

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

50 Ways to Break an Impasse: *Tips, Tricks, Traps and Tools* ABA Section of Dispute Resolution 2015



Sam Imperati, J.D.

Institute for Conflict Management, Inc.

SamImperati@comcast.net

www.mediate.com/ICM

© 1992 – 2015 ICM, Excepting Cartoons and Where Attributed



**Sam Before He
Started Mediating!**

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**

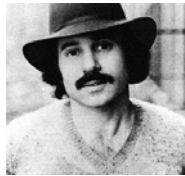


50 Ways to Break an Impasse: Tips, Tricks, Traps and Tools

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*

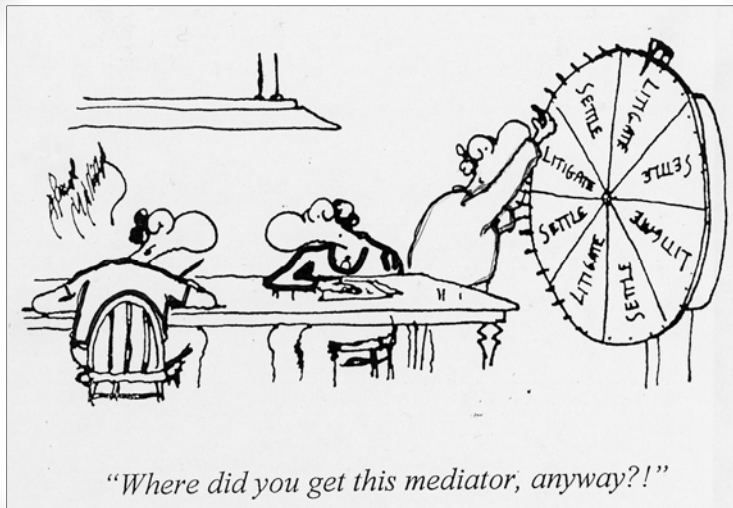
*I said why don't we explore with all our might
I believe you'll begin to see the light
Soon they realized I probably was right
There must be 50 ways to break an impasse
50 ways to break an impasse*



Semi-Sincere Apologies to Paul Simon

Institute
for Conflict
Management, Inc.

Full Disclosure

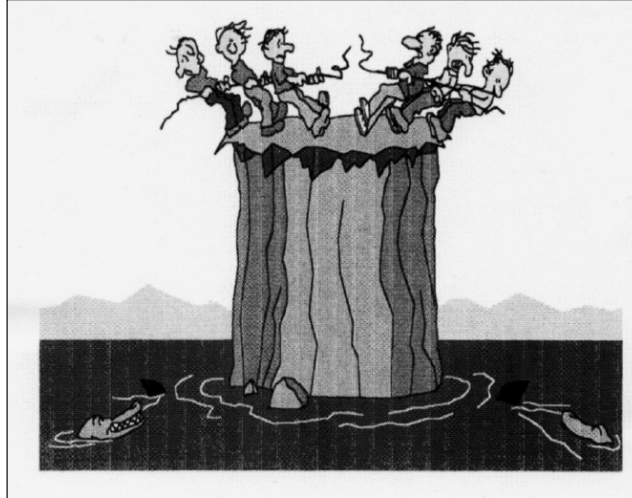


Function of Your “Philosophical” Approach

Institute
for Conflict
Management, Inc.

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

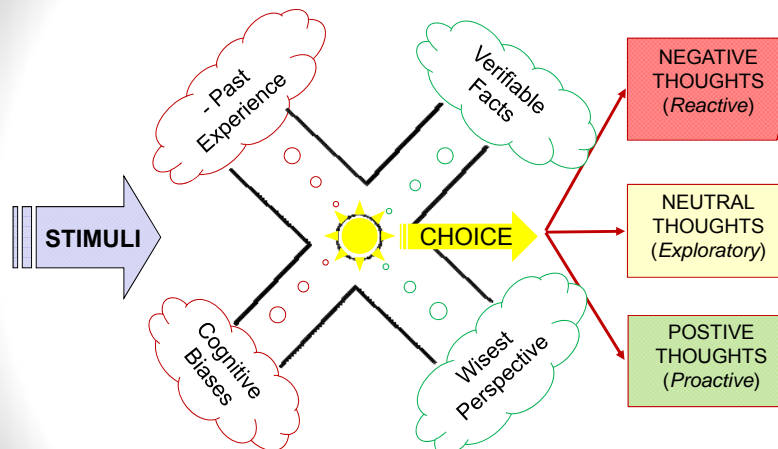
Typical Mediation Impasse



***"I'm NOT settling. That's my BOTTOM Line.
It's a matter of PRINCIPLE!"***

Institute
for Conflict
Management, Inc.

The Intersection of Logic and Emotion



"Our life is what our thoughts make it..." (Marcus Aurelius)

Institute
for Conflict
Management, Inc.

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

Pre-Session Tools



Institute
for Conflict
Management, Inc.

