

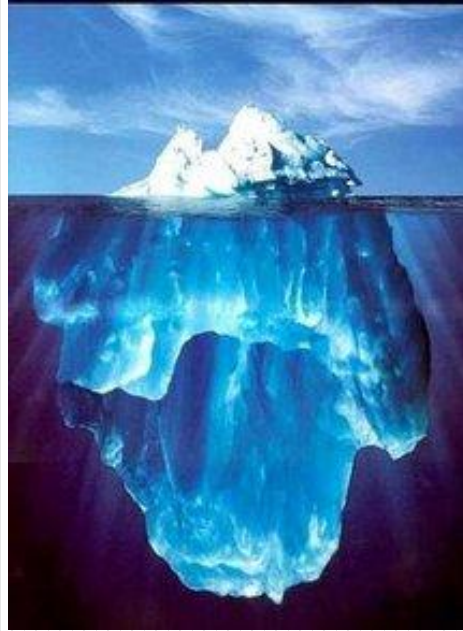
# CLOSING STRATEGIES

**Presented by**

**The ADR Section of the Hawaii State Bar Association**

**The Association for Conflict Resolution of Hawaii**

# INTERESTS/NEEDS/OPTIONS



# Assessment Tools

PMI (plus – minus – interesting)

BATNA/WATNA assessment

Cost/benefit analysis

Fishboning

Decision Making Matrix

**ID parameters and valuation components**

- Risk Tree
  - Risk Analysis
  - Proportionate valuation
  - Developing a mathematical basis for rationale.
  - If chances are worth 50/50 and likely damages are \$1,000,000, then accepting \$500,000 is reasonable
- On your Best/Worst/Average day
- Force field analysis

# Creative Packaging

- Linking future purchases to creative exchanging value
- Low cost/high value components
  - **Apology**
  - **Letters of reference**
  - **Agreed statements of reference**
- Using time, installment payments

# Process Controls

- Setting decision deadlines
- Designing procedural processes to organize negotiations
  - **Who meets**
  - **Who speaks**
  - **Synchronous or asynchronous**

- Expert Roundtable
- Use of neutral's neutral/expert
- Building Negotiation Momentum
- Settle Series of easier issues, leaving difficult issue to last
- Negotiate corollary terms that will need to be addressed as part of a final global settlement, leaving quantum to last
- Single text for drafting

# Realty Testing

- Doubt or Dissonance Strategy
- Maintenance of party control
- Send case back to court



# POSITIONAL/TACTICAL/STRATEGIC BARGAINING



- Exploratory conditional proposal
  - **If I could get them to X, would you be willing to do Y?**
- Be more than a messenger
  - **On a buying/selling price negotiation, find out what both seller would accept to sell and what buyer would offer to pay to buy before you communicate offer**
- Decline to convey insulting or unproductive proposal
- Concretizing the issue
  - **Develop focus on a few concrete points**
- Keep parties at the table
  - **Wear them down**

- Reframe the discussion
  - **Discuss suggestions for solutions instead of stating positions**
- Add in additional terms that you don't need so you have something extra to give away at the end
- Conduct a secret poll
- Bracketing
  - **If positions are at unproductive extremes, determine if mediator would get party to X, would other party be willing to do Y**

- Mediator proposal
- Settling around holdout.
  - **Good faith settlement determinations.**
  - **Increased exposure and defense costs to holdout.**
  - **Assignment of claims.**
  - **Shared information.**
  - **Assignment or restriction of access to settling parties' experts.**
  - **Bad faith exposure.**
- Obtain joint mediation with supervising court participation.
  - **Mediating in the shadows of the Court.**
  - **Good guy/bad guy.**
- Incorporating post settlement mediation/arbitration processes.

# RELATIONAL/EMOTIONAL BARGAINING



- Building on commonalities, shared goals, values, common fears and enemies

- Reframe to sidestep intractable differences

- Futurizing/Envisioning

  - If you could design your ideal/preferred future, what would it be like?**

  - What can we do today that will make a difference tomorrow?**

- Appreciative Inquiry

- Venting and open-hearted listening

-Finding emotionally satisfying components

-**A memorial fund**

-**Donation to worthy cause**

-**A scholarship in the memory of \_\_\_\_\_.**

-Bring together and let the Principals/CEOs talk at the end of the day

- Design a pilot project

- Procedural process design

-**Structured discussion, sequential caucusing**

- **Identify options blend and select**

-Trading places

-**Walk in the other person's slippers**

- What would (Jesus/Mom/\_\_\_\_\_) do?

# TECHNICAL/MEDICAL/ SCIENTIFIC DISPUTES





-Expert roundtable

-Use of statistics

**-80% of medical malpractice cases result in a defense verdict**

**-Less than 1% of design and construction deficiency cases are resolved through adjudication**

**-Parties commonly overestimate the value of their case by 25%**

-Joint fact finding

- Summary mini trial, advisory jury

**-Last offers must remain on the table for 48 hours**

-Neutral evaluation

-Managing Consent clauses dynamics

-Hammer clause

# EVALUATIVE STRATEGIES

- Confidential Mediator's report to parties
- If I were the arbitrator, you would lose
- The Mediator's evaluation, in context



# LARGE GROUP/CLASS IDEAS

- Mediator's allocation process
- Negotiated decision making formula
  - **2/3 vote/100% bound**
- Good faith settlement process
  - **Create momentum through partial, sequential settlements**
  - **Creating settlement envy**



# VALUE/MORAL CONFLICTS

- Building upon commonalities, shared goals, values, common fears and enemies
- Mutual Gains approach (Susskind & Field)
- Build upon shared or overreaching principles on which to base a continuing dialogue
- Joint Problem Solving

“...in Northern Ireland, mediator George Mitchell told the parties that if they did not reach an agreement, thousands more people would likely die.” And history will hold you accountable,” he told the negotiators. “Do you want to be responsible for that?” Mitchell reported when asked what the turning point in the negotiations that it was this question, along with an artificial deadline imposed by Mitchell, that pushed them on towards agreement.”

