some or all of that party’s claims or defenses, or significantly impairing the presentation of their case. All cases have them! Dispositive contingencies are part of each side’s “worst case” analysis. These contingencies can be identified, evaluated and weighed and consideration given to the risk avoided by settlement.

- There are sometimes things external to the lawsuit that could affect the value of what is at issue, the finances or stability of one or both parties, etc. These contingencies are frequently the answer to “What could possibly go wrong?” Just like dispositive contingencies, these outside influences can be identified, evaluated and weighed and an adjustment made for the risk avoided by settlement. For example, the impact of avoiding fluctuations in the stock, financial or real estate markets; the impact of avoiding negative publicity about the lawsuit and adverse verdict; the impact of removing a contingent liability from a balance sheet.

- Other factors may be difficult to quantify but nevertheless have bearing upon the rational value of a case for purposes of settlement as compared with possibly obtaining a judgment in the future. For example: What is the judge’s track record with respect to the efficient (or inefficient) management of a trial? Does the judge have a known predisposition with respect to summary judgment, jury voir dire, motions in limine, foundational issues, use of scientific information? Has the judge decided similar issues in other cases and, if so, which way did he/she rule? What is the
experience or skill level of the attorney(s) on the other side? What is the population from which a jury will be pulled and what biases or prejudices might they, as a group, share in terms of how they might view / identify with or against the parties. And finally, the complete unknown as to who your jurors might be and the complete lack of control over what they do and how they decide a case. All of the foregoing are risk factors. When a risk is avoided through settlement, a value should be attributed to that avoided risk.

The above discussion points all focus on quantifying the value of risk avoided. We do not perceive or assess risk the same way, and much depends on whether we are facing a gain (selling) or a loss (buying). Generally speaking, in the context of a litigated dispute, plaintiff is selling its claim and defendant is buying plaintiff’s claim. Studies show that the person selling places a higher value on that which is being sold than the person buying. Additionally, some people are more risk averse than others – meaning that they will pay more or take less in order to avoid the risk of loss/liability – and some people are risk seekers in the sense that what looks like an unwise gamble to most would look like a gamble worth taking to the person with an exceptionally high tolerance for risk. Risk attitudes of both the parties and their counsel are a subliminal factor in any negotiation and exert strong cognitive influence on how settlement is viewed as compared to the high stakes and uncertainty associated with litigation.

Consider the recent decision in the Playboy whistle blower case brought by former senior vice president, Catherine Zulfer. In May 2015, Ms. Zulfer received a $6 million jury verdict under a 2002 federal law that protects whistleblowers. On top of that, the court awarded punitive damages. Playboy was represented by Sheppard Mullin, whom it sued for legal malpractice claiming that an attorney of ordinary skill and capacity would have advised it to settle the case and to demand that its insurer tender the $5 million policy limits. However, according to news reports, Sheppard Mullin very carefully evaluated the case, conducted research and analysis of prior verdicts and settlements, and even conducted a mock jury trial before providing Playboy with a valuation of the case. Based upon the information collected through these activities, Sheppard Mullin evaluated Playboy’s “worst case” scenario as presenting an exposure well below policy limits and rated Playboy as having a 75% chance of prevailing on Ms. Zulfer’s wrongful termination claim. What Playboy appears to have not factored in was the 25% chance of not prevailing, and the caution Sheppard Mullin most certainly gave its client that juries are unpredictable, especially with
respect to their handling of emotional distress and punitive damages – both of which were awarded in this case. There are no reports of what was or was not offered or demanded in any pretrial negotiations between the parties, but it is probably safe to assume that Ms. Zulfer’s opening demand was above policy limits and that Playboy’s final offer was well below the $5 million policy.

Calling attention to the Playboy case is not intended to be critical of Playboy or its counsel\(^1\) but, rather, to call attention to how much influence a defined reservation point may have on a party’s perception and/or understanding of its downside risk and how that may in turn influence the party’s attitude about and approach to settlement. It also shows the importance of reassessing the value of a case for purposes of settlement once the gap between the parties’ respective reservation points has been reached – the assumption being that a settlement was attempted in the Playboy case and the parties got stuck around the policy limits figure (with Ms. Zulfer at or above policy limits and Playboy well below). Finally, it illustrates the importance of managing a client’s expectations, and interjecting that management oversight periodically as the case develops.

