**Upchurch Watson White & Max Mediation Group**
**and the University of Florida Levin College of Law Institute for Dispute Resolution**
are proud to co-sponsor today's Webinar:

# *Negotiate Like a Pro – Professionalism Matters*

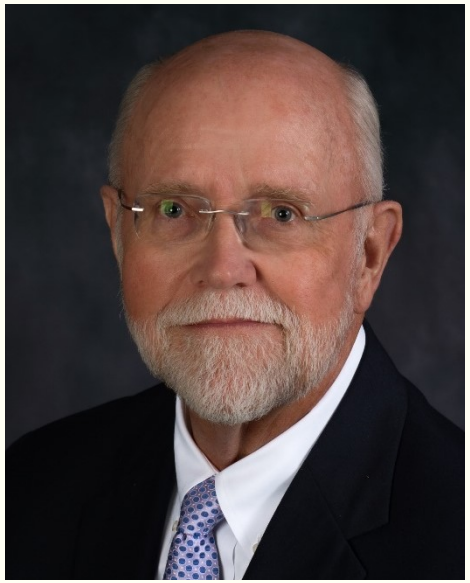
# NEGOTIATE LIKE A PRO – PROFESSIONALISM MATTERS

A Presentation of Upchurch Watson White & Max



# Meet our presenters…

- **Howard R. Marsee**



- Mediator / Arbitrator / Special Magistrate
  Upchurch Watson White & Max
  hmarsee@uww-adr.com
  uww-adr.com

- **Kimberly Sands**

- Principal / Mediator
  Upchurch Watson White & Max
  ksands@uww-adr.com
  uww-adr.com

HAVE YOU EVER NOTICED THAT SOME NEGOTIATORS CONSISTENTLY GET BETTER RESULTS AT MEDIATION?

# PROFESSIONALISM MATTERS

# OUR GOAL TODAY

- Share with you those attributes that we and our colleagues have observed in the really good negotiators;
- Explore what “professionalism” means in the context of negotiation.

# Preamble: A Lawyer's Responsibilities
# Florida Bar Rules of Professional Conduct

- "As a negotiator, a lawyer seeks a result advantageous to his client but consistent with requirements of fair dealing with others."
- "In all professional functions, a lawyer should be competent, prompt and diligent."
- "A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others."

# THE TRULY EFFECTIVE PROFESSIONAL NEGOTIATOR KNOWS, ALMOST INSTINCTIVELY, THAT SHE DOESN'T HAVE TO BE DISAGREEABLE IN ORDER TO DISAGREE.

Realizes that negotiation is persuasion and that you don't persuade by:

- Intimidating
- Badgering
- Shouting
- Insulting
- Degrading
- Doing battle

# Bob Woolf, Friendly Persuasion

- “I’m going to tell you the real truth about negotiation.  It is not about going to war. It is about talking, not screaming. Negotiation is the respectable art of persuasion between two parties, whether the person on the other side of the table is Henry Kissinger or your local used-car salesman.”

## THE PROFESSIONAL KNOWS THAT NEGOTIATION BEGINS WHEN HE HAS HIS FIRST CONTACT WITH THE OTHER NEGOTIATOR.

- Works continuously to foster an atmosphere of good will.
- Avoids creating an atmosphere of animosity and distrust.
- By the time he gets to mediation, his adversary respects him.

# The professional comes to the mediation totally prepared.

- Knows all the facts, issues and law.
- No loose ends.
- Is not lazy or careless with his statement of facts, issues or law.
- Is prepared to field the adversary's and mediator's probing inquiries.
- Has thoroughly informed his client of all risks, of the mediation process, and has avoided creating any unreasonable expectations.

# The professional adheres always to the “Golden Rule.”

- Deals candidly and fairly with everyone.
- Expects that they will deal candidly and fairly with her.
- Commands dignity and respect by exhibiting dignity and respect.
- Doesn’t violate her adversary’s trust. Knows that trust is too hard won to squander.
- Has over time developed a reputation for integrity, honesty, candor and fair dealing.

# The professional is careful of his choice of voice and language.

- No rough, loud or profane language.
- Refined humor only.
- Pleasant voice. Polite.
- No “demands.” (proposals, suggestions, etc)
- No ultimatums.
- No “take it or leave it.”
- No “I’m insulted.”

# The professional at all times remains calm and cordial.

- Doesn’t whine.
- Doesn’t get emotional without a goal.
- Doesn’t take things personally.
- Doesn’t raise her voice.
- Cultivates a spirit of cooperation.
- Exhibits compassion and acknowledges the human side of the problem.
- Is self-effacing and leaves his ego at the door.

