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“connect. explore. energize.”

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STATE OF THE ART: NEGOTIATION & MEDIATION

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SUMMARY

This paper and companion presentation at the conference will enhance your negotiations by improving your ability to recognize various negotiation approaches and to respond effectively to any approach you may encounter. This expanded understanding and skill set will allow you to consistently improve your negotiated results. Teaching points to be covered are as follows: (1) How to establish or regain credibility. (2) How to quickly create a collaborative work environment for faster and better negotiated results. (3) How to let style and communication differences work for you, not against you. (4) How to present your ideas successfully to your team and to your opponent. (5) How to achieve trust in give-and-take negotiations up, down and across. (6) How to project self-confidence without being dominating or overbearing. (7) Get to know your assets and your biases better. (8) How to apply a "win-win" model, without being a pushover. (9) How to manage commitment and ownership to get mutually satisfactory negotiation results. (10) How to lead a negotiation, whether you are in charge or not. (11) How to align the support of others before, during and after the negotiation.

INTRODUCTORY THOUGHTS

The underlying premises in the materials that follow are that: All people are seeking to connect; to understand, and to be understood. I see negotiation as a connection that is essentially a conversation with another for the purpose of gaining mutual understanding or reaching agreement. Although the context changes (judge, jury, appellate court, pro se mediation, community mediation, commercial mediation, strategy meetings at the firm, family councils or shooting the breeze with friends) and although the techniques appropriate

for the engagement change; the interpersonal and analytical skills are the same. I see mediation as simply an assisted conversation. It is a ritualized form of connection.

PROCESS EXPERTS

The defining characteristic of any mediation practice is the value placed on dialogue. Through facilitating the exchange of ideas, mediators can help parties and advocates recognize issues, clarify their perceptions of them and understand the ways in which one issue bears upon another; amplifying, modifying or challenging what has come before. Mediators are the experts in process; a process that when properly done, makes the wise resolution self-evident to parties committed to the concept of self-determination. The mediation process demands specialized knowledge, skills and abilities as well as the experience of assisting diverse individuals and groups to resolve a wide range of conflicts. These components are the makings of a consistently effective, extraordinary advocate for resolution.

HOW HARD CAN IT BE?

When the conversation results in a mutual agreement or an understanding, how do you know it's a good result? (1) The needs of your client are met. (2) It is the best practicable combination of choices. (3) The alternatives are not as desirable. (4) It will withstand scrutiny. (5) Resources have not been wasted. (6) Appropriate relationships are formed, and (7) Commitments made can and will be honored. Example - What the client really needs is not a "winner take all" result, but rather a solution to a problem. Consider two parties who were each other's best opportunity for growth. They joint ventured. One or the other or possibly both of them breached the agreement. Instead of discussing developments as they occurred, each was hesitant to reveal things to the other. The lack of communication eventually created suspicion about the others motivations and mutual hostility took hold. Each felt they had been wronged. Eventually, suit and countersuits were filed. After thousands of dollars of litigation costs and many months, trial resulted in a judgment for one of the parties. However, that judgment was not easily collectable, if at all, because, both parties were crippled by the lost opportunity, litigation costs and relationship cost. The better alternative would have been to renegotiate the past relationship, to manage the present relationship and to structure an appropriate future relationship that recognized the past in a productive way. What would have allowed them to get to a wise resolution?
CONVERSATION.

LIFE AS A NEGOTIATION AGENT

We are in the business of conflict. Each day, we communicate in order to resolve, escalate or avoid conflict. As attorneys, we come to know people when they are either in difficult situations or are in transitional periods of their lives. Often, they are highly focused on that one event or situation, to the point where it is the defining characteristic of their life, but they lack the ability to solve the problem. Consequently, this creates a particular kind of stress

and can trigger the “fight or flight” response. This means that we don’t always see clients at their best or in their most rational state of mind.

