“Mediating the Litigated Case;

And Essential Negotiating Skills;
A New Perspective”

What’s New in Negotiation Practice?

3 D Strategic Negotiations, Decision Making and
The Science of Influence and Persuasion

USC Marshall School of Business

Presented by Myer J. Sankary

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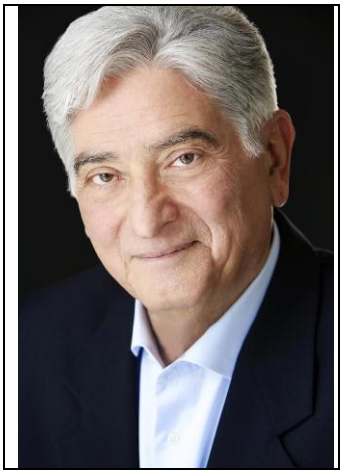

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Myer Sankary has mediated over 1000 cases since 1996 involving a variety of areas of law and business with over a 90% settlement rate. He mediates numerous cases in employment law, real estate, construction, personal injury, family law, corporate, partnership and business disputes, intellectual property, and numerous other areas of law in which he has practiced over his career. He is also a specialist in Probate Mediation because of his more than 40 years of practice in the field of probate and estate planning. Attorneys who use his services consider him to be one of the most effective mediators in this region.

Mr. Sankary started practicing law in Beverly Hills with the Wyman, Bautzer, Rothman & Kuchel firm after graduating Harvard Law School in 1965. He has extensive experience both as a litigator and transactional attorney. He is considered an expert in contract law (he teaches a course in drafting contracts), and specializes in probate, wills, trusts, and conservatorships. He serves on the probate volunteer panel for the LA Superior Court Probate Department. He has an A.V. rating in Martindale & Hubbell. Mr. Sankary currently specializes in alternative dispute resolution, conducting mediations, arbitrations, and consultations with individuals, lawyers and businesses to resolve disputes through negotiated settlements.

He is an author and lecturer on negotiating strategies as well as the new social science of persuasion and influence. Mr. Sankary is the only attorney and mediator trained and certified by Dr. Robert Cialdini, Professor of Psychology and Social Science at Arizona State University. He has presented numerous workshops and lectures for mediators, attorneys, corporate legal departments, consulting firms, corporate executives, human resource managers, strategic planner, and expert witness associations, on the subject " Applying the Science of Influence to the Art of Negotiations. Mr. Sankary is considered one of the leading authorities on this subject.

Among Mr. Sankary's published articles and topics on which he has lectured are:
"Applying the Social Science of Persuasion and Influence to the Art of Negotiations," SCMA Annual Conference; (Mr. Sankary will be a featured presenter on this subject at the 18th Annual SCMA Conference at PepperdineLaw School, on November 4, 2006.
"Critical Crossroads, Good Decision Making Is Key To Successful Negotiations," published in the State Bar of California, Solo Section News magazine, the ICFAI Journal of Alternate Dispute Resolution, Hyderabad, India and The Corporate Legal Environment,, published by ICFAI Business School, (2006) and in the National Realtor Association Magazine.
"Ethical Limits to Legal Negotiations: When is Lying an Acceptable Tactic in Mediation?" Big News Magazine.
"Poker Lessons: Negotiators Should Use Mediators As Friendly Dealers," Big News Magazine, Probate Journal
"Is Mediation a Waste of Time?" Big News Magazine

"Legal Negotiations and Mediations" Big News Magazine
"Keeping Your Cool: The Power of Persuasion in Mediation - Applying the Social Science of Influence to the Art of Negotiation in Employment Disputes"

All of the above articles can be found on Mr. Sankary's website at www.sankarymediation.com

ADR EXPERIENCE

Mr. Sankary has extensive experience in ADR, having served as an arbitrator for the American Arbitration Association, Kaiser Permanente, and Los Angles Superior Court Arbitration and Mediation panel since 1996. Arbitrator/Mediator,Los Angeles Superior Court and Probate Court Panel of Mediators/Arbitrators Conducted over 1000mediations and arbitrations ; Arbitrator, Kaiser Permanente Arbitration Panel, 1999 to present; Arbitrator, American Arbitration Association, 1985-1995, commercial, insurance, employment and personal injury; Probate Settlement Officer, Probate Dept., Los Angeles Superior Court, Van Nuys, Northwest Division. (Mr. Sankary organized and administers the Van Nuys and Los Angeles Superior Court Probate Settlement program.) Mr. Sankary was the representative of the San Fernando Valley Bar Association to ADR Committee of LA Superior Court – Judicial Education Subcommittee

PROFESSIONAL ASSOCIATIONS:

Member and Past President and Treasurer of the Southern California Mediation Association; California Dispute Resolution Council, former member ADR Committee of State Bar of California, Dispute Resolution Services, L.A. Consumer Lawyers Association, Los Angeles County Bar Association; Past Member, Board of Trustees, San Fernando Valley Bar Association; and member of State Bar of California (since 1966); Past Chairman and current Senior Advisor to the Executive Committee of Solo and Small Firm Section of State Bar of California; Recipient of Myer J. Sankary Annual Achievement Award; Recipient of the 2002 ABA General/Solo Section Rikli Lifetime Achievement Award. Professional Network Group (Encino);

DISPUTE RESOLUTION TRAINING AND TEACHING

Lecturer at USC Marshall Graduate School of Business in Legal Negotiation Theory and Practice, 2001-2006. Mr. Sankary conducts a unique negotiation workshop for MBA candidates and conducts experimental studies in negotiation strategies in these advanced classes. Lecturer at the 14th Annual Dispute Resolution Conference, U. of Washington School of Law, Seattle. Presenter at the 18th and 19th Annual Southern California Mediation Association Conference, "Applying the Science of Persuasion to the Art of Negotiations."

Mr. Sankary has attended over 300 hours of Arbitration and Mediation training since 1996 including ADR programs sponsored by the Rutter Group; Straus Institute Pepperdine Law School: Basic and Advanced Mediation Training , Mediating the Litigated Case, Mediation Masters Forum 2000, 2002, Negotiating Techniques in Mediation, C**ivil and Probate** Mediation Training, by James C. Melamed , J. D., Mediation Center, Inc, Mediation Workshop at School For Peace, at Latrun, Israel, 1996. Training Courses Given by Mr. Sankary include U.S. Department of Justice, Southern District of California; Mediating the Probate Dispute; Lecturer, State Bar of California, and author of "Mediation-How To Negotiate the Best Deal for Your Client"; See online MCLE program at www.calbar.org - streaming video of Section Education Institute;

Straus Institute, Pepperdine Law School, Mediation/Arbitration Training/Master Forum 1996 to present and numerous other training programs.
Harvard Law School, J.D. graduated 1965, [Admitted in State Bar of California 1966]
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"Mediating the Litigated Dispute"

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The following is an outline to help you learn about how mediation procedures and techniques can help you, your family, or friends settle contentious disputes with less cost and emotion. Ninety-five percent of all court cases are now referred to mediation before trial, and most of those cases are settled. Why have the courts adopted this method of settling cases? Because it works.

Five common approaches to dispute resolution:

1. Avoidance
2. Self-help and use of force
3. Direct Negotiation
4. Mediation
5. Arbitration
6. Court imposed outcome through litigation.

What is mediation and how does it differ from arbitration?

