

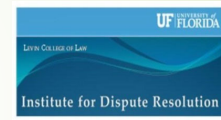
**Upchurch Watson White & Max
Mediation Group**

and the **University of Florida**

Levin College of Law

Institute for Dispute Resolution

are proud to co-sponsor today's Webinar:



RISK ASSESSMENT IN MEDIATION **Obtaining and Using Information** **for Optimal Negotiation Outcomes**

Meet ...




**Our presenter,
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RISK ASSESSMENT IN MEDIATION
Obtaining and Using Information
for Optimal Negotiation
Outcomes

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Upchurch Watson White & Max

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**It didn't occur
to the ancients,
not even the
Greeks, that
risk could be
measured or
controlled**

- Reason lay in their attitude about the future.
- Perceived the future as a matter of luck or random variation
- Future was in the hands of the gods
- Might foresee it through augers or oracles
- But the thought of controlling risk was outside their cultural and philosophical reality.

We of course can do a better job than the ancients.

I have served as a mediator for 26 years and as a lawyer and professional negotiator for 30 years before that. After observing thousands of negotiators—great, average, and awful— I have discovered some major differences among them.

Today, I will be offering a few suggestions that should improve your negotiations, whether within or outside mediation.

CAVEAT – will be covering a lot of ground quickly.

There are basically three types of truly awful negotiators

Clueless




The Warm Body




Ego-Maniacal





They all share an inability to collect information, digest it, or utilize it effectively.

INFORMATION IS THE BODY AND SOUL OF NEGOTIATION



Information is power

Each party wants to know the real limits of the other party.

THE STRUGGLE

- ▀ Each party wants to obtain more information than they are willing to give up.
- ▀ Common strategy for each party to conceal their true bargaining posture

Information that each party wants to know about the other

• Do they have authority to settle?

• Who's making the decisions?

• Each attendee's role in negotiations?

• Are they making telephone calls? Why?

• What are their situational pressures?

• What are their constraints—both inside and outside mediation?

More information each party wants to know about the other

- Who's paying the fees and costs?
- What are the major obstacles to settlement?
- What is the lawyer's skill level?
- What is the negotiation style of the lawyer or his/her client?
- What expectations has the other party brought with them?
- What is their choke point?

- Is the Defendant solvent?
- Does the Defendant have the wherewithal to fulfill the terms of settlement?
- Insurance coverage: Limits; Deductibles? Reservation of rights?
- Does Defendant have a prospect of recovering his/her/its losses? Indemnity? Reinsurance? Subrogation? Contribution?
- Is negotiation being handled by the person who created the cause of action?
- If an insurance claim, the insurers track record for settlement and negotiation style?

Information the Plaintiff wants to know about the Defendant

Information the Defendant wants to know about the Plaintiff

- What does the Plaintiff expect to do with the settlement proceeds?
- How badly does the Plaintiff want to settle?
- Are fees and costs a problem?
- Are there unpaid bills, liens, letters of protection, or subrogated interests that Plaintiff must satisfy from the proceeds?
- What are the tax consequences for the Plaintiff?
- Will the Plaintiff lose entitlements?
- What is the net to Plaintiff after all deducts?
- Is the Plaintiff or the lawyer driving the negotiation train?



"I'd just like to know what in hell is happening, that's all! I'd like to know what in hell is happening! Do you know what in hell is happening?"

Obtaining Information Before the Mediation



Correspondence.



Depositions and interrogatories.



Conversations with opposing counsel.



Conversations with other attorneys.



Exchange of mediation summaries.



Review your client's costs and fees.

The letter of understanding

Extremely valuable tool.

Especially in pre-suit mediations.

Flushes out information.

Confirms information known or suspected.

Increases comfort level of relying on unverified information.

Minimizes risk of mediation blow up.

Should you provide a copy of your mediation statement to the other party?

- Consider whether a skillfully drafted Mediation Statement ought to be provided to the opposing party—maybe even one different from the one you provide the mediator.

