CHAPTER EIGHT

NEGOTIATION STRATEGIES AND TACTICS

For Party Representatives

This Chapter is about how the parties and their representatives can get the best out of the negotiation phenomena. Some of the propositions here are stated in large bold print, for emphasis. The propositions stand up for themselves and are to a very large extent self explanatory. They should be absorbed and become a natural part of the tool kit of the effective negotiator, being used instinctively rather than in a routine or perfunctory manner. Effective negotiation is borne out of a state of mind, a positive but discerning attitude to what is achievable in any given situation.

The key to optimising your potential in negotiations is ***"thorough and thoughtful preparation."*** What then can be prepared and how does one prepare to engage in mediation?

Planning your Negotiation Strategy :

In any negotiations, have a clear idea of what you want and how you will achieve this before you start the process. Instinct suggests that we must immediately *"leap into action"*. This is not a good idea in any negotiation process.

The important thing is to know your own position and what your goals are and what you can realistically hope to achieve. This was recognised by Sun Tsu, a classic Chinese strategist, who produced a series of essential rules for successfully engaging in conflict, the principal of which was :-

"DO NOT PICK A BATTLE THAT YOU CANNOT WIN."

Do not let your emotions conduct the negotiation, think and act rationally!! Let the other party act emotionally if they must!

In any negotiation process, assess your position and determine exactly what you (*and your client*) need. In successful negotiations assessing your own position, including arguments and weaknesses is the first step towards a successful negotiation. In many unsuccessful negotiations it is notable that one or both of the parties have not bothered to do this. Where one party does, but the other does not, the latter party is likely to find itself at a distinct disadvantage, resulting either in a failed negotiation, an unfavourable outcome or at the least a less favourable outcome than might otherwise have been the case.

i) Determine your goals
ii) Prioritise your goals
iii) Determine your bargaining range, including walk away point
iv) Identify your alternatives
v) Are there underlying interests?
vi) Should your strategy be fixed or flexible?

Evaluating the Parties :

Evaluation of both your own and the other sides characteristics is very important. You need to know yourself, the parties you represent: that is to say your constituency, as well as the other side's representative, parties and constituency.

There is an old adage that states that in order to prevail one should KNOW ONE'S ENEMY. The term ENEMY is somewhat pejorative, and perhaps not helpful in the context of compromise, but the sentiment still holds good. It is important to understand where the other side is coming from and their strengths and weaknesses.

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If you are well prepared, this becomes obvious as the mediation progresses, both to the mediator and the other party. Conversely if you have not adequately prepared for the mediation, but rather decide your tactics as the mediation progresses whilst the other side has prepared well for the process, this will undoubtedly lead to a process where the one party will be at a distinct disadvantage.

PREPARE YOUR CASE WELL

Assessment of your opponents will come from observation of what the other side asks for or are prepared to give; their starting points, threats; whether they need to take advice. It is also very important to concentrate on what they regard as important and whether you and your clients regard these as important.

OBSERVE AND LISTEN

Do not necessary think that you must say anything in periods of silence. It is human nature to talk, so if you remain quiet or non committal it is possible that the other side will give you information which will permit you to better evaluate their case and to prepare a more suitable response than would be the case otherwise.

REMEMBER MEDIATION SHOULD NOT BE A WIN - LOSE PROCESS.

A WELL CONDUCTED MEDIATION IS A WIN - WIN PROCESS.

For a successful mediation, observe what you "opponent" is asking for and if you have done your homework and are well prepared then you will know, or should know, where this stands in the process. It is not unusual for red herrings to be floated as in all negotiation processes and then for the main points to be added as an addendum.

If you are well prepared you will know what the true position is and will be prepared to counter tactics which may not be in keeping with the concepts of mediation.

REMEMBER YOU CAN ALWAYS WALK AWAY IF YOU DO NOT APPROVE OF THE TACTICS USED BY THE OTHER SIDE.

Evaluating the claimant's / respondent's case :

Even if you have well prepared for the mediation there can and will be surprises which you did not expect as the process develops. As stated previously, it is not unusual for the parties to be in disagreement over points which in a "face to face" meeting are not in dispute.

KNOW YOUR CASE AND HAVE ALTERNATIVES PREPARED PRIOR TO THE MEDIATION PROCESS.

Mediation is a process which is designed to settle disputes in a win – win process, not in a confrontational adversarial manner. If the parties to the dispute enter into the true spirit of a mediation process; that is in a spirit of collaboration, not conflict nor necessarily compromise, then matters can arise which are outside the original terms of the dispute.

In situations where the possibility of alternatives may arise, have alternatives prepared and be flexible, the benefits may be greater than having a fixed point of view.

The cases which come to mediation are as a rule those where the parties have grounds to compromise, they are not cut and dried. Given the potential for dispute and different interpretations and desirable outcomes depending whether you act for the claimant or defendant, know your case and know the other side's case to the best of your ability and the knowledge you have.

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DO NOT GO INTO ANY MEDIATION UNPREPARED
YOU WILL COME UNSTUCK !!!

Remember at a mediation, you will have your client there observing you in action. If you are unprepared and developing strategy and needs as the mediation progresses, then this reflects badly on you and your client may not be impressed and will withdraw from or not recommend your services in future. Mediation can be a practice builder, but like all aspects of the litigation process if badly carried out it can damage your practice.

The key word is :- **PREPARATION**.

If you have correctly prepared for the mediation, you will be *au fait*, or should be with all aspects of the case. This is important when it comes to evaluating the other side's case. If you know the details of the case you will immediately identify in the process the points which the other side are emphasising, those they are shying away from by not mentioning or skirting over. Preparation also permits you to identify those points which have been raised and are being emphasised in the process. However, remember red herrings are a possibility in all mediation / negotiation processes. If you know the case you should be able to identify these.

Evaluating your case :

This is the natural follow on from the points raised above. If you have fully prepared for the mediation you should not be caught unawares by any points raised by the other side. This is fine in theory, but it is not unheard of for "rabbits to be pulled out of hats".

If you have not prepared your case, then you may be left with no option, but to withdraw from the mediation process and begin again, or alternatively concede to the other side. This is not a good practice builder.

