Introduction

- Sam Imperati, JD
- Former Trial Attorney and Pro Tem Judge
- Taught: Willamette MBA and L&C Law
- Currently: a Mediator, Facilitator, and Trainer
- Father of Two Mini-Mes!
- Uncle “Big Al” Capone

Presentation vs. Handout
No Legal Advice
50 Ways to Break an Impasse

The impasse is all inside your head", I said to them
The deal is easy if you take it logically
I'd like to help you in your struggle, don't you see
There must be 50 ways to break an impasse

I said why don't we explore with all our might
I believe you'll begin to see the light
Soon they realized I probably was right
There must be 50 ways to break an impasse
50 ways to break an impasse

Semi-Sincere Apologies to Paul Simon

Full Disclosure

“Where did you get this mediator, anyway?!”

Function of Your “Philosophical” Approach
Typical Mediation Impasse

“I’m NOT settling. That’s my BOTTOM Line. It’s a matter of PRINCIPLE!”

The Intersection of Logic and Emotion

“Our life is what our thoughts make it…” (Marcus Aurelius)
1. Opening Letter Tips to Manage Impasse
(Mediation is a Process – not an Event)

- Voluntary process that affords all parties the best opportunity to explore a dispute in a confidential environment and reach agreement. I can personally attest to its success in cases ranging from “admiralty to zoning.”
- Enclose your pre-session submission request, and Memo of Understanding. (See, Tip # 48)
- Reserve the Whole Day
- Each party, or as a less desirable option, a representative with complete authority to fully resolve all issues is present. Please notify me immediately if this is not possible.
- Pre-session exchange of key documents and mediator as “discovery master”
- Discuss Confidentiality (ORS Chapter36) (FED and WA Different)
- Call after receiving submissions and chat them up
Ask for a Pre-Session Submission

1. A brief review of the procedural status of the case
2. A brief factual overview
3. Identification of the key factual and legal issues including a detailed “damages” analysis
4. A bullet-style list of your factual/legal strengths
5. A candid, bullet-style list of the other party’s factual/legal strengths, along with your response
6. The underlying non-monetary needs of both parties
7. A history of settlement discussions including the last proposals and “whose court you think the ball is in”
8. Your view as to the past and current barriers to settlement
9. Highlighted copies of the key documents and pleadings
10. A summary of any other helpful information
11. A list of the key persons so I can check for “conflicts”

Exchange with Opposing Counsel or Mediator’s Eyes Only?

Session Tools
2. Opening Statement Tips to Minimize Impasses

- **EXPLAIN ROLES & GROUNDRULES**
  - Your Role: What it is and What it is not.
  - Order of “presentations” — same as in trial given burden of proof
  - Full opportunity to speak
  - Save settlement proposal for caucus
- **CONFIDENTIAL (Secret, Non-DISC & INADMIS)**
  - What is said here stays here: Will not testify
  - Exceptions Required by law & A/M
  - Public Records & Open Meetings
- **CAUCUS**
  - Private meeting ~ Confidential
  - Ask questions and go through risk analysis
  - May likely feel impatient with pace
- **IMPASSE**
  - You’ll want to leave three times!
- **QUESTIONS and COMMITMENT**
  - Work hard toward resolution

3. Explain Anatomy of a Negotiation

- **POSITIONS**: What each party says they want – their preconceived solution
- **ARGUMENTS**: Why they think they should get it
- **INTERESTS**: Underlying needs, hopes & concerns that must be satisfied to achieve a resolution
- **SUCCESS**: Perceived Differences, Scarce Resources, Inaccurate Information, Unfulfilled Needs, Power Struggles
4. Ask Effective Questions

- Who, what, when, where, why and how?
- I want to understand this from your perspective, would you please tell me again…?
- I know you realize any solution needs to work for both of you. Do you have any suggestions on how we can improve the proposals?
- They have presented an X-part proposal for your consideration. Should we discussed the proposals one at a time or as a package?
- Is there some external reference we can look at to assess fairness?
- Maybe we should examine perceptions. What assumptions are you or they making?
What are the personal (and business) ramifications from (your perspective) (their perspective) if we can’t reach an agreement?
What would you think if they proposed…?
What do you think they are misinterpreting? What do you think they believe you are misinterpreting?
We appear to be momentarily stuck, what can we do to get back on track?
If we can’t get this settled, what happens next?

5. Create Umbrella Question to Reframe Issue

The Business Deal

How can we fairly and cost-effectively address Brown’s need to get its product to market, while at the same time protect Green’s distribution rights, thereby satisfying your common need for profitability and viability?
Umbrella Question Diagram

How can we address ____________________________
(interests of Party A)
while at the same time ____________________________
(interests of Party B)
thereby satisfying your ____________________________
(common interests)

National Coalition Building Institute International

Umbrella Question Tip Sheet

- Short (oral) vs. Long (written)
- Whose Interests Do You Lead With? (Theirs)
- If Neither Work? (Common)
- Incorporate Values, Needs, and Interests

There's no such thing as good writing – just good re-writing!
Sister Mary Fintan, Sam's 6th Grade Teacher
6. Consciously Decide Whether to Caucus

Why Do We Do Them? Test the Default Assumptions About If/When to Caucus.

Reasons For:

Reasons Against:

"The days of the bartender-psychologist are over, but I can help you settle any disputes!"

Caucus Tips and Mechanics

Considerations:

1. Whom to meet with first?
   A) Your gut feeling as to who needs to vent most
   B) Party with Burden of Proof
   C) Party that made the last proposal

2. Give parties “homework” to do while waiting. Some of the best work happens when the parties have time for private reflection.

3. Some of our best work is done when we are NOT in the room!
Use an Inter-Caucus Worksheet
(Confidential – for Mediator only)

Party __________
Caucus # __________

What specific needs or interests would be satisfied by reaching a settlement today?

