

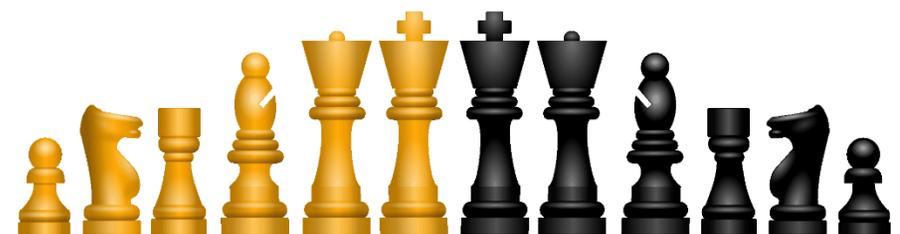
**Negotiation and Mediation
Communication Gambits for
Breaking Impasses
and More:
What Do I Say When I Want To ...**

**Professor John Barkai
University of Hawaii Law School**



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Introduction

Gambits: This book contains over 3,000 phrases (which I call gambits) for more than 400 negotiation and mediation topics that negotiators, mediators, mediation advocates, and judges can say to be more effective in their settlement work. Those phrases are mainly focused on breaking impasses, which are the heart and most difficult part of conflict resolution. The word “gambit” in this book means the opening few words, phrases, or sentences in a conversation that provide the transition to a new topic.¹ The gambits herein will improve your negotiation and mediation skills.

How to use this book: Obviously, read the book and apply these gambits to your practice. However, the most effective way to add these gambits to your personal ADR toolbox is to say them out loud to practice. I strongly encourage you to do that. My friends call such reading out loud in my classes the “Barkai Chorus.”

Use this book to shop for negotiation and mediation gambits like shopping for clothes. I was over inclusive when compiling the lists in this book. I would never use all of them. Sort through the piles of them on the pages, focus on a few, and try them on. Say the ones you like best out loud. Make some alterations in the wording to fit your conflict resolution approach and personal style, and then display them proudly as you stride towards successful conclusions in your negotiations and mediations.

Because there are so many gambits in this book, I would suggest that you check mark the gambits that sound best to you, make your list of favorites in the last two pages of this book, and review that list before your next negotiation or mediation. However, if you actually followed my advice and said them out loud as you went through this book, I’ll bet they will be on the tip of your tongue when you need them.

Although reading gambits out loud may seem like simply child’s play, psychologists tell us that child’s play builds adult skills. Reading gambits can improve the ADR skills of adults. Reading gambits out loud sticks the gambits

¹ Sometimes the word “gambit” is used to describe the opening move of a series of chess moves. That definition was the inspiration for the chess pieces on the book’s cover. The tongue represents speaking the gambit. I needed a couple of visuals to spice up the long title..

into negotiator’s or mediator’s mind more effectively that just reading the gambits silently to yourself.

My history with gambits and reading them out loud in class and trainings:

I have been conducting negotiation and mediation trainings since 1980. I developed the reading-out-loud teaching technique for gambits in the early 1990s when I started teaching negotiation and mediation to many non-native speakers of English. During that time I taught negotiation and mediation in Hong Kong for law and other graduate students at what was then called City Polytechnic University, did mediation trainings for the judiciaries of Kosrae and Pohnpei states of the Federated States of Micronesia, started teaching classes in the University of Hawaii business school’s Japan Focused and China Focus Executive EMBA programs for 17 years and for the Japan America Institute for Management Science (JAIMS) for 35 years, taught at the Asia Pacific Center for Security Studies, and did other programs with non-native speakers of English.

What I saw from those non-native English speakers was startling. After in-class exercises where non-native speakers of English had practiced some communication skills by reading gambits out loud, a few minutes later they were using those same gambits (often very awkwardly) during in-class negotiation and mediation simulations. I concluded reading gambits out loud would probably also improve the communication skills of native speakers of English, especially those who were non-native speakers of effective conflict resolution (which is almost everyone).

I have collected tens of thousands of such gambits over the 40+ years that I have been a mediator, mediation teacher, and mediation trainer. For the past 20 years, an end of the semester assignment in all my negotiation and ADR courses has been to ask students to write several pages of gambits for negotiation and mediation situations. [See a sample gambit assignment page 118.] My gambit collection is from those class assignments, books, articles, videos, trainings, friends, and many that I have made up myself. The best of those gambits are the heart of this book.

Breaking impasses: Breaking impasses is at the heart of many negotiations and virtually all mediations. Although many writers and trainers have proposed definitions of impasse, for this book my definition will simply be - the parties to a negotiation or mediation are “stuck” and cannot seem to move forward. Negotiators can get stuck when no party is willing to make a first offer or the parties cannot close the gap between their respective offers. Almost all parties enter mediation because their unassisted negotiation has come to an impasse. They have not be able to resolve their dispute by themselves and are now seeking help from an impartial, neutral third-party call the mediator.

I see almost everything about mediation, and many parts of negotiation, to be focused on breaking various impasses whether it be 1) getting the first new offer in mediation, 2) keeping the negotiations going during the mediation, or 3) closing the last gap between the claimed, final, bottom-line positions of the competing parties. Although this book artificially separates the gambits by organizing topics

of negotiation, mediation, impasse breaking, mediation advocacy, and judicial settlement conferences, the gambits are largely interchangeable between sections. If you cannot figure out how to move the ideas presented in these sections to other parts of negotiations and mediations, you probably should not attempt to mediate anyone else's dispute. In my opinion, with minor word modifications, the ideas underlying most gambits in this book can be used in almost all of the roles covered in this book – negotiator, mediator, lawyer advocate, or settlement judge. Although some recent scholarship divides impasses into categories of “wanted,” “forced,” and “unwanted,” this book is focused on breaking the impasses whatever their nature and whenever they occur. Additionally, I believe that all of my mediator friends would agree that being a mediator has made us better negotiators. We often apply mediator techniques in our own negotiations, a form of undercover mediation.

I have produced this book of ADR gambits so you do not have to re-create the wheel of gambits, but rather can steal the wheel from this book and ride it to your destination. Borrow and modify the gambits you find in this book and make them your own. I hope the materials are of use to you, and that your personal and professional negotiation go better for you after using these materials.

Why an 18-word book title? The title is long, and it accurately conveys the book's content and the approach to using the material. Each of the 3,000 phrases can be spoken by a negotiator, mediator, mediation advocate, or judge to accomplish specific goals in negotiation or mediation. It also makes the book easier to find with a general internet search.

Regarding copyright – there is none. I give you permission to freely copy and sections of this handbook under a Creative Commons Attribution (CCBY) 4.0 License, which essentially means that you may use, share, or adapt the information in these pages for any purpose, even commercial, if you give "appropriate credit" and indicate changes you made, if any.

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Disclaimer: The author and publisher are offering no legal advice. I cannot guarantee your success at negotiations and mediations. Not everyone can be a great chef, but everyone can learn to cook better. I think you will be better after using this book, but that is as much as I will say.

Corrections, omissions, suggestions? Contact me at barkai@hawaii.edu

Cover images represent the ideas of 1) gambit is an opening move in chess and a transitional statement in negotiations and mediations, and 2) that ideas and strategies are just ideas in your mind until execute them with your mouth.

Share your gambit. If you have a great gambit that you are willing to share, email it to me at barkai@hawaii.edu, and I can add it to this book.

Aloha
John Barkai

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This book contains more than 3,000 negotiation and mediation gambits, organized into over 400 topics. The gambits are organized into six groupings 1) negotiation, 2) mediation, 3) breaking impasse, 4) mediation advocacy [lawyers representing clients in mediations], 5) judicial settlement conferences, and 6) general ESL (English as a Second Language) gambits.

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Negotiation Gambits

Active listening

- So you're telling me...
- I'm picking up that...
- As I get it, you felt...
- If I'm hearing you correctly...
- So, as you see it...
- I'm not sure I'm getting you, but...
- So you feel that...
- It sounds as if you are concerned about...
- What I am hearing is...? Is that right?
- Before you go on, do you mean...
- Do you mean that...
- I just want to make sure that I understand you are coming from. To clarify, your point of view is that...

Agreeing to a procedure or agenda

- May I suggest that we begin by...after that...then...finally...
- We should first establish a procedure that...
- Here's what I would suggest as an agenda... How do you feel about it?

Accepting offers

- That should be acceptable to us...
- That is fine with us...
- Okay, we will accept that.
- I think we have an agreement...
- It's a deal then!
- That would seem reasonable.

Accepting suggestions

- Okay, I'll try that...
- That seems to be a good idea...
- Yes. I can do that...
- Of course. I'll do that...

Add credibility to your position

- This is how we see the problem.
- Let us tell you how we came to our conclusion.
- This is the reason why our position is stronger.

Admitting

- We have made a mistake.
- The fact of the matter is...
- We are to blame...
- It's all our fault...

Apology – offer or ask for one

[See the Apology heading in the Breaking Impasse Gambit section, p. xx]

Ask more questions

- Tell me more about that.
- What do you mean by that?
- Can you put that in other words?
- How do you feel about that?
- What do you mean by... ?
- Can you be more specific?
- How so?
- In what way?
- That's helpful, keep going.
- Humm, hum.

Ask them to explain

- Can you tell us why you feel so strongly about your position?
- If you were in my shoes, why might you think this offer is not acceptable?
- If you were in my shoes, why might you accept this offer?"

Asking about ability

- Will you be able to...
- Is it possible for you to...
- Would you be able to...

Asking about agreement

- Wouldn't you agree ...
- Don't you think ...
- Can you guarantee ...
- Do we see eye to eye about...
- Have we smoothed out our differences about...
- Have we settled our differences about...
- Are we in agreement on...

Asking about feelings and opinions

- Which alternative do you prefer?
- Let's look at the alternatives and decide which is best...
- Which idea do you like the best?
- What do you feel is most important?
- Tell me more about...
- How do you feel about...
- What is your reaction to...
- What is your thinking on...
- What brings you to conclude that...
- Can you elaborate on that idea?
- Can you reflect on that idea?

Asking for a commitment

- Is your company willing to put \$X in?
- Would you be in favor of a proportional contribution, perhaps an equal contribution ...?
- Well, are you agreeable to ___?
- Could you guarantee that you could ___?
- Can you commit to ___?

Asking for more information

- Do you have some examples of what you mean?
- What are some other ways that we could approach this problem?
- What other things should we consider?
- How should we proceed with this?
- Would you like to add something to what has already been said?
- Can you elaborate on that idea?
- Can you suggest a way that we should approach this?
- Can you reflect on that idea?
- That is very interesting. Tell me more about...

Changing one's mind

- Sorry, there has been a change.
- My boss told me we won't be able to do that.
- Back at the office, they won't let me go through with what we were talking about.
- I would like to withdraw from...
- I need to back away from on...
- Although I thought it would work. We just can't do that.
- I would like to back out of...

Clarifying

- There is no problem with __; however,...
- Let me clarify...
- Let me share the big picture with you...
- And it's only ___ that can provide ___?
- You are absolutely right. The products we need must ___

Comparing products and services

- ...performs better than...
- ...is superior to...
- ...has an edge over...
- ...is ahead of...

Concession – ask for one

- Can you do better than that?
- How much are you willing to come down?
- Is that your best offer?
- Will you take X for it?
- I can't go any higher than X.
- What can you do?
- We're going to need something more than that.
- What is your side willing to do?
- Can you do anything to meet us halfway?
- Would you consider making any concessions?
- Now, I know that you must concede at least something.
- You have to give to get.
- What are you willing to give?
- Honestly, is that really your best offer?
- We would agree to X, if you would do...
- I'm sure you can do better than that. What's a reasonable offer?

Concession – don't use the word "concession"

[Don't use the word "concession." Some people equate "concession" with yielding, conceding, losing, and being blameworthy. They will not do that.]

- Do you have another idea?
- Do you have something that I might like better?
- Can you make a different proposal?
- Can you give me a more interesting proposal?
- What's another approach?
- Have another path forward?
- You might like it better if we...

Concession – make one

- We would be willing to pay \$X for Y.
- What do you think of this?
- What if I were to ...
- I would like to offer a concession.
- Does this meet your needs?
- In an effort to show good faith, we are willing to...?
- Well, I think we can accommodate you there.
- Perhaps we could provide?
- Maybe this could work for both of us.
- We can probably do something along those lines.
- Because I want to see this thing work, I'll..
- I am willing to ...
- Although we feel we deserve X, we can live with Y.
- If I were to agree to that, what would you be willing to do in return?
- To get this going, I'll be flexible on this.
- I really don't normally do this, but...

- Would this solve our problems?
- Because you are ..., I'll do this.
- I have a new idea.
- Here's a different proposal.
- I think you'll like this better.
- Here's some good news for you. We could...

Conditional offers

- I've got an idea. If we ____, can you ...?
- We'll agree to ____ if you...
- We're prepared to give ____ discount if...
- We are prepared to __ on the condition that...
- We can't consider __ until we reach an agreement on...
- We are going to have to discuss __ first and then...
- There are no guarantees that I can persuade my client, but what if I could get my client to agree to X. Would you agree to that? I'm not willing to put the effort persuading my client to change his negotiated position if you are going to refuse his offer.

Create doubts

- I have a different viewpoint.
- Our investigation tells us that...
- I have different facts....
- I have a document to shows the opposite of you what you are telling us....
- Yeah, but our witness is more likely to be believed.
- You are applying the wrong rules...
- That is not how the system works here....
- What happens when this becomes public?
- If we don't agree today we will
- How much time away from his business is your client willing to spend to be involved in litigation?
- I think if your client wanted to practice law, she should have gone to law school.
- How will your employees [children, boss, friends] feel when subpoenaed, and notified....?
- She will eventually wear you out with her....
- My client has money and connections
- I cannot create a precedent for
- My boss insists that....
- I can do better elsewhere....
- You need to deal with me or else....
- Our expert knows more X than yours.
- If we don't reach agreement, this is the likely scenario....
- You seem to assume that they will be wise and rational. Maybe, maybe not.
- I disagree with everything you said except for the fourth issue.
- You are right, there are seven risks for us. I would like to respond at an appropriate time to each one of those.

Negotiation Gambits

- I have a one-page document here which has anticipated everything you just said, and gives our responses in point form.
- We have heard all of this before and responded in detail in the letters and pleadings dated....
- We have never heard any of this before. Why?
- Sure, I agree my client faces some risks. But we say that these risks are small compared to the four burdens you have.
- You have pointed out X risks I do face. In fact, you left a few out. We have carefully weighed all the risks and we are not worried.
- People who live in glass houses should be careful about throwing lists of risks.

Deadline

- I think that we keep coming back to the same thing over and over. Arguing without time limit will get us nowhere. Let's set the deadline. If we cannot reach an agreement by tomorrow morning, we will ...
- Let's work on this issue for another 10 minutes, but if we can't conclude it then, we will move on.

Defer until later

- Let's break down the whole thing into issues (a), (b), and (c). I think that issue (a) is the most difficult to solve. Why don't we put aside this issue and negotiate first the relatively easier issues of (b) and (c)?
- Before we go over that issue, let's start with X. We'll get to that other issue in due time.
- If we put that issue aside for a while, maybe we won't even have to deal with it.

Deflect a direct question

- Although this is not our official position, someone would probably respond with....
- We would need more information to give an official answer, but tentatively....
- Assume they make reasonable concessions, we could theoretically....
- I don't think we can answer that until we discuss....
- Well, I don't think that can be addressed up front.
- Why don't we see what the mediator thinks is fair?
- I don't think either one of us are in a position to give an objectively fair estimate at this point.
- What would you want if you were in my position?

Delay a decision

- I'm sorry, but I'll have to give that more thought.
- Let me get back to you on that matter.
- I'll have to check on that.
- I'm not ready to go that far.
- Why don't we address that later.
- I have an idea of what I want. However, I'd like to hear your offer first.

Negotiation Gambits

- I have to talk to Jim about this.
- Before I provide you with that information, can you tell me how much this whole thing is worth to you?
- That's a question I'm not prepared to answer yet.
- Perhaps if you tell me about your interests, we may be able to find an appropriate figure.
- I'm going to have to digest this material a little longer. Do you mind if we break until after lunch?
- Let's go over this proposal one more time later. I really want to give it the attention it deserves.
- Let me get back to you on that.
- Can I have a couple of days to think about it?
- Let me discuss it with my supervisor before I give you a solid answer.
- I need to talk it over with my supervisor, but it sounds good.
- Let me sleep on it before I decide.
- The approval will take a couple of days. I'll be in touch.
- I'm late for an appointment, let me get back to you when I return.
- I like what I'm hearing so far, but I need to have my accountants (or engineers, etc.) take a look at it.
- Can we make our final decision on ____? That's when everyone will have had a chance to look at the project more thoroughly.
- Now is not a good time because (excuse), how about we discuss it on _____?
- Can you get me more information before I decide?
- Sounds great, but give me a day to think about it
- It need to talk to my ... about this first
- This is a serious decision that requires careful consideration
- Thanks, but I cannot make a decision right now
- Unfortunately, I am so busy I can't get to it right away
- I promise to let you know ASAP
- I need to check with my ...

Don't jump at the first offer

- Although I appreciate you coming down on the price, we are still far apart based on what I can really afford. I would be willing to do the deal right now, I we can meet at ...
- Thanks for your offer. I'll need to think about it for a while. I'll get back to you.

Downplay your weaknesses

- It's not much of a consideration when you think about....
- I don't want to waste your time with the details because....
- At the end of the day, X isn't going to matter as much as Y.
- It depends on which way you look at it.
- That shouldn't even be part of the conversation right now.

Dumb is smart

- I don't know much about this, but I was told that...
- You probably know more about this than I do but...
- I may be wrong, but my understanding is that...
- I'm not really sure about this, and maybe you could explain it to me, but...
- Okay, I'm trying to make sure I understand can you explain that again?
- I'm sorry, but I really don't think I caught the gist of this proposal. Could you run through it again, but in more detail for me?
- I'm not sure I understand. How does your solution make it better for both of us?

Expand the pie

- I know we were having a hard time deciding where to go on vacation and who should take time off of work, but the main thing I want is for us to go somewhere together. The next time you have to travel for work, why don't I plan to go along too?
- Our companies have been quite competitive in the past, but if we can settle our differences and promote this industry standard, it will help increase both of our numbers of customers and give each of us a greater market value.
- How would you feel paying the total amount over time in instalments rather than all right now? Alternatively, you can pay at a later date with fair interest.

Expand the pie with an add-on offer

- I can't go lower on the price for the X, but what if I added Y. W would that do it for you?
- How about we settle on \$X for now, and I'll lend you my Y for a week?
- If you lend me \$X now, I'll pay you back in full in a month and I'll add 5% interest.

Exploring positions

- How important is...
- ___ is the most important thing from our point of view. How about you?
- If we were to say___, would that be acceptable?
- How would you feel if...
- Suppose we...
- Would you be willing to...
- Let's talk about a hypothetical situation...

Expressing feelings and opinions

- I would like to set the record straight...
- I would like to have an open mind about...
- I would like to insist on...
- I would like to share my priorities...

Giving information

- We have found that...
- Evidently...
- It seems that...
- I have discovered that...

Giving conditions

- What it boils down to is...
- I would like to make a point...

Expressing negative situations

- We have reached a stalemate...
- We have reached a dead end...
- Our negotiation has broken down...

Expose their tactic but continue the negotiation

- I might be mistaken, but I think you are trying to use the good-guy bad-guy tactic here. I want to do business with you, but I don't have time for these games.
- Look, you seem to be low-balling me. If you want to get into a range where we can do some serious negotiation, great. But if you are just going to keep trying to "steal the deal," go find someone else to negotiate with.

Express conditions

- I will agree to do that but only if you are willing to....
- I will let you keep this item, only if you promise to let me borrow it twice a year.

Fears – ask about theirs

- Tell me why you are so upset about my current offer. Maybe if we understand your fears/concerns, we can find a way to make the deal better.
- What is it that worries you the most about this situation?

Gather more information

- Tell me more about that.
- What do you mean by that?
- Can you put that in other words?
- How do you feel about that?
- What do you mean by ___ ?
- Can you be more specific?
- How so?
- In what way?
- That's helpful, keep going.
- Humm, hum.

Getting a better price

- When I spoke with the other salesman yesterday, he said....
- Hey, pal, do you think I was born yesterday?
- I'm robbing myself with the price I quoted you.
- They're selling the same thing down the street for....

Good-guy, bad-guy

- My boss assigned me to this task because he likes you and thinks you're very reasonable. Trust me, you don't want to have to deal with him. So what can you do now?
- I'm the good guy in our office. If it doesn't settle with me, they call in the pit-bull. Let's get started.

Guide the conversation back to your strengths

- We could spend all day talking about X, but that really means nothing when you consider Y.
- My client really feels that we ought to consider X first.
- I see what you're saying, but that really just proves....
- Perhaps we could continue our discussion of X.
- I'd like to see if we could go back to....
- If we could just address....
- This whole issue comes down to....
- Maybe it would help to think about it in terms of....

Highlight common interests

- Well, we both seem to agree that..., so I know we can come up with a solution for this.
- I completely agree with you that...

Ideal future

- Where do you see yourself a year from now in terms of this problem? How do you think we can get you there?
- What would be the best outcome for you?

Insulting first offers - how to respond

- That sounds like what you are hoping to get if there is going to be a trial. We both know that hardly any cases go to trial. How about we talk about some realistic settlement offers from both of us?
- I assume that is your "home run" number for a jury trial. However, this is settlement negotiation. No home runs or strike outs. Let's talk settlements.
- That's a very high (low) number. Can you tell me the reasoning behind your offer?
- Are you saying there is no liability? You can say that, but that isn't a settlement position. To talk settlement, you have to talk money.

Interrupting to give information

- I'm sorry to interrupt, but...
- Excuse me for interrupting. There is something that I would like to point out.
- Forgive me for interrupting. May I add something?

Introduce a position or interest

- We're here today because....
- Basically, what we want is....
- Where should we begin?
- I'll try to cut straight to the heart of the matter.

Justification

- We've done this with other clients...
- Our other clients have been very happy with...
- The amount of money you will save with this system will...
- You have to realize...
- This is a matter of great urgency.

Making a counter offer

- We could accept this if...
- How about...
- Would you be interested if...

Making decisions

- I would like to think X over.
- I would like to consider these terms
- In light of...
- In this case...
- Under these circumstances...
- On the basis of...

Making offers

- We can offer...
- We propose...
- We would be willing to...
- We cannot do any more than...
- Our bottom line is...
- We're prepared to...

Making suggestions

- I recommend that...
- Don't you think it would be a good idea to...
- Have you thought about...
- Would you be interested in...
- Why don't you...
- I think you should...

Money trade off

- Look, we can't budge on the price, but if you can go along with our price, I'll guarantee that I will ... [something else they wanted].
- We can work with trade-in value, down payment, interest rate, or sales price. What would you like to work with first?

More information – get it

- Any suggestions on how we can resolve this?
- Why don't you walk me through your thought process regarding...? That way I can get a better idea of what you need and why.
- I see... in the proposed agreement. Can you explain to me what your reasoning was?
- I'm not very familiar with your industry and market. Could you please explain the significance of...?
- How did you arrive at that valuation?
- What sort of motivations did you have regarding the... term in the agreement?
- That's interesting; tell me more.
- That's interesting; why would you say that?
- That's interesting; why would you do that?
- That's interesting; why would you ask that?
- Can you share more information about...?
- What information do you think we can provide to move the topic forward?

More information – persuade your client to reveal more

- I understand you don't want the other side to know some critical information but we might gain their trust by sharing some information with them.
- We don't have to put all our cards out on the table but maybe if we share more information, we have we can avoid reaching an impasse.
- Let's not be too hasty. Maybe if we share some information with them, we can find out if we have a better option.

More information – share it

- I think me sharing a little bit more would help us come to an agreement.
- Let me try and help you see where I'm coming from so I don't sound unreasonable.
- Just to give you a little bit of background,

More time for a decision

- In light of you points you just made, my partners and I need time to confer.
- I will not wager the state of my company on a whim. I need more time to come to a wise decision.
- I understand you may need some time to think about....
- If you'd like, we can take a break.
- Maybe we can revisit that at another time. How about we move on to...?

Offer - ask for one

- What are you looking for?
- What is your ballpark range?
- What are you willing to offer?
- We'd like to get this resolved today. What do you need?
- How do you see this?
- What do you think?
- Look, tell me what you need, and I'll tell you if we can work something out.
- Why don't we just lay our cards out on the table so that we can start sorting out the details. Go ahead, tell me what you want.
- How much are you asking?
- What will it take to get you to ...?
- What is your range?
- What is your bottom line?
- What do you think is a fair proposal?
- What are you willing to do to resolve this dispute?
- What is your solution?
- Could you tell me what you need?
- What would it take to preserve this relationship?
- What do you think we should do?
- Why don't you start us off in the right direction?
- Could you fill me in on what you're willing to do here?
- What would it take to close this deal right now?
- What kind of figure would get you interested?
- What is a reasonable starting figure for us today?
- To get the ball rolling, how about giving me a ballpark figure?
- (In your best Brando) Make me an offer I can't refuse.
- I'm open to suggestions.
- What do you truly want?
- What are you interested in?
- Why don't you tell me a little about what you're shooting for why you're shooting for that?
- Honestly, what is it that you really want?
- Why don't you tell us where you'd like to start this negotiation.
- What is your initial position?
- What is your general range?
- What do you have in mind?
- I'm open to listening to proposals.
- I'm open to listening to offers.
- What would a solution look like for you?
- Why don't you go ahead and make the first offer?
- What sort of ballpark figures were you thinking?
- Is there a certain range that you were thinking of?

Offer - make one

- Well, this is how I see it...
- Let me tell you what I had in mind.
- Why don't we start at...
- This is what X would like; what is your position?
- After serious thought, I want to put this on the table.
- Would you be willing to try this?
- Are you open to discussing serious offers?
- Would you be open to accepting an offer at this meeting?
- I think it is a good offer. What do you think?
- If I could offer you..., what could you offer me?
- To get the ball rolling, we think X could offer...
- (In your best Brando) I'm going to make you an offer you can't refuse.
- I just want to get this resolved, so what if...
- If this went to court it would cost us both a great deal of time and money; therefore...
- Let's get down to it. What if ...
- We want to be frank with you, so here's our opening offer.

Open-ended questions

- How do you feel about this situation?
- How did you come to that conclusion?
- If you were doing things over again, what would you do differently?
- What do you mean by that?
- Why is that important to you?
- Tell me more about that.
- What happened next?
- Will you give some examples of what you mean?
- I'm not sure I followed that. Could you explain it to me again?
- That is interesting, but why ...?

