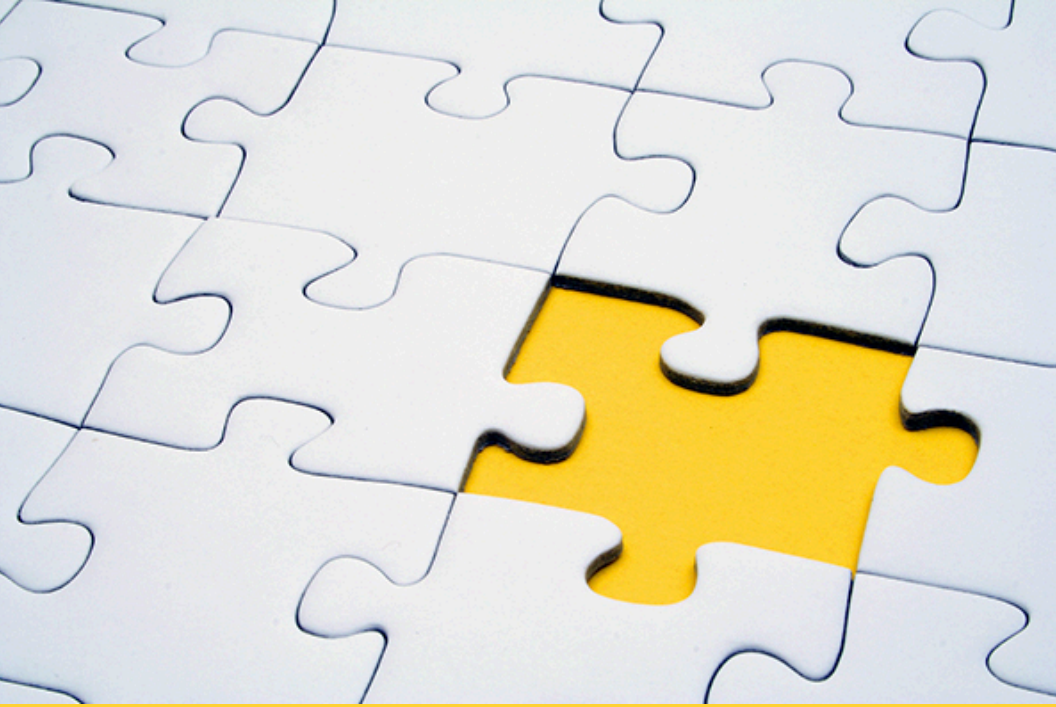


Becoming A Better Negotiator

Better Outcomes in Mediation

By **Bob Meynardie**

Introduction

Benjamin Franklin is credited with saying that "Necessity never made a good bargain!" Although negotiating a settlement in the context of civil litigation is probably not what Ben had in mind, the point is important here. If a negotiator needs to make a deal, it's not likely to be a good one. This is particularly true if the other side understands that need. The parties' need to strike a deal is a function of their Best Alternative to a Negotiated Agreement ("BATNA").

This paper is intended to provide an overview of the skills and techniques that are essential to negotiating from strength. Properly preparing for any negotiation is key. In addition, you will obtain better outcomes if you understand what your mediator is doing so that you are better prepared to help her help you. Finally, this paper discusses various models of mediation or mediation theory.

The paper also describes "enhancements" to the traditional model of conducting a mediation. The traditional model leaves it to the parties to determine the timing of the conference, the amount of discovery necessary, and essentially expects a facilitator to grasp the legal and factual issues through a carefully scripted presentation and/or pre-mediation paper. The use of a neutral to help negotiate settlement would be more productive with a more expansive understanding of the mediator's role.

This paper begins, as everything in effective advocacy begins, with preparation.

Preparing for Mediation

Know Your Case

It should go without saying that negotiating a resolution to your client's claims (or the opposing party's claims) requires a thorough understanding of the facts and circumstances of the dispute and the law that governs resolution. This also includes the need to understand your opponent's case.

Although the techniques for learning something more about the facts than those filtered through your client's perspective is beyond the scope of this paper, the need to understand your case from both your and your adversary's perspective should inform the timing of mediation. As discussed in various other places, mediation models such as Guided Choice and Structured Negotiation are methods that engage a neutral early in the process to help the parties get to a more thorough understanding before the need for full blown discovery.

Seek first to understand and then to be understood.

In most mediated negotiations, parties are well versed in the law and facts from their perspective, but a majority of litigants fail to fully appreciate the other perspective. This may be simply a by-product of aggressive advocacy but as Stephen Covey preaches: Seek first to understand and then to be understood.

Understand Your (And Your Client's) Negotiation Style

Are You Naturally Cooperative or Competitive?

How lawyers and their clients approach conflict is important to understand as you approach a negotiation. Some people are more naturally competitive than others. In his negotiation skills course, Pepperdine Law School Professor Peter Robinson explains that some peoples' natural instincts are to be competitive and others are naturally more cooperative. According to Professor Robinson, neither is necessarily better than the other but recognizing our own instincts and those of the opposing party will make you a better negotiator.

The competitive approach to negotiation is sometimes called distributive bargaining - determining through negotiation how to split a fixed sum. The pie cannot be expanded so the only way I get a bigger piece is to reduce the size of your piece. On the other side of the spectrum is what is called integrative bargaining – cooperation to increase the size of the pie.

