

ADR  
Ilana Hurwitz  
[ihurwitz@bu.edu](mailto:ihurwitz@bu.edu)  
1020C

-----  
8/31/09

Send \$3 to Prof by next Weds to cover negotiation costs.

Grading:

- Race Horse negotiation (observed and critiqued): 10%
- Negotiation Report on a negotiation of your choice: 10%
- Mediation Report on a mediation of your choice: 10%
- Class participation: 15%
- Final paper due last day of classes: 55%

-----  
Role-plays will have confidential instructions for your eyes as a negotiator. Do not share, even with people on same side.

-----  
Win as much as you can.  
-----

Sources of conflict:

1. Intra-psychic conflict
  - a. Thoughts
  - b. Ideas
  - c. Emotions
  - d. Predispositions
  - e. Values
2. Inter-personal conflict
  - a. Between people.
3. Intra-group conflict
  - a. Within a small group (team, family, jury, etc)
4. Inter-group conflict

Styles:

1. Hard-line – pursue position at all costs
2. Soft – Let other side win to make friends, etc.
3. Inaction – Conflict avoidance
4. Problem-solving, collaborating, and integrative – Find a solution that meets the interests of both sides.
5. Compromising – pursue moderate effort to get to an outcome – split the difference – lazy attempt at problem solving.

---

## Race-Horse Negotiation

9/2/09

## Negotiation Theory

- Preparation:
  - Possibly the single most effective tool.
  - Write down the issues that you want to talk about.
- Agenda
  - In what order do you want to talk about?
  - Most or least contentious stuff first?
  - Order things according to strategy.
- Things to consider:
  - Parties – who are they, and how do they relate?
  - Issues – what are the things to hammer out.
  - Interests – what are yours, and what are those of the other side. What might influence or satisfy them?
  - Legitimacy – What is the objective criteria that makes your option fair?
  - Alternatives – BATNA, yours and theirs. How do you worsen their BATNA.
  - Commitment – Do you want a signed deal, a handshake, or a tentative agreement.
  - Communication – What are you going to disclose, and what are you looking for.
- Styles:

Win/Win	Win/Lose
<ul style="list-style-type: none"><li>• Cooperative. Reach mutually beneficial position</li><li>• Value-creating</li><li>• Relationship focused</li></ul>	<ul style="list-style-type: none"><li>• Competitive.</li><li>• Value-claiming.</li><li>• Relationship straining.</li></ul>

Typically negotiate in a positional way. A position tells the other side what you want – a quick solution or demand in a pressurized situation. Asserting a position effectively locks you in – your ego and credibility become associated with your position. Accordingly, need face-saving mechanism to move from position.

Principled negotiation is about changing the game from positional styles.

Skills:

- What kind of interests open the door to creative and better solutions.
  - Shared interests – Find interests that are common between the parties.
  - Dovetailing interests – Look for interests that are complimentary. E.g. time for money (booking flights in advance are cheaper).
  - Risk aversion/proclivity. How easily can the party bear risks?
- Think laterally.
  - Think outside the box.
  - Write down hats:
    - Winter
    - Baseball
    - Fedora
    - Firefighters helmet
    - ALL UNIVERSITY NAMES, LOGOS
    - Western
    - Cowboy

- Bowler
- Stovepipe
- Fun
- Boring
- Red
- Pink
- Yellow
- Fucia
- Violet
- Big
- Small
- Funny
- Glittery
- Poorly made
- Expensive
- Cheap
- Imported
- Exported
- Gifted
- Inherited
- Purchased
- Inflatable
- Beer-helmet
- Fuzzy
- Leather
- Cloth
- Cotton
- Polyester
- Find ways to combine and expand each parties' skills/resources/etc.
  - Expand the pie.
  - Arbitrage interests of disparate values.
- Have other side invested in option creation and selection process.
- BATNA – Best Alternative to Negotiated Agreement
- WATNA – Worst Alternative to Negotiated Agreement
- Objective Criteria
  - Standards of fairness by which a possible agreement is evaluated.
  - Doesn't have to be equal for both sides – sometimes it is just *equal opportunity* for both sides.
    - A husband and wife take turns picking items to keep, and thereby have equal *opportunity* to select items.
      - Problematic when one makes selections motivated by spite or later negotiation position.
  - How will your opponent justify the deal to his or her constituency?
- What's a successful negotiation?
  - Does it meet your client's interests?
  - Does it meet the other side's interests?
  - Did you use your time efficiently?

- Is the agreement fair?
  - Why or why not?
- Does the other side believe the agreement is fair?
- Is it likely to last?
- Have you established a good working relationship?

Race-Horse Negotiation:

- Room opposite 1020. Be there 10min early.
- Negotiation limited to 10min
- No discussion of your instructions.
- No written assignment.