Options and alternatives

- Is there any other way we can come to an agreement? How about I offer you different perks instead of the lump sum payment you are asking for? I am willing to give you more than I owe you in value of the perks instead of cash.
- Those terms are not going to work for me. What other options can you offer?

Overcome general obstacles

- I think we both want the same outcome. Let's think of a way we can both get what we want.
- How is your goal different from my goal?
- If I offer to give up something, would you be willing to give up something too?
- What would X do if he was here today? I think he'd compromise.

Pause and schedule a time for a specific offer

- I'm going to need some time to think this over. Why don't we meet a week from now. I'll have an answer for you then.
- I'm out of time. Let's reconvene in two weeks.
- It seems like we both need more time to rethink our offers. How about we schedule another meeting in a month?
- That's too bad. I thought we could have done a deal here today. I'm not out for all I can get; I just want fair compensation. I could give you a commitment \$X, which would hold open for the next 24 hours. Think about it and give me a call.

Pause to speak to significant other

- That sounds like a great idea, but I'm afraid I'm going to have to discuss it with my spouse [brother, partner, family, roommate, parents, kids] before I can agree to it.
- I will have to discuss this with my co-workers before I can decide.

Postpone a difficult issue

- Maybe we can circle back later and decide on that topic later. Let's move onto the issue of X for now.
- I was hoping we could wrap this up today, but I need to gather some more information on costs. Let's come back to this piece on another day.

Prioritize needs and interests

- I suggest we refocus on what is really important to both sides.
- Is it truly in everyone's best interest to not move forward because of...?

Probe for underlying interests

- What do you think is important?
- Why do you think that happened?
- Why is that important to you?
- What exactly are you after?
- You say that bothers you. Why does that bother you?
- In other words, your point is....
- What are your other concerns?
- Are there issues other than what you have already told me?
- What were you trying to accomplish when you did...?
- That's interesting; tell me more.
- Why are you opposed to that idea?
- How will what you are asking for meet your needs?
- ... seems to be very important to you. Could you explain why?
- Our discussion always seems to come back to X. How about we specifically talk about X?
- I sense that there might be something else.
- Is there another spin to this?
- So, how do you feel personally?
- How does this sit with you?

Negotiation Gambits

- What is your opinion?
- Can you live with this?
- Have you thought through the consequences?
- What do you expect by the end of this negotiation?
- Can you tell me why you feel that way?
- Can you tell me why you think that is more important than ...?
- What would be most satisfactory to you, and why?
- What are your goals?
- Are there other things we should consider?

Propose both of you compromise

- I think we're both moving in the right direction. How about I'll move a little, and you move a little?
- If you can live with X, then I can live with Y.

Putting aside the issue

- We still need to work on this issue more. However, we also have several other items to discuss. For now, let's move on to the next talking point.
- It seems to me that issue of... is of higher priority. Let's consider... next.
- How about we wait on deciding this part for now? We can work on this other section first. Once that's out of the way, we can go back to the original issue.
- We've done a lot of work on this issue so far, but we've reached an impasse here. We should table this issue for now and discuss something else. Perhaps we can come to an agreement elsewhere that will make this issue easier to come to an agreement on later.
- Before we continue discussing..., can I ask you how you feel about...?

Refusing suggestions

- Well, the problem is...
- I'm afraid that won't work because ...
- I don't know if we can do that because...
- I'm not sure that will be necessary...

Rejecting offers

- That would be a real problem for us...
- I'm sorry, that is not acceptable...
- That is out of the question...
- I don't have any leeway on ...
- That's really not of interest to us.
- We don't see our position changing ...

Restate their proposal

- Could we each recap our proposals and the two or three key facts that support them?
- Now, let's restate what we just heard the other party say.

Negotiation Gambits

Requesting concessions

- Could you make a small concession?
- If you can see your way to ...?

Setting deadlines

- We all are busy people who need and want to get back to our lives. I suggest we allow for a break to rethink the priorities at hand, and reconvene tomorrow with a final decision. We either find a solution for the current impasse or move forward to court.
- Let's keep working on this issue for another 10 minutes and if we don't solve it, we will agree to move on to another issue. Ok?

Shift to the hard issue

- How about we turn to X now?
- We can move forward if we focus next on issue X.
- How do we feel about issue X?
- Now that that is out of the way, let's discuss issue X.

Showing ability

- We can do...
- It is possible...
- We have had experience doing...
- We are able to...

Showing agreement

- That's right.
- That's true.
- I couldn't agree with you more.
- You have a point.

Showing disagreement

- I don't think so.
- I'm not so sure...
- I'm not sure if I can agree with you.
- I can't agree.
- I have doubts about...
- I would like to counter that offer with another...
- I would like to reject that offer...

Showing inability

- We are not able to...
- It is not possible to...
- I'm not sure if it is possible to...
- We have had no experience doing...
- I'd like to, but I can't...
- There is no way that I can do this...

Starting a topic

- Regarding...
- As far as X is concerned...
- As we have seen...
- In the first place...
- To begin with...
- It seems to me that...
- Concerning the issue of...
- Please correct me if I'm wrong...
- Could I ask some questions to see if my information is correct?

Stating positions, concerns, and desired outcomes

- Let me begin by outlining our position...
- Our position is...
- Our main concern is...
- We hope to achieve...
- We hope to come away with...
- Our goal is to...

Stay flexible

- I think there are better options out there. Let's take some time to think about a few new options that might be better than the one we currently have on the table.
- I've got my yoga outfit on today. I'm flexible. We can try some different terms.

Take a break

- I feel like we're going in circles right now. Let's take a break and do some thinking about the best way to approach how we are going to divide the money among our clients. We need to think of solutions that will work for everyone.
- Look, we've been at this for some time now. Why don't we take a short recess to recollect our thoughts and come back in half an hour?
- It's time for lunch. Shall we put this aside and return after we've eaten?
- We're clearly not going anywhere right now, so why don't we continue next week?
- I'm certainly still very confident that we will be able to successfully negotiate this problem. I think we're just a little stuck at the moment. How about we take a quick break to recharge and re-assess our priorities?
- Why don't we take a break and reconvene after we've had some time to think things through on our own? Maybe even sleep on it? Then we can come back well rested, with a clear mind and work on this some more.
- Before we lose sight of the priorities we are negotiating, let's sleep on it and meet again tomorrow, bright and early.
- Let's stop while we're ahead and take a break and resume the negotiation when we are fresh tomorrow.
- I think we are both getting a little emotional here. Let's take a 10-minute break, cool down, and then reconvene.
- I like your offer but need to check with my boss. I will get back to you this afternoon.
- Let's step away from the current issue at hand and review what we have accomplished so far in this negotiation.
- Let's take a step back and spend a little more time getting to know each other.
- We've made some progress, and I think it's time for some coffee and a little fresh air. Let's take this opportunity to refresh ourselves and think of some ways we can come to an agreement on this issue. Would a 10-minute break be okay with you?

Threatening

- We have to have... or...
- If we have to, we're prepared to...
- My people are ready to do what we need to do...
- I didn't want to have to ____, but...
- So we are hopeful that we can find a solution to this, but if necessary we will ...

Negotiation Gambits

Trade off

- Well, I don't know. I'll check with my people and see, but let me ask you this: If we can do that for you, what can you do for me?
- We can't make a deal on those terms, but what if we traded off X for Y?

What's essential to them?

- Which of these concerns is most important to you?
- If you could only get one of these, which would they be?
- Would you be willing to prioritize your requests?
- Realistically, we're both going to have to give up something. What would you be willing to trade if I agreed to give up something?

Why did you settle? – talking points

When you settle, some people will ask you, "Why did you settle?" They have heard you talk about this conflict for a long time. You need a talking point for them – here are a few.

- I was ready to move on.
- I got what I wanted in the settlement.
- We both got what we wanted in the settlement.
- Considering everything, I thought it was best for me to put this behind me.
- I thought I wasn't being fair to my friends and family.
- The conflict took too much of "me" away from "you."
- I figured you were tired of hearing about this.
- Putting it behind me gave me a great sense of peace.
- I'm sure I have some better stories to tell you than this.
- When I really looked at all the pluses and minuses, settling this conflict and putting it behind me was by far the best thing for me.
- I got tired of throwing good money and time at a bad situation.
- Why do you think I settled? [Let them answer and then say,] "Mainly you are right."
- My lawyer's kid graduated from college. He didn't need any more of my money. Let me buy you lunch.
- I'm tired of thinking and talking about this. Let's just get on with real life.

You'll have to do better than that - responses

- I just made the last concession. It's your turn. Later I might do better than that, but it will depend on what you do.
- You know that no one will bid against themselves, me included
- No, it's your turn to make an offer..
- You know the negotiation process, no one bids against themself..
- Make me a better offer and I figure out what I can do.

You'll have to do better than that - use it

- You'll have to do better than that.
- With everything we've discussed thus far, that's the best you can do?
- I've been more than frank and flexible with you. Your offer is almost insulting. You'll have to do better than that.

Mediation Gambits

Mediation Gambits

Active listening

- What I hear you saying is...
- It sounds to me like ...
- It sounds like what you mean is...
- It sounds like you are saying ...
- I hear what you are saying, _____ is that what you mean?
- Is this what you mean by that?
- Before we continue, I would like to clarify what you just said...
- So an example of what you are saying is...
- Let me tell you what I think you said...
- So what you are really trying to say is...
- So, you think ... is most important
- What I get from what you are saying is ...
- In other words...
- If I understand you correctly...
- Don't you really mean _____
- So to summarize what you just said, ...
- What you're really trying to say is...
- So what you're saying is...
- You seem to be saying that...
- Would I be correct in saying that what you want/mean is...
- So would it be fair to say that what you want/mean is...
- Let me see if I understand what you're saying
- So you mean that ...
- Let me be sure that I am understanding correctly. You're saying...
- So as far as you are concerned, you want to discuss....

Agent of reality

- What do you think will happen if you don't do that?
- Do you think it's possible that what you think is X is really Y?
- I am here to help you focus on the reality and prevent emotional conflict from influencing this solution process.
- From what I'm picking up from them, that is not going to happen.
- In my experience, there's no way they're going to even consider that
- Realistically, you're probably not going to be anywhere near that.
- If that's what you expect, maybe we should just stop this right here.
- What would you do if you both walked away at this moment?
- What is your Plan B? Your BATNA?
- How do you think the other side will react to this offer?
- How do you think they will read this offer?
- Let's try and think realistically
- Now, let's try and consider some realistic options
- Has anyone besides a close friend suggested that the other side will accept your proposal?

Mediation Gambits

- Do you think that is a feasible option for you?
- Do you really think that they would see your offer as a good solution?
- Every offer sends a message. What message do you think your offer is sending?
- Let's try and put yourself in their shoes, do you think that they will see your offer as reasonable and fair? Why?
- What's the likelihood that the court would rule in your favor?
- The problem is, what you think, is exactly what the other party thinks...
- People come into a mediation with their end goal in mind. They tend to forget that there are two sides to every story. Each side needs to remember that there are plus and minuses to each of your cases and that the goal is to find what will work for everyone.
- It's almost funny. Everyone I meet in mediation thinks they have the strongest side of the case. Of course that can't be true.
- Everyone I meet in mediation thinks they have about a 85% chance of winning in court. Wouldn't you agree that is not possible?
- Have you considered any other options?
- In every negotiation, it helps to have a fallback plan, just in case things don't quite work out.
- Do you believe that what you are saying will be seriously considered by the other party? Why/why not?
- Why do you think a jury will give you that money that you are requesting?
- You know no one can accurately predict what a judge or jury will do.
- Now that seems like you're looking for an ideal situation. What do you think would be a more reasonable price?
- Even hall-of-fame baseball players strike out much more often than they hit a home run. What do you think will happen when you go to bat in this case?
- Even the best teams in baseball each year seldom win more than 60% of their games. How do you think you team will do if you decide to go to court?
- How do you think the other party would react to your proposed solution?
- In your opinion, what do you think other parties' concern is?
- Do you think that you and the other party have similar concerns?
- Do you really think the other side is going to agree to that?
- What's in it for them?
- What if you offered something like that, but also dialed it back a bit and offered something less onerous?
- Let me show you where I am having trouble with your reasoning.
- Do you think you can win in court?
- What percentage chance do you see of winning in court?
- How certain are you?
- What risks are you willing to take?
- Do you take such risks with other decisions in life?
- What if you lose?
- What will you lose?
- What will your life be like then?
- Try on your proposal. When you say it out loud, how does it sound to you?
- Let's talk about the how much, where, when, and how of that idea.

Mediation Gambits

Another form of ADR

- Would you like me or somebody else to just make a decision on this last remaining issue, just like arbitrating it?
- Before you actually turn to a trial and prepare for that, would you like to try a summary jury trial or a mini trial?
- We could even set up a mock trial so the parties and the lawyers could see what the case might look like if you actually do go to trial

Apology – offer or ask for one

[See the Apology topics in the Breaking Impasse Gambit section]

Appealing to ego

- We've worked together in the past, so I know you are logical and can see both sides of an issue.
- Your lawyer is a very good lawyer. I suggest you listen very carefully to what she is suggesting.

Ask more questions

- Tell me more about that.
- What do you mean by that?
- Can you put that in other words?
- How do you feel about that?
- What do you mean by ?
- Can you be more specific?
- How so?
- In what way?
- That's helpful, keep going.
- Humm, hum.

Being evaluative by asking questions

- How do you think the other side will react to your proposal and why?
- Why do you think the other side's proposal is unreasonable?
- Can you show the other side any cases that would support...?
- Can you explain to the other side why you think the court will...?
- In what ways do you think the other side will agree with your analysis on...?
- How do you respond to the other side's legal argument that...?

Being evaluative by giving opinions

- I do not think that the evidence will be admissible because...
- I cannot imagine a judge granting your motion when...
- I do not think the court will uphold the...
- I think the likelihood of your success is only about X percent and that you are only likely to get a verdict of about \$Y.
- Based on what I've learned during the course of this mediation, I think their proposal is reasonable given your...
- I do not think your proposal will be taken seriously by them. It is just too high (low).
- This is a settlement proposal that I have created and will recommend to both of you. Please take some time to consider it and let me know confidentially whether you accept or reject it.

Brackets - early

- If the other side is willing to start at X, would you be willing to start at Y?
- Will you start at X, if the other side agrees to start at Y?
- What is the range within which you are willing to start the negotiations?

Brainstorming

- What do you think about?
- What would you like to see as an outline for a settlement structure?
- What settlement terms would you like to see?
- Would you be willing to consider a settlement that included?
- So they made a settlement proposal. Are there other things that you want to see included?

Concession - get from a party

- You have to hang the meat low enough for the dog to jump for it. He has to think he has a chance to keep him in the game.
- What do you think will happen if you can't reach a settlement here?
- Your major responsibility is thinking about tomorrow. Because of this litigation, you are spending a lot of time, energy, and money on yesterday.
- Victory and vindication are going to cost extra in terms of time, money, and emotion. And then there are still appeals.

Confidentiality

- Everything you say here today will remain confidential.
- Please understand that under the Uniform Mediation Act (UMA) and some other state rules of evidence and case decisions, not everything said in mediation can be excluded from court cases. Crimes, abuse, neglect, or a statutory duty to report are not privileged and not confidential. Likewise imminent threats and plans to injure a person or commit a crime of violence are also not privileged. Statements about professional misconduct and malpractice are also not protected. The good news is that confidentiality and privilege are almost never a problem.
- You should be aware that there are some exceptions to confidentiality. As mediators in this state, we must follow the state and federal laws on confidentiality. Exceptions to confidentiality include details concerning child abuse, homicide, suicide, and the commission of a felony. Do either of you have any questions concerning confidentiality?
- I want to remind you that everything we say in caucus remains confidential unless you allow me to disclose it.
- Confidentiality is strictly adhered to in mediation.
- The information you disclose here is totally confidential. What's said here, stays here. No one can use the information they get here in court or anywhere else.
- Under the rules of evidence, Rule 408 in most evidence codes, our discussions during this mediation are settlement negotiations and cannot be used in court.
- I will not disclose any information you tell me unless you explicitly say I can.
- I will not disclose anything I hear today with anyone who is not part of this mediation.
- I want to assure you that everything you say will stay in this room
- If there is anything you don't want me to share with the other party, please let me know
- Let me explain how the mediation process works. Whatever you tell me privately, I will not tell the side or anyone else. Everything we discuss privately will be kept in the strictest of confidences.
- Everything that we do here will be confidential. You both signed an agreement to that effect before we began. In that document you agreed that none of us will talk to anyone outside of this room about what went on in here today. If an agreement is reached, written up, and signed by both parties, that document alone will survive. Any notes that were taken in this mediation will be destroyed after the mediation.
- Before I share any specific information with her, I'll ask you if that is OK with you.
- You have my word that what you share will be kept between us unless you give me permission to share it with them.
- Everything you tell me will be a secret between us.
- Until you give me the "okay" to share information with the other party, I will not.
- I will keep that confidential. However, if I think it will settle the case, can I share it with her?

Mediation Gambits

- Whatever you tell me will be held in strictest confidence unless you tell me otherwise.
- This discussion is off the record and will not be repeated without your permission.
- Our discussions here today will not be divulged to the opposing party unless absolutely necessary.
- Everything you share with me in this caucus is confidential, and I will not reveal it to the other side unless you give me permission to do that.
- Now I'll go and hear what the other party wants to share with me. Is there anything you just told me that you absolutely do not want me to share with the other side?
- As well as confidentiality against the outside world, you may also speak confidentially to the mediators. In our individual caucuses, we will ask you if anything is confidential. We will only share what you want with the other side.
- Confidentiality refers specifically to what goes on in a caucus. As a mediator, I will not reveal in a joint session any information learned in caucus without the permission of the party that has shared the information. Confidentiality can only be asserted by the mediator on behalf of the party not on behalf of the mediator.
- Privilege refers to what is stated in the joint session with both sides present. No information revealed in the joint session can be used in court against the other party.
- I will not reveal what we have talked about to the other party unless you instruct me to do so.
- Please know that whatever we discuss is confidential and I will not disclose it to the other party unless you allow me to.
- I will not reveal what we have talked about to the other side unless you instruct me to do so.
- Just to be clear, I can discuss X, Y, and Z with the other side, but not mention A?

Confidential hypothetical bargaining

- Assume they are now at \$X. Just for my private information where would you go if they did that?"
- If they give you a more favorable demand, where are you likely to move to?

Mediation Gambits

Confidentiality – seeking release from

- I think that would be very helpful for the other party to know. I think it could help settle this case, which is the goal of this mediation. Would you feel comfortable with me sharing this information?
- If I could tell them that information, it might end the case. Can I?
- It seems the other party doesn't know about X. However, I think it is important for them to know so that they understand your position better and will be more receptive to your offer. Is it alright with you that I share this information?
- With your permission, may I let the party know about this issue?
- May I paraphrase what you have described to me to the other side?
- Do I have your authorization to communicate that information to the other negotiating party?
- Would it help to meet in conference in order to discuss matters privately?

Cushion or delay a manipulative tactic

- Your word is all you have at this point
- That is not the issue here
- Let's slow down
- Okay, let's take a break
- I don't think that's what he means
- Let's not go there just yet
- That is not necessary at this point
- I understand your view. I know exactly where you're going with this. I don't think it is good
- Maybe it's not exactly what you think
- I believe we are getting off track
- No, that is not what I think she means
- They honestly did not mean anything by that
- Let's stay focused on the real issues here
- There is no need for this type of tension
- Let's play nice here

Explain an offer as a gain

- Isn't X's offer more than you initially expected?
- Isn't X's offer better than your alternative (BATNA)?
- Isn't this offer moving in the direction you had hoped for?
- Don't you think this is a good offer.

Feelings and opinions – ask about

- How do you feel about that?
- Would you say that you feel...?
- Do you want to try talking with the other side again?
- What is your reaction?
- Do you think that might work?
- What are you thinking?
- You look frustrated. Can you tell me why this offer makes you frustrated?

Focus on the merits

- What's the meaning behind your actions?
- What exactly are you trying to say ?
- How does that relate to the main topic?
- We are getting away from the main topic.
- That is not why we are here today.
- Okay, back to the main topic.
- Instead, let's focus on what we can do about it.
- Tell me what it is you want to happen today.

Future

- Where would you like to be a year from now?
- Settle today, or move on to pre-trial, trial, and maybe one of more appeals. What is your future going to look like with this case?

Get control of an unproductive process

- At this time in the process we normally move into private sessions (caucuses), so now I would like to ...
- I am getting the sense that it would be a good time to move into private meetings.
- If you are talking, you can't hear. If you can't hear, you can't learn. If you can't learn, you won't settle.
- Remember you agreed not to interrupt. You will have time to comment when it's your turn.
- It seems that our emotions are getting the best of us. Can we agree that only one person talks at a time? Believe me, I will make sure the second person gets an adequate opportunity to respond.
- I have noticed that often when one of you starts talking, the other person raises their voice to try to cut them off. Can we agree that only one of you will talk at a time?"
- Can you understand where party B is coming from?
- What is making you so upset?

Impartial mediator

- I am an impartial party and will be helping with the communication between both parties. I am not here to choose either side. I will not be evaluating what each side says.
- I am here to help you solve this problem.
- I will act as a friend to both sides.
- I will not be evaluating the merits of your case. I am not here to judge you.
- I am here to facilitate the communication.
- Mediation is an impartial process, and I am an impartial mediator.
- You, the parties, have the power to control the outcome. I am only here to help you with this impartial process.
- I am here to help both parties communicate to come to a solution that is mutually agreeable.
- I will not give my personal opinion about your case, unless you ask for it.

- I will only give my opinion if both sides are agreeable to me doing so.
- I am here as a neutral party and will help facilitate a greater understanding of each parties interests.
- Hopefully an impartial solution can be found that works for everyone.
- I am here to offer impartial observation, and facilitate a mutually agreed upon solution. I will not make any decisions for you. That is entirely up to you.
- I am here to help each side see the other's position and help both of you to come to an agreement.
- I am here to help each side evaluate the others interests against their own.
- I want to let you know that I am a neutral party
- I will be listening to both parties without taking sides
- I have no interests at stake for either party to come out ahead
- I am simply here to help guide both parties to reach an agreement
- My job here is to listen, assess, and help you reach an agreement
- I will not take sides
- I will not take sides, but I might make suggestions based on the information I gather from both parties
- I'm here because you both asked me to be here. I am not here to make decisions for you, but simply to assist all parties in understanding the big picture. Hopefully thru that understanding, a solution can be found that works for everyone.
- I'm here to help the both of you work this out on your own. If you needed or wanted a third party to make the decision for you, you could just go to court. I am not a judge, I am not here to judge either party or to take sides, I am simply here to help facilitate the discussions between the two of you so that they can be as productive as possible in reaching a solution.
- I'm here to help both parties reach a decision that is a good one for everyone.
- Part of my job is to help both parties to hear what the other side is really saying.
- Think of me as a translator, I am simply helping each party to understand what the other party is actually saying. I am here to help both parties as long as both parties want me to be here
- I'm not here to take sides.
- I hope that both parties will be open and forthcoming with me. It will help me to understand exactly where both of you are coming from
- As a mediator, I am here to help you come to an agreement. My job is to be totally neutral, and I will not take any sides.
- As a neutral supporter, I will try my best to help you dissolve whatever misunderstandings or discrepancies there is between the two of you, so you can come to a negotiated agreement.
- You have the power to make decisions... however, as you may already know, I do have some experience in this field, so if you wish, I will assess the situation and give you my opinion on the matter.
- My role in this negotiation is not to take sides, but rather to be fair and impartial to both parties. This is important for both sides so that the negotiation process can function properly.

Mediation Gambits

- I will not be partial to either side. Instead, I will be fair to all parties. I will be impartial.
- I am here simply to help the two parties reach an agreeable solution.
- I'm not here to make any judgments.
- I'm meeting both parties for the first time here so I have no prior history with either of you.
- I'm not here to judge the merits of the two sides' stories. No worries

Inaccurate opponent - treat the opponent's view as inaccurate

- Please correct me if I'm wrong...
- Are you sure about that? Can you tell me more about that?
- Under what circumstance could that be right?
- I can't speak on that because it does not sound familiar to me, but I wonder if...

Joint session – suggest one

- I think this maybe the time to talk to the other side again in a joint session.
- The other side really is the decision-maker. As a trial lawyer how often do you waive the opportunity to make an opening statement in a trial?

Lawyer doesn't let client speak

- I think this is a good time to hear from your client.
- [Client] would you like to add some points to the discussion?
- [Lawyer] Will you be testifying as a fact witness if this case ends up in court?

Mediation is not court

- Mediation is not "all or nothing." Hopefully both sides can get what they need.
- Mediation allows you to go beyond what the law will allow.
- Unlike court, in mediation there are no losers, only winners.

Missing pieces

- What is it about this issue that's holding you up? Is there more that's going on than you've already told me so far?
- I'm bound by the principles of confidentiality. The more you can tell me, the more I will be able to help in this conflict. It seems like there is a piece that no one is willing to tell me.

Money claims – a critical look

- They are having a hard time understanding your damage calculation. Could you go over that again with me?
- I don't really understand how you got that number. Could you go over it again please?
- Could you help me understand how you came to X?

Mediation Gambits

Next steps

- Why do you think the mediation has stalled; what do you think we can do to get things moving again?
- If you are unwilling to move, where would you like to go from here?
- If you are unwilling to move from your position, the other party may have no choice but to go to court.

Observations

- I'm concerned about What do you think about that?
- Based on what we've been talking about, it's possible that a judge might even go in a direction neither party has considered. What do you think about that?
- Yeah, that's probably true. But what if the jury instead thinks that ...?
- It appears that ... is at the heart of this dispute. What do you think about that?

Personal support and encouragement

- I appreciate what you've done
- You are so helpful
- How did you come up with that great idea?
- We're rolling now
- We should team up one day
- You have some great ideas
- This is the best session I've been to in a while
- You're going to put me out of a job pretty soon
- You're doing great, you don't need me

Present your reasoning

- Let me show you where my head is
- Let me explain to you my point of you
- My take on the whole thing is...
- May I share with you my thoughts
- Listen to me for a minute
- Give me a quick second

Probe for underlying interests

- I am aware of _____, but I do not understand as to why this is so important in this situation!
- Can you explain to me ...
- Could you summarize the main points of your argument?
- Tell me more about that--
- And, how does that make you feel?
- Let's go back and start when...
- When you say _____, do you mean _____?
- I'm trying to understand where you are coming from, can you explain again why...
- That's interesting. What do you mean by that?
- I'm beginning to understand. Can you tell me a little bit more?
- I'm not sure I understand. Can you re-phrase what you're telling me?