"Best Alternative Position"

If you have fully prepared your case, then even if the other side spring "nasty surprises" on you, then all should not be lost. You need a "**Best Alternative Position**" or "**BAP"** for short. This should not present a difficulty if you have prepared your case and have discussed alternatives with your clients and how the case has progressed and what they wish to have from the mediation process and the case.

In light of information and materials presented by the other side, you may have to re-evaluate your case. If you have not prepared and have no fall back **BAP** then your own case may be placed in jeopardy. If you have, however, fully prepared your case then the re-evaluation process in light of disclosures by the other side should either strengthen your case or at the very least not substantially weaken it.

The evaluation process can also permit you to identify weaknesses in a seemingly impregnable position held by the other side. If this is the case then it is possible to develop your case and modify it in light of the information which can be garnered during the mediation process. Successful negotiation tactics are outside the scope of this particular course, but participants are recommended to attend one of those currently available.

Using evidence at a mediation

The use of evidence at a mediation does not necessarily follow that of the accepted court practice. This is important. Mediation is a facilitated negotiation process, not a competition to denigrate the other side's case and their witnesses. Depending on the tactics adopted, it is possible for the evidence to follow the normal civil procedures of disclosure, but also other evidence may be used if the parties agree. See the point below.

In the mediation process, the evidence should be used to the benefit of both parties as mediations are not winner takes all procedures. Compromise and collaboration are the key words. By comparing and evaluating the evidence of the parties, a clearer picture can be developed. This is true of both witnesses of fact and opinion. The witnesses will not be at the mediation process and cannot be evaluated for their reliability in the witness box.

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This has advantages and disadvantages for the parties. The advantages are that if in your opinion you could not rely on the witness to make a good witness in court, then that person will be saved the ordeal of appearing in court especially if your case is built upon testimony where the reliability of the witnesses can be called into question due to age or infirmity or for other reasons. Conversely if you have solid witnesses, then you may prefer the court system, with all that entails. The evaluation of the witnesses is your evaluation and you have to balance the credibility of your witnesses with those of the other side. Use the available evidence to strengthen your case by identifying both the good points and the bad points.

Identification of your weaknesses can strengthen your case.

Using "Inadmissible Evidence" : The mediation process is not a court hearing where the **Civil Procedure Rules 1998** have to be adhered to. Mediation is an informal process where the parties and the mediator set the rules and the tone of the mediation. This enables the parties to introduce evidence which for one reason or another they would be reluctant to do into court. "Inadmissible evidence", is used here to describe evidence which whilst obtained in a manner which is legally and / or morally acceptable one of the parties does not wish to have revealed in court. An example of this would be surveillance of a worker suspected of fraud through legitimate means such as videoing the worker. It does not mean evidence gathered by illegal means such as "wire tapping". The use of such evidence in a mediation is acceptable as it is used to bring the dispute to a conclusion. It is part of the process of dispute settlement.

Mediation also enables hearsay and "gossip" to be explored. This is information which in a court would have to be introduced carefully, if at all. In a mediation, however, it can be floated and it is up to the other party to refute it or alternatively accept it as part of the process and adjust their position accordingly. It can be as revealing as and indeed on times more devastating than discovery. It is evidence which can be used to compromise a settlement which under the court system of "winner takes all" is not available. It is however, up to the parties whether they wish to use such evidence and if it is used, how much capital they can make out of it by forcing the other party to compromise.

How to use "Non-monetary" concessions to achieve settlements : The use of non-monetary concessions is one of the great advantages of mediation. The expression of a willingness to co-operate with the other side over some issue that they value may not cost anything at all, but may well be of value to them, for example the provision of documentation that enables the other side to make an insurance claim, or evidence to assist them in future litigation against third parties.

REMEMBER : IN A MEDIATION EVERYTHING IS NEGOTIABLE

Mediation is a facilitated negotiation. It is necessary to emphasise once again that mediation is a facilitated negotiation and in common with all negotiations the parties make offers and counter offers. If this was not done there would be no need for the negotiation process.

The mediation process is designed to achieve win – win positions for the parties at the mediation. The process is such that it is possible for either party to suggest something which in normal circumstances would be "laughed out of court". It is not unheard of for some of the settlements to be reached via "bizarre" routes, but the outcome is satisfactory to both parties.

This is particularly true of the concessions and services that one party might be able to provide at little or no expense, which pander to the ego or the sense of justice of the other party, but which would never be considered by a court since the concessions would not be valid forms of damages for a court. Inducements to settle have included annual invites to works Christmas Parties and outings, appointments to the board of social committees, change of office, new furniture, enhanced titles such as Assistant Office Manager, the repainting of the outside of a premises and the planting of a tree.

A good example of a settlement is one where the monetary value of the claim had been agreed, but still the claimant would not settle. After probing by the mediator and the claimant's legal representative, the home circumstances of the claimant were such that any moneys received would be spent on the family and not herself. Settlement was reached by arranging for the claimant to have her hair styled at a top salon. She had not deprived the family of any money, but had received something which in the normal course of events she would not have contemplated having as she would not have spent money on herself.

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NEGOTIATION AND CONFLICT

Introduction. Negotiation is an everyday fact of life for everyone. A prerequisite of negotiation is the existence of a dispute. The factors that elevate a difference between people into a dispute or conflict are the size of the gap between views and the importance attached to their view points by the parties. We all engage in negotiation, albeit frequently at a low level of intensity and in an unsophisticated manner. Within the work place we rapidly develop parameters in which to settle day to day routine matters adapting to the peculiarities of the job and the people we work with. Recourse is only made to third party dispute resolution when our own negotiation techniques fail to produce a satisfactory result. By this stage it is clear that there is a conflict or significant dispute.

Third party dispute settlement may involve firstly either an expert determinator, an adjudicator, an arbitrator or a judge, or secondly, settlement may be achieved by negotiation, frequently with the help of representatives, and on times through the good offices of a third party such as a conciliator or mediator. It is the second of these that we are concerned with here. Frequently the sanction for a failure to successfully conclude the negotiation is that the parties will then have recourse to the first form of third party dispute settlement mentioned above, taking the matter to adjudication, arbitration or the courts. If on the other hand the negotiation is for engagement in an activity then the sanction is withdrawal from the venture.

