

**INTRODUCTION  
TO**

**ALTERNATIVE  
DISPUTE  
RESOLUTION**

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**Negotiation:** the art of reaching an agreement  
voluntary  
not binding  
parties engage in discussions seeking a  
mutually satisfying resolution

**Mediation**  
may or may not be voluntary  
not binding  
third party guide: in search of solution

**Facilitation**  
voluntary  
not binding  
third party guide: in search of interests

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**Arbitration**  
parties choose whether  
voluntary or mandatory  
and/or  
not binding or binding

choosing arbitration made either  
by prior agreement  
or  
at time of dispute (rule in Nebraska: capacity)  
selection of arbitrators  
typically: by you, by me, and then by our  
award  
both greater and lesser than court's remedy

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**Federal Arbitration Act of 1929**  
favors arbitration for **commercial transactions**  
however  
legislative intent to **exempt** from arbitration  
the **enforcement of "rights"**  
(no exemption for SEC or RICO)  
and  
commercial transactions need to satisfy State's  
**general rules for contracts**

FAA **liberally construed** to encourage  
enforcement of arbitration agreements  
e.g., administrative agency's standing to sue

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**limited judicial review** of both the  
process  
and  
award  
**focus on compliance with arbitration agreement**

**Role of Precedence in Arbitration**  
typically, no precedence;  
but, with labor arbitration  
**Rule of Shop**

**Concurrent State and Federal Powers**  
but  
Commerce Clause  
Supremacy Clause

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**NOTE: the bulk of the material on negotiation**  
comes from the **Harvard Negotiation Project.**

**Negotiation is the art of reaching an agreement.**

**Mutual understanding**  
is a necessary precondition to  
reaching an agreement.

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**Preparation**  
is the best path to mutual understanding.

**Preparation**  
includes much more than analysis  
of each party's interests.

**Preparation includes**  
analysis,  
perception,  
prioritization,  
anticipation,  
and development of **objective criteria**  
as well as **options for mutual gain**.

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**Analysis:**  
often is the simplest part.

**Your analysis should identify**  
the **relevant legal and business issues**.

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**Perception:**  
means that you "walk a mile in my shoes."

**My view** of the relevant issues  
**will not be the same as**  
**your view**  
because the issues will "pinch" me  
at different points than the issues pinch you.

The **emotional component**  
of my perception must not be overlooked.

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**Prioritization:**  
is an understanding of the  
**relative value**  
of each issue.

**Know yours and know theirs.**

**Recall, value is time sensitive:**  
**"One who gives quickly gives twice."**

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**Anticipation:**  
is necessary to **hear opportunity knocking**  
and is necessary to **avoid poisoning the well.**

**You will most certainly miss a golden opportunity  
or you will react caustically to  
a statement born of frustration  
unless you anticipate both  
your reactions and your opponent's reactions  
to the topics and the sequencing of topics.**

**Kindness at a critical juncture  
establishes the trust upon which  
the agreement is built.**

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**Objective Criteria:**  
are the building blocks of the agreement.

**Objective criteria allow the discussion to progress.**

**Avoid a focus on positions**  
(e.g., My patent is worth millions.)  
**or on persons**  
(e.g., You stole my idea!),

**Focus on the parties' interests**  
**and**  
**the objective criteria for analysis and outcome.**

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**Options for Mutual Gain:**  
are the cement of the agreement.

Build your opponent a **golden bridge**  
to retreat across.

When you both have a problem,  
a solution  
is **not a zero sum game**.

Be creative.

**This is the most difficult task.**

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A negotiator should **identify**  
the **topics** of discussion  
as well as  
the **sequence** of discussions.

Specific attention should be given to  
what the negotiator is willing to **trade**  
(**and for what!**)  
in order to obtain the desired **outcomes**.

You should clearly identify your **BATNA**  
(**Best Alternative To a Negotiated Agreement**)  
and  
under what conditions you  
would resort to your BATNA.

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**Everyone has a preferred negotiation style.**

Each style can be either **ideal** or **worthless**,  
**depending** upon  
the style of the person on the **other side** of the table  
and  
the **duration** of the relationship.

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Hard, or **aggressive**, negotiators prefer to **understate** both their **willingness to settle** and their **probable end point**.

Hard negotiators approach the negotiation as a **test of wills in a zero sum game**.

Hard negotiators tend to **excel** against **hard negotiators** in all contexts; and against soft negotiators in **one time negotiations**.

Hard negotiators tend to **fail** against soft negotiators who become insulted and resort to **BATNA as well as** tend to **fail in ongoing relationships**.

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Soft, or **reasonable**, negotiators prefer to **correctly state** both their **willingness to settle** and their **probable end point**; thus leaving **little room for future movement**.

Soft negotiators approach negotiation as a **path to agreement**.