<table>
<thead>
<tr>
<th>For you:</th>
<th>For the other side:</th>
</tr>
</thead>
</table>

If you could create the fairest resolution of this conflict (i.e., objectively fair to all parties and satisfying their respective needs and interests), what would it look like?

And why is it fair to all concerned?

Use the “SWAP-LION” Protocol

Strengths: Where are you strong?
Weaknesses: Where will the other side say they are strong?
Alternatives: If the conflict is not resolved, what will happen?
                  BATNA Analysis (Decision Trees and Tables)
Perspectives: Theirs – What is driving the controversy? What do they need to agree on resolution? Why?
                  Yours – What is driving the controversy? What do they need to agree on resolution? Why?
List Interests: Party A, Party B, Common, Prioritize
Options: Brainstorm multiple options for resolution.
                Separate the process of inventing from negotiating.
Negotiation: Tie proposals to legitimate objective standards.
                  Get permission to discuss basis with other side.

S, W and A: Direct to Attorneys; P and L: Direct to Party; O and N: Both
Disclosure Issues and Note Taking Tips

Always close with authority to disclose. Be specific in terms of what you want to disclose. Alternative: ask “What do you want me to disclose?” or “Is there anything I can’t disclose?”

The three types of information received in confidence:

1. **Must** be disclosed – Mandatory
   - Settlement offers/proposals
   - Specific directives (“I want you to tell them that…”)
2. **May** be disclosed – Discretionary
   - Everything else you have the authority to disclose (e.g., strengths, objective standards, etc.)
   - Conditional Disclosures: Don’t Take the Bait!
3. **Must not** be disclosed – Non-Discretionary
   - Everything that you do not have authority to disclose

**NOTES:** O = Ask to Disclose; OK or NO; OK

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7. Wise Decisions

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When Decision Making Goes Wrong!

So, you’re asking me when was the last time I made the correct call?

Decision Making and Cognitive Conflict

“Cognitive Conflict” = Importance $\times$ Uncertainty

Examples:

1) High Importance and High Uncertainty
2) High Importance and Low Uncertainty
3) Low Importance and High Uncertainty
4) Low Importance and Low Uncertainty

Too Much Cognitive Conflict Can Create Panic

Too Little Cognitive Conflict Can Create Apathy

Risk Tolerance

AVERSE  NEUTRAL  TOLERANT
1  2  3  4  5  6  7

“You say it’s a win-win, but what if you’re wrong-wrong and it all goes bad-bad?”

Do a BATNA Analysis with Them

- Probability of Summary Judgment/Dismissal

- If tried case 100 times, what % of time would you get favorable result? (Most frequent answer: 70%)

- Realistic range of verdict/award decision

- Time to prepare for trial/hearing

- Cost to prepare for trial/hearing: Discovery, Experts, Attorneys Fees, Opportunities Lost

- Length of trial/hearing
50 Ways to Break an Impasse: Tips, Tricks, Traps and Tools

- Cost to present case at trial/hearing: experts, witnesses, attorney fees, etc.
- Likelihood of appeal
- If argued case 100 times, what % of time would you get favorable result? (Most frequent answer: Low %)
- Cost to appeal
- Length of time to appellate decision
- Probability of retrial/hearing vs. dispositive win
- Time value of money, opportunity costs: disruption of business, life, benefit of minimizing uncertainty

Have Them Visualize “Unbiased” BATNA
“Best Alternative To a Negotiated Agreement”

Father Guido Sarducci’s Five Minute University!

\[
\begin{align*}
&WATNA = \text{Worst Alternative to a Negotiated Agreement} \\
&MLATNA = \text{Most Likely Alternative to a Negotiated Agreement}
\end{align*}
\]
50 Ways to Break an Impasse:
Tips, Tricks, Traps and Tools

Mediator’s Analysis of “Biased” BATNA and the “Resolution Zone”

The “Resolution Zone” is Usually Bordered by the Peaks of the Two Curves

Support Modification Decision Tree

Substantial Change
Not Proven 30%

$6,000
30% x $6,000 = $1,800

60%
Improved Lifestyle
Proven

$3,000
70% x 60% x $3,000 = $1,260

Substantial Change
Proven 70%

40%
Improved Lifestyle
Not Proven

$6,000
70% x 40% x $6,000 = $1,680

Now, Factor in:
Court Costs, Attorney Fees, Interest, Tax Issues, Lost Time/Wages, Lost Opportunity, etc.

Then, Consider:
Non-Economic Factors via a Decision Table

Risk x Reward
Preliminary Result:
$4,740
Decision Tables Reduce Errors by:

A) Providing external memory
   - *External Memory Frees the Imagination*

B) Comparing alternatives
   - *We Choose Better When We Compare Alternatives Directly*

C) Focusing on outcomes and facts
   - *Without Facts, We Tend to Rely on Stereotypes and Other Mental Shortcuts*

D) Analyzing outcomes by attributes/values and group them
   - *Better than trying to keep all in our head*

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Litigation – Example

1) The Economic, “Settle-Don’t Settle” Alternatives are created with the Decision Tree
2) The Subjective Evaluation Factors are evaluated with a Decision Table
3) Consider together when making a Wise Decision in the Intersection of Logic and Emotion!

[Link to Wise Decider](http://wisedecider.net)
Wise Decider

Unlock it by going to http://wisedecider.net/ and either:

A) Create your own free account, or

B) Use the Demo Account (You can delete/transfer info at the end of class)
   1) username = demo
   2) password = demo

C. Watch Videos

Remember, It’s Free!

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8. How to Respond When “Being Spun”

- Watch for phrases signaling an unstated admission that there’s more to tell:
  - “That’s about it.”
  - “That’s pretty much our position.”
  - “There’s not much more to tell.”
  