# The professional doesn’t expect capitulation without negotiation.

- Perceptive people won’t communicate with you unless reciprocal risks take place.
- You want to gain information.
- People won’t share information with you unless you incrementally share information with them.
- Avoids setting or yielding to artificial deadlines or ultimatums.

# The professional actively listens.

- Gives visual and audible signs of listening.
- Doesn’t interrupt.
- Let’s them have their say.
- Doesn’t denigrate.
- Understands the concepts of “venting” and “face.”

# The professional understands the role of the mediator.

- Role not to jawbone or beat up anyone.
- Facilitates the orderly identification, discussion and evaluation of the issues.
- Conciliatory influence.
- Fosters communication.
- Friend of the mediation process.
- Is bound by ethical constraints.

# The professional:

- Avoids overstating or misstating his case, or over reaching – and thereby losing credibility.
- Knows who is making decisions in the other room.
- Is patient of other's foibles and the pace of negotiation.
- Doesn't gloat or brag when successful. Is gracious in victory and defeat.
- Doesn't burn any bridges that may lead to future negotiations.
- Knows how to resist uncontrollable urges.

# The professional creates “intellectual” and not “visceral” opponents.

- The intellectual opponent “can be addressed on an intellectual level with factual and descriptive comments. In this climate, despite the difference in the initial viewpoint of the parties, creative problem solving can take place.”
- “A visceral opponent is an emotional adversary, who not only disagrees with your point of view, but disagrees with you as a human being…. Once you make visceral opponents, they tend to stay with you a long time, for they are difficult to convert… Avoid making a visceral opponent the way you would avoid a contagious disease.”

**Herbert Cohen, You Can Negotiate Anything**

# The professional understands the basic tools of negotiation.

- Anchoring.
- Crossing the zero line.
- Numbers as semaphore.
- Arithmetic break points.
- Brake lights.
- Brackets.
- Risk analysis.
- The end game.

# Anchoring – early negotiation

- Psychological phenomenon
- We are often unduly influenced by the initial figure we encounter. (e.g., car sticker)
- Reference point that anchors our expectations about an item's or claim's value
- Studies show that negotiation outcomes often correlate to the first offer.
- May be a value to Defendant going first. Depends on circumstances

# Anchoring and Information

- A party with limited information will be disproportionately influenced by the other's anchor.
- Heuristics: a cognitive shortcut employed by the mind to devalue information that can only be processed with difficulty.
- In setting your anchor, it becomes important to evaluate the relative degrees of information available to you and to the other party.

# Anchoring – The Predictability Trap

- Plaintiffs or claimants especially vulnerable
- Reputation for being a two-for, three-for, four-for, etc
- Defendants can only start at zero absent a counter-claim, but can also be guilty of always starting at the same number case after case
- Loss of credibility – short and long term

# Crossing the zero line

- Usually case of claim and counterclaim
- Calls for special attention to the anchor point
- Usually the first party to offer a “washout” is the party who pays.
- Should know at outset if you are going finally to be payer.
- But your anchor may favorably influence how much you pay at end of day.
- Calls for persuasive sell of your case to justify.

# Numbers as semaphore

- Don’t be the drunken sailor
- Every number should have signal value -- conveys information
- Tug of war of midpoints
- Yes, the other party is reading the midpoint.
- Don’t be impatient
- Value of time/effort investment
- Midpoints can be deceptive

# Arithmetic breakpoints

- The larger the delta, the more important round numbers become.
- 1000 – 5000 – 10,000 --- 50,000 – 100,000, etc.
- The crossing of a round number has signal value.
- Reluctance to cross a round number has signal value.

# Brake lights

- Premature slamming on of brakes can be catastrophic.
- Several ways of signaling approaching end.
- Diminishing reductions or increases, especially near round numbers.
- Oral messages:
  - “We are almost out of  room to move;
  - “We can’t do much more, but we could pay the mediator’s fee (or other collateral benefit).”

# “Brackets”– Theory and Perspective

- Often misunderstood and poorly used.
- “Bracketing” actually begins with the first demand and first offer.
- Bracket is formed by the initial, opposing anchors (These “bracket” a range.)
- Important: The resulting midpoint is a fiction created by the parties’ opening anchors.
- A fiction because defendant can only start at or near zero

# More bracket theory and perspective

- Arguably, opening midpoint is plaintiff's real anchor
- Parties begin to strive toward or away from the fictional midpoint as progressive offers and counter-offers are made.
- At some point one or both parties realize that the starting bracket is unproductive (Early? Late?)
- No one is willing to reach the fictional midpoint

# Negotiating a new bracket

- Process often referred to as “bracketing”
- Actually a “conditional offer” or a “re-bracket”
- Mediator or a party proposes a new negotiating bracket that, in effect, negotiates new anchors.
- Effort to create a new, more realistic midpoint
- Who should initiate the new “bracket?”
- Most often the defendant (its first real anchor)
- Plaintiff may be reluctant because, so far, Plaintiff has dominated the mid-point.