Mediation Gambits

- I feel there may be something else. Could you elaborate?
- It is important that everyone's interests are represented. Is there anything else you would like to add?
- That's interesting. Do you have more you would like to share?
- What is motivating you?
- Is there anything else that has not been discussed yet?
- It appears that something else is affecting you.
- Can you honestly tell me that's the whole story?
- Is there anything else?
- What do you need? Why?
- Tell me more.
- Why are you here today?
- How can I help?
- Why do you feel that way?
- What do you mean?
- What do you think I need to know?
- Tell me what I need to know.
- What do you want out of this mediation?
- What do you really want from them?
- What are you really trying to get at?
- Is what you really want ... ?
- What is the most important to you?
- What will it take for you to settle?
- In order for you to settle, you want...?
- What did you hope to accomplish by entering into this deal?
- Is there more?
- What else?
- Why do you think that ... happened?
- So this is important to you?
- I'm beginning to understand. Can you tell me a little bit more?
- That's interesting. What do you mean by that?
- Can you re-phrase what you're telling me?
- Can you tell me what you think I really need to know to understand the situation?
- What do you hope to accomplish here? Where are you headed?
- What is your goal?
- What's your standpoint on ...?
- What will it take to settle this matter?
- Can you tell me about the business issues here?
- Can you tell me about any emotional issues here?
- Can you tell me about any issues here?
- What do you think the other party really wants and why?
- Where do your priorities lie?
- What do you want to accomplish/achieve at the end of this negotiation/meeting?

Mediation Gambits

- If there are two or three things you need from this situation, what would those things be?
- What is most important to you?
- Could you give me an example of what you are referring to?
- What would you like out of this mediation?
- How do you feel about what the other party has just said?
- Is there something that concerns you that we haven't touched on?
- How do you feel about this?
- How do you feel about what the other side said?
- So, you're saying that you want to do this?
- What is your motivation in
- Could you talk more about ...
- [Silence]
- What is the principle behind your action?
- I'm not following the connection you seem to be making between X and Y.
- That interests me. Can you say more about it.
- Yes, please go on.
- Please tell me more about what you mean when you stated...
- Tell me a little more about this.
- Please clarify
- Can you help me be clearer in my mind about...
- I sense that there is something critical you have not revealed. It may be important that you open up so we can get to the root of the conflict.
- What are you trying to accomplish by taking that approach?
- What do you want it for?
- I am just trying to find out what it is you need.
- Tell me as much detail as you can. Sometimes even the most subtle detail can be significant and important to consider.
- Can you tell me the same story that you just told me, now in the perspective of the other party? Be equally as specific with as much detail as you can.

Questions to invite discussion

- When you say X, what you are relying on?
- You want X? What is that based on?
- Could you walk me through your reasoning about?
- Tell me what leads you to believe X...?
- How do you think a judge or jury might respond to ...?
- What if X changes or turns out not to be as you think? Then what?
- Have you considered ...?
- How do you feel about what the other side just said?
- What is your interest in?
- Could you talk more about ...?

Reasons for rejection

- So you say their settlement offer unacceptable. Can you tell me why?
- What do think they should be offering?
- What are you willing to counter with? Why?
- Before I take your counter offer to them, walk me through how you got to your number because I'm sure they are going to ask.
- In support of their offer, they said What do you think about that?

Schedule another meeting

- This was great, we should wrap this up at a later date
- We are 75% there, lets reconvene
- This would be a great time to break and come back later
- We can meet you at your earliest convenience
- Are you free on.....?
- Let's take some time, think about, and come back later
- I know you have better things to do today, so let's meet later
- Let's meet one last time
- I think one more meeting and we're done
- This will definitely require another day

See the other's side

- Remember, understanding X's idea is not the same as agreeing with him. But if you can understand X, you will have a better chance of resolving this matter.
- How do you think X feels about this?

Seek opinion of a facilitative mediator

- It's not my opinion that counts.
- I'm not sure that would settle anything
- Do you really think that would be helpful?

Settlement event – create one

- We don't need to agree on what happened yesterday to settle this case today.
- If not now, when?
- I think we should go as long as necessary – I'm not going to ask you to come back another day.

Statements – turn them into offers

- So, you're saying that you are willing to offer ...?
- So, you're saying that you want to ...?

Stumbling block isolation

- If not for ..._ would you feel comfortable making this deal?
- We seem to have one particular blockage to reaching an agreement. How can we get past that?

Take a basic stand on principle

- Our concern is fairness
- We just want everyone to be happy
- We just want to do the right thing
- That would be the moral thing to do
- As long as we keep it fair
- Your word is all you have at this point

What can we achieve?

- We are here to find solution that both parties can live with.
- No one is likely to get everything they'd like.
- Focus on an outcome that gives you enough.
- Think about a realistic, fair compromise, not what you want.
- Usually in settlement both parties gets at least some of what they want.
- No one gets the big smashing "win" in mediation, but no one has to lose either.
- In mediation you can be beyond what the law will allow.
- No losers in mediation, only winners. – Singapore Mediation Center
- Both parties will leave the mediation thinking they are right and the other is wrong, but the deal will do. What will matter is the number agreed upon.
- This isn't to do with justice; it's simply about doing what's possible.
- If there is a commercial solution here today it will be more than you want to pay and less than he wants to receive. No settlement that has everyone going away skipping and dancing.
- Many people say that the best mediation is when people walk away a little disappointed

Mediation Gambits

Why did you settle your case? – talking points

When you settle, some people will ask you, “Why did you settle?” They have heard you talk about this conflict for a long time.. You need a talking point for them – here are a few.

- I was ready to move on.
- I got what I wanted in the settlement.
- We both got what we wanted in the settlement.
- Considering everything, I thought it was best for me to put this behind me.
- Putting it behind me gave me a great sense of peace.
- I thought I wasn’t being fair to my friends and family.
- The conflict took too much of “me” away from “you.”
- I figured you were tired of hearing about this.
- I’m sure I have some better stories to tell you than this.
- When I really looked at all the pluses and minuses, settling this conflict and putting it behind me was by far the best thing for me.
- I got tired of throwing good money and time at a bad situation.
- Why do you think I settled? [Let them answer and then say,] “Mainly you are right.”
- My lawyer’s kid graduated from college. He didn’t need any more of my money. Let me buy you lunch.
- I’m tired of thinking and talking about this. Let’s just get on with real life.

Your turn

- Remember, they have already moved off their position to meet your demands.
- Almost no one will, as some people say, “Bid against themselves,” which means make two concessions in a row without a movement from the other side. Right now it is your turn.

Breaking Impasse Gambits

Breaking Impasse Gambits

A Mediator's View of the Bargaining Process

Some mediators view the bargaining process as having three stages:

- 1) getting the parties unstuck,
- 2) moving the bargaining along, and
- 3) closing the final gap.

All of those stages involve breaking impasses.

1. Getting the parties unstuck from the positions that they ended with in their failed negotiations. This is largely the problem of getting the first new offer in mediation after the parties have ended their negotiations. Among other things, it can be seen as getting a change in position or a shift in the discussion from positions to interests, or who will make the first move.

2. Moving the bargaining along. This is the process of generating significant movements in the bargaining. It can often be seen as multiple concessions from each side or the modifications, reshaping, or prioritizing of interests.

3. Closing the final gap. At some point in the mediation, the parties may feel they have moved to their new bottom lines or to unchangeable interests. The mediators still needs to greater movement or other changes to reach a settlement.

An indirect and simple way to break an impasse (sometimes)

Not – “How can you compromise to solve this problem?”

But – “What could the other side do to solve this problem?”

[The party you are talking to will probably offer many things the other side could do move towards settlement.]

Followed by – “

If they did something like you just suggested to move towards settlement, what could you do to match their offer?

Active listening by a party

- Would you be willing to restate (active listen) what they are asking for? I simply want to clarify anything that was misunderstood or misstated. After that, I'll ask Party B to restate what Party A is asking for.
- Just so we are clear on both of your offers, goals, and proposed solutions, I'm going to ask each of you to restate what you think the other part is asking for and why they want it.

Active listening to capture concessions

- You say that "sometimes the other side has been quite reasonable?"
- So in your experience sometimes they have ...[something positive]
- What you are saying is that "in the past you and they have ...[something positive]"
- So you are saying that you have actually...?

Agenda control - sequencing issues

- You have a variety of concerns to address, can we start by talking about X and then move on to Y and Z?
- At least we understand more fully your perspectives on the matter of damages. Putting aside for a moment the amount of damages, let's look at the timing of the payment right now.

Agent of reality

- What do you think this will look like if this goes to court?
- What do you think will happen if this goes on to court?
- How much will that cost?
- Would you rather spend your time doing more deals and making more money, or paying your lawyers?
- You know, a judge will just look at the legal issues and a lot of things we have talked about will not even be admissible in court.
- Do you think you're going to have this much flexibility in court (facilitative)?
- You know, you will not have this much flexibility in court (evaluative).
- Listen, you're going to be spending a lot more time and money if this thing is not resolved today.
- Have you hired attorneys? Have they given you a cost estimate?
- Have your lawyers given you an estimate on much it will cost to litigate this case?
- Is that really worth the extra time and money?
- Look, you see that this isn't going anywhere, right?
- In my experience, getting or court verdict to collect for defamation is very difficult.
- Yes, they have claimed triple damages, but such an award is almost never a part of any settlement payments, so please try to ignore that part of their number when we start talking about settlement value.

Apology – offer or ask for

- Are you asking for an apology?
- Have you thought about apologizing?
- If you want an apology, do you think they want one too?
- If they apologized to you, do you think they would expect a reciprocal apology?
- When thinking about settlement options, don't overlook apologies.
- Do you think an apology would help resolve this?
- How does apologizing make you feel? What if they also apologized to you?
- I know you had hoped to continue this relationship; maybe non-monetary steps are needed to mend the relationship.
- How do you feel about receiving an apology from her? Would that be significant to you?
- Do you think an apology would work?
- What would an apology be worth to you?
- Whenever I'm in a conflict, I always ask myself, "How have I contributed to the situation." How have you contributed to this situation?
- Have you contributed to this problem at all?
- Would an apology help settle any resentful feelings?
- How have you felt when people apologized to you?
- How have you felt when you apologized to someone else?
- How would you feel if you got an apology today?
- What do you think the other party is really asking for?
- If they were to apologize as a part of an agreement between the two of you, would that help you reach an agreement?
- Sometimes there needs to be an apology before any of the other issues can be resolved.
- Sometimes an apology is the last issue after all the other issues are resolved.
- Would you be willing to do/give her in exchange for an apology from her?
- Sometimes people get into disputes because they really want an apology from the other party. Is that possibly the case here?
- Would an apology from the other side help resolve things?
- In this situation, how important is a formal apology?
- Sometimes the first step to resolving a conflict is to say, "I'm sorry."
- Do you think you two are ready to put aside your differences and say you're sorry?
- Let's look at other ways of approaching this. How might an apology impact these negotiations?
- Knowing what you do about X, would an apology by you to X assist in moving this negotiation in a favorable direction for you?
- Have you thought about the impact of an apology?
- Do you think an apology is a possibility?
- In my experience, many people who think they are victims feel that their privacy was violated. Do you think he might?
- So you're saying that you didn't expect things to escalate the way they did and that you're sorry your part in what happened. What do you think would happen if you told him that?
- Although we do not admit making a mistake, let me explain how we made our decision, and tell you now that we are terribly sorry for the outcome.

Apology – to break an impasse

- Can you just say you're sorry so we can move this forward?
- I forgive you for your actions. Can we please move forward with the negotiations?
- Maybe if you apologized, we could put this behind us and move on with the negotiation?
- A wise man once said, "The road to agreement is paved with apologies."

Appeal to principles and ideals

- You both seem to agree to avoiding unnecessary harm, so how can we do that?
- You have agreed that you both want to act in the best interests of the ...
- If lawyers are not leaders in marshaling cooperation and designing mechanisms that allow it to flourish, they will not be at the center of the most creative social experiments of our time. - Derek Bok
- Discourage litigation. Persuade your neighbors to compromise whenever you can.
- The nominal winner is often a real loser--in fees, expenses and waste of time.
- As a peacemaker the lawyer has a superior opportunity of being a good man." - Abraham Lincoln.
- The true function of a lawyer is to bring parties together who have been driven asunder. - (Gandhi)
- All polishing is done by friction." - Mary Parker Follett
- Our task now is not to fix the blame for the past, but to fix the course for the future." - John F. Kennedy
- The significant problems we face cannot be solved at the same level of thinking we were at when we created them." - Albert Einstein

Assuring satisfaction

- One of you remains concerned about the job being completed. What if you built in grievance procedures?
- ...added guarantees to the contract?

Assign homework

- Between now and our next mediation session, I think it would very helpful if you could...
- For our next session could you come back with ideas about...
- What I have found is that it is very helpful if between mediation sessions the parties make a list of..... Would you do that?

Baseball binding mediation – (like high-low arbitration)

- Would you be willing to try high-low mediation? I will ask each of you to pick a number, write it down, and put it in an envelope which you will seal. It should probably be your best offer to make to the other side to settle this case, but you can figure out your own strategy. Before seeing your numbers, I'll also write down my number, which will be where I think this case should end up. We will all agree that I, your mediator, will look at both your "secret" numbers and select one of your two numbers – the number closest to the number I have written down as the mediator's number. Hopefully, this strategy will motivate you to select a number that will be your best shot at solving this dispute. Truthfully, this technique is not that different from a mediator's proposal with the exception that the parties have agreed in advance to accept it.

BATNA check

- What kind of outcome do you or your attorneys predict will happen if this disagreement goes to court? [then work with the conflicting perspectives]
- Most people are trained to think that going to court might be their best alternative to settling. Remember, for half of those people court might be their WATNA – their Worse alternative.

BATNA factors for trials

- You are going to be facing a summary judgment motion right?
- How much time will it take to prepare for future pre-trial hearings?
- If you tried this case 100 times, what percent of the time would you get favorable result?
- If you tried this case 100 times, what would be the range of verdicts?
- What will be your lawyer's bill for future motions, the trial, and a possible appeal?
- How much time will it take to prepare for trial?
- How much time will you have to take away from your business and family to go to trial?
- What will your experts cost for trial?
- Which evidence you are planning to use has the greatest risk of not getting admitted by the judge?
- How long will the trial take? How about the appeal?
- What else would you do with your time if you were involved with the litigation?
- What's the likelihood of appeal if they lose? What if you lose?
- How much time will it take to get an appellate decision in this jurisdiction?
- What's the time value of money for you? What's your opportunity costs? What else would you do with the money?
- How will continued disrupt your life / business / job / impact your family / your social life / vacations?
- What's the chance of having to reschedule the trial? You know that happens a lot.

Be blunt

- Listen, we can sit here and disagree all day long. But your other options at this point is to walk away or to walk into court. As you know, court means months of costly litigation and maybe years of appeals. Is that really what you want?
- We are down to the last issue here, folks. In fact, it's a minute detail of the last issue. It's late; it's dark. I know you both have families to go home to. We can sit here all night if you want to continue arguing, but I'm not sure our time is worth the money at stake. Or you can both be a little more flexible and we'll be done. What's it going to be?

Best messenger delivers the message

- [*In caucus*]. They seemed to respond well to your co-counsel. What do you think about having her deliver the next offer?
- [*After it has been agreed upon in caucus*]. Okay, we're going to take a quick ten-minute break. At that time, I'd like to speak with Party B and Ms. Z. Everyone else, please wait in the hall.
- To be honest with you, he seems to get very nervous and starts to shut down when you're in the room looking directly at him. I'd like to try the next session with you out in the room. OK?

Bracketing - Conditional offer technique

- If I could convince the plaintiff to reduce its demand to \$X, would you be willing to increase your offer to \$Y?
- If I could convince the defendant to come up to \$Y, would you be willing to come down to \$X?

Bracketing - Range bargaining [Mediator's bracket]

- We seem to be stuck. Neither side wants to move off their position. What I find that works much of the time is to allow me, the mediator, to propose a range or bracket – with different numbers than what we have out there right now. The numbers are will not be really close together, but closer together than they are right now. After we agree on the bracket, we will continue the negotiation in that range. Would you be willing to try that? [Mediator simultaneously reveals both ends of bracket.]

Bracketing - Range bargaining [Mediator asks for commitment to]

- What I'd like to do now is trying some bracketing. Are you familiar with that?
- If she were willing to offer X would you be willing to offer Y in return?
- To jump start this mediation, if I could get them to increase their offer to X would you be willing to move to Y?
- You two are still pretty far apart. To get us closer an agreement, if I can get them down to X will you move to Y?
- We could try range bargaining – develop a range on the assumption that if you moved to a certain place, they would move. And, they have agreed to move to X if you would move to Y. How does that sound?
- I understand that you are not willing to put another offer on the table right now. However, if I could get the defendant to move up to \$X, would you take it?

Brainstorm with parties (in joint or private sessions)

- Let's try some brainstorming for 5 minutes – that's coming up with as many solutions about this topic as you can. No evaluation or critiques. Just ideas. Many groups do this to generate innovative ideas. Fire away!
- Have you ever tried brainstorming? I have used it many times and it really works well. Here's what we will do ...

Break - take one

- Folks, you've been working hard. Why don't we all take a break for a few minutes?
- Okay, I'm going to suggest that we all break for any early lunch now. Grab some food and drink. You've been doing great work!
- We are making substantial progress but we are not there yet. Shall we power through, or do we need to schedule another time?

Break it into parts

- How do you eat an elephant? One bite at a time. We need to take this in small steps. We can even celebrate each step.
- Remember, a journey of a thousand miles begins with a single step. We just took a small step. Let's keep going.
- I want us to focus on small victories today. So, how can we further break down issue X?
- I know it seems like we haven't gotten that far today. But I'm very happy that we agreed to X. That's progress! Before we end today's session, I hope to have more progress.
- Would you be willing to discuss this in smaller pieces, if so, how do you think we can split the issues?
- We assemble a jigsaw puzzle by adding to it piece by piece. I think we need to work on this conflict piece by piece to get it solved.

Build an information base

- Tell me more about...
- What do I need to know to understand this conflict?
- What's most important to you?
- What do you think is the most important thing to her?
- Why hasn't this dispute settled?
- Where are we headed?

Can't say? - probe for information when they say: I can't say. - I can't think of anything. - I'm not able to say. - I couldn't really tell you that.

[Is it that they don't know, or don't want to tell?]

- What can you share with me?
- What might other people say?
- What's your best guess?
- What would other people tell me?
- Who should I ask that knows more?
- Do you want me to guess?
- Here's what I think some people might say.

Cartoons

Show a cartoon to make a point. An image is worth 1,000 words – maybe 10,000 words if it is funny and get people to view the situation differently

- Angeles & Devils cartoon [the other side often appears as the devil] See Barkai Negotiation & ADR Cartoon Captioning Contest Book.
- Ugly duckling and beautiful swan cartoon [everyone thinks their case is stronger than it really is] See Barkai cartoon book , ugly duckling sees swan as reflection
- Kitty sees a lion in the mirror [everyone thinks their case is stronger than it really is] [Goggle search for cat sees lion in mirror}

Caucus to stay on task – separate the parties

- Normally at this point in a mediation I move us into a series of private meetings.
- Although I usually keep both sides together during a mediation to provide an open atmosphere, as we are getting down into the details of the final agreement, it seems like you folks are starting to take more verbal shots at each other – which really isn't helping. So what I would like to do now is start working in separate sessions with each of you so we can explore options a bit faster.
- I can see it is time to move into private meetings for the next stage.
- Considering what is going on in the room right now, I'd like to move into private sessions with each of you. I think that might lead to a better agreement..
- If we now start to use private caucuses I think we will be able to focus on solidifying our solutions, okay?

Challenge low offers & lack of movement

- What's the reaction you think you'll get to that?
- What effect you expect to that offer?
- Do you think that offer is in the right ballpark?
- If you're going to settle, it will settle in a range that people call the zone of possible agreement. Do you think your figure is in that zone?
- If that's your offer, what's the change they will walk out?
- If you offer that, will they stay?
- If you come back with a more realistic offer, then you'll have a better chance to stay in the negotiation.
- If we are going to settle, I think both sides are going to have to make some big moves. I don't think yours is one of them.
- If you want more from the other side, you are going to have to put arguments forward to convince them
- What can you say to them to offer more?
- How do you want to get them to that higher/lower number?
- Can you persuade them of that?
- If you are going to persuade them to go home with less, you have to shake their confidence on their argument.

Chance a single unresolved issue

- How about we just flip a coin? Whomever wins, we do it their way.
- Just one issue left. Heads or tail on who gets to pick. OK?

Chance it

- Do you want to just flip a coin on who gets the last gap between you two?
- Rather than even flip a coin, which is all or nothing, you could just draw slips of paper out of a hat or something, and the paper could have on it 0, 1/4, 1/3, 1/2, 2/3, 3/4, and 100%. Or we could use other numbers. Do you want to try something like that?

Change a team member

- We think we'd like a new perspective from someone with fresh ears. We'd like to swap out...
- I think there is some personal conflict between some of our team members and some of there team. So, I'm going to adjust our team for the next session.

Expert opinion

- Why don't we consult with an outside expert to see how they would handle this dispute?
- Since we are not sure how much this item is worth, why don't we ask someone who is an expert in this area?

Change negotiators

- Maybe it would be better if your CEO was not here. She probably has better things to do
- Do you think you could get the CEO to come to future sessions? Do you think we need to change negotiator? Maybe things would be smoother with a different negotiator.

Change the base for calculating percentages

- What it help if we used a smaller percentage of a larger base?
- ... or a larger percentage of a smaller but more predictable base may get things back on track.

Change the order of discussion

- We have been working on this issue for quite some time. We are making less progress here than I had hoped. What if we change the order of discussion and discuss [some other issue] for a while. We will come back to this issue after we have had some success on another issue. OK?
- Let's move to another issue for a while. We are getting stalled on this one.

Change the time scale of performance

- What if we completed 60% over 4 months rather than 3 months?
- Could he get a slower start and still complete the job within the desired timeframe?

Change the surroundings

- Sometimes changing your position actually helps to see things from a different perspective. I'm going to suggest that you all switch seats for the afternoon session.
- Since we are going to come back for a second session, how about we do this in another place/room/other lawyer's office etc.
- Let's move to
 - a more neutral ground
 - a place physically near your ultimate decision maker
 - the courthouse while jurors are there for other trials. That might get the attention of the clients.

Change the type of contract

- Maybe to make this work we will need to change the contract to a fixed price, indexed or scaled price, time and materials, percentage of savings.
- Do you think we might need to base our contract on the percentage of increased sales, percentage of profit created, or something else. What do you think about that?

Changing minds resources

[Many such techniques are described at <https://changingminds.org>.] A goldmine of techniques.

Check the math

- In contract disputes, I have found that going over the math once again can lead to some breakthroughs. It can be helpful to open up some new areas. It can be a cornerstone for an agreement. Maybe we find some tradeoffs. Can we do that now?
- Let's run the numbers again. Never know what might turn up.

Choices

- Your choice is spend time trying to convince me that he wrong or to spend time trying to fix the problem. What do you want to do?
- Your choice is to spend time building up your case against them or building a better relationship with them? What do you want to do?

Clear the air

- In order to move forward, we need everyone to be honest with each other. I think it's time we share things with each other that may not be things you want to hear or you might disagree with. So can I mention something to you?
- So when we meet in a joint session, I think it would be a good time for you to tell them...
- Would you be willing to say that to her directly? I think it would help.
- I think that issue is really holding us back. Can I bring it up to them in my next caucus with them?
- Do you mind if I raise that with them?
- There is something that I think we keep dancing around to don't directly talk about. Don't you think X is an important issue in this conflict?
- Sometimes in mediation it's important to be honest with each other... even if it's something hard to hear or something you don't believe. With our ground rules in mind, I want us to take some time to share those honest feelings with each other.

Clients-only meeting

[Tread lightly here. Most lawyers do not like this step.]

- Both lawyers are doing an excellent job in the mediation, and we are still not at a settlement yet. Sometimes I find that it can be useful for me to just meet with the parties. Can I do that now?
- Maybe this is best left for the clients to resolve on a personal level without the lawyers. Can we have a client-only session?
- You might think I'm crazy to suggest this, but maybe we should let just our clients meet alone, without the lawyers or the mediator. You know sometimes we lawyers are less guardians and more troublemakers. No comment on the mediator issue.
- I seldom ever do this but I am wondering if we should just let the clients meet together. They might be able to come up with a business solution that we are not getting to.
- Maybe we are fighting too much over the legal issues. Would you be open to suggesting to the other side that the clients do a "clients only" session with you the mediator? [a mediation advocacy technique]

Clock talk

- So it is 3:30 PM right now. We're scheduled to end at 5. Should we iron out the details of the first solution?
- With an hour left, can we shift to high gear?
- What would you folks like to accomplish in our time left?
- Are we going to have to unplug the clock to get this settled today?
- Can we turbocharge the process and get it done, or would you rather spend your time preparing for trial?

Close the gap

- What is necessary to catch their attention? Put enough on the table that makes it difficult for them to walk away.
- If we are going to start the bidding I would like to go back with something credible.
- We need a proposal that you think there's a fighting chance that he'll accept. Anything else is a waste of time.

Coaching

- Okay, the way you presented your offer was better. However, it is not leaving room for flexibility and further negotiation. After you present your offer, instead of asking, "we got a deal?" try following up with "because..." and then say why you think this is a better offer.
- I think instead of standing up and raising your voice to present your offer, you should sit down. Your physical relationship to Party B can come off as you expressing a sense of superiority. I'm not sure Party B will react well to that.
- Try having a conversation with Party B instead of demanding your offer.
- It might be more effective if you give a reason for any concession.

Committing to change the process

- Would you be willing to set up a new process that would prevent anything like this happening to anyone in the future.
- I don't like what happened here either. As part of our settlement agreement, we will agree to change our policies and procedures in situations like this for the future.

Compliment productive behavior

- Thank you both for coming to mediation.
- Thank you for explaining your concerns and listening patiently.
- I commend you both for coming up with a variety of options.

Concession – don't mention that word

- Do you have another idea?
- Do you have something that I might like better?
- Can you make a different proposal?
- Can you give me a more interesting proposal?
- What's another approach?
- Have another path forward?
- Might you find it acceptable ...
- Could you live with ...?

