May 2005

Bond Dispute Resolution News Volume 19

BOND UNIVERSITY
Dispute Resolution Centre

BOND DISPUTE RESOLUTION NEWS

Volume 19 May 2005

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Recent Activities of Bond University Dispute Resolution Centre

May 2004
Five Day Mediation Course taught by Professor John Wade at Pepperdine Law School – Summary of student evaluations

2-4 December 2004

Basic Mediation Course – Marriott Resort, Surfers Paradise, presenters, John Wade, Laurence Boulle and Pat Cavanagh – click for feedback

21-23 April 2005

Basic Mediation Course – Marriott Resort, Surfers Paradise, presenters, Professor John Wade and Ms Robyn Hooworth.

The Centre hosted a luncheon for **Professor Dan Druckman** visiting fellow for the Australian Centre for Peace and Conflict Studies on 2 March

In April the Centre hosted a visit from **Justice Louise Otis** from the Court of Appeal in Quebec during her Australian visit.

On 15 March the Centre hosted a luncheon for **Ray Rinaudo** to celebrate his appointment to the bench of the Queensland Magistracy. His Honour attended one of the first basic mediation courses in the early 1990s and has been one of the longest serving coaches in the Centre's mediation workshops.

LAURENCE BOULLE

10-14 January	Participated in the Dispute Resolution course at Victoria University, Wellington New Zealand
4 March	Attended meeting of the Law Council of Australia ADR Committee, Brisbane
21,22 March	Attended two day members meeting, National Native Title Tribunal
23 March	LawAsia Conference, Gold Coast, presentation on Cultural Issues in ADR with Bee Chen Goh, Ian Hanger QC and Nadja Alexander. Chaired session on Legal Education involving Kay Lauchland and other presenters
31 March–3 April	Attended official launch for Australian Centre for Peace and Conflict Studies University of Queensland and chaired session on On-Line ADR at inaugural ACPACS conference
11-27 April	Taught course on European ADR at Gent University Belgium and presented seminars on ADR in Hanover, Germany, Gotheburg and Lulea, Sweden

JOHN WADE

January 2005	Five-day Mediation Course taught at Southern Methodist University, Texas, USA
25 February	'Duelling Experts' paper presented to National Forensic Accountants Conference, Sydney
11 April – 12 May	Negotiating Effectively for Clients and in Your Personal Life – One-day Workshops conducted at Blakes Law Firm, Brisbane, Sydney, Canberra, Melbourne
20 May	'Duelling Experts' paper presented in Montgomery Alabama at annual ADR Conference
23–27 May	Five day mediation course, Pepperdine Law School, California
8 July	Paper on 'Teaching Skills' at Waikato Law School, New Zealand, ALTA Conference
9 July; 6 August	Negotiation workshops for Hunt & Hunt, Lawyers, Brisbane

BEE CHEN GOH

25 February	NADRAC Forum, Adelaide
23 March	'ADR in practice', LawAsia Conference, Gold Coast
31 March-3 April	'Peace as a Human Consciousness Movement', Australian Centre for Peace And Conflict Studies Conference on 'Peace, Justice, and Reconciliation', Brisbane

BOBETTE WOLSKI

18 February	Lexis Nexis Advocacy Masters Class *Opening and Closing Addresses*, Brisbane
6 May	*Preparing Clients for Mediation*, Lexis Nexis Family Law Conference, Brisbane
January-June	Multiple mediation (conferences) for Legal Aid Queensland

PAT CAVANAGH

17 March	Commercial Negotiation Strategies for Lawyers Seminar presented at the Leo Cussen Institute, Melbourne.
18 March	Commercial Negotiation Strategies for Lawyers Seminar held in conjunction with the Law Society of New South Wales presented in Sydney.
15 April	Commercial Negotiation Strategies for Lawyers Seminar held in conjunction with the Queensland Law Society presented in Brisbane.

Recent and Forthcoming Publications

Bobette Wolski

Forthcoming book: 2006 Thomson/LBC *Practical Legal Skills.*

Laurence Boulle

Produced six issues of the *ADR Bulletin.*

Chapter in Tania Sourdin (ed) *ADR in Australian Courts and Tribunals* (Federation Press 2005), 'In and Out the Bramble Bush'.

Submitted manuscript for second edition of *Mediation: Principles Process Practice* (LexisNexis Butterworths Sydney 2005).

John Wade and Bee Chen Goh are working on 4 chapters for forthcoming book on *Negotiation* edited by Christopher Honeyman and Andrea Schneider for the American Bar Association.

FLETCHER'S PARTNERSHIP DISPUTE - DVD

This DVD models segments of a role play of a problem-solving or 'facilitative' mediation between two partners in an accounting firm. The two partners involved are in dispute about the value of their respective jobs, about tradition versus modernity, use of staff time, and the types of clients they should attract to their business.

The DVD is divided into eight abbreviated stages of the 'problem-solving' mediation. The whole process can be viewed at once (30 minutes); or individual segments can be watched and discussed.

Viewing excerpts – http://www.bond.edu.au/law/centres/drc/DVD/index.htm

Fill in the order form below and send to:

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Forthcoming Courses of the Dispute Resolution Centre

Bond University Short Courses				
28-30 July 2005	Sofitel, Gold Coast (Broadbeach)	Short course – 3 days	Basic Mediation Course* Download Registration Form	Boulle, Wade
22-25 September 2005	Sheraton, Noosa	Short course – 4 days	Advanced Mediation Course Download Registration Form	Boulle, Wade
14-16 October 2005	Melbourne	Short course – 3 days	Basic Mediation Course, in conjunction with Leo Cussen Institute. Phone 03 96023111 email: lpd@leocussen.vic.edu.au	Boulle, Wade
3-5 November 2005	Canberra	Short course – 3 days	Family Law Arbitration Workshop – contact AIFLAM Law Council of Australia – kate.bolas@lawcouncil.asn.au or fax: 02 6248 0639	Theobald, Altobelli, Wade
1-3 December 2005	Marriott, Surfers Paradise	Short course – 3 days	Basic Mediation Course*	Boulle, Wade
* This course also has a Family Mediation stream, run in conjunction with AIFLAM (Australian Institute of Family Law Arbitrators and Mediators)				

IN-HOUSE NEGOTIATION TRAINING
For details of popular individual course outlines on Negotiation see http://www.bond.edu.au/law/centres/drc/courses/index.htm

Thoughts and Themes

MAPPING THE DECEPTIVE DANCE OF HARD BARGAINERS:

What are the possible roles of mediators when supervising the dances of deception, delusion, and decision-making?*

Introduction

This workshop sets out by presentation and exercises:

(1) How mediators often necessarily supervise *deception* and *delusion* during negotiation.

(2) The deception is of the negotiator internally (self-delusion), within each negotiator's "team" or "tribe", and is attempted upon the "opposition".

(3) How the deception is often accompanied by the rhetoric and behaviour of TTLB (theatrics, threats, lies and bluffs).

(4) What are the possible causes of this common negotiation behaviour of deception and delusion (habit?; wisdom?; efficiency?; laziness?; naiveté?).

(5) What are possible and common responses of mediators to these patterns of deception – including education, clarification, creating doubt, risk analyses, advice-giving, persistence, summarising, expanding the pie? How to unearth the gems of "truth" hidden in the rhetoric of TTLB?

(6) If such deception and/or delusion has a familiar pattern (dance), then mediators (and negotiators) need to have a range of practised responses for:

a. Managing duelling experts.

b. Crossing the last gap.

c. "Ending" unsuccessful negotiations in a way which provides a way back to the negotiation table.

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* Professor John Wade, Director, Dispute Resolution Centre, Faculty of Law, Bond University, Queensland, 4229 Australia; email john_wade@bond.edu.au; website http://www.bond.edu.au/law/centres/. This is a paper presented at a workshop at SMU Dispute Resolution Program in Dallas in 2005.

A In a mediation last year when dividing $6.6 million accumulated during a four year de facto relationship, the lawyer for the female said, “My client is entitled to 40%.”; the lawyer for the male, responded “No, you’re wrong, she is entitled to 5 ½ %.”

Each lawyer and client vowed that (s)he was “correct”. ($2.6 million apart).

What will you do?