1. Key features that distinguish mediation are the following:

    a. It is a voluntary facilitated negotiation by a trained impartial neutral;
    b. All communications during the mediation are confidential.
    c. The mediator may meet with the parties jointly or in separate private sessions where the parties can discuss their case in a frank and candid manner.
    d. Mediation is nonbinding unless the parties enter into a written agreement to become bound to a settlement of their dispute. No judgment is imposed upon the parties.
    e. Parties in the dispute do not need attorneys to represent them in mediation – the same in arbitration. A party may also represent himself in court but would be at a serious disadvantage without knowledge of formal legal procedures. There is no formal legal procedure in mediation, so the party can negotiate on his own behalf without concern that an adverse outcome may be imposed on him without his consent.

2. Mediation differs from arbitration in the following ways:

    a. Arbitration is usually binding – (substitute for a trial or judge) – the arbitrator makes a final and binding decision which can be enforced in court;

    b. In mediation, the mediator frequently gives no opinion about the merits of the case, and if he does, his opinion is not binding. At other times, the mediator will give an impartial evaluation of the case and suggests possible ways to

resolve the dispute. The skilled mediator will assist the parties during the negotiation by suggesting steps that will lead to a mutually acceptable outcome. Unless the parties agree in writing to the terms of a settlement, the dispute will continue in court until final judgment.

c. The arbitrator hears the evidence in a similar manner as a judge – but the rules of evidence are not as strictly applied as in court. The arbitration process is like a trial, each party presents evidence (documents and witnesses) to support their case. The arbitrator weighs the evidence and decides which version of the facts he believes. The Arbitrator is judgmental. He is supposed to apply the applicable to the facts and state how the dispute is to be resolved. The decision is imposed upon the participants. There is generally no appeal from an arbitrator's decision, even if it is unfair, unjust and not based on law or fact. Arbitration can be very arbitrary.

d. A good outcome in arbitration, like in trial, is to win! Put another way, a good outcome is a loss for the other party. There is no concern about the continuing relationship between the parties. There is no attempt to fashion a fair result, based upon the needs and interests of the parties. Winning is everything!!!

e. A good outcome in mediation is for each participant to achieve a fair acceptable solution, regardless how the law might govern the outcome. The outcome is not forced upon them. Preserving relationships may be a high priority. The parties will seek a creative solution to the problem. There are no winners! But there are no losers. Everyone seeks to satisfy basic needs, interests and wants, and are willing to compromise to achieve this result. A good objective is to reduce the cost of the conflict and to put the dispute behind them. The process is strategic negotiations.

f. In arbitration, testimony is under oath, and the results are not confidential. In mediation, no testimony under oath is required. All statements and procedures in the mediation process are confidential and cannot be used in any other proceeding.

What are the benefits of Mediation?

1. Success – most cases are successfully resolved.
2. Timely – disputes can be resolved more quickly through mediation than through litigation.
3. Affordable – Mediation costs only a fraction of typical litigation expenses.
4. Private and Confidential– Mediated disputes are settled without a judge, jury or media display. All statements are confidential.
5. Reduced Stress – Mediation eliminates courtroom trauma and risk of uncertainty. The mediator can create a calm, rational environment that is conducive to resolution of disputes.

Why mediation is so effective for resolving conflicts The mediation process overcomes the 4 major barriers to a negotiated agreement:

1. Overcomes the strategic barrier
2. Overcomes the principal – agent barrier
3. Overcomes the emotional barrier
4. Overcomes the phenomena of reactive devaluation
5. The process permits an impartial mediator to control the pace and style of the negotiations – and to shape reasonable expectations
6. The mediator can frame the issues so that each party can see the result as a winning proposition for their side – rather than a loss
7. Allows for exploring options and finding creative solutions

What types of disputes can be settled by mediation? Almost any type of dispute or conflict can be resolved by the mediation process:

1. Family disputes – concerning estates, wills and inheritances
2. Divorce and termination of marriage
3. All civil litigation matters
    a. Personal injury
    b. Business contracts
    c. Real estate – purchase agreements
    d. Construction contracts
    e. Employment disputes
    f. Environmental disputes
    g. Neighborhood disputes
    h. Schools and Universities
    i. Even some criminal disputes can now be better resolved through mediation
    j. Appellate cases
    k. Civil unrest – 1996 Democratic Convention in LA – use of mediators
    l. Hostage negotiations
    m. National conflicts between disputing groups

When should you consider going to mediation? The earlier a dispute can be recognized and dealt with, the more likely it will be resolved. Today, many companies have implemented Conflict Management Systems which deal with all conflicts throughout their business environment, both internally and externally. If the dispute has reached the point where lawyers are engaged, early mediation can save parties substantial legal fees. In litigated matters, many attorneys try mediation before onslought of discovery which will burden the dispute with substantial costs. Sometimes lawyers wait until all discovery is completed and all legal issues are sorted out, and will mediate the day before trial. **How to get the other side to participate in the mediation?** Find a qualified mediator who can contact the other party to convene a mediation. The mediator will explain the process and invite the parties to participate. **What type of mediator should you select?** There are many types of mediators – from judges, practicing lawyers and many nonlawyers. Find a mediator who has substantial training and experience. Judges are judgmental – this may be appropriate in some cases, but there are serious problems with judges. Costs are significantly higher. Judges sometimes do not have good interpersonal skills which can offend and alienate parties. Lawyers who have good client skills have adapted well to the mediation process. Nonlawyers may be helpful when the dispute is not heavily based on legal issues and expertise in the field is important – such as a contractor or architect

mediator for construction disputes, or an accountant mediator for financial dispute. Ask for references – talk to the mediator – ask what is the mediator's style – judgmental and evaluative, or facilitative? **Valuable tips about how to improve your negotiation skills.**

1. Have a realistic plan and strategy to reach your objective
2. Understand distributive bargaining vs. integrative bargaining
3. Understand collaborative negotiations vs. competitive negotiations.
4. The same approach does not work in every situations – size up the other side and apply the strategy that works in the specific context

How to achieve success in mediation

1. Have a plan and strategy
2. Pick the right mediator and talk with him about the mediation
3. Prepare a written outline of the dispute (what lawyers call a brief)
4. Consider in advance what possible solutions might there be to this problem
5. Consider which solutions are best for your interest
6. Consider what are realistic solutions for the other parties
7. If the dispute is about money, be prepared to with the following

    a. Learn the language of negotiations – how to communicate to achieve your objectives without creating a hostile adversary. While discussing your differences about perception of the facts, be careful about using language that tends to increase emotions. More importantly, avoid language that attacks and demeans your opponent's "identity." Comments that indirectly accuse the other party of lying, cheating, or defrauding – in short, that they are untrustworthy - undermines the negotiation environment
    b. Consider carefully what your opening number should be – it should fair and reasonable, not insulting. It should be higher than your reserve number.
    c. Have a "reserve number" – the number which you would like to have as a good outcome
    d. Know how to make counterproposals – how much each concession should be
    e. Determine your last acceptable number – ascertain from the mediator what the other party should be willing to pay or accept
    f. Determine your BATNA – your walk away alternative g. Don't emphasize a "bottom line" but talk about a "fair and reasonable" number that needs to be achieved as acceptable to both sides.
    g. When the other side gives you a final walk away number, use the process called "Smart Choice" to analyze whether you are making a smart decision – not a perfect decision. Use a decision tree analysis to project what is a good range of outcomes, one of which should be accepted. Consider your tolerance for risk of loss if you don't accept the offer.
    h. Consider the costs, not only in expenditure of money, but also in terms of your emotions, energy, loss of productive time in other ventures.
    i. Always keep the door open even if you reach an impasse. Don't be afraid to return to the negotiating table to continue to work through the obstacles. Sometimes the best deal that can be achieved comes at the eleventh hour, but

know when you have obtained the best deal and don't lose the opportunity to make the deal.

