

Impasse Breaking Skills for Mediators and Advocates: *Traps, Tips, and Tools!*



October 24, 2019

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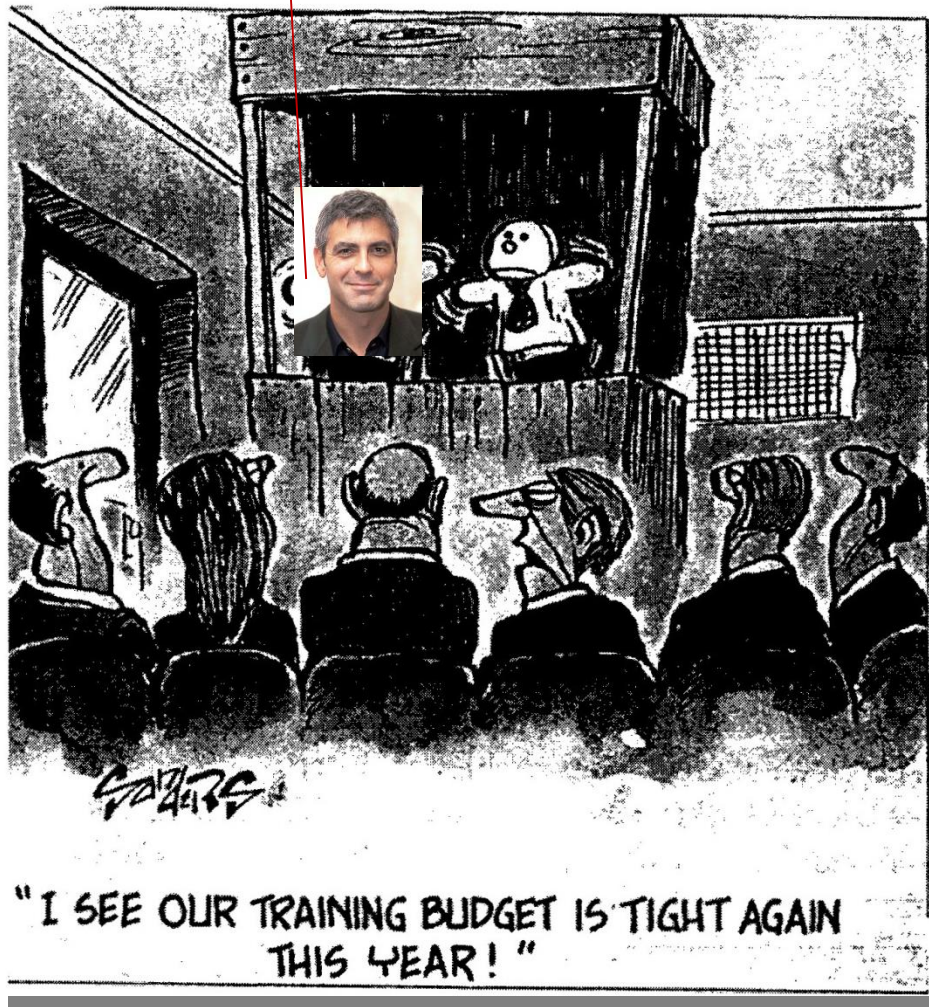
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ICMRESOLUTIONS

Sam Before He Started Training!



Introduction

- Sam Imperati, JD
- Former: Private Practice, Nike Trial Attorney, and Pro Tem Judge
- Taught: Willamette MBA and L&C Law
- Currently: a Mediator, Facilitator, and Trainer
- 2006 – 2020: Best Lawyers in America – ADR

I've been involved in thousands of disputes ... some of which I started!



Table Introductions & Ice Breaker

Your name
Mediator or Advocate

Your New Name For Use During
This Training!

FIRST: Name of the first pet you can remember

LAST: Name of the first word (not numbered)
street you can remember



I'm "Butch Oxford"



PLAY LIST
[Chariots of Fire](#)

Agenda

- 1) Setting The Stage
- 2) Managing “Truth” Decay and Cognitive Biases
- 3) “50 Ways” to Break an Impasse
- 4) The Rest of the Survey Says ...