Conduct some discovery and then come back

- One place there is a lot of difference of opinion is that you have radically different viewpoints of how good a witness X will be and how her testimony will impact the case. Would you consider allowing a limited deposition of the witness where you can get some answers and both sides can get to do an assessment of how good the witness she will be and what her impact on the case will be? After the depo, you come back to mediation. Would that work?
- In many cases it is hard for lawyers to do serious negotiations until they have conducted some pretrial discovery, know the issues better, and are fairly sure there will be no summary judgement granted. Do you think you need to do some discovery before we start serious negotiation in this mediation?

Concessions breed concessions

- I want to remind you that a concession from one party often results in concession from the other party. That's just the way it works.
- In this business, we often say, "It takes on to get one." I'm talking concessions.
- If you want them to move, you will probably have to make a move.
- You can even make a concession without making a concession. I call it a "contingent concession." You can say, "I'm willing to improve my offer, if you improve your offer. But if you won't, I won't."
- Lawyers often say, "I won't bid against myself." What they mean is that they won't make two concessions in a row, if the other side does not also make a concession in between. Its simple human nature.
- Most negotiations and mediations call for reciprocal concessions. Both sides have to move if there is going to be further movement.
- While you might not think their concession is as big as your concession, it takes concession from one party to get a concession from the other party.
- Yeah, you may not think much of their concession, but even bad offers are progress
- You can't get there without taking steps from here.

Concession – don't speak the word

Because some people react negatively to the word "concession," use a different word when asking for a concession from them, words such as new offer, attempt, bid, pitch, proposition, tender, suggestion, approach, suggestion, overture, etc.

- I want to remind you that a "new offer" from one party often results in "new offer" from the other party. That's just the way it works.
- In this business, we often say, "It takes on to get one." I'm talking about "other proposals."
- You can even make a proposition without making a proposition. I call it a "contingent proposition." You can say, "I'm willing to improve my proposition, if you improve your proposition. But if you won't, I won't."

Confidential listener

- I would ask you and then them, confidentially, for your “next to last” offer. What might be your next to final offer before you quit. Then I will bring in the lawyers for both sides and verbally describe in general terms, without telling anyone the confidential numbers, how far about the two sides are. I would not share the numbers. But you do get some new information.
- [When talking with the lawyers] There is a significant gap between the two sides. It is going to cost as much or more to litigate this. I think it is worth continuing to work on this. There are some options. You could both agree to share those numbers with each other – through me to be sure that both sides do disclose. Or you could continue your bargaining, going back to who is up to give the next new offer.?

Confidentiality – seeking release from

- I think [certain information you have] would be very helpful for the other party to know. I think it could help settle this case, which is the goal of this mediation. Would you feel comfortable with me sharing this information?
- If I could tell them that information, it might end the case. Can I?
- It seems the other party doesn’t know about X. However, I think it is important for them to know so that they understand your position better and will be more receptive to your offer. Is it alright with you that I share this information?
- With your permission, may I let the party know about this issue?
- May I paraphrase what you have described to me to the other side?
- Do I have your authorization to communicate that information to the other negotiating party?
- Would it help to meet in conference in order to discuss matters privately?

Convert statements to offers and strategies

- Can I take that to them as an offer?
- Can we develop that idea into an offer?
- How can we get from that idea to a possible settlement?
- How can we sell that idea to her?
- Is that something you’d feel comfortable with me taking to them?
- What can we do to make that into something that they are likely to consider?
- What do you think it will take for them to accept that ideal?
- What do you think they would say to that?
- What would it take to make that idea into something you could accept?
- Would you be willing to make that an offer I can take to him?
- Would you like to propose that idea as a solution?

Costs of no agreement

- What will it be like going home this evening and facing the same situation that you had before you came here?
- What would it feel like if we are unable to get this thing settled today?
- What would be the effect of the failure to settle on your business/state of mind/litigation expenses/ going forward?
- Would it make sense to try and come up with a plan for the next few weeks until you can come back for your 2nd mediation session?

Create doubts

- What are your weakest defenses?
- What are the problems, if any, with your claim of...?:
- What percentage chance do you see of your claim being rejected?
- What is your worst case scenario?
- What evidence do you have to support your claim of...?
- Do you have any case law support for your claim of...?
- If their side argues X. How do you responded that?
- My opinion is that the court will exclude that evidence because....
- Anything is possible of course, but I don’t think it’s likely that the judge will...
- My sense is that the judge will allow them to X. It seems to me that you have a significant risk on that issue.
- If this case gets to a jury, and I think it will if you don’t settle, I see will most likely jury verdict is in the range of X and Y dollars.
- It’s your decision of course. But if you want my advice, you should except their offer.
- Do you really think you can prove X?
- The judge will probably find for their side because of....

Create doubts about collectability of judgment

- Will they be around and have money in two years after you have won at trial and maybe an appeal?
- While yes we do offer a lifetime warranty, but those warranties really involve two lifetimes. Yes, the homeowner may live in that house another 50 years, but I as the seller plan to retire in 2 years. No one is going to cover that warranty after I close up my business.

Creative catalyst statement

- Okay, this might seem a little bizarre but what if...?
- I’m going to suggest something that will seem like it came out of left field. But just take a minute to think about what if....

Criteria for an acceptable outcome

- Before we focus on the outcome itself, would you like to try to define the qualities that any good outcome should have?'
- Before getting to the specific solution, shall we define the qualities that good outcome should have?
- What’s your ideal outcome and why?
- What needs to be part of the solution to be acceptable to you?

Cultural differences

- Do it for me.
[Said a “high status” mediator in Kosrae, Federated States of Micronesia. I first was appalled by the comment, but later thought it was appropriate in that culture where a high-status person acting as mediator would “lose face” if he failed to get the parties to a settlement in mediation].

Deadlines move parties

- The building closes in 45minutes, if you don't get an agreement tonight, you might never get one and have to go to court. What do you want to do?
- If you can't reach a solution in the next 30 minutes, you will have to go into the Small-claims courtroom for a trial.

Details to avoid attacks or emotions

- I just want to remind everyone of the ground rules that we set at the beginning of the session. Remember that the top, most important rule was to remain respectful of the ideas that each party brings to the table.[the parties were squabbling] Why don't we talk about the details of the solution we came up with for issue X?
- Let's go back to the solution [and put aside our fighting] we talked about yesterday. There were a couple of details that we tabled for today. How about we figure those out right now?

Devaluing offers or concessions

- In the opening joint session, you said you were "happy" to give up X. Is that how you really feel? Happy?
- Next time, don't say, "I was going to do that anyway." Make it a trade-off and get something for it.

Develop offers

- I want you both to write down you best and final offer. You'll give them to me, I will review, and with your permission, I'll share if the offers are close, what the range of settlement is, and any other helpful information.
- Yesterday, I had you make a list of possible solutions for this issue. I looked at them last night and I think there's some middle ground here. Are you both okay with me sharing that mid-point/range?

Develop trade-offs

- You want X to pay you for your damaged reputation, and she wants compensation for her property loss. Can we look at whether these items might balance each other out to some extent?
- We both have lots of issues to discuss. I can't let you have everything you are asking for. What are you willing to give up?

Dividing up physical assets

- Want to take turns picking?
- Want to defer the division of the last (contested item) and divide the rest?
- Want to sell the last (contested) item at an auction and split the money?
- Want to let one person put the assets into two piles and then let the second person "pick-a-pile?"

Dominating attorney or another representative

Check in with the party / speak to the attorney privately

- Your attorney suggested X. How do you feel about that?
- [Client] What would you like to do now?
- [Make eye contact and otherwise attend to the party]
- [Client] Is there anything you'd like to add?
- [Client] Is that something you really want?
- Usually in a situation like this I like to talk privately with the lawyer regarding some legal issues. Could we have a private meeting?

Don't caucus too soon or too late

- I will move us into private sessions in a moment, but before we do I would like to explore...
- But we normally do now is move into caucuses, but before we do...
- After hearing that exchange between the two of you, I think it's time for us to move into separate sessions.
- What we normally do now is move into separate sessions.

Don't get too specific too early

- I usually find it helpful to spend time developing the back ground and history of how you two got to this point before we start exchanging proposals for the future.
- As we start, I want to mention that many mediators find it useful to not have the parties exchanged dollar offers right at the beginning because it often pushes the parties even farther apart and makes the mediation drag on longer.
- You may have to go slow now to go fast later.
- Can we agree that will hold back money proposals until I start to ask for them?
- Why don't we take some time to each list the top three things we hope to accomplish today?

Draw from a hat

- Why don't we place a series of percentages in a hat and have one person draw from it to see who gets what?
- Five assets to divide up. How about we put the names in a hat, and you can take turns drawing the assets.

Early low offers and big gaps

- It's not their last word; it's their first word.
- There's a big gap, but not one that is unbridgeable.
- I don't know what their first bid is but my experience is that when I bring it in it feels like a bucket of icy water. Please don't walk out.
- I don't want you to react adversely to the offer because it's an opportunity to get into negotiation.
- [Preparing one side for an extremely low first offer from the other side] Don't be disheartened; all that counts is their best offer.
- All negotiations start like this. My job is to keep you in the building.

Eliminate uncertainty

- This issue is really a sticking point right now. How about we postpone this issue until later when we have more information and move on to an easier issue for now?

Emphasize the future; de-emphasize the past

- We have gone over how we got to this point, so how about shifting our focus to the future?
- I think I have a good understanding of the facts and issues at this point, so normally what I do at this point in the mediation is to start working on the future. Are you ready for that?
- So that's what brought you here, now how are we going to get you ready for what is ahead of you?
- It's time to find a remedy, not fault.

End phase

- This is the moment to dig deep and make an impressive offer.
- If I can get \$x will you take it? [To prevent the onion slicing that is typical at the end of the negotiation phase.]
- If you're going to give concessions to the other side it has to be concessions that mean something to them.

End the mediation?

- It feels to me like we are at impasse on these issues and we are not making progress. Shall we declare this an impasse and end the mediation? You will be free to go your separate ways or to court. What do you think? ["Calling it off sometimes drives the parties towards settlement.]
- We have been at it most of the day. I haven't seen any progress for quite a while. Are we done with mediation? Shall we call it off?

Endowment effect

- I'm not trying to make this a psychology class, but let me explain something.
- We think our things are worth more than the same things that other people have. That's called the endowment effect.
- Sellers almost always think things are more valuable than do the buyers.
- A tort lawsuit is really like selling an injury. The plaintiff is selling; the defendant is buying. Not surprisingly, plaintiffs always feel like they should be paid more and defendants feel like they should be paying less.
- We love our kids more than we love other people's kids.
- We will do more for our family than we will do for other people's families
- Most sellers overvalue their sales; most buyers undervalue their purchases.

Enforcement options

- I understand that you're not totally sure about the agreement because you're worried about enforcement. How do you feel about mutually selecting someone to hold you both accountable?
- Is there someone objective, neutral person that you both trust, that you can go to if there's a minor issue with the agreement?

Express your own frustration

- Frankly, I'm a little surprised that we are still at impasse. I thought this case was going to settle. Of course it is your case. It's up to you.
- Look, I've sat here listening to you two argue over this all day. At this point, I have the sense that you two aren't listening to each other and almost enjoy yelling, just for the sport of it. If you really came in here to mediate, then I'll stick with it and keep going. But if you are not even going to listen to each other, then I think we are done. So what is it?
- For the third and final time, I have tried to help you find common ground and a solution that you both could go along with. My sense is you don't seem to want to resolve it today. If that's the case, I suggest you move on and go see a judge if that is necessary. Let a judge or jury decide. Or, you can just walk away from this case if that is possible for both of you.

Fairness - appearance of

- What does "fair" mean to you?
- What does a "fair" solution look like to you?
- What do you think it would seem "fair" to her?
- I think you both have different definitions of fairness.
- I think your definition of fairness is simply – you win!

Fantasy football draft

- As you are winding down your partnership and trying to divide up your customers, do you want to get the list of your customers and then pick or draft them like a sports team?
- We still have to divide the assets that are left. Would you consider taking turns making choices - just like kids picking teammates for a neighborhood sports team?

Fears

- What concerns you the most about this situation?
- What worries you the most?
- What are you afraid might happen?
- What is the scariest thing about this?
- What makes your skin crawl about this?
- What is your biggest fear here?

Flip a coin

- This might sound unusual, but I'm sure it will work. I suggest we just flip a coin to decide at this point to see who gets the remaining gap that you are arguing over.
- Do you want to flip for it?
- Heads we go with your number, tails we go with hers.
- Well, what do you say we let the old quarter decide?
- Do you have a quarter? I think I know how we can solve this.
- Want to go high-tech? Let's use a random number generator.
- We are both tied to our positions, and we both want to complete this deal. Why don't we just flip a coin?
- 50% odds aren't bad!
- So here we are. You are stuck on your number, and I'm stuck on my number. Do you think it would be fair if we just flip a coin and move forward with this effort?
- We've worked on this issue for quite some time, and I believe we're getting closer, but not close enough. Let's flip a coin, and the winner gets to choose the terms for this issue. I'll flip the coin, and you can call it.
- There are only two choices, and each has unique values. How about we flip a coin? One of us will choose heads or tails, and the other party will flip. Do you want to flip or make the call?

First offer – flip for it

- Since neither of you wants to put in the first offer, let's flip a coin. Winner gets to choose first. Heads or tails?
- I know this is rather unusual, but since neither of you is willing to make the first offer, let's just do a football coin toss. Winner gets to "kick it off" or receive the first offer. Winner's choice.

Focus on options and solutions rather than the problem

- I want you to put yourselves in each other's shoes. From that perspective, tell me what your ideal solution would be to this issue.
- It's clear to me that we all recognize what the problem is. Now, without rehashing what the issue is, let's focus on some solutions.
- Okay, folks. Let's put on our problem-solving hats and work towards coming up with a solution.
- Since there may not be one quick solution, what are our options?

Follow the parties' pace

- I want to slow down just a little bit and give you both the time and space to fully understand what this solution means for both of you.
- I know this has been hard for you. It must have taken a lot of courage to propose the solution that you did. I want you to be proud of yourself. How about we take a few breaths together?

Follow-up call

- Hi. I wanted to touch base with you now a month after our mediation did not result in a settlement. Has anything changed? Would you be interested in trying another mediation session to see if we can come to an agreement?
- Hello. How are you? It's been a month since you reached an agreement in mediation. Just checking to see if the agreement worked out and you were able to complete the settlement.

Fork in the road

- Being stuck may just mean we need another path to solving this or it is time for a brake.
- Don't forget, everyone comes to a mediator because they were stuck. It's normal.
- When you seem out of options, it's part of the natural process of solving many conflicts.
- Most disputes settle on terms that work for both sides. Let's keep searching for those terms.
- An impasse just means that the topic is something that matters to the both of you. We can find ways to work it out together.
- Impasses are not bad. They are natural markers to remind us we need to shift gears to get up this hill.

Frame the choice as a gain not a loss

Heuristics, prospect theory, and loss aversion explain why people are drawn towards gains and away from losses.

- Their offer is proposing to provide you with medical care and a pay raise!
- Their offer represents a 75% gain (don't say their offer represents a 25% loss).

Generate options and solutions

- How do you think we can make best use of today?
- What's the best way to run the mediation most effectively?
- Do you have a feeling as to the quickest and most effective route to settlement?
- How can we advance this process profitably?
- Where do you think this might go? How might it pan out?
- What's the next move? Where do we go from here?
- At the end of the day it's going to be a deal between you and him. I'll need your help in knowing what's going to work and what's not going to work.

Get a neutral third-party opinion

- The two of you are pretty far apart on this one. What if we asked the trial judge to hold a conference in this case, and seek the judge's opinion on [liability, valuation, or other issues]. [A judge's opinion often has a strong tendency to move the parties. The judge also can use "bench leverage" to encourage the parties to consider resolution.] Would that sound good in this case?
- You know we could even hire a retired judge for a day to give an informal opinion of the merits of your case. Want to try that?

Global summary to see where parties are stuck

- Party A's positions and interests seem to be X and they said Y and that ... was important to them. Party B's positions and interests seem to be ... and they said ... and that ... was important to them. So you can see that we are stuck. What can we do to get unstuck?
- This is what we have accomplished and where we are now.

Great transitions to proposals

- I saw this on Judge Judy once....
- I know some mediators who try ...
- One of my mediator friends use to...
- Some people in situations like this try...
- What do you say? Want to try it?
- Some people in situations have found that...

Going public with dirty laundry

- I understand your frustration, but please understand that for now, this issue is a private matter. But if an agreement cannot be met, and you end up in court the matter will be open to the public and the media.
- One of the real benefits of mediation is that nothing becomes public. Reputations, personal and business, remain intact. If you don't settle who knows what information will start floating around.

Going to get worse if it is not settled

- If we cannot reach an agreement today, understand that the other party will probably request a substantial amount of document production from your office, depose you and your staff, and require you to answer interrogatories.
- If we leave today without a settlement, the billing machines for both lawyers will start working overtime.

Ground rules

- Can we agree that in addition to the "no interrupting" ground rule, that if I as the mediator think that our discussion is drifting too much into "who was right and who was wrong," that I can ask you to get back to focusing on the future?
- We have five parties to this dispute. Can we agree that no one gets to talk twice until everyone has had to speak once?

Half a job

- We have solved most of the issues, but a couple remain. Would you like to write up an agreement on the issues we have resolved and
 - defer the others until a later time?
 - arbitrate those issues – just have me or someone else decide them?
 - flip a coin to decide?
 - drawn numbers out of hat?
- Do you have any suggestions on how we can improve the proposals?
- They have presented a multi-part proposal. Should we discuss them one at a time or as a package?
- Is there some external reference we can look at to determine fairness?
- What would you think if they proposed..."
- What do you think they are getting wrong?
- What do you think they don't understand about your offer?
- It we can't settle this, what happens next?

Hard move – hard sell

- It's going to take more money
- I know this is not what you want to hear from me. You are probably going to have to...
- It's going to take more money - and this is the last time I will ask
- To get this done today, I think you are going to have to dig a little deeper

Highlight common interests

- You both seem to care deeply about...
- If I understand you correctly, you both would like to...

Honesty - Let's be honest.

[Danger! This gambit might injure the mediator's relationship with the party.]

- I want you to remember that all the feelings you feel are valid. You don't have to fake how you feel because you think it will please me or the other party. We're trying to be honest here– and all in the hopes of working together to make sure both parties come out happier. Okay?
- I need to tell you something that you probably don't want to hear and might have a hard time believing.
- You might disagree with what I'm about to tell you.
- This is the way I see it...

[Safer gambit is to put the "honest" statement in quotes and attribute it to another person.]

- Now some people might say, "XX"
- Other could believe that ...
- No doubt someone out there would be thinking...

Humor (especially self-deprecating) to ease tensions.

- Ha, I bet you two wish you picked a different mediator, huh?
- Take your time with this decision. I don't have anywhere to be anytime soon... my frozen pizza and pre-recorded movie aren't going anywhere!
- The only binding decision I make is when to stop for lunch.
- Did you hear the story about three lawyers who met at a bar to negotiate a settlement?

I once had a case... or Some folks...

[Barkai calls this a "soft" mediator's proposal or a facilitative evaluation.]

- I once had a case where the people were in similar conflict, but not exactly the same circumstances you have. What they decided was that they would do is... Do you think something like that might work for you?
- Some folks in your situation have ... Is that something you both would be interested in exploring?
- I actually had a client in the same position. What he realized was...
- Sometimes, we see parties to this kind of dispute agree to something like the following
- A few weeks ago in a mediation, some people I was working with decided to...
- Sometimes parties who are in a similar dispute like to try something like (make up an example to give them).

Ideal or good

- I know you must have an ideal outcome that you're shooting for, but you might not be able to reach the ideal state in mediation. What really would be a 'good outcome' for you?
- It might not be perfect, but remember it also has to seem good to them to be a settlement.

Incomplete responses – need expansion

[Mediators need to get party expansion of responses such as:

That's about it. - There's not much more to tell. - That's pretty much our position.]

- Tell me more about that?
- Sounds like there is more tell.
- What else do I need to know?
- What do you mean by ("about it," "pretty much," and "not much more")?

Information about the other side

- What do you think the other party's position is?
- Give me information about the personalities and styles in the other rooms.
- Any guidance on them as people?
- Where are they likely to be coming from?
- You have worked with them for months/years. What's the best way through to them?
- Are they hard-nosed or reasonable negotiators?
- Mediators also invite parties to provide what the other side(s) would need if they were to be persuaded to change their minds and shift their positions
- If I am going to convince the other party I need ammunition from you.
- What can you give me to convince them that they are wrong?

Insulting first offers² - how to respond

- You started pretty high, so it is not surprising that they started pretty low is it?
- Yes, they are trying to anchor high, you are trying to anchor low. We can stay at the extremes for a while, or we can get down to some real negotiations. What do you plan to do?
- Not surprising that their first offer is not in the ballpark is it? So what are you thinking?
- Did you expect something different than that?
- What can you do to get them in the ballpark?
- Yours seems like a pretty extreme offer. How do you think they are likely to respond?
- I have to say, if I bring them that offer, we might have a very short day. They might just up and leave.
- Every offer is a message. Ok, I can take your offer to them. But what is your offer supposed to be signaling?
- I'll bring your offer to them, but what should I tell them it means?
- If you can give me an offer that might have more appeal to them, I will tell them that you only wanted to offer X, but in an attempt to move this forward, I asked you to go to ...
- Can I also tell them that if we do reach a settlement, you will agree to not ...
- I'll take her your offer, but I don't think it will help much, but maybe I will communicate something they need to know about how you feel right now.
- They made an offer that is really not in your range. They are angry.
- If I tell them that you won't put any money on the table until they come off their initial multi-million offer, how do you think they are likely to respond?

² Credit to Dwight Golann's ideas

Issue identification is premature

- I know you listed on the intake form and told my intake person on the phone that the issue in this dispute is X. And, I always like to start with a full discussion of the facts from your current viewpoint so we don't miss anything. So, please start at the beginning and tell me how did this conflict start?
- Our discussion so far has been a good start, and to make sure we are not jumping into only part of the problem for you can you take me back as far as you can to understand the problem.
- I'd also like to know if anything has changed since you fir talked to my office on the phone and identified the problem as you saw it then.

“If” statements (hypotheticals)

[“If” is a mediator’s most useful word.]

- If they were to give a little on X, would you be willing to give a little on Y?
- If I could get them to... would you...?
- If you would..., what do you think she would do?
- What if we had to decide this thing by tomorrow? Considering all that we've discussed thus far, would you both be comfortable if we settled on X?
- What if we...?
- Do you feel it would work for you if they...?

In principle - used to build agreement

- I know we haven't worked out the details yet, but do you like the direction this idea is going?
- Setting the details aside, in principle would you agree to...
- While we haven't ironed out the details yet, I think I am hearing as a core idea that
- With those key details in mind, what in principle seems to be a unifying idea that we can build a solution around?

In principle - used to move forward

- That principle seems to allow us to make forward movement! Why don't we come back to the details later?
- Can we take this forward-moving momentum that the principle gives us and address some other issues before we get into the nitty-gritty of the details?
- I think we all like that idea as a key principle for the settlement, am I right? Can we keep moving forward while we seem to be on a roll? We will flesh out the details later.
- I know there's a lot of important considerations and details to work through, but in principle, if X would [state the principle], do you think that might work for you?‘‘

Jeopardy

- We've made such good progress today. Is this issue enough to jeopardize all that work we've completed so far?
- We have accomplished a lot here today. We are not at the end of the game yet, but we have come a long way. I'd hate to see that all wasted.

Justify positions

- Okay, I understand that you want to offer X, but first let's try a little exercise. I want you to pretend that I am the other side. Present your offer to me and let's simulate a little negotiation.
- I think the initial way you presented your offer to Party B came off a little too aggressive and set the mediation back Let's try again. You want X. I want you to make your best case for why you think that should be the solution.

Know when not to settle

Some people don't want to settle today. Give them time.

- I feel like we are close to a deal, but I'm also sensing that you are not ready to do it today. Am I right? Do you want to call it a day and come back some other time?
- We don't need to resolve anything today. The good thing is that we've had a lot of productive conversation. Do you want to pick it up here sometime next week?

Language - Metaphors, vivid descriptions and dramatic language

- When I bring in the first offer it can feel like a bucket of cold water.
- Think about the impact of that offer like pouring petrol on the flames.
- This is a journey; there are hills to get over before we can see where we are going.
- There is an area of calm water between the parties. If they go there they will settle.
- A bird in the hand is worth two in the bush. [Settling now rather than running the risks of a trial in court.]

Last and final offer

- I want to ask you to make a last and final offer. And I won't come back to you anymore. It might not be quite the number you want to give, but it might just end this now. It is a number I think I can get from them. Here is the number...
- If you can't give me the amount I am asking to take to the other side right now, I might have to come back and ask you for another number. You don't want that do you?
- Numbers are emotional, not just rational. This is a number that I think will settle this case. Can you do it?
- We are at the home stretch, my friends. I want you to muster as much flexibility as you can and come up with your best and final offer.
- We're at the point where there's just a little more to go. At this time, I'm going to ask you both to write down your best and final offer. Hopefully, after we share those offers, this mediation will be over soon after.
- Sometimes if I (as a mediator) tell people this is the last and final time I am coming to them with a request, they will sometimes go farther than even they were otherwise willing to go. That's what I did here. They gave me a number. It might not seem fair to you today, but it is the most I think you can get today. There is certainty with it. It has a lot to recommend it. If you accept this offer, you will put this dispute behind you. No more thinking about it next week when you are with your families. No more thinking about it in the middle of the night.

Last gap to a charity

- We can't seem to agree on how to close the last part of the gap between us. You don't want me to have it, and I don't want you to have it. Let's donate it to Make a Wish foundation. That way a deserving child will benefit and something great will come out of all this arguing.
- Since we can't agree on who gets the last item, why don't we donate it to charity instead?
- Instead of letting this last item block us from all the progress we've made, why don't we just donate it to a charity in which we both support?

Lawyers-only meeting

- I think it is a good time for a break. I think it would be a good time for me to meet with just the lawyers. Would that be ok with all of you?
- I think we have reached the point where legal issues have to be discussed by the lawyers separately.
- Frequently I have found that it is useful to meet with just the lawyers to discuss some legal issues and other things. Could I do that now?
- I think we have reached the point where legal issues have to be discussed by the lawyers separately.
- Maybe the parties are already too caught up in the matter.
- It is time to thresh out the non-factual issues here.
- Would you - the clients - be okay if the attorneys and I meet to go over all the facts and solutions discussed during today's meeting?