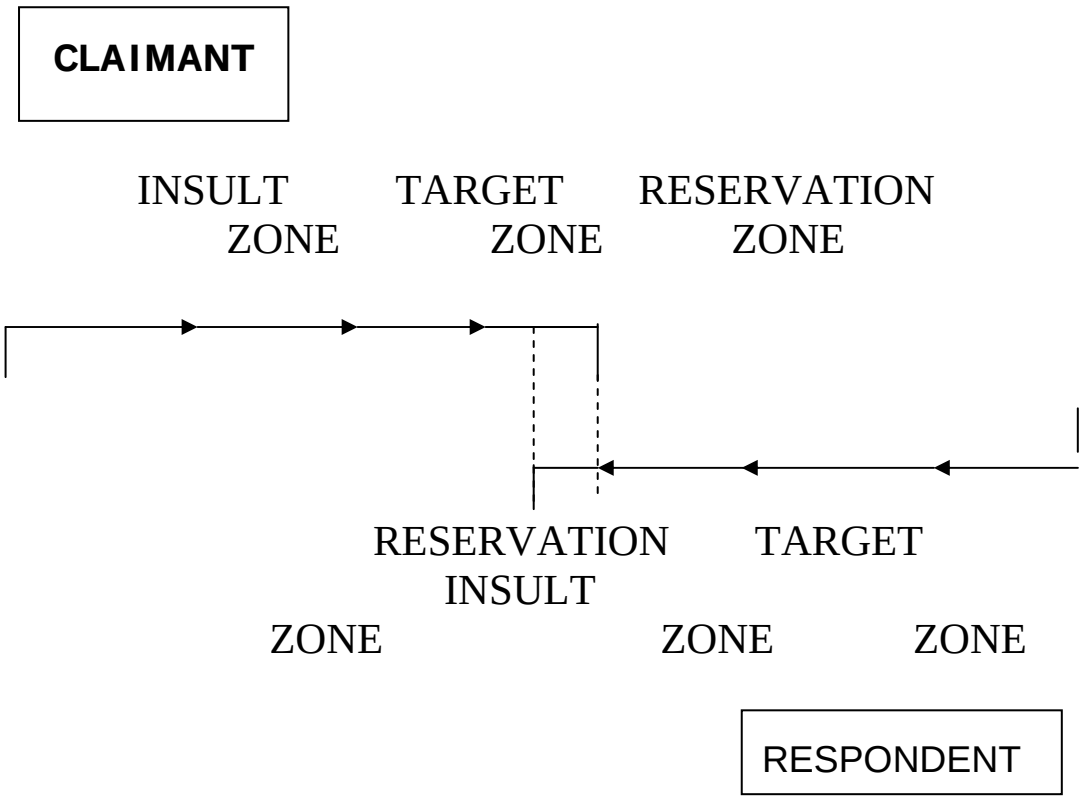
B In another mediation which took place last year to divide marital assets of $1 million, the lawyer for the wife stated confidently, “My client is entitled to 70% of the assets.” Guess what the lawyer for the husband said? “Your client is entitled to 30%!

($400,000 apart)

What will you as mediator or facilitator do?

“Positional bargaining” can be described broadly as a process whereby two or more parties suggest solutions to a transaction or to a conflict, and then engage in various doubt creation behaviours, in order to encourage the other to make successive incremental concessions towards the “opposition’s” solution. It is a very familiar process at a real estate auction or used car yard.

“Positional” or “solution-oriented” negotiation is helpfully symbolised by the following diagram:



Working descriptions of these concepts are:

Insult Zone: The number which, on currently available information, has no objective justification.

Just Inside the Insult Zone: The number which, on currently available information, has improbable objective justification.

"High Soft" or "Low Soft": A number which, on currently available information, is inside the Insult Zone, but is statistically unlikely to be achievable elsewhere; **and** the proponent of the improbable number gives code messages to indicate that (s)he will move.

Target Zone: The number which, on currently available information, would "satisfy" commercial and personal goals.

Reservation Zone: The number which, on currently available information, can be achieved "elsewhere" (eg in court on a bad day; or from another vendor of a similar house).

Typically, here are the standard "steps" to the positional bargaining dance. These are the steps which a mediator or negotiator "supervises", for better or for worse.

(1) Each party makes an offer just *inside* the insult zone, and attempts to justify the number with a blah-blah speech setting out dubious criteria. (They may or may not include code language to indicate that the "high" or "low" initial offer is "soft".)

(2) Each party responds to the other by systematic or random attempts to "create doubt". These are sometimes known as TTLBs (theatrics, threats, lies and bluffs).

(3) Each party makes incremental movements from just inside the insult zone, accompanied by speeches of righteousness and doubt creation. The atmosphere becomes increasingly tense as each move amounts to a "loss". United teams begin to splinter in separate meetings.

(4) Each incremental movement tends to be half the previous move, and take twice as long. Tension mounts. Intense speeches multiply.

(5) The dance ends in one of two ways. *Either*, the parties reach the "last gap" and go home without a settlement, angry, and stereotyping the other as "unreasonable" or "stupid", or "I told you that would be a waste of time". *Or*, the parties reach the "last gap" and are "coerced" to settle by a formal or informal risk analysis organised by a moderate team member, or by a mediator. Often the last gap is bridged by "splitting the difference", or by staggering the timing of payments.[1]

If the negotiation dance is often so predictable, should a mediator (or wise tribal member) educate parties in advance of what is to follow? How to avoid conflicted parties feeling demeaned that their "unique" lives are being reduced to a predictable script?

[1] See J H Wade, "The Last Gap in Negotiations – Why is it Important? How can it be Crossed?" (1995) *6 Aust DR Journal*, 92.

Creating Doubt

Part of the negotiation script outlined above, includes each party attempting to "create doubt" for the "opposition". This can be done gently or aggressively. Each actor, speaker or writer of doubts is attempting to persuade the reluctant listener to accept the existing offer, as it is "doubtful" whether the listener will do "better" elsewhere. Again, the script of doubts is predictable, in both concepts and colloquial embodiment.

CREATING DOUBT
IN NEGOTIATION AND MEDIATION

CONCEPT	APPLICATION?
1. FACTS – "I have different facts…."	
2. EVIDENCE – "I have a document to show…."	
3. CREDIBILITY – "who is more likely to be believed….?"	
4. RULES – "You are applying the wrong rules…."	
5. RULES – Insider knowledge: "That is not how the system works here…."	
6. PUBLICITY/REPUTATION – "What happens when this becomes public?"	
7. DELAY –"If we don't agree today…."	
8. COSTS (Direct) – "The predicted costs of lawyers and accountants are…."	
9. COSTS (Indirect) – "How much time away from business…."	
10. STRESS – "How much sleep….?"	
11. INCONVENIENCE FOR THIRD PARTIES – "How will your children, boss, friends, feel when subpoenaed, notified….?"	

12. NOTHING TO LOSE – "(S)he will eventually wear you out/stone in shoe…."	
13. POWERFUL – "My client has money and connections"	
14. FLOODGATE – "I cannot create a precedent for …."	
15. OUTSIDE INFLUENCES – "My constituents/members/boss insist that…."	
16. ALTERNATIVES – "I can do better elsewhere…."	
17. GOOD COP/BAD COP – "Deal with me or else…."	
18. EXPERTISE – "Our expert knows more X than yours"	
19. LOSS OF CONTROL and ESCALATION – "If we don't reach agreement, this is the likely scenario…."	
20. RATIONALITY – "You seem to assume that the court, club, system, is wise and rational…."	
21. OTHER?	

Exercise

In your world, which doubts do you hear/say most often?

TRYING TO "CREATE DOUBT" FOR "THE OPPOSITION"

- "Predictably, I disagree with everything that Jane said except for her fourth comment."

- "Bill has suggested that there are 7 risks for us. I would like to respond at an appropriate time to each one of these."

- "I have a one-page document here which has anticipated everything Mary has just said, and gives our responses in point form."

- "We have heard all of this before and responded in detail in the letters, pleadings dated…." "We have never heard any of this before. Why?"

- "David has suggested that my client carries some risks. I agree. But we say that these are miniscule compared to the four burdens you carry."

- "Joanne has suggested that my client carries 5 risks. In fact, she has missed 3 others. We have carefully weighed these up in our written risk analysis." (waves paper)

- "People who live in glass houses should be careful about throwing lists of risks."

- "I would like to put our responses up on butcher's paper so that they are clearly visible for the rest of this meeting."

- "Thank you for those comments, I'd like to move on now…."

There are only:

3 WAYS TO OPEN NEGOTIATIONS

- High soft / low soft
- Reasonable firm
- Problem solving

Questions

(1) When should a mediator attempt to educate a negotiator about these three ways to open and/or which method is possibly "best" in a given situation?

(2) Describe the characteristics of a person and situation where a "reasonable firm" offer can be made effectively (ie the message sent is also the message received and believed).

Deception, Delusion and Double-Talk

The essence of positional bargaining is deception. The negotiator's goal is to hide his/her target and reservation zone, and to discover and modify the "opponent's" target and reservation zone. All good negotiators can read upside down in the hope of spotting two key numbers in the opposition's or mediator's paperwork. For lawyers, "permissible deception" does escalate ethically to behaviour just short of lying (at least according to the ABA Code of Professional Responsibility).

THE MORAL CODE OF PROFESSIONAL RESPONSIBILITY

(ADAPTED BY ABA)

A LAWYER SHALL NOT:

- KNOWINGLY ADVANCE A CLAIM OR DEFENCE THAT IS UNWARRANTED UNDER EXISTING LAW EXCEPT HE MAY ADVANCE SUCH A CLAIM OR DEFENCE IF IT CAN BE SUPPORTED BY GOOD FAITH ARGUMENT FOR AN EXTENSION, MODIFICATION OR REVERSAL OF EXISTING LAW.
- CONCEAL OR KNOWINGLY FAIL TO DISCLOSE THAT WHICH HE IS REQUIRED BY LAW TO REVEAL.
- KNOWINGLY USE PERJURED EVIDENCE OR FALSE EVIDENCE.
- KNOWINGLY MAKE A FALSE STATEMENT OF MATERIAL FACT OR LAW.

NB: A LAWYER GENERALLY HAS NO AFFIRMATIVE DUTY TO INFORM AN OPPOSING PARTY OF RELEVANT FACTS.