  **TIP:** What are they not saying? Ask, “Please tell me the rest…” or “What else do I need to know?”

- Watch for phrases signaling they “can’t” reveal information to you:
  - “I can’t say.”
  - “I can’t think of anything.”
  - “I’m not able to say.”
  - “I couldn’t really tell you that.”

  **TIP:** Is it that they don’t know, or don’t want to tell? Ask, “What can you share with me?”
50 Ways to Break an Impasse:
Tips, Tricks, Traps and Tools

• Watch for claims that you have no proof for your assertion:
  • “There’s absolutely not one piece of proof.”
  • “Show me the evidence.”
  • “No proof exists one way or the other.”
  • “What evidence do you have?”

  **TIP:** Ask, “Are you willing to exchange evidence on this point?”

• Watch for phrases given without a pause or an immediate response denying knowledge:
  • “I don’t remember.”
  • “I can’t seem to recall at this time.”
  • “Not to my knowledge,” or “Not that I can remember.”

  **TIP:** Usually, people trying to recall something, pause before they say they can’t remember. Ask, “Who might have the answer?” or “What do you need to do to refresh your memory?”

• Watch for “projection” phrases. This is a defense mechanism where a person voices their own fears while attributing them to someone else:
  • “A person would have to be crazy to expect that.”
  • “Sounds like that person is a real fool.”
  • “You’d have to be a jerk to make demands like that.”

  **TIP:** The other party might be referring to himself, and is aware that he is appearing in an unfavorable light and is concerned about it. Ask, “We all make mistakes… What really happened here?”

Experience is a wonderful thing… It enables you to recognize a mistake when you make it again!

Adapted from “Detecting Lies in Disguise,” Calibre Press Street Survival Newsline No. 310, 9-30-98
9. Educate Them

The “Skilled” vs. “Average” Negotiator:

- Made twice as many comments regarding long-term considerations and considered twice as many options.
- Made three times as many comments about common ground.
- Tested the other party’s understanding and summarized previous points more than twice as often.
- Seldom used heated or emotional behaviors to attack the other party or defend their position.
- Offered commentary about feelings almost twice as often (e.g., fairness and motives for proposals).
- Asked more than twice as many questions.
- Did not require “issues sequencing.”

From Neil Rackham, Huthwaite Research Group, 1968

... and Mention These Collaborative Tips

1) Seek first to understand, then to be understood because suspending judgment is the foundation of clear thought.
2) Explore – Don’t debate. Attack the problem – Not the person.
3) Listen for agreement – not disagreement.
4) Ask questions, don’t restate your position.
5) Don’t prepare your response while they are talking.
6) Don’t interrupt.
7) Treat the person’s values, needs and interests with respect.
8) Manage your reactivity and take responsibility for your actions.
9) Keep focused on the team’s common vision and values.
10) Be assertive about the need to collaborate!

Blessed are the flexible, for they shall not be bent out of shape! Gumby
10. Ask Their Objective: “Resolution” or Settlement

“Build a Relationship and Fix the Problem”
or “Build a Case and Fix Blame”

<table>
<thead>
<tr>
<th></th>
<th>“Resolution”</th>
<th>“Settlement”</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Definition</strong></td>
<td>Durable, Satisfying Closure</td>
<td>Walk Away Unhappy</td>
</tr>
<tr>
<td><strong>Getting the Deal</strong></td>
<td>Slower</td>
<td>Faster</td>
</tr>
<tr>
<td><strong>Ultimate Acceptance</strong></td>
<td>Sooner</td>
<td>Later</td>
</tr>
<tr>
<td><strong>Result</strong></td>
<td>Success</td>
<td>Compliance</td>
</tr>
<tr>
<td><strong>Maintenance Costs</strong></td>
<td>Low</td>
<td>High</td>
</tr>
</tbody>
</table>

Ask Them to Listen for Agreement

<table>
<thead>
<tr>
<th>Reactive Listening</th>
<th>Proactive Listening</th>
</tr>
</thead>
<tbody>
<tr>
<td>Interrupt</td>
<td>Listen</td>
</tr>
<tr>
<td>Assume</td>
<td>Inquire</td>
</tr>
<tr>
<td>Demand</td>
<td>Ask</td>
</tr>
<tr>
<td>Emote</td>
<td>Reflect</td>
</tr>
<tr>
<td>Deny</td>
<td>Acknowledge</td>
</tr>
<tr>
<td>Focus: You</td>
<td>Focus: Us</td>
</tr>
<tr>
<td>Intention: Change Them</td>
<td>Intention: Understand Them</td>
</tr>
<tr>
<td>Approach: Distributive</td>
<td>Approach: Interest-Based</td>
</tr>
<tr>
<td>Goal: “Settlement”</td>
<td>Goal: “Resolution”</td>
</tr>
</tbody>
</table>
50 Ways to Break an Impasse: Tips, Tricks, Traps and Tools

**Explain Classic Approaches**

**“Distributive”**
- Competitive/antagonistic
- Independent action preferred
- Fixed Sum - Resource allocation is distributive (individual gains)
- Goal: win as much as you can – especially more than the other side
- Debate Leads to Settlement

**“Interest-Based”**
- Collaborative/cooperative
- Interdependence and common interests valued
- Expand Sum - Resource allocation is integrative (joint gains)
- Goal: mutually agreeable solution - durable and fair to all
- Exploration Leads to Resolution

“Why can’t we all just get along?” Rodney King

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**Help Them Select Their Negotiation Approach**