All good negotiators and mediators are able to at least explore cooperative alternatives even if they, and their clients, are fiercely competitive.

The Pepperdine skills course uses a game to demonstrate variations of the same negotiation if both

negotiators are competitive, both are cooperative, or one is competitive and the other cooperative. We might expect the game to result in lopsided victories for the competitive player who seeks only to maximize his/her share of a fixed goal. However, cooperative does not mean conciliatory so the results may surprise you.

Cooperative negotiators do not seek peace at all costs. Certainly not in civil litigation mediations; if they did, the dispute would have never escalated to the point of litigation. It is said that 80% of all negotiations have elements of both.

All good negotiators and mediators are able to at least explore cooperative alternatives even if they, and their clients, are fiercely competitive. Litigators tend to be on the competitive side of the spectrum, but every negotiation would benefit from careful consideration of alternatives that might benefit both parties.

The best negotiators are competitive, cooperative, AND collaborative. They listen closely and collaborate to create value; they compete for the biggest slice of the pie, and they make compromises when necessary. Recognizing your (and your client's) natural tendencies -- and your opponent's -- is an important step to finding the right tone for your negotiation.

The Good Practices, Tactics & Tricks Framework

Dean Hal Abramson makes a distinction between how you want to negotiate ("negotiation style") and how

you naturally negotiate ("conflict style"). Your conflict style is your natural reaction to conflict and should influence your negotiation style but regardless of how you naturally react to conflict you can choose a different negotiation style. Negotiation styles -- or better referred to as choices -- are described by Abramson as Good Practices, Tactics, and Tricks ("GTT").

In the GTT trichotomy, good practices are such things as being a proactive listener or looking for win-win solutions. Certain tactics are not overly risky, such as making an inflated demand or referring to an offer as a final offer when it is not; however, such tactics may run the risk of losing a level of trust or believability in the process. Tricks include misrepresentations, failing to bring the decision-maker, or adequate authority to resolve the dispute. Seeking an early mediation and then stonewalling because of a need for further discovery would fall under the category of a trick. Running the risk of using tricks can end a negotiation or at the least prejudice your credibility.

If you are trying to build trust and credibility -- and you should be -- careful attention should be paid to how your opposing party would perceive your tactics and tricks.

Looking at your negotiation choices through the GTT lens, that is as your opponent would see them, should encourage the use of good practices, the judicious use of tactics, and the avoidance of tricks. Most importantly, looking at your choices through this framework should

help you avoid making choices that the other side sees as a trick unless that is a conscious choice on your part. If you are trying to build trust and credibility -- and you should be -- careful attention should be paid to how your opposing party would perceive your tactics and tricks.

Power in Negotiation

In his informative book, Practical Negotiating, Tom Gosselin contends that "In negotiating, power is a function of alternatives." Gosselin goes beyond simply calculating BATNAs by breaking down the alternatives concept and outlines how to go about forecasting the other side's alternatives.

Gosselin separates these alternatives into three categories: (1) alternative sources, (2) alternative currencies, and (3) alternative skills and behaviors. The point being that the more alternatives a bargainer has the more power in the negotiation. Gosselin believes that these categories or levels of alternatives are "cascading" and a negotiator should therefore explore each exhaustively before moving to the next. It is imperative to evaluate your alternatives before each negotiation and at least attempt to evaluate your opponent's.

The role of alternative sources in negotiation is illustrated in Practical Negotiating by the example of the Toyota Prius. A car buyer has many alternatives but a buyer who wanted a reliable gas/electric hybrid that got nearly 50 miles per gallon had only one choice for the first decade or so after the Prius was introduced. The predictable effect on

negotiation was that the Prius was sold at or above sticker for several years. Toyota's negotiation power was significantly impacted by the introduction of alternatives, such as the Ford Fusion and others.

Alternative currencies refer to the tangible or intangible resources that are perceived to have value by the receiving party. The identification of resources that have a higher value to the receiver than the giver can provide win-win opportunities for resolution. The most obvious example is where one party provides goods or services in settlement rather than money. The provider's cost is hopefully lower than the retail or market value of the goods or services. Likewise, acknowledgement of regret or an apology may have significant value to the receiver but costs the giver almost nothing. Similarly, removing a contractor from a "blacklist" or a "no bid" list, or reversing a debarment has great value to the contractor but costs the owner nothing.

Power in negotiating is really a function of the perception of power rather than actual power.

Gosselin believes that how you negotiate is as important as what you negotiate. How a proposal is presented can change the value of the currency to the other side. By understanding the other side's needs, it is possible to better position the proposal to address those needs. Here Gosselin points out the value (he calls it power) of the relationship. A skilled negotiator can affect the outcome of a negotiation by acknowledging and

understanding the other side's position and treating it and the party with respect.

Few negotiators are fortunate enough to know the other side's true power (i.e., alternatives). Therefore, power in negotiating is really a function of the perception of power rather than actual power. This is obviously true to a certain extent in the mediated settlement context but unlike many negotiations the negotiator's power is dependent on the strength of legal arguments related to liability, damages, and defenses. Legal research and factual discovery allow us a better glimpse at the other side's "power in negotiation."