When the reservation-point-gap is reached, the question at that point is not so much “Is this a good deal on the table that I should accept?” but “Will I regret not staying at the table and making a further effort to settle if the worst case turns out to be worse than estimated?” This is a very uncomfortable discussion to be had, for sure, but it is equally uncomfortable all around the table! Movement in this zone is both difficult and uncomfortable. However, in this changing climate where attorneys are being sued for “settlement malpractice” – both for recommending or not recommending settlement – it is a discussion that needs to be had. This is especially true since a foundational underpinning of mediation is party self-determination, meaning that it is the party (not the attorney) who should to make the ultimate decision to or not to accept a settlement and thus take ownership of that decision.

\(^1\) To the contrary, based on what has been reported concerning counsel’s efforts to assess Playboy’s potential exposure, it would appear that they appropriately told the client that there was risk and that they made a concerted effort to approximate the client’s worst case based on the information then available in terms of prior judgments and verdicts.
Mediation Advocacy: Some Tips and Perspectives
By Rebecca Callahan

People think that adjudicatory processes are predictable, but they aren’t and the public is figuring that out and moving away from formalistic procedures to mediation.

- Hon. Wayne D. Brazil (Ret.)

Referring to the results of a 2011 survey of Fortune 1000 corporate counsel, Retired Magistrate Judge Brazil made the above observation during the 2015 advanced training seminar provided by the U.S. District Court/Central District to its panel mediators. The 2011 survey shows that less than one percent of the responding companies espouse an “always litigate” posture, as compared to roughly ten times that percentage of the responding companies in a similar survey conducted in 1997. The 2011 survey also revealed a dramatic drop in the percentage of companies that purport to “litigate first” before moving to ADR. See, Thomas J. Stipanowich and J. Ryan Lamare, “Living with ADR: Evolving Perceptions and Use of Mediation, Arbitration and Conflict Management in Fortune 1,000 Corporations,” www.mediate.com/articles/LivingWithADR.cfm. Why are the 2011 survey results important to legal professionals working in the civil dispute arena? Answer: They are an indicator that those who have had repeat experience with adjudicatory dispute resolution processes (litigation and arbitration) prefer a negotiated – versus litigated – outcome. This is consistent with statistics maintained by the Judicial Council which show that approximately 80% of all civil filings are resolved by means other than a trial on the merits (e.g., settlement, dispositive motion, abandonment). See, “2014 Court Statistics Report,” p. 43, www.courts.ca.gov/documents/2014-Court-Statistics-Report.pdf

Litigating civil disputes in the current environment requires a lot of strategic thinking and planning. It is no longer enough to map out legal theories and the discovery plan to develop evidence to support those theories. It is the rare case filed today where thought is not given to when – not whether – to go to

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2 Rebecca Callahan is a full-time mediator and arbitrator with ADR Services, Inc. She received her JD from Boalt Hall at UC Berkeley and her BA from USC. She also earned a master’s degree in dispute resolution from Pepperdine University School of Law/Straus Institute. A shorter version of this article was published by the Orange County Lawyer in July 2015. A PDF of that article is available under “Articles and Programs” on Ms. Callahan’s website – www.callahanADR.com.
mediation. Partly due to the broad confidentiality protections afforded by Evidence Code section 1119, mediation has become the preferred method of ADR. Mediation is a facilitated negotiation that has developed into an ADR process that is uniquely distinct from the settlement conference and early neutral evaluation. The center point of mediation is party self-determination, giving the disputants control over defining both the process and the outcome. The purpose of this article is to examine a few strategies that might help you and/or your clients utilize the mediation process to its best and fullest potential.

1. **Risk is in the eye of the beholder.**

   We do not perceive or assess risk the same way, and much depends on whether we are facing a gain (selling) or a loss (buying). Generally speaking, in the context of a litigated dispute, plaintiff is selling its claim and defendant is buying plaintiff’s claim. Studies show that the person selling places a higher value on that which is being sold than the person buying. Additionally, some people are more risk averse than others — meaning that they will pay more or take less in order to avoid the risk of loss/liability — and some people are risk seekers in the sense that what looks like an unwise gamble to most would look like a gamble worth taking to the person with an exceptionally high tolerance for risk. Risk attitudes of both the parties and their counsel are a subliminal factor in any negotiation and exert strong cognitive influence on how settlement is viewed as compared to the high stakes and uncertainty associated with litigation.