<table>
<thead>
<tr>
<th>Goals</th>
<th>Yours</th>
<th>Theirs</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 Outcome and</td>
<td>Pure Collaborate</td>
<td>Collaboration Soft Compete</td>
</tr>
<tr>
<td>Relationship Important</td>
<td></td>
<td></td>
</tr>
<tr>
<td>2 Outcome Important</td>
<td>Collaborate</td>
<td>Hard Compete</td>
</tr>
<tr>
<td>3 Relationship</td>
<td>Pure Collaborate</td>
<td>Subordinate</td>
</tr>
<tr>
<td>4 Neither Outcome</td>
<td>Collaborate</td>
<td>Passive Avoidance</td>
</tr>
<tr>
<td>5 Neither Relationship</td>
<td>Soft Subordinate</td>
<td>Subordinate</td>
</tr>
<tr>
<td>6 Outcome Important</td>
<td>Collaboration Soft Compete</td>
<td>Subordinate</td>
</tr>
<tr>
<td>7 Relationship</td>
<td>Subordinate</td>
<td>Active Avoid</td>
</tr>
<tr>
<td>8 Neither Outcome</td>
<td>Subordinate</td>
<td></td>
</tr>
<tr>
<td>9 Neither Relationship</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
Use Your Words Carefully

**USE**
- Proposals
- Resolve
- Firm Proposals
- And

**INSTEAD OF**
- Positions
- Compromise
- Non-negotiable
- But

To be honest, I’ve never ripped into anything that wasn’t begging to be ripped into.

*Mud thrown is ground lost!*

... and Reframe

Translate “positions” into “interests” by diving below the waterline of adversarial banter. Help those involved focus on “real” needs versus stated positions.

**EXAMPLE:** “I want 50% custody!”

**REFRAMER #1:** “It sounds like being available so you can meaningfully contribute to your kid’s development as she moves through life is important to you”

**REFRAMER #2:** “If your child support payments stayed the same and you had liberal visitation, would you be willing to consider less than 50% custody?”
11. Use Holy Trilogy of Impasse Breaking

- First “Real” Response
- “The Settlement Dance”
- First “Real” Proposal

PLAYING FIELD

BLEACHERS

TRUTH
&
JUSTICE

RESOLUTION ZONE
Competing Perceptions of Truth & Fairness

BLEACHERS

The Three Impasses:
Explain the “Tricks” or “Tools” in Joint Session

A) Conditional Offer

**Defined:** An offer/proposal that may be disclosed only if a certain condition is met.

**Use:** Get them on “Playing Field” or into “Resolution Zone”

**Conditions may be:**

- "Movement" "If they move off last number in response to my offer ($10,000), you may put the conditional offer on the table ($20,000)."

- "To finite number" "If in response to my offer ($10,000), they come down to ($70,000), then you may offer ($20,000)."

- "To specific range" "If in response to my offer ($10,000), they come below ($70,000), you may offer ($20,000)."

**Response:** May get a conditional response to a conditional offer.
B) Confidential Settlement Proposal

Defined: Mediator obtains what is “pretty damn close” to their bottom line – not their actual bottom line! The structure allows for private testing of an offer (only the mediator will know.)

Use: In “Resolution Zone.” Second to last mediator move

Three Possibilities:
1) Numbers are the same and the case settles
2) Numbers “overlap” – never seen it happen!
3) The “gap” is:
   A) Not bridgeable: mediation is over
   B) Might be bridgeable: ask for new confidential numbers
   C) Bridgeable: ask if they want you to:
      i) Disclose gap in general terms
      ii) Disclose actual number(s)
      iii) Mediator’s Proposal (Frequent Pick)

C) Mediator’s Proposal

Defined: A solution proposed by the mediator to each side in caucus. It is not the mediator’s opinion of case’s FMV. It is her best judgment of where the case might settle based upon all of the dynamics.

Use: The Last “Trick” or “Tool.” Usually for economics, but can be used for other terms.

Technique: Mediator explains the procedure and asks for permission to offer a confidential proposal. Not FMV; rather a solution that the mediator believes both sides are likely to accept. If one party says YES and the other NO, the party who said NO will not be told that the other was willing to accept the solution.

Number: Based on their BATNA analysis, risk tolerance, saved transaction costs, and your gut instinct.
Impasse Busting Potpourri

12. Missing Guests:

A) Only attorneys attend – parties not present
   • Insist that parties (decision-makers) are present
   • Let the other side know of the tentative nature of the commitments early in the process

B) Insurance rep. present without sufficient authority
   • Give opportunity to call or confer with supervisor
   • Speak directly with supervisor
   • Fax signatures on Agreement to Mediate

C) Pro se – unrepresented party
   • They are more likely to rely on mediator for advice. This can be tricky if mediator is an attorney who should not be giving legal advice. Legal information: OK? Recommend they get independent legal advice.

13. New numbers – Parties posture by retreating from pre-session offers. Only works if new law or new “killer” fact. In pre-session communication, explain the importance of keeping the negotiations moving forward and urge that last offers not be taken off the table. Determine settlement history in advance of session.
14. **Party or advocate states hard line opinion at outset and/or is arbitrary or emotional:**
   - Develop rapport before pressing for proposals
   - Consider using Confidential Offers

15. **One party gives you maximum authority up front and asks you to negotiate the best deal** - You cannot negotiate for any party.
   Avoid the psychological block when a “bottom line” is put out too early

16. **“I won’t bid against myself!”** Use Conditional Offer

17. **Legitimate outside standards** – Tie proposals to them

18. **Soft therapy:** (you sense they are missing something) … “Have you had an opportunity to…”

19. **Two proposals that tease out true needs** (E.g. money or reinstatement)***

20. **Disparate time spent in different caucuses:**
   “I’ll spend as much time with you as you need. It doesn’t matter where we start – only where we end.”

21. **Suggest non-monetary items** – e.g. reference letter. Often something of high value to one party with minor cost to the other
22. **Silence** – Can be motivating

23. **Set a deadline** – “90/10” or **Extend time** – Recess

24. **Look for WOWD factor** – A Way Out With Dignity

25. **Suggest giving gap to charity**

26. **They ask you to convey something you know will not facilitate the process**
   Start with, “I’ll do that if you want me to.”
   Pause. Then ask, “What impact will that have on our ability to get this resolved?”