"UNDER GENERALLY ACCEPTED CONVENTIONS IN NEGOTIATION, CERTAIN TYPES OF STATEMENTS ARE NOT TO BE TAKEN AS STATEMENTS OF A MATERIAL FACT. ESTIMATES OF PRICE OR VALUE PLACED ON THE SUBJECT OF A TRANSACTION AND A PARTY'S INTENTION AS TO ACCEPTABLE SETTLEMENT OF A CLAIM ARE IN THIS CATEGORY"

(COMMENTS ON ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY)

"A careful examination of the behavior of even the most forthright, honest, and trustworthy negotiators will show them actively engaged in misleading their opponents about their true position…. To conceal one's true position, to mislead an opponent about one's true settling point, is the essence of negotiation."

James J. White, "Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation" (1980) *American Bar Foundation Research J.* 926-930

A wider range of deceptive behaviour is arguably "permissible" for negotiators who are not lawyers, and who use community standards as ethical justification for deception.[2]

The deception includes well known comments such as "We will not budge…"; "This is our bottom line…"; "I have advised my client that …"; "We will take this claim to court …". "This is an open and shut case"; "My client is very determined; a maniac etc".

Exercise

Write out three comments or behaviours you routinely hear or see as TTLBs, or deception, during negotiations.

1.....

.....

2.....

.....

3.....

.....

This ritualised pattern of deception raises some challenges for a mediator.

- If I carry offers and TTLBs will the parties begin to shoot the mediational messenger (who is carrying lies)?
- Can the parties ever be honest with a messenger who is carrying lies?
- Should the parties systematically attempt to deceive the mediator also, so that (s)he will more effectively communicate the deception (eg "Tell them that this really is my real bottom line, and I am very angry")
- If a negotiator has systematically deceived with TTLBs for three hours, how will the mediator or other parties know when (s)he ***really*** wants to tell the truth? "I have been deceiving you with my early offers, but now I am really serious – this is my really, really truthfully best offer."
- Amidst the haze of TTLBs, there are some important "truths" about risk and doubt. How to locate the gems beneath the slime?
- Clever negotiators use double-talk or code. They speak both Greek and Latin. The literal language says "strong position" and "clear doubts", but in between the lines is a code which is saying "moveable position" and "we have risks also". What if the speaker does not know the two languages; or the listener does not hear? In the writer's experience, insurance negotiators start "low soft", create doubts, and then six hours later make a code speech as they reach their reservation point, ("I have been bluffing all day but…") "I have just about reached my limit."

[2] Eg see Lewicki et al, *Negotiation* (2003).

Of course, this code sentence could itself be deception, but the insurer as a repeat player needs a believable code phrase for future daily use, and also needs repeat playing lawyers who can reliably interpret the linguistic switch.

"This is my bottom line" is a linguistic switch which has been totally discredited due to its overuse, and because it is regularly used or heard as ongoing deception.

Exercise

A Write out 3 negotiation phrases which literally sound "tough", but have code phrases to indicate that movement will occur.

1.....

.....

2.....

.....

3.....

.....

B Write out three code phrases in your culture by which the speaker is attempting to say "I am no longer engaged in deceit and double-talk, this is "true" (as a doubt, or reservation point)

1.....

.....

2.....

.....

3.....

.....

C Does the coded message require some emotion or theatrics to be "really" convincing? If so, describe the attached emotion or theatrics?

1.....

.....

2.....

.....

3.....

.....

"Typologies of Deceptive Tactics[3]

Deception and disguise may take several forms in negotiation:

1. *Misrepresentation of one's position to another party*. In misrepresentation, the negotiator lies about the preferred settlement point or resistance point. Negotiators may tell the other party that they want to settle for more than they really expect or threaten to walk away from a deal when they are actually ready to make further concessions and believe the parties are close to agreement. Misrepresentation is the most common form of deceit in negotiation.

2. *Bluffing*. Bluffing is also a common deceptive tactic. Negotiators state that they will commit some action they don't actually intend (and may not be able) to commit. The best examples of bluffs are false threats or promises. One negotiator may threaten to walk out if her terms and conditions are not met (but really doesn't intend to take that action). Another negotiator may promise to perform some personal favour for the opposing negotiator later on, when in fact he has no intention of ever performing that favour.

3. *Falsification*. Falsification is the introduction of factually erroneous information into a negotiation. Falsified financial information, false documents, or false statements about what other parties are doing, will do, or have done before are common examples.

4. *Deception*. The negotiator constructs a collection of true and/or untrue arguments that leads the other party to the wrong conclusion. For example, a negotiator may describe in detail what actions were taken in a similar circumstance in the past and thereby lead the other party to believe that he or she intends to take the same actions again in this context. Both falsification and deception can also constitute legal fraud, in which the actor fails to disclose known defects in a product.

5. *Selective disclosure or misrepresentation to constituencies*. The negotiator does not accurately tell his or her constituency what has transpired in negotiation; does not tell the other party the true wishes, desires, or position of his or her constituency; or both. He or she may therefore play both sides (the constituency and the other party) against each other to engineer the negotiator's own preferred agreement. Selective disclosure can be viewed as a win of omission rather than a sin of commission – in other words, what the actor chooses *not* to do, rather than what she *does*. In some of the situations described at the beginning of the chapter, the actor's choices included options to simply not do something (eg withhold information) rather than to explicitly lie or act deceptively.

Researchers have extensively explored the nature and conceptual structure of marginally ethical negotiating tactics, using a list of 18 marginal truth-telling and means-ends tactics. MBA students and executives were asked to rate the tactics on two 7-point scales: How appropriate each tactic would be to use in a negotiation situation and how likely the negotiator would be to use the tactics. The mean ratings of tactics show that four tactics were rated as appropriate (a mean rating of 5 or higher), two were rated as neutral (a mean rating of 4) and the remainder were rated as inappropriate (a mean rating of less than 4). The tactics rated as appropriate were:

[3] Lewicki, Saunders & Minton, *Essentials of Negotiation*, 2nd ed. McGraw Hill, pp 168-170 (2001).

- Gain information about an opponent's negotiating position and strategy by asking around in a network of your own friends, associates, and contacts
- Make an opening demand that is far greater than what you really hope to settle for
- Hide your real bottom line from your opponent
- Convey a false impression that you are in absolutely no hurry to come to a negotiation agreement, thereby trying to put more time pressure on your opponent to concede quickly.

The two tactics rates as neutral were:

- Lead the other negotiators to believe that they can only get wheat they want by negotiating with you, when in fact they could go elsewhere and get what they want cheaper and faster
- Make an opening offer or demand so high (or low) that it seriously undermines your opponent's confidence in his or her own ability to negotiate a satisfactory settlement.

Finally, these tactics were rated as inappropriate (the lower the tactic in the list, the more inappropriate it was judged):

- Intentionally misrepresent the nature of negotiations to the press or your constituency in order to protect delicate discussions that have occurred.
- Talk directly to the people to whom your opponent reports, or is accountable, and try to encourage them to defect to your side.
- Gain information about an opponent's negotiating position by paying friends, associates, and contacts to get this information for you.
- Intentionally misrepresent factual information to your opponent when you know that he or she has already done this to you.
- Gain information about an opponent's negotiating position by cultivating his or her friendship through expensive gifts, entertainment, or personal favors.
- Intentionally misrepresent the progress of negotiations to the press or your constituency in order to make your position or point of view look better.
- Threaten to make your opponent look weak or foolish in front of a boss or others to whom he or she is accountable.
- Talk directly to the people to whom your opponent reports, or is accountable, and tell them things that will undermine their confidence in your opponent as a negotiator.
- Promise that goods things will happen to your opponent if he or she gives you what you want, even if you know that you can't (or won't) deliver those good things when the other's cooperation is obtained.
- Threaten to harm your opponent if he or she doesn't give you what you want, even if you know you will never follow through to carry out that threat.
- Gain information about an opponent's negotiating position by trying to recruit or hire one of your opponent's key subordinates (on the condition that the key subordinate brings confidential information with him or her).

- Intentionally misrepresent factual information to your opponent in order to support your negotiating arguments or position."

Why are these various schools of "positional" negotiation apparently so common? Here are a few anecdotal observations –

Habit

Some insurers, real estate agents and lawyers use this method by habit. It requires little time to prepare, is low cost (initially), and allows movement later, rather than earlier. Legal rules currently do not punish the habit of claiming high, or offering low. Moreover, it is normal, as colleagues do the same.

"Efficiency"

For some experienced negotiators, (repeat players), such as insurers and builders, extreme offers coupled with TTLB, has proved to be "efficient" in the vast majority of cases. "Efficiency" has multiple meanings including – speed, confirmation of tough reputation, low cost of preparation, comfortable ritual, avoidance of emotion, and good to excellent financial outcomes against inexperienced negotiators, or against those (such as sub-contractors) who do not have many alternative sources of work.

Even if the extreme initial offers are modified with the passage of time and attrition, there is some diagnostic efficiency as the opposition has proved to be persistent, and able to muster impressive "real doubts", hidden amidst the blindness of conflict and TTLBs.

Laziness

About 10% of the lawyers (and other experts) who appear at mediations before the writer, are unprepared and are "winging it". They make extreme claims based on the propositions "I've come along to see what you have to offer"; or "We do not know all the facts yet in order to predict what is a reasonable outcome"; or "Your offers are not yet reasonable to my client"; or "If you make us a good offer, of course we will consider it".