Assess the "Bargaining Zone"

1. Assess BATNA, Target Price, and Reservation Price

A. BATNA

A critical step in preparing for a negotiation is to make a realistic assessment of your Best Alternative To A Negotiated Agreement or BATNA. Although the BATNA is usually thought of as a calculated number, there are many subjective factors that are not a precise calculation. Nevertheless, it is important to work through this assessment. The Harvard Program on Negotiation ("PON") suggests the following methodology for making this assessment:

First, list the alternatives if the negotiation impasses. In the litigation context, the alternatives are the potential

outcomes and the probabilities of each outcome. For instance, a defendant might evaluate a $10,000,000 claim as follows:

> 25% probability of dismissal at summary judgment
> 25% probability that Plaintiff recovers $10,000,000
> 50% probability that Plaintiff recovers $3,000,000

If legal costs to achieve these results are expected to be $500,000, then the math suggests that the defendant's BATNA is $4,500,000 (25% x $10M + 50% x $3M + $0.5M). If the math was the only factor, then any settlement that cost the Defendant less than $4,500,000 should be preferred over proceeding through litigation. Although math is objective, there is a lot of subjectivity in this simple exercise. Most lawyers will give their clients a range of probabilities, outcomes, and even a range of legal costs. Regardless of whether the calculated BATNA is a number or a range of numbers, you should go into every negotiation with an understanding of the alternatives to a settlement.

In assessing your calculated BATNA, it is also wise to keep in mind that Plaintiffs and their counsel tend to overestimate both the value and the likelihood of success and Defendants do just the opposite. There are a number of studies and explanations for this that are beyond the scope of this paper and it is certainly not true in every case, but it is worth considering that your real BATNA is likely to be less favorable than calculated.

The next step in the Harvard methodology is to "translate" your BATNA to the current deal. This is a

recognition that alternatives rarely, if ever, represent apples-to-apples comparisons. For instance, there are several other factors that should be considered here. First, the math ignores the real-life impact of the possible outcomes. For instance, if the $10M judgment would bankrupt the defendant or if a judgment of any kind would affect the defendant's ability to continue to do business, then the calculated number may have little to no value in assessing the risks. Likewise, if the Defendant does not have the financial ability to fund the litigation, the calculated BATNA may not be relevant. In addition, the uncertainty of the outcome and the personal and psychological costs to the client of going through the process are not measured in the above calculation.

The next step in the process is to carefully evaluate the opposing party's BATNA. As obvious as this sounds, every negotiation is about relative power. That power comes from the party's ability to walk away from a deal. Although there are more unknowns when assessing the other side, like legal costs and ability to pay them, you need to carefully and objectively consider the other side's willingness to walk away from a settlement and that starts with their BATNA.

The Harvard PON suggests that you consider the possibility that more than one BATNA is at play on the other side of the negotiation. As they put it, most major deals are made between organizations but negotiated by individuals. They query: does the negotiator have a different incentive to get the deal done than the organization they represent?

Finally, multi-party negotiations add an order of magnitude more complexity making it even more important to assess every party's BATNA. Professor Lawrence Susskind posits that multi-party negotiations are much more complex because each party's BATNA fluctuates as the parties' dynamics are revealed or evolve. As a result, the PON suggests that you track what is the apparent BATNA (literally tracking what you can discern about the party's target price rather than BATNA) of each party through the negotiation.

Calculating your BATNA is not just an exercise in knowing when to walk away and knowing when to run. Consideration of your BATNA is also an opportunity to strengthen your BATNA or weaken your opponent. For instance, understanding the parties' BATNAs might suggest that you take a key deposition or obtain a damning affidavit before mediation.

B. Reservation Point or Reservation Price

The reservation price is the least favorable point at which you will accept a negotiated agreement. For example, for a seller (Plaintiff) this means the least amount (minimum) or bottom line they would be prepared to accept. For a buyer (Defendant), it would mean the most (maximum) or top dollar that they would be prepared to pay. It is also sometimes referred to as the "walk-away" point. It should be heavily influenced by your BATNA but not necessarily defined by it.

After analyzing the subjective and objective factors that make up your BATNA, good negotiators will know their walk-away price. It is also important to estimate the other side's walk-away price. By this it is not meant that your reservation point, or your estimate of the other side's reservation point, should be fixed in stone prior to the mediation. One of the purposes of mediation is to share and receive information that may move these calculations.

C. Target Price

Finally, once you know your BATNA and your reservation price, the parties should determine their target price. Mediated negotiations falter repeatedly when one party sends mixed messages. A fictionalized -- but all too real example -- illustrates the point.