9/9/09

- What's the condition of the Jockey?
  - Leverage Jockey's uncertain future into LT relationship
  - Discuss BEFORE getting to \$\$
  - Stay on mount for other races in triple crown?
    - Depends on condition of other jockey and success in derby
      - Defer to owner
    - She pushes against an incentive clause
- He pushes for relationship
  - Tries to commit her to Chisto next year.
    - She pushes back re: performance.
- He talks about fair.
- \$15 is higher than they had expected to pay?
- What would you have to do to get approval?
  
- We're prepared to pay.
- I suggest a fair payment is around \$15k
  - Gives her **LOTS** of bargaining room.
  
- "Up and coming"
  - More that arrived.
    - Really!?!
- Opportunity to ride Flashdance
  - In a bind, and not going to put just anybody on.
  - Chisto to the rescue!
- Zero interest probing or information bargaining.
- "you can take your chances"
- Both focused entirely on dollars.
- Someone didn't read their instructions well.

9/16/09

9/21/09

Easy's Garage.

Tactics:

- Delay
- Silence – making the other side feel that they needed to fill in the silence.
- Limited Authority – Tell you last minute they have to get principal's authority
- Bottom Line - How realistic is their bottom line?
- Stonewalling – Person just says “no.” Ask “Why?”
- Auction – I can get it cheaper, faster, etc. somewhere else.
- Deadlines – Accept by X or the offer expires.
- Threats & Promises – Are they real? Call their bluff.
- Anger – Is it real or feigned (to convince you of the seriousness of the problem)?
- Aggressive Behavior – Designed to convince of seriousness of position and to control opponent.
- Presentations – Convincing or attempt to snow?
- Lying
- Take-it-or-leave-it
- Routines and Games
  - Good cop, bad cop.
  - Wolf in sheep's clothing – person plays victim.
  - Passive-Aggressive:
    - Doesn't show up on time
    - Doesn't bring key documents
- Know-it-all
- Snow-Job – tries to overwhelm you with all the facts and figures and get you confused.
- De-emphasizing the conceded item – We want a *real* concession here.
- Wheat and Chaff – Otherside concedes something you don't care about, and demands a meaningful concession on your part.
- Putting the blame on someone else – Fine w/ me, but the Board won't buy it.
- Boredom
- Psychological pressure
- Surprise & the Gorilla – filing motion right before a holiday

How to handle it:

- Identify it
- Decide if you want to say something to the other side.
- Either play the game, or sidestep (ignore) it.
- Yield to principle and not to pressure.
- Avoid being either the victim or persecutor
- Take a break.
- Determine if it's time to leave.
- Identify behavior and invite them to be more productive.
- Refuse to be punished
- Ask questions/seek information
- Point out consequences



Getting past 'NO'.

- Go to the balcony – take a break and remove yourself from the situation and collect yourself.
- Stay focused on your goal.
- Know in advance what presses your buttons
- Stick to their side
  - When they blow up, listen and acknowledge.
  - Active listening
    - Resist urge to defend
    - Do not judge.
- Stand up for your side
  - Once you have acknowledged them, let them know how you feel.
- Don't reject. Reframe.
  - Change position into (one of many):
    - An option
    - A standard
- 3-2-1 Method of Problem-Solving
  - 3: Look at negotiation as a third-party observer.
  - 2: Understand the problem from their point of view
  - 1: Talk about "I".
- Bring them to their senses, not to their needs
  - Establish walk-away alternative
  - Educate them about cost of non-agreement

9/23/09

## Difficult Conversations

### Five Steps:

- Three Conversations
  - What happened?
  - Feelings
  - Identity (what does it mean to you)?
- Check your purposes, and decide if you should raise the issue?
  - What do you hope to accomplish w/ the conversation?
  - Can you shift your stance from emotional to supporting, sharing and problem-solving?
- Turn blame into a contribution.

10/7/09

#### DONS Negotiation Follow Up.

Where is the line between misleading and committing fraud?

- Disingenuous but plausible readings of cases/statutes are OK.
- Puffery is OK
- Using false demands for leverage is OK.
- Cannot lie about bottom line
- Is there safety in nondisclosure of a material fact? Yes unless:
  - Partial disclosure that becomes misleading.
  - Fiduciary relationship between parties
  - Non-disclosing party has material information that the other side does not have access to.

How to avoid fraud as Matt's attorney:

- Convince client to disclose.
- Convince to settle case without your involvement
- Can refuse to go into the meeting.

Is Lisa's inheritance a material fact?

- Not really. Damages based on Matt's suffering, not punishing her.

Gender and negotiation:

- Women control the negotiation through mutual empowerment
  - Power with v. power over.
- Interactive Dialogue
-

October 21, 2009

Behavior Things:

- Develop rapport with the parties.
- Establish credibility and trust/confidence.
  - Both in the process and in yourself as a person.