These predictable propositions mask the lawyer's laziness, and/or cost cutting preparation. It is dangerous behaviour because, if "labelled", gossip spreads, and the lazy lawyer or builder finds it difficult to organise serious negotiations with anyone.

Moreover, this shrinking group of lazy lawyers now face an increasing number of potential sanctions from punitive legislation which is targeting lazy insult offers.

Righteous Delusion

Some people who have suffered "loss" of reputation, a business, profit, a marriage, an inheritance, a limb, a job or self-esteem, are sitting ducks for self delusion. While grieving the loss, they are ready to be convinced by self, gossip, tribunal members or a lawyer, that their deep loss needs deep compensation.

"I am right, you are wrong, and an extreme (punishing) claim is the solution."

Preparation and Realistic Alternatives

Some apparently extreme offers (eg "zero" from an insurer) are made because the offeror expresses "confidence" that the extreme number is "reasonable". This is a dangerous tack as "over-confidence" is one of the most commonly documented errors and delusions of negotiators.

Nevertheless, there is obviously such a thing as "justified confidence" where a negotiator or decision-maker has spent time, money and "independent" expertise in preparing realistic alternatives (WATNAs, BATNAs and PATNAs) if the negotiations are unsuccessful.

"Justified confidence" is often alleged as part of routine TTLBs, but rarely is justified in the writer's experience due to "conflict blindness". "Conflict blindness" is a colloquial shorthand phrase used to describe the normal conglomeration of misperceptions, decision traps, clumsiness and irrationality which beset all people to lesser and greater extents, when engaged in escalating conflict – see Pruitt and Kim, *Social Conflict*, 2003.

Nevertheless, when a negotiator has realistically done a risk analysis of his/her worst alternatives, (s)he can make apparently "extreme" offers (eg "We offer you nothing"; or "We want an apology, plus $60 million, plus…..).

Decision-Making Shortcuts and Traps

Over the last decade, there has been an encouraging connection between practitioners and scholars working in the field of conflict management and negotiation.[4]

Psychological studies give many helpful insights into the process of human decision-making, and how we are all prone to error. These tendencies to err are sometimes collected under the labels of "cognitive heuristics", or "decision-making shortcuts" or more simply, "decision traps".

Most of these decision traps profoundly influence negotiation decisions to make extreme claims, and to mismanage negotiations. In other words, all the parties to the "decision-making" of negotiation, including a mediator, are prone to *delusion* and self-deception. This is particularly challenging, as the opposition is trying to deceive me, and at the same time I am already self-deceived! Deception, delusion and double-talk abound. How am I supposed to make a wise decision?

Again, when and how should a mediator, or a team moderate, educate himself/herself/the parties/their tribal members, about these lurking bands of decision-making demons?

Set out below are examples of some of the decision traps which we have all seen at work in our own lives, and in daily national and international negotiations.

[4] See for example, overviews in R. Lewicki et al, *Negotiation* (2003); J.S. Hammond et al, *Smart Choices* (1999); C. Menkel-Meadow, *Dispute Processsing and Conflict Resolution* (2003).

DECISION- MAKING SHORTCUTS AND TRAPS (FOR NEGOTIATORS AND OTHERS)[5]

- The **ANCHORING** TRAP: Over-relying on First Thoughts
- The **SUNK-COST** TRAP (ENTRAPMENT):Protecting Earlier Choices
- Mythical **FIXED –PIE** Beliefs
- The **STATUS-QUO** TRAP: Keeping on keeping on
- The **CONFIRMING EVIDENCE** TRAP: Seeing what you want to see
- The **FRAMING** TRAP: Triggering a premature answer with the Wrong Question
- **EASILY AVAILABLE INFORMATION** TRAP: "What an impressive chart!"
- The **WINNER'S CURSE**: "Perhaps we could have done better?"
- The **OVER CONFIDENCE** TRAP: Being too sure of your knowledge and ability
- The **BASE-RATE** TRAP (The Law of Small Numbers): Neglecting Relevant Information
- **SELF-SERVING BIAS**: Environment versus Personality
- **IGNORING OTHERS' INTERESTS AND PERCEPTIONS:** "Let's Get Down to Business"
- **REACTIVE DEVALUATION**: Ridiculing "Opposition's" Ideas and Behaviour

[5] See Lewicki (2003), *Smart Choices* (1999).

Exercise

DECISION – TRAPS: EXAMPLES

You will hear younger and older lawyers make the following comments. Identify which decision-making trap the speaker has probably fallen into for himself/herself and for his/her client. Remember from Lewicki and Hammond that there traps have been "proven" repetitively to be part of the unconscious decision making process of the majority of lawyers and other professionals. The myth of rationality inculcated at Law Schools is indeed a myth.

1. "They want to talk about possible future business. What a waste of time. This dispute is just about money".
2. "Their behaviour is outrageous. They deserve to lose".
3. "This is a cut and dried case". We will walk all over them in court".
4. "My client has been under a lot pressure at work. Imposing deadlines on him is quite unreasonable".
5. "We have spent over $20,000 in legal costs, and a year of negotiation. We are not giving in now".
6. "They want $600,000. We will never be able to settle this".
7. "They have given us a clear summary of the value of the business assets, and how their profits dropped after the accident".
8. "Our Law firm has a fabulous record, over 80% of wins, in any litigation we undertake".
9. "It's time to stop talking and get down to the bottom lines here".
10. "I worked hard for my client, I got a good outcome in the terms of the lease; and now she's ungrateful".
11. "Their client wants to increase the payments to us; spread them over five years; and secure the payments on his business. That would never work".
12. "If we keep wearing them down with paper, they will give in before the court hearing".
13. "I told you that they are not to be trusted – they did not answer my letter; arrived late for the meeting; and now sit outside talking and snickering obviously unprepared".
14. "We handle hundreds of these cases. We know what we are doing".
15. "From my experiences in court, judges do not like emotional witnesses".
16. "Big banks which hire large Law firms rarely lose in court. They are too powerful. Just look at the cases over the last 10 years".

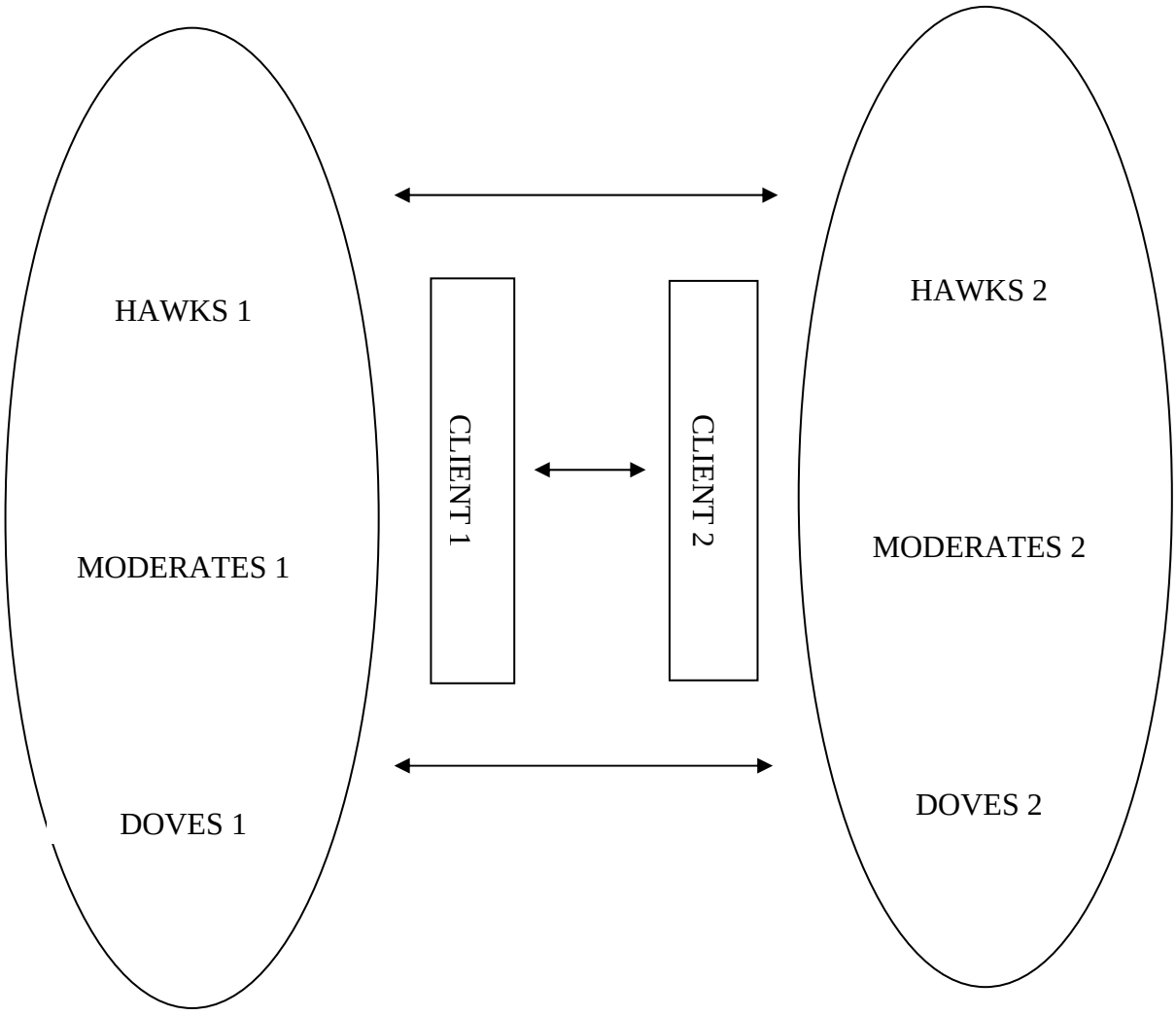
Delusion, deception and attempted decision-making is occurring at several levels including:

(1) Individuals debating **with self** – "What should I do?" "Am I being taken to the cleaners?" "What if some of their speeches are partly true?" "The more we talk, the more confused I am becoming".