Information Gap Concept

- In cases where you suspect they will be coming to the mediation without a full grasp of the facts or issues, this might prove helpful in educating the other lawyer and his client.
- Will have to be cautious about what information you provide.
- Remember that their poor grasp of the facts and issues may not help you in settling the case.

Consider conceding obvious points of risk

Bullet-pointing the risks that you see for the other party

Letting them know you are willing to exchange information essential to a serious risk evaluation

Getting everyone to think in terms of assessing respective risks

During opening statement demonstrate that you are serious about assessing risk and that you expect the same from the other party.

Consider:

Essential persons and information sources should be available during mediation.



Lien holders, persons
with letters of
protection



Referring attorney,
appellate attorney



Annuity experts



Excess insurers,
re-insurers, E & O
insurers



Legal research tools

Obtaining information at mediation

Remember, other party
will expect reciprocity

Effective listening.

Get to mediation early while
guards are down.

Tit-for-tat – the reciprocal,
measured release of information.

Quiet, persistent probing.

Feign confusion or impotence.
"We need help."

Non-verbal cues.

"Columbo technique"

Don't be afraid to ask questions:

If we come to terms, do you have authority to make a deal?

It would really help us if we knew...

Could you shed some light on the question of...

What is Ms. Jones' role here today?

Do you need to call someone? We don't mind, but we'd like to know. We'd be happy to provide information directly to them if it will help.

Are there any time constraints today?

Is there some other information that we ought to be considering at this point?

Essential that the mediator and plaintiff's lawyer calculate with the plaintiff:



The net to him/her from any settlement.



The net to him/her from a judgment.



How the two nets compare.



What risks he/she must take to realize a dollar amount greater than the net provided by a negotiated settlement.



The tax consequences.

The mediator and the defendant should go through the same plaintiff-calculations.



May provide insight into what it might take to settle the case.



Defendant can thus consider how far apart are plaintiff's ultimate position from defendant's



Will help understand the plaintiff's risk perspective.



Failure to consider the opposing party's perspective is a common mistake.

The defendant's lawyer and the mediator should calculate with the defendant:



What it is going to cost him/her/it to achieve victory at trial and subsequent appeals.



What the best-case and worst-case scenarios at trial mean for him/her/ it.

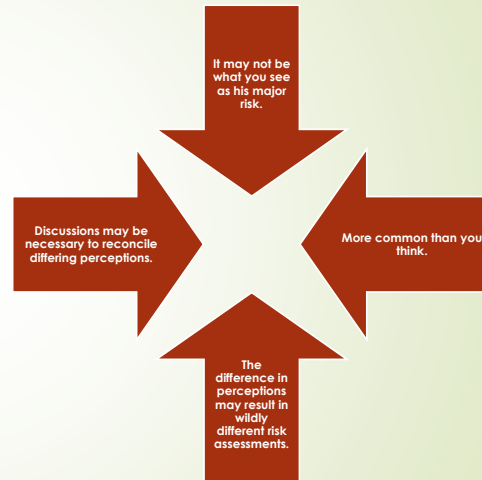


The tax consequences for him/her/it.



What the non-monetary costs are to him/her/it. (Professionals, institutions, business relationships, etc.)

► **Make sure you understand what the other party perceives as his major risk.**



What is the other party's tolerance for risk?

Are they gamblers by nature?

Is the risk symmetrical, especially with respect to financial resources?

How important is a quick resolution for your client? For your opponent?

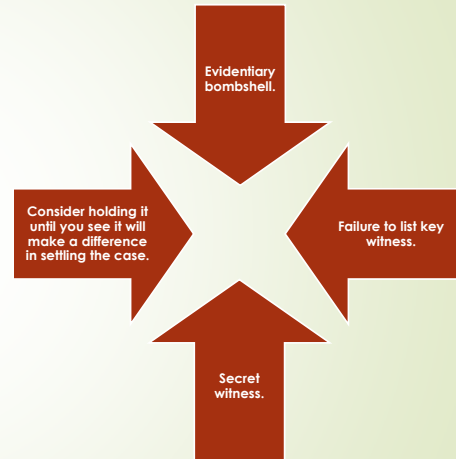
Some people enjoy litigating.