Whilst it is clear that there are undesirable conflicts, domestic disputes, social disturbance, war and aggression being obvious examples, in many situations conflict and dispute are positive aspects of human behaviour and the result is frequently beneficial in terms of the sum of satisfaction generated for both parties, though clearly the negotiated settlement may result in one party getting more and another getting less than they had hoped for.

The parameters of potential benefits from a negotiation are commonly expressed today in terms of :-

Best **A**lternative **T**o a **N**egotiated **A**greement

(BATNA)

and

Worst **A**lternative **T**o a **N**egotiated **A**greement.

(WATNA)

Provided the agreement is located midway between these points for both parties then the negotiation can be considered a success. The outcome is a compromise. Compare the negotiated settlement with that of the adjudication / arbitration / judicial outcome where one party is a winner and the other a loser.

There are many theories on negotiation strategy. Indeed, the strategy appropriate to any dispute will depend entirely on its context, from industrial relations, to consumer / supplier, to construction, tort, domestic, public, private or international etc and will vary depending on the mechanisms adopted such as conciliation, mediation and on the form of sanction such as withdrawal from the adventure or moving on to a trial. Equally the type of preparation, needed for a negotiation, will depend on the same variables. Nonetheless, negotiation is a skill, an interpersonal skill, and it is possible to learn a number of strategies to improve one's negotiating performance. Furthermore, there are tactics which can be adopted to maximise the negotiation process.

Above all, it is important to understand that negotiation is a bargaining process. The negotiator must have a clear understanding of what both parties want out of the process and to be able to recognise the respective strengths and weaknesses on both sides in order to make a realistic assessment of what is achievable and what is not achievable. A failure to realistically assess the opponent's bottom line could result in a sell out. If one settles below that figure or on the negotiation failing if your target lies above that figure.

There is no shortage of books on negotiation methodology , some short and concise, with lists of do's and don't and others that are very long, tedious and potentially convoluted. Maddux's book, Successful Negotiation is relatively small and compact, with lots of short lists and bullet points, a few of which are set out below.

CHAPTER EIGHT

MADDUX : Outline Analysis of Negotiation Process.

Maddux claims that to be an effective negotiator one needs to :-

1 Be aware that one has entered into a negotiation.

2 Be able to distinguish between needs and wants.

3 Appreciate the importance of pre-negotiation preparation.

4 Understand the various stages of negotiation.

5 Be able to employ a range of strategies effectively.

6 Be able to employ a range of tactics effectively.

7 Adopt a confident manner with a win / win approach.

Maddux defines negotiation as "The process we use to satisfy our needs when someone else controls what we want." And goes on to state that "Negotiation occurs because one has something the other wants and is willing to bargain to get it."

A win / win philosophy requires the negotiator to take the other party's needs into consideration. The key to both parties winning is to identify the needs of the other party that do not detract from your own needs. It is both practical and ethical. Ethical in that a degree of fairness to both parties is aimed at in the outcome and practical in that without having a preparedness to give the other party something, there is nothing to negotiate about.

Benjamin Franklin stated that *"Trades would not take place unless it were advantageous to the parties concerned. Of course, it is better to strike as good a bargain as one's bargaining position admits. The worst outcome is when, by overriding greed, no bargain is struck, and a trade that could have been advantageous to both parties, does not come off at all."* The win / loose or Zero option involves both parties adopting a get/no give position.

Distinguish between :

Model	PARTY ONE		PARTY TWO
1	Give / Get	Versus	Give / Get
2	Get / Give	Versus	Get / Give
3	Get / Give	Versus	Give / Get

The approaches to negotiation adopted in Models 1 and 3 can succeed

But the approach adopted in Model 2 is likely to run into a stalemate.

Maddux identifies 6 stages in negotiation

1 Getting to know one another – preparation.

2 Statement of goals and objectives.

3 Starting the process – separating issues or bundling – and prioritising – setting the agenda.

4 Expressions of disagreement and conflict. Identify each party's wants.

5 Reassessment and compromise. Recapitulation and bargaining. Give / get – or principled negotiation.

6 Closure – agreement in principle or settlement.

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MEDIATION METHODS FOR MEDIATORS AND PARTY REPRESENTATIVES

Maddux on Planning and Preparation.

1 Where to start – identify what you want and what you can give and set a time scale in the light of amongst other things, where relevant,
   - a economic impact on both parties
   - b supply and demand
   - c past precedent and standard practice
   - d time constraints
   - e legal implications and considerations
   - f long and short term advantages and disadvantages.

2 Consider where to get information

3 Develop a time perspective

4 Identify sources of power. Sources of power include
   - a Persistence – give the other party time to think – and try again and again
   - b Competition – you may have other options
   - c Expertise – knowledge and skill
   - d Legitimacy – back up claims with documentation
   - e Involvement – if one is involved then the other party will emulate you – for the lawyer this means going beyond the routine.
   - f Attitude – be positive - reduce stress by avoiding anger and frustration – take a break.
   - h Set high goals at the outset – not low expectations
   - i Make smaller concessions than the other side.
   - j The response of the other side is always unpredictable – so it is always worth trying a gambit even if you suspect acceptance is unlikely.

Strategies by Maddux

1 High ball – low ball - ask for highest price or offer to pay the least.

2 Pinpoint the need – by finding out what the other party is willing to accept. "If not this, what then will you accept ?"

3 Challenge – question an assertion by reference to facts or precedents.

4 Defer – take time out to consider – puts pressure on other side wondering what you will do – they may make concessions to encourage you to accept.

5 Split the difference

6 "Salami" – split issues up and separate them off and trade.

7 *Fait accompli* – do something then present it to the other side as complete.

8 Standard practice.

9 Deadlines.

10 Feinting – red herring – ask for something one does not want so that it can be conceded in exchange for something you do want – ie create something with which to bargain where perhaps there is nothing originally with which to trade.

11 Apparent withdrawal. Call the bluff.

12 Good guy / bad guy – where there is a team.

13 Limited authority. This is far as I can go without more authority – works if time is of the essence to the other party.

CHAPTER EIGHT

Maddux – mistakes to avoid in negotiation.