Essential Negotiating Skills – *A new Perspective*

By Myer J. Sankary, Esq., CMCT

Negotiating is one of the core skills for all professionals. Many negotiators rely solely on intuition and conventional wisdom, but fail to achieve their objectives, leaving lots of money on the table. This program offers a new perspective about how to negotiate effectively using a reasoned and systematic approach while maintaining awareness and proper use of the power of intuition[1]; the topics will include the following: the four critical stages of a negotiation; how to apply the new social science of persuasion to the art of negotiations; how to level the playing field with power negotiators; how to make smart decisions in the face of uncertainty; understand the common mistakes that derail negotiations; how to use emotions and psychology to gain an advantage, and how the understanding of game theory will advance your skills. This is a view of negotiations from experienced practitioners who have conducted successful negotiations in a variety of situations, including making deals, settling disputes, and winning in court.

You could not have obtained a law degree and passed the bar without knowing how to negotiate. You could not practice law or competently represent a client if you did not know how to negotiate. We acknowledge that every lawyer knows how to negotiate – to a degree. Every salesman knows something about selling. Every manager knows something about running a company. But how many lawyers, salesmen and managers are truly successful and effective negotiators. We negotiate every day – with our family members (did you ever negotiate with a three year old about bedtime – or a teenager about staying out late?)- and with just about everyone we deal with every day.

The problem is that our own success, even though limited, oftentimes interferes with our ability to move to the next level to becoming a more effective and efficient negotiator. By becoming complacent, we will tend to slide backwards into comfortable old habits that may have worked in the past, but do not serve us well in the future.

This program is about equipping you with some of the latest ideas about negotiation strategies and tactics and to provide you a framework from which you can draw consistently to increase the likelihood that you will be able to achieve your objectives either for yourself or for your client.

Essentially there are four major phases, stages, or acts in preparing for and participating in negotiations – known as "**SDTD**:"

1. The **S**etup away from the table

[1] Many new publications by psychologists promote the advantages as well as the drawbacks of using intuition. See David Myers, "Intuition, Its Powers and Perils," (Yale U. Press, 2002); Gerd Gigerenzer, "Gut Feelings; The Intelligence of the Unconscious," (Viking Penguin, 2007); Gary Klein, "The Power of Intuition," (Currency, 2003); Malcolm Gladwell, "Blin," (Back Bay Books, 2005).

2. The **D**esign at the drawing board

3. The **T**actical exchange at the table

4. The **D**ecision in the face of uncertainty

We will take each of these phases in order based on the latest developments in negotiating theory and practice based on the science of persuasion and influence.

In a newly published book by two Harvard Business school professors,[2] Lax and Sebenius persuasively argue that negotiators mistakenly focus on only one dimension at the negotiating table of a "win-win" or "win-lose" approach to negotiations. In reality, there are at least three major dimensions to more effective negotiations plus a final stage of making a decision in the face of uncertainty whether to accept or reject the last and final offer or demand. Like an architect, the negotiator must first plan the structure of the negotiations before he or she can successfully build the components of a final agreement. Your negotiating objective should focus on **creating value** as well as **claiming value** with a view toward building relationships and implementing an agreement that will be satisfactory for all parties, an agreement that everyone will want to commit to and live up to the letter and spirit of the agreement. The most serious mistake a negotiator can make is failure to implement a systematic strategy that incorporates each of these vital components.

In every negotiation, Lax and Sibenius suggest that there are three dimensions to keep in mind:

A. The Setup – consider what moves you can make away from the table to set up the most promising situation once you are at the table. The "Setup" entails planning to ensure that the right parties are involved, the right sequence, the right issues, the right set of interests, the right table or tables, the right time, under the right expectation, and having the correct understanding of the consequences of walking away if there is no deal. (Remember there are times when no agreement is better than agreement.) As you plan for your next negotiation, consider who should be at the table and what each of their interests are (for example, lawyers may represent the interests of their client, but there is also an agenda that lawyers have that differ from that of their client that may affect the deal).

1. Focus on interests, not positions. An "interest" is what a party seeks to achieve by the negotiations and what he or she cares about that is at stake in the process. It may or may not be money. When negotiating to purchase or lease real estate, price is important, but the need for the property, its convenience, the timing of occupancy, its utility for the buyer, amount of down payment and future payments, improvements, modifications, etc. are all important elements to be considered when making the best deal. Whether a person is purchasing a home or commercial property, many interests are in play for both the buyer and

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[2] "3 D Negotiations; Powerful Tools to Change the Game in Your Most Important Deals," by David Lax and James Sebenius (Harvard Business Press 2006)

seller. The skillful negotiator will consider both his or her own interests as well as the interests of the other party.

2. Understand the importance of the "No-Deal" option! A common mistake by negotiators is the belief that they must make the deal at all costs. However, your ability and willingness to walk away from a deal often will strengthen your bargaining position. Sometimes you are better off not entering an agreement. Suppose you are planning to buy a car from a salesman. Assume two situations. In one, you and your wife discuss with the salesman that the car he has shown you has everything you want, you are in urgent need of a car because your clunker might not get you home, and you haven't seen any other car that suits your needs as well as this one. In the other situation, you and your wife tell the salesman that you have some doubt about whether the car has all the features you want, that you have seen another car B at another dealer who has offered you a lower price than what this salesman has offered, and you preferred the color of other car. In which scenario will you more likely get a better deal?

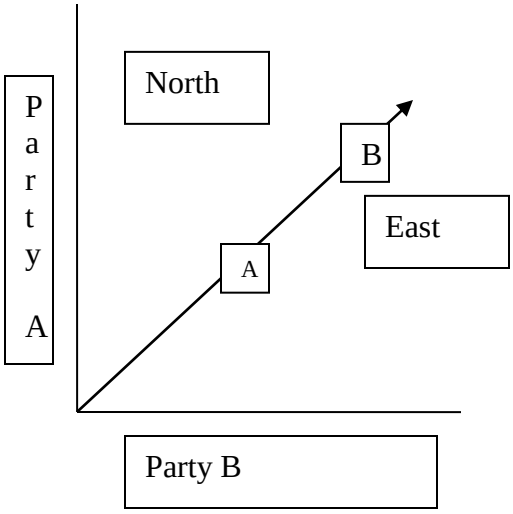
Your analysis of the "No-Deal" option will prepare you to determine whether or not there is a Zone of Possible Agreement – the ZOPA – with your negotiating partner. If you have a Better Alternative to this Negotiated Agreement (your BATNA) then you will know whether you are better off walking away from this deal. In fact, one of the most important tools you have against a more powerful negotiator is your BATNA. The importance of the Setup phase of the negotiating process is to understand not only your own No-Deal option but also the No-Deal option of the other party. If you believe that the offer you are making will clearly be rejected by the other party, you have created a situation where the other party's No-Deal option will be better than what you are proposing. Hence, you have given the other party a powerful tool and incentive to walk away from this agreement. On the other hand, in order to strengthen your own hand, you will want to let the other party know the viability and desirability of your walk-away alternative. If the other party wants to make a deal with you, they will have to make a proposal that is in the Zone of Possible Agreement, or they will lose the deal.