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

Institute
for Conflict
Management, Inc.

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

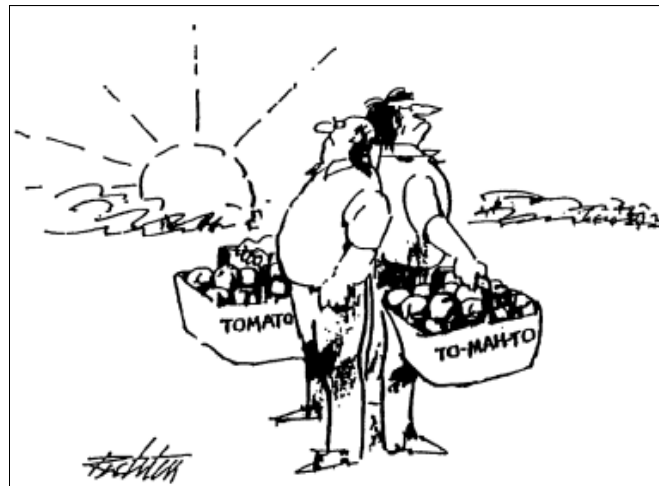
Ask for a Pre-Session Submission

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?

Institute
for Conflict
Management, Inc.

Session Tools



Institute
for Conflict
Management, Inc.

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

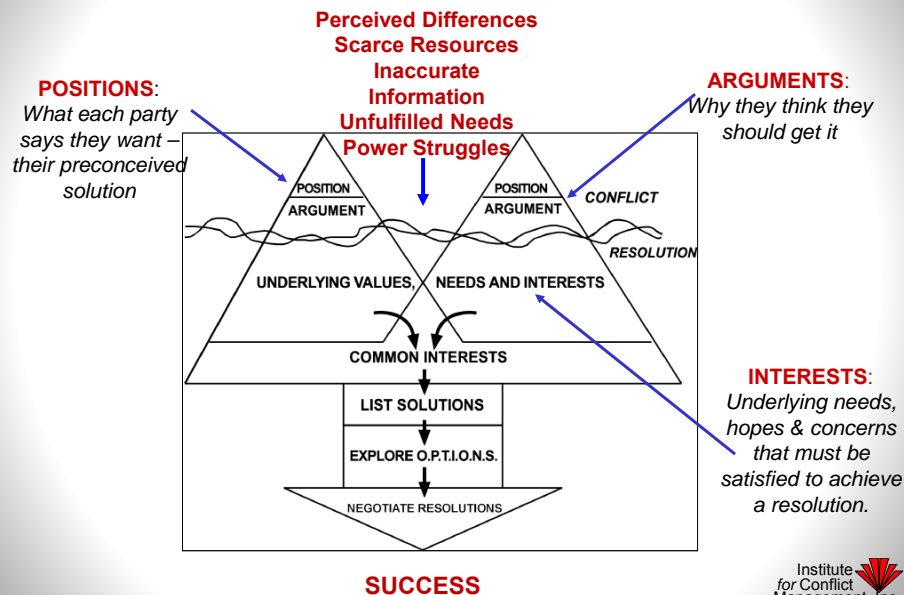
2. Opening Statement Tips to Minimize Impasses

- **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



Institute
for Conflict
Management, Inc.

3. Explain Anatomy of a Negotiation

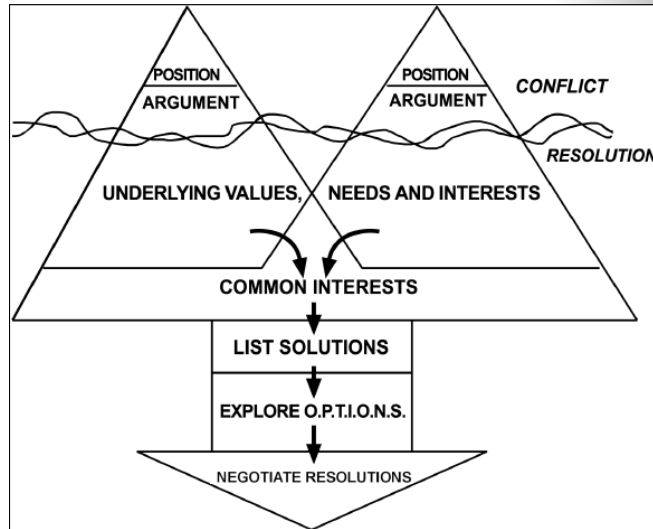


50 Ways to Break an Impasse: Tips, Tricks, Traps and Tools

And Negotiation Protocol

The Four Steps:

1. **IDENTIFY THE STATED PROBLEMS**
2. **EXPLORE THE REAL ISSUES**
3. **DEVELOP POSSIBLE SOLUTIONS**
4. **SELECT & IMPLEMENT SOLUTIONS**



SUCCESS

Institute
for Conflict
Management, Inc.