1 Inadequate preparation

2 Ignoring the give / get principle.

3 Use of intimidating behaviour

4 Impatience.

5 Loss of temper.

6 Talking too much and not listening.

7 Arguing rather than influencing / persuading by education.

8 Ignoring conflict – accept it and resolve it.

Maddux Negotiator's Guide to Preparation

Checklist

1. Define goals and objectives

- Exactly what do I want from this negotiation?
- What do I have to get to meet my needs?
- What am I willing to give up to get what I want?
- What are my time and economic requirements for this negotiation?

2. Clarify the issues

- What are the issues as I see them?
- What is the supporting framework for my position?
- How will I present it to the other party?
- What are the issues as seen by the other party?
- How will they support their position?
- What appear to be the significant differences in the way the parties view the issues?

3. Gather information

- Who will I be negotiating with and what do I know about them? How do they approach a negotiation? What are their ego needs?
- When and where will the negotiation take place? What advantages or disadvantages do the alternatives have for me? ... for the other party?
- What are the economic, political and human implications of the issues?
- What personal power do I have that can be used constructively in this negotiation?

4. Humanise and set the climate

- How can I best establish rapport with the other party?
- How can I establish a win/win climate?

5. Prepare for conflict

- What will be the major points of conflict?
- How will I determine what the other party needs as compared with what they want?

6. Compromise/resolution of the issues

- How will I attempt to resolve conflict? How will I respond to the other party's attempt to resolve conflict?
- What concessions am I prepared to make? Under what conditions?
- What do I expect in return for my concessions?

7. Agreement and confirmation

- How formal must it be?
- What approval process will be required? How long will it take?
- What implementation steps will be needed?

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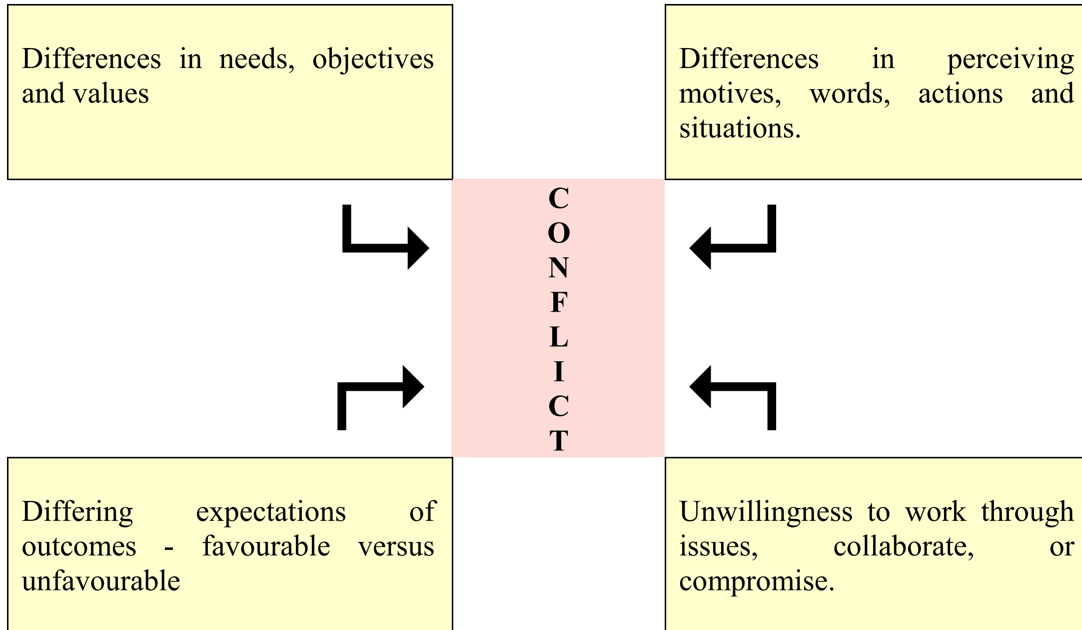
Maddux : Managing Conflict During Negotiation

The term 'negotiation' itself suggests the presence of conflict. It may be minor or a monumental block in achieving success for the parties involved. The parties may mean well, but each is trying to achieve what they perceive to be the best objective. Conflict is present because of:



Conflict becomes unhealthy when it is avoided or approached on a win/lose basis. Animosities will develop, communications will break down, trust and mutual support will deteriorate, and hostilities will result. The damage is usually difficult (sometimes impossible) to repair.

Conflict is healthy when it causes the negotiators to explore new ideas, test their position and beliefs, and stretch their imagination. When conflict is dealt with constructively, the negotiators may be stimulated to greater creativity, which should lead to a wider variety of alternatives and better results.

Negotiators do not always get all they 'want', even in a successful negotiation. But they do work hard to get what they need. Each negotiator wants to get as much as she/he can, yet each knows a compromise may be necessary, that original goals may have to be altered. If a negotiator is to get what she/he wants, the other party must understand her/his point of view. This requires that the substance from which negotiating positions were developed be made clear. This is a process of education, not argumentation.

Good negotiators always look for ways to convert divergent ideas into channels of common interest. They emphasise and build on matters that can be agreed upon and avoid dwelling on points of difference.

Five basic styles of conflict resolution are described on the following page. It is easy to identify those that have the highest likelihood of producing positive results in a negotiation.

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CHAPTER EIGHT

Conflict resolution styles

There are five basic approaches to conflict resolution. They can be summarised as follows. Indicate the one you are most likely to use in a negotiation.

Style	Characteristic behaviour	User Justification
Avoidance	Non-confrontational. Ignores or passes over issues. denies issues are a problem	Differences too minor or too great to resolve. Attempts might damage relationships or create even greater problems.
Accommodating	Agreeable, non-assertive behaviour. Co-operative even at the expense of personal goals.	Not worth risking damage to relationships or general disharmony.
Win / Lose	Confrontational, assertive and aggressive. Must win at any cost.	Survival of the fittest. Must prove superiority. Most ethically or professionally correct
Compromising	Important all parties achieve basic goals and maintain good relationships. Aggressive but co-operative.	No one person or idea is perfect. There is more than one good way to do anything. You must give to get.
Problem Solving	Needs of both parties are legitimate and important. High respect for mutual support. Assertive and co-operative.	When parties will openly discuss issues a mutually beneficial solution can be found without anyone making a major concession.