3. The Six Principles Of Persuasion. Prepare in advance for your face to face meeting at the negotiating table by determining how you might best use the six principles of persuasion that will be discussed below. These principles will guide you about how to be more effective and influential in getting others to agree to your proposals.

B. <u>The Deal design</u> – give consideration to all of the elements of the transaction, with attention to the needs and interest of all the parties. As stated above, negotiations is a ***<u>process of creating value and claiming value</u>*** – as well as a process of competing and cooperating. Negotiators frequently make the mistake that the only way to reach their objective is to act competitively to claim the largest share of the fixed pie. Aggressive, competitive negotiators often do not get the best deal – they are ego-driven and concerned about winning – claiming the largest share of the fixed pie. They missed the opportunity of increasing the pie for both parties. By focusing on the Deal design, the negotiator's attention is drawn to the task of creating a bigger pie that can satisfy the needs and interests of both parties with the objective that each party will benefit more from the terms of the deal. Lax and Sebenius suggest that using a drawing board metaphor where the negotiator views the task at hand not as one to divide a fixed pie, but rather as a joint effort to *move northeast* – a

landscape image where the parties find agreement by each moving to maximize and satisfy their needs and interests. "If north is the direction that I want to go, and east is the direction you want to go, then moving northeast may be a very attractive option. In fact, it may be the best option for all parties – better than any of them could do on their own. (at 12)

MOVING NORTHEAST – FINDING A BETTER SOLUTION FOR BOTH PARTIES BY INCREASING THE PIE. START WITH UNCOVERING THE DIFFERENCES THAT WILL MAKE FOR THE BEST TRADEOFFS. (Eg. the story of the two sisters who both want the one orange. How can they maximize their interest.)



Deal design is all about finding creative ways to increase the pie for you and the other party. Although it may seem counterintuitive, the parties should probe to find how their interests are different, so that they can find ways to make exchanges that allow for one side to give something of low interest to himself but of high value to the other side. In short, look for ways to dovetail differences to create value. Not only should you look for common ground, but you should create value from differences of interest among the parties.

In developing the design for the deal, consider maximizing the net "value pie" that is available to the parties. The net value is that remaining after costs (legal fees, delays, investment of time of the parties) have been accounted for. In building consensus, it helpful to compare the overall value created by your northeast moves with the value that was available before those moves. The overall value relative to those compromises, should be greater than

your starting point, and definitely better than the no-deal alternative. The final deal should incorporate the highest net value and the lowest net cost to the parties.

Examples of this type of exchange is found in the case of selling a business where the Seller places a higher value on the business and the Buyer places a lower value, each having a difference in projection of future earnings. Using the "earn-out contingency," the seller pays less if the earnings do not meet expected levels, but pays more if they do. Structured settlements is another example of bringing the interests of the parties together by exchanging values – the plaintiff wants higher long term monthly payments over time but the insurance company wants to pay less up front to settle the case. The structured settlement meets the needs of both plaintiff and the insurance company.

C. Tactics at the table – what moves will you make when facing the other side at the table, what information will be exchanged, how will you treat the other parties, and what tone and attitude will you use. In this phase of the negotiations you are trying to claim value. What tools will you use to maximize your claim?

Using Distributive Bargaining. Your opening demand or offer will set the tone and guide you through the next moves you will make to reach your objective. How much should you offer or how much should you demand? In the Setup phase you should have considered the value of your claim, or the value of the business your client wants to purchase. You will then make an offer or demand that will maximize your opportunity to claim value. But the challenge is to make the proposals within the Zone of Possible Agreement (ZOPA). "You will want to shape perceptions to claim value."

Your minimum [----------] Their maximum

Zone of Possible Agreement

The ZOPA is that range of possible of agreement in which it is better for both sides than the no-deal option. You will want to influence the other person's perception of what is acceptable to you. Ideally, as seller, you will want to end up with a price close to their maximum and as buyer, you will want to pay the minimum that is acceptable to them.

Framing is an important part of the psychological advantage you can gain by framing the transaction in a way that favors your position. In a series of studies, the investigators found that negotiators who focus prior to the negotiation on what they hope to achieve do better in price negotiations than those who focus on what they hope to avoid. This suggests that you should approach the negotiations consciously setting your target where you want to end up. Your target should be ambitious – try to hit the best target possible – this will generally encourage you to use more effort in all aspects of your negotiations. Your opening offer or demand should be just above the most that the other side might be willing to pay. Then you will have room to make concessions that will lead to the ZOPA. (As discussed below, it is essential that you have made a demand sufficiently high or an offer that is sufficiently low so that you have room to make credible concessions so that you activate the reciprocity priniciple.)

Should you make the first offer or demand? Your justifiable concerns are that if you do not make the demand ambitious enough, you will leave money on the table. But if you are too aggressive, then you will offend the other side, damage your credibility, adversely affect the relationship, and possibly derail the negotiations. What to do? If you do not have enough information to know the true value of what you are seeking, you may want the other side to make the first offer. On the other hand, if you are confident in the amount you should pay or accept for any transaction, then you can gain an advantage by making the first offer that is ambitious because you will be taking advantage of a psychological principle known as "anchoring." In many studies, people who must make a decision in the face of uncertainty are influenced by the numbers offered by those who have an interest in the transaction. For example, if you are the owner of a house you want to sell, by telling the realtor that you want to get a price higher than market value, based on a reasonable justification, the realtor will be influenced by the price you set – because of the anchoring affect, and he will try to sell the property at that price or close to it. When an anchor is introduced into the negotiation, it can shift perception of the ZOPA in its direction, thereby increasing the likelihood that a final agreement will drift toward the anchor. The result is that a final agreement will favor the one who dropped the first anchor. (A word of caution! If you are unable to provide any reason or justification for your aggressive proposal, the anchor will be ineffective and may indeed sink your cause. Such a move can be counterproductive because you will lose credibility and appear to be unreasonable. Studies have confirmed that giving a reason for your request will substantially increase the likelihood that the other side will accept the validity of your request.)

2. **Applying the Principles of Persuasion**

In his best selling book, "Influence; Science and Practice," renowned social scientist, Dr. Robert Cialdini, sets forth a framework of universal principles that govern how people influence one other and are able persuade others to agree with their request. The findings from his original research and those of many other social scientists were quite surprising, but enormously valuable to those whose main efforts are to persuade others as opposed to compelling others to comply. Lawyers, doctors, experts, salespersons, fund raisers, recruiters, marketing professionals are among those who use persuasion every day in everything they do. Knowledge and skill about persuasion is a core competency that should be mastered by all professionals.

The six universal principles that should be mastered and used in all negotiations during any phase of the proceedings are as follows:

1. **Reciprocity** – by making a gift or concession, one creates an obligation in the other person to return the favor. It is a social rule in all societies. In Japan, for example, sophisticated negotiators will give a concession that was not requested in order to create an obligation in the recipient to give back future concessions. We know the rule as "Give and Ye Shall Receive," or "What Goes Around, Comes Around." Every attorney has encountered reciprocity in "tit for tat" negotiations. Reciprocity can be of a positive nature like the "Golden Rule," or of a negative character, such as an "Eye for an Eye."

The lesson to be learned from this principle is that by making an ambitious offer or demand that appears to benefit both the recipient and the donor, you can create the

condition in which your future concessions – by reducing your initial or opening offers or demand – will create a reciprocal concession with a move in your direction. If done properly, it will lead to reciprocal behavior that will inure to the giver's benefit. Do not hesitate to be the first to make a concession, but make sure the other party is aware of your move in their favor as a signal of a cooperative attitude to resolve a problem. This will create a strong likelihood that you will receive a favorable move in your direction which will lead to a settlement.