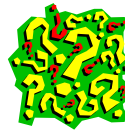
4. Ask Effective Questions

- 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?

Institute
for Conflict
Management, Inc.

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

- 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?



Institute
for Conflict
Management, Inc.

5. Create Umbrella Question to Reframe Issue



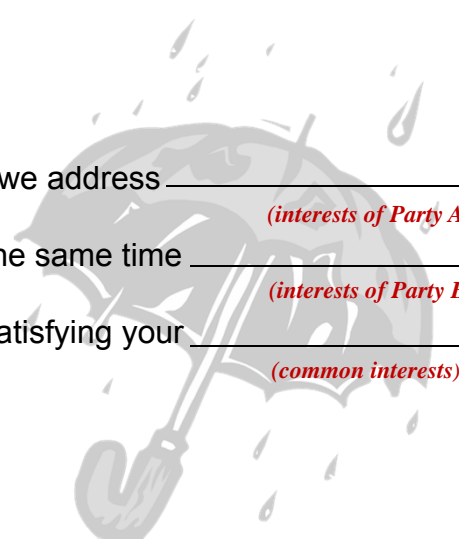
The Business Deal

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?

Institute
for Conflict
Management, Inc.

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

Umbrella Question Diagram

A faint background illustration of an umbrella with raindrops falling around it.

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

Institute
for Conflict
Management, Inc.

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

Institute
for Conflict
Management, Inc.

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

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!"

Institute
for Conflict
Management, Inc.

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!

Institute
for Conflict
Management, Inc.

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

Use an Inter-Caucus Worksheet (Confidential – for Mediator only)

Party _____

Caucus # _____

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

For you:

For the other side:

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?

Institute
for Conflict
Management, Inc. 

Use the “SWAP-LION” Protocol

- S**trengths: Where are you strong?
- W**eaknesses: Where will the other side say they are strong?
- A**lternatives: If the conflict is not resolved, what will happen?
BATNA Analysis (Decision Trees and Tables)
- P**erspectives: **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?
- L**ist Interests: Party A, Party B, Common, Prioritize
- O**ptions: Brainstorm multiple options for resolution.
Separate the process of *inventing* from negotiating.
- N**egotiation: 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

Institute
for Conflict
Management, Inc. 

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

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**

Institute
for Conflict
Management, Inc.

7. Wise Decisions



Institute
for Conflict
Management, Inc.

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

When Decision Making Goes Wrong!



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

Institute
for Conflict
Management, Inc.

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

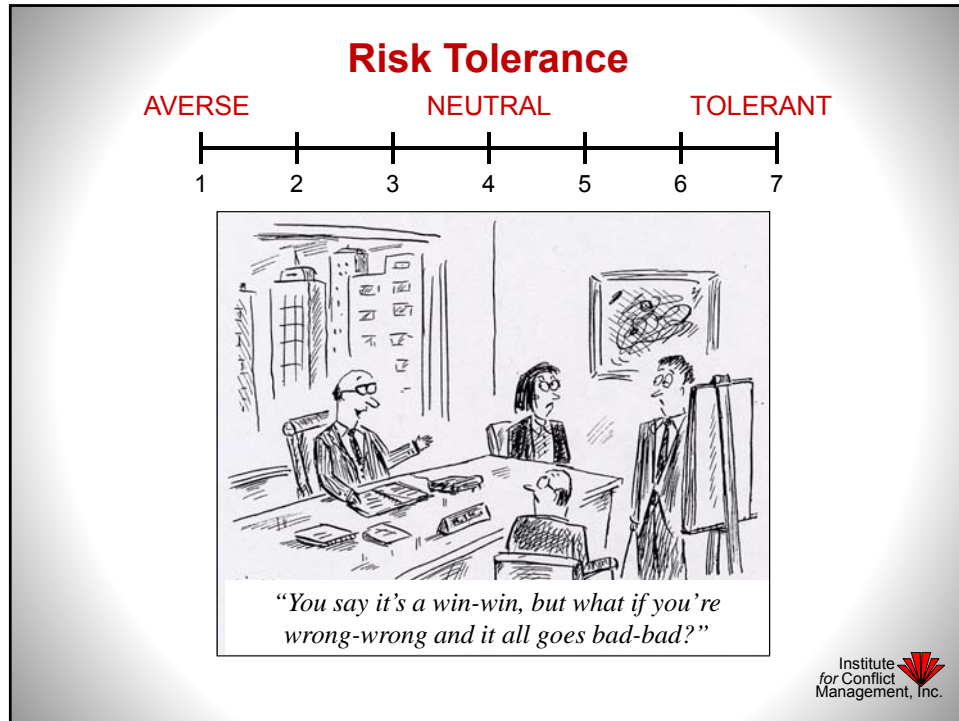
Too Much Cognitive Conflict Can Create Panic

Too Little Cognitive Conflict
Can Create Apathy

Janis, I. L., & Mann, L. *Decision Making: A psychological analysis of conflict*. NY: Free Press.
Berlyne, D. E. *Structure and Direction in Thinking*. NY: Wiley.