27. **Ask parties for help** - why they are at impasse, suggestions for moving forward, what are their fears, or what are their hopes

28. **Ask party, “what would you like to hear them say to you if they ‘got it?’”** How would it sound to you if they were to ‘got it,’ and interpret ‘it’ back to you?”
29. Suggest or use neutral subject-matter expert (factual or legal)

30. Call an attorney-only or party-only caucus

31. Summarizes agreements to date to show progress

32. Ask what additional movement they would be willing to make if the other side would say “yes” to their new proposal

33. If They Vent, VECS Them

(Diving Below the Waterline of Adversarial Banter)

- **Validate**
  - Acknowledging people for talking even if you disagree: “I appreciate your willingness to say…”

- **Empathize**
  - Identify with another’s views even if you disagree: “This is tough.”

- **Clarify**
  - Open-ended questions to clarify issues or meaning: “What bothers you most about this situation?”

- **Summarize**
  - Setting the stage to move toward a cooperative resolution: “So, let’s back up and review… so where do we go from here?”

*If you can’t do this with genuine sincerity, don’t do it!*
34. Suggest an apology: full, partial, or just an acknowledgment or recognition of the “yuck”

35. Package deal points perhaps including elements that are not as important/costly

36. Unbundle deal points

37. Move from money to terms, or vice versa

38. Propose a “trial” settlement for a period of time or a “contingent” settlement to allocate the risk, manage trust,

39. “It’s going to take need more money... it’s the last time I’ll ask”

40. Give them a reason to let them sleep that tonight – what to tell their “Shadow Jury”

41. Give them hope that they can survive this – “normalize” their emotions, which often caused by the following “Psychological Traps”
**50 Ways to Break an Impasse:**

*Tips, Tricks, Traps and Tools*

<table>
<thead>
<tr>
<th>Psychological Traps</th>
<th>Mediation Tools</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>A) Anchoring:</strong></td>
<td>1) Use “Confidential Numbers” until “Resolution Zone.” Then play “cards up.”</td>
</tr>
<tr>
<td>People get stuck on salient, irrelevant numbers. (See next slides for Demo!)</td>
<td>2) “Ever settle a case with the initial exchanges?”</td>
</tr>
<tr>
<td></td>
<td>3) Tie to legitimate outside standards</td>
</tr>
<tr>
<td><strong>B) Concession Aversion:</strong></td>
<td>1) Mediator’s Proposal can diminish this trap as it does not come from other side. Cloaks the source.</td>
</tr>
<tr>
<td>People don’t value equal trades from a neutral perspective. They distort the value of the offer so as to overvalue the loss, making equal trades difficult to effectuate. People tend to avoid taking risks when it means losing secure gains: positive frame. People tend to accept risk to avoid a certain loss: negative frame.</td>
<td>2) Use drawn continuum to show comparable movement, distinguishing between percentage movement vs. raw numbers</td>
</tr>
<tr>
<td><strong>C) Construal Biases:</strong></td>
<td>1) Normalize using Conflict Style Continuum</td>
</tr>
<tr>
<td>People think that others hold more extreme views than they do, and are unwilling to accept that others are moderate in a partisan situation</td>
<td>2) Suggest Conditional Offers</td>
</tr>
<tr>
<td>3) “Trial” settlement with revaluation terms</td>
<td></td>
</tr>
<tr>
<td><strong>D) Fairness as a Decision-Making Criterion:</strong></td>
<td>1) Deconstruct core elements of notorious case and compare objectively to current case.</td>
</tr>
<tr>
<td>People reject deals that leave them better off than no deal if they perceive that their norms of fairness are being violated in accepting the deal.</td>
<td>2) Use external, objective indices of fairness.</td>
</tr>
</tbody>
</table>
| 3) Rawls thesis extended is that self-interest would motivate decision-making using agreed-upon norms in the face of uncertain results.
E) **Fundamental Attribution Error:**

We react to situations while others act in accordance with immutable character traits. Restated, attribute good motivations to ourselves and bad to others.

1) Normalize with “we are all so damn human, and instinctively listen for disagreement, not agreement.” Could the jury see any good in the other side, even if rehearsed and insincere?

2) Example: real estate fraud claim where defendant is bristling at the suggestion they are a liar. Ask, “What would you have done, repair or price-wise, had this leaky roof been known to you prior to closing the transaction?” Thinly veiling the negative connotation while giving person opportunity to save face.

3) Draw out the narcissistic – altruistic continuum and ask where the jury could find the Prado Optimum point between self-interest and the broader societal interest?

4) Move beyond those assumptions and suggest MED-ALOA (Keep arbitrator in dark as to last positions)

---

F) **Chasing Sunk Costs**

“Throwing good money after bad”

1) Explain the phenomena and normalize with “we are all so darn human.”

F) **The Availability Challenge**

Tendency to focus on information that is more readily available to us

---

42. Preempt the “Oh, by the way…” Play. Bring it up when they are 80% of the way to settlement. Get all terms on the table before proceeding into the “Resolution Zone.”

43. Bifurcation – Suggest bifurcating the dispute and submitting the disputed portion to arbitration (e.g., settle the main claims and arbitrate the attorney fee portion.) Mere suggestion of bifurcation can break impasse.

… or Suggest or Use Hybrid Processes:
A) In MED-ARB, the parties agree if a settlement is not reached, the mediator becomes “arbitrator” and issues a binding award. Concern is that the parties will be less candid with the mediator if that person may wind up “arbitrating.” The “fix:” do MED in Joint Session.

B) MED-ALOA: Mediation and Last Offer Arbitration – Parties make one last attempt, and if unsuccessful, process converted into binding arbitration. Neutral must select either the last offer or last demand. Mediator can become arbitrator or parties pick new one. This is baseball arbitration.