The Practical Details:

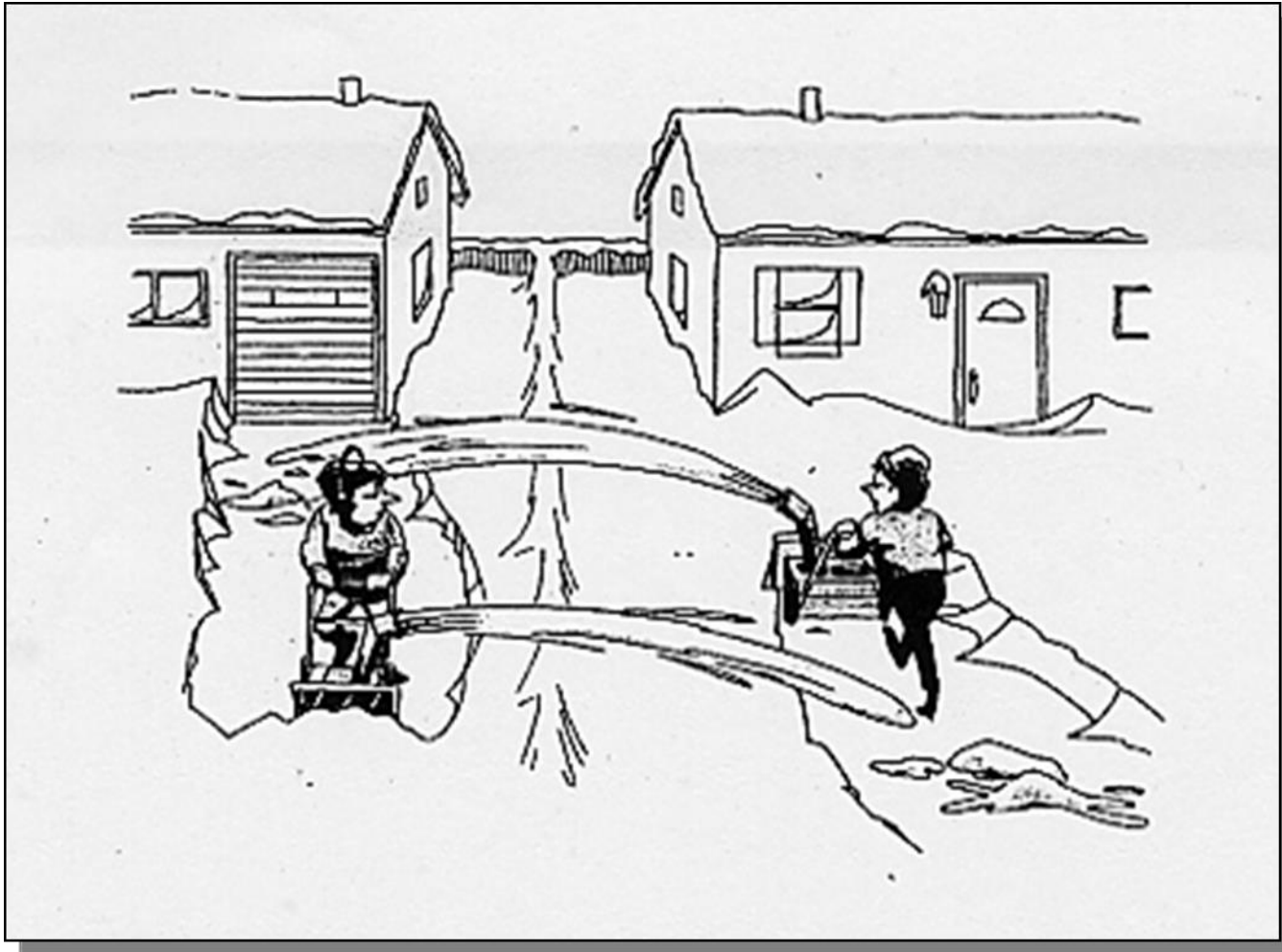
- Audience: Broad Spectrum
- Presentation vs. Handout
- We’ll be Going Fast and Slow over material
- Educational - No Legal Advice
- Breaks and Lunch
- Rotating Small Groups – Shared Experts Model
- Provoke Thought/Conversation, Not Judgment
- I’m an acquired taste that ...