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Principled Negotiation : Goldberg summary of Getting to Yes :

A different approach to negotiation is described by Roger Fisher and William Ury in their widely read book, *Getting to Yes.* This approach has variously been characterized as "principled," "integrative," "problem-solving, interests-based," "win-win," or "co-operative."

The five basic elements of this approach, according to Fisher and Ury, are these:

1. ***Separate the people from the problem.***
   The negotiators should attack the problem, not each other.

2. ***Focus on interests not positions.***
   Your positions are what you want. Your interests are why you want them. Focusing on interests may uncover the existence of mutual or complementary interests that will make agreement possible.

   One interest that Fisher and Ury suggest is typically important to both negotiators is that of maintaining a good long-term relationship between them. This relationship is of much less concern to those who follow a competitive strategy and is often a casualty of such a strategy.

3. ***Invent options for mutual gain.***
   Negotiating need not be a competitive game in which each negotiator seeks to gain the biggest slice of a fixed pie. To the contrary, there may be bargaining outcomes that will advance the interests of both negotiators. One well-known example involves the two children who are trying to decide which of them should get the only orange in the house. After some frustrating negotiations, they decide to divide the orange in half. If they had realised that one child wanted to squeeze the orange for its juice, and the other wanted to grate the rind to flavour a cake, an agreement that maximised the interests of each would have become apparent.

4. ***Insist on using objective criteria.***
   There are some negotiations, or at least some issues, that are not susceptible to a "win-win" approach. The price of something can be such an issue, since each dollar I give you is one dollar less for me. To minimise the risk of either inefficient haggling or a failure to reach agreement on such issues, Fisher and Ury suggest that the parties focus on objective criteria to govern the outcome. Thus, instead of negotiating over the price of a used car, one party might look to the blue book value, the other to the depreciated cost. Even if they cannot agree on which standard should control, focussing on objective criteria may narrow the range of disagreement.

5 ***Know your best alternative to a negotiated agreement (BATNA).***
   The reason you negotiate with someone is to produce better results than you could obtain without negotiating with that person. If you are unaware of what results you could obtain if the negotiations are unsuccessful, you run the risk of entering into an agreement that you would be better off rejecting or rejecting an agreement that you would be better off entering into. For example, it would be unwise to agree to buy a car from a friend for $6,000 without knowing how much a similar car would cost you elsewhere. The latter figure is your BATNA.

   You should also know as much as possible about the other party's BATNA. If your friend does not sell the car to you, how much can she get for it elsewhere? Knowing the answer to this question might substantially affect the amount of your offer. It may be difficult to determine the other party's BATNA, but the value of this information is often sufficiently great that you should be willing to devote considerable effort to determining it. At the very least, you should ask questions of the other party designed to aid you in determining the other party's BATNA.*

The concepts of principled negotiation, as set out by Fisher and Ury, have gained many converts, and are widely espoused. Still, this approach has been criticised on both the tactical and strategic levels. At the tactical level, it has been suggested that a Fisher and Ury "principled negotiator" would be incapable of standing up to a negotiator who followed the precepts of Meltsner and Schrag.

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CHAPTER EIGHT

In an excerpt from *Getting Past No* (1991), William Ury offers tactical advice for dealing with a so called *Meltsner and Schrag* "Tough" negotiator. Are you persuaded that following the advice provided by Fisher and Ury would enable you to deal with such a negotiator ? Goldberg, amongst others, is not convinced.

ADDITIONAL READING

Erstwhile mediators should not be **content** with this summary of either the views of Maddux, Fisher and Ury or of Goldberg and are strongly urged to read Successful Negotiation : How to Create a Win-Win Situation and Getting to *Yes* and *Getting Past No* in their entirety. Another useful book is Essential Legal Skills : Mediation by Michael Noone. Cavendish Press. In the same series see also Negotiation by Diana Tribe.

Dispute Resolution – Negotiation, Mediation and other process. Goldberg. Aspen.
Successful Negotiation. R.Maddux. Kogan Page.
Getting to YES. Fisher & Ury. Arrow.
Getting Past No. Ury : Random House Business Books.
You can Negotiate Anything, H.Cohen. Lyle Stuart.
The Win Win Solution. Brams & Taylor. Norton
The Mediation Process. C.Moore. Jossey Bass.
The Complete Negotiator. G.Nierenberg. Berkley.
The Negotiating Game. C.Karrass. Harper.
Give & Take. C.Karrass. Harper.
Negotiate to Close. G.Karrass. Fireside.

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THE MEDIATION SESSION.

Use of joint sessions. The mediation will commence with a joint session where both parties get the opportunity to set out what they perceive the problem to be and to state what it is that they want to get out of the mediation. This session is vital and it is important to listen and learn about the other party's view point and to identify the strengths and weaknesses of their position both from a practical, a legal and from an emotional stand point. The importance or urgency of a settlement and essential needs of the other party often come to light at this stage. Care must be taken not to give away any adverse views on your client's side at this stage beyond a willingness to participate in the mediation process and to convey a willingness to settle the dispute.

The mediator will normally set the ground rules for this session and seek the approval of both parties. The mediator will set the running order for the introductory session which may be limited to an opening speech by both representatives but may also include an opportunity for both parties to say their own piece. If the latter course of action is to be taken you must decide whether it is advantageous to let your client talk. If not try to veto the suggestion from the mediator but without alienating your client. This is best done by discussing the issue before the session starts and by advising your client that in the circumstances it would not be a good thing and by getting your client to agree. If your client is to speak then prepare your client well not only in what they will say but also in respect of questions you anticipate they might be asked by the mediator. Note that the mediator will not normally allow the other party to interrupt or to ask questions directly to you or your client. The mediator will want all questions to be channelled through the chair affording the mediator with the opportunity to rephrase or paraphrase questions introducing a degree of diplomacy and moderation into the questions.

Depending on the complexity of the issues being mediated there may be a number of joint sessions as the mediation progresses, either to establish agreement on a particular issue. Where a mediation covers several distinct issues, some of these issues may be resolved and signed off as separate agreements. Even if the mediation fails to settle all the issues, those that are settled may represent a significant benefit to the parties and ensure that if the outstanding issues go to trial, the trial will be that much shorter, quicker and less expensive.