C) In ARB-MED, the neutral conducts a hearing and issues a sealed award. Parties then talk settlement with the mediator and the envelope is destroyed if settles. Otherwise, envelope is opened. (Variation: ARB-MED-ALOA)
44. Fairness


In *A Theory of Justice* (1971), John Rawls introduced the concept of a veil of ignorance as a device for encouraging the fair and unbiased judgments required for decision-makers. Rawls asked us to assume that decision-makers would be operating in an original position of equality, behind a veil of ignorance as to their actual positions in life.

Philosophical analysis and psychological research point to the importance of fairness in conflict and to the appropriateness of excluding potentially biasing information as a means to fairness. Potentially biasing information can be excluded from consideration by:

A) Thin Veils consist of instructions to disregard information that is known and already in consciousness.

B) Thick Veils make it more difficult for information that is known but not in consciousness to be brought to consciousness.

C) Cloaks withhold information that is not yet known.

Opportunities to apply cloaks and veils of ignorance arise in fact conflicts, value conflicts, and interest conflicts. They reduce transparency, and transparency of facts, values, and interests is an acknowledged goal of mediation. They must be used with care and the Informed Consent of the participants should be obtained in advance.

Barry Anderson: andersonb@pdx.edu
Les Swanson: lesswanson@comcast.net
Sam Imperati: samimperati@comcast.net
45. Check Your Cultural Assumptions

<table>
<thead>
<tr>
<th>Characteristics</th>
<th>Stereotypical Legal Culture</th>
<th>Another View</th>
</tr>
</thead>
<tbody>
<tr>
<td>Focus</td>
<td>Individual</td>
<td>Group</td>
</tr>
<tr>
<td>Communication Pattern</td>
<td>Direct and specific, eye contact</td>
<td>Indirect and ambiguous, limited eye contact</td>
</tr>
<tr>
<td>Approach</td>
<td>Risk-taking is valued, make demands, confrontation</td>
<td>Caution is valued, don’t make demands, non-confrontational</td>
</tr>
<tr>
<td>Conflict Comfort Level</td>
<td>More comfortable</td>
<td>Less comfortable</td>
</tr>
<tr>
<td>Goals</td>
<td>Reach settlements, win, task accomplishment</td>
<td>Preserve relationships, save face, harmony</td>
</tr>
<tr>
<td>Respect For:</td>
<td>Rights, legal precedent</td>
<td>Responsibilities and tradition</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Characteristics</th>
<th>Stereotypical Legal Culture</th>
<th>Another View</th>
</tr>
</thead>
<tbody>
<tr>
<td>Escalation Signals</td>
<td>Spontaneous frankness or bluntness, raised voices</td>
<td>Vagueness or roundabout approach, don’t speak</td>
</tr>
<tr>
<td>Participants</td>
<td>The actual parties</td>
<td>Larger community/extended family</td>
</tr>
<tr>
<td>Who Assists?</td>
<td>Law enforcement, attorneys, impartial neutral</td>
<td>Trusted, known intermediaries, elders</td>
</tr>
<tr>
<td>Setting</td>
<td>Formal</td>
<td>Informal</td>
</tr>
<tr>
<td>Language</td>
<td>Precise language and word choice valued</td>
<td>Meaning conveyed by words, inferences, interpretation</td>
</tr>
<tr>
<td>Ethics</td>
<td>Professional codes</td>
<td>Community expectations</td>
</tr>
</tbody>
</table>
... and Consider Emotional Expressiveness/Restraint
Conflict Styles ala the ICS Inventory
http://www.icsinventory.com

<table>
<thead>
<tr>
<th>Emotional Expressiveness</th>
<th>Emotional Restraint</th>
</tr>
</thead>
<tbody>
<tr>
<td>Overt display of emotions</td>
<td>Disguised display of emotions</td>
</tr>
<tr>
<td>Control emotions by &quot;externalizing&quot;</td>
<td>Control emotions by &quot;internalizing&quot;</td>
</tr>
<tr>
<td>Visible display of feelings through nonverbal behavior</td>
<td>Minimal display of feelings through nonverbal behavior</td>
</tr>
<tr>
<td>Expansive vocalization</td>
<td>Constrained vocalizations</td>
</tr>
<tr>
<td>Sensitive to constraints on expressing own feelings</td>
<td>Sensitive to hurting feelings of other party</td>
</tr>
<tr>
<td>Relational trust through emotional commitment</td>
<td>Relational trust through emotional maturity</td>
</tr>
<tr>
<td>Emotional information necessary for credibility</td>
<td>Emotional suppression necessary for credibility</td>
</tr>
</tbody>
</table>

... and Internal Decision-Making Preferences

LONG TERM

1 2 3 4 5 6 7

SHORT TERM

END RESULT

1 2 3 4 5 6 7

PROCESS

1 2 3 4 5 6 7

DETAILS

1 2 3 4 5 6 7

BIG PICTURE

1 2 3 4 5 6 7

BY THE BOOK

1 2 3 4 5 6 7

JUST DO IT

1 2 3 4 5 6 7
46. Use “Uncle Sam’s” Bailout: Bridging the Gap with Tax Plays

- Wages
- Pain and Suffering (P & S):
  - Caused by Physical Injury
  - No Physical Injury
- Punitive Damages
- Interest
- Attorney Fees
  - Contingent Fee
  - Statutory Fees
  - Fees on Physical Injury
  - Fees on Combo Physical and P & S
  - Deductibility: Itemized Deduction?
- Involve their CPA or Tax Attorney

47. Avoid Giving Opinions

You cannot help forming opinions, but you should refrain from giving them until the bitter end, if at all.