As negotiating agents, we aspire to: (1) Set appropriate planning and performance goals for ourselves in relation to the needs and wants of the persons we are assisting. (2) Identify problems and issues, including the legal and business problems of which the person is aware and can articulate, the legal and business problems of which the person is unaware or does not articulate, and personal issues that affect the legal and business questions. (3) Recognize company policies or how a person feels about certain issues and to use that knowledge to inform you as to how you should proceed as the negotiating agent. (4) Measure appropriately the necessary depth and breadth of relevant information that should be obtained from the company or individual before beginning negotiations as well as what additional information will be needed on an ongoing basis. (5) Develop an appropriate rapport with the person you are assisting or the decision makers within a company. (6) Ask questions effectively, to recognize inadequate responses and discern the reasons for them, and to continue to follow-up in a non-threatening way. (7) Recognize and send cues and to fully utilize nonverbal communication, and (8) Counter inhibitors of communication and use facilitators of communication.

To accomplish these aspirations, it is helpful for attorneys to have an appreciation of the common conflict styles and the tendencies associated with each one: Avoidance – People who use this style are generally uncomfortable in conflict situations. They typically put off discussing issues and attempt to cut off any discussion as quickly as possible. Accommodation – This style is characterized by choosing to keep quiet or to give in quickly to another’s point of view. Compromise – People who use this style are generally comfortable in situations of conflict, however they do not fully engage it. They look for solutions where everyone has to give up something they want. Competitive - This style can either be characterized by one who is aggressive and views his concerns or wants as more important than those of others or it can be characterized by one who is assertive of his needs, while recognizing that others may have concerns as well. Collaborative – People who use this style are willing to engage conflict and to use resources to identify interests, needs and concerns of all parties. Solutions are viewed as good if they meet the needs of everyone to the extent possible, and where not possible, that a fair problem-solving process has been used.

When attorneys develop an appreciation of the different conflict styles, it helps in the management of clients and the case and makes it more likely that a result will be achieved where the negatives will be minimized and the positives maximized. How do you choose which conflict style to use at a given time? Avoidance – Attorneys may choose to put off discussing issues if the issue is unimportant to your client or if other parties should be taking responsibility. Accommodation – Attorneys may choose to concede quickly on an issue if there are likely to be long-term negative effects from being assertive or if the issue is not a critical one to your client. Compromise – Attorneys may use this style if horse-trading or splitting the baby satisfies the needs of their client, but should be careful to resist the

tendency to concede disproportionately for the sake of an easy agreement or because of momentum. Competitive - Attorneys may use the competitive / assertive style in a negotiation where you work to obtain the best practicable result for your client, while assisting your counterpart, where possible, in doing the same. Alternatively, attorneys may want to use the more aggressive aspects of this style if dealing with a counterpart who does not have an appreciation of, or a respect for, any style other than competitive / aggressive, or where a quick resolution of the issue is needed or where the issue is of supreme importance to your client. Collaborative – Attorneys may use this style when there are likely to be long-term positive outcomes. It is also useful when support for a decision is needed from a group of people, or where planning at the concept stage are essential to future implementation and overall success of the project.

Regardless of which types of conflict style you most identify with, almost no one can say that it is bad to develop additional problem solving skills. A problem-solving representation approach is a strategy and a technique used from the initial interview of client, to preparing the case, to preparing for a negotiation to preparing for trial, to preparing for mediation or in implementing an exit plan. This is a creative approach that includes, but also goes beyond, the traditional ones based on rights, obligations and precedent. In developing a collaborative relationship with your client and opposing counsel, you can make the distributive conversations that are likely to occur more palatable, because you will be better able to overcome impediments and to counter adversarial tactics with problem-solving responses.

THEORY, STYLE AND STRATEGY

Problem solving is a buzzword in education today because it seeks to reconcile the parties' goals and create mutually beneficial outcomes using a firm but flexible approach. Although broken down here for purposes of analysis; theory, style and strategy are in practice, highly interrelated and dynamic.

In broadest terms, negotiation theory tells us that conversations can occupy a place on the continuum between positional and principled; or using alternative language, on the continuum between distributive and integrative.

A negotiation style is the overall approach of the negotiator, such as: (1) competitive; (2) collaborative; (3) avoidance, or (4) accommodation. Overcoming an avoidance style requires extraordinary pressure, which can be very hard on the people involved. An accommodation style leads to depressed outcomes because one party simply yields to end the engagement, or alternatively both yield to maintain the status quo. A competitive style forecloses opportunity for joint gain because of the lack of mutuality. The collaboration style is most closely related to problem solving, but can sacrifice interests for the sake of agreement.