1) SETTING THE STAGE

Conflict, Which is Defined as

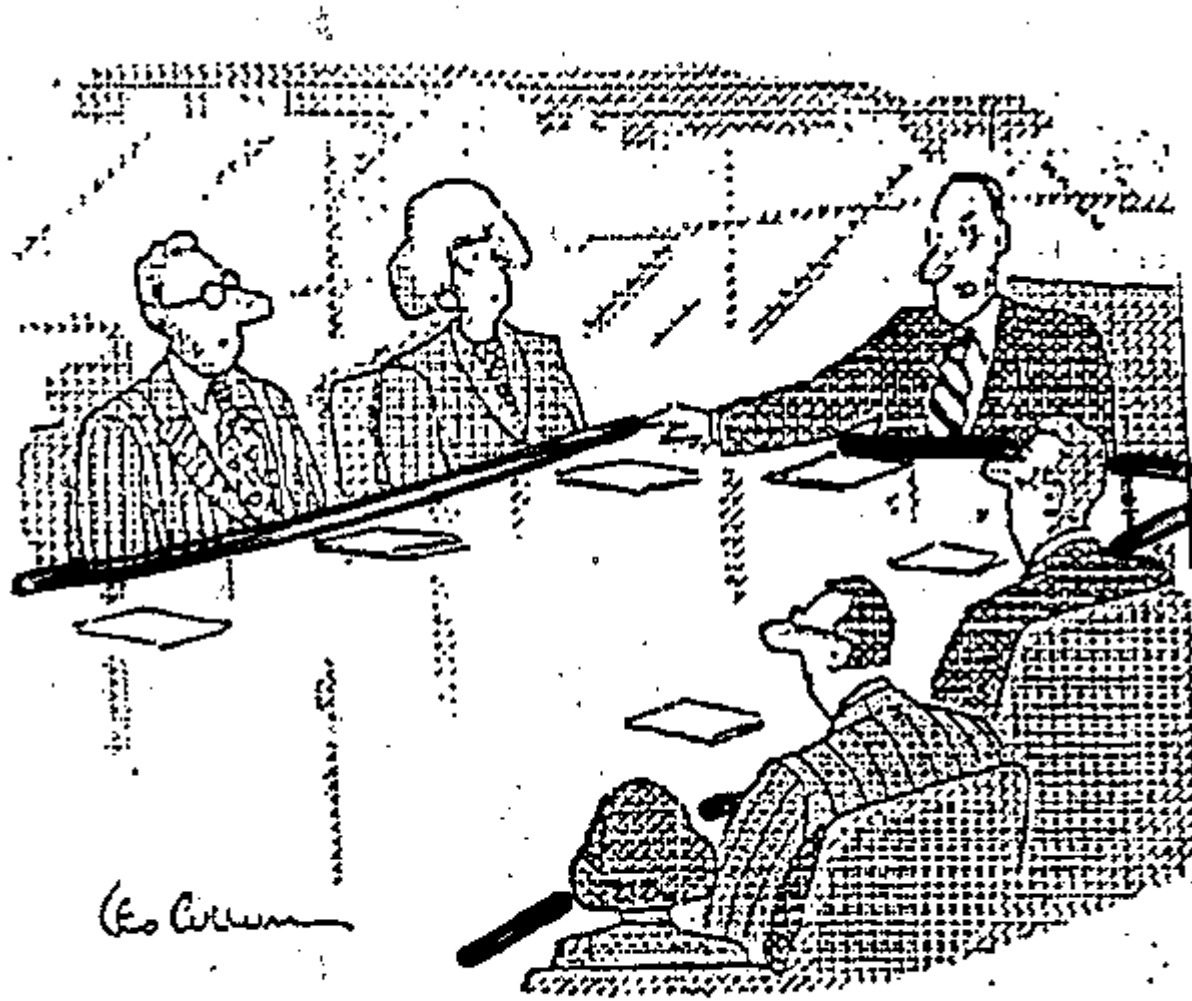
When someone insists that they are right, and you are wrong!