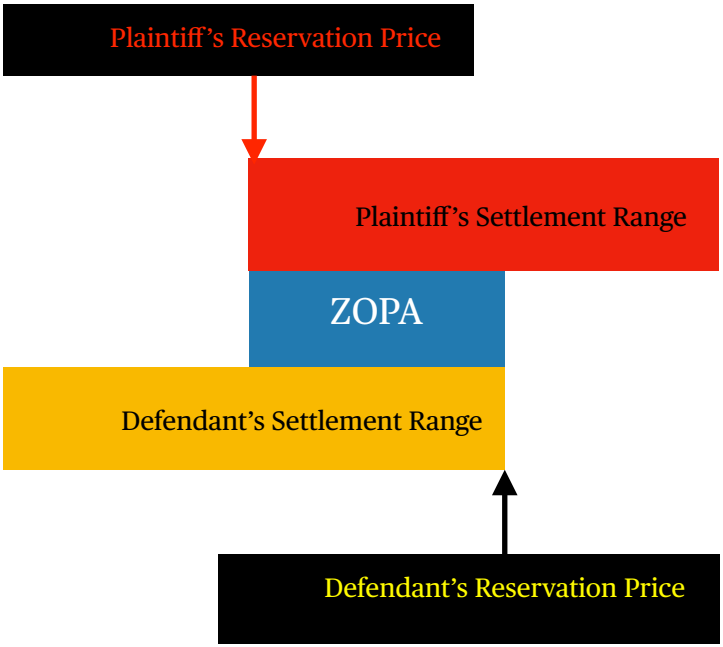
Assume Plaintiff has made a pre-mediation demand of $4M. Defendant challenges both liability and damages. After exploring the theories of liability and damages, the obstacles to resolution, and options for mutual gain the parties begin the money negotiation by trading numbers. After a series of near matching moves, the Plaintiff has reduced its demand to $3.0M and the Defendant has offered $750,000. Defendant abruptly announces that $750,000 is all the money they have to offer. In our vernacular, they have reached their reservation point.

Needless to say, this negotiation ends without settlement. Presumably, the Defendant in this example knew its reservation point before the mediation but its negotiation strategy was not designed to inform the

Plaintiff. Although settlement may not have been possible in this example, knowing your price and bargaining toward it consistently is much more likely to lead to settlement.

D. Zone of Possible Agreement

The Harvard Program on Negotiation ("PON") defines the Zone of Possible Agreement ("ZOPA") as the overlap between the highest price the buyer is willing to pay and the lowest price the seller is willing to accept. If there is an overlap, the parties should be able to strike a deal. If there is no overlap, there is not going to be an acceptable deal (so called negative ZOPA).



2. *Mapping a Negotiation Strategy*

A. Begin With The End in Mind

With apologies to Stephen Covey, your negotiation stately should always begin with the end in mind. IN his 7 Habits, Covey uses this "habit" to discuss underlying principles and long-term goals, but it is critically important in a negotiation to determine the objective before the mediation.

It is critically important to determine the objective before mediation.

Too much emotion is involved for real critical thinking in the "heat" of a negotiation. The other side may say something that inflames those emotions and making it too easy to lose sight of the goal. Additionally, it is impossible to structure a negotiation if you do not know where you want to end up. As George Harrison put it: "if you don't know where you're going, any road'll take you there."

No plan survives first contact with the enemy …

Of course, the end the parties have in mind must be realistic. Determining "realistic" requires an accurate assessment of the law and facts but also requires an understanding of the other factors that play into the BATNA. If your client's best day in court is a million-dollar

judgment, your BATNA is significantly less than that amount.

but failure to plan is planning to fail.

Once you have a goal, time should be spent mapping out a strategy to get there. Very few parties come into a mediation with a defined strategy. Often, it takes parties two or three exchanges of offers before either party feels confident about where the other side is headed. Mediators spend hours in hallways as lawyers and their clients discuss their next move. If you are three steps into a negotiation before you have a sense of where the other side is going there is a far higher probability that a misstep has been taken. Better settlements are possible if the road is mapped beforehand.

Take the time to simulate a negotiation. Hopefully, you know where you want/need to end up (target price and reservation point). Now make assumptions about your opponent's target price and reservation point and run through several if/thens. If I do this, they will do that. If nothing else, the real negotiation starts to look familiar to you earlier in the negotiation.

There may be unexpected twists, but you will be better prepared to interpret and respond to them if you have an end in mind and a roadmap for getting there. The party with a defined negotiating strategy is also more likely to send a consistent message about value and settlement ranges.

MORE EFFECTIVE MEDIATION

Effective Openings

Prepare a statement of your client's position that is less argument and more statement of fact and rational conclusions. Remember that the objective is to convince the other side that your position has merit or that theirs does not. The statement - like everything an advocate does in mediation - should be designed to make the opponent insecure in their position. Rarely, if ever, do accusations of bad character or bad faith contribute toward this goal. These statements are far more likely to end any serious consideration of your statement.

The most effective opening statements are those made directly to the opposing party. Obviously, you are trying to educate the mediator as well, but the primary objective should be to put doubt in the mind of the opposing decision-maker.

PowerPoints

Some of the most effective opening statements involve the use of a PowerPoint. Some of the least effective opening statements involve the use of a PowerPoint. The

difference involves either, or both, the inclusion of too much or too little information. If your only purpose in using a PowerPoint is as an outline of your opening, don't bother.

The purpose of an opening is to seed doubt in your opponent's mind about their evaluation of the case. What are the elements that the Plaintiff must prove to prevail? What key evidence supports your position or contradicts theirs? If this evidence is documentary, include the document in your presentation with a clear explanation of its importance. If the other side's key witness has lied under oath, or contradicted an element of their claim or defense, include the quote or better yet blow up the transcript passage. If there are pictures that illustrate the point, use them.

The PowerPoint, like the rest of the opening, should not be argumentative. Show your facts and explain their significance.

Experts At Mediation -- Best Practices

Experts are most valuable when they appear to be presenting a logical interpretation of objective facts. The best use of experts at mediation recognizes that experts are perceived to be hired guns - that is that their opinion is a function of who is paying them. Whether this perception is accurate depends on the expert but regardless of its accuracy, the perception should be recognized and

minimized. To maintain any influence on the process, an expert should be relied upon in opening statements as little as possible and then only for the technical analysis supporting his or her opinion.