A negotiation strategy is a negotiation behavior demonstrated in a given circumstance using easily recognizable techniques, for example: The start high, stay high approach. Under this approach, a party usually begins with a demand that is somewhat high relative to objective

criteria, such as established verdict and appellate awards. That party does not move significantly on the monetary demand until an entire settlement package has been outlined, at which point, the demand drops dramatically. The agreement in principle approach. Under this approach, parties have usually had significant substantive discussions prior to mediation and seek the assistance of the mediator to move the parties toward a more specific one and to bring the final decision-makers into the conversation. The bargaining zone approach. Under this approach, parties proceed through a series of offers and counteroffers until a settlement range becomes apparent. The activities in the mediation are viewed as tactical maneuvers designed to identify if such a zone exists and if so, to define and redefine its boundaries. Tradeoffs or concessions are usually the method by which this is achieved and the mediator's main tasks are to coax new information from the parties and to tentatively explore boundaries with each party.

PROBLEM SOLVING NEGOTIATION

The ability to be a successful conversationalist, a.k.a. PROBLEM-SOLVER, a.k.a. GOOD NEGOTIATOR rests on a combination of analytical and interpersonal skills. Analysis is important because a conversationalist cannot develop promising strategies without a deep understanding of the context of the situation, the interests of the other parties, and the range of possible moves and countermoves. Interpersonal skills are important because a conversation is a process of mutual persuasion through trust building or trust breaking. Sharp interpersonal skills also serve to inform the analysis.

PAST, PRESENT AND FUTURE

Beginning in the late 1980's, new processes have tended to focus on cooperation, identification of interests and recognition of the importance of mutuality in negotiation. These approaches have been called many things, Mutual Gains Bargaining (MGB), Interest Based Bargaining (IBB), Needs-Based, Positive-Sum, Problem-Solving, Principled Negotiation or in the vernacular, Win-Win. Each approach is based generally on the premise that all parties would have something to gain by negotiating, and that the agreement ultimately proposed will be better than each party's most favored alternative course of action.

In the classic text *Getting to Yes: Negotiating Agreement Without Giving In*, (New York: Penguin Books, 1983). Roger Fisher and William Ury describe four principles for effective negotiation: separate the people from the problem; focus on interests rather than positions; generate a variety of options before settling on an agreement; and insist that the agreement be based on objective criteria. [p. 11] In their view, the process begins with the analysis of the situation, of the other parties' interests and perceptions, and of the existing options. The next stage is to plan ways of responding to the situation and the other parties. Finally, the parties discuss the problem trying to find a solution on which they can agree. The terminology for the seven factors discussed in *Getting to Yes* are: (1) Interests, (2) Options; (3) Alternatives; (4) Legitimacy; (5) Communication; (6) Relationship, and (7) Commitment.

Although very commonly used and therefore valuable as a kind of shorthand for those familiar with *Getting to Yes*, there is really nothing magic about the words. Negotiators can use whatever terminology makes the most sense in a given circumstance to make the point that they are seeking a “win / win” outcome. For example alternative language may be more helpful to people who are not familiar or are confused with the distinction between issues and interests. For example, the following: (1) Needs. (2) Choices. (3) Possibilities. (4) Reasonableness. (5) Clear understanding. (6) Strengthen, maintain or sever ties. (7) Willingness and ability to fulfill promises.

Take a moment to contrast these approaches with the “old” way described by Philip G. Schrag and Michael Meltsner in their 1973 article, "Negotiating Tactics For Legal Services Lawyers," *Clearinghouse Rev.* 259. Here is a hint – it is a list of dirty tricks that will get lawyers disciplined in many states now.

INTERPERSONAL SKILLS

The most important skill in conversation is listening - NOT talking! The ability to listen well can do more to improve the quality of your communications than anything else. When you become an active listener, you will gain a better understanding of the speaker and active listening builds trust. We typically trust - have more confidence in - and find more persuasive, people who listen to us when we speak. A common barrier to effective communication occurs at the listening stage, when people allow their thoughts to shift to the substance of what they want to say in response while the speaker is still talking - often interrupting the speaker with words or with body language.