   Researchers have found that a party’s position in the negotiation as plaintiff (seller) or defendant (buyer) influences how risk is assessed. Plaintiffs face a sure gain in settlement versus the possibility of a larger gain at trial, coupled with the potential for complete loss at trial. In the absence of counterclaims, defendants face a sure loss by settling versus the possibility of a defense judgment after trial, coupled with the potential of a significantly larger loss at trial. In one study, the majority of subjects facing gains (seller position) preferred a certain $250 over a 25% chance of $1,000 (worth on average $250). On the other hand, when the same group was put in the position of facing a loss (buyer position), the majority preferred a 75% chance of losing $1,000 (worth $750) to a sure loss of $250. So, the position as plaintiff or defendant is likely to influence each side’s valuation of the case. There is not much anyone can do to avoid completely the influence of risk tolerance in a negotiation, but when an extreme position is taken and held onto, then you need to spend time working through why one side’s perception of the downside risk is so minimal. The following are some areas where you might test assumptions:
1. **Control.** Where we believe we have control, we have a lower perception of risk. Travelling by car is a good example. We feel less comfortable as a passenger than as the driver. For a seasoned litigator with a history of success through trial, the bias may be to try a case rather than resolve it through mediation. Similarly, where the plaintiff controls the decision to settle or litigate, the bias may be to “go to trial” rather than make a counter-offer so as to keep the negotiation moving forward because plaintiff’s initial control over the litigation process may cause plaintiff to underestimate or under appreciate the risk of loss. The influence of the “control” bias is countered by taking the time to critically assess and talk through the various attributes of the trial process that are uncertain and outside the control of the parties and their counsel.

2. **Novelty.** New risks are seen as higher than ones we have grown used to seeing. For example, genetically modified food is viewed as more risky than pesticides. Continued exposure to the same risk also results in it being seen as less risky. An attorney may be more confident in his/her assessment of the trial outcome in a court or before a judge where the attorney routinely appears versus the situation where the attorney is prosecuting or defending a case in an unfamiliar court. Same case / same client – but the risk looks different in the “foreign” court. Similarly, a party or insurance adjuster may be more confident in his/her assessment of the trial outcome where that party has been involved in numerous similar cases versus the situation where being involved in prosecuting or defending a case of any kind is unfamiliar territory. The novelty bias is countered by delving into the particulars of the case at hand, as well as the representativeness and reliability of the “sampling” from the prior case / prior court experience.

3. **Risk-benefit trade-off.** Behavioral studies show that risk is discounted when there is a perceived benefit as well as a threat. Smoking cigarettes and drunk driving are examples of risk discounting. This factor impacts the analysis required
for a successful negotiation where the risk of trial is severely discounted because either the defendant focuses on the “benefit” of winning big and paying nothing or the plaintiff sees only the upside success of the trial and discounts all related risk. This bias is countered by focusing in on the specifics of the perceived benefit, and directly contrasting those benefits with the downside risks.

4. **Trust.** Where protection from a risk is offered from a trusted party, the risk is perceived as lower, but lack of trust makes the risk seem higher. Public trust in the government, intelligence agencies, and law enforcement can influence the perceived level of threat from terrorism. The client’s confidence in his/her attorney may distort the risk analysis for a given dispute. This is also known as the “halo effect,” and as recent cases have shown, clients have been known to settle (or not settle) with their adversary and then sue their attorney when: 1. they settle for something significantly less than what they were asking for in litigation and have seller’s remorse, or 2. they pass up an opportunity to settle and then obtain an outcome in litigation that is far worse. See, e.g., *Filbin v. Fitzgerald*, 211 Cal. App. 4th 154 (2012); *Moua v. Pittullo Howington Barker Abernathy LLP*, 228 Cal. App. 4th 107 (2014); *Syers Properties III, Inc. v. Rankin*, 2014 WL 1761923 (1st Dist., May 5, 2014); *Amis v. Greenberg Traurig LLP*, 2015 WL 1245902 (2d Dist., Mar. 18, 2015). The simplest strategy for countering the “trust” factor is to coordinate with the mediator in advance to lead the “worst case” discussion and to make sure that the ultimate choice to accept or reject a settlement is left in the client’s hands.
2. **Be mindful of what your body is communicating to the other side.**

In any communication, but especially in a negotiation environment, it is important to keep in mind that 80% of our messages are communicated nonverbally. That is a two-way street: your messages to the other side and the other side’s messages to you. Nonverbal clues include body posture, gestures, eye contact and movement, facial expressions, tone of voice, diction and points of emphasis, and reveal a person’s unspoken attitude, intention, feelings and state of mind. For example, irrespective of what words have been spoken, a person’s body language may communicate aggression, fear, disrespect, respect, subordination, superiority, boredom, attentiveness, disagreement, agreement, disappointment, relief, etc. Body language is a significant component of how we communicate with one another and happens on both a conscious and subconscious level.