Loss and mourning the dispute

- I know you have been living with this conflict for a couple of years now. You had high expectations and now you are finding, like most people in conflict, you are not going to get all you want. Let me add, no one really ever does. And for a lot of people, it is hard to give up the conflict. It becomes part of your life and identify. Even if it is time to move on, and even if your friends tell you to move on - some people can't seem to do that. I want to ask you very directly - could that be you too? Let me give you some time to think about this. I'll come back to you and see if you are still interested in settling.
- Have you ever heard of Dr. Elisabeth Kübler-Ross and the stages of grief and loss she has written about? Ending a longtime conflict is like that for some people. It is hard to move from the anger about the conflict through the states of grief all the way to the last stage of acceptance. It is very hard. While your relationship has been the major conflict in your life for a number of years, ending this relationship is also hard to do. It has become part of your life for years. While part of you wants out, another part of you might want to stay in. Why don't you take some time to think about this, talk more with your lawyer and therapist, and come back next week to see what you really want to do here.
- You have the opportunity to end this conflict. One way to look at this is that you're benefitting a lot more by going through this mediation than you would if you went to court.
- This solution really seems to work for the things that are very important to you. You get to spend more time with your family, and you have enough funds to make some new and lasting memories. Are you ready to do that?

Maintain positive momentum

- You folks are doing such a great job. I want you to keep up this resolution-making momentum!
- I can see a final settlement in the very near future!
- We've made a lot of good progress so far. Do you want to take a break before we get into the home stretch?
- We have come a long way. Almost there.
- As you can see we are probably going to settle this.

Manage expectations

- Don't be dismayed about opening session, it's typical at this stage for parties to be saber-rattling.
- Just because someone expresses their case strongly doesn't mean they'll be intransigent in the negotiation.
- Mediation is like a journey with obstacles along the way that will frustrate, depress, make you wonder why you are here.
- Quite often there's despair at 3pm. Hang in there, we can get through it.
- There are necessary rites of passage before we can get to a settlement.
- I've done a lot of these and we have to go through these phases so please don't talk about leaving now.
- We can only go as fast as the slowest person so there may be frustration.
- Have you heard Elisabeth Kubler-Ross' idea of the five stages of grief – sort of a death-adjustment pattern that many people go through as they are dying? Denial, anger, bargaining, depression, and acceptance. Settling is often like that too. It takes time to adjust to giving up your dispute. Some people experience that during mediation too.

Match eagles with eagles

- Frankly, there seems to be a status mismatch in status of the negotiators. They have brought their CEO as part of the mediation team, but your side has a mid-level manager. Your manager is doing a great job, but I'm getting the sense that they are feeling disrespected. She seems to feel like she has to show off, which is taking our process into a whole different direction – which actually is not helpful. To make the mediation flow better and help us reach a satisfactory result, could you add a higher ranking person to your team?
- ...could you get some engineers involved with their engineers?
- ...some operations people with their operations people?
- ...some bosses with their bosses?

Mediator claims ownership to remove reactive devaluation.

- You have been talking about X but seem reluctant to make that an offer because you think they will reject anything you propose. And, frankly, I think it is possibly part of the solution here. So what if I bring it to them and say it's my idea as the mediator. Would that work for you?
- One of the parties says, "Mediator, would you be willing to say it was your idea for a solution?"
- [Said in a joint session] What if we looked at this proposal from the list of brainstormed ideas we just created. What do you both think?

Mediator's proposal

- Can I make a mediator's proposal, which is a number that I think you both could "live with"?
- It's been a long day. We don't have an agreement yet. We could try a mediator's proposal to reach settlement. It involves me coming up with dollar figure or other terms that I think have the best chance of getting both of you to say "yes" to it. It will not be a number that necessarily is my personal evaluation of the case, or even my prediction of what a judge or jury would reach. It is a number that I think may be one you both could "live with" after spending all this time with you and hearing from both of you about your case. I'll tell you more about it if you like.
- I will tell you both the same number or other terms in private. I'll give you some time to think about it. Then you each tell me, again in secret, private sessions, or what some people call a caucus, whether you would accept those terms as a settlement. If both of you say "yes," then we have an agreement. If one of you does not accept those settlement terms then the mediation is over. If you say "no" I won't tell you if the other person said "yes" or "no." By keeping their answer a secret, you will not learn if they would have accepted those terms, and it will not give you any advantage over them in any future bargaining.
- My proposal will be a number that I think the plaintiff is likely to accept and the defendant is likely to pay.
- We have come a long way, but we are definitely not there. This is the time when I would roll out a mediator's proposal, but only if you both want it. My number, and perhaps other terms, would not be what I think a judge or jury would select. My number is what my gut tells me is a number that you both would accept. Of course there are more terms to talk about, but is that something that sounds like what you would want from me?
- I'll give the same number to both sides in private and some time to think about it. You tell me in private if you will accept it as a settlement. The other side won't be told your answer unless you both say "yes." If you accept it and they don't, they will never know that you accepted it. I will just say we do not have a settlement.
- Do you want to try a mediator's proposal, which is a last ditch, take-it-or-leave-it recommendation by me to settle this dispute at a certain dollar amount (and maybe other terms)?
- We are at an impasse. And, I think I have earned and shown myself worthy of, your trust in this case. So, I am proposing a mediator's proposal.
- My proposal is not necessarily my opinion of the settlement value of the case, but it simply represents a proposal which may be within the "reach" of all of the parties, although slightly beyond the amount preferred by either party.
- The mediator's proposal is an effort to "stretch" both parties beyond that which they would otherwise move in a negotiated fashion, but not so far as to lose the opportunity of obtaining a resolution.

Variations

- [Overnight or longer] You can go home and talk to others about my proposal or simply "sleep on it" (or even take a week) before making your decision.

Breaking Impasse Gambits

- [Written explanation] I will give you a detailed, written explanation of my reasoning with the proposal.
- [Pre-proposal range] Before I make my proposal I want you to know that I'm thinking of making a proposal in the range of between X and Y. I don't want your reaction to that range right now, but I do want to know (tell me privately), if you would seriously consider a proposal in that range. It would make no sense to make a proposal that you won't even consider.
- [Independent value, not just a value that would settle the case] I'm going to give you a mediator proposal that is my independent judgement on the value of the case and certainly not just the mid-point between your two last offers.
- [Disclosing a confidential "yes"] Although I initially said that I would not tell them if you accepted the mediator's proposal, and they didn't, I want to revisit that ground rule. I want to see if you want to change it. I know that sometimes if I go back to them and directly tell that you have accepted the proposal that sometimes changes their minds. I think it is worth trying, but again it is up to you. It is your case. But I don't think you lose much if I tell them you have accepted. They already know that it is a value that I think might settle the case. I think it might make a real difference if they knew you had accepted it and, I will really lean on them. I think it's highly likely that if they know you accepted, they will go back to their decision-makers and get a different answer. Do you want to try that?

The downside of many mediators using mediator proposals is that if parties learn to expect a mediator's proposal at the end of a mediation that has not reached an agreement, they will not actively negotiate during the mediation but will try to "game" the mediator as they use the day to set up for the final, now expected, mediator's proposal.

So why do mediators continue to use mediator proposals?

- Mediator's proposal work. They often bring a settlement.
- Mediator proposals remove the chilling effect of reactive devaluation when a proposal comes from the opposing party.
- Parties anticipate mediator proposals. They hold back some excess in their apparent final offers for the movement necessary to reach the mediator's proposal.
- Such proposals allow parties, their representatives, and lawyers who attended the mediation to go back to their constituents, clients, bosses, and other government officials and say that they held firm, but the mediator made them settle (or the mediator offered very convincing arguments about why we should settle).

Breaking Impasse Gambits

Money - change the "shape" of the money

- We are at impasse on the financial terms. You both seem to agree on the total price, but to make this work could you make a larger first payment?
- ...a larger deposit?
- ...complete the payments sooner?
- ...offer a different payment stream?
- Your offer of \$1000 worth of products from your store is not as important to her as \$1000 cash to pay bills. Is there some flexibility on the form of the \$1000?
- I understand that you think the \$1000 in skin products is a cheap offer, but I think Party B's reason for gifting those products is because they know how much skin care means to you.
- A \$2 per hour increase might not sound as impressive as a \$4,000 a year increase, but they are the same.

Money gap – bridge it

- You could end up losing many times that amount if you end up taking this to court.
- Consider it a small tip for bad service. Put the money down and walk out. You have better things to do with your life.
- The other side has thrown you a pass with that last offer. Do they have to catch it for you, too?
- When you think about where we started, it really isn't that much.
- What's it worth to you to put this conflict to bed and have a good night's sleep instead of coming back here tomorrow?
- What's it worth to you to leave here and go make some money rather than staying here and spending more money on your lawyer?
- I know you like your lawyer, but would you rather fund her kid's college education or yours?
- I don't know about you, but many people would pay twice that amount or more to never have to see those people again.
- You're totally right money is important... but not the kind of money you're talking about.
- If you start splitting hairs at this point in the process, you are going to end up looking like you just got a bad haircut.
- Yeah, if you say it enough times, it starts to sound like real money.
- What you need to realize is that the other party is in the next room, thinking the exact same thing. If that's the case, we're going to be here all afternoon, arguing over a few bucks.
- It is totally up to you. We can absolutely spend the next few hours quibbling over rounding errors, but...
- I have no decision-making capacity, after all... and I am getting paid at an hourly rate.
- It's a totally valid point. We're here about the money, after all, and you're well within your rights to wrestle for the last dollar if it suits you. I would be shirking my duty if I didn't remind you of something, though what we've been doing here today, in essence, is building a house of cards... and the

more wrestling that you do in that house, the more you risk the entire structure collapsing. So, do you really need to make another counter offer?

- I understand. My eight-year-old is the exact same way. Gotta fight for that last inch. I'm sure he will get wiser as he ages.
- Wow, you must know some cheap litigators!
- No offense, but is this your first negotiation?
- No matter what happens after this point, you've already saved money compared to what it would have cost to litigate this thing. So, don't think of it as money. Think of it as code that opens a door and lets you walk away from this mess and get on with the rest of your life.
- I'm sure both sides are thinking right now that if they stay strong and are "tough" negotiators, they're going to get everything that they want... which is the first clue that it's not going to happen.

Move from exploration to negotiation

- Do you need to know any more about their position before getting to numbers?
- Is there any benefit in getting you further entrenched in the facts? If there is, let's do it. If not, let's move on to numbers.
- How much of the law do you want to get into? You know you both disagree on the law.
- Would it be better to get some numbers on the table?
- What do we have to discuss before you are willing to look at numbers?
- Would discussion of legal/technical points be helpful? Haven't you been doing that for months?
- To what extent do you need to know their position better or are we in a position where you're prepared to say we understand the risks and are prepared to move forward.
- Can you make or evaluate a settlement proposal based on that... or do we need to do more explorations?
- The focus today is not on what's happened before but on where you can agree.
- What do you need to discuss, before you can get into a position to negotiate?
- Do we have to argue the legal points? My sense is that it is not going to get you or them to change your minds.
- I am a great believer in seeing what the gap is early. It can be very helpfully when parties know how far apart they are.
- Should we look at what they are willing to offer and what you are willing to offer before 4pm? We can wait until then, but I don't think much will change by then.
- It doesn't matter why you agree; it matters where you agree.
- One way to move forward is to put a toe in the negotiation pool. Each of you doesn't know what the other is prepared to do to settle. At some point discussion has to get into figures.
- I don't want to get bogged down, and I imagine you don't want to get in a battle of the experts.

My lawyer says I have a very good case

- Your lawyer says you have a good case huh?
- Has your lawyer put that in writing?
- Did your lawyer assign a percentage to your chance of winning?
- Is your lawyer guaranteeing that you will win?
- Is your lawyer making any promises?
- Will your lawyer win – meaning get paid – even if you lose at trial?
- Is your lawyer not going to charge fees and expenses if you don't win?
- You know I have hardly ever had one of the two lawyers in a case say they had less than a 50 percent chance of winning. Statistically, that's not possible.

Negative reactions – anticipating them

- You're probably going to be tempted to reject this offer out of hand, but I think you should give it some serious thought before doing so.
- If you want to make the deal, this may be about as far as you can push him.

Net Recovery Technique

- You are at \$X and they are at \$Y. So let's look at your future litigation costs, expert fees, attorney fees, taxes and any other monetary and non-monetary costs of continuing this dispute. Let's add in the appellate costs (They won't quit if you win at trial will they? Would you, if you lose?) And don't forget the time value of money – getting paid now- and what your opportunity costs are. What would you do with that money if you could get even their \$Y right now. Of yeah, and how much extra of your personal or business time will this cost. Will you give up watching your kids play soccer? What else?
- So let's compare all your costs with what you are hoping to gain.

Next moves – getting one from them

- What would you be willing to offer if I agreed to accept your proposal?
- Would you agree to move a little bit on your offer if it means we can settle this matter?
- Let's look at how far we have each come from our initial offers.

No free concession

- If I agree to buy \$X, what do I get out of it? I also need some Y. Can you do that for me?
- If you expect me to lower my price, I expect that you will provide an extended warranty period.

No issue is final until...

- Although we are working on several different issue that are in dispute (issues 1, 2, 3 etc.), nothing is finally settled until all issues are settled. Usually issues are not reopened, but sometimes to close off one issue another one needs to be looked at. We are here to work together to make sure that both sides benefit. Okay?
- Although it feels good to have all issues settled but one, sometimes it is necessary to go back and renegotiate other issues to allow space to work out the final issue. Sophisticated negotiators do this all the time.

Non-monetary or discounted compensation

- Are there any other non-monetary items of value that you can offer as part of the settlement?
- Offering them discount coupons could reduce your pay outs, and might even create more business for you.
- Truthfully, the other side was insulted by your conduct. Offering to apologize might reduce the money you are likely to pay out.
- If you apologize early, you might have not have to pay as much in damages. Life just works that way.

Normalize

[Saying that mediators (or I) normally do something allows you to make process suggestions that are likely to be followed.]

- What I normally do now in a mediation is to move into private sessions.
- What mediators normally do in a situation like this is to ask each party to ...
- What often works best in a situation like this is to ...

Okay not to settle

- So you are telling me that you will not change your offer, and we will not reach a settlement. That's OK. You have a right to say you won't settle. It is your case.
- You have heard my mediator's proposal and you have decided not to settle. That's Okay. And, as we agreed, I will not tell you if they accepted my mediator's proposal.
- It is OK not to settle. I will not pressure you to settle. I do want to go over a few things just to make sure you understand everything. But I want to be clear that I am not trying to pressure you to settle.
- Parties A and B, the goal of this mediation is to benefit *both* of you. If you're not happy with the proposed solution, that's okay. We do not need to settle today.
- Let me help you plan a little bit about what are the next steps.

Offers other than cash

- Would you be willing to offer them a discount on future purchases of ...?
- Would you commit to future purchases of ...?
- Would you consider promising to allow them to bid on your future projects?
- Would you agree to offer them rights of first refusal?
- Would you commit to purchase (or sell) a certain amount at a certain price?
- Would you commit to purchase (or sell) a certain amount at a price to be set in the future by others (market price or an appraised value)?
- Would you give them an option to purchase within a fixed time?
- Would you accept a performance bond?
- Would you hold (or offer) collateral?
- Would you ...
- ...offer endorsements?
- ...create alliances?
- ...provide press releases?
- ...train the sales force with the product?
- ...agree to training on the topic of ...?
- ...assign your claim of ...?
- ...ask for assignment of the plaintiff's claims against the non-settling defendant?

Paradoxical intervention

- We can try to prove who was at fault, or in the time remaining we could explore how structure future arrangements to address these types of issues. It's up to you. How would you like to spend the time?

Parallel option development

- Okay, great. So, it sounds like we have two options X and Y. Let's run with both ideas for a minute.
- With the settlement options we have, let's list some pros and cons of each and see what we like better.
- It's great to have multiple options open, isn't it?

Patience – give them time

- I understand and hear your frustration. Take some time to think about it. I'm going to get a snack from the vending machine outside. I'll be right back.
- I know how difficult of a decision this may be for you. I'm going to step outside for just a moment to let you think it over by yourself, okay?

Payment shifts

- If payment is a problem right now, why don't we brainstorm some ideas of how payments can be made over a period of time?
- Do you want to explore a payment schedule? Monthly, bi-monthly, or some other stream that works for both of you.

Payments

- If they were willing to pay for your loss, would you be open to them donating to a charity instead?
- ... to a charity that you selected?

Payments of the last gap between the positions

- Would you consider just splitting the difference?
- This is a little unusual, but would you consider flipping a coin on it?
- Would you consider taking only 45% of the gap?
- Would you consider both taking only 49% and donating the remainder?
- Would you consider drawing gradations from a hat (.1, .2, .3, .4, .5, .6, etc.)?
- ... drawing gradations from a hat (1/4, 1/3, 1/2 .2/3, etc.)?

Payments to others

- I understand your reluctance to make a payment to the other party. What about... donating money to an agreed upon charity? There might be a tax deduction too.
...donating money to... a relative?
- ... donating money to ... a child?

People are the problem

- A major part of the conflict seems to be the personalities of those of you at the mediation. To work through this could you add someone else to your bargaining team?
- ...maybe you take a different role on your team?
- ...maybe decide you “need to be called out of town?”
- Do you think it might help to change the team leader?

Persistence to work out details

- We are making such great progress here. I hope you both see that. You know the saying, “it gets harder before it gets easier?” We can work through these little details. We just need to keep going and ride this forward-momentum.
- Okay, what detail is bugging you most right now? Let’s brainstorm some ways we can work through it.
- That was a great suggestion. Let’s talk about some details of that solution so we can start to clarify some details.

Pick-a-pile method

- Since we aren’t arguing over money, we can try an option well known to family lawyers: One of use can divide our stuff into two lists of approximately equal value, and the other gets to choose one list as his share. It is fair and we can resolve this with much less hassle.
- Why don’t one of us divide the assets? The other one then gets to pick.
- You pick how you want to split the tasks, and I’ll tell you what I want to take on.
- You list ten chores you want to get done, and I’ll pick five of them to complete.

Precedents XXX

- I know you’re worried that others will come to expect similar settlements. However, there are ways we can avoid that by ... [adding certain language to the agreement, making it confidential, tailing the agreement so that it is unique, isolating or removing certain issues, etc.].
- Do you expect more similar mediations to take place? Or is this mediation for this topic rare?
- You still seem uneasy about this agreement. What’s going through your mind? What’s are you worried about?

Prioritize interests

- Earlier you told me your five goals for resolving this conflict. Of course you can’t always get everything you want. Can you put those in an order from high priority to low priority?
- You are asking for several concessions from them. Can you tell me which is most important to you?

Principle of the thing - I won’t settle

- What principle is that exactly?
- What do you mean when you say that “it’s a matter of principle?”
- Do you have any higher principles?
- Is this principle the most important one in your life?
- What is going to happen if the other party is sticking to the same principle?
- Is there some way that we could move the discussion forward without violating your principle?
- How much flexibility does that principle have?
- Are there other principles we could consider?
- Think of how far we have come. Are we going to lose all that over a principle?
- It seems like your principle mainly involves not getting your feelings hurt.
- Does your principle involve going to court?
- Do you think a judge is going to be impressed with the principle?
- I had a client say the same thing to me three years ago. I still remember it like it was yesterday. We were negotiating with the other party over (something related) and had almost closed the deal, but the other party had made an off-hand comment during the last series of offers that he just couldn’t let go of. “It’s the principle of the thing,” he kept saying. He ended up blowing up the whole thing. I think the appeal from his trial is still going on.
- Trust me: Ten days from now, after you’ve put this conflict to bed, your piece of mind will outweigh that abstract principle. But ten weeks or ten months from now, after a lot of sleepless night, and you’re preparing to argue this thing in court, I guarantee that you’ll wish that you had.
- That’s a really great point, and I know a lot of people tend to feel that way in your position. I also know that it takes a strong will to ignore that gnawing in your gut and do the right thing, but in this case, that’s exactly what the situation calls for.

Breaking Impasse Gambits

- Are your family and friends also so impressed with this principle that they want you to keep this conflict going for months into the future if you can't get everything you want?
- What advice would you give a friend of your in the same position? Would you hold on to your position no matter what the cost to your [finances, sleep, health, business, reputation, family, etc.]?
- I knew from the moment you walked in here that you were a person of principle, and on a personal level, I really admire that. There's a time and place to stand on principle, though, and a time and place for practicality. I think that over the course of the last hour, we've drifted over from the former place and entered the latter.
- I would never advise someone to abandon their principles. However, staking out an absolute positions can take a big toll. Are you prepared for that?
- Some people might say that there's sticking to your guns, and then there's gluing your guns to your hands.
- Would you like to upgrade your principle and get to a better outcome?
- Are you going to stick to your principle even though it does not seem to work in this particular situation?
- Are you willing to give new ideas a try?
- It is sometimes a good idea to try out new ideas. Do you want to try one?
- There is French saying, "Qui ne risque rien n'a rien," meaning "Nothing ventured, nothing gained."
- If it's that important to you, is there another issue for them that you could trade off on?
- We have made such great progress thus far, are you really willing to let the principle of the matter be the deciding factor in whether we resolve this dispute or not?
- What could the other side do to get you to move from your current position?
- How much do you value winning on principle? Is there a monetary value, pride value, etc.?
- I would like to set this issue aside for now and discuss some of the other issues that might be contributing to this one.
- Where would you like to be a year from now?
- What principle do you think the judge will apply?
- What do you know about the judge's principles?
- This issue of principle; can you tell me more about it?
- [Move past the principle by getting off the position and down to the real interests.] So I think I know what you want, so can you tell me why you want it?
- Principle huh? So what you are saying is....?
- Let's be clear. By principle, are you referring to...?
- How much is this principle worth to you?
- One of my favorite principles is "quit while you're ahead."
- Could you go into more detail about your principle?
- Our principles may be different, could you consider my point of view? My principles are...

Breaking Impasse Gambits

- We have already come this far. We have agreed to ... and ... Is the matter of principle more important than all of the things we have already agreed upon?
- Putting the issue of principle aside for a moment, are there any other aspects you do not agree on?
- Can you tell me more about the background principle that seems to be stopping you from proceeding further on this issue?
- What is it that makes you so attached to this principle. Why is it so important to you?
- Are you willing to entertain some other ideas on how to ensure that you walk out of this room feeling satisfied in some shape or form?
- Do we really want to stop this whole negotiation because you folks cannot agree on principle?
- It seems to me like we are working with two different sets of principles. How about we leave it to chance and flip a coin?
- Considering all the money involved, is it really worth losing all that money (or spending that much more money) just because this one aspect didn't perfectly fit your principles?
- We are here to make a business deal right? Could we take the personal principles out of the equation?
- Is it really worth going to court over the matter of principle?
- I've had people get hung up on principle before and not come to an agreement. After the fact they told me...

Propose ending the mediation

- I'm thinking that we are not getting to where I had hoped and so I'm thinking we should end this mediation. What do you think?
- Looks to me like we might just want to declare an impasse here, unless you want to keep working on it and think that might be productive.
- There seems to be a lot more fighting today. Unless you both are willing to work through this and make some forward movement, I think it's best that we end the mediation here.
- It doesn't seem like there's a lot of progress going on and it seems like everyone's feeling a little burnt out. Why don't we end today's session?

Quotations on conflict

- Just remember, folks... when there's a will, there's a way!
- I truly believe that everything happens for a reason.
- Eyes on the prize, folks. And it's going to be one heck of a prize.
- You've got to hang the meat low enough to get the dog to jump for it.
- Do not find fault, find a remedy. -- Henry Ford
- It ain't over till it's over. - Yogi Berra
- When a man says he approves of something in principle, it means he hasn't the slightest intention of putting it into practice. - Otto von Bismarck
- Perfect is the enemy of good enough. (Perfection prevents progress) - Sergei Gorshkov

- If you are planning on doing business with someone again, don't be too tough in the negotiations. If you're going to skin a cat, don't keep it as a house cat. - Marvin S. Levin
- The journey of a thousand miles begins with one step. - Lao-Tzu
- The man who says he is willing to meet you halfway is usually a poor judge of distance. - Laurence Peter
- The real art of conversation is not only to say the right thing at the right place but to leave unsaid the wrong thing at the tempting moment. - Dorothy Nevill
- Opportunity may knock, but it seldom nags. - David Mamet
- You can't shake hands with a clenched fist. - Indira Gandhi
- People rarely do what they do not want to do. - Victoria Pynchon
- Modest data beats out loud, arrogant opinion every time. - Dharmesh Shah
- When you are going through hell, keep going. - Winston Churchill
- The things I never say never get me into trouble. - Calvin Coolidge
- Bad offers are progress. - Steve Brutsche
- The mediator always knows more than the parties.
- The only decision I will make here today is when we break for lunch – and I'd like your input on that too.
- The road to agreement is paved with apologies.

Reactive devaluation neutralization

Reactive devaluation – a bias against any proposal that comes from an opponent. The receiver of the proposal “reacts” to it by “devaluing” it because it comes from their opponent.

- They might not accept my offer because it comes from me (says a party) so how about you (the mediator) propose the idea and say it comes from you?
- As I have been observing this mediation in my role as the mediator, it is apparent to me that they oppose everything you propose. If you say it is Tuesday, they will probably say it is not. So I was thinking, why don't I make you latest proposal and say it comes from me? What do you think?
- As you already know, my role in this mediation is as a third-party neutral. Maybe if I proposed the idea and says it come from me (actually it will be coming from me), they may be more open to it. Shall we try that?

Re-examine their views

Sometimes re-examining views results in a change even if nothing has changed.

- Considering where we are at in this mediation, do you think it would be helpful to rethink your initial offer?
- You have heard where they are at; they know where you are at right now. Can you think of a way forward for you?
- Now that you know their side and you know your side, what might be our next best step?

Reciprocal concession

- Ever hear a lawyer say in negotiations, “I won't bid against myself.” That means no one wants to make two concessions in a row without the other person conceding even once. Because they just made a concession, you will probably have to make a change (concession) or the mediation is likely to end. Concessions are almost always reciprocal. They made one. It's your turn.
- She has just made what looks like a significant concession. I think it's a good faith effort to settle. Like all bargainers, she expects to see you take the next step. If you want to settle your dispute, now is the time to show your good faith and make a concession of your own.
- He moves, then you move. That's the way negotiations go. It is your turn to make “some” move.
- It's the etiquette of negotiations. You might not want to be “Miss Manners,” but no lawyer will “bid against themselves.”

Refocus the parties on something else.