Active listening is a process of focusing on the messages being sent by another and communicating to that other acknowledgment of both the content and emotion expressed. Active listening requires that you face the other person directly, relax your posture, place your weight on the balls of your feet or lean slightly forward if sitting, make eye contact, nod and smile occasionally and pay attention to the words while attempting to understand their meaning. Some common active listening tools are as follows: Reflecting – choose a key word or phrase that is given emphasis by the other and use it in your response. Validation – demonstrate respect for the speaker’s point of view. Reframing – restate the speaker’s position in neutral language. Showing Empathy and expressing sympathy – share in the speaker’s thoughts and feelings. Summarize – confirm the message received and your understanding and ask the speaker to confirm that you have mirrored it back to them correctly.

After effective listening, the next most important skill is questioning. Rather than getting into the usual back and forth, a better approach is to train yourself to pause for a second after the speaker stops talking and then to ask a question designed to elicit more information while directing the conversation toward an area of your interest. Having a few phrases and questions ready ahead of time for different situations will help you practice this skill. For example: “Let me see if I’ve got this right, you are saying . . . ?” “It would help me if I

could understand your concerns/needs a bit better, could you tell me about that? “I am trying to see things from your perspective. Help me understand what you think about . . .” “How do you mean?” “This may be more my problem than yours, but are you suggesting my client should agree to _____. I am not sure I could recommend that. Am I misunderstanding what you intended?” “It might be that we can come up with a solution that works for both of us. How do we start?” “Here is what I think we agree on, and here are the areas that I think we still need to work through. Did I miss anything?”

Mastery of effective questioning techniques increases the likelihood you will achieve an outstanding result. The ability to ask good questions in a negotiation takes practice, but the results are worth it. Effective questioning allows you to gain insight into your parties or your counterpart’s interests in a relatively low risk setting. Asking follow-up questions allows you time to think about the impact of the information on the possible resolution and to generate options. Also, effective questioning techniques allow you to reframe pure argument into neutral language, acknowledging the position, but still redirecting the conversation towards interests. Finally, effective questioning gives you the opportunity to assess the value systems of your counterpart; for example, are tough questions answered carefully but truthfully.

Question Tools: Open questions seek more information. (What brings you here today?) The power resides with the individual questioned as to what the answer will be. Closed questions seek limited information. (Did you come here today because you needed help with your will?) The power is shared between the questioner and the individual questioned. Leading questions attempt to impart opinions from the questioner to the questionee. (Isn’t it true that _____!) The power remains with the questioner.

Another way to classify and understand question forms and their purposes is as follows: Fact-finding questions are targeted at verifiable data such as who, what, when, where and how much. Use them to gather information about the current situation. “What kind of computer equipment are you now using?” “How much training did staff receive at the start?” Feeling-finding questions ask for subjective information that gets at the participants’ opinions, feelings, values and beliefs. They help you understand views, and they contain words like think or feel. e.g. “How do you feel about the effectiveness of the new equipment?” “Do you think the staff felt they received enough training?” Tell-me-more questions can help you find out more about what the participants are saying. They encourage the speaker to provide more details. “Tell me more.” “Can you elaborate on that?” “Can you be more specific?”

Yet another way to classify and understand question forms and their purposes is as follows: Best/Least questions help you understand potential opportunities in the present situation. They let you test for the outer limits of participants’ wants and needs. “What’s the best thing about receiving a new computer?” “What’s the worst thing about the new equipment?” Third-Party questions help uncover thoughts in an indirect manner. They’re designed to help people express sensitive information. “Some people find that computer training is too time consuming. How does that sound to you?” “There is some concern about overly autocratic

managers in many factories. Can you relate to that concern?” “Wish List” questions let you explore people’s true desires. Also known as crystal ball questions, these are useful in temporarily removing obstacles from a person’s mind. “If time and money were no obstacle, what sort of a computer system would you design for the department?”