2. **Liking** – you are more persuasive if you can demonstrate how you are similar to or like your negotiating counterpart. Having common interests, similar objectives, common background, religious affiliations, or similar hobbies, will enhance rapport. People are more likely to say yes to people they like as well as people who are like them. Most importantly, people will say yes to people who like them. You will create an environment of affiliation and trust by showing that you like the other person if you offer praise and compliments. In a well known study involving internet negotiations between students at Northwestern and Stanford, those students who began their negotiations after spending time to get to know one another by exchanging personal information about each other (such as sending photos, discussing sports, and other common interests, etc.) were able to reach agreement 3 or 4 times more often than those negotiators who got right down to business. This is known as the "schmoozing effect." By investing a few minutes of time schmoozing or getting to know some information about the person with whom you are negotiating, you will likely reach agreement more often and more quickly. This is because you are more likely to trust someone whom you know than someone who is a stranger. In Asian, South American, Middle Eastern and European cultures, you are not likely to succeed in your business dealings if you do not spend time getting to know one another first before getting down to the discussing the substance of your business.

3. **Authority** – people are more easily persuaded by one who is an authority. One can show his or her authority by the mere trappings, such as certificates and diplomas or membership in professional associations, as well as the clothes or uniform one wears, etc. More importantly, the authority must demonstrate knowledge and expertise in his or her field. Above all, however, an expert must demonstrate his or her credibility and trustworthiness. As lawyers, you have an excellent opportunity to be more persuasive by demonstrating that you are an honest authority and that your advocacy is not solely to benefit your self-interest. One who is perceived as a true authority will be given due respect and will be able to influence others to accept what he or she recommends, because of their honesty and integrity. Lawyers generally know that when they select a mediator, for example, they want someone who exhibits knowledge, expertise, confidence, and experience in helping them analyze the case. But most importantly, it is the integrity, trustworthiness and neutrality that enhances the mediator's ability to guide the parties to a settlement. Your effectiveness as a negotiator is enhanced by whether others perceive you as a trusted authority.

4. **Consensus** – when people are uncertain and do not know what to decide, they look to what other similar people are doing, thinking, and deciding in a similar situation. As a negotiator you will enhance your persuasiveness if you use the consensus principle to bolster your arguments. If you are buying or selling a property, illustrate that other similar, property was sold for the price that your are asking. What is an appraisal? It is the consensus of value of what other people are paying for similar property in the area. If you are buying or selling a used car, never enter a negotiation without checking the Kelly Blue Book or go online at Edmonds.com to find out what similar cars are selling for in your area. It is not

likely that you will be able to sell your car for a price higher than what someone is able to buy the same car at a lower price. (I know, I just had that experience. The first buyer who looked at my Z3 pointed out that my asking price was about $1000 more than several other Z3's of the same year – and my lower mileage didn't justify the additional price. He came equipped with several pages printed that day from Edmonds. If I wanted to sell that car at that time, I had to accept the price the buyer offered, or there was no-deal. Since I didn't want to continue to pay the insurance premiums and had no use for the car because I had already bought another one, my only option was to sell the car to the buyer who used incontrovertible evidence of consensus to take $1000 off of my asking price!) For lawyers, we know that evidence of how much other plaintiffs received in similar cases in that geographic area can be very persuasive about the value of a plaintiff's claim. On issues of law, citing numerous legal authorities, cases, and decisions that support your claim also can strongly influence the decision of the adjuster, other lawyer or party.

5. **Consistency** – once people make a commitment, they will generally feel an obligation to act consistently with that commitment. This principle becomes more powerful if the commitment is one that is voluntary, requires active participation, and made in public. Many studies have shown that such types of commitments will produce a greater likelihood that people will live up to their previous action. An obvious example of this is taking an oath of office (voluntary, active and public). Similarly, marriage vows are generally made openly, voluntarily and publicly to get people to live up to their commitments. Politicians who do not live up to their commitments, who act inconsistently with what they promise, generally lose credibility and trust of the voters – witness Bush vs. Kerry. (Today, each candidate for president does not hesitate to point to inconsistent positions taken by their opponent, while taking inconsistent positions of their own. No candidate wants to be seen as a "flip-flopper." In the negotiation environment, studies have shown that once a person has expressed an open commitment to a principle that is similar to the one being offered by the other party, there is greater likelihood of reaching agreement. Having the parties make even small mutual commitments, that develop into larger ones, will have a salutary effect on the outcome. So it is important in the Setup phase to consider the sequence of issues that are discussed and upon which agreement can be reached. Once the parties show that they can be cooperative on minor points of differences, then the commitment to cooperative efforts will be more easily achieved. Often when there are multiple issues that need to be resolved, it is wise to get open, public and active agreement on the simple issues before you tackle the larger and more difficult or contentious issues.

6. **Scarcity** – studies have shown that people tend to desire more of that which there is less of. Think of products of which there is a limited quantity. Generally, prices will increase to match the economic rules of supply and demand. (Consider the price of homes in California during the last several years and now that many homes are on the market from foreclosures, the price has dropped due to an increase of product and a reduction of qualified buyers.) People also tend to believe that scarce information is more valuable than information that is publicly known to everyone. This phenomenon often drives the price of a stock when buyers feel they have scarce information that will lead to an increase in the value of the company. The scarcity principle is used by retailers who offer discount coupons to increase sales of their products. Generally, you will see that most discount coupons have two important conditions: one is that the offer expires after a limited time; and the other is that there is a notice of limited supplies. Studies have shown that customers desire those products

more when they are limited in time or supplies. At the root of this phenomenon is the human factor that people do not want their freedom to choose restricted or limited; so in order to prevent the limit on their freedom, they find the product more desirable. Another aspect of the Scarcity principle is that people are more likely to buy a product if they are shown that they are likely to lose if they don't buy the product, as opposed to their being told what they will save or gain if they purchase a product. By framing the condition as a loss, there is more likelihood that a person will purchase a product or agree to the terms if they are shown that they are likely to lose if they do not accept the deal. This approach works well and often in negotiations after a long day trying to settle a litigated dispute. Either one side or the other, or the mediator, often states that unless the party accepts the last, final and best offer, the party stands to lose by going to trial and will incur substantial costs and legal fees. One reason that you should place a time limit for the other party to accept your last and final offer is the Scarcity principle – you are more likely to get acceptance of your offer. This enhances the desirability of the offer and will more likely influence a party to accept the proposal.

To understand and apply these universal rules of influence and persuasion, one must make an effort to study the theory and to develop the skills through practice of these principles. To find out more about the application of the principles in negotiations, go to www.usinginfluence.com and to www.influenceatwork.com.

D. In every negotiation, after considering all the alternatives from the possibility of accepting the terms of the agreement or the settlement to the no-deal alternative, the final step is to make a "smart decision" whether to accept the deal as presented by the last and final offer by the other parties or to choose another course of action that you have determined will better satisfy your interests.

Attached to these materials is an article I have written entitled, "Critical Crossroads, Good Decision Making is the Key to Successful Negotiations." In this article, I have analyzed the stages of a litigated case, and utilize the method developed by Professor Howard Raiffa, of the Harvard Business School, and his colleagues, that is set forth in his book, "Smart Choices." This approach to making a smart decision in the face of an uncertain outcome is the best analysis I have found for making a decision in any negotiation, particularly, when a lawyer advises his or her clients about whether to settle a litigated dispute. A disciplined, reasoned approach is preferable to one that is based on instinct, intuition, common wisdom or emotions. Raiffa suggests that in making a decision, you should consider the following factors:

- The Problem
- The Objectives
- The Alternatives
- The Consequence
- The Tradeoffs

Three additional elements -- uncertainty, risk tolerance, and linked decisions help clarify more complex decisions, such as whether to take the last proposed offer.