Institute
for Conflict
Management, Inc.

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



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

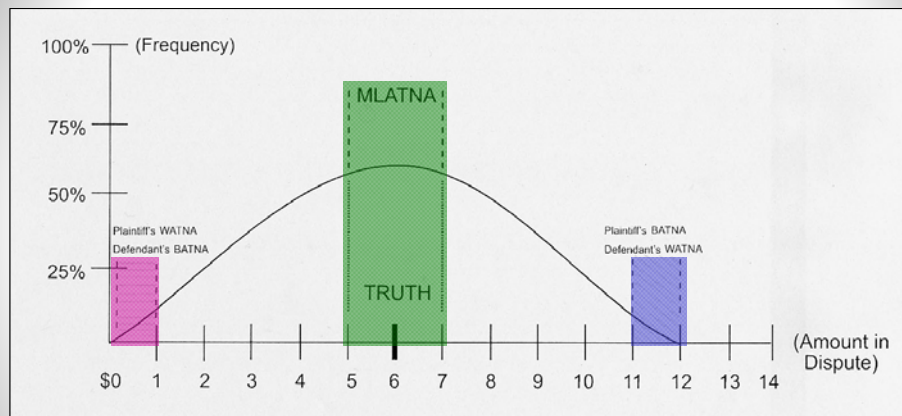
Institute
for Conflict
Management, Inc.

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

Institute
for Conflict
Management, Inc.

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



Father Guido Sarducci's Five Minute University!

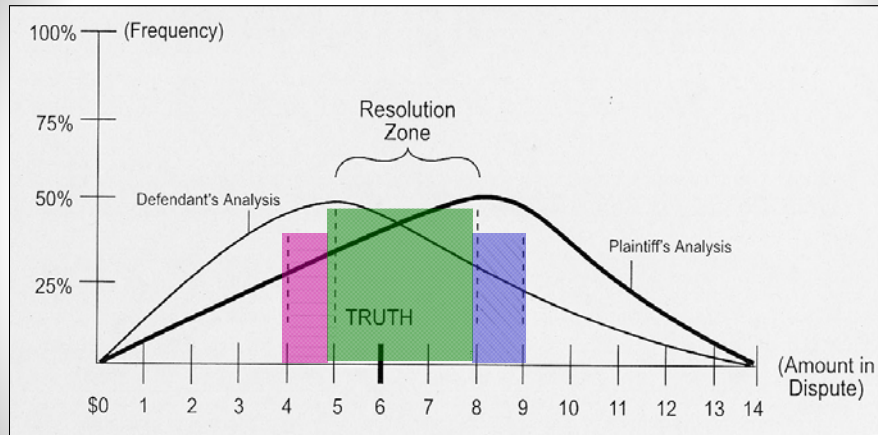
WATNA = **W**orst **A**lternative to a **N**egotiated **A**greement

MLATNA = **M**ost **L**ikely **A**lternative to a **N**egotiated **A**greement

Institute
for Conflict
Management, Inc.

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

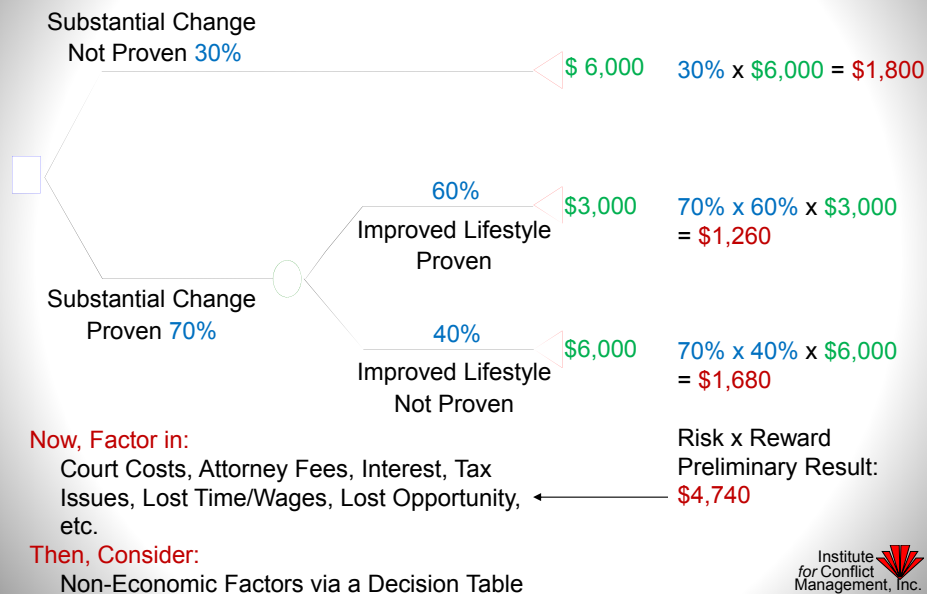
Mediator's Analysis of "Biased" BATNA and the "Resolution Zone"



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

Institute
for Conflict
Management, Inc.