Just as time would be spent preparing a client to give testimony in a deposition or at trial, time should be spent with the client in advance of a mediation preparing the client (a) for the process in general, (b) his/her specific role(s) at the mediation, (c) what to say and do (or not) in private caucus with the mediator, and (d) what to say and do (or not) in joint session with the other side. Given that the ultimate objective of the mediation is to achieve a negotiated resolution, time should also be spent on rehearsing constructive dialogue scenarios, especially on difficult subjects.

3. **Spectacular achievement is almost always preceded by unspectacular preparation.**

Before starting the mediation, time should be devoted to preparing for the negotiation, exploring tactical moves and setting overall strategic objectives. Fact gathering, developing positions, and devising supporting arguments and materials are essential. Another critical task is to identify the personal and business interests of one’s client and the opposing party. Where do they overlap? Where do they conflict? How many things can you identify and prepare for in advance that your client or the other side might want or need to talk about on the way to reaching a deal? Are some interests more important than others?

* A pessimist sees the difficulty in every opportunity; an optimist sees the opportunity in every difficulty.  
  - Winston Churchill
there any “deal-breaker” points and, if so, should they be put on the table at the beginning or end of the negotiation?

Many negotiators plan on beginning and ending the negotiation with a move aimed at “claiming value” (i.e., getting a larger share of the pie). In addition to those “final moves,” preparation should include planning moves that will “create value” such as payment terms, trade-offs, non-monetary concessions, non-traditional options for settlement. In order to go to a negotiation with “creating value” moves, the negotiator must spend time before the negotiation identifying what he/she thinks are interests and/or needs of the other side and planning what might be offered to satisfy those interests or needs. That, of course, requires client input and approval, and should be done in conjunction with identifying and prioritizing the client’s interests and needs and planning what might be sacrificed to achieve a concession to a higher priority item.

Advance preparation pays other dividends. If you (and your client) do this type of work in advance of the mediation, you will not have to work quite so hard at the mediation. Why is that important? Answer: Because one of the top reasons why disputes do not settle at mediation is mental fatigue – too many decisions to be made in a short amount of time on important matters. The following is a simple planning outline for working through these issues in advance of the mediation:

1. **Issues** – What are we there to talk about? What are the key issues that my client needs to have discussed? What does the other side likely want to talk about?

2. **Zones of Negotiation** – Plan for the distributive bargaining “dance” in terms of anticipated initial positions, fallback positions and reservations points, and assess how close or far apart the parties’ reservation points might be.

3. **Think Outside the Box** – Plan for the integrative bargaining “dance” by evaluating where there might be opportunities to “expand the pie.” *Why* do the parties want or think they deserve what they are asking for? Where does the dispute *currently* fit in the parties’ respective lives? What does each party *currently* want or need in general and with respect to the dispute?
4. **Be Objective** – From both perspectives, what are the best and worst outcomes if a negotiated resolution is not achieved? Are there any other options that do not require litigation or mutual agreement? Be sure to discuss the estimated attorney’s fees and costs to take the matter through trial. Be sure to discuss any downside exposure to the client for prevailing part costs and/or attorney’s fees and make an effort to quantify that potential exposure.