(2) Individuals debating **within their own "teams"** or "tribes" – "We must be strong"; "Remember what they did to us in 1993?"; "You are too confident – who is going to pay for this?" Each tribe contains hawks, doves and moderates who fluctuate in degrees of aggression, and definitions of success. This is one important reason for regular breaks during negotiations and mediations, in order to enable on-going intra-tribal discussions.

(3) Individuals debating with and listening to individuals who are apparently **"on the other side"**, or in another tribe.

DECISION-MAKING AND NEGOTIATION OCCURS FOR INDIVIDUALS WITH SELF, WITHIN AND ACROSS TRIBES



"NO TEAM IS UNITED"

How to respond as a mediator to this task of supervising deception, delusion and decision-making? There are no easy answers here. Nevertheless, certainly a mediator (or negotiator) must include in the toolkit, and practise using, the following familiar tools:

(1) Preparation routines

(2) LARS (Listen, Acknowledge, Reframe, Summarise)

(3) Questions

(4) Attempts to find goals and needs behind solutions

(5) Packaging offers

(6) Repetitively preparing a visible risk analysis in the client's own language[6]

(7) Managing duelling experts[7]

(8) Crossing the last gap after a tense dance of rejected offers. Almost every negotiation will reach a tense last gap and jam (20-50%?); or find a way across that last gap (50-80%?)[8]

(9) Be practised in methods to end "unsuccessful" mediations or negotiations (20-50% of cases?) so that there is a way for all parties to return to the negotiation table without loss of face (who makes the first telephone call without appearing to be weak?)

Preparation Routines

FIVE HUMBLE HYPOTHESES

- What are the **causes** of this conflict?
- What **interventions** might be helpful?
- What **bumps/glitches** are predictable?
- What **substantive outcomes** are possible/probable?
- What **risks** if the conflict continues? (**Goals**?)

[6] See J.H. Wade, "Systematic Risk Analysis for Negotiators and Litigators: But You Never Told me it Would be Like This" (2001) 13 *Bond Law Review* 462; also in Bond University DR News, Vol 6 Oct 2000.

[7] J.H. Wade, "Duelling Experts in Mediation and Negotiation" (2004) 21 *Conflict Resolution Q* 419; also in Bond University DR News, Vol 13 Sept 2002.

[8] See J.H. Wade, "The Last Gap in Negotiations – Why is it Important? How can it be Crossed?" (1995) 6 Aust DR Journal 92.

Abbreviated Corridor Intake Questions for Mediators

1. **Why haven't you been able to settle this by yourselves so far?**
2. **What would help this conflict to settle today?**
3. **What would you like me to do to help you both reach an agreement?**
4. **What risks do you (each) face if you walk out with no agreement?**
5. **How will you respond to normal patterns of negotiation?**

DIFFERENT OPENING CONCEPTUAL QUESTIONS BY MEDIATORS/NEGOTIATORS

Feelings

How are you feeling?

What do you feel about this situation?

Facts

Can you tell me the background to this dispute?

What is your understanding of the facts?

Concerns

What concerns bring you here?

What is concerning you at this time?

Goals/Aims

What do you hope to achieve?

What are your aims in this negotiation?

Where do you hope to be in X year' s time?

Issues

What are the issues/questions for discussion?

Differences

What is the history of offers?

What are the current differences between you?

What is the gap between you?

Solutions/Wants

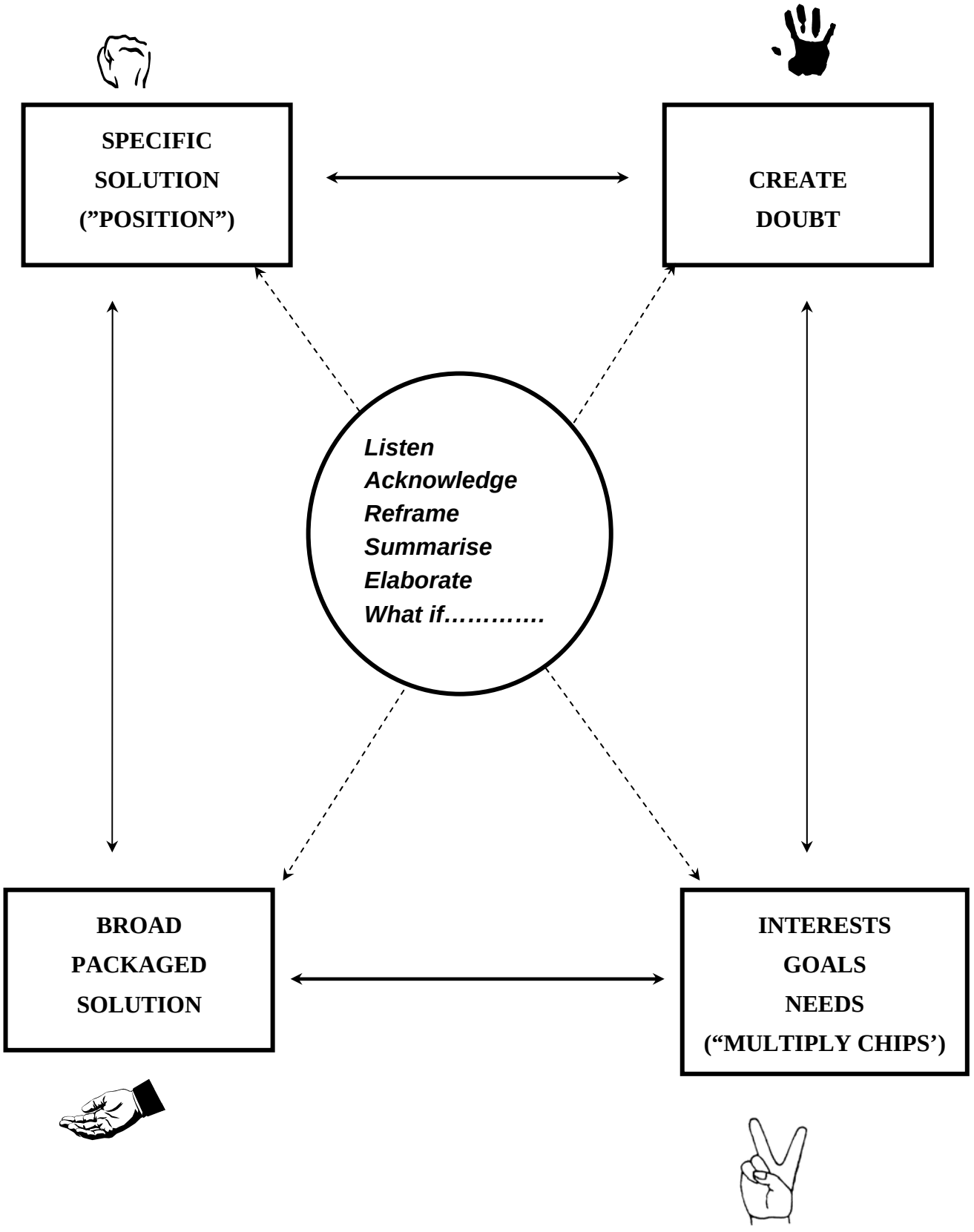
What do you want/What do you see as the solution to these problems?

Arguments

What are the arguments for your side?

Can you summarise the (legal) arguments for each side?

FOUR COMMON NEGOTIATION MOVES



LINGUISTIC ATTEMPTS TO CONVERT POSITIONAL BARGAINING TO INTEREST BASED / PROBLEM SOLVING NEGOTIATIONS

Commonly, positional bargaining has the following 3 chapters: "I am right; you are wrong; this is the solution".

RESPONSES?	CATEGORY?
(1) "Predictably, we disagree with many of the things you say, but I do agree……"	(1) Try to identify anything in common.
(2) "I don't want to respond immediately to what you've said Mary as I don't think it will help. Our position is completely different. But if I tell you our goals for this meeting for 5 minutes, would you be willing to listen, and then tell us your goals?"	(2) Stop the current action/ reaction conversation. Suggest a new process.
(3) "Joe, I have an offer that will sound just as ridiculous to you, as your offer just sounded to me. Do you want me to tell you what it is, create a jam, and then we can get down to the business of looking for some creative solutions?"	(3) Label process.
(4) "I did not understand what you said about X. Could you elaborate?"	(4) Ask open questions.
(5) "Can you tell me why that solution would be helpful to you?"	(5) Closed "why" questions.
(6) "I would like to start not with a single solution, but with some questions which I think should be on the agenda. Could I write these up on the board?"	(6) Ignore previous offers. Slow the pace. Create the beginning of a visual agenda.
(7) "Bill, you have just made what we consider to be an extreme, out-of-the-ballpark offer. What do you want us to do about it?"	(7) Label past process. Open discussion of future process.
(8) "If I take that offer back to my constituents, they will laugh at me. Help me somehow to sell this back at head office. How are you different to the 300 other files/employees….?"	(8) Identify your personal interests/floodgate/ constituents. Ask for help.
(9) "I am going to ask my tenacious lawyer to give a short response on how she sees the legal position. Then I suggest that we dismiss the lawyers and try to find some satisfactory business solutions."	(9) Identify process. Bad cop/good cop.