# Bracket advantages

- Expedites the process – eliminates baby steps
- Relieves negotiation fatigue
- Moves from struggle over fictional mid-points to struggle over more realistic mid-points
- Breaks cycle of mutual discouragement
- Signals willingness to settle on some rational basis

# Bracket disadvantages

- Main disadvantages arise from poor timing or unsophisticated usage.
- Timing – if too early, can diminish the psychological impact of your initial anchor
- Timing – if too early, reduces effectiveness of time/effort investment tool
- Failure to understand signal being sent ( mid-point or range)
- Failure to incentivize.

# Mediator's bracket – pros and cons

- Distinguish between a confidential "*would you, could you?"* and a mediator's bracket.
- Former explores negotiation positions
- Latter offers the mediator's suggested range to both parties
- Former is relatively risk free.
- Latter carries risk -- if mediator has misread center of gravity between the parties, one party will feel overly encouraged, and the other will become discouraged and resistant to the mediator

# Creating the new bracket - Tips and Caveats

- Proposed new bracket must incentivize the opposing party. Do you have room?
- Make sure you can live with some number reasonably near the midpoint of your bracket.
- Conditional proposals create assumptions.
- Remember: you can’t un-ring the bell.
- Must be clear who moves next if the new range is accepted.
- Many build deception into the midpoint.
- North or south of goal.

# Reading re-bracket proposals

- Trading brackets is a dance.
- How reliable is your opponent?
- What, if anything, does their midpoint signal?
- Does it make a difference whether the brackets are being proposed by the mediator?
- Beware regressions of the midpoints.
- Watch the midpoint of the midpoints.

# Framing the bracket

- Mediator: “ Could you move to X if you knew the other party would respond at Y?”
- Mediator: Could you respond with Y if you knew the other party offered to move to X?”
- Party: “We would move to X if we knew you’d respond with Y.”
- Party: “ If you move to X, we will respond with Y.”
- Mediator or party: “I/we suggest that a more appropriate bargaining range is X and Y.”

# Response to the proposed bracket

- Accept the bracket
- Accept one leg of the bracket but counter to the other leg
- Counter to both legs with a new bracket
- Reject the bracket concept altogether and return to incremental negotiation.
- End negotiations entirely

# Risk analysis – Do the math

- Important that both parties calculate the net result
- Defendant should calculate Plaintiff's net early – provides insight into what it might take to settle case.
- Each party should calculate his/her own net sometime in the negotiation.

# Risk analysis – the Plaintiff

- Settlement
- $100,000
- - $40,000 attny's fee
- -$10,000 lien
- -$  5,000 costs
- = $45,000

- Verdict
- $150,000
- -$ 60,000 attny's fee
- -$ 10,000 lien
- -$ 20,000 costs
- = $60,000
- Have to risk a zero verdict to gain $15,000

# Risk analysis – the Defendant

- Settlement
- $100,000
- +$20,000 attny's fee
- +$5,000 costs
- =$125,000

- Verdict
- $ 50,000
- +$40,000 attny's fee
- +$20,000 costs
- =$110,000
- Have to risk high verdict to save $15,000

# The end game

- Clothing near-end proposals with different degrees of finality
- Repeating final numbers
- Enticing the final number to make one more move
- Offers to split the difference
- Collateral concessions.
- The mediator number.
- The silver bullet

*"By God, for a minute there it suddenly all made sense!"*

# Thank You For Joining Us

"***Negotiate Like a Pro – Professionalism Matters***"

Florida Bar Course #
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CLE Credits
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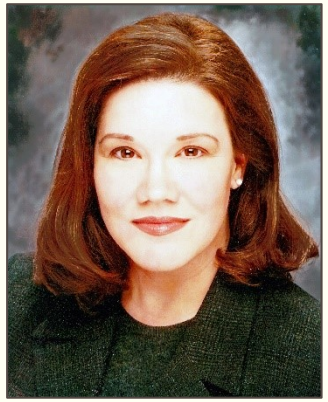
Professionalism: 1.5

Please contact Howard at hmarsee@uww-adr.com or Kimberly at ksands@uww-adr.com with questions or comments regarding content.



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