Still another way to classify and understand question forms and their purposes is as follows: “Application” questions ask your counterpart to apply knowledge in context. For example: How could you apply / distinguish this new Supreme Court case to / from this case? Help me understand how will you establish _____ in light of the ruling in the _____ case? “Analytical” questions ask your counterpart to analyze information, concepts, themes, and processes. For example: How are the facts of these cases alike? How are they different? What is an analogous situation? How would you classify these claims? What distinguishes the categories of claimants? How do the damages differ? “Synthesis” questions ask your counterpart to formulate a theory, make inferences, or create a scenario. For example: What do you think is the cause of this area of damage to the vehicle? How do you think this fire happened? What do you infer from the witness’ statements about _____? What do you think your expert might say about _____? What were alternative designs? What do you estimate will be the costs for preparing this case and going through trial? How is the best way start to talk about settlement and when? “Interpretive” questions are open-ended questions that ask your counterpart to formulate opinions in response to the ideas you present. For example: What does it do to your case that the guard was removed from the machine after it left the factory? What about the fact that the driver had THC in his system? What if we learned _____? Do you think your client understands where I am coming from on this? Would you be willing to recommend _____, if not, what could you recommend? “Evaluative” questions ask your counterpart to justify judgments and criticisms based upon clearly articulated criteria. For example: Why did your client choose to do _____ when _____ was an option for him instead? What were some of the things your client could have done to mitigate these damages? How do you think _____ will look to a jury? I understand your damages, but I don’t see how you get to liability - you tell me?

A final point on questions is to remember to examine the motivations of the questioner: Are the questions legitimate or illegitimate? Legitimate questions gather necessary information. They help us to understand the circumstances; to understand consequences; to provide direction to the conversation; to explore possibilities and to send transition signals. Illegitimate questions are a form of attack. They are intended to irritate; shut down dialogue and put an opponent on the defensive, to cross-examine and trap them into saying or implying something that they do not actually believe or do not actually affirm. If you find you or your counterpart or your parties are deliberately or inadvertently in illegitimate questioning mode you must do something to stop it.

THE CONFLICT CYCLE

How does conflict become a dispute? Perception becomes expression and then escalation, and annihilation. Identification – A conflict is perceived or realized. That there is a

disagreement with consequences or an action has been taken that is inconsistent with expectations. Assignment – The source of the conflict or persons involved are identified. The responsible person(s). Confrontation – The individual approached the responsible persons. Dispute – If an understanding is not reached at this time, then the conflict becomes a dispute.

Congratulations on your dispute! What are you going to do about it? The answer depends on whether you are dealing with a principled negotiator, who uses the 7 factors of Interests, Options, Alternatives, Legitimacy, Communication, Relationship and Commitment, or instead, are you are dealing with someone who is an aggressive power negotiator and not familiar with the win / win approach.

However, before we can go there, each of you must answer the following question correctly: Can you control how your counterpart engages you in a dispute? No. What you can control is how YOU present a dispute and/or how YOU respond. It is true that later interactions with your counterpart can be influenced, even profoundly influenced by your actions, but that first initial engagement is usually most strongly shaped by communication and conflict styles and personality traits that have nothing to do with you or even to do with the present dispute. Lets assume that you are not dealing with someone who is able to skillfully apply the framework from “Getting to Yes” and blinks at you briefly before launching another volley when you asked about their interests.