PACKAGING OFFERS

If several "interests" or "goals" can be identified for and by each negotiating party, then creative "packages" or bargaining "mixes" become possible. That is, one party can offer "If you can do A, B and C, then I am willing to do X, Y and Z".

The key language for packaging is "what if…"; "if… then…"; or "assuming that…". These conditional phrases need to be practised regularly.

Additionally, it is often helpful to make **alternative** packaged offers. The offeree may then hear that there are limits, appreciate the effort made to create the alternatives, and respond by indicating priorities.

Example – "The Italian Solution"

Negotiation myth or anecdote describes the situation where an Italian company was stuck in oil negotiations with an Arab seller. The Arab seller wanted $10 per barrel, and the Italians had reached their limit at $9 per barrel. After a long break, the Italians returned to the negotiating table and said "We have two alternative offers. You can choose which one you prefer.

Offer A: we will pay $9 per barrel and all future supply disputes will be arbitrated in your country. Offer B: we will pay $10 per barrel and all future supply disputes will be arbitrated in London."

After a short break, the Arab seller chose alternative B. Both parties were very pleased.

Specific, general and mixed packages

A packaged offer may contain

(a) all detailed and **specific** clauses. For example,
"If (i) you will pay COD in US dollars, the sum of $10 per barrel of oil into our National Bank account number….

AND (ii) delivery of oil barrels is at our expense to take place at your warehouse in Venice between the hours of ….

AND (iii) etc

OR (b) all **general** clauses, often using the words "appropriate", or "reasonable". For example,
"If (i) you will pay a reasonable price COD per barrel into our specified bank account….

AND (ii) delivery is at our expense on such transfer as is appropriate and standard to a destination in Italy to be agreed ….

OR (c) the packaged offer can have a **mixture** of specific and general clauses, thereby giving some leaway for give and take as vague terminology is filled by more "what if" offers.

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DUELLING EXPERTS

Possible Reactive Strategies

- Experts jointly explain differences to disputants
- Conference; written joint explanation
- Third expert present at conference to clarify
- Create doubt for one or both by new facts ("would your opinion be any different in the light of….")
- Third expert gives non-binding opinion
- Third expert gives binding ruling
- Split difference
- Trade chips ("what if I accepted your expert, would you be prepared….?")
- Leave to judge/umpire to choose one or the other

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OPTIONS FOR CROSSING THE LAST GAP IN NEGOTIATIONS

(1) Talk – try to convince

(2) Split difference

(3) Expanding the pie by subdividing the last gap

(4) Expanding the pie by an add-on offer – "What if I moved on….?"

(5) Refer to a third party umpire

(6) Chance – flip coin

(7) Chance – draw graduations from a hat

(8) Transfer the last gap to a third party

(9) Conditional offers and placating incremental fears

(10) Pause – and speak to significant others

(11) Pause – and schedule time for a specific offer

(12) Defer division of last gap; divide rest

(13) Sell last item at auction; split proceeds

(14) Pick-a-pile; you cut, I choose

(15) Skilled helper has a face-saving tantrum

(16) File a court application – expend time and money

How to Cross the Last Gap in Negotiations[9]

Apart from anticipating the last gap, what strategies are available to cross this hurdle in negotiations or mediation?

One aspect of a mediator's or adviser's role is to be an expert in the dynamics of negotiation and to educate the disputants concerning these dynamics. Parties can then have some confidence, even though they may feel in the wilderness, that there are well trodden paths which they have some power to choose between. On some classic model of mediation, this education is not necessarily advice-giving. Rather the mediator or negotiator can give information concerning the range of options which have emerged in the strategies of negotiation. A mediator or negotiator can give this information before or after the last gap has been reached in the negotiation. What follows is a list of options on how to cross the last gap. Some of these can often be helpfully written on a whiteboard. Each disputant may be advised "You will need to choose one of these methods if you want to reach a settlement tonight. I am going to ask you each in turn which of these methods you (i) would at least consider as a possibility; or (ii) prefer; or (iii) would like to avoid"

This ritual of visualising options in dispassionate words on a whiteboard may assist the disputants:

* to resume a style of joint problem solving.
* to withdraw gracefully from a strongly stated position - "I will never settle unless I get that car".
* to realise that impasse on the last increment is a normal stage in negotiations.
* to realise that there are many solutions and there still is opportunity to negotiate about the most palatable of these.
* assist the parties to avoid a dramatic and premature walkout before all the options have been considered.

Options for crossing the last gap in negotiations

The sixteen methods are as follows:

(1) Talk - Try to convince

(2) Split Difference

(3) Expanding the pie by subdividing the last gap

(4) Expanding the pie by an add-on offer - "What if I moved on.....?"

(5) Refer to a third party umpire

(6) Chance - flip coin

[9] Extract from J.H. Wade, "The Last Gap in Negotiations" (1995) 6 *Aust DR J*. 92.

(7) Chance - Draw gradations from a hat

(8) Transfer the last gap to a third party

(9) Conditional offers and placating incremental fears - "What if I could convince client to...? How would you respond?"

(10) Pause - and speak to significant others

(11) Pause - and schedule time for a specific offer

(12) Defer division of last gap; divide rest

(13) Sell last item at auction; split proceeds

(14) Pick-a-pile; you cut, I choose

(15) Skilled helper has a face-saving tantrum

(16) File a (further) court application – pursue pain and hope.

(1) ***Talk - Try to Convince***

A common response at the last one million dollars; or $10,000; or at last set of paintings; or last car, is for one or both disputants to talk - to rehash old arguments in an attempt to convince the other party to give in. These arguments take various forms:

* "I have given up so much in these negotiations; now it's your turn".

* A lengthy filibuster re-iterating all the merits of the speaker's claims, and the weaknesses of the agitated or glassy-eyed "listener".

* An angry speech about how the listener's first offer was outrageous, so (s)he should make the last incremental concession "to be fair".

* A lengthy speech about the cost of litigation, the costs already incurred and the likelihood of settlement at the door of the court.

* A detailed historical version of the concessions made to date in the negotiation leading to the predictable conclusion that it is the listener's turn to be reasonable and make the last concession.

* A short but angry speech with express or implied threats about walking out, stonewalling, scorched earth, subpoenaing relatives or business associates, or advising the Commissioner of Taxation about unpaid tax of some kind.

* A combination of some or all of these speeches.

Anecdotally, these speeches rarely appear to be directly successful in crossing the last gap. The listeners may become inflamed to hear such a one-sided presentation (yet again) so late in the day, and deliver a counter speech or the speaker may back himself/herself into a positional corner. One mediator/facilitator strategy is to interrupt the flow of words with an attempted educational comment, and redirect the disputants to the remaining list of options on the board. "I don't think that these

arguments are going to convince either of you; you've both hear them all before; the last gap is never crossed by logical argument; I'm going to ask you each in turn which one of the other options on the board you could live with".

Nevertheless, some degree of managed speech making at the last gap may serve latent functions of catharsis, boredom, the last dagger, further emotional pain, or attempted justification of perceived role and fees of a skilled helper, or the farewell address. A managed last speech may be important given the complex psychological functions which the last gap appears to serve[15] .

(2) *Split Difference*

This method is commonly suggested where the last gap consists of money or other divisible items - such as time with a child. It has the merits of simplicity, that both parties "lose" equally and that it is culturally commonplace.

However, given the complex psychological dynamics surrounding the last gap, "splitting the difference" may be seen as too quick, part of an orchestrated plan of attack, or involving another painful "loss".

Double Blind Offers – Split the Difference via Formulae

This method is used in a number of computer based negotiation programs. Each disputant agrees in writing to make one or more confidential offers to a mediator (or to a computer), on the condition that if the offers are "close" ("close" being agreed upon as a percentage), then the mediator (or computer program) will split the difference and both will be bound.

For example, the parties may be stuck at offers of $300,000 and $200,000 with a gap of $100,000 between them.

They can agree to each make pairs of confidential offers; and that there will be no agreement unless and until one confidential offer is say at least 75% of the other. (or perhaps unless and until parties are only $65,000 or less apart).

Thus if each confidentially move $10,000 and offer $290,000 and $210,000, then there will be no automatic splitting the difference, as 21/29 = 72%.

However, if each agrees to another round of confidential offers, and one moves $5,000, and the other moves $10,000, then there is a settlement as $215,000/$280,000 = 77%.

Splitting the difference between $280,000 and $215,000 means that the payout-figure is $247,500.

(3) *Expanding the pie by sub-dividing the last gap*

The last increment can sometimes be divided in ways apart from an equal split by dividing the time of use or time of payment. For example,

* the last $10,000 can be paid over time in instalments

[15] See previous discussion of "Why is the Last Gap so Difficult to Cross?"