Support Modification Decision Tree



Institute
for Conflict
Management, Inc.

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

Decision Tables Reduce Errors by:

- A) Providing external **memory**
 - o *External Memory Frees the Imagination*
- B) Comparing **alternatives**
 - o *We Choose Better When We Compare Alternatives Directly*
- C) Focusing on **outcomes and facts**
 - o *Without Facts, We Tend to Rely on Stereotypes and Other Mental Shortcuts*
- D) Analyzing outcomes by **attributes/values and group them**
 - o *Better than trying to keep all in our head*

Litigation – Example

Litigation

Getting Started Alternatives Values Outcomes Deciding Wrapping Up

Evaluation Factors: Attributes Values

	Risk Tolerance	Reputation	Impact on Kids	Impact on Co-Parenting	Impact on Personal Life	Principal/Fairness/Precedent
\$3,000						
\$4,740						
\$6,000						
Go to Trial						

Alternatives

- 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!

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

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!

Institute
for Conflict
Management, Inc.

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.”
- 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:** What are they not saying? Ask, “Please tell me the rest...” or “What else do I need to know?”*

***TIP:** Is it that they don’t know, or don’t want to tell? Ask, “What can you share with me?”*

Institute
for Conflict
Management, Inc.

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?”

Institute
for Conflict
Management, Inc. 

- 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

Institute
for Conflict
Management, Inc. 

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



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



Institute
for Conflict
Management, Inc.

... 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*

Institute
for Conflict
Management, Inc.

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

10. Ask Their Objective: “Resolution” or Settlement”

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



	“Resolution”	“Settlement”
Definition	Durable, Satisfying Closure	Walk Away Unhappy
Getting the Deal	Slower	Faster
Ultimate Acceptance	Sooner	Later
Result	Success	Compliance
Maintenance Costs	Low	High

Institute
for Conflict
Management, Inc.

Ask Them to Listen for Agreement

Reactive Listening	Proactive Listening
Interrupt	Listen
Assume	Inquire
Demand	Ask
Emote	Reflect
Deny	Acknowledge
Focus: You	Focus: Us
Intention: Change Them	Intention: Understand Them
Approach: Distributive	Approach: Interest-Based
Goal: “Settlement”	Goal: “Resolution”

Institute
for Conflict
Management, Inc.

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

Explain Classic Approaches

"Distributive"



"Interest-Based"

- | | |
|--|---|
| <ul style="list-style-type: none"> • 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 | <ul style="list-style-type: none"> • 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

Institute
for Conflict
Management, Inc.

Help Them Select Their Negotiation Approach

		Yours			
		A Outcome and Relationship Important	B Outcome Important Relationship Not	C Relationship Important Outcome Not	D Neither Outcome nor Relationship Important
Theirs	1 Outcome and Relationship Important	Pure Collaborate	Collaborate Soft Compete	Pure Collaborate	Collaborate Soft Compete
	2 Outcome Important Relationship Not	Collaboration Soft Compete	Hard Compete	Subordinate	Responsive Avoidance Medium Compete
	3 Relationship Important Outcome Not	Collaborate	Soft Compete	Collaborate	Passive Avoidance
	4 Neither Outcome nor Relationship Important	Soft Subordinate	Collaboration Soft Compete	Subordinate	Active Avoid

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

Use Your Words Carefully

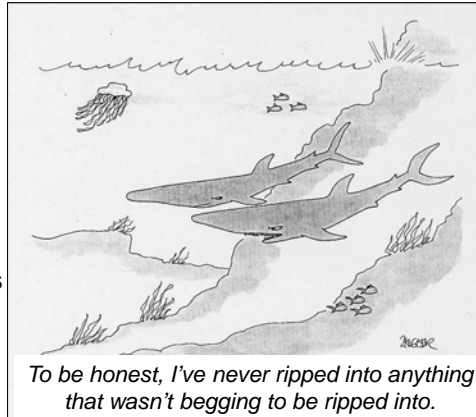
USE

Proposals

Resolve

Firm Proposals

And



INSTEAD OF

Positions

Compromise

Non-negotiable

But

Mud thrown is ground lost!

Institute
for Conflict
Management, Inc.

... 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!”