A joint session where a central issue, identified by the mediator, is agreed and settled, often means that subsequent issues can be quickly agreed and a final joint session used to sign off the mediation.

Joint sessions can be used to break a log jam situation where, the mediator having paved the way, once the parties come face to face again an agreement can be brokered or at the least a new agenda set for the next round of caucus. Sometimes a party is simply waiting to hear the other side state something first hand before being willing to proceed further.

A joint session can also provide the opportunity for a party to let off steam, to let the other side know how they feel. Once done further progress can be made.

The final joint session is used to conclude the agreement.

Using 'private' sessions to your advantage. Private session or "caucus sessions" involve one party and their representative and the mediator. The mediator will use the sessions to gather information about the state of affairs and the expectations of your client. By shuttling between the parties the mediator can start to narrow the gap of expectation between the parties and identify areas of common ground upon which to base a settlement.

The private session provides you with an opportunity to feed the mediator with your expectations and to find out what the other party really wants. You can explore possible solutions with the mediator and the mediator will pass on to the other side any offers that you are prepared to make and any information that you would like the other party to consider and take into account.

Methods of using the mediator.

To establish 'good faith' Good faith can be established by making concessions which the mediator then passes on to the other side.

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To establish bargaining parameters You can discuss your own bottom line with the mediator. The mediator will in turn be able to give some indication of the other party's bottom line thus setting the parameters for the negotiation. These base positions may well change, and indeed need to change, several times during the private sessions. Eventually if a settlement is to be achieved the distance between the parties will be narrowed to such a point that a compromise which is acceptable to both parties can be brokered.

To float 'trial balloons'. One way of raising the stakes for your client is to make demands or suggest needs that are not essential but which if given credence by the other side will ultimately look like compromise on your behalf once dropped.

To convey 'threats'. The use of threats is always dangerous and can be counter productive. However, in given situations they can be very effective. An outright refusal and a statement that you are willing to see the other party in court can force the other side to make an offer or to accept what you have offered. The closer one is to a settlement and the narrower the gap between the parties the more effective such threats become.

Establishing negotiation momentum. A vital aspect of mediation is movement. Outright stonewalling may boost your client's ego and show that he or she is ",not for turning" but will not do much for the settlement process. Making minor concessions, conciliatory sounds, even if lacking in substance, or even sending an apology or an indication of regret that the problem has developed can be sufficient to create momentum. Once momentum gathers pace it becomes progressively easier for each party to make concessions and thus brings the settlement process closer to a conclusion.

Establishing a rapport between parties and the mediator. It is important for the party representative to help the client to establish a rapport with the mediator. Of course the mediator must play his or her part in the process but the party representative who wants a settlement to be reached must work with the mediator to establish and reinforce the good faith and neutrality of the mediator. You can do this by asking the mediator to confirm that everything is confidential and your client's position will not be jeopardised by disclosure to the mediator.

Using the financial value of time to your advantage. The cost of trial and the delay that can result in a failure to settle are powerful incentives for a party to settle.

Using 'structured settlements' to your advantage. Structured settlement arise out of the fact that a complex issue can be broken down into a number of separate settlements. As each issue is settled the magnitude of the problems separating the parties start to shrink and with each agreement the conclusion of the dispute gets easier and closer.

Closing to a settlement. This is a very important stage of the process and your professional advise will be required to ensure that the terms of the agreement are water tight and that no unpleasant traps find their way into the agreement. Often your client's guard will be down at this stage as mental exhaustion sets in so concentration at this stage is very important.

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MEDIATION SESSION NEGOTIATION TACTICS

EFFECTIVE LEGAL NEGOTIATION

Introduction. The purpose of all non binding forms of ADR is to facilitate negotiated solutions to conflict. In this sense negotiation is the primary means of dispute resolution, and expert negotiators can sometimes achieve on their own resolutions that otherwise might have required third-party intervention.

The topic of negotiation is too vast to be covered in a single outline. Nonetheless, this material is designed to introduce a useful framework for considering negotiation and for responding to the difficult challenges that confront those participating in the negotiation process.

Framework of Negotiation : As a preliminary matter, it is helpful to consider three aspects of the negotiation process, namely 1. Preparation, 2. Evaluation and 3 Focusing on objectives

Strategy : Many people see negotiation, like chess, as a game of strategy. Some believe they become more effective by developing an increasingly large repertoire of clever strategies. No doubt negotiation, when consciously practiced, does involve strategy. On the other hand, psychologists remind us that human beings are creatures of habit. Studies of human behavior in routine situations suggest that most negotiators follow basically the same patterns in every negotiation. This suggests that patterns are keys to an understanding of the negotiation process, and brilliant strokes of strategic insight are less important, in the long run, than the patterns that the two parties follow.

Communicating with one's own side. Several years ago, a legal research team tracked 100 cases scheduled to go to trial within the next three months in Phoenix, Arizona. The research focused primarily on the cases that settled, and the majority did settle. However, one of the most important findings resulted from examining the cases that went to trial because they represented failures to settle. According to the attorneys in those cases, more than half the cases (53 percent) went to trial because one of the clients refused to accept settlement terms recommended by that client's own attorney! If this is correct, then more than half of the cases went to trial not because the two attorneys were unable to reach an agreement but because one of the attorneys failed to communicate adequately with his or her own client. This confirms a point that has been made by others: Negotiators must invest time and energy not only in negotiating with opposing solicitors, but also in communicating-negotiating-with their own client. Failure to devote adequate time and attention in either direction leads to failure in the negotiations as a whole.

Study of the Importance of Negotiating Skills : Several years ago, a law professor conducted an experiment designed to shed light on the effect of negotiating skills on the outcome of cases. Experienced attorneys in a medium-sized town were asked to participate in a negotiation, knowing that if they participated, the results of the experiment would be published with their names attached. Remarkably, 40 attorneys volunteered. They were randomly divided into two groups, one designated as plaintiffs attorneys and the other designated as insurance defence attorneys. The attorneys on each side received the appropriate case file for the same personal injury case and were given two weeks to prepare. The facts assumed that the accident occurred in their state and that local law would apply and verdicts would conform to jury verdict reports for the locality. Photocopies of jury verdict reports for comparable injuries from state court juries in that city were included in the case files of both sides. The attorneys came together on a Saturday morning and were asked to negotiate the case to a conclusion if possible, knowing that their outcome would be compared with that of other attorneys in the experiment. In short, their reputations were on the line.