Typical Mediation Looks Like This



... or This



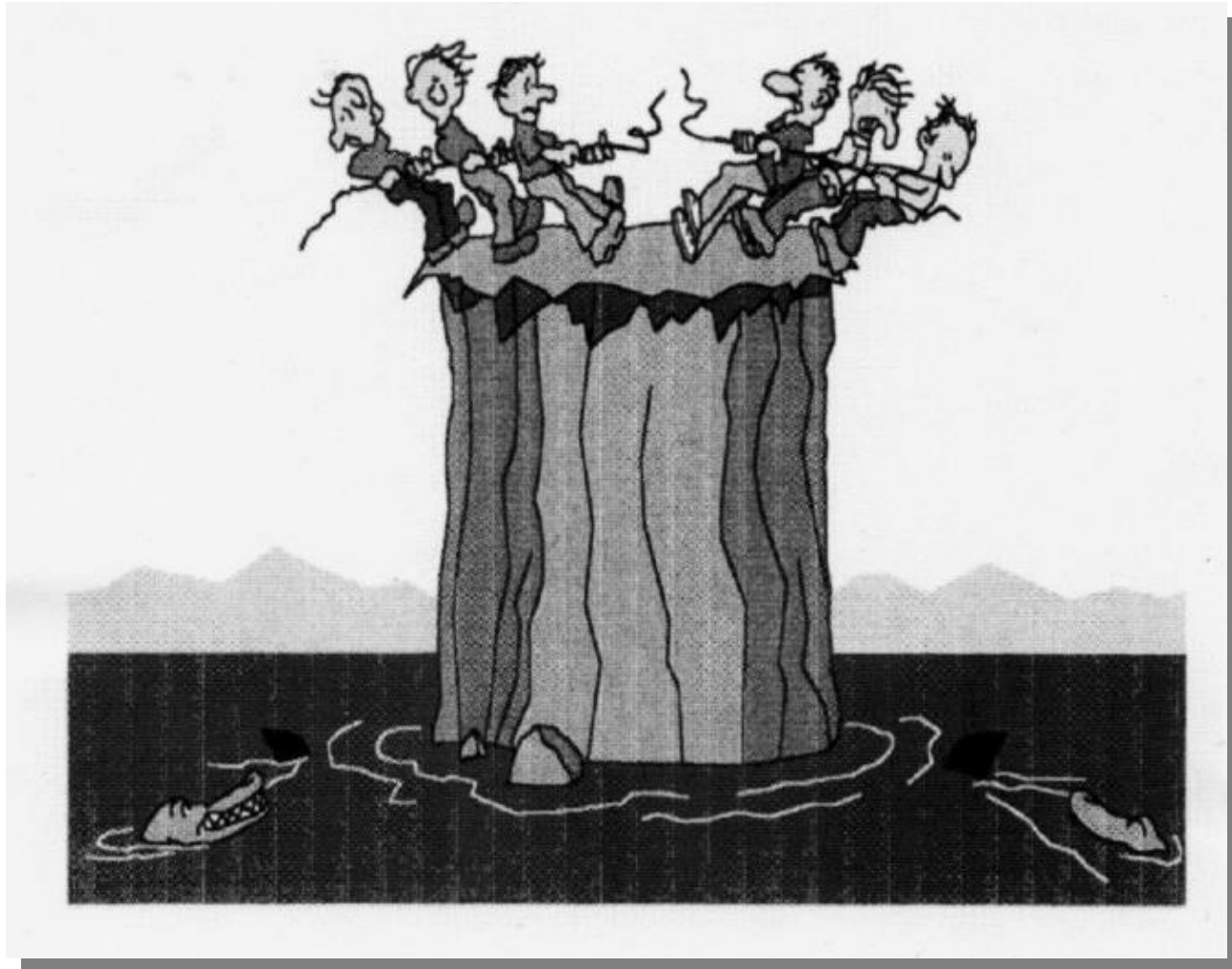
We can sit here all day until the person with the hidden agenda speaks up.

At Home, It Looks Like This!