Lawyer should keep in mind several key concepts. In deciding whether to accept an offer, the litigant should isolate three essential considerations:

1. The chances of winning at trial and, if so, the different possible jury awards. Constructing a decision tree will graphically portray the choices.

2. The time and stresses associated with trial and not going to trial, together with the degree of the litigant's regret if she loses, or satisfaction if she wins.

3. The litigant's willingness to take risk

A decision to accept a final and last offer or to reject it and go to trial is a choice between finality and certainty on the one hand and continued litigation in the face of an uncertain outcome on the other hand. A competent lawyer will develop analytical tools to advise his client about how to make such a decision based upon a consistent rational approach to problem solving.

Summary

The 3 D approach encourages negotiators lawyers to be aware of the important elements to be considered before they get to the negotiating table where they will employ tactical maneuvers and apply negotiating skills face to face with the other participants. The key for success is in the design and implementation of an overarching plan that will increase the likelihood you will accomplish your negotiating objectives. The negotiator should always keep in mind at all time the six universal principles of persuasion and influence that will increase the likelihood that the other party will want to comply with your request. And finally, the legal negotiator should be able to advise his or client about how to make a smart decision about whether to accept the last and final best offer. This completes the cycle involved in negotiating competently and successfully.

ADR INSIGHTS – Published in Big News For Smaller Firms – Solo and Small Firm Section of the State Bar of California in September, 2003 and Published in Corporate Legal Environment, ICFAI University Press, Hyderabad, India

"*Critical Cross-Roads*
Good Decision Making Is Key To Successful Negotiations"

By Myer Sankary

THE IMPORTANCE OF GOOD DECISION MAKING IN THE FACE OF UNCERTAINTY

The process of making a decision whether to accept a settlement proposal or reject it and go to trial deserves the lawyer's best efforts, skill, knowledge and judgment. Too often, the decision is made without careful thought, but rather is the result of undue optimism or pessimism, and is clouded with emotional frustration. Lawyers are often unaware of the different stages of negotiating a legal dispute and sometimes press for a resolution before the case is ripe for settlement. This article will review the four stages of a legal dispute with emphasis on the fourth and critical stage – making a decision to reach agreement or accept an impasse.

Failure to develop and consistently implement an objective rational decision making process often leads to acceptance of a settlement that is far less than what a client might have obtained if the attorney had been better prepared for this critical phase of the negotiating process., Moreover, poor decision making can result in an unnecessary trial that is costly for the client as well as the attorney. A disciplined decision making process may not result in the "best possible settlement" (for that goal is not always attainable), but it can lead to a "reasonable decision" which the client and the attorney can make and live with in confidence.

Most lawyers are natural negotiators. They love to argue and persuade others to their point of view. Many rely on intuition and past experience as their primary guide through the negotiation process. Unfortunately, because negotiating efforts come so easily to some lawyers, they fail to analyze what they are doing or to learn how to improve their negotiation skills. . Failure to examine negotiating tactics and strategies can lock us into patterns of thinking and behavior that defeat our primary objectives which is to represent our clients competently in making deals and settling disputes. (Some may disagree and argue that the main objective of the lawyer is to get the maximum amount of money or obtain the best possible result for his or her client.)

Clients seek advice from their lawyers because of their knowledge, experience, analytical skills and good judgment. In representing a client in either a deal or a dispute, lawyers are generally capable of investigating the facts, researching the law and drawing conclusions about whether a client has an actionable claim or whether a deal meets legal muster. Indeed, lawyers usually perform competently during the first three phases of the negotiation process

as outlined below, but it is in the critical fourth stage when poor decision making can lead to poor results. [i]

Stage One

Orientation, Positioning And Developing Strategy.

In this initial stage, attorneys gather facts, evaluate their client's story, research the applicable law, draw certain preliminary conclusions about the claims or defenses of their client's case, contact opposing counsel and explore the negotiating environment. The lawyer will begin to develop a strategy or roadmap that will lead to the desired result.

In the opening stages, attorneys may signal to opposing counsel either a cooperative, problem solving approach or an adversarial competitive one. A cooperative lawyer will indicate that he will want to work with his colleague to reach a fair and equitable outcome for both parties based upon fair objective standards. He may also indicate that he follows an integrative approach seeking to create options and to package a deal that meets everyone's interests and needs. The competitive lawyer may demonstrate a maximalist approach – asking the most he can get for his client, perhaps even asking a lot more than he expects to get, leaving room for some compromise, but always in his client's favor.

It is essential that the skilled negotiator detect whether he is dealing with the "cooperative" or the "competitive" lawyer early in the negotiations and understand what to expect in order to adjust one's own approach so as not to become manipulated, bullied or exploited. Studies have indicated that a cooperative approach can be very effective, but not if the opponent is adversarial. A tit for tat approach may be required at least until the cooperative approach is accepted by all participants. Through the early stages, each negotiator will signal the style that he or she will use. A lawyer should be prepared to react appropriately.

Stage Two

Discovery, Perception, Argument, Persuasion

At this stage, the lawyer tries to obtain as much information about both sides of the case as possible either through formal discovery or through direct communications, written and oral. In the course of discovery, the negotiator tries to shape the perception most favorably toward his own case so that his opponent will believe that his client will ultimately prevail in his claim or defense. Through presentation of arguments the issues become more defined, strengths and weakness become apparent, and each party tries to find out the real position of the other. The advocate may tend inflate the merits of his case in hopes that his opponent will overvalue his hand. (An unintended consequence of exaggerating a claim is that the client may come to believe that he or she is entitled to the maximum demand – this can become a serious obstacle to settlement unless the client has been thoroughly advised about the true range of value including the potential for loss if the opposition's case is believed.) Some concessions may be made at this stage. The style of each negotiator becomes apparent through discovery – either full disclosure is made to reasonable questions or objections and roadblocks prevent exchange of information.

Stage Three

Emergence And Crisis

At this stage, negotiators come under pressure from court deadlines, financial constraints, and ultimate trial dates. Each side realizes that concessions must be made, new options created, or they face impasse and the risk of trial. Crisis is reached when neither side wants to make further concession; both sides are fearful of being exploited or manipulated, no more room for compromise seems possible; breakthrough is required to avoid future expenses and uncertainties; and the client is concerned about whether he should accept his lawyer's advice to settle. The legal advisor should have prepared the client for the eventual critical crossroads of decision making which will lead the client to the certainty of settlement or the uncertain risk of trial.

Stage Four

Agreement Or Impasse - Making a Decision

The pressures of cost, uncertainty of outcome, and sufficient compromise usually brings the parties to agreement in more than 90 percent of litigated cases. This is the stage that is most critical for the client, because a fundamental decision must be made whether to accept the last proposal, continue to negotiate thereby risking withdrawal of a final offer, or proceed to trial.

It is during this critical final stage that the lawyer must have a disciplined systematic approach to decision making to enable him to give competent professional advice to his client. Unfortunately, in these circumstances, when the client is reliant the most on his lawyer for helpful advice, some lawyers are not equipped with the analytical skills necessary to advise their clients to make a "smart choice" not a "perfect one!"