- I just want you folks to take a minute to imagine how it would feel if we came to a conclusion about this issue today. What would it feel like?
- I want to commend you both on working well with each other so far in this mediation. I want to try something very briefly that I have found adds additional benefits. I want both sides to say something they've appreciated from the other side so far.
- This is a very tough process, one that can be infuriating or even just scary. If something is frustrating or scary for you, it might feel better to put that out in the open. Chances are, the other party is just as frustrated or scary. What has it been like for you?

Reframe it

- Is it possible their intent was to ...
- [He's sloppy] So, you see him as disorganized?
- [He's an SOB] You don't get along with him very well.
- [She's so self-centered] She thinks a lot of herself.
- [She's an idiot] She and you definitely have different views.
- [Noise keeps me awake] You need it quite to sleep.
- [She needs to apologize to me] Being treated with respect is important to you.
- [Office is chaos] You need order to work.
- [Had to clean up by myself] Next time you want to divide the work fairly.
- [She criticize me in front of everyone] In the future you want to discuss these things privately.
- [Their mangy mut barks all night] Their pet dog wakes you up early.

Risk analysis - Decision tree analysis

Use a decision tree. Draw a flow chart illustrating the possible outcomes of the choices the parties have and their percentage chance of winning and the sum of all the results.

- [In caucus]. Here’s where your case is strong. [Explain]. But here’s how your case is weak. [Explain]. Knowing these things, what do you think the settlement value of your case is?
- You say you have a strong case; I don’t suppose you have done a decision tree on your case have you? Shall we try that?
- So your [lawyer/friend/advisor] said you had a strong case. Did they put a percentage on your chance of winning? Yeah, I thought not.
- Both of you claim you have a strong case. You know that’s not possible, right? You know one, or even both of you, must be wrong.

Risk assessment

- Where do you see your major hurdles in this litigation?
- If you were to have a bad day in court, what would that look like?
- You understand the possibility that a judge might?
- What are the pressures on you to settle?
- What’s your best case?
- What’s your worst case?
- What’s your most likely case?
- What would be your best upside if you would win “big time” in court?
- What would be your exposure if you lost in court?
- If you were to factor in the risk for litigation how would you do it?
- How much is it worth to you to buy that risk off?
- What is it worth for you to settle today and not spend four weeks in court?
- No matter who would win in court, how long would it take to get through the final appeal in this state?
- What’s the risk and cost for you to take it to trial and have someone decide it for you?
- What’s it worth to pay to avoid it?
- I understand where you are coming from but you have to balance up the risk of a judge saying differently.
- Winning a case and getting the money you want isn’t a simple thing. In fact, it is two very different things. Right?
- Money today in your hands is worth a lot.
- You know the line, “A bird in the hand is worth two in the bush,” right?
- What does it take, if you don’t settle, to get that amount of money in your pocket?
- What is it going to cost you in time, money, and energy away from the rest of your life?
- What is your best position worth?
- If it goes his way... if it goes your way.... What would those look like?
- You know, settling today is like buying certainty in your life.
- Do you really understand what you’re getting into?
- Think about what it’s going to take you – cost you - to get the money you want.
- What is your best position worth? What are you likely to recover at trial?
- [After doing a risk assessment] What is a reasonable settlement figure based on this picture?

Role reversal

- Putting yourself for a moment in X’s chair and considering what he has said here about...
- If you were the other party, how do you think your conduct would look to them?
- If you were the defendant, how do you think you would respond to an opening demand of \$X?
- Put yourself in their shoes. What do you think they might’ve thought when you said...?
- I know you don’t agree, try to say what he could have been thinking.
- Do you understand how she might have thought X?
- Looking at it from her perspective, why might she have acted the way she did?
- Is it possible that you might have acted the way he did because of a concern for X rather than because of how he felt about you?
- Is it possible that the communication between the two of you had broken down so much that you misunderstood her intentions?
- If you were the other side, what arguments would you make in support of their position?
- If you were them, would they argue that their rights should take precedence over your rights?
- If you were him, how would you view your intended demand?
- You say that their dollar offer is totally inadequate as an offer to settle this case. I wonder, are they wealthy?
- In light of their financial position, do you think that their current dollar offer is a “lowball” offer from their perspective?
- Now that we are in a caucus, can you play devil’s advocate and argue against your own point?
- Let’s change it up and do a role reversal. Can each of you play devil’s advocate and argue against your own point?
- Put yourself in their shoes for a minute. Do you truly believe that your current offer is something they could get on board with?
- Would you accept your proposal?
- If you were them, how would you react to your proposal?
- If you were X, why do you think your proposal wouldn’t be workable?
- If you were X, why would you accept your proposal?
- What do you think your offer looks like from their side?
- Do you think your current offer is something you would jump at if you were in their shoes?
- Look at it from his perspective for a minute, why do you think...
- Play Devil’s advocate for a minute. How would you argue against your own position?
- Okay, I’m going to pretend to be you and present your offer. You pretend to be him and react the way you think he will react to your offer.
- Why don’t you put yourself in my shoes and let me know what you think I should do?
- Imagine you are us. What would we say about your demands?
- I’d like to try and see things from your perspective, and I would like you to try and see things from mine.

Salami technique

- Okay, since you're willing go down to \$X, what's another \$25 bucks?
- Rather than going for all you want at once, I think you would have a better chance of getting what you want by making several, consecutive requests. [price, delivery terms, quality, etc.]

Rule 68 offers

[Federal Rule of Civil Procedure 68 and similar state rules.]

- Have you considered making a Rule 68 offer? That sometimes really brings some changes in the settlement process.
- Maybe you want to tell them that you are considering making a Rule 68 offer. I have seen that move cases.

Selective perception

- I'm not trying to make this a psychology class, but let me explain something. Everyone tends to notice facts and arguments that support their own side and ignore factors that hurt their side. We are selective in noticing and weighing the factors to judge cases. Quite simply we over-value our case and under-value our opponent's case. What that means is that both sides should be moving farther than they think they have.
- An impartial, objective evaluation of this case might well come out differently than what you and your opponent values the case. You both think your side of the case is better than it actually is. That means both sides should give a little more to the other side. That's the way we close the gap between what appears to be the final positions of both sides, position that don't result in settlement

Set aside the issue temporarily

- I know we've been on this issue for quite some time now. How about we put it aside for the moment. In the meantime, we can go over some of the details on other things.
- Let's put this issue aside for now. I think we all need a little change in pace. Let's talk about something else.

Settle half the case

- Yes, I know you would like to settle this whole case today, but I'm sensing that it is not going to happen. What if we could get an agreement on one of the issues? Wouldn't that be valuable to you?
- I'm not sure we will be able to settle any part of this today, but what if you both could agree to limit pretrial discovery, which would limit your costs. Wouldn't that have some value?

Share the responsibility of getting past the impasse

- What would you like to see happen next?
- What would you like to do next?
- So now what is the game plan?
- What is the next step in this conversation?
- How can we get past this?
- Got any great ideas, or even a half-baked one?

Silence

Say nothing for a while. Pause. Leave them alone during a caucus with the other side. Let them think about it. Many people won't change their minds while in front of the mediator or the other party.

So you think you are going to trial?

- Lots of people bring a legal action and think they will go to trial and win. Usually, both sides think they will win. Of course both sides can't win at trial. One of the two teams at the Super Bowl loses each year after they got so close. What will happen to your side in this dispute?
- It is a very rare case that goes to trial. Some cases end with a pretrial legal ruling by the judge, such as summary judgement. But this case is past that stage. The vast majority of the rest of the cases end in some type of settlement. That's what I would predict for your case too. Truthfully, no more than 1-2% of civil law suits in federal and state courts go to trial. Very few cases ever go to a jury trial. Your task should be one of getting the best settlement you can.
- Whose case goes to trial? People who are blinded by their rage and anger. People who think they have been so offended that they can't stop the litigation process no matter what it costs in terms of time, money, or emotions. People who can't see the facts – especially the facts against them, the risks, and the uncertainty in their own case. People who are so stuck on some principle of rightness that they can't see any other principle such as protecting their business, their health, their family, or other parts of their life. Some people who will do anything and take any risk to prove they are right. And usually even those people I just described will also settle their cases, they just do it later in the process and after expending greater costs than others.
- You can go to trial. Most lawyers are very willing to go to trial especially if they are billing their clients hourly. The question is, "What is best for you?"

Split up the gains and losses to appear bigger or smaller

- So they have agreed to offer you a new position at their brand-new branch which comes with a salary increase, full medical coverage, parking, and more vacation time. What do you think about that?
- They did not agree to some of the other terms you requested, but look at the new benefits you're getting.

Split the difference

- You are pretty close to a final settlement on the money now, would you be willing to split the difference?
- If this went to court it would cost us both a great deal of time and money; therefore, maybe it might make good business sense if we just split the difference at this point.
- Why don't we just split the difference to get a win-win on this?
- So here we are. You are stuck on your number, and I'm stuck on my number. Do you think it would be fair if we just split the difference and move forward with this effort?
- At this point our time has more value than the remaining dollar amount. Let's split the difference and call it a wrap.
- Listen, your number is what you think is fair, my number is what I think is fair. Why don't we do what is fair to both of our positions and meet in the middle?
- I have a proven solution I learned in my three years of law school. Let's add up our two numbers and divide by two. Ha ha. Really, no joke.
- Let's each split 40% and 40%, put the 20% into a Certificate of Deposit, and decide how to split it 6 months from now.
- Would you be willing to split the costs evenly up until \$ 5,000? If there are any costs over that amount, we can agree on how to split it later.
- I think we are at a point where we are just going back and forth on pennies. We should split the difference and get this over with.
- These negotiations are going well, and I think we are at a point where we are just going back and forth on pennies. We should split the difference and get this over with.

[Note: if you are getting close to a split the difference, you probably don't want to make the last concession before you agree to split the difference.]

Sports performance bonus contract

- You two have very different views on how many people will attend the event and therefore every different views on the potential profit. What if you based the total payment on a combination of a base price and then your performer getting a percentage of all sales/tickets over a certain amount? Sort of like a player getting a bonus for the number of hits/goals/wins/selection to all-star team or how far you go in the playoffs/some other measure?

State all areas of agreements so far

- We've agreed to three out of the five issues, so far, folks! Regarding issue X, we've agreed that.... For issue Y, everyone was happy with.... Finally, on issue Z, the agreement is that... You have done a great job and have come a long way. We only have a little way to go. I would hate to have all this slip away from us.
- You have already resolved most of the issues in the case [list them] only two more left. Let's keep this going and move on.

Structured settlement

- Before we come to an agreement on the amount of money you will be settling for, can we spend some time discussing how, when, and in what amounts those payments will be made?
- Considering the current state of your finances, over what time period and in what amounts can those payments be made?
- So we seem to have an agreement on the total amount of money that will change hands in this dispute. Can we move on to taking about a structured settlement and maybe in bring in a person or a firm to work on structuring the settlement?
- Shall we now talk about a structured settlement? That's a stream of payment that can pay for the injuries over time and provide for financial security rather than one lump sum of cash.
- In cases like this one where the settlement is a large amount of money the parties create a structured settlement which provide long-term security for party receiving the money. The idea is to not allow the money to be mismanaged or used for the wrong purposes.
- Most families or even small to mid-sized business are not experienced managing large amounts of money. The settlements are often structured to make sure the money is "blown."

Sunk costs

- Let's just make sure that you don't throw good money after bad.
- Think about this like a poor business or investment decision. At some point it makes sense to close down the business or sell the stock at a loss rather than lose even more.

Support person for a party

- You seem a little uncomfortable. Do you want someone (lawyer, advisor, family member) here with you for support?
- Do you folks have attorneys? Do you want them here with you?

Take 49 percent?

- I think they are really trying to dominate and win. This may not end until they feel they have won. Here's an unusual suggestion. Would you accept 49% of the difference and let them have 51%? The money difference is not much and it might remove an impasse. What do you say?
- They don't seem to be willing to split the difference. I have the feeling that if you let them have a little more than half, they might go for it. Want to try it?

Talking them off an explosive offer

- I'll do that if you really want me to, [pause] but what impact will that have on our ability to resolve this case?
- What are you trying to communicate?
- How do you think they will read your offer?
- What's the message in your offer?
- Your intent with that offer is what?

Temper extreme offers by moving towards the middle

- We all know that in traditional negotiation, parties both start with extreme offers and usually eventually move more towards each other, even if it is not really the mid-point. I have asked you both to allow me to hold back your initial offers because I think neither of you is prepared to accept the other's extreme offer. In fact, those offers might result in one or both of you walking out of this mediation. So I asked you both to allow me to suggest -
 - less extreme offers for you both to put forward
 - a more middle area number that I think you could productively bargain over.

Temporarily put the issue aside

- Why don't we put a pin in this one for now and come back to it later?
- Why don't we put this issue in the parking lot for now?
- I can see this is a sensitive issue. Let's write it down and address it later.
- Maybe this issue is too hot to deal with right now. Let's set it aside to work on later and spend our energy on another issue now.
- It looks like we are stuck on this issue. In order to keep the negotiations moving along, let's put this issue to the side for the time being and revisit it in a bit.
- It seems that we are kind of stuck. Let's write down that point so we can return to that issue later and move on to...

Test the margins

- So, the gap that we're trying to get over is about \$500. Does that \$500 really matter to you? Why?
- What if we could get the gap to \$250? Would that gap be small enough to forget it?
- Would it be more appealing if the \$250 went to a third-party?

The message in an offer

- The amount in an offer "speaks" a message. Consider what message is being conveyed with your offer.
- Send an offer that recognizes there is a risk for both sides.
- They're not going to offer everything you want.
- Think of a number that speaks to them.
- Think of what it is worth to them to settle.
- Urge them to look at their own exposure

Third party ADR referral

- Since we are at odds as to who should get what, why don't we ask a neutral third party for some perspective and then re-evaluate our terms?
- I think we are close to coming to an agreement but need some help getting there. Let's have a mediator help us close the gap.
- Let's seek guidance from an expert to come to an agreement.
- It looks like we can't come to an agreement on our own. What if we brought in a third-party umpire?
- I'm glad we were able to decide on the financial items, but since we are both upset when discussing visitation of the kids and who pays for their airfare to visit you, let's ask for a mediator/arbitrator/judge to decide for us.

Time management

- Negotiation tends to take as long as we have, I will push you forward.
- We could spend a lot of time....
- We can do this in a day.
- My hope is for a normal workday, but it's up to you, I will keep the momentum going.
- Do you have a feeling for the quickest and most effective route to settlement? If we can get the route right we can save a lot of time.
- Come on, it's 4pm and we haven't had an offer on the table.
- We can all be here till midnight, it depends on how quickly parties move.

Time to write down future comments

- We have been going for a while now. Would you like a little time to write down and sketch out what you would like to say next? [Great for introverts]
- Take 10 minutes to write out what you want to say to each other about this particular issue. Write down how you feel, how the proposed solution makes you feel, what would make it better, why you're frustrated, why you're angry, or anything else that comes to mind. Just keep writing for those 10 minutes. We'll regroup at the end of that time.
- I feel tension in this room. Perhaps it would be a good time to sit in silence and write down why you think there's so much tension and what you think would ease it up. OK?

Time-out

- Okay, we need to take a time-out. [use the sport's time-out - T sign with your hands?] [said in joint session] Did you hear what she is saying? I think they're trying to express something that's important to you. However, I'm asking you to try not to speak while she repeats what she just said.
- I want you to re-evaluate what you just did. I don't think that was effective. I want to remind you of the ground rules that we agreed to in the beginning of the session. Besides interrupting, it wasn't respectful listening. Give please give him a moment to express how he's feeling about your proposal even if you don't agree. It's their turn to speak right now.
- Okay, time-out! There is a lot of talking over each other right now. You must know that it is not helpful nor productive. I want you to both, in silence, to take a few deep breaths. Nothing good will come of you two yelling over one another.

Translate options into personal experiences

- I know you're a little concerned with the trial period. You're into cars, right? Well think of the trial period as like a test drive of a car. You both get a turn at driving the car, you both can have opinions about what works well about the car and what doesn't, then you come back into shop, and we fix those things that don't work about the car. How's that sound?

Trial outcomes are very uncertain

- If you tried case 100 times, what percent of the time would you get favorable result?
- If you tried case 100 times, what would be the range of verdicts?

Trial period

- By the looks on your faces, I don't see total comfort in the arrangement we've talked about. How do you folks feel about trying it out for a little bit? Like in a trial period? After a two-month period, you can meet again and make adjustments as needed.
- Some of my clients have tried out an arrangement like this for a couple of weeks to see if they're comfortable with the agreement. Is that something you two would be interested in?
- How about if we try it our way for a few months at no risk? If that doesn't work out, we can try it your way for the next few months."
- It seems like we have reached a reasonable solution for now. Both parties seem like they're happy. Would you consider doing a trial period, and then reassessing if this is a solution we want to make permanent?
- How's this? Let's agree on this price for today. If you really don't think the goods are worth it by next week, we can re-negotiate then. Sound good?

Turn to parties to get pass impasse

- Why do you think we've come to an impasse right now?
- What's stopping you from engaging with the solution?
- How do you think we can get through this?
- What would be helpful for you to know in order to move forward?

Two offers at once

- Here are my best two offers. Surely one has got to be up your alley. So, let's be up front here— which one do you prefer?
- I know this is unusual, but here are two offers at once. It's like going to an optometrist. Do you prefer lens number one or lens number 2?

Umbrella question to summarize the issues

- How can we fairly and efficiently address their need to ... while at the same time satisfy your need for ...?
- How can we work out a parenting plan that allows you both to get relatively equal time with your children and also assure that you each get to spend some holidays and special occasions with the children.

Unbundle issues

- It seems like we have a couple of issues at hand. Let's break them up into two parts and see if we can't tackle them one by one.
- We have a lot of moving parts. Let's separate the issues and work on them one at a time.

Uncertainty of estimates

- We seem to be down to the last moments of this mediation, but there is still a large gap between the parties. What I have found is that no one is fully accurate predicting the future. Just like political polling, there is always a plus or minus difference even between the best estimates. There are good psychological reasons for that, but we don't need to get into those reason right now. I have found that the best estimates still have a plus/minus difference of about 25% (mediator could change the percentage if needed). And if we took that 25% and applied it to the plaintiff's position that would move them to X. And if we took that 25% and applied it to the defendant's position that would move them to Y. Those X and Y numbers almost totally close the gap. What do you think?

Unproductive demands or concessions

- If you were the defendant, how would you respond to an opening demand of X dollars like you have just made?
- I'll take your number to them, but I am concerned that...
- You could say that your demand represents what it will cost to X.

Unsuccessful mediation's summary and overview

- As you've both elected to end this mediation, I want to summarize what we have established so far so we're all on the same page moving forward for whatever your next steps are. Okay?
- Before we end the mediation, I want to review everything that we've agreed to so far so that we all have the same understanding.

Visual to focus attention –blackboard, flipchart, or just a sheet of paper

- [Just write on the board, chart, or piece of paper. It helps groups and individuals to remember and organize their thoughts. It also "draws the fire" of negative comments if you allow the words to stay on the visual.]
- [Be very careful about using it in a caucus. Be sure to remove it when the other party enters or else you will lose confidentiality.]
- Let me jot those thoughts on the board here so we keep them in front of us.
- Sometimes it helps to see the ideas we are talking about. I'll write them down on my writing pad right here.

Way out with dignity

- Seems like that will be a big loss of face for them, won't it?
- I understand your offer, but that does not seem to leave them a way out with dignity. I'm afraid it may set our negotiations back further. What do you think?
- Have you considered ... as a way to offer them a way out with dignity?
- Do you think they will retaliate?

Breaking Impasse Gambits

What's it worth to settle?

- Think about an offer you can live with, the value of settling today.
- Consider your own position what is it worth to you to get out of this?
- Think in hard commercial terms what is the least/most you're prepared to accept/pay to get rid of this. Go there now.

What would it be worth to you

- What would it be worth to you to not have to worry about this case next week in bed?
- ...not have to think about this case at a family dinner next month?
- ...to not have to think about this case on your next vacation?

Whisper number from mediator

- "What if I could get them to \$X?"
- Although I can't guarantee it, but what if I could get them to...

Work on an easy issue first

- We have lots of issues to work on. Rather than tackling the biggest sticking point first, I have often found that it is better to build some momentum in this process by working on an easier issue first. Do you think working on [easy issue] first would help?
- I often find it helpful to go for an agreement on a minor, easy point first. We can gain some momentum as we head for the bigger issues. Can you suggest a good starting point?

Mediation Advocacy Gambits

Mediation Advocacy Gambits (for lawyers representing clients in mediation)

Active listen the mediator

- This is what I'm hearing...
- Right In other words, you mean...
- Interesting, tell me more about...
- So from your point of view...

Ask mediator about the other side

- It seems like they're saying X. Is that right?
- We understand that their position is still....
- What did they have to say about that?
- I'm curious to hear where they're coming from.
- Can you give us any insight into X's comment earlier?
- How do you think they'd react to X offer?
- Where do you think they are headed?
- What do they have to say about...?
- Do they have an opinion on...?
- Can you offer any insight about the interests of the other party?
- Did their attitude change based on any of the information we conveyed today?
- I know that you are bound by confidentiality but one of my concerns is... Can we talk more about this issue with the opposing party?

Ask mediator to take ownership of a proposal to protect it from reactive devaluation.

- I have a suggestion for terms of a settlement but I think it would have much more of an impact if it came from you (mediator), not me. Will you propose it and say it is your idea?
- I don't think those words are the best way to say it, and I don't think that's the way you would want to phrase it. I am confident you would say to them that you decided after talking with us that it wasn't fruitful to talk in terms of how many dollars we would give them to settle - that you came up with a suggestion for a discount program.

Ask mediator to provide information about opponent

- Has the plaintiff's calmed down?
- If his lawyer recommends a deal, do you think he'll listen?
- Do you think her client will listen if she recommends settling?
- Is this the lawyer's first time representing this client?

Assign homework

- While I am in the caucus with the other side, why don't you work on a proposal that would allow you to...
- Between now and our next session could you come up with ...

Bargain through the mediator

- Could you let them see our point of view without giving us away?
- Could you convey this message as coming from you instead of us?
- Without telling them that we will go for X, would you be willing to just say that you think we would be interested?
- Without giving away our bottom line, can you tell them...

Case assessment – ask (or not).

- What's your view of this case?
- Now that you have spoken with both sides, can you tell me if you think this is a fair offer?
- This is my position. What do you think?
- We might be at a point where both of us are unwilling to budge.
- What is your assessment of our positions?
- You probably have a good understanding of our issues and concerns. Can you offer some guidance?
- I do not want to hear your evaluation of the damages right now. I don't think that would be helpful right now.
- I do not want to hear your evaluation of the damages right now.
- I don't think that would be helpful right now.

Confidential information

- Let me tell you something in confidence.
- To be completely candid with you...
- This is something I would like to keep between the two of us.
- Under rule of evidence 408, let me tell you some things in confidence.

Clients-only meeting

- Maybe this is best left for the clients to resolve on a personal level.
- You might think I'm crazy to suggest this, but maybe we should let just our clients meet alone with the mediator. You know sometimes we lawyers are less guardians and more troublemakers.
- I seldom ever do this but I am wondering if we should just let the clients meet together. They might be able to come up with a business solution that we are not getting to.
- Maybe we are fighting too much over the legal issues. Would you be open to suggesting to the other side that the clients do a "clients only" session with you the mediator?

Conditional disclosures to close

- If you get to the point where you think you can close the deal, then I would say go ahead and release the information. We would like to settle today but I don't want to just waste the information.
- You can show them the affidavit if it will tie down a deal.
- You can tell them about that information if it will close the deal.
- More than that is impossible, but we might be able to be persuaded to go as far as \$X if it would finally resolve the case.
- I might be able to push my client that far if it would truly get it done.

Conditional offer

- There are no guarantees that I can persuade him, but what if I could get my client to agree to X. Would you agree to that? I'm not willing to put the effort persuading my client to change his negotiated position if you are going to refuse his offer.

Confidential information for the mediator.

- What I am about to tell you has to stay between us.
- You have said things will be confidential in mediation and we both signed an agreement about that. So, you cannot share what I am about to tell you unless I give you permission to share it.
- To be frank, I need to X, but I really do not want the other party to know that
- It is very important to my client that this information remain confidential and you don't tell them about it. Are you ok with that?
- Listen to this... But I don't want you to tell her.
- ...The rest is confidential.
- I don't want you to tell him that...
- Look at the data we have turned up on profits of this supposedly "troubled" company over the past three years -but you can't tell them we have it.
- He claims to be disabled, but our investigators saw him playing basketball last month. Just wait until we cross examine. We want to surprise him with that. You can't tell them I told you.
- They didn't send the required demand letter before suing, and in a week it will be too late. If this doesn't settle today we will move to dismiss. But that's a secret you must keep confidential.

Confiding in the mediator

- This information must remain between us, okay?
- There's something I haven't mentioned yet that might end this entire negotiation in five minutes.
- In your experience, how would you approach this?
- How can I say this honestly without insulting them?
- I need to protect my client but do you think I am holding my cards close?
- Tell them that this is our final offer – but I may have a little more to give.
- Help them understand how important this is to us.
- If they don't give us this, there is no point in going any further.
- I don't think they're recognizing how reasonable we're being.
- They have absolutely no case and they know it.
- They could never win that argument in any court.
- We're doing them a favor by even entertaining their suggestion.
- Just between us, what do you think this case is worth?
- I know they said X, but have you considered....
- My client just wants the truth to be told, and that is....
- I can't accept that offer in good conscience when my client has....
- We understand what they're saying, but....
- We don't want to drag this thing out. We just want....

Convey messages about your intentions

- I am willing to mediate through you, but be clear I have no intention of giving him
 - - an equity interest.
 - - an exclusive distributorship.
 - - a number beginning with a 3.
 - - more than \$X.
 - - a chance to work here again.
 - - access to X

Conveying information and offers

- This is my suggestion...
- I'd offer the following
- What would they think about...?
- Is this something they might be open to?
- I think this could work. What do you think?
- What would their opinion be on this matter?
- Can you pose our suggestion to them as a hypothetical to see if they are interested?

Delay a decision

- Let me get back to you
- Okay, I will think about it
- Sounds great, but give me a day to think about it
- It need to talk to my ... about this first
- This is a serious decision that requires careful consideration
- Thanks, but I cannot make a decision right now
- Unfortunately, I am so busy I can't get to it right away
- I promise to let you know ASAP
- I need to check with my ...