Don't take that tone of thought with me!

Typical Mediation Impasse



***“I’m NOT settling. That’s my BOTTOM Line.
It’s a matter of PRINCIPLE!”***

Why? Reactionary Automatic Cognitive Processes



*“Your offer’s a crumpled little ball
on my desk.”*

Are Habit-Bound and Inhibit Clear Thought

Our Role: Car Mechanic, Travel Agent, or Tour Guide?

- *Consider the parties as travelers headed to a rendezvous at "agreement" and they get stuck on the way.*
- Is the mediator someone who comes in and helps only to get them unstuck so they can find their own way to their predestined agreement?
- Or, is it okay to give them each some input (ideas, information, etc.) that might help them find a different and hopefully better rendezvous (i.e. there's good food nearby where you were going to meet)?
- Or, how about the mediator who believes he or she knows where they should meet and tries to get them there?

Ninth Circuit Mediator, Chris Goelz, JD

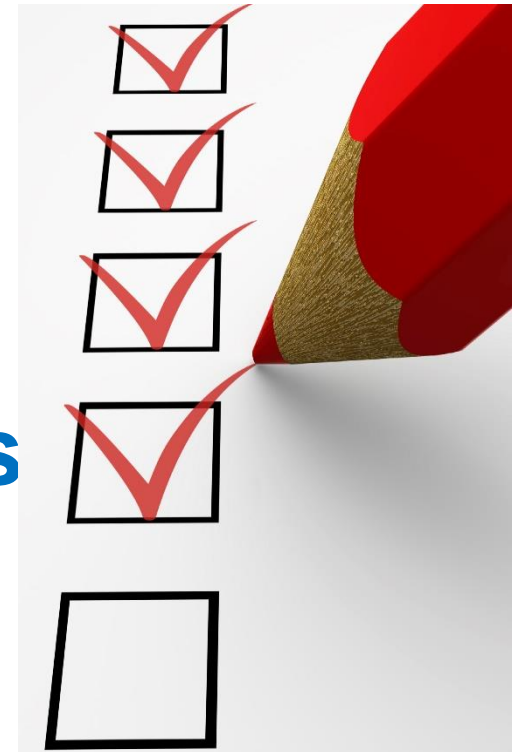
If you had to pick, is it the mediator's job to:

- a) Facilitate the discussion,
- b) Provide suggestions, or
- b) Get them to where they should go?



The Survey Says ...

**Not a Predictive Poll
Not About Right Answers
Simply a Discussion Aid**



[Whistle Baby](#)

Overview

- Survey as discussion aide – not a predictive poll
- Sent to all Training attendees
- 35 mediators and 33 advocates participated
 - Not everyone answered every question.
 - Results are rounded – do not always equal 100%
 - Did not analyze “Other” answer choices



- Today's Focus:
- “Dissonance: Identify it, Own It, and Change it.”
- Behaviors: Good and Bad

Survey Demographics

QUESTION	MEDIATORS	ADVOCATES
Educational Background	85% Law 6% Business 6% Other (Mediation)	93% Law 7% Business

- Mediators had more mediation experience than advocates
 - 60% of mediators had over 200 cases
 - 25% of advocates had that many
- Most were paid mediators (81%)
 - 17% reported their practice was 100% volunteer
- Mediators and advocates differed over frequency of cases where all parties were represented by an attorney
 - 78% of advocates said most of the time all parties were represented
 - 34% for mediators

Mediators can Manipulate by Using Rhetorical Tactics



Just Say-in!

Why Does Anyone Mediate if Mediation Risks Psychological Dissatisfaction, Extra Costs and Manipulation? Three Theories Reveal Paradoxes Resolved by Mediator Standards of Ethical Practice, 29 Ohio St. Journal of Dispute Resolution (2014).

Mediators or Master Manipulators?

Are the “Old Saws” true if we manipulate?