CONFLICT BEHAVIORS, REACTIONS AND MOTIVATIONS

There is some very good literature about how “people” behave in conflict. In *Getting Past No*, Ury describes three common behaviors: Stonewalling - Refusing to budge from one’s position. Refusing to discuss the matter at all. Stonewalling works if the counterpart is convinced that there is no flexibility, that discussion would be a waste of time. Examples: What’s done is done. It is company policy. I told you that if I were going to sign up for a class, that I would not be able to do overtime. Let me get back to you on that. Take it or leave it. [suggestion] No. [creative idea] No. [what about . . .] No. Attacks - Pressure tactics designed to intimidate, overwhelm, or otherwise get you to say “Uncle”. The tactic works by fear. If you don’t do x, then I am going to make sure that y happens to you. (a dire consequence) I can appreciate you are trying, but this might be the worst summary judgment brief I have ever seen. What were you thinking? Not much. Maybe you are not cut out to be a lawyer. Are you sure you are a lawyer? You obviously have not been at it for long or you would know _____. Authority – what authority, you don’t have any authority. If you had any credibility to loose, your whining might mean something to me. I don’t want to talk to you, I want to talk to someone who actually can make a decision. Tricks - Takes advantage of your decision to be truthful and forthcoming and to deal in good faith, along with your expectation that the behavior will be reciprocated. It works by luring you into a false sense of well-being. You are in deep water before you realize it and then your counterpart tries to drown you. Manipulating data, obscuring its meaning with a false interpretation or

misdirecting attention for the purpose of creating confusion is one tactic. The “no authority” ploy is another. Reassuring cooperation and then turning adversarial at the last moment.

What can you do when confronted with a difficult behavior? Wanting to be a problem-solver may lead you to the conclusion that you should try and reason with your counterpart. But, by definition, these three examples are behaviors and are not the product of reasoned analysis or strategic thinking. So, can you reason with an unreasonable person? You can try. What is the likely result? Frustration. It will be frustrating to you that your counterpart hears your attempts to be logical as positional arguments and pressure. It will be frustrating that compromise is not recognized or if it is, goes unappreciated, just confirming that you were wrong all along. It will be frustrating that your counterpart will only engage you on ‘your “problem-solving” terms’ in a limited way, and calls you arrogant for placing yourself ‘above it all’.

In frustration, you will likely react predictably in one of three ways described by Ury: Act Difficult - Do you step into the ring and start swinging? Fight fire with fire? See if they can take it as well as they can give it? Attack + Counterattack = confrontation, potential escalation, eventual annihilation. Instead, are you hoping that if they see how difficult it can be, that they will choose a better way? The success of this reaction depends upon was the original difficult behavior a tactic or a genuine barrier. They may be unskilled at negotiating and bear you no ill will, or they may be trying to provoke a fight, so that they can deal with you in the way that they are accustomed. However, the standard in this class is “more likely or less likely”. Does acting difficult in response to a difficult person make it more likely or less likely that counterparts will co-create a wise solution? Give In - The opposite of acting difficult is to give in. You just want to get it over. It may not be worth fighting over. Your counterpart may have some good points. Do you give in hoping that it will create a better relationship? Usually, giving in results in an unsatisfactory outcome. You may have compromised your interests. You may feel that you are rewarding bad behavior. You may gain a reputation for weakness. Others may try to exploit this in the future. What examples can we learn from parenting? Do you reward tantrums? When a counterpart throws fit to get a concession from you, but does not do it in front of the Judge, or his client or his boss, what does that tell you? It is a behavior that has been successful in the past, which became a personality trait. Break Off - Cease contact. End the relationship. Quit the job. Terminate the contract with an employee. Hire a divorce lawyer. Move away from problem neighbors or family. Stop speaking to a co-worker. Avoidance, or a calculated severe reaction can be appropriate in some extraordinary circumstances. However, using this as a response to difficult people causes steep losses in opportunity, emotions, and well-being. It leads to a pattern of starting over again and again. You may never learn to stand your ground. Most of all, the response is not genuine, not authentic. It becomes an unhealthy pattern.

Why Don't People Want to Cooperate? If you conclude that your counterpart is an idiot and a jerk. Then, its over. No point in going further. If it truly is a mental defect, that is not fixable. By concluding the bad negotiating behaviors are just part of the other person's basic nature, the implication is that you can do little or nothing to change that. Of course there is a

strong relationship between behavior and personality, but you can affect behavior by successfully dealing with the underlying motivations. Ury describes four common motivations underlying a decision not to cooperate: They are afraid. - Many people feel insecure when they must negotiate. They take rigid positions to protect themselves. They overreact. Behind outbursts or verbal assaults is a fear of losing status, authority, control or losing an opportunity, such as for a promotion, to avoid a layoff, etc. If you are viewed as a threat, than any tactic that can be used in defense is justified and anything you say is an attempt to weaken their defenses. They don't know better. - Conventional negotiators say that one must be rigid, attack vigorously and use ruses and deception. We learn this at a very young age on the playground and by watching our parents argue. These lessons are reinforced in sports by our coaches. They don't see what is in it for them. If they are not used to thinking first in terms of joint gains, before dividing scarce resources, then they are not going to see why they should cooperate with you. They automatically assume that more for you is less for me. So, no cooperation. They think they can win. - What's mine is mine and what's yours is negotiable. Why share, when I can take it all? If the other side feels that they can extract an extra 10% by maneuvering you into a trap – why should they give that up?