The other attorney or party may not be as smart or informed as you, therefore they may be more prone to make bad decisions.

They may suffer from egomania.

Their bad decisions could make it difficult or impossible to settle the case.

➤ What to do with the “secret weapon”



High-Low agreements.

Settle the claim and let the court decide fees and costs.

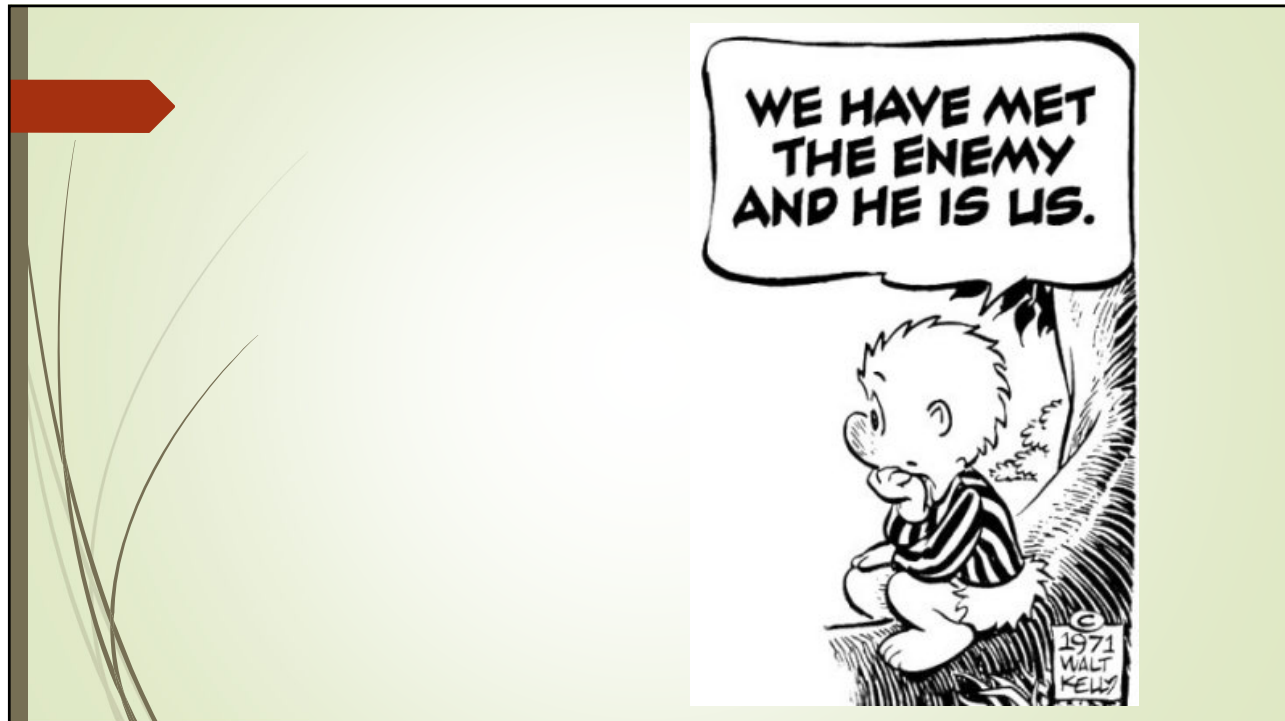
Settle some issues or claims but not all.

Negotiate trade-offs on evidentiary disputes.

Settle with some but not all opponents.

Agree upon pro rata shares of liability.

Don't overlook non-outcome-determinative agreements that may hedge your client' risk.



Thank You For Joining Us.

RISK ASSESSMENT IN MEDIATION Obtaining and Using Information for Optimal Negotiation Outcomes

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