Be Prepared

If you expect the other side to compromise because of case law that controls the matter, bring those cases. If there are documents or communications that contradict the other side's position, bring them. A significant part of the advocate's role in a mediation is to help the mediator make the other side less confident. No matter how impressive your resume, your opinion as an advocate is not going to convince the other side during mediation any more than it did when you had that argument outside mediation.

The best mediators are neutral – or more importantly perceived to be neutral. This is not to discount the fact that many mediators are engaged because of their subject matter knowledge. Why hire a construction lawyer as your neutral if she is not going to evaluate the claims? This paper briefly describes evaluative mediation and neutral evaluations elsewhere. But even facilitative mediations require elements of evaluation. However, there is a thin line between helping the parties evaluate their case and losing the neutrality that is essential to a good facilitator. Therefore you, the advocate, must supply the

ammunition for this process. If the mediator challenges one side with her own evaluation, virtually everything that comes next from the mediator may be perceived as defending her own opinion. A good negotiator is prepared to arm the neutral with supporting law and/or evidence so that the neutral can remain neutral.

Building Trust

Another no-brainer concept: being effective as a negotiator in mediation is usually not a function of how aggressively you can advance your client's position. It is possible to advance that position while conveying to the opposing party the sense that you remain open-minded. Maintaining neutrality is one of a good mediator's most important tasks. The ability to convey some semblance of neutrality and objectivity will also make you a more effective negotiator.

Imagine the opposing party thinking that you are more objective than their own counsel.

Make Principled Demands/Offers

Tied in some ways to the concept of price anchoring described below, making reasonable and principled demands/offers -- especially the first offer/demand, will begin to build some trust between the negotiating parties. Concessions or compromises should also be tethered to

principle. Position movement tied to a consistent explanation can be used to encourage movement from the other side but can also be a powerful tool for braking or slowing your concessions.

Consider Making Unilateral Concessions

This may seem counterintuitive to negotiators who rely upon the worn adage "do not bid against yourself" but making concessions that do not come with strings attached will position the negotiation as less adversarial. Good negotiators look for unilateral concessions that have more value to the other side than to the offeror. Caution is necessary here though to convey that the concession is an act of good will and not an indication of weakness. It is also counterproductive to inform the other side that the concession is not valuable to you.

Conceding such things as the location, the starting time, or whether the carrier must be physically present can set the tone with little or no cost to the party making the concession.

Explain your moves and to the extent possible tie concessions to an understandable rationale. Without this people tend to assign bad motives to actions by people with whom they are in conflict. Even without attribution of bad motives, it is difficult to argue principle for no further concessions if previous demands/offers were unprincipled.

Price Anchoring

Many litigants resist making the first offer. Plaintiffs rely on their demand -- the amount that represents winning at trial (maybe more than that) -- and Defendants do not want to offer anything until the Plaintiff is more "realistic." Research suggests that this may not be the best course of action. That research suggests that the first offer has a significant affect on the negotiations.

Anchoring bias is the tendency to give weight to the first number and is still true even when the number is random.

Studies show that there is an anchoring bias that can play a significant role in negotiations. Anchoring bias is the tendency to give weight to the first number and is still true when the number is random. How random?

In one famous study, participants saw the spin of a roulette wheel marked from 0 to 100. After seeing the roulette spin, they were asked if the percentage of African countries that were members of the United Nations was higher or lower than the number spun on the wheel. They were then asked to estimate the actual percentage. The number on the wheel had a significant impact on the answers. Participants who saw the wheel land on 10 estimated the actual percentage at 25%, on average, but those who saw 65 guessed 45%, on average. Those

numbers, of course, had nothing to do with the question but nevertheless had a clear impact on the answers.

The Harvard PON suggests that the likelihood of a benefit from making the first offer depends on two factors: 1) your knowledge of the zone of possible agreement ("ZOPA") – described above; and 2) your assessment of your opponent's knowledge of the ZOPA. Essentially, the more your opponent understands the ZOPA the less likely that an anchor will have a significant impact. Put another way, if you do not properly prepare for the negotiation, you and your client are likely to be influenced negatively by the other side's attempt to anchor.

Understanding this cognitive bias is a step in improving your negotiation skills but how do you respond to the other side's attempt to influence the bargaining through anchoring? Although a specific response will depend on the specific anchor and its context, the most important response is not to legitimize the anchor. For instance, assume a contract-based action with a demand for several million dollars where half or more of the damages are consequential and the contract contains a waiver. Any response requires a firm rebuke of your willingness to negotiate against a position that is better than one that the Claimant could recover at trial.

Reverting to our preparation section, regardless of how well you know your opponent's actual BATNA, you should know that it is lower than a figure that includes

damages that are not recoverable under the contract. This should be communicated through expressed rejection but also in the number that you are willing to offer. In the face of an out of bounds demand, it is possible for the response to anchor the negotiations even though it would not be the first number offered.

In the face of an out of bounds demand, it is possible for the response to anchor the negotiations even though it would not be the first number offered.