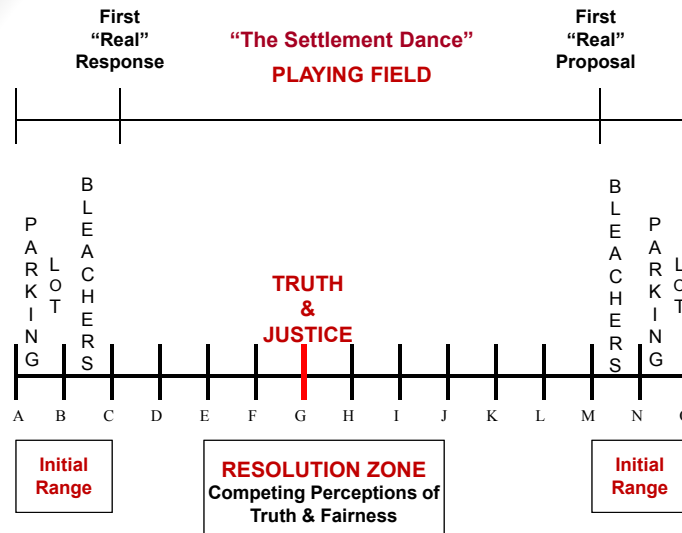
REFRAME #1: “It sounds like being available so you can meaningfully contribute to your kid’s development as she moves through life is important to you”

REFRAME #2: “If your child support payments stayed the same and you had liberal visitation, would you be willing to consider less than 50% custody?”

Institute
for Conflict
Management, Inc.

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

11. Use Holy Trilogy of Impasse Breaking



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

Institute
for Conflict
Management, Inc.

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.

Institute
for Conflict
Management, Inc.

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

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.



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

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

Institute
for Conflict
Management, Inc.

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.

Institute
for Conflict
Management, Inc.

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

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

Institute
for Conflict
Management, Inc.

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

Institute
for Conflict
Management, Inc.

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

- 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?”

Institute
for Conflict
Management, Inc.

- 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?”



Institute
for Conflict
Management, Inc.

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

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

Institute
for Conflict
Management, Inc. 

33. If They Vent, VECS Them

(Diving Below the Waterline of Adversarial Banter)

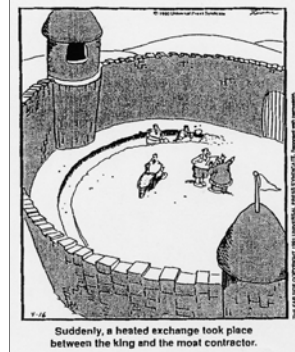
- **Validate**
 - Acknowledging people for talking even if you disagree: *“I appreciate your willingness to say...”*
- **Empathize**
 - Identify with another’s views even if you disagree: *“This is tough.”*
- **Clarify**
 - Open-ended questions to clarify issues or meaning: *“What bothers you most about 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!

Institute
for Conflict
Management, Inc. 

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

- 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



Institute
for Conflict
Management, Inc.

- 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**”

Institute
for Conflict
Management, Inc.

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

Psychological Traps

A) Anchoring:

People get stuck on salient, irrelevant numbers.
(See next slides for Demo!)

B) Concession Aversion:

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.

Mediation Tools

- 1) Use "Confidential Numbers" until "Resolution Zone." Then play "cards up."
- 2) "Ever settle a case with the initial exchanges?"
- 3) Tie to legitimate outside standards

- 1) Mediator's Proposal can diminish this trap as it does not come from other side. Cloaks the source.
- 2) Use drawn continuum to show comparable movement, distinguishing between percentage movement vs. raw numbers

Institute
for Conflict
Management, Inc.



C) Construal Biases:

People think that others hold more extreme views than they do, and are unwilling to accept that others are moderate in a partisan situation

D) Fairness as a Decision-Making Criterion:

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.

- 1) Normalize using Conflict Style Continuum
- 2) Suggest Conditional Offers
- 3) "Trial" settlement with revaluation terms

- 1) Deconstruct core elements of notorious case and compare objectively to current case.
- 2) Use external, objective indices of fairness.
- 3) Rawls thesis extended is that self-interest would motivate decision-making using agreed-upon norms in the face of uncertain results.

Institute
for Conflict
Management, Inc.



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

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)

Institute
for Conflict
Management, Inc.

F) Chasing Sunk Costs “Throwing good money after bad”

F) The Availability Challenge

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

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



Left Column:

<http://www.scribd.com/doc/30548590/Cognitive-Biases-A-Visual-Study-Guide>

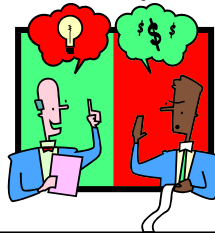
Right Column: ICM, Inc.

Institute
for Conflict
Management, Inc.

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

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.



Institute
for Conflict
Management, Inc.

... 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)

Institute
for Conflict
Management, Inc.

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

44. Fairness

Veils and Cloaks of Ignorance: Under-used Tools for Conflict Resolution. 30 Ohio State Journal on Dispute Resolution (2014) Anderson, Swanson & Imperati

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

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

45. Check Your Cultural Assumptions

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

Institute
for Conflict
Management, Inc. 

Characteristics	Stereotypical Legal Culture	Another View
Escalation Signals	Spontaneous frankness or bluntness, raised voices	Vagueness or roundabout approach, don't speak
Participants	The actual parties	Larger community/ extended family
Who Assists?	Law enforcement, attorneys, impartial neutral	Trusted, known intermediaries, elders
Setting	Formal	Informal
Language	Precise language and word choice valued	Meaning conveyed by words, inferences, interpretation
Ethics	Professional codes	Community expectations

Institute
for Conflict
Management, Inc. 