How can you break through resistance? Avoid reacting - A harsh “No!” or an attack can stun you or provoke you to counter. Learn to detach yourself mentally from the negotiation and to suspend your emotional reaction. One technique is called ‘going to the balcony’. Imagine yourself looking down at a stage. From this point of view, you can recognize your counterpart’s tactics and hear his dialogue. In the dark, you have time to remember your interests, to think about what the nuance in language and posture reveal, to prepare your response and to deliver it in a controlled and balanced way. Diffuse fears - They expect an attack or strong resistance from you. If you do the opposite of what they expect. Embrace. Acknowledge the human being that is speaking to you – competence, status, and authority. You know what they say about walking a mile in someone else’s shoes? Anybody? You are a mile away and you have his shoes. Next, you change the game. Instead of rejecting your counterpart’s position, which will only reinforce it and cause him to defend it, direct attention to meeting each side’s interests to the extent possible. Take accusations and allegations and reframe them as an issue that must be addressed. Let the problem be the teacher. What if we were to _____? I’m hearing that you want _____ and I am wondering if you can help me understand why _____ is your number one priority here today? Educate - Educate your counterpart on the costs of non agreement. Make it hard for your counterpart to say no. You could use threats and force. Expect a counter attack if you do. You can try to maneuver him into a corner, in which case there is no way out except to fight. Instead, ask questions. Reality testing questions. What is the likelihood that you will prevail on this issue? How will that chance be affected if you do not prevail on discovery ruling _____? What are the chances that our Supreme Court will let you keep a judgment on that basis? Give reassurances that the goal is mutual satisfaction. Bring your counterpart to his senses, not his knees. Entice - Not yet convinced of the benefits of cooperation, your counterpart will attempt to stall. You may be tempted to push and to insist. This will likely provoke resistance. Instead, diligently continue working to build a bridge between you – a

golden bridge for them to retreat across. Give them a way out with honor, highlight how the outcome can be viewed as a victory for them. Make it pleasant and convenient for them to agree with you. Build the bridge on their ideas. Impress - Impress upon your counterpart that his way will not be easy and that you will have to do your job and the outcome will not be certain. Certainty can be achieved by continuing to work toward mutual agreement. Bad Negotiating behaviors will not be effective.

COMMUNICATION CAN CAUSE CONFLICT

Some of us have never been taught how to communicate so as not to cause a negative reaction unnecessarily. Five examples of how communication can cause conflict are as follows: Dichotomization – this is the process of narrowly viewing only two options – the “either this or that” choice. Comparison – some comparisons, such as between former relationships or supervisors are detrimental to the exchange of ideas. Polarities – Dealing in extremes can be off-putting and will tend to close off creative input. “Yes, but” – When people respond to an idea by saying, “Yes, but” this operates as a verbal erasure – indicating an unwillingness to listen to other points of view. The answer – This occurs when people fixate early on in a discussion on their idea of “The answer” and discount any other solution offered.

CONCLUDING THOUGHTS

This paper and the accompanying presentation takes a practical, rather than theoretical approach to examining the process of finding common ground through negotiation and mediation. Lawyers who try to use a conventional legal framework alone to guide their negotiations, whether with opposing counsel, clients or law partners, often ignore the application of other important factors to the bargaining process and reduce their effectiveness. The purely legalistic approach dehumanizes the experience because it ignores the needs the people behind the positions. Successful negotiation and mediation advocacy has as much to do with psychology, sociology and philosophy as it does with legal doctrine. What is the best negotiation strategy? As with everything . . . It Depends . . .

Thank you!