Bring The Decision-Maker

As discussed previously, coming to a mediation without authority to settle or without the actual decision-maker may be considered a negotiating trick. This is unlikely to advance the purpose of the negotiation. In some cases, failure to bring the decision-maker will be perceived as a lack of respect and/or sincerity about the party's commitment to the process. In many jurisdictions, a person with authority to settle must be present during the negotiations. Of course, this begs the question of what the term means. Virtually anyone in an organization has authority to settle at some level. Must a defendant send someone with authority to settle at the plaintiff's demand? Even if the defendant has no intention of ever satisfying that demand?

Using Emotional Expression At Mediation

It is a rare civil dispute that advances to the point of litigation that does not carry with it significant emotional reactions. As a negotiator though, are you better off showing or hiding those emotions. There is little scientific research on the topic, probably because the circumstances are likely to significantly impact the answer. However, in a 2015 article in the Harvard Business Review, Professor Alison Brooks examined the issue in some detail. Although her conclusions and suggestions may seem obvious after reading them, they are worth considering as you plan your negotiation strategy.

Professor Brooks' article is based upon a role-playing exercise conducted with MBA students trying to re-negotiate a contract. In each pair of negotiators, one of them is instructed to express anger -- through personal attacks or impatience and rudeness -- at the beginning of the negotiation. She writes that the more anger displayed the more likely the negotiation ended badly. Professor Brooks concluded that "bringing anger to a negotiation is like throwing a bomb into the process, and it's apt to have a profound effect on the outcome."

Anger is not the only emotion Professor Brooks studied. Anxiety is often prevalent when parties appear for a mediation. This is natural but Professor Brooks found

that anxiety leads to timidity in negotiation. Anger may lead to a fight response, but anxiety leads to a flight response. She concluded that "people who express anxiety are more likely to be taken advantage of in a negotiation, especially if the other party senses their distress."

Although beyond the scope of this paper, Professor Brooks' article goes on to suggest ways to prepare your emotional strategy for the negotiation and how to influence and possibly manage your opposing party's emotions to your benefit.

Help Your Mediator Help You

Choose the Right Mediator

The first question is whether the negotiation requires someone with subject matter experience. Do you need a mediator who has litigated not only construction cases but specific types of construction cases? Although many State mediation rules proscribe or limit the mediator offering legal advice, parties regularly select mediators with the experience to offer an opinion.

Incorporating elements of evaluative mediation can be particularly helpful in complicated cases. As previously discussed, good facilitative mediators are called upon to challenge the parties and lawyers on the merits of their claims or defenses without sacrificing their most valuable weapon: perceived neutrality.

A second, and equally important but often ignored, question is the style or personality of the mediator. In one recent mediation, the mediator's opening revolved around convincing the parties that he had subject matter expertise resulting in the perception by the parties that he thought he knew their case better than they did. As you can imagine, he lost the ability to convince the parties that he was neutral during the process.

One of the first things every good mediator tries to accomplish is building credibility with the parties. That credibility is based upon conveying impartiality and that the mediator either has no particular bias or can set any bias aside to be neutral. Challenging one party is better received if that party believes that the mediator is challenging the other side in the same manner.

In a survey conducted by the Harvard PON, top mediators identified three key traits of successful mediators: 1) an ability to build rapport, which they defined as a relationship of understanding, empathy, and trust; 2) creativity -- the ability to help the parties look at the problem differently and find ways to overcome obstacles to resolution; and, 3) patience -- a willingness to allow the parties to come to a resolution in their own way and their own time

Prepare Your Mediator To Help You

Many mediations begin for the mediator with no knowledge of the underlying dispute -- other than the names of the parties. If the parties are ABC Builders and XYC Electrical, the mediator may be able to glean something of the dispute beforehand but expecting your mediator to help you resolve the dispute under these circumstances narrows the likelihood of success.

One of the unique values of a mediation is the neutral's ability to use the inadmissibility rules to explore obstacles to settlement that the parties may not even know exist. Submission of pre-mediation statements allows the neutral to help the parties explore these obstacles and ways to overcome them. Pre-mediation interviews with the parties is even better.

A mediation statement that reads like a brief and sets out only the law and the facts as your client perceives them is a start, but your statement should not be limited to that. Many times, hardened positions are the result of something far deeper than an application of specific facts to an interpretation of law. As a party's advocate you may not know what that is but providing the mediator with the law and facts in advance will allow her to explore other obstacles that may be preventing settlement.

Don't Blindside The Other Side / Every Communication Is Part Of The Negotiation

Both parties come into a mediation with an expectation of how the negotiation will proceed. A defendant who believes the settlement value is cost of defense accomplishes nothing by insisting on mediation without communicating that expectation in advance.

MEDIATION THEORY 101 — UNDERSTANDING WHAT YOUR MEDIATOR IS DOING

There are numerous "models" of mediation, including facilitative, evaluative, transformative, narrative, explorative, etc. It is beyond the scope of this paper to discuss all these various models

Facilitative v. Evaluative Mediation

In most States, mediators are trained in facilitative mediation practices. The training is centered on facilitating a discussion that encourages the parties to reach a compromise. The rules do not prohibit a mediator from providing the parties with his or her evaluation of the case.