- Opinions tend to validate one party at the expense of other.
- Your opinion is not the issue – the burden is on the parties to convince the other team.
- Deflect their request by asking them to give you questions to direct to the other side to help with their evaluation.
- Neutrals are often surprised at settlements because the parties decide what is in their own best interest.
- Disassociate from problem – it belongs to the parties.
- Mediator only has limited exposure to case.
- This is not your role as stated in opening statement.
... but, When You Give Opinions

That being said, some mediators adopt an “evaluative” approach and give their opinions as to the probable outcome of specific issues (factual and/or legal) and/or the overall case. If you are going to do it, first ask permission (in joint session) and discuss advantages and disadvantages of doing so. If they agree, do it on issue(s) first, certainly before opining on the ultimate outcome.

Often, a “Mediator’s Solution” (not “Opinion”) Works

48. Change Your Mediator Approach

<table>
<thead>
<tr>
<th>Transformative</th>
<th>Facilitative</th>
<th>Evaluative</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>Hybrid</td>
</tr>
</tbody>
</table>

“So much is written, so little advanced.”

If Freud, Jung, Rogers & Beck were Mediators – Who would the Parties Pick?

50 Ways to Break an Impasse: Tips, Tricks, Traps and Tools

### Approaches and Their Differences

<table>
<thead>
<tr>
<th>Approach</th>
<th>“Transformative”</th>
<th>“Facilitative”</th>
<th>“Evaluative”</th>
</tr>
</thead>
<tbody>
<tr>
<td>Negotiation Theory</td>
<td>Interest-Based Relational</td>
<td>Interest-Based Preference</td>
<td>Rights-Based Distributive</td>
</tr>
<tr>
<td>Mediator’s Value</td>
<td>Process</td>
<td>Process</td>
<td>Results</td>
</tr>
<tr>
<td>Central Actor</td>
<td>Party</td>
<td>Party</td>
<td>Attorney-Focused</td>
</tr>
<tr>
<td>Reference Points</td>
<td>Relationship</td>
<td>Relationship Preference</td>
<td>Legal Rights &amp; Responsibilities</td>
</tr>
<tr>
<td>Communication Style</td>
<td>Listen</td>
<td>Explore</td>
<td>Argue</td>
</tr>
<tr>
<td>Goal</td>
<td>Fairness and “Resolution”</td>
<td>Prefer “Resolution”</td>
<td>Power and “Settlement”</td>
</tr>
<tr>
<td>Decision-Making Reference Points</td>
<td>Perceptions &amp; Subjective Standards</td>
<td>Combination</td>
<td>Evidence &amp; Objective Standards</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Approach</th>
<th>“Transformative”</th>
<th>“Facilitative”</th>
<th>“Evaluative”</th>
</tr>
</thead>
<tbody>
<tr>
<td>Length of Sessions</td>
<td>Longer</td>
<td>In-between</td>
<td>Shorter</td>
</tr>
<tr>
<td>Underlying Values</td>
<td>Self-Determination</td>
<td>Both</td>
<td>Protection of Rights</td>
</tr>
<tr>
<td>Disclosure Expectations</td>
<td>Full Disclosure</td>
<td>Full Disclosure Preference</td>
<td>“Secret” Information OK</td>
</tr>
<tr>
<td>Number of Sessions Assumption</td>
<td>One or More Sessions</td>
<td>One or More Sessions</td>
<td>One Session</td>
</tr>
<tr>
<td>Mediator’s Skills</td>
<td>Process Expertise</td>
<td>Process Expertise and Subject Matter Familiarity</td>
<td>Process Familiarity and Subject Matter Expertise</td>
</tr>
<tr>
<td>Party’s Interests</td>
<td>Non-Economic</td>
<td>Economic and Non-Economic</td>
<td>Primarily Economic</td>
</tr>
<tr>
<td>Negotiation Style</td>
<td>Collaborative</td>
<td>Combination</td>
<td>Aggressive</td>
</tr>
</tbody>
</table>
### Pre-Session Approach Assumptions

<table>
<thead>
<tr>
<th>M E D I A T O R A S S U M P T I O N (M)</th>
<th>Party A's Assumption (A)</th>
<th>Party B's Assumption (B)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Transformative</td>
<td>Facilitative</td>
</tr>
<tr>
<td>Transformative</td>
<td>M, A, B</td>
<td></td>
</tr>
<tr>
<td>Facilitative</td>
<td></td>
<td>M, A, B</td>
</tr>
<tr>
<td>Evaluative</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

### 49. Why Does Anyone Mediate if Mediation Risks Psychological Dissatisfaction, Extra Costs, and Manipulation?

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50 Ways to Break an Impasse: Tips, Tricks, Traps and Tools

Spoiler Alert: Mediators are Master Manipulators

Old Saws
1) Mediators own the process
2) Parties own the outcome
3) Mediators don’t have preferences as to the outcome

Provocative Proddings
1) Mediators should not own the process
2) Parties may not actually own the outcome
3) Mediators do have preferences over outcomes

1st of 3: Self-Determination Theory (SDT) (Psychology)

SDT: everyone has a need to feel:

- **Competent**: to have an effect and attain valued outcomes
- **Related**: to feel connected to others.
- **Autonomous**: to self-organize and be concordant with one’s integrated self.

Self-determining parties choose their
- dispute resolution processes and
- substantive agreements.

PARADOX: The more the mediator maximizes the parties’ self-determination, the less the mediator satisfies her own.
2nd of 3: Transaction Resource Theory (TRT) (Economics)

TRT: people confront problems of imperfect information with respect to substance and process. Negotiating parties face contradictory pressures that consume resources:

Costs of making concessions and complying with the agreement militate against making an agreement.

Versus

Benefits of reducing conflict and inducing others to cooperate militate in favor of making it.

PARADOX: Parties exhaust their transaction resources in resolving the dispute, yet they invite a mediator in with her own interests and costs.

3rd of 3: Collective Choice Theory (CCT) (Political Science)

CCT: assumes individuals can exercise choice consistent with their preferences – be it on process or substance.