Soft negotiators tend to **excel** against other **soft negotiators** and to excel in **ongoing relationships**.

Soft negotiators tend to **fail** against **hard negotiators**, especially in **one time negotiations**.

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***Beyond Winning:  
Negotiating to Create Value in Deals and Disputes.***

**Mnookin, Peppet, and Tulumello**

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*Beyond Winning:  
Negotiating to Create Value in Deals and Disputes.*

**Mnookin, Robert H.,  
Peppet, Scott R., and  
Tulumello, Andrew S.**

Cambridge, Mass.  
The Belknap Press of Harvard University Press  
2000.

ISBN: 0-674-00335-7

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**Preface and Introduction**

problem solving approach to negotiation  
legal system alters feasible outcomes

**construct fair and durable commitments**

opportunity costs  
context of the negotiation: deal v. dispute

**distributive issues** = zero sum game  
**create value** = not a zero sum game

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**Tensions inherent in all negotiations**

creating value v. distributing value

empathy v. assertiveness

principals v. agents

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**Deals and disputes are negotiated  
in the shadow of the law.**  
lawyers have special opportunities to create value  
misused,  
lawyers are wasteful and costly

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**SYSTEMS OF RELATIONSHIPS**

client A to client B  
client A to lawyer A  
lawyer A to lawyer B  
client B to lawyer B

any relationship can be a barrier or a bridge

information exchange  
filtering  
value creation  
requires accurate and nuanced info

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fair and durable commitments  
are more likely if  
define and allocate transaction risks  
understand underlying interests  
rather than mere positions  
understand and address legal opportunities and risks  
identify and accommodate decision points  
design efficient processes  
manage expectations

preparation for negotiation always is inadequate

expect ethical dilemmas

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**Part I: The Dynamics of Negotiation**

tensions are inherent  
can not eliminate, can only manage

distributive gain v. joint gains (create value)  
asymmetric information fuels this tension  
trust

empathize v. assert  
an experiential tension  
both, not either/or

principal v. agent  
incentives and monitoring

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**Chapter 1: The Tension between Creating and Distribution Value**

negotiation's central activity  
search for  
value creating trades (not distribution)  
search in  
divergent interests,  
divergent resources, and  
divergent capabilities

**BATNA:** recall agreement means voluntary

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**Sources of Value**

differences between the parties  
interests  
resources  
capabilities

non-competitive similarities

economies of scale  
and  
economies of scope

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**Sources of Value: Differences between the Parties**

**resources**

**relative valuation**

**forecasts** (belief and likelihood)

**risk preferences**

averse v. neutral v. taker  
risk shifting towards efficient carrier

**time preferences**

event v. payment

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**Non-Competitive Similarities**

avoids zero sum game  
shared objectives

**Economies of Scale**

production v. consumption  
**MES** = **Minimum Efficient Size**  
absolute v. relative

**Economies of Scope**

joint v. concurrent = shared  
network effects  
positive *and* negative

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**The search for value creation opportunities necessarily creates the potential for exploitation via asymmetric information.**

**Value distribution must occur.**

**Unpack the distributive issues.**

**Move away from positions and toward interests.**

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**Alternatives**

range of feasible options **without** agreement  
**BATNA**

**Reservation Value**

minimum value *prior to* resort to BATNA

**ZOPA = Zone Of Possible Agreement**

**Aspiration Value = high (reasonable?) estimate**

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**Asymmetric information**

**material**

would change the conclusion  
*see slides on Contracts*

**latent**

a reasonable inspection will not discover

**Strategic Opportunism**

concealed: reservation value and BATNA

independent generation and confirmation of info

**ZOPA v. range of BATNA to aspiration value**

**sculpting perceptions**

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**Hard Bargaining Tactics**

1. Extreme claims followed by small, slow concessions.
2. Commitment tactics.
3. Take-it-or-leave-it offers.
4. Inviting unreciprocated offers.
5. Flinch.
6. Personal insults and feather ruffling.
7. Bluffing, puffing, and lying.
8. Threats and warnings.
9. Belittling the other party's alternatives.
10. Good cop, bad cop.