* the last $100,000 can be paid at a later date with an interest component
* a painting can be used for alternative months by different parties, with one or the other paying shipping and insurance.
* both parents can meet a child on his/her birthday at a common venue, rather than each having exclusive time with the child.

(4) *Expanding the pie by an add-on offer*

One party can attempt to overcome an impasse on the last increment by re-opening a "decided" issue, or adding another issue to the negotiating table. In these ways, there is an attempt to prevent the "last" issue from being the last.

For example,

* "I would be willing to give up my lounge room couch if you return the children's bikes to my house".
* "If that last $10,000 is paid to me, I would be willing to redirect all old customers to you".
* "We have already agreed that you will occupy the house for 3 years, but I'm willing to reconsider that time period if I can have that painting".

Obviously, it is not always easy to re-open or to discover extra value to place on the bargaining table. One of the clear benefits of questioning and listening skills is that a negotiator can develop ideas on the needs concerns and interests of the other disputant so that extra value can be put on the table. Some negotiators *begin* bargaining with a positional style. When on impasse is reached, they switch (or have a fellow negotiator switch) to an interest based problem solving approach.

(5) *Refer to a Third Party Umpire*

The impasse of the last item can be "resolved" by:

* agreeing to refer the whole dispute to an arbitrator or to a judge
* agreeing to refer just the issue of crossing the last gap to an arbitrator. A respected expert can be paid for two hours of his/her time to come to a binding oral or written decision only on the last $20,000, car, Christmas Day or week of the school holidays.

In mediation, the disputants may request that a trusted mediator make a *recommendation* or a binding *decision* on how the impasse should be resolved. Most mediators respond to such requests with reluctance and make speeches about neutrality. However, occasionally the parties manage to persuade the mediator to accept one or both of those roles.

In passing it should be mentioned that judging and arbitrating have many different sub-categories which can be set out for disputants to consider. These include *baseball arbitration* (both parties submit a figure to the arbitrator who can only choose one of the submitted figures); *night baseball arbitration* (both parties submit secret and sealed offer; the arbitrator makes a decision and opens the sealed offers; the offer closest to the arbitrator's decision is binding); *high-low arbitration* (parties agreed to the range of outcomes; the arbitrator can only decide within that range); *"night" high-low arbitration* (each party submits a sealed high-low range of outcomes; the arbitrator or valuer makes a decision which is only binding if the decision falls within

the overlap of the ranges when these are disclosed; *scope arbitration* (the arbitrator is only authorised to decide upon a range of outcomes divided by say 15%; parties agree to settle within that range); *on-the-papers arbitration* (a cheap and quick decision making process where there are no oral presentations); *early neutral evaluation* (an expert gives a non-binding assessment of the likely court outcome of a dispute).

(6) *Chance - flip-a-coin*

Chance provides an important option for deciding who gets the last gap. This is because flipping a coin:

* is cheap and fast
* involves equal chance of winning or loosing
* avoids loss of face by being "beaten" by other more personal strategies
* is sometimes culturally acceptable in a gambling society
* provides a stark visual metaphor of "going to court" and also reflect the educational conversations of many lawyers and clients[10]
* is so abhorrent to some risk averse disputants that they return to the remaining list of options with enthusiasm!

(7) *Chance - Draw from a range of Solutions*

This is a alternative version of chance which avoids the all-or-nothing result of flipping a coin. The disputants care that several solutions will be written out on slips of paper, placed in a hat, and the one drawn out will prevail.

For example, if the last increment is $20,000 then ten slips of paper can be placed in a hat beginning with "$2000" and ending with "$20,000" with gaps of $2,000" written on each slip of paper. The drawer receives whatever number is on the drawn piece of paper; the residue of the last gap goes to the other disputant.

Of course this method can be extended to a range of more complicated alternative solutions.

(8) *Transfer the last gap to a Third Party*

This option involves both parties agreeing to transfer the last gap to a child, a charity, to pay the fees of skilled helpers such as lawyers or mediators, or to pay for renovating a house or business before a sale.

Thus for example, last increments from the division of a pool of assets in a matrimonial or deceased estate have been transferred:

* to a trust fund to pay for future child support or private school fees.

[10] eg. A. Sarat & W. Felstiner, *"Law and Strategy in the Divorce Lawyer's Office"* (1986) 20 *L & Soc'y Rev* 93; A. Sarat & W. Felstiner, *"Law and Social Relations: Vocabularies of Motive in Lawyer/Client Interaction"* (1988) 22 *L & Soc'y Rev* 737; J. Griffiths, *"What do Dutch Lawyers Actually do in Divorce Cases"* (1986) *L & Soc'y Rev* 135; J.H. Wade, *"The Behaviour of Family Lawyers and the Implications for Legal Education"* (1989) 1 *Leg Ed Rev* 165.

* in the form of an antique car to a husband on the condition that he bequeath it to his children.

* to pay a mediator's fees.

Such transfers to third parties may have the clear benefits of mutually avoiding a "loss", and of wedding a third party to the solution chosen.

(9) *Conditional offers and placating the incremental fear*

Where a pattern of incremental bargaining has been established, each disputant will usually be concerned about the consequences of initiating any offer across the last gap. Why? Because any offer is likely to be whittled away by a incremental counter offer. For example, if the last gap between A and B is $20,000, and A offers to split the difference ($10,000 to A) how is B likely to respond? "B is likely to respond, split the difference again - only $5,000 to A". Thus there is a reluctance to make the first move, and the impasse remains intact.

Accordingly, some negotiators make exploratory conditional offers in an attempt to placate the fear of incremental counter-offers. This works best if there are at least two negotiators (eg. lawyer and client) on each negotiating team.

Lawyer: "What if I could persuade my client to make a split-the-difference offer, would you guarantee that you wouldn't try to cut down her offer?"

Opposing Disputant: "What do you mean?"

Lawyer: "Well I'm not willing to put the effort persuading my client against her wishes to modify her position if you're going to try to cut her offer in half. She will then feel betrayed. I'm not willing to put in the work to attempt to persuade her unless I know what your response will be. And there are no guarantees I can persuade her".

Opposing Disputant: "Let me talk to my lawyer about this in private for a moment. We'll be right back".

Obviously, this option can be manipulated by a negotiator attempting to discover the other side's willingness to settle for a hypothesised offer. However, the offeree's response is also clearly conditional ("if your client makes that offer....") and can be withdrawn readily. Moreover, raising any suspicion of manipulation will usually be counter-productive at such a late stage of nearly successful negotiations.

(10) *Pause - and speak to significant others*

The intensity of a negotiation or mediation session means that it is easy to become weary, to lose perspective and to make "a mountain out of a molehill". Additionally, some people are cautious and are accustomed to reflecting upon options available before making a commitment.

Accordingly, it is a helpful strategy to suggest a break to consider one or more written options, with a clear appointment to resume negotiations, and with encouragement for each disputant to speak to specified trusted third parties. Where a mediator is being used, it is often helpful for all disputants to make contact during the break to clarify, brainstorm and hypothesise on negotiation dynamics (eg. "What will be the likely response if I make this offer.....?")

A skilled "significant other" can also assist an entrenched person to work through a visual risk analysis (again). What are the risks if the gains from the negotiation are "lost" due to a relatively minor last goal or gap?[11] The writer as mediator has found that a renewed, visual, and private risk analysis is helpful with parties jammed on the last gap. "What are your goals; what have you gained so far; and what will be lost if you leave here without an agreement?" For example, here is an example "life goal" list prepared by the writer as mediator during a family property negotiation "jammed" over a last monetary gap.

LIFE GOALS?	THIS OFFER??
✡ To get on with life	☐
✡ To open a new business	☐
✡ To invest money	☐
✡ To stop paying lawyers	☐
✡ To stay healthy	☐
✡ To minimise contact with "x"	☐
✡ To reduce stress on colleagues	☐
✡ To take a holiday	☐
✡ To focus on my work	☐
✡ To avoid becoming bitter	☐
✡ To regain "control" of my life	☐
✡ To settle "in the range"	☐
✡ To reduce risks of paybacks	☐
✡ To receive [$540,000] – current offer $500,000	☐
✡ Other??	☐

[11] See J.H. Wade, "Systematic Risk Analysis for Negotiators and Litigators: But You Never Told Me It Would Be Like This" (2001) 13 *Bond Law Review* 462.

Once the goals are visualized and pondered, anecdotally most clients are reluctant to lose the 14 dangling gains for the chance on one missing goal (the last gap).

(11) ***Pause - and schedule time for a specific offer***

As a variation on the previous procedure, the parties can actually draft a precise or general form of offer before the break is taken. This may for example represent a mediator's recommendation of "splitting the difference" which is too difficult to swallow during the negotiations.

A time and place is then agreed upon for one party to contact the other and make the offer as drafted (eg. phone on Wednesday night between 6-8 pm). Both agree not to haggle, but either to accept or reject the ritual pre-planned offer and to return to the negotiation/mediation table at a specified time with the result.

This procedure gives a concrete proposal, reduces the fear of incremental haggling during the break, ritualises conflicted conversations, provides a deadline, and allows the parties to return to the negotiation table knowing what has been decided.