PARADOX: it is impossible to design a process for a group to make a choice that guarantees an outcome as rational as choices made by its individual members. The parties risk cycling interminably among possible outcomes.

Or, if they agree upon one, it may well result from a party or the mediator manipulating the process.
Mediators Manipulate by Using Heresthetic & Rhetorical Tactics

Heresthetics: Structuring the world so you can win. Related to rhetoric, but involves more than verbal persuasion. It involves setting up a situation so that other people will want or feel compelled by circumstances to cooperate, even without persuasion.

According to SDT and TRT, a mediator in support of Self-Determination should engage the parties in a collaborative discussion and ultimately a decision to select mediation and the mediator’s approach be it Transformative, Facilitative or Evaluative.
Rhetorical Tactics (Persuasive Discourse)

Aristotle divides rhetorical arguments into three, not mutually exclusive, categories:

**Logos:** Logic stimulates need to feel competent

**Ethos:** Ethics, virtue, and goodness stimulate a party’s need to feel related by communal norms

**Pathos:** Sympathy and emotion can satisfy a person’s need to feel autonomous

Rhetoric presents existing information in a way that can manipulate a person’s thinking.

- **Forensic:** “Attempts to change what we see as the truth about the past” (E.g. “Is it possible their intent was [positive] …”)
- **Epideictic:** “Attempts to reshape views of the present” (E.g. “You have a choice - fix blame or fix the problem.”)
- **Deliberative:** “Attempts to make the future” (E.g. “Wouldn’t it be better to build a relationship vs. build a case?”)
Mediator Ethical Challenges

- Heresthetics and Rhetorical tactics impart power to mediators.
- Every mediator action exercises some form of power while mediating; so, let’s own it for crying in the night!
- If we don’t, how is it safe for parties to engage in mediation?

Ethical Standards

1. Self-Determination
2. Informed Consent
3. Impartial Regard
4. Confidentiality
5. Process & Substantive Competency
6. Good Faith Participation
7. Fees
8. Advertising & Solicitation
9. Dual Roles & Hybrid Processes
10. Mediation Practice

http://www.omediate.org/pg61.cfm
50 Ways to Break an Impasse:
Tips, Tricks, Traps and Tools

Intersection of Ethics and Approaches

MEDALATOR’S ETHICAL CONCERNS

Low
Facilitate Communication

High
Offer Opinion on Outcome
Raise Issues or Defense
Play Devil’s Advocate
Raise Options

Transformative
Facilitative
Evaluative

Post-Session Tools
50. Close the Deal or Post-Session Follow-Up

1. Have all bases been covered – any loose ends? Is the “deal” sustainable, durable and enforceable?

2. Who will do What, When, Where, and How?

3. Do you need a written agreement?

4. What do will you do if problems develop in the future?

... and Minimize “Settlement Remorse”

- Congratulate the parties and note that what they did, not you, is better than the alternative
- Summarize the essential terms in closing. (Who, what, when, where, why, and how)
- Provide for specific steps to formalize the agreement
- Help in drafting a Memorandum of Understanding (Next Slide)
- Suggest they involve you if problem develops
- Contact them, post-session, to check in
- If no “deal” reached, help them process the matter in a timely and efficient manner
Memorandum of Agreement of Essential Terms and Conditions

1. The mediation being concluded,
   □ this is a final, binding and enforceable agreement resolving all issues raised or raisable between the parties, **OR**
   □ this is not a final, binding and enforceable agreement. Signed final documents effecting the following essential terms and conditions are required before all issues raised or raisable between the parties will be resolved.

2. Full mutual releases.

3. Terms confidential except when exercising enforcement remedies. May also be disclosed to: clergy, spouses, therapists, accountants, lawyers, shareholders, directors and officers, as required by law.

4. Total amount paid by ______ to ______ : $ ______

5. Allocation and payment terms:


7. Promissory notes: Contain cross default and cross acceleration provisions.

8. Cure language in the event of a default (e.g., notice and opportunity to fix).

9. No prepayment penalty but prepayments are applied to end of note term and all subsequent payments must be made on time and pursuant to applicable ___-year amortization schedule.

10. Additional terms: ___________________________
     _______________________________________
     _______________________________________
     _______________________________________
11. Confession of Judgment on promissory notes to be signed by _____ and held by _____’s attorney and not filed or executed upon unless a default occurs.

12. Parties agree to complete and sign final documents by ______. Inability to reach agreement on the final documents will not invalidate the settlement reached on ______. If they can’t agree on language, disputes over the final documents will be resolved by:
   - final, binding and non-appealable arbitration by ______ who can provide any additional language and terms to effectuate this settlement. (The parties: acknowledge that the Mediator has received confidential information during the mediation process, agree that s/he can use this information in deliberations to arrive at a final decision and waive any and all claims against her/him.), OR
   - other process (please specify):

13. Standard boilerplate: _____ law; number, gender, caption; prior agreement/integration; enforcement/survivability; non-waiver; binding effect; notice provision for non-promissory note notices; legal representation; representations re: full authority to bind.

14. Mediator will authenticate this document and the signatures, but will not otherwise testify or be compelled to produce, testify or give any other evidence. Mediator will hold this original agreement with copies to each party. Mediator can destroy all information in his/her possession, including this agreement once final documents signed.

15. It is so understood and agreed: (signed and dated by each party)

16. Approved as to form: (signed and dated by each attorney)
**Bust Your Britches to Get a Deal!**

At the end of a successful process, we were in a room tying up loose ends when one of the attorneys said, “Sam, sorry we had to bust your butt today.” I replied, “No problem. I thought you were all quite well behaved.” He said, “Turn around!”

I did and said,

“*What … Aren’t your boxers supposed to match your tie!*”

---

**Go Forth and Break Impasse!**

“*May I be excused? My brain is full.*”