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

... and Consider Emotional Expressiveness/Restraint Conflict Styles ala the ICS Inventory

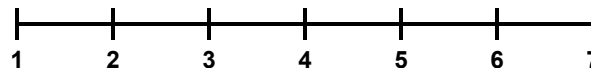
<http://www.icsinventory.com>

Emotional Expressiveness	Emotional Restraint
Overt display of emotions	Disguised display of emotions
Control emotions by "externalizing"	Control emotions by "internalizing"
Visible display of feelings through nonverbal behavior	Minimal display of feelings through nonverbal behavior
Expansive vocalization	Constrained vocalizations
Sensitive to constraints on expressing own feelings	Sensitive to hurting feelings of other party
Relational trust through emotional commitment	Relational trust through emotional maturity
Emotional information necessary for credibility	Emotional suppression necessary for credibility

Institute
for Conflict
Management, Inc. 

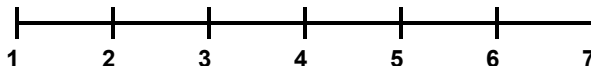
... and Internal Decision-Making Preferences

LONG TERM



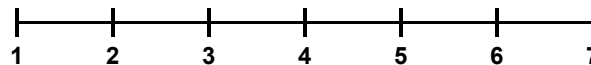
SHORT TERM

END RESULT



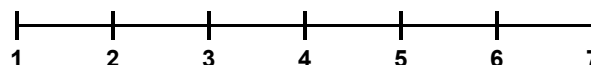
PROCESS

DETAILS



BIG PICTURE

BY THE BOOK



JUST DO IT

Institute
for Conflict
Management, Inc. 

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

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



Institute
for Conflict
Management, Inc.

47. Avoid Giving Opinions

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

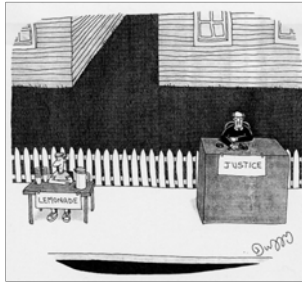
- Opinions tend to validate one party at the expense of other.
- Your opinion is not the issue – the burden is on the parties to convince the other team.
- Deflect their request by asking them to give you questions to direct to the other side to help with their evaluation.
- Neutrals are often surprised 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.

Institute
for Conflict
Management, Inc.

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

... but, When You Give Opinions

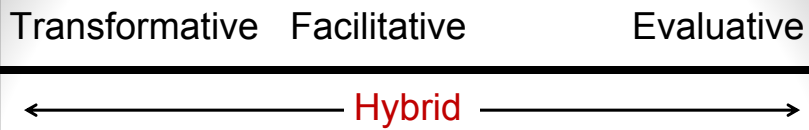
That being said, some mediators adopt an “evaluative” approach and give their opinions as to the probable outcome of specific issues (factual and/or legal) and/or the overall case. If you are going to do it, first ask permission (in joint session) and discuss advantages and disadvantages of doing so.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



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

Institute
for Conflict
Management, Inc.

48. Change Your Mediator Approach



*“So much is written, so little
advanced.”*

If Freud, Jung, Rogers & Beck were Mediators
– Who would the Parties Pick?
43 Idaho Law Review 643 (2007)

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

Approaches and Their Differences

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

Approaches and Their Differences

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

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

Pre-Session Approach Assumptions

M E D I A T O R A S S U M P T I O N (M)	Party A's Assumption (A)			
		<i>Transformative</i>	<i>Facilitative</i>	<i>Evaluative</i>
	<i>Transformative</i>	M, A, B		
	<i>Facilitative</i>		M, A, B	
	<i>Evaluative</i>			M, A, B
	Party B's Assumption (B)			

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



Sam Imperati, JD
Institute for Conflict
Management, Inc.

SamImperati@comcast.net

Steve Maser, PhD
Willamette University
MBA

SMaser@willamette.edu

© 29 OHIO ST. J. ON DISP. RESOL. 223 (2014)

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.

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

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.



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

Mediators Manipulate by Using Heresthetic & Rhetorical Tactics



Just Say-in!

Heresthetics (Political Strategy)

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.

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

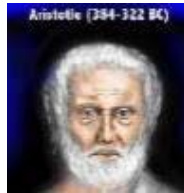
Rhetorical Tactics (Persuasive Discourse)

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?")