- 1) Mediators own the process
- 2) Attorneys and their clients own the outcome
- 3) Mediators don't have outcome preferences

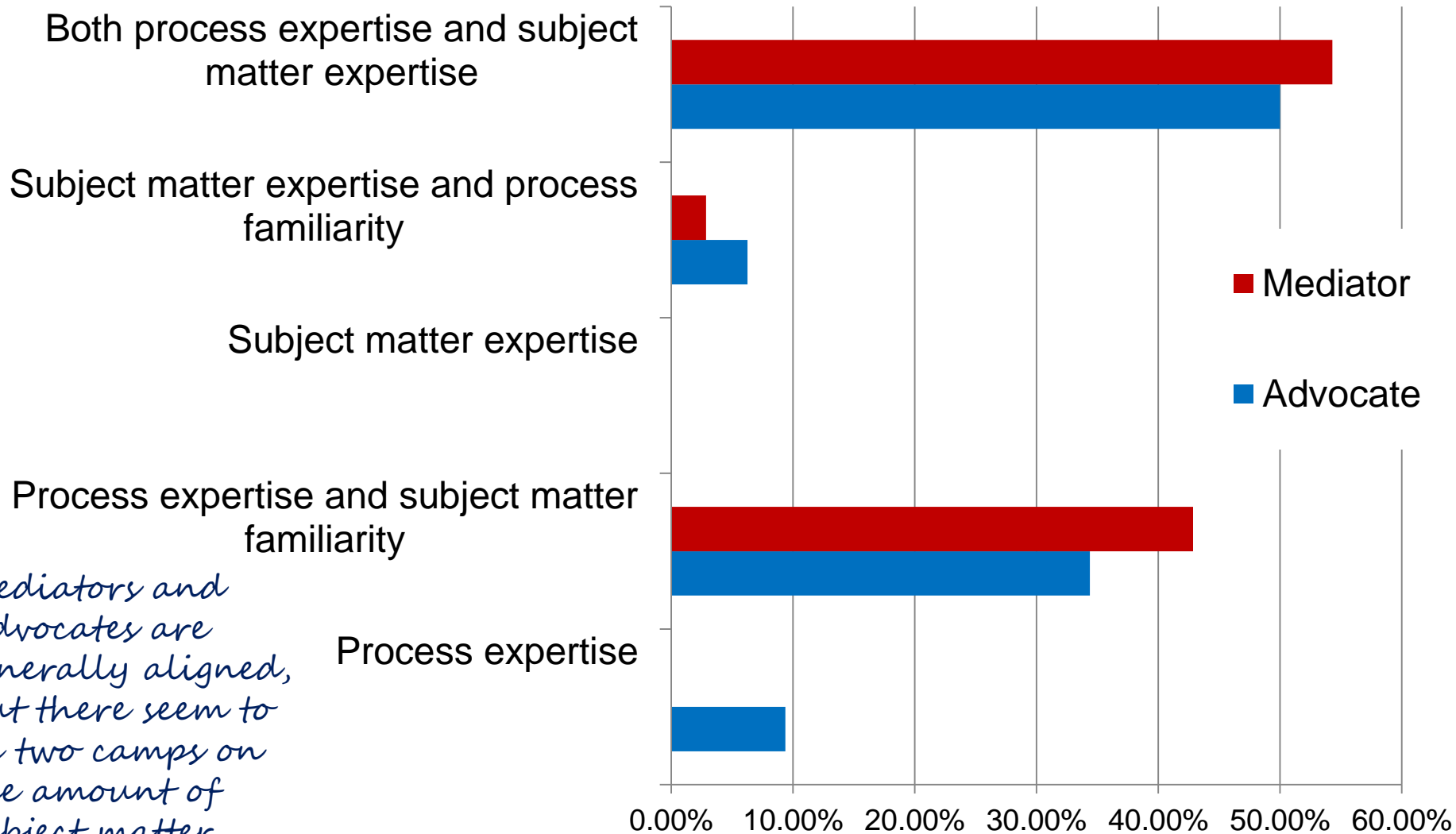
Provocative “New Saws” or “Sins?”

- 1) Mediators, attorneys and clients should own the process
- 2) Attorneys and their clients may not actually own the outcome
- 3) Mediators do have preferences over outcomes

Deformation Professionnelle = “the tendency to look at things according to the conventions of one's own professions, forgetting any broader point of view.”