Downplay your weaknesses

- It's not much of a consideration when you think about....
- I don't want to waste your time with the details because....
- At the end of the day, X isn't going to matter as much as Y.
- It depends on which way you look at it.
- That shouldn't even be part of the conversation right now.

End mediation without agreement

- I think this is as far as we can get today.
- It is probably best to come back on another day.
- The issues before me now are things I need time to think through
- I will need some time to think about this a little more. Can we take a break?
- We have had a long day of discussion. We are making progress. We deserve a break. It is getting late and we should re-convene tomorrow to complete just a few more details.

Guide the conversation back to your strengths

- We could spend all day talking about X, but that really means nothing when you consider Y.
- My client really feels that we ought to consider X first.
- I see what you're saying, but that really just proves....
- Perhaps we could continue our discussion of X.
- I'd like to see if we could go back to....
- If we could just address....
- This whole issue comes down to....
- Maybe it would help to think about it in terms of....

"If" proposals

- If you can get them to seven figures, I will consider moving to...
- If they are willing to move up, I am willing to move down. But I'm not going to move that they don't also move.
- If I move, will they move?
- You can tell them that I will move if they do. But if they don't, we can all just go home now.

Impasse breaking suggestions

Mediation Advocacy Gambits

- Maybe if we tried...?
- What do you think about trying...?
- Would you try to get a sense of whether they would drop their demand for X if...?
- Can they move to X? My client won't make another concession if they don't move.
- Can you ask him if he is willing to move up to the low 5 figure area?

Influence the agenda

- I would like to talk about X next.
- I think we could make some progress if we started with X.
- Because of our time constraints today, how would it work if we moved X up on the agenda?
- Since we seem to be stuck on A, can we set that aside for now and focus on B instead?
- If I may, I think this might work.
- We should talk about...
I think the real issue

Inform the mediator about your case

- What I can tell you is this...
- Are you just looking for a summary of facts now or can I give my detailed analysis?
- Let me give you the facts as I see them.
- This dispute arose out of a (one word, for example house).
- There is really just a few words to describe this situation.

Joint session – suggest one

- Maybe this is the time to talk to the other side again in a joint session.
- His lawyer is really getting in the way of doing a deal. I've worked with him before. How about you suggest that we meet together in a joint session?

Keep going

- You seem to be ready to call it a day, but let me ask you to keep going a little longer. I sense we are getting close.
- I know you are feeling a discouraged. Are you willing to go a little longer? I think we might be able to make some progress.

Mediation advocates gambits - more

- Tell them we are at X. but we are prepared to talk seriously once they drop their claim of...
- X is as low as we'll go with this point. You can tell them X. [signaling more possible movement]
- The reason we are not moving is Y, but you can't tell them we have that information. [Keeping information confidential]
- You can show them the affidavit but only if it will tie down the deal.

Mediation Advocacy Gambits

- Why don't you tell them you think you might be able to get us to X. We are not going to go all the way to Y, but I might be able to get my client to X if that would truly get it done.
- Let me think about that.
- I am open to any reasonable offer.
- What are the details?
- Is this open to negotiation?

Mediator's proposal - negotiate over one

- We are going to reject their \$X offer, but if you would make a mediator's proposal at \$Y, I would try to convince my client to take it.
- Would you consider suggesting we adjourned for a week but do that only after you suggest that he think about what he would do with the money on the table if was in his bank account.

Near end of bargaining range

- Our number is \$X. We might go a little farther, but that's close to our endpoint. Let's see what they come back with.
- I think they are hoping to get more from us. It won't happen. You should try to let them know that you think we are at the end of our bargaining range.

Need to make the next move

- Look I just made a move. I might have more "give" left, but you are not going to get it right now.
- It's too quick for me to concede anything more. I don't want to look like a pushover or else this will never end for me.
- You need to do more work with them. You know I can't "bid against myself"
- Why don't you tell them you think you might be able to get us to \$X.

Not playing fair

- I don't think they are being fair or ethical. What do you think?
- I don't understand how they can think that is a fair offer. How do you see it?
- Maybe you need to remind everyone to be forthcoming with the mediators.
- I came here to negotiate in good faith. I don't think they did. Can you help with that?
- Why don't we re-examine the guidelines we agreed to earlier...
- I think they 're trying to low-ball my client knowing she is vulnerable. I won't let that happen.
- Maybe I am taking the other side's comment out of context, but it seems they are trying to...

Offer - make one through the mediator

- One of the ways I thought we might be able to resolve the issue would be for a ...
- Based on what we have learned so far, we can offer . . .
- Although we feel like we deserve _____, we are willing to make an offer of _____.

- We will respond if they come down to a range of reasonableness, but right now their offer is just in the stratosphere. I know that you're experienced and I'm going to rely on you to understand our viewpoint and talk to them and tell them what the real world is like.
- Mediator, do you think they are interested in...?
- If you think it will make a difference to move the discussion along, we will increase our offer to...

Offer – opening of the other party

- Why don't you give us a ballpark range of what he's looking for?
- What compensation is she looking for specifically?
- Let's work off her needs. What is her opening offer?

Other process suggestions

- We have some sensitive issues we would like to discuss with the mediator alone. Would anyone mind if we caucused first?
- We have not seen the other side face to face since the opening, it might be helpful if we were able to address them in person and make our case for the settlement directly to them.
- What if we brought the other side back in and we gave them a sincere apology? I think that would really help move the talks along.

Process suggestions

- Why don't we try...?
- Let us try something different at this point.
- Let us look for ways to make these negotiations better.
- Would it be better if...?
- What if...?
- Is this ... feasible?
- What could we do about...?

Questions about the other side's attitude, emotional state, and team members

- How are they approaching this?
- Do you think they are interested in settling? I think they have been playing us.
- He seemed angry and a bit unhinged. Do you think he can make any deal today?
- She seems to be just trying to use mediation for discovery. What does it look like to you?
- I have dealt with Jim before but those other two are new to me. What's your read on how they are going to mediate?
- What are they like?

Recommend your proposal

- If I could convince my client to go to X, would you be willing to tell the other side you think our move is a big step and ask them to go to X or maybe Y?"
- I think they might go for the proposal what includes X, but I doubt they will go for it if they think it is my proposal. Could you propose that idea to them and would you be willing to tell them that it was your idea?

Respond to the mediator's questions

- In my opinion...
- For me...
- I would say...
- Here is...
- Sure we can talk about that, but first could you tell me about ...?
- That's a question I'm not yet prepared to answer.
- That sounds like a valid point, but my concern is...
- Can I look into that and get you and answer after lunch?
- Is there a way that we can come to a solution without my having to answer that question?

Respond to uncomfortable mediator questions (non-answers)

- Well, yes and no.
- You could think of it that way, but...
- What kind of answer are you looking for?
- It's difficult to say.
- We're not necessarily saying X, but...
- There are several different answers to that question.

Reveal confidential information to your advantage

- Let me remind you that we know this confidential information about them ...[confidential information]. If we don't settle, that information will come out at trial, and I'm pretty sure they will not like that. As our mediator, can you gently make that point? It shouldn't sound like a threat, but frankly that is what it is. They are going to get hurt if we don't come to a settlement.
- If we can't settle today, we are going to be filing motions in this case to ... Even if they think they will prevail on the motions – and we don't think they will prevail - it is going to cost them in terms of time and money. The smarter thing to do is to settle today.

Rule 68 offers

[Federal Rule of Civil Procedure 68 and similar state rules.]

- You can tell her that I'm drafting a Rule 68 settlement offer. That might bring some movement.
- I'm prepared to file a Rule 68 Offer of Judgment for \$70,000. You can tell them that.

Seek coaching from the mediator

- What do you think is a more effective way I can get him to see it my way?
- Can you tell me if there is anything you see as a mediator that our side could be doing to help the process along?
- Well, I just lost my cool at that last meeting with the other side. Do you have some suggestions for how to avoid this again

Something you know that I don't

- I have the feeling that I am missing something. What is it that you know that I don't?
- They seem to know something that I don't. Do you know what that is?

Mediation Advocacy Gambits

Suggest procedures or a strategy

- I think it would be helpful if we could set up a discussion between my client and their client.
- We hope you will raise the issue with them of X because we don't see...
- Would you be willing to go back to them and say that you came up with this offer for settling the case?
- If I could convince my client to go to X, would you be willing to tell them that you think it is a significant step and ask them to go to Y?
- Our number is X. We might go a little farther, but that's close to our endpoint.
- We reject their offer of ..., but if you made a proposal at ..., I would try to convince my client to take it.

Tell them

- You can tell her we are not willing to ...
- Please be sure to tell him that we are at the outer edge of our bargaining range and that should not expect much more to come from us.
- You could save us all a lot of time and pain if they heard from you that you don't think we will, under any circumstances, do/go to ...
- You can tell them we really want to settle this case but our client won't settle if they ask her to...
- You can tell them we are close, but our client needs something so he can go back to his people and say this settlement is a win for them because...

Whisper number from a lawyer

- My client hasn't agreed to this , but if I can get him to \$X, will the other side go to that?
- "What if I could get my client to \$X? Would that do the deal?"

Judicial Settlement Conference - Judge's Gambits

Judicial Settlement Conference - Judge's Gambits (Gambits from videos)

- Why don't you tell me about your case?
- What information do you have from them so far?
- What is your client's position?
- Do you have any money?
- How are you going to get around the fact that ... ?
- Let me ask you a different question.
- Is your client really firm on the amount he is demanding?
- Is there any give to that?
- I assume you have talked to him about the expenses of litigation. And the expenses of pretrial discovery. And the costs of the depositions.
- You know, you have a problem. Let's focus on your problem for a moment. I don't know who is going to be on your jury, but how do you explain to a jury that...[negative facts]?
- I don't know what I can get from the other side, but if I can get some movement, do you have some leeway on the amount you are demanding?
- Let me see how far I can move the other side, and we will see what we can do, all right? [Caucuses with other party] Would you excuse me for a minute?
- Tell me, your guy didn't... [brings up negative facts]
- So tell me something, your client probably isn't really at zero is he [meaning he is making an offer of \$0]?
- Let me ask you a question. From your client's point of view, your client is really not interested in being in this lawsuit is he? He is much more interested in going on with his life isn't he?
- Your client doesn't want to get tied up in pretrial discovery does he?
- I have had some discussions with the other side. If I could get the other side to come down in their demand, give me an idea of how much money you could offer to settle this case?
- [Defense offers a low amount] You know that amount of money is not going to settle this case. He has probably spent more than that to bring this case. In addition we probably have to give him a little bit more. Let me throw out a figure, and ask you how this figure hits you. How would \$X sound to your client?
- [Defense says "No" to a requested defense payment amount] Why is that not a realistic number for your client?
- [In response to the defendant's favorable view of their case] You know you're going to have a jury, and it is my experience with juries in this jurisdiction that the jury is going to come in with a verdict that is favorable to the other side {for some reason}.
- You know the answer to your argument is xxx, and the other side can ... bring this out, ...
- [Defense makes an offer] Let me see what we can do with the other side, and see if that is acceptable.
- How do you know that?

Judicial Settlement Conference - Judge's Gambits

- You know, you have a problem with the defendant. Picture what happens in front of the jury when he comes to court and says ...
- Let's talk money.
- There is some movement on the other side.
- Let me ask you this. Why don't you go out and talk to your client and ask him, if I could get them to pay somewhere in the area of \$x-y, would he accept it?
- I need to make something very clear. Make sure your client knows that I do not have that money offer from them yet. This is not an offer. Second, I want you to understand that I am not asking your client for an offer that responds to the offer I hope to get from him. What that means is, if you do not agree at the number, then when you go to the next stage of litigation, then their offer is still back at the original number.
- If you both accept the offer, you will have a settlement and the case will be over. If your client doesn't accept it, or the other party, he's got a lawsuit. He's got the expenses of a lawsuit. Who knows what will happen if there is a trial.
- All he is buying is a chance that the jury will believe him and will not believe the other side. He can tell his story to the judge or the jury, but who knows what will happen.
- He is taking a chance that that jury will give him more than the other side is offering today. It is not clear how the jury would react to what the other side is saying now.
- But let us be clear, I do not have that offer from them now. And, I am not asking your client to make a new offer. I am only asking that if I got that offer from the other side, would your client accept it?
- This is your best chance to settle. It's your best chance because
 - It is early in the process.
 - No one has spent a lot of time yet.
 - No one has spent a lot of money yet.
 - And both clients are a little bit cooler.
 - They will soon see that this is a long process.
 - And no one has become too dug in yet.
- [Speaking to the defense lawyer] You know you have an obligation to the court too. Tell your client it is less than what he hoped for, but it brings the process to an end, he doesn't have to come in for depositions, he doesn't have to go through a lawsuit. If he can pay this amount then it's over. Why don't you go call him?
- [Judge says, I need to start with the plaintiff and see if the plaintiffs would consider accepting an offer in a certain range. I don't want to get the defense to come up and make an offer if the plaintiff will not accept it]
- [Talking to defense] We are making some progress. Time has some value to your client too. They have moved. If I can get her to settle for \$x-y, could you get your client to accept it?
- Speaking to lawyer who is without a client now] Do you want to go outside and make a phone call to your client now?

ESL General Conversational Gambits

ESL* General Conversational Gambits

This list of general conversational gambits are derived from with works of Eric Keller, Sylvia Warner, and Bimas Reskiawan. These gambits were designed for ESL (English as a second language) and EFL (English as a foreign language) teaching materials. The gambits below only include conversation gambits likely to be useful in ADR situations. Negotiators, mediators, and other engaged in ADR activities should find the gambits helpful in creating their own ADR gambits.

See, Conversation Gambits by Eric Keller & Sylvia T. Warner (1988), and The Analysis Of Gambits In The English Communication By Undergraduate Students In EFL Classroom (2016) by Bimas Reskiawan

*ESL means "English as a Second Language." Alternatives are EFL – English as a foreign language, and EIL – English as an international language.

Action in order

- First of all...
- Then...
- Next...
- After that...
- Finally...
- Make sure you...
- Be careful not to...
- Remember to...
- Don't forget to...

Active listening

- So what you're saying is...
- So what you are really saying...
- In other words...
- If I understand you correctly...
- So you mean that...

Adding things

- To start with...
- And another thing...
- What's more...
- Just a small point...
- Perhaps I should mention...
- Oh I almost forgot...

Agreement or disagreement

- That's very true...
- I agree with you there..
- Yes I know exactly what you mean.
- Yes but don't you think...
- Yes but in the other hand...
- Of course I would...
- I certainly would...

Apology – to break impasse

- Can you just say you're sorry so we can move this forward?
- I forgive you for your actions. Can we please move forward with the negotiations?
- Maybe if you apologized, we could put this behind us and move on with the negotiation?
- A wise man once said, "The road to agreement is paved with apologies."

An unpleasant thought

- Actually,...
- The only thing is...
- To tell you the truth...
- To be honest...
- Frankly...

Argument and counter argument

- Yes but...
- Yes but don't forget...
- That would be great except...
- That's a good idea but...
- Even so...
- Even if that is so...
- That may be so but...
- That's probably true but...
- Possibly but...

Asking for Information

- Do you know...?
- Could you tell me...?
- Could you find out...?
- Could I ask...?
- Do you happen to know...?
- I'd like to know...
- I'm interested in...
- I'd like to ask...
- Could you tell me...?
- I was wondering if you could tell me...

Being sympathetic

- Oh no!
- What a pity!
- What a shame!
- What a nuisance!
- How awful!
- How terrible!
- I'm really sorry to hear that
- That must be awful!
- Poor you.

Breaking in

- Excuse me
- Sorry...
- Excuse me for interrupting but...
- May I interrupt for a moment?
- ... please!
- Certainly...

Changing the subject

- By the way...
- Oh before I forgot...
- That's reminds me...
- Talking of...

Checking in

- Are you with me?
- Are you still with me?
- Is that clear?
- OK so far?
- Have you got it?
- Do you understand so far?.

Communication problems

- Sorry what did you say?
- Sorry?
- I didn't get the bit about...
- I'm sorry
- Would you mind saying that again?
- Could you repeat it?

Conviction

- I honestly feel that...
- I strongly believe that...
- I'm convinced that...
- Without doubt...
- I'm positive...
- I'm absolutely certain that...

Correcting yourself

- What I mean is...
- What I meant was...
- Let me put it another way...
- What I'm saying is...
- What I'm trying to say is...
- Don't misunderstand me...
- If I said that
- I didn't mean to...
- Let me rephrase what I just said.

Declining the offer

- I'm not really interested in...
- But I'm not worried about...
- I've got no use for...
- I'm perfectly happy with...

Demanding explanation

- Why is that...?
- How come...?
- Does this mean...?
- Can you explain why...?
- I don't understand why...?
- Do you mean to say...?

Don't know

- I'm afraid I don't know
 - I'm sorry I don't know
 - I haven't a clue
 - I couldn't tell you
 - I'm not sure
 - Oh it slipped my mind
 - I've forgotten
 - It's not good
- I can't remember.

Emphasizing a point

- That's just the point...
- But the question is...
- But the real question is...
- This raises the problem of...
- But can't you see...

Exceptions

- There are exceptions of course...
- One exception is...
- But what about...?
- But don't forget...
- Let's not forget...

Expressing your reservation

- Yes but...
- I doubt...
- But the problem is...
- Possibly but...
- I'm afraid...
- Yes but the problem is...
- What I'm worried about is...
- What bothers me...
- I don't see how...

Finish your story

- So...
- So in short...
- So in the end...
- To cut a long story...
- All in all...
- To sum up...
- To put the whole thing in a nutshell...

Generalizing

- In general...
- Generally speaking...
- As a rule...
- By and large...
- In my experience...
- Usually...
- Generally...
- As a rule...
- Most of the time...
- Again and again...
- Time and again...
- Every so often...
- From time to time...
- Every now and then...

Give a reason

- Also...
- In addition...
- Not only that but...
- And besides...
- And another thing...
- Not to mention the fact that...
- Plus the fact that...
- Not only that but...
- Because...

Great escape

- The plan is...
- We're thinking of...
- What we have in mind is...
- What we plan to do is...
- I'll tell you what we'll do...
- What about this for an idea

Guessing

- Perhaps it's...
- I think it's...
- It looks like...
- It's difficult to say but...
- I'd guess...
- I'd say...
- Could it be...

Have you got a good reason?

- The reason why...
- That is why...
- For this reason...
- Because of that...
- That's the reason why...

Hesitation

- Well
- Um...
- Well let's see...
- Mumm
- I'll have to think about that

Hidden truth

- I doubt if...
- Let's face it...
- The catch is...
- The truth of the matter is...
- The real question is...
- Come on now...
- Let's be realistic...
-

Illustrating your points

- For example...
- For instance...
- Take that way...
- Take for example...
- For one thing...
- To give you an idea...
- Look at that way...
- By the way of illustration...

Interrupting

- Anyway...
- In any case...
- To get back to what I was saying...
- Where was I...
- I'd like to comment on that...
- Sorry but...
- Excuse me for interrupting...
- Can I add something...?
- Can I add here that...
- I'd like to comment on that...
- Can I say something?
- I'd like to say something if I may...
- Can I ask a question?
- May I ask something?

Listing excuses

- First of all...
- Secondly...
- The main reason is...
- The other reason...
- Another reason is...
- Besides that...
- And on top of that...
- And finally...

Main thing

- First of all...
- The main thing is...
- The most important thing is...

Main trouble

- The main problem is...
- The problem is...
- The real problem is...
- The point is...
- The trouble is...
- Don't forget that...

Offering a suggestion

- Why not...?
- Perhaps you could...
- I have an idea...
- Let's...
- Have you thought about...?
- Why don't you...
- One way would be to...
- If I were you...

Opinion

- I think...
- I'm pretty sure...
- I suppose...
- I suspect that...
- I'm fairly certain...
- I'm convinced that...
- It's my opinion that...
- I'm pretty sure that...
- I wonder if...
- In my opinion...
- To my mind...
- I personally believe...
- I personally think...
- Not everyone will agree with me but...

Personal opinion

- In my opinion,...
- Well personally...
- In my case...
- From my point of view...
- If I had my way...
- What I'm more concerned with is...

Plan and counterplan

- How about...?
- Why not...?
- Why don't you...?
- If I were you
- I would...

Popular misconception

- Many people think...
- Some people say...
- You've probably heard that...
- It may seem...,
- But in fact...
- But actually...
- The truth of the matter is...

Putting the record straight

- That's not what I said at all...
- I have no idea who told you that...
- Goodness where did you get that idea from?
- I'm afraid that just isn't true...
- The fact of that matter is...
- Look let's get this straight

Repetition

- Repeat that please.,
- Would you mind repeating that?
- Sorry I didn't catch the last part
- Sorry you have lost me
- Sorry I don't follow you
- What was that again?

Right or wrong

- That's correct...
- Right...
- OK...
- Yes exactly...
- No I'm afraid not..
- Not quite...
- You're close...
- I don't know...
- I'm not sure...

Saying “no” tactfully

- It’s not my idea of...
- I can’t stand...
- I’m not keen on...
- I’m not particularly like...
- I’d rather not...
- I’d prefer...
- I’d really much rather...
- I’d rather...

Searching for an answer

- Well let me see
- Well let me think
- I’ll have to think about that
- That’s a good question
- How shall I put it?
- Let’s put this way
- The best way I can answer that is...
- Mumm that’s a difficult question.

Seeing the good side

- OK but...
- Anyway...
- But in the long run...
- Very true but...
- To make up for it...
- Even so...
- Actually..
- Look at this way...
- On the other hand...

Sharing a confidence

- Have you heard...?
- I’ve heard...
- They say...
- Just between you and me...
- I heard on the grapevine...
- Maybe I shouldn’t say this but...
- This shouldn’t be passed around but...
- Why don’t you...
- You could always...
- Perhaps you could...
- Perhaps you would...
- If I were you...
- What about trying?
- Try...
- How I get the ...

Showing interest

- Right
- OK
- Yes?
- And?
- Really?
- And then?
- Did you?
- Have you?
- Are you?
- Were you?
- Was it?
- Have you?
- Are you?
- Were you?
- Was it?

Surprising fact

- Do you realize that...
- It may sound strange but...
- Oddly enough...
- Generally...
- By and large...
- As a rule...
- Believe it or not...
- Surprisingly...
- Normally...

Surprising news

- Guess what! Surprise! Do you know what?
- You won’t believe this but...

Taking into consideration

- Considering...
- Bearing in mind...
- If you remember...
- Allowing for the fact that...
- When you consider that...

Telling a story

- To begin with...
- First of all...
- First...
- Then...
- After that...
- So...
- So then...
- At the end...
- Finally...

Think about a problem

- In case like this...
- In a situation like this...
- In this sort of situation..
- I see..

Thinking ahead

- If...
- If I ever...
- When...
- Whenever...
- As soon as...
- By the time...
- Unless...

Unsure

- I don’t know
- I can’t decide
- I can’t made up my mind
- I’m not sure.
- Probably not
- I don’t think so
- I doubt it.
- Never in million years
- Not on your life!
- Not even if you paid me!
- I think I would...
- I might...
- I might consider it.
- I think so.

We take it for granted

- Many people think that...
- It looks like...
- It seems as if...
- We take it for granted...
- But actually...
- At first glance it looks as if...
- But in fact...
- In reality...
- The fact of the matter is...

4 Basic Training Gambit Exercises

The following four pages are the in-class gambit exercises I have been using for 30 years. The still work. They come from my article, Teaching Negotiation and ADR: The Savvy Samurai Meets the Devil," 75 Nebraska Law Review 704 (1996). Read the full description of how I run the exercises in the article.

Open Ended Questioning In-class Exercise Done in Pairs

This exercise is done in pairs. One person asks the bolded open-ended question, and the second person answers (the answer should be limited to one sentence). The questioner then selects other open-ended questions below, in whatever order seems reasonable, to continue the conversation. Tell the students that "Tell me more about that" could almost be asked every other question. Each pair gets 90 seconds to work the conversation. After 90 seconds, the students switch roles.

Open Ended Questions

What is one of the most important issues facing our country in the next 10 years?

Tell me more about that.

What do you mean by that?

Can you put that in other words?

How do you feel about that?

What do you mean by ____?

Can you be more specific?

How so?

In what way?

That's helpful, keep going.

Humm, hum.

Full Class Active Listening Exercise

The full class (The Barkai Chorus) runs through this active listen exercise one row at a time. The instructor reads the leftmost column, the students as a group read the second column, the instructor reads the third column which completes the mini conversation. The comments are discussed.

Active Listening

	Speaker (Instructor)	Active Listener (Student)	Speaker Continues	Comments
1	I had a terrible day today.	<u>What I hear you saying is</u> you had a terrible day today.	Yeah, that's what I said. Are you feeling OK today?	Classic active listening. Uses introductory phrase. Repeats exact words.
2	I had a terrible day today.	... a terrible day?	Yeah, nothing went right, and then there was that thing with my boss.	Skips introductory phrase. Repeats a few of the exact words.
3	The boss screamed at me about some assignment.	... blamed by the boss?	Yeah, he was going on and on about it.	Paraphrased, but still not a complete sentence.
4	He was being unfair. I didn't even know what he was talking about.	... unfairly blaming you?	No, actually it did turn out to be my fault. But he shouldn't have acted like that with my co-workers around.	Speaker corrects inaccurate active listener.
5	How do you think you would feel if that happened to you?	... you are very disturbed about this.	Of course I am. No one should have to go through something like that.	Active listening used instead of answering the question.
6	[if they go on and on and on and on and on]	Wait a minute! Let me see if I understand you correctly.		Active listening is used to interrupt without offending.

Communication Techniques

Open-ended Questions, Follow-up Questions, and Active Listening

Speaker	Listener	Technique
	1. What do you think is one of the most important skills for negotiators?	Open-ended Question
2. Ah, I'd say communication skills.	3. Tell me more about that.	Open-ended, Follow-up Question
4. Sure. Negotiators need to be able to collect information and to persuade people. Of course they need to communicate to do that.	5. What do you mean by "collect information?"	Clarifying
6. Negotiators need to learn information from other people. So negotiators "collect" this information by asking appropriate questions and using other communication techniques.	7. Humm, hum.	Passive Listening
8. After they have collected the information they then use it in some way.	9. Can you be more specific?	Narrowing
10. Sure. When negotiators learn about the other side's interest, they can use that information during the negotiation.	11. That's helpful, keep going.	Facilitator
12. They use techniques like open-ended questions, follow-up questions, clarifying questions, and active listening.	13. How so?	Open-ended
14. They use these techniques to gather information from their opponent.	15. They collect the information by using these techniques?	Summarization Active Listening
16. Yes, the good communicators collect the information which is an important foundation for the negotiation.	17. How do you feel about that?	Open-ended Question Probe for Feelings
18. I think it is one of the most important things that negotiators do, and unfortunately, many negotiators neglect these skills.	19. So you think communication is important, but many negotiators neglect it?	Summarization Active Listening
20. Right. Negotiators should realize that good communication techniques can help them to be successful, and they should pay attention to, and practice good communication techniques.	21. Thanks. You have helped me to better understand your views about communication. And I hope I have helped you demonstrate some of the techniques that you have talked about.	