However, there is a line that is often impossible to see that if crossed will destroy the mediator's perceived neutrality. In many States, the rules actively discourage a mediator expressing her opinion of either the merits of the action or the merits of an offer/demand. In North Carolina, for instance, the rules state:

> A mediator shall not impose his/her opinion about the merits of the dispute or about the acceptability of any proposed option for settlement. A mediator should resist giving his/her opinions about the dispute and options for settlement even when he/she is requested to do so by a party or attorney. Instead, a mediator should help that party utilize his/her own resources to evaluate the dispute and the options for settlement.
>
> This section prohibits imposing one's opinions, advice and/or counsel upon a party or attorney. It does not prohibit the mediator's expression of an opinion as a last resort to a party or attorney who requests it and the mediator has already helped that party utilize his/her own resources to evaluate the dispute and options.

The reasons for discouraging the evaluative process should be obvious. The first is that the mediator lacks the in-depth knowledge of the evidence that would be required to evaluate the case. More importantly though, the minute the mediator offers an evaluation she has lost the ability to

be a truly effective neutral. Once the mediator expresses an opinion, there is at the least a perception that the mediator is defending their own opinion rather than being objective. However, a good mediator can use her understanding of the subject matter and results in similar disputes to help both parties examine potential holes in their reasoning without sacrificing her neutrality.

The Roles of Distributive and Integrative Bargaining in a Money Negotiation

At the risk of oversimplifying the concepts, integrative bargaining is the interest-based bargaining advocated by Fisher & Ury in Getting to Yes. The idea is that bargaining over interests can increase the size of the pie. Distributive bargaining, on the other hand, is the distribution of a fixed pie. Virtually every civil litigation mediation begins with some form of integrative bargaining and ends with distributive bargaining.

By far the most often quoted tenet of the "Getting to Yes Method" is to avoid positional bargaining and instead focus on the underlying interests of the opposite sides. Fisher & Ury illustrate their point with the story of two people in a library arguing over whether a window should be open or closed. The opposing positions are open on the one hand and closed on the other.

Hearing the argument, the librarian comes over and learns that one party wants the window open for the fresh air and the other wants it closed to avoid the draft. Both people's interests are satisfied when the librarian opens a different window. The illustration is useful and the point obvious once it is pointed out to us but how often are interests easily ascertained and separated from the stated positions. Fisher & Ury's example also illustrates the point that to reach an agreement it is not necessary to find shared interests. It only requires finding complementary interests (actually non-complementary interests that do not conflict are sufficient).

In civil litigation, the parties' positions are readily apparent. Pleading rules require the parties to state the factual and legal basis for their claims and affirmative defenses. In contrast, oftentimes parties are not consciously aware of their own underlying interests much less the interests of the opposing side. So, how do we go about determining the parties' underlying interests – without addressing the respective interests a mediator is unlikely to be successful.

The best way to uncover underlying interests is to ask yourself and your opponent two questions: why and why not?

Fisher & Ury teach that the best way to uncover underlying interests is to ask yourself and your opponent

two questions: why and why not? First, try to put yourself in their shoes and ask yourself why are they taking the position they are taking? Then try to understand why they are not willing to do what you are asking them to do? Why and why not? Many times in mediation, the parties are in a better position than a mediator to understand their opponent.

The second step is to ask the opposing party why and why not. This is where the true value of mediation lies. It is difficult to ask anyone about the interests underlying a position without making them defensive about the position. If the exploration of underlying interests becomes a justification of the position the entire exercise is self-defeating. A good mediator can explore the parties' underlying interests without the perception of attacking the positions. An adversary probably cannot.

Understand the Role of Narratives

Every business dispute includes either a dispute of the facts or a dispute about the legal effect of those facts, or both. Mediators spend a significant amount of time exploring and challenging each parties' legal analysis. At the same time, mediators ask each party to help present the other side with something that creates insecurity about their understanding of the facts underlying the dispute. Many times, litigants confronted with documentary evidence that appears to contradict their position maintain their interpretation and/or dismiss the contradiction.

What becomes obvious to a neutral seeing both sides are two competing and apparently incompatible versions of the facts that cannot be justified side by side. For a neutral, the recognition of this phenomenon reveals avenues for possible resolution that would not otherwise present themselves. Although this paper is not intended to explore mediation models in detail, you will be a better advocate/negotiator in mediation if you understand some basics of human nature that inform what has come to be known as Narrative Mediation.

You will be a better advocate/negotiator if you understand some basics of what has come to be known as Narrative Mediation.

Narrative Mediation is an offshoot of Narrative Family Therapy, developed in the mid-1980s by Michael White and David Epston, in Australia. The underlying premise is that people tend to organize their experiences in story form. That is, the phenomenon we are trying to understand is best understood as part of a story. The description of problems is typically told and understood as part of a narrative. Furthermore, it is easier to understand complex fact patterns by fitting them into stereotypical narratives. Once facts or partial facts are understood within the context of a "conflict-laced" narrative it is difficult to recast them in a way that might lead to concessions and ultimately settlement.

Narrative Mediation attempts to break down conflict stories into smaller, constitutive parts. It posits that whether the underlying facts are true or not is not as important as the impact those facts have on the individual. How these "facts" create or influence a reality rather than whether they accurately describe reality is the important point.

Almost without exception, the parties fall into predictable roles in these narratives. Very few litigants see themselves as the villain in their own version of the facts. The stories of conflict told by the participants invariably cast the teller as the victim or at the least the non-culpable party. Narrative Mediation techniques are used to open space to an alternative narrative. Consider the following hypothetical example:

An employee has a non-compete and/or a non-disclosure. He leaves his employer and goes to work for a competitor. Whether or not the employee technically complies with the non-compete, the employer sees the move as a betrayal and believes that the employee is using confidential information to compete. Couple this with a predictable defection of customers and the employer "knows" that the employee is violating their agreement. The only "objective" facts in this narrative are that the employee resigned, is working for a competitor, and the employer has lost some business.