With 40 attorneys, there were 20 pairs of negotiators. At the end of the experiment, only 14 of the 20 pairs were willing to submit the results with their names attached. We can only speculate on the outcomes of the other six. The results for the 14 pairs appear in the Table below. When the results were recorded on a chalkboard, the attorneys involved were disconcerted by the patterns that emerged in terms of the plaintiffs' opening demands and agreed settlements. The plaintiffs' opening demands ranged from $32-675K, which is all the more impressive when one considers that the attorneys' were operating on identical facts in a single jurisdiction. The final outcomes were somewhat less extreme, but remarkable just the same. They ranged from $15-95K.

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CHAPTER EIGHT

RESULTS OF EXPERIMENT ON NEGOTIATING SKILLS

Pair No	Plaintiff's Opening Demand	Defendant's Opening Offer	Agreed Settlement
1.	$32,000	10,000	18,000
2	$50,000	25,000	no agreement
3.	$100,000	---	56,87
4.	$110,000	3,000	25,120
5.	$675,000	32,150	95,000
6.	$100,000	5,000	25,000
7.	$475,000	15,000	no agreement
8.	$210,000	17,000	57,000
9.	$180,000	40,000	80,000
10.		0	15,000
11.	$350,000	48,500	61,000
12.	$87,500	15,000	30,000
13.	$175,000	50,000	no agreement
14.	$97,000	10,000	57,500
		Average Settlement $47,318	

How can we account for the extreme variation in opening offers? Two explanations come forcefully to mind: expectations and strategic posturing. With respect to expectations, it is safe to assume that the plaintiff's attorney #5, who opened negotiations with a demand of $675,000, probably expected to receive a higher settlement than the plaintiffs attorney #1, who demanded only $32,000. So expectations obviously account for some of the differences in the opening demands and, as a consequence, in the final outcome as well. On the other hand, the plaintiff's attorney #5 was obviously willing to settle for substantially less than his initial demand of $675,000 because he agreed to a final settlement of $95,000. It appears, then, as a matter of strategy, he communicated his high expectations by making an extremely high opening demand. In his case, the strategy worked; he received an extremely high final agreement. The plaintiff's attorney #7 was not so fortunate; he demanded $475,000, thus communicating high expectations, but was unable to reach any agreement at all.

These results are not surprising. They illustrate in very concrete terms the complexity of the negotiation process and the conclusion that negotiating skills do indeed make a difference in the outcome of individual cases. Even the most experienced negotiators know that they always have more to learn.

Cooperative versus Aggressive Negotiators : Basically all practicing solicitors / legal representatives can be characterized as following one of two basic negotiation patterns. The patterns are too complex to be described in a single word, but in order to discuss them, it is helpful to label them with descriptive names. The word which best characterizes the first pattern is ***cooperative,*** the word for the second pattern is ***aggressive.*** About 60 percent of lawyers fall into the cooperative pattern and 40 percent into the aggressive pattern. Sections 5 and 6 contain lists of the characteristics of the two types of negotiators as well as the advantages and disadvantages of pursuing an aggressive or cooperative strategy.

Aggressive Negotiating Strategy : Aggressive negotiators move psychologically ***against*** their opponents. They use:

1. Intimidation (demoralize, browbeat, perturb)
2. Threats
3. Superiority (every kind, in every way)
4. Blame (problems are caused by client and opponent).

Under the smoke screen of the attack, aggressive negotiators follow a four-fold strategy:

1 Make extreme demands
2 Make very few concessions
3 If concessions must be made, make very small ones
4 Create false issues

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The aggressive approach is risky because it can:

1 Create misunderstanding between the two sides; therefore agreement takes longer and consumes more resources
2 Increase the number of failures; for example, the aggressive negotiator's trial rate is more than double that for cooperatives
3 Raise a strong likelihood of retaliation
4 Be less profitable than a cooperative strategy, in repeated encounters.

The primary advantage of aggressive negotiating is that it avoids the risk of exploitation and, if used with some restraint, can be effective.

Cooperative Negotiating Strategy

Cooperative negotiators move psychologically ***towards*** their opponents. They:

1. Establish common ground
2. Emphasize shared values
3. Are trustworthy (fair, objective, reasonable).

Cooperatives establish credibility and good faith by:

1 making unilateral concessions, and
2 seeking the highest joint outcome (benefiting both sides).

The dangers or risks of the cooperative approach include:

1 the possibility of being manipulated and exploited because one has assumed that by being fair and trustworthy and making unilateral concessions, the other side will feel an irresistible moral obligation to reciprocate; and
2 the probability of righteous indignation when the opponent fails to reciprocate in a cooperative manner.

The benefits of the cooperative approach are:

(1) in repeat situations, a savvy cooperative strategy yields a better individual result than an aggressive approach; and
(2) in virtually all situations, a cooperative strategy yields higher joint benefits than an aggressive tactic.

Effective and Ineffective Negotiators : An effective negotiator is not necessarily someone whose chosen strategies and tactics prove to have placed you on the back foot in a negotiation to the detriment of your client. Likewise an ineffective negotiator is not necessarily a negotiator who is doing a bad job for their client to the benefit of your own client. The extent to which a negotiated agreement must be fair to both parties is dealt with in the section on ethics below. Rather, “Effective” and “Ineffective” address the extent to which a negotiator facilitates movement in a negotiation. Rather, the ineffective negotiator is one who has adopted stonewalling tactics which up to that point in time have prevented one from making any progress in the negotiation.

Most Effective Negotiating Strategy : No one negotiation strategy can be recommended for use every time that negotiations are entered into. The choice of strategy depends on the relationship between the parties. If there is no relationship between the parties and no possibility of a relationship only a one off transaction then the adoption of a competitive strategy may be recommended. A prime example would be the purchase of a car from a dealer. The purchaser wants the best possible deal as regards price and other services whilst the dealer wishes to maximise his profit. There is little or no possibility of an on going relationship. In this case, a competitive strategy would be adopted by the dealer however it is disguised. The purchaser can adopt his own strategies, but the recommended course would be a competitive strategy if there is no on going relationship. If the purchase was a private deal between friends, then different strategies may be adopted. These could be of the compromise or collaborative nature as there is an on going relationship which existed before the transaction and hopefully will be maintained after the transaction.