4. **The Popeye Phenomenon.**

Popeye is a cartoon character from the 1950’s famous for saying, “I am what I am … and that’s all that I am.” The same could probably be said for each negotiator in terms of how he/she perceives the world, interacts with people and makes decisions. In 1921, Carl Gustav Jung theorized that there are four principal psychological functions by which we experience the world: sensation, intuition, feeling and thinking. Of these four functions, Jung proposed that one is dominant and influences how we act and think. Katharine Cook Briggs and her daughter Isabel Briggs Myers took Jung’s theories one step further and put the theory of psychological types to practical use through the Myers-Briggs Type Indicator (first published in 1962). The underlying assumption of the MBTI is that we all have specific preferences in the way we construe our experiences, and these preferences underlie how we define and perceive our interests, needs, values and motivations. Those preferences fall into four broad, general categories:

1. **Extrovert** – strong-willed, outgoing, social, demanding, determined

2. **Introvert** – cautious, precise, deliberate, questioning, formal

3. **Feeling** – caring, encouraging, sharing, patient, relaxed

4. **Thinking** – logical, organized, verbal, persuasive, demonstrative

In addition to their personal “preference behavior,” negotiators can choose from a well-defined range of negotiating behaviors and styles, ranging from competitive to collaborative, compromising, accommodating and avoiding. Effective negotiators are aware of their natural orientation, take time to observe
and identify the orientation of their counterpart, and work to understand the
dynamic interplay of the negotiation styles that may be at the table. They are
versatile and able to use different styles, depending on the circumstances of the
negotiation at hand. For example, if one negotiator’s natural orientation is to
problem-solve and look for a collaborative solution, he/she will need to change
his/her action plan if the negotiating style of the opponent is competitive. For
another example, if one negotiator’s natural orientation is to be competitive,
he/she will need to work at being more patient, relaxed and encouraging if
his/her opponent is an avoider whose negotiating weapon is to not engage and to
avoid discussing key issues by diverting the discussion elsewhere.

5. **Negotiation is a dance, but it is not a two-step.**

Negotiation is akin to a dance competition where the dancers must be
capable of performing more than one dance and switching from different tempos
and beats. In the context of negotiating the settlement of a litigated dispute, it is
unlikely that either side will be persuaded to adjust its assessment of risk or its
evaluation of the merits to mesh with that of the other side on most issues. So,
squaring off and arguing “the evidence” or “the law” will not yield a settlement –
unless, of course, both are undisputed, but then you would not be in mediation.
The party on the undisputed losing end would simply yield. In order to settle a
litigated dispute, something more needs to happen and be discussed. And that
takes time and patience all around the table. First of all, both/all sides need to
have an opportunity to speak, respond and find some level of common ground.
One side may have thought the whole thing through and have a pretty good idea
of where the negotiation should end, but the psychological reality is that most
people need to engage in a back-and-forth negotiation – they need to dance a
little (or a lot) - before they are comfortable saying “yes” to a deal. A good
negotiator understands this aspect of the process and plans out in advance how
to engage in a constructive dialogue with the other side, which means
identifying a framework within which everyone can agree to discuss settlement.
A good negotiator also understands and comes prepared for two negotiations:
the first being the negotiation that gets each side to its “best” number; the second
being the negotiation that bridges the gap. It goes without saying that the higher
the level of preparation and communication skills, the faster a negotiation will
move. And the reverse is also true. So, wear comfortable shoes and be prepared
to dance more than just the two-step.
6. **True genius is the capacity to evaluate and make decisions in the face of uncertain, conflicting and missing information.**

In any negotiation, but especially in the context of the litigated dispute, a negotiator will not have all of the information he/she would like to have. Even in negotiations that occur after discovery has been completed and everyone has a pretty good idea of “the facts” and who they are dealing with on the other side, the negotiator still cannot predict what the other party will do or how they might react or respond to an offer or counter-offer. Thus, in addition to making and responding to substantive moves, each party must make a deliberate choice throughout the course of the mediation as to whether to make a move that will be perceived and received as competitive versus cooperative. With a competitive move, the party runs the risk of alienating the other side so that it makes the ultimate competitive move of walking out the door. With a cooperative move, the party runs the risk of yielding too much and obtaining a less advantageous outcome than was otherwise available if it had been more competitive. This is the prisoner’s dilemma, and explains why two rational parties might not engage in a cooperative/problem-solving-type negotiation even if – objectively – it is in their best interests to do so.

If parties are thrown into a negotiation or do not prepare in advance and/or do not know or trust the other side, they are going to be more inclined to make competitive moves. When one or both parties have information and know something about each other and both sides of the case, there is less uncertainty and more options, and thus a potential willingness to make cooperative moves – because the cooperative player can always return to competitive mode if his/her cooperative move is not reciprocated. The following are several steps to follow when engaged in a competitive negotiation heading for a stand-off (i.e., impasse):

1. Begin in a cooperative way, but do not risk very much – meaning, do not reveal your bottom line. The point is to get the negotiation going.