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

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

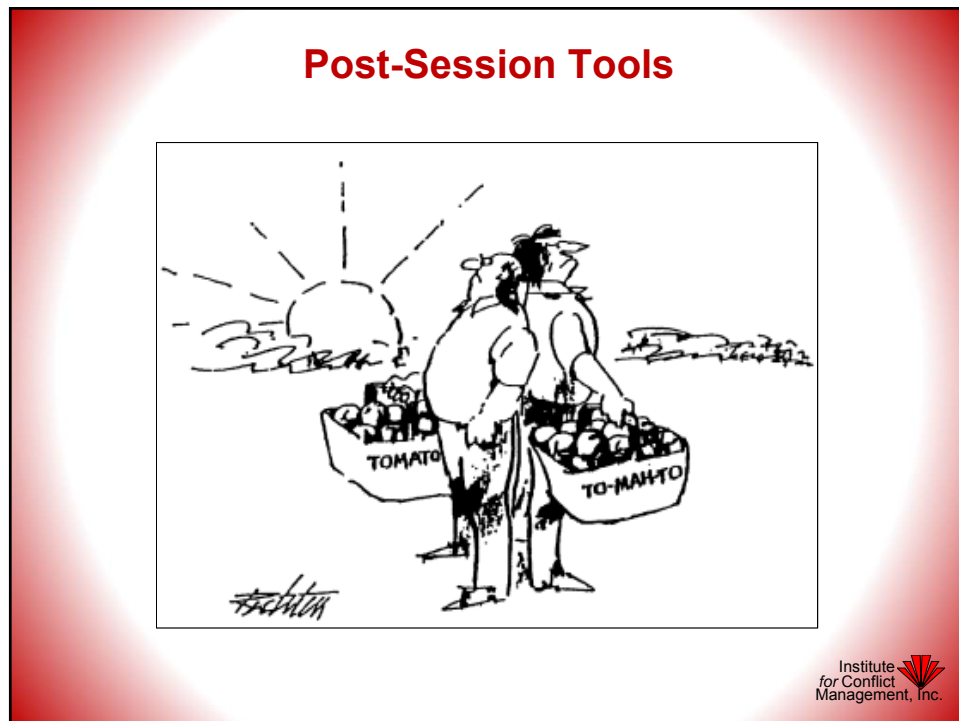
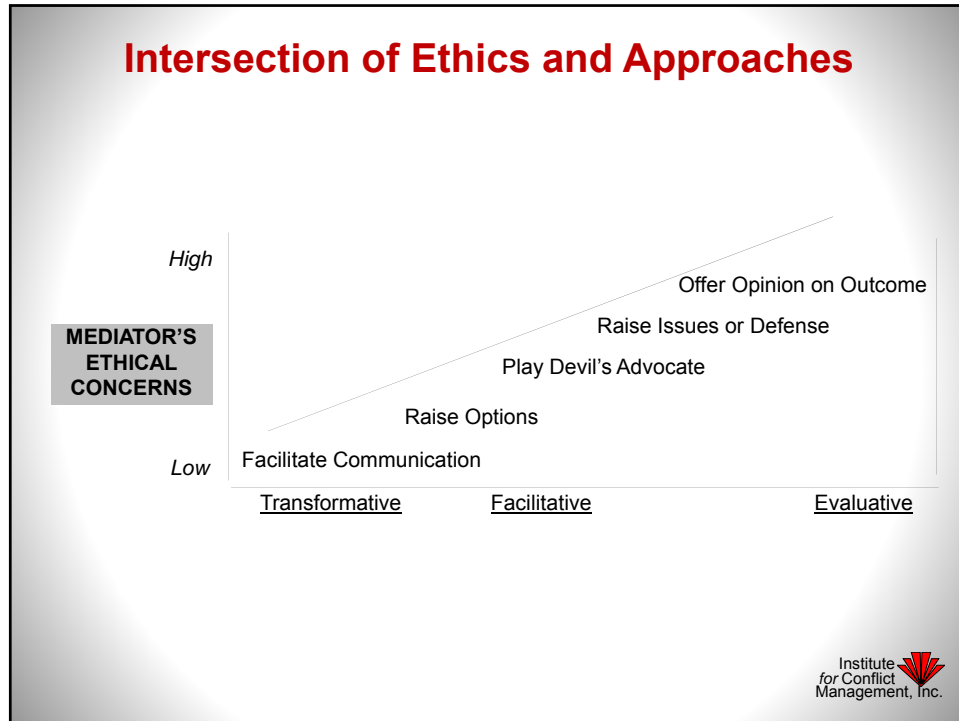


<http://www.omediate.org/pg61.cfm>

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

Institute
for Conflict
Management, Inc.

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



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



Institute
for Conflict
Management, Inc.

... 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



Institute
for Conflict
Management, Inc.

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

SAMPLE

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 _____ : \$ _____

Institute
for Conflict
Management, Inc.

5. Allocation and payment terms:
6. Tax treatment: hold harmless and defend.
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: _____

Institute
for Conflict
Management, Inc.

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

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)*



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

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!"



Institute
for Conflict
Management, Inc.

Go Forth and Break Impasse!



"May I be excused? My brain is full."

Thank You!

Institute
for Conflict
Management, Inc.