**Functional if [a] in a single transaction and/or [b] opponent is an aggressive negotiator.**

**Disastrous in sequential transactions with a reasonable negotiator.**

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**Aggressive bargaining  
and  
information asymmetry  
increase the benefits  
from  
reducing transaction costs  
and  
dampening strategic opportunism.**

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**Lemons**  
latent defects and adverse selection,  
but  
feedback loop to reputation

**Moral hazard**  
after shifting the risk,  
the non-riskbearer may profit  
from induced losses due to  
lack of detection or consequence

**Focus on value creation  
while minimizing exploitation risks.**

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**Always prepare for a negotiation.**

**All preparations always are  
inadequate and misdirected.**

**Increase your preparation.**

**Evaluate, post-negotiation, your preparation.**

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Identify positions, issues, and **interests**.  
**both yours and theirs**  
Contemplate **value creation** opportunities.  
Know your **BATNA**  
and translate into a **reservation value**.  
If possible, increase your BATNA.  
**Estimate their**  
BATNA, reservation value, & aspiration  
Estimate the **ZOPA**  
Establish your ambitious, but good faith, **aspiration**.  
Know yourself , know your **assumptions, AND verify**.

see Summer 1999 web page for negotiation preparation form

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**Negotiator Styles**  
hard / aggressive / positional  
v.  
soft / reasonable / principled

**Negotiation building blocks**  
good faith  
reciprocity  
brainstorming  
without evaluation or commitment  
side payments  
dynamic, not static

**Only a zero sum transaction is solely distributive.**

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**Chapter 2: The Tension between  
Empathy and Assertiveness**

**empathy**  
understanding the other person  
and  
demonstrating that understanding  
NOTE: nonjudgmental not = agreement  
**assertiveness**  
express and advocate your own interests  
NOTE: not belligerent

emotionally charged  
often grounded on assumptions (erroneous?)  
shades the substance of the transaction

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Negotiation focused on problem solving with  
**both empathy and assertiveness** is:  
win - win if both sides do it  
win for the one that does it  
reduces transaction costs  
reduces strategic opportunism

If increase  
**perspective-taking abilities and behaviors,**  
then increase  
anticipation of strategic problems  
correction of misperceptions  
earning of trust  
inspiration of openness  
**Assertiveness is beneficial in a zero sum transaction.**

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**Unproductive Tendencies:**  
suboptimal lack of nimbleness

**Competitor** (high assertion)  
advantage with distribution

**Accommodator** (high empathy)  
focused on sustaining a relationship  
but, imbalanced and prone to exploitation

**Avoider** (low assertion and low empathy)  
conflict unproductive, wait for it to go away

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competitor - competitor  
strategic dance to stalemate  
competitor - avoider  
annoyance and alienation  
competitor - accommodator  
unceasing exploitation

accommodator - accommodator  
overlook value creation in rush to agreement  
accommodator - avoider  
both end up avoiding

avoider - avoider  
neither aware of the other  
**page 55, Figure 3, nimble upper right corner**

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**PREPARE**

to minimize your (plural) most likely errors  
to maximize your (plural) outcome

**INTROSPECTION**

know thyself

**CURIOSITY**

know thy opponent  
verify assumptions  
ask  
demonstrate understanding  
paraphrasing

**SHARE**

process for perspective-taking behaviors  
key points in a story framed without blame

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**At the Table**

reciprocal processes

empathy loop

inquire > respond >  
demonstrate > test > inquire

do not agree if you disagree

unambiguous understanding  
unambiguous lack of agreement

transition from empathy to assertion

verify understandings

assert your story

verify they *heard* what you said

and that you said what they heard

dynamic process

focused on fair and durable commitments

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**Chapter 3: The Tension between Principals and Agents**

an agent acts instead of and on behalf of the principal

an agent brings the principal advantages in

knowledge  
resources  
skills  
strategic

advantages

absolute v. relative  
competitive v. comparative  
outweighed by agency costs?

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**Agency Costs**

agent's interest  
will not necessarily align with the principal's

**PREFERENCES**

reputation as a repeat player

**INCENTIVES**

"success" reach with different outcomes

**INFORMATION**

availability  
kinds  
discovery

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**Management Mechanisms**

none are cost free  
none eliminate the tension  
exploitation can cut both ways

**Incentive Contracts**

align definitions of "success"  
competition with asymmetric information

**Monitoring Systems**

observe v. distinguish  
creates another set of incentives

**Bonding**

reputation validated by another agent  
most effective with repeat players **and** info flows  
short term v. long term flexibility

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**Incentive Contracts**

contingency fee  
champerty  
not for criminal  
hourly fee  
time value of money  
fixed fee  
total quality constrained  
mixed fee  
off setting deficiencies?  
salary  
no profit motive

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**Professional Norms**

prior commitments with high claims

reputational aspect  
strength of peer group

express v. implied  
statute v. judicial  
mores v. norms  
intent v. negligence

good faith

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**Capturing the agency benefits and minimizing the agency costs.**

**Acknowledge "the agency problem". Do not avoid the agency problem.**

The agency problem is shared by the principal **and** the agent

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**focus on comparative advantage and strategy**  
scope of authority  
only process? only deal? only dispute?  
no single bottom line if multiple issues  
dynamic during negotiation

**candor between principal and agent**  
BATNA and reservation

**principal can not distinguish and must trust agent**  
segments of the agreement v. the whole

**your opponent also has the "agency problem"**

**misused, agents can destroy value**

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