2. If the other side comes back competitively, you should “retaliate” and make a competitive move. You need to show

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_The best way to get a good idea is to get a lot of ideas._
- Linus Pauling
that you are capable of being a competitive negotiator even if that is not your natural style or orientation.

3. If the other side becomes cooperative, you need to be forgiving and play along even if that is not your natural style or orientation. However, your cooperative moves should be measured (i.e., tit-for-tat), and you should bear in mind that a negotiator who is by nature competitive will only change his/her behavior if it is going to hurt to not do so.

4. You need to be clear on the process (as distinguished from the substance) and on how you want or prefer to negotiate. You may need to be prepared to negotiate the process with your counterpart, and you may need to adopt a negotiating style that is not your norm.

5. In the event of a stand-off, be prepared to discuss a proposed bracket (e.g., your client will come up or go down to “X” if the other side will go down or come up to “Y”). This is one way to deal with the prisoner’s dilemma because each side knows in advance of its move what the other side’s pre-agreed response will be.

6. Look for opportunities to be creative and find agreement on side issues.

7. I like the idea, but I don’t like you.

In the context of the litigated dispute, it is sometimes difficult to formulate a proposal that both parties, given their different interests and views and their conflicting strategic goals, will embrace. Even when such a “mutually-acceptable-in-principle” proposal can be formulated, there may be an additional barrier to overcome: namely, reactive devaluation.
Reactive devaluation is a cognitive barrier in which we automatically reject without consideration that which is said or offered by the other side – even when it is favorable – simply because the source of the message is our adversary or someone we hold in low esteem. This barrier also influences us to reject or devalue whatever is freely available and to strive for whatever is denied (the grass is always greener on the other side of the fence). The reasoning that leads to this reactive decision making is entirely inferential and assumes a perfect opposition of interests – or, in other words, a true “zero-sum” game. That is rarely the case in real world negotiations where parties’ needs, goals, opportunities, risk assessments, risk tolerances are complex and varied.

Reactive devaluation helps explain the popularity of caucus mediation and use of the mediator to carry proposals between the parties. For some reason, when the proposal is delivered by the mediator – even though sent from the “other” side – it is heard and received differently than if the “other” side delivered it directly. Why is this important? Answer: It should encourage you to think strategically about when and how to open settlement discussions. Will the process be easier and will it move more quickly to your client’s desired end point if you conduct settlement negotiations at a mediation versus doing so directly/privately?

8. Anchor’s away!

Anchoring is an attempt to establish a psychological reference point around which a negotiation will revolve and negotiation adjustments will be made. Anchors function much like our “gut” reactions to the value of an object based on its price tag. In this regard, researchers have found that there is a psychological pull towards the “first number,” “price tag,” “policy cap,” etc. In situations of great ambiguity, complexity and/or uncertainty, the anchoring effect is even stronger in terms of the influence it has on the rest of the negotiation. That being said, there is a way to counter the psychological impact of anchoring: Preparation. Researchers have found that the more relevant information our analytical mind has, the less we are swayed/influenced by an unreasonable

Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser – in fees, expenses, and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good man. There will be business enough. - Abraham Lincoln
anchor. In the context of settlement, it is important to undertake a critical analysis of each element of the case before you begin the negotiation. That analysis should include following:

1. What does the known evidence show – pro and con?

2. What are the known arguments that will be made – pro and con?

3. What is the story my client will tell? How factually or emotionally compelling is it? Is there a critical fact on which the case hangs and is that fact in dispute?

4. What is the story the other side will tell? How factually or emotionally compelling is it? Is there a critical fact on which the case hangs and is that fact in dispute?

5. Is there an extraneous factor that may affect the outcome, such as the attractiveness or repulsiveness of a party or key witness, the current economic mood in the community, the manner in which a key witness speaks or presents himself, the disparity in the parties’ status or perceived power, the nature of the dispute, any positive or negative media attention, etc.?

The availability of good information, coupled with the ability to assimilate that information (pro and con to the theory of the case), can have a clear impact on the weight of an anchor if you are on the receiving end of the “first offer.” Likewise, preparation may result in a negotiation strategy where you decide to make the first offer in an effort to anchor and pull the negotiations in a certain direction.