(12) ***Defer Division of the last gap; divide the rest***

Where parties are in dispute over a pool of assets, it is possible for a portion to be divided as agreed, and for the last gap to be set aside for division at some later time. For example, a wife could take 50%; a husband 40% and the contested gap of 10% be invested in a joint account until the parties are "ready" emotionally or otherwise to deal with that 10%.

The writer has been told of one case where the last contested chattel was the matrimonial bed. The parties chose to divide everything else but to place the bed into indefinite storage until a decision could be made.

(13) ***Sell the last item at an auction; split the proceeds***

This option involves an agreement to sell the last contested item(s) at a without reserve auction, usually with all parties free to bid. The most determined bidder "wins" the item and the net proceeds of the auction are then divided in portions agreed to beforehand.

(14) ***Pick-a-pile***

Where the last gap consists of a number of items such as "all the furniture"; "all the stamp collection"; "all the paintings", then the parties can be offered the "pick-a-pile" option, which is well known to family lawyers.

One party agrees to divide the chattels into two lists of approximately equal value and submit these lists to the other party by a deadline. The other party then has a specified time in which to choose one list as his/her share.[12]

Like dispute resolution by chance, this pick-a-pile option is so filled with risk and tension that some disputants quickly reject it and return to the list of remaining options with some relief.

(15) *Skilled helper has a face-saving tantrum*

This option is rarely chosen by the disputants. However, some parties comment confidentially during or after a mediation to a mediator - "I wish you would apply more pressure to us both; we are stuck"

Accordingly, when the last gap persists, some mediators try this option from their box of tools. For example, with varying degrees of simulated anger, the mediator comments: "I cannot believe it. You have both sat here for three hours and patiently and successfully negotiated through four issues. Now you're about to throw it all away on this miserable bunch of paintings. You both really disappoint me. I'm not going to let you out of here until you both do the right thing and ..... etc. etc."

This option may cause the mediator to lose reputation and two clients, or may enable both parties to avoid any loss of face by making the last concession. They can blame the mediator for "forcing" the last concession (and rescuing them both from their painted-in corners).

This dramatic option may be particularly successful if the mediator has gained the respect and trust of all parties (both lawyers and disputants) over a period of time.

(16) *File a Court Application – Pursue Pain and Hope*

Sometimes, the last gap is too difficult to cross amidst the sense of loss arising from a day of concessions. Accordingly, the mediator or one of the negotiators delivers a mixed message of pain and hope “I believe that this dispute will settle; you have made progress today; in my opinion, you are not diagnostically in the 1-3% of disputes which need a judicial decision; however you both may need to suffer more pain and expense of filing (further) court applications, open offers, and paying your lawyers; could the lawyers now agree to a time to talk over the phone in say 14 days time etc.” (Competent negotiators/mediators always organize face-saving methods to re-open negotiations.)

Various versions of this pain and hope speech have sometimes led to awkward silences, and then positive responses to the question “Would you like to take a short break, then try for another 15 minutes to see if this can be concluded today?”

[12] Precedent clauses for such agreements can be found in *Australia Family Law and Practice* (CCH) "Precedents" tab and in *Australian Encyclopaedia of Forms and Precedents* (Butterworths) under "Family Law" tab, Volume 6, precedent 30.165.

Conclusion

Conflict managers are becoming more sophisticated in their knowledge of negotiation dynamics. This paper has attempted to systematise some of the reasons for the difficulties experienced in crossing the last gap.

Sixteen ways of crossing the last gap have been described. Visually setting out some or all of these sixteen strategies is a useful addition to a mediator's or negotiator's repertoire for working with disputants to cross the last gap.

HOW TO END "UNSUCCESSFUL" MEDIATION (NEGOTIATION)?

1. **Ask parties to make closing speeches**
   "Anything to say?"
2. **Summarise; give structure**
   - mini-agreements
   - areas of jam
3. **Summarise in writing**
   "I will send you both a written report…"
4. **Make optimistic speech**
   "You will settle…" – with time; more information; more pain
5. **Brainstorm process**
   "What will progress with negotiation?"; "I'm stuck at the moment…"
6. **Suggest "process" speech**
   "In my opinion, you need to go through the following steps… (swap information, Bill and Mary meet)." "Are you willing to agree to this timetable?"
7. **Plan next meeting**
   "Are you willing to meet again?" "Can we make a time?" "I'm available…"
8. **Pause and think**
   "I will phone both of you next Friday to ask you upon reflection, how you think this can be progressed." "We are all weary at the moment…"
9. **Silence**
10. **Stay, threaten or beg**
    "I'm locking the door." "Crazy to lose this progress…"
11. **Just send everyone home**
    "They have gone…"
12. **Repeat internal risk analysis/life goal with each team**

Conclusion

Mediators (and negotiators) are asked regularly to supervise forms of positional bargaining and decision-making which necessarily involve layers of deception and delusion.

This reality requires mediators to:

(1) understand and be comfortable with the standard "dance" and moves of positional bargaining

(2) understand (and challenge if appropriate) why this style of negotiation is being used

(3) develop a practised range of responses in the toolbox to work through the standard bumps and glitches necessarily associated with this standard form of negotiation.

Exercise

One of the tasks of a negotiator or mediator is to help negotiating teams or "tribes" make wise decisions in the face of uncertainty, team division, practised deception and self-delusion.

One standard method for doing this is to **clarify** team goals and risks amidst the rhetoric of rights, entitlement and fairness talk (plus TTLBs).

(1) Listen to the following standard "rights-risks rhetoric" speech from a participant in a mediation (made during private preparation with a mediator, and snippets repeated during the joint sessions).

(2) As you listen to her, write down a numbered list **either** of her **goals** or **risks** (see sheet PTO).

(3) Summarise and reframe your numbered list back to her (eg "Have I understood you correctly, there are 6 **risks** for you if this conflict continues....?"; or "....there are 7 **goals** you have in this negotiation".

(4) Keep changing your list and language until she agrees with your summary.

(5) Then ask "Can you number your goals in order of priority?" or "How much of a premium are you willing to pay to avoid some of these risks?" (Do not expect her to tell you the truth on the latter question – why should she trust a leaky, deceptive and manipulative mediator?.)

Exercise

Abbreviated Facts

Mary and Bob have lived together for 4 ½ years. They each had little money when they began living together. Bob has been a very successful global entrepreneur. He now has assets of about $6.5million; Mary has assets of about $600,000.

After Bob assaulted Mary, they separated. She lives in a secret location as Bob is still in love with her and tries to contact her. Mary has spent $127,000 so far in legal costs, attempting to locate more of Bob's assets and liabilities. Her lawyers here discovered legal actions against Bob in 4 overseas countries claiming $10 million from him. It is unlikely that these claims will succeed. Bob is an experienced international litigator. Bob has spent $130,000 so far on legal costs against Mary's claim.

Mary's lawyers have confidently advised her that she is entitled to 40% of their joint assets. Bob's lawyers have confidently advised him that Mary is entitled to between 5 ½% - 11% of the joint asset pool. They have produced 3 reported cases which are supposedly precedents for this latter range.

Now listen to Mary as she speaks to you (the mediator) or to you her lawyer or representative, privately in preparation. From her speech, summarise carefully **either** her **goals** or **risks** (PTO).

MARY'S GOALS	**MARY'S RISKS (if the conflict continues)**
1	1 .....
.....	.....
2	2 .....
.....	.....
3	3 .....
.....	.....
4	4 .....
.....	.....
5	5 .....
.....	.....
6	6 .....
.....	.....
7	7 .....
.....	.....
8	8 .....
.....	.....
9	9 .....
.....	.....
10	10 .....
.....	.....

Mediator's Questions

(1) "Mary, if this chart of **your** goals or risks is correct, what will you do if you only receive a low (ie 11½ % of the pool) monetary offer today?" (Predicted answer, "I will take him to court")

(2) "Mary, could you please write a dollar amount next to each goal or risk. How much will you pay today to achieve each goal, or avoid each risk?"

MARY'S GOALS	MARY'S RISKS (if the conflict continues)	$ value
1 To be healthy	**1** Stressed for 2 more years	
2 To avoid contact with Bob	**2** 2 years more of contact	
3 To marry and have children	**3** Delay for 2 years at least	
4 To stop spending money on lawyers	**4a** Predicted 25% of her $600,000 remaining will be spent **4b** Lawyers must keep investigating Bob's alleged international debts	
5 Increase size of pool	**5** Decrease due to vague international litigation and debts	
6 Increase her % of pool	**6a** Decrease due to reported case precedents **6b** She has no case precedents in her favour **6c** Obtain net $ *less* than current offer	
7 Minimise conflict	**7** Bob enjoys conflict	
8 Get revenge	**8a** Bob enjoys negative intimacy **8b** Bob will only spend 2% of his assets on lawyers	
9 "Win" (whatever that means!)	**9** Against an experienced conflict-junkie?	
10 Get on with life	**10a** Bob has nothing else to do **10b** Judge may adjourn case if alleged international debts remain uncertain	
11 Other?	**11** Other?	

- If you can live with the identified "real" risks, you are a strong negotiator
- If not, settle.

Bonding to Bond

If you have any suggestions about this newsletter; *OR* if you or your colleagues would like to be included on, or excluded from receiving this occasional newsletter, **please send us a message** with your e.mail address to:

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