Making a decision whether to accept or reject a last and final walk-away offer is indeed one of the most important decisions a client will be required to make. Counsel must always remember that the final decision whether to settle or go to trial is the client's, although that decision is usually based upon counsel's judgment and advice. Yet, all too often, the client is surprised to find out that the final best offer falls far short of his expectation which was based upon his attorney's assurances about the value of his case. It is not uncommon for tensions to arise between a client and his attorney resulting in a loss of trust and confidence. A client, who has not been prepared to face the critical crossroad of decision making, may refuse to accept an offer recommended by his own attorney.

Attorneys and their clients are often disappointed in the mediation process because it resembles an arm-twisting mandatory settlement conference. These encounters are highlighted by judicial pressures and threats with nothing more to support the final decision than judicial intimidation. In this context, neither the attorney nor the client feels that a decision to settle was based on a fair and rational process.

On the other hand, through the assistance of an experienced mediator trained in decision making process, the lawyer can receive support in his advice to his client about why the last offer is a reasonable one under the circumstance that should receive serious consideration. The mediator can assist both parties in understanding the decision making process so that they can have confidence that the decision was a good one based upon a rational analysis.

The Lawyer Has a Duty to Obtain a Reasonable Compromise if Possible

The standard for determining whether a lawyer has met his professional obligation by recommending a settlement in litigated cases was recently examined in *Barnard vs. Langer*. In *Barnard*,[ii] a client claimed that the attorney was negligent by compromising his claim without achieving the "best" possible result. The appellate court rejected this claim, citing Mallen, on Legal Malpractice (fn. 13 - see below):

> "The standard should be whether the settlement is within the realm of reasonable conclusions, not whether the client could have received more or paid less. *No lawyer has the ability to obtain for each client the best possible compromise but only a reasonable one*." *Barnard* at p. 588 (emphasis added).

One of the best discussions about how to make a rational decision of an offer to settle a litigated case in the face of uncertainty can be found in the book, *Smart Choices.*[iii] The *Smart Choice* approach is based upon eight elements, referred to as PrOACT. Harvard Business School Professor Howard Raiffa explains that a smart decision requires a step-by-step analysis of the core considerations:

- The Problem
- The Objectives
- The Alternatives
- The Consequence
- The Tradeoffs

Three additional elements -- uncertainty, risk tolerance, and linked decisions B help clarify more complex decisions, such as whether to take the last proposed offer.

Lawyer should keep in mind several key concepts. In deciding whether to accept an offer, the litigant should isolate three essential considerations:

1. The chances of winning at trial and, if so, the different possible jury awards.

2. The time and stresses associated with trial and not going to trial, together with the degree of the litigant's regret if she loses, or satisfaction if she wins.

3. The litigant's willingness to take risk Supra, *at p. 127*

A decision to accept a final and last offer or to reject it and go to trial is a choice between finality and certainty on the one hand and continued litigation in the face of an uncertain outcome on the other hand. A competent lawyer will develop analytical tools to advise his

client about how to make such a decision based upon a consistent rational approach to problem solving.

The lawyer should prepare a risk profile to simplify decisions involving uncertainty as follows:

A. Identify Uncertainties

Many uncertainties exist within a lawsuit, such as what facts will be admitted to support each claim or defense; how will the judge rule as to admission of evidence; what testimony will be elicited from each witness ; how will the jury react to the attorneys, to the parties and to the witnesses? Whose story will the trier of fact most likely believe?

B. Define Outcomes

This is a two stage process. First, determine how many possible outcomes are needed to ascertain the extent of uncertainty; and how each possible outcome can best be defined. Second, in a litigated matter, anticipating a variety of possible outcomes is much more useful than predicting only two – a win or a loss. (See table below)

C. Assign Chances

Although difficult to predict, it is important to place a number on each possible outcome, the total adding up to 1 or 100 percent. This exercise replaces fuzzy concepts ("You have a 'good' chance of winning") with precise thinking based upon the lawyer's experience, knowledge, and judgment. (See table below.)

It is essential to use more refined probabilistic predictions about the litigation outcome in order to compare possible outcomes with the final offer.[iv] This requires the lawyer to examine each material issue, weigh the evidence, and make a realistic prediction about the outcome of each finding leading to a final verdict. In predicting possible outcomes at trial, lawyers should try to predict a range of probable outcomes giving each range a probability factor. An effective negotiator should factor the probability of a loss (meaning – the result predicted by your opponent as adjusted by your evaluation of what a loss may mean in financial and legal consequences to your client) together with the probability of a low recovery, average, and high recovery.

For example, in a personal injury case, with some risk of proving liability (or having a major portion of comparative fault attributed to your client) a reasonable prediction may be the following:

	Numerical Probability	Possible Net Recoveries After Payment Of Attorneys fees and Costs
Loss	10%	-$10,000 (costs)
Low Recovery	20%	15,000
Average	40%	25,000
High	30%	50,000

Table 1 – Risk Allocation with Possible Outcomes Going to Trial

Instead of telling the client, "I think you have a good chance of winning," or "You should prevail," or "Your position is very risky," numerical estimates for various probabilistic outcomes gives a more precise statement of your assessment of the case.

By making a prediction of this type, the client will be in a better position to assess what a win looks like as opposed to a loss with the probability of each alternative occurring.

D. *Use a Decision Tree as Graphic Illustration of Risk*

Use a "decision tree" to graphically illustrate a risk profile. The authors of *Smart Choices* recommend this method of displaying the interrelationships among choices and uncertainties to create a blueprint for making a complex decision. (See illustrative decision tree analysis at the end of this article)

Counsel should also seek to understand how the decision styles of your client, yourself, and other parties to the litigation affect the negotiating process. A decision style reflects how much information one needs to make a decision, how much time is required to process the information to reach a conclusion and one's personality trait when under pressure. To force a client to make a decision before all of the information is obtained and understood could result in rejection of the advice.

Also, often overlooked by attorneys who give advice about accepting or rejecting the last offer is the *client's tolerance for risk*. This aspect of decision making is perhaps one of the most important elements of decision analysis, for it is based upon each client's intangible willingness to take risk. Although the attorney may feel more more confident about the outcome of a trial than the client and may therefore be willing to go to court if the settlement is not what the attorney believes is adequate, it is the client's personal decision whether the cost of losing outweighs the potential upside of winning. More than likely, your client will be more risk averse than you. Risk tolerance can be quantified by desirability or utility scoring. (See pages 140 et seq. in *Smart Choices*.).