Reframing Exercise

In the exercise below, I have included reframed examples of the first two original statements. I class, I just discuss the show the first two reframed statements but the rest of the reframed examples are missing and expect the participants to create the reframed statements.

Reframing

Is the glass half full or half empty

"It all depends on how you look at it." - Tom Sawyer

Reframing	Restating another person's statement to make it less provocative and more productive.
-----------	---

When you reframe for yourself, you are choosing to see something in a different way or from a different perspective. Assisting others to reframe often involves persuasion. Tom Sawyer did not have to be a painter because he turned out to be a great reframer. He convinced his friends that what seemed to be an unpleasant task of painting a fence was really a fun activity worth paying to do.

How can you reframe the following common "couples complaints?"

REFRAMING	
Original Statement	Reframed Statement
She talks too much	She's so friendly and puts everyone at ease.
He argues so much	He has such strong convictions
She thinks she knows it all	She is very well informed
He is so conceited	He is very confident
She too easygoing	She is very friendly
He's so stingy	He is thrifty
She spends too much money	She is very generous
He's too rigid	He is very organized
She can never sit still	She has lots of energy
She's too emotional	She freely expresses herself

Articles With Concepts On How To Resolve Legal Cases

Processes in Civil Case Mediation

Wall & Chan-Serafin, Conflict Resolution Quarterly, 26(3), 261-291

Observed Mediators Techniques

- Asks for information
- Shows empathy or understanding for disputant
- Points out weaknesses of disputant's case
- Indicates strength of opponent's case
- Weakens other
- Criticizes disputant
- Criticizes other
- Strengthens disputant
- Praises disputant
- Praises other
- Notes costs and risks of trial

Friendly Persuasion in Civil Case Mediations

James A. Wall, Suzanne Chan-Serafin

Journal Article Conflict Resolution Quarterly 31(3) 285-303 (2014)

Established Legitimacy

Showed Strategic Flexibility

Used A Ratchet Approach

Use Aspiration-Reduction Maneuvers (to reduced their goals)

Assertive and Nonassertive Judicial Mediation Techniques

From The Judge as a Mediator

Wall & Rude, Journal of Applied Psychology 1991, Vol. 76, No. I, 54-59

Techniques Mediators Can Use

Nonassertive Techniques

Talked about the high cost of going to trial

Let the attorneys set the trial date

Said "split the difference"

Left the lawyers and exited the room

Argued logically for concessions

Assertive Techniques

Called a certain figure reasonable. (JB evaluative)

Argued one attorney's case to the other.

Spoke personally with the clients to persuade them to accept settlement

Stated what a case was worth to the client. (JB evaluative)

Assertive and Nonassertive Judicial Mediation Techniques

From The Judge as a Mediator

Wall & Rude, Journal of Applied Psychology 1991, Vol. 76, No. I, 54-59

Techniques Mediators Can Use

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Talked about the high cost of going to trial

Let the attorneys set the trial date

Said "split the difference"

Left the lawyers and exited the room

Argued logically for concessions

Assertive Techniques

Caucused with each side separately

Called a certain figure reasonable.

Argued one attorney's case to the other.

Tried to convince one lawyer that he has a distorted view of the case.

Spoke personally with the clients to persuade them to accept settlement

Emphasized to the parties the risks of a jury trial.

Stated what a case was worth to the client.

By Judges

Argues one attorney's case to the other

Talks about the high costs of going to trial

Leaves the lawyers together and exits himself

Interprets the issues for the lawyers

Emphasizes to client, the risks of a jury trial

Tells an attorney that he has ignored important facts- 69%

Convinces a lawyer that he has a distorted view of the case

Pressures the ill-prepared attorney

Tells attorneys as to how similar cases have been settled

Speaks personally with the client to persuade him to accept

Takes responsibility for the settlement amount even if the figure was not suggested by him

Convinces the client his lawyer is strongly defending his case

Has each lawyer paraphrase the other

Should Judges Grease the Slow Wheels of Justice?

A Survey on the Effectiveness of Judicial Mediation Techniques

Wall, Schiller & Ebert - 8 American Journal of Trial Advocacy 83 (1984-1985)

(71 Techniques Used by Judges to Facilitate Settlement)

These are techniques mediators can use

(Rank order - percentage of lawyers who have seen judges do – range 97-4%

Talks about the high risks of going to trial – 88%

Moves discussion to areas which have highest probability of settlement

Argues logically for concessions

Tells the attorney to concentrate on the relevant issues

Says “Split the difference”

Offers advice to a lawyer

Suggests a settlement figure after lawyers' input

Evaluates one or both cases for the attorneys - 79%

Analyzes the case for a lawyer

Argues one attorney's case to the other

Talks about the high costs of going to trial

Leaves the lawyers together and exits himself

Interprets the issues for the lawyers

Emphasizes to client, the risks of a jury trial

Tells an attorney that he has ignored important facts- 69%

Convinces a lawyer that he has a distorted view of the case

Pressures the ill-prepared attorney

Tells attorneys as to how similar cases have been settled

Tells parties about the rewards of a pretrial settlement

Gives advice to the lawyer with the weaker case

Talks to each lawyer separately about settlement

Asks amount each would concede, going back and forth to break settlement into small steps

Tells one lawyer that the other can't sell a particular settlement to his client

Offers alternative proposal not thought of by the lawyers

Tells client strengths and weaknesses of his case - 58%

Sides with the stronger party in order to force agreement

Downgrades the merit of the stronger case and/or the demerits of the weaker

Speaks personally with the client to persuade him to accept

Takes responsibility for the settlement amount even if the figure was not suggested by him

With client, emphasizes the fairness of the figure - 47%

Suggests settlement figure without asking for lawyers' inputs

Convinces the client his lawyer is strongly defending his case

Suggests a settlement figure to the client

Threatens lawyer for not settling

(e.g., threatens dismissal or mistrial) (U) - 28%

Gives information to lawyer with weaker case

Has each lawyer paraphrase the other

Relays information to and from the client

Forces client to explain why he won't accept the settlement figure of lawyers

Evaluative Mediation Competencies

Dorothy Della Noce

27 Conflict Resolution Quarterly: No.2, p.193, Winter 2009

Prior to mediation

- Require and read party briefs
- Require disclosure of the current negotiating range (last best offers)

The initial joint session

- Hold the initial joint session.
- Communicate with lawyers rather than parties.
- Ground rule: no interruptions
- Ask questions; gather information; clarify issues; be neutral
- Don't evaluate or assess in the joint session.
- Move to caucuses.

In caucus sessions

- Keep parties apart until settlement
- Communicate with the lawyers not the parties.
- Insist on reasonable initial offers and demands.
- Create an evaluation that falls within the parties' negotiating range
- Use “legal language” to deliver the evaluation, enhance its credibility, and persuade parties to make concessions - the language of legal precedent, experience in the courtroom, jury verdict trends, and experience with local people, practice, and procedures.
- Conduct positional or distributive bargaining.
- Encourage concessions
- Structure persuasive arguments to yield concessions.
- Discourage / forbid backtracking from previous offers
- Undermine each party's confidence in their case.
- Offer only negative evaluations to a party in caucus
- Act as devil's advocate.
- Offer only positive evaluations of the opposing party's case.
- Interpret precedent and local practice unfavorably for the party you are meeting with
- Predict a “loss” in litigation for the party you are with
- Interpret precedent and local practice favorably for the other party
- Predict a “win” in litigation for the opposing party.
- Impress parties with the costs and risks of litigation.
- Extract a concession before leaving the caucus room for every new round of bargaining.
- Control the flow of information between caucus rooms.
- Share information between the parties strategically and selectively

Final joint session

- Use a final joint session only to finalize the settlement.

Barkai Sample Gambit Assignment

(Due Date: Monday xxx, 8 am)

"What do I say when I want to ..." Gambits (2 pages if single spaced, 4 pages double spaced). Submit them directly to me barkai@hawaii.edu with your name on them. It is "credit/no credit."

In class, I use the word "gambit" to mean the specific words that a person can say to direct or shift a negotiation or other ADR discussion 1) to a new topic, 2) to induce a party to take some action, 3) to break through an impasse, or 4) learn more information. You have spoken the gambits out loud in class (Open-ended questions, mediator practice lines, and Tongue Fu lines). There are also written gambits in our handouts (Negotiation Gambits, Mediation Gambits, and Facilitator Talk).

I want you to write the actual words, phrases, or sentences to be spoken as gambits. Please create at least 2-3 gambits for each topic you are writing about and label your gambits so that I know what each gambit is designed to accomplish.

Your individual efforts will become part of a vast list of gambits useful in various ADR situations. Efforts from past classes are in the Dropbox.

In addition to the gambits in our materials and videos for class, you can find many more examples by searching the web—doing Google searches like "impasse breaking & negotiation." Note that other people do not call them "gambits." If you find other good lists of what to say, please give me the cite or URL.

As a minimum, please create 2-3 gambits for the following topics:

Gambits: "What Do I Say When I Want To ... [as a negotiator / mediator]"

1) As a negotiator:

- ...make the first offer
- ...get them to make the first offer
- ...make the first concession
- ...get them to make the first concession
- ...probe for underlying interests
- ...close the final gap

2) As a mediator:

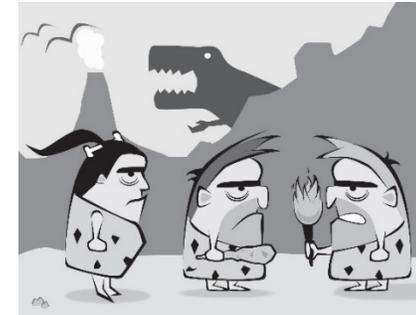
- ...explain confidentiality in mediation
- ...get a party to make the first concession
- ...get a party to consider making an apology
- ...get past "it's the principle of the thing" objection to making a concession
- ...get a concession in a purely money dispute
- ...make a mediator's proposal

#) Pick 5 specific impasse breaking techniques and write 2-3 gambits for each technique.

You can find such techniques in class PPTs, readings, and on the internet. Identify the technique and write 2-3 gambits. Below are some impasse breaking techniques mentioned in our class.

Split the difference; you-cut-I-choose; normalize; what would it be worth to you to ...; highlight common interests; appeal to principles and ideals; explore the costs of no agreements (BATNA & WATNA); emphasize the future; mediator takes ownership of the solution; "in principle" technique; brainstorm; change the shape of the money; eliminate some uncertainty; reframe; set aside one issue for now; what would you like to do next; ask about fears; clarify criteria; validate and affirm areas of agreement; offer a model. - The possibilities are almost endless.

Doing ADR Since 6 B.C.



Art by Dan Mazanec

Yes, I have been involved in ADR since 6 B.C. – 6 years” Before Computers” were used by faculty and staff at the University of Hawaii.

No, I wasn't really a caveman at the start of my ADR work, but I was part of the first mediation training class in the fall of 1979 for the Neighborhood Justice Center (NJC) of Honolulu. Immediately below is a picture of our mediation center's graduation class that was trained in Honolulu by Edith "Edie" Primm from the Atlanta Neighborhood Justice Center. Over the next four decades, three members of this group, David Chandler, Bruce Barnes, and myself, would go on to teach, train, and do research on negotiation, mediation, and ADR at the University of Hawaii Law School, as well as across the United States, throughout the Pacific, Asia, and other places in the world. Attorney William "Bill" Burgess (standing on the far right) was the founder of mediation center in Honolulu and had the foresight to start and support the mediation center its early years.



That is me, in the back row, third from the right, with long hair, a beard, and sunglasses. Just in case you are having some problems recognizing me, on the next page is a blowup of my face from that group photo.



When I show the above photos in my mediation classes, I like to say, “Mediation has changed a lot in 40+ years - and so have I.” See the back cover of this book for a cartoon picture of my much older, but younger looking self.

Other influences that shaped my gambit teaching:

1. Sidney Goldstein, *The Basketball Coach's Bible: A Comprehensive and Systematic Guide to Coaching* (1994). My thanks for the suggestion of literally using a step-by-step approach to teaching novices athletic skills. I applied this approach for many years coaching my twin daughters' teams for soccer, volleyball, and basketball, and have now used it for years in my law school teaching.

2. The NITA (National Institute of Trial Advocacy) approach to teaching trial advocacy skills through “drills,” short, mini exercises, including rote learning, sued to develop competency in performing direct and cross examination. The drills concept was explained long after I started doing it. See, Robert Stein & Ben Rubinowitz, *Compendium of Trial Advocacy Drills*

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- Professor of Law, Director and later Co-Director of the Clinical Programs at the University of Hawaii School of Law since 1978;
- Professor at Wayne State University Law School 1973-1978 (tenured 1978).
- BBA (1967), MBA (1968) and JD (1971) from the University of Michigan.
- Visiting Senior Scholar, City University of Hong Kong, 1992-93
- "Outstanding Professor of the Year" 2005-06 & 1991-92, William S. Richardson School of Law
- University of Hawaii. Regents' Medal for Excellence in Teaching, 2007
- teaches courses on Alternative Dispute Resolution, Evidence, and Prosecution Clinic at the Law School
- taught Negotiation and ADR courses at Pepperdine, Ohio State, University of Idaho, and Hamline law schools, as well as Shinshu University (Japan), Central European University (Hungary), Helsinki School of Economics and Business (Finland), and La Trobe Law School (Australia).
- frequently conducts negotiation and ADR trainings in Hawaii and has taught ADR in Australia, Finland, Hong Kong, Hungary, Japan, and the Federated States of Micronesia (Kosrae & Pohnpei)
- made ADR presentations in Canada, England, Japan, Korea, Malaysia, Netherlands, Russia, and Taiwan
- author of 76 books – 74 on evidence; 2 cartoon captioning contest books, and 1 on communication gambits.
- co-author of the teacher's manual for Abramson's *Mediation Representation: Advocating as a Problem-Solver in Any Country or Culture* (N.I.T.A. 2010).
- taught International Negotiations at the Shidler College of Business in the Japan focused and China focused Executive MBA programs (1985-2007), Intercultural Negotiations at JAIME (Japan American Institute for Management Science) (1986-present), and the Asia-Pacific Center for Securities Studies (2010-2014).
- trainer for 7-day Mediation Workshops for 30-50 Judges from the Kingdom of Thailand, Honolulu, 2008, 2010, 2012, 2014
- worked in the field of ADR since 1979 after becoming a member of the first group of mediators trained at the Neighborhood Justice Center of Honolulu (now called Mediation Center of the Pacific)
- mediated cases for the Neighborhood Justice Center, the Hawaii Judiciary's Center for Alternative Dispute Resolution, the State of Hawaii, and private groups

- former chair and co-chair of the Alternative Dispute Resolution (ADR) Section of the Hawaii State Bar Association (for 10 years)
- past president and board member of the Board of Directors of the Neighborhood Justice (Mediation) Center of Honolulu
- founding member (1986) of the University of Hawaii's Program on Conflict Resolution
- ran the "Humor in ADR" Cartoon Captioning contest in the American Bar, Association's Dispute Resolution Magazine, 1997-2011
- served as a consultant to the Hawaii Judiciary, The Judiciary of the Republic of the Marshall Islands, the Supreme Court of the Federated States of Micronesia, the Pacific Judicial Council, and the Minister of Justice for Papua New Guinea
- arbitrates for the Hawaii Court-Annexed Arbitration Program and the Department of Commerce and Consumer Affairs' Lemon Law Program
- former chair of the ADR Section of the Association of American Law Schools
- published numerous articles on the subject of negotiation and mediation (see later list)
- United States representative to APEC ADR in Executive Education Project 2000
- criminal trial lawyer for Legal Aid & Defender Association, Detroit, Michigan 1972 - 1973

John Barkai's ADR Publications

Available at SSRN: <http://ssrn.com/author=47903>

Listed in order of downloads from SSRN.com

1. How to Develop the Skill of Active Listening, Practical Lawyer, Vol. 30, No. 4, p. 73, June 1984
2. Nonverbal Communication from the Other Side: Speaking Body Language, San Diego Law Review, Vol. 27, p. 101, 1990
3. Empathy Training for Lawyers and Law Students, Southwestern University Law Review, Vol. 13, pp. 505-529, 1983
4. What's a Cross-Cultural Mediator to Do? A Low-Context Solution for a High-Context Problem, Cardozo Journal of Conflict Resolution, Vol. 10, pp. 43-89, 2008
5. 36 Chinese Strategies Applied to Negotiations, PowerPoint presentation
6. Cultural Dimension Interests, the Dance of Negotiation, and Weather Forecasting: A Perspective on Cross-Cultural Negotiation and Dispute Resolution, Pepperdine Dispute Resolution Law Journal, Vol. 8, No. 3, 2008
7. Mediation of Construction Disputes in the United States, 17 pages, 24 Jul 2009, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1435380
8. Teaching Negotiation and ADR: The Savvy Samurai Meets the Devil Nebraska Law Review, Vol. 75, p. 704, 1996
9. Using Alternative Dispute Resolution Techniques in Construction Disputes, Papers from the 3rd International Symposium on Infrastructure Management and Financing, Kyoto University, Kyoto Japan, 2003
10. Active Listening, Trial, Vol. 20, p. 66, August 1984
11. What Happens When Mediation is Institutionalized? Ohio State Journal on Dispute Resolution, Vol. 9, No. 307, 1994, with James J. Alfini, Robert A. Baruch Bush, Michele Hermann, Jonathan M. Hyman, Kimberlee K. Kovach, Carol Bensinger Liebman, Sharon Press and Leonard L. Riskin
12. Let's Stop Spreading Rumors About Settlement and Litigation: A Comparative Study of Settlement and Litigation in Hawaii Courts, Ohio State Journal on Dispute Resolution, Vol. 29, pp. 85-160, 2014, with Elizabeth Kent
13. Sensory Based Language in Legal Communication, Practical Lawyer, Vol. 27, No. 41, January 1981

14. Applying the Hawaiian Mediation Model to Disputes and Conflicts, *Interspectives*, Vol. 11, No. 40, 1992
15. The Education and Training of Mediators, The Fifth International Conference on Multi-National Joint Ventures for Construction Works 2009
16. Using Court-Annexed Arbitration to Reduce Litigant Costs and to Increase the Pace of Litigation, *Pepperdine Law Review*, Vol. 16, pp. 43-74, 1989, with Gene Kassebaum
17. Hawaii's Court-Annexed Arbitration Program: Final Evaluation Report University of Hawaii at Manoa, Program on Conflict Resolution, PCR Working Paper Series 1992-1
18. Using Electronic Mail for International Negotiation Simulations, 23 Jul 2009, with Andrew Clark
19. A Profile of Settlement, *Court Review*, Vol. 42, No's. 3-4, Fall/Winter 2006, with Elizabeth Kent and Pamela Martin
20. A New Model for Legal Communication: Sensory Experience and Representational Systems, *Cleveland State Law Review*, Vol. 29, p. 575, 1980
21. Settling Civil Lawsuits in the Hawaii Circuit Courts, *Hawaii Bar Journal*, Vol. 10, No. 13, 2007, with Elizabeth Kent and Pamela Martin
22. The Legal Education of Plea Bargaining Participants, *68 Kentucky Law Journal* 240 (1979)
23. The Lecture-in-Disguise, *New Mexico Law Review*, Vol. 19, pp. 117-136, 1989
24. Bringing Mediation (Back) to Micronesia, 18 Jul 2009
25. The Impact of Discovery Limitations on Pace, Cost and Satisfaction in Court Annexed Arbitration, *University of Hawaii Law Review*, Vol. 11, No. 81, 1988, with Gene Kassebaum
26. American Alternative Dispute Resolution: Mediation - An Overview and Mini-Training (in the Japanese Language), *Hiroshima Law Journal*, Vol. 15, p. 157, 1991
27. Investing in Vietnam: An Ancient Land Looks for Modern Money, *Legal Times*, pp. 36-40, June 1994, with Laurence Brahm
28. Electronic Negotiation: The International Electronic Mail Computer Negotiation Project

29. Pushing the Limits on Court-Annexed Arbitration: The Hawaii Experience, *Justice System Journal*, Vol. 14, p. 131, 1991, with Gene Kassebaum
30. Nonverbal Communication from the Other Side: Speaking Body Language, *Journal of Law, Politics, & Sociology*, Vol. 66, p. 100, 1993, with Akira Ishikawa
31. The Hardest Case I Never Settled, *13 Hawaii Bar Journal* (Nov. 8) 2009
32. Humor in Negotiations & ADR: Cartoon Contest Caption Winners from the ABA Dispute Resolution Magazine
33. Hawaii's Court-Annexed Arbitration Program: Is It Worth It? (in Japanese), *Hiroshima Bar Journal*, September 1992

I have other publications on SSRN and in print
that are not related to negotiation and ADR

**Other Evidence, Cartoon, and ADR Books
by John Barkai**

Federal Rules of Evidence Handbook with Common Objections & Evidentiary Foundations

Humor in Negotiations & ADR: Cartoon Caption Contest Winners from the ABA Dispute Resolution Magazine

Humor in Trial Evidence: Cartoon Caption Contest Winners and Challenges from My Evidence Class

Military Rules of Evidence Handbook with Common Objections & Evidentiary Foundations

The Pocket Guide to Common Trial Objections & Evidentiary Foundations

The following evidence books in my
Handbooks with Common Objections & Evidentiary Foundations series
are available exclusively on Amazon for the following states:

Alabama	Indiana	Nebraska	Rhode Island
Alaska	Iowa	Nevada	South Carolina
Arizona	Kansas	New Hampshire	South Dakota
Arkansas	Kentucky	New Jersey	Tennessee
California **	Louisiana	New Mexico	Texas **
Colorado	Maine **	North Carolina	Utah
Connecticut	Maryland	North Dakota	Vermont
Delaware	Massachusetts	Ohio	Virginia
Florida **	Michigan **	Oklahoma	Washington
Georgia	Minnesota	Oregon	West Virginia
Hawaii **	Mississippi	Pennsylvania **	Wisconsin
Idaho	Montana		Wyoming
Illinois			

** Also published “Just the Rules” books for these states.

Massachusetts, Missouri, and New York do not have formal rules of evidence but
Massachusetts and New York do publish state “Guides” to evidence

Handbooks for the following Pacific Island jurisdictions,
which are supported by the 9th Circuit Federal Courts,
are also available on Amazon

American Samoa	Marshall Islands
Chuuk	Northern Mariana Islands
Federated States of Micronesia	Palau
Guam	Pohnpei
Kosrae	Yap

Also handbooks for the U.S. Virgin Islands and Puerto Rico.

The author has “self-published” all the above books.

They are available exclusively on Amazon.com and are “print-on-demand.”

To find Barkai’s evidence and cartoon books

1. Go to the Amazon website – www.Amazon.com

2. Enter into the search bar: - John Barkai

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Dedication

To my wife Linda and my adult twin daughters Hope and Leah,
 who bring me so much joy and enrich my life,
 and
 to the thousands of my former negotiation, mediation, and ADR students who
 took my classes, attended my workshop, learned gambits with me and created
 gambits for me (and themselves) over the past 40+ years while I have been
 teaching at the William S. Richardson School of Law
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About the Author

John Barkai is a full-time law professor at the University of Hawaii School of Law where he teaches negotiation & ADR, evidence, and a criminal prosecution clinic. He is in his 50th year of full-time teaching and has been a mediator for over 40 years. This is his 45th year at the University of Hawaii. He taught for 5 years, and was first tenured, at Wayne State Law School in Detroit Michigan. He was a former criminal defense trial lawyer in Detroit. In Hawaii, he has received his University's Excellence in Teaching award and has twice received the Professor of the Year Award at the law school. He has a B.B.A, M.B.A, and J.D, all from the University of Michigan. Since 1978 he has been the Director, and now Co-Director, of the Law School's Clinical Program. He has done extensive international teaching, training, and presentations in the ADR field. His scholarship has focused on communication, cross cultural topics, and empirical research on settlements. In the past 5 years he has written evidence handbooks for all 50 states, as well as about 15 other jurisdictions from American Samoa to the U.S. Virgin Islands, two cartoon books, and this book. More information about him and his scholarship appeared on previous pages.

Your Favorite Gambits

Your Favorite Gambits

This book contains over 3,000 gambits designed for more than 400 topics such as:

make and ask for the first offer, concessions, counter offers, conditional and contingent offers, final offers, apologies, active listening, agent of reality, anticipate negative reactions, baseball binding mediation, be evaluative by asking questions, bracketing, break through "I can't say," bridge the gap, cartoons, chance it, change minds, clients-only meeting, close the gap, compliment productive behavior, confidential listener, converts statements into offers, create doubts, decision tree, don't say "concession," draw from a hat, endowment effect, expand incomplete responses, explain confidentiality, fantasy football draft, ask the mediator to take ownership, flip for it, frame the choice as a gain, generalize, get control of an unproductive process, get next moves from them, highlight common interests, humor, "I once had a case" or "Some folks" proposals, "if" statements, "in principle" technique, indirect way to break impasse, "It's the principle of the thing," last and final offer, last gap distribution, lawyers-only meeting, loss and mourning the dispute, make a global summary, make no free concessions, match eagles with eagles, mediator's proposal, money - change its "shape," "My lawyer says I have a good case," negotiate over mediator's proposal, net recovery technique, normalize, paradoxical intervention, parallel option development, personal support and encouragement, pick-a-pile, postpone a difficult issue, prioritize interests, probe for underlying interests, propose both compromise, quotations, range bargaining, reactive devaluation, reciprocal apologies and concessions, reframe, respond to insulting first offers, respond to uncomfortable mediator questions, restate their proposal, risk analysis, role reversal, Rule 68 offers, seek coaching, selective perception, settle half the case, share the responsibility of impasse, "So you think you are going to trial," split the difference, sports performance bonus contract, structured settlement, sunk costs, take 49 percent, temper extreme offers, test the margins, the great escape, the message in an offer, transitions to proposals, trial period, two offers at once, umbrella summarizing question, uncertainty of estimates, way out with dignity, what would it be worth, whisper numbers, "Why did you settle your case?" and "You'll have to do better than that."



John Barkai