Conclusion

While sometimes it is necessary to make a little war before there can be peace, parties involved in civil litigation should be provided with the opportunity, encouraged and empowered to seek a negotiated resolution from the outset of the dispute. As discussed in this article, there is a certain ying and yang to making a deal. Every negotiation is a mixed motive exchange, but no matter how big the pie is, at some point it has to be divided. In negotiation, we
have the challenge of managing what are competing voices. On the one hand, we want to compete and claim all the value that we can. On the other hand, we know that if we do not cooperate on some level, we will not get a deal done. These two voices are very different and frequently in conflict: A versatile negotiator is one who is well-schooled in an array of bargaining methods and capable of translating the two basic negotiating paradigms into a negotiating strategy. As J. Paul Getty once said, “You must never try to make all the money that’s in a deal. Let the other fellow make some money too, because if you have a reputation for always making all the money, you won’t have many deals.”
This case involved a dispute between the Assignment-for-Benefit-of-Creditors Estate and Newco, the entity that purchased substantially all assets of Oldco, concerning ownership of an unscheduled asset: namely, a class action recovery that was potentially worth as much as $15 million. The parties had spent a fair amount of money on the litigation and both agreed that the class action recovery was probably worth at least $1.5 million. And both were willing to split that recovery 50/50 to reimburse themselves for their out-of-pocket legal expenses.

Where they got stuck was on how to divide any recovery in excess of $1.5 million. And they had traded various proposals based simply on how to divide up anything over $1.5 million. What helped them work through impasse was division of the potential recovery into tranches. They then exchanged a first round of proposals – set forth below – and that helped them see that they weren’t that far apart.

They then put an Excel sheet up on a screen and fiddled with percentages and additional tranches and worked everything out, but it was the first visual that got them going.

<table>
<thead>
<tr>
<th>NEWCO PROPOSAL</th>
<th>OLDCO ESTATE PROPOSAL</th>
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<td>8,850,000</td>
<td>6,150,000</td>
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This case involved a dispute between three siblings over the division of Mom’s estate after she died. With the exception of sentimental objects, the only asset with any value was Mom’s house. The eldest daughter had been Mom’s caretaker for the last 5 years of her life and had lived in the house with her. She of course wanted to continue living there, but did not have the financial means to cash out her brother or sister. The brother was a man of means. The youngest sister was semi-retired and living on a fixed income. Much of the mediation involved a lot of venting about what the other had or had not done to take care of the house, to take care of Mom, etc. Ultimately, their collective reality was that they needed to move to the present and talk about how to divide an asset that was not easily divisible into three equal parts, as provided in Mom’s will.

**Bank Account w/$600,000**

$200K
Sister 1

$200K
Sister 2

$200K
Brother

**House Worth $600,000**

How do you divide a house into 3 equal parts in a way that makes any sense?
Inventor patented a process that was licensed to Party A for commercialization in a very narrowly defined field.

For consideration paid, Party A and Inventor entered into an agreement to terminate the license so that Inventor could enter into a license agreement with Party B. That agreement included a provision that should Party B’s license terminate, Party A would have the right to enter into a new license agreement with the Inventor on the same terms as the original license.

Over the years, Party B and Inventor entered into various amendments of their license agreement which defined a number of additional fields in which Party B was allowed to use the patented process.

Party B went out of business and its assets were sold in liquidation to Party C. The assets included an assignment of Party B’s license agreement with the Inventor.

Party A then sued, claiming that it – not Party C – had the right to use the patented process. Party A also sought monetary damages for the profits Party C had earned through use of the patented process.

Party C’s profits were not attributable to use of the patented technology in the field defined in the original license, but were attributable to a later defined field of use granted by the Inventor to Party B.

Based on the following analysis and information shared during the mediation, Party C was willing to relinquish its rights in the Original License Field so that Party A could enter into a new license agreement with the Inventor.

**Party B’s License Fields Per Amendments [Red & Green]**

Gross Earnings – All Licensed Fields/Applications: $_______

[Red, Green & Blue]

Net Profit from All Licensed Fields/Applications: $__________

[Green]

Revenue Contribution from Original License/Application: $__________

[Blue]
Click here to go to the Commercial Arbitration Rules

Click here to go to the Commercial Arbitration Rules
Effective 10/1/13

Click here to go to the Construction Arbitration Rules

Click here to go to the Employment Arbitration Rules

Click here to go to the Labor Arbitration Rules