In discussing your client's willingness to choose the risk of going to trial, be sure not to fall into the following mental traps:

- Don't be overly pessimistic about your chance for success
- Don't underestimate the probabilities to account for risk
- Don't ignore significant uncertainty
- Avoid foolish optimism
- Don't avoid making risky decisions because they are complex
  Pp.155-156

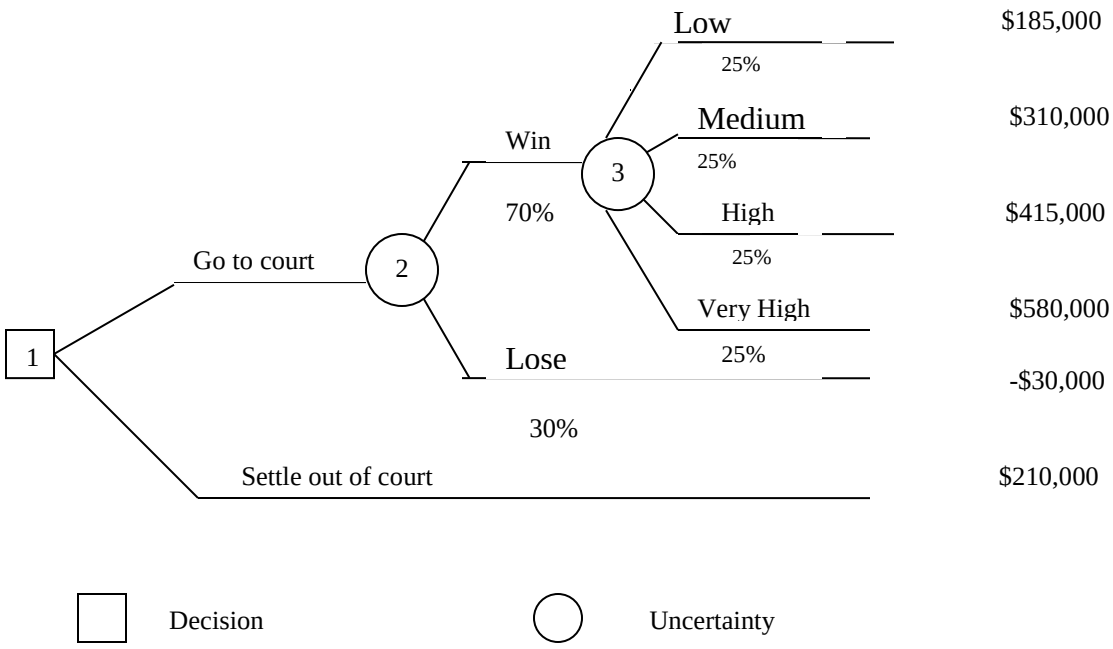
The opportunity for lawyers to utilize these decision-making tools can be found in the mediation process, provided the mediator is knowledgeable and experienced in this dynamic approach. When an attorney guides his clients through the decision making process in

negotiations, he must be able to provide sound advice and suggests ways the client can choose whether or not to accept the last best offer. Fortunately, because of the substantial advances in mediation research and training, a knowledgeable and experienced mediator can assist the attorney and his client to make a rational decision. The mediator has the opportunity to learn critical information from the other side which may be unknown to attorney; he can also provide a more balanced approach to quantifying risk assessments on each of the issues in dispute. The right mediator can be a fair and impartial sounding board as well as a trusted guide through the complicated and difficult maze of making a reasonable decision either to accept the certainty of a settlement or to undertake the risk and unknown consequences of a trial.

Whether or not you agree with the opinions and assessments of the mediator, the opportunity to compare your projections and analysis of the possible outcomes of a trial with those of an objective and experienced neutral facilitator should be worth the investment of time and money.

The important thing is to make a decision you and your client can live with. Armed with the knowledge of the four stages of a legal dispute and how to make a smart choice when facing uncertainty, the attorney and his client will have confidence that when they arrive at the critical crossroads, the decision they make will be a reasonable one under the circumstances. At that point making a decision is better than making none at all. When the final choice has to be made, the knowledgeable attorney should keep in mind the wisdom of Yogi Berra who said, "*When you come to a fork in the road, take it*!"

DECISION TREE
POSSIBLE OUTCOMES OF DECISION TO SETTLE OR GO TO COURT



Decision Tree Diagram – *Smart Choices,* Hammond, Keeney, Raiffa (1999), at 151

Illustration of components of making a decision whether to accept an out of court settlement for a net of $210,000 or to go to court with various possible win or lose outcomes.

At Stage 1, the attorney and client must decide whether to accept the settlement or go to court. In making the decision, the attorney should advise the client about possible outcomes based upon the attorney's knowledge, experience and judgment. In the above example, the attorney believes that there is a 70 percent chance of winning and a 30 percent chance of losing.

At Stages 2 and 3 the outcomes at trial are uncertain, but in making a reasonable decision, the client is better informed when he is told about the range of possible outcomes at trial. This is translated into numbers which the client can understand better than the general observation – "you have a good chance of winning!" Of course no attorney can guarantee a result in litigation, but he should use his expertise and skills to illustrate for his client what a possible win or loss will look like.

IMPORTANT FACTOR THAT MUST BE CONSIDERED – In each of the predicted outcomes, you must deduct the estimated amount of costs, including attorney fees, expert fees, and deposition costs that will likely be incurred to reach to expected result. That calculation will give a much more realistic picture of what the client can expect to take home.

Combining the risk profile of trial with the risk tolerance of the client will assist the client in making a reasoned decision, not a perfect one.

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[i] One of the classic textbooks on legal negotiations is *Legal Negotiation and Settlement*, by Gerald Williams (West Publishing 1983). His work is based upon research and studies observing a variety of attorneys negotiate in a number of different settings. One of the important findings of the studies that skilled legal negotiators should know is that every negotiation of a disputed claim goes through four basic stages (page 70 ff)

[ii] *Barnard vs. Langar* footnote 13 D.J. cite: 2003 DJDAR 7090 (June 23,2003 2d dist –Justice Vogel)

"The hindsight vulnerability of lawyers is particularly acute when the challenge is to the attorney's competence in settling the underlying case. As a leading legal malpractice text observes, the amount of a compromise is often "an educated guess of the amount that can be recovered at trial and what the opponent was willing to pay or accept. Even skillful and experienced negotiators do not know whether they received the maximum settlement or paid out the minimum acceptable. Thus, the goal of a lawyer is to achieve a 'reasonable' settlement, a concept that involves a wide spectrum of considerations and broad discretion. ¶ Theoretically, any settlement could be challenged as inadequate, and the resolution is likely to require a trial. . . . ¶ A claim regarding an inadequate settlement often fails because it is inherently speculative. Negligence cannot be predicated on speculation that the attorney or another attorney could have secured a more advantageous settlement or the fortuitous event that a jury instead of a judge may have returned a higher award. A client, who was a plaintiff, must establish not only that concluding such a settlement fell outside the standard of care, but also what would have been a reasonable settlement and that such sums would have been agreed to and could have and would have been paid." (4 Mallen, Legal Malpractice (5th ed. 2000) Error - Settlement, § 30.41, pp. 582-585, citing *Thompson v. Halvonik*, supra, 36 Cal.App.4th 657, and *Marshak v. Ballesteros*, supra, 72 Cal.App.4th 1514.) As the same text notes, the speculative nature of hindsight challenges to recommended settlements "often are protected as judgment calls. In evaluating and recommending a settlement, the attorney has broad discretion and is not liable for a mere error of judgment. The standard should be whether the settlement is within the realm of reasonable conclusions, not whether the client could have received more or paid less. No lawyer has the ability to obtain for each client the best possible compromise but only a reasonable one." (Id. at p. 588.)

[iii] See *Smart Choices*, (Harvard Business School Press 1999) an excellent book by Hammond, Keeney and Raiffa, who have set forth a proven roadmap for decision making that will take some of the guess work out of this important part of the negotiation and mediation process. Professor Raiffa has developed these principles more fully in his recent book, Negotiation Analysis (Belknap-Harvard 2002) in collaboration with Richardson and Metcalfe

[iv] Roger Fisher and William Ury in their landmark publication, *Getting to Yes*, urged negotiators to know their BATNA before engaging in the final stages of negotiating a settlement. The Best Alternative to a Negotiated Agreement can be determined through the analysis set forth in Smart Choices and the use of the decision tree. Knowing your BATNA can give the attorney and his client a degree of confidence in making the decision whether to settle or litigate.