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CHAPTER EIGHT

It is incumbent upon the parties to adopt the strategy or strategies most important to the relationship from the outset. This means identifying the relationship, if any, whether it is worth preserving or not and equally important what strategies will the other part adopt. This leads into the next section.

Handling the Aggressive/Ineffective Opponent : The aggressive/ineffective opponent in many instances is the same person though need necessarily be the same. In this section it is the aggressive/ineffective opponent who will be dealt with. Too many people identify negotiation strategy as being one thing and one thing only and that is to be aggressive to "brow beat" the opponent into submission. This tactic may work against an ineffective negotiator, but in dealing with professionals it is hardly likely to work if the opponent has done their "homework" correctly. This process involves identifying what is being negotiated, what are the alternatives, if any, and is there an alternative. In many cases, the choice is simple, WALK AWAY from the negotiation table if you can achieve a similar deal/ transaction elsewhere. If you cannot achieve the same deal elsewhere, there are a number of strategies to be adopted. One of the first is to suggest a break from the negotiation to reduce the tension between the parties. On resumption of the talks make it clear that the aggressive stance being adopted by the other side is not acceptable and that the atmosphere is such that it may be better to return another day, if at all. It works!! People have invested time and money in preparing for the negotiation and if you are prepared to walk away, the other party will have to explain the failure to his constituency. A task that he may not relish.

An aggressive stance is often adopted because negotiators think that it is expected of them. If you are firm without being aggressive, it is often possible to restore equilibrium to the negotiations. This is important if there is the possibility of an on going relationship. The aggressive/ineffectual negotiator and his demands need to be met firmly, but fairly.

Handling the Aggressive/Effective Opponent : The aggressive/effective opponent is probably the most effective opponent and the most difficult to deal with face to face. There are however, pitfalls with this approach. In a one off transaction where the only outcome is a win – lose position then by all means adopt this approach. Purchasing a car or a house can justify this approach. In other circumstances where there is an on going relationship or if a collaborative approach was adopted then this approach is not the best method to adopt.

At no stage lose your temper or resort to threats in your negotiations with such people, if you do you have lost!!!!

Remain calm at all times and use the forcefulness of your well rehearsed arguments to nullify the stance of the aggressive. Do not concede any ground in the hope that this will pacify and satisfy this opponent. It will not!!

The more that you concede without concessions on the other side's part the more that they will want. Adopt the strategy of if "you do that we may do this" towards concessions. If he does not wish to compromise or collaborative, do not concede to his demands as you may well find that you have become the classic "salami" in that you have conceded little by little until your opponent has the whole.

Remember there is no shame in walking away from an opponent who will not negotiate. It is your choice. The question which you need to ask yourself is "where is my negotiating range?" If the negotiations are outside that range, why negotiate? If they are inside the range are you prepared to meet the aggression or is your BAP or BATNA a better proposition. The choice is yours do not let the aggressor dictate. If he dictates, he controls the game and you lose, possibly big time.

Do not be afraid to walk away, ask for an adjournment or seek alternatives. Do not give into the aggression. You will only make a rod for your own back as you will be perceived to be a poor, weak negotiator.

Do not however, under any circumstances adopt the same aggressive stance. It will only make a bad situation worse as a cycle of behaviour will have been established. Maintain a calm, reasoned attitude whatever the provocation. Attempt to defuse the situation, but do not make unnecessary concessions simply to keep the dialogue going. Assess the situation carefully and be prepared to withdraw from the negotiations if you are uncomfortably with the way that they are being conducted.

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Balancing Toughness and Cooperation : The balance between knowing when to be tough and when to co-operate is the difference between a successful negotiator, who consistently achieves positive results and the unsuccessful negotiator who frequently fails to conclude the negotiations or who has antagonised the other side to such an extent that they have become "bloody minded" to the point that even when presented with a good deal still they press for more or are prepared to walk away from the negotiations.

A good negotiator is well prepared and has developed strategies and alternatives prior to the negotiations commencing. He knows what his constituency wishes, he should have reasonable knowledge of the other side's position to allow him to be able to make a reasoned guess at their negotiating range and their BAP.

It is this knowledge coupled with the knowledge of the relationship, if any, between the parties which allows the good negotiator to make concessions which "cost nothing" in terms of his side's position, but can be of major value to the other side.

Contrary to popular belief, good negotiators are not born, but they can be made. The skill comes from experience, of knowing when to be firm, when to make concessions and when to adopt a collaborative strategy.

This book cannot give you these skills, but there are courses available which deal solely with negotiation, its techniques and strategies. If in your working life you need to negotiate on a regular basis then you are highly recommended to attend such a course. If you do not negotiate on a regular basis, then a viable alternative is to employ a professional negotiator to undertake your negotiations for you.

Negotiation skills can be learnt and experience is invaluable, but we all have to start somewhere. It is a matter of balancing priorities to meet the needs of clients and what can be achieved from the negotiation process with the need to protect on going relationships, if any.

Note in particular that needs are not wants or desires. Must haves are non negotiable. If you remember these points you have a good starting point to develop your negotiation skills.

Self Assessment Exercise No 8

1. Identify the sources of arbitration law relevant to arbitration practice in England & Wales
2 Identify the sources of arbitration law relevant to international arbitration practice

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ADDITIONAL READING

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Schoenfield M.K. & R.R. *McGraw-Hill 36 Hour Negotiating Course*. McGraw-Hill Inc.
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Sun Tzu *Mastering the art of war*. Ed Thomas Cleary. Shambhala
Twist.H. *Efective Interviewing*. Blackstone Press.
Ury.W. *Getting past no*. Random House
Wells.C. *Negotiating Tragedy*. Sweet & Maxwell

WEB-LINKS

Mediation Essays. http://adrr.com Steven Marsh
Mediate.Com : www.mediate .com