October 28, 2009

“Your sides” sets up a competitive atmosphere.

Allows “he cheated me”

- Empathy “understand how challenging”

Attempts to build common ground.

---

Diffuses the mediator fee issue.

Preserving and repairing relationship, which reminds them of their trust and rapport.

November 9, 2009

For next time: read p. 206 facts.

Power imbalance:

- The most powerful party risks dominating the weaker party and dominating the outcome, and there are many myths associated:
  - Belief that richer party will always “win”
  - Perception of equal power necessary for fair mediation
  - Notion that stronger party imposes its will on the weaker party
  - Assumption that power means control and influence
  - View that power is a possession
- Mediation is powerful because it empowers the parties to resolve their own dispute.

Responses/ When to terminate mediation:

- At least one party does not want to participate
- One party would agree only out of fear

November 11, 2009

Monday:

- On call: A-K
- Read: DR 213-253
- Focus on:
  - Southland
  - Volt
  - Buckeye
  - First Options

November 16, 2009

For Weds: 253-297

What is arbitration: A neutral third person makes a (typically) binding decision for the parties. Less legalistic and more informal than a court.

Benefits of arbitration over litigation:

- Parties select their own arbitrator and have more power over the evidence submitted and scheduling of arbitration.
- Court will almost always respect arbitrator's decision as final.
- Award is not self-enforcing. Usually no sanction against a party for non-compliance unless there is judicial confirmation of the arbitrator's decision.
- Court can deny confirmation if:
  - Award procured by corruption, fraud or undue means.
  - Impartiality of arbitrator
  - Misconduct of arbitrator
  - Arbitrator exceeded powers

One big issue is preemption:

- Federal Arbitration Act, §2
  - Clause must be in written contract
  - Evidence a transaction in commerce

---

- Southland (223)
  - *Franchisees with broad arbitration clauses in franchise agreement argue that Federal Arbitration Act **did not** preempt California Franchise Investment Law*
  - Court held that CA law violates supremacy clause and is preempted by Fed Law.
  - Fed. Arb. Act is substantive law, not procedural, as it invokes the commerce clause, and thus Congress was trying to claim the full extent of its power.
- Volt (227)
  - Contract says that state where dispute takes place is the law that will apply.
  - Question is whether you can stay an arbitration until a pending companion case in court is resolved
  - No real conflict between state law allowing stay and Fed. Arb. Act, so arbitration stayed.



- Green Tree (232)
  - Commercial lender sued by customers. Agreements had arbitration clause.
  - *Can an arbitrator preside over a class action where the agreements do not speak to the issue of classes?*
  - Court held that previously selected arbitrator was best positioned to interpret the contract (and thereby bestow upon himself more power and money).
- Typical Question:
  - Is there a contract?
  - Is the issue a “dispute” and thus arbitrable? (e.g. interpretation of K may not be a dispute)
  - Is claim a procedural arbitrability claim?
  - Prima Paint – Can consider enforceability of arbitration clause without looking at the rest of the contract.
- Buckeye (240)
  - Check cashing co. and customer.
  - *Should a court or arbitrator determine if a contract is void for illegality?*
  - Court held that “a challenge to the validity of the contract as a whole, and not just the arbitration clause, must go to the arbitrator.
    - Particularly troubling as it dealt with an issue of state law.
- First Options (244)
  - First Options executes stock trades.
  - Kaplan is an investor (with a wholly owned investment company)
  - *Should a court or arbitrator decide if the parties agreed to arbitrate?*
  - Held: Unless the parties clearly consented to arbitration, arbitrability of the dispute is properly settled by the courts.

November 18, 2009

For next time: 301-350, 578-585

On Call.

November 23, 2009

Different kinds of arbitration:

- Can be used for contract negotiation – e.g. union (labor) v. employer.
- Arbitrators tend to split difference.
- Final offer arbitration
  - Require arbitrator to pick *either* the high or low position, so will pick the most reasonable, and thus parties incentivized to move their offers.
- High-Low Contract
  - Parties agree on liability but not damages, but set out a range. Arbitrator selects from inside the range.
  - Parties may also agree that any award will be adjusted down or up to conform to the cap or floor respectively.
- Tripartite Arbitration
  - Three arbitrators – sometimes all neutral, sometimes each party picks one and there is a neutral.
  - Party-selected arbitrators may be allowed to have ex parte discussions with the party.
- Med-Arb
  - Mediates, but if failed moves to arbitration role.
  - Incentives for parties to be less forthcoming w/ info
- Court-Annexed Arb
  - Mandatory and non-binding. Have to go to arbitration before going to court, but can go to court if don't like the decision.
- Minitrial
- Summary Jury Trial
  - Takes place in a courthouse.
  - Jurors are picked from a regular jury pool, and not told that they are there for a summary trial.