The employee, on the other hand, left the employer because he was passed over for promotion, or was slighted in some other way, and believes he should be free to work where he is respected. So, he goes to work for a competitor just outside the geographic or other limits of the non-compete or he gets a legal opinion that the non-compete is unenforceable.

Both narratives lead to "legitimate" and hardened positions. The narrative mediator's job is to help both parties explore the underpinnings of these narratives to open the legitimacy of alternative narratives.

Narrative Mediation also requires the mediator to examine the effect of his or her own socio-cultural context on the competing narratives. Good mediators are neutral in the ordinary sense, but everyone interprets facts through the lens of their own narrative. Recognition of this fact helps the mediator understand the varying narratives and remain neutral.

True Narrative practice is somewhat at odds with our problem-solving orientation. However, it is a rare neutral who has not heard competing conflict stories based upon the same facts. Using Narrative Mediation techniques to help parties consider an alternative narrative in some cases can be a powerful tool toward resolution.

WHEN SHOULD YOU MEDIATE

The simple answer is as early as possible that is consistent with our advice that the parties adequately prepare for the negotiation. As this paper illustrates, there is a lot of information necessary to properly prepare for mediation and may require discovery and perhaps even some briefing on dispositive motions. Although preparation is stressed here, opportunity to resolve matters before positions harden and potentially large amounts of money are spent in discovery should be explored.

It is a rare litigator who has not participated in a mediation that stumbled when one party, or another, concluded that they did not know enough about the claims or had an adequate opportunity to evaluate the claims. Pre-litigation, or even early-in-litigation, mediation can offer significant cost saving benefits. It is equally likely to be a necessary waste of money because the parties are not prepared. Unfortunately, this is often the result in court-ordered or contractually required mediation which occurs too early in the process for the parties to appreciate the facts, the risks, and the costs of litigating the case through trial. On the other hand, if the parties convene mediation

at the end of discovery, significant amounts of money have been spent and there is usually an incentive for at least one party to see the result of a filed or contemplated dispositive motion before compromising. As has been said: "The right offer at the wrong time is the wrong offer." So, what is the right time for mediation?

Guided Choice Mediation

Guided Choice Mediation is a process that engages a mediator early with delegated authority to determine what information must be exchanged prior to mediation and the best time to engage in settlement negotiations. It is more expensive than traditional civil court mediation because the process begins earlier and requires more mediator involvement but its flexibility has the potential to save many times its cost compared to full blown discovery and trial preparation costs. At least for large dollar or complex cases it should become the new norm.

Paul Lurie, one of the authors of Guided Choice, described it this way:

> Guided Choice is a mediation process in which a mediator is appointed to initially focus on process issues to help the parties identify and address proactively potential impediments to settlement. Mediation confidentiality is a powerful tool to help the parties safely explore ways of setting up a

cheaper, faster, and better process to explore and address those impediments. Although this person works essentially as a mediator, in Guided Choice the mediator does not focus initially on settling the case. Instead, the mediator works with the parties to first facilitate a discussion on procedural and potential impasse issues and help them analyze the causes of the dispute and determine their information needs for settlement.

The mediator works with the parties to design a process best suited for an early, but educated, settlement negotiation. The objective is to find a process that avoids unnecessary cost but ensures that the parties have the opportunity to fully develop the law and facts so that they make an informed decision regarding settlement.

Another key aspect of Guided Choice is the commitment to keep the facilitator or Guided Choice Mediator involved in the negotiations if the initial process reaches an impasse. Far too often in our civil practice, mediation is a box that the Court requires be checked or counsel believes is concluded at the end of the initial substantive negotiation. Guided Choice anticipates the neutral's continued involvement.

CONCLUSION

Although the outcome of a settlement negotiation may depend to some extent on the mediator, the difference between settlement and impasse is far more dependent on the preparation and negotiation skills of the parties and their advocates. As is true with most aspects of litigation it is far more likely that a case will settle or that an impasse is well reasoned if everyone is prepared and understands what their mediator is trying to accomplish.

The information presented in this paper provides an outline of how to prepare for mediation and a basic understanding of the mediator's objectives. There are a significant number of resources available – many are free – to learn more about different mediation disciplines, negotiation skills, and the psychology of negotiation but there is no substitute for experience.

About the Author

Bob Meynardie has been a Raleigh, North Carolina based civil trial lawyer since 1993. His practice is primarily commercial and construction related. Prior to forming the predecessor of Meynardie & Nanney, PLLC, Bob was a litigation partner in 2 large Carolina-based firms.

Bob became a certified mediator in 2000 and a member of AAA's Panels for Commercial and Construction mediation and arbitration in 2010.

Prior to moving to North Carolina, Bob served as a judicial law clerk to the Honorable Susan H. Black at both the U.S. District Court for the Middle District of Florida and the U.S. Court of Appeals for the 11th Circuit. He is a graduate of Emory University Law School, the University of San Francisco's MBA Program, and the Wharton School at the University of Pennsylvania.

Bob lives in Raleigh with his wife, Catherine, and is the proud father of three adult daughters, from whom he learned a lot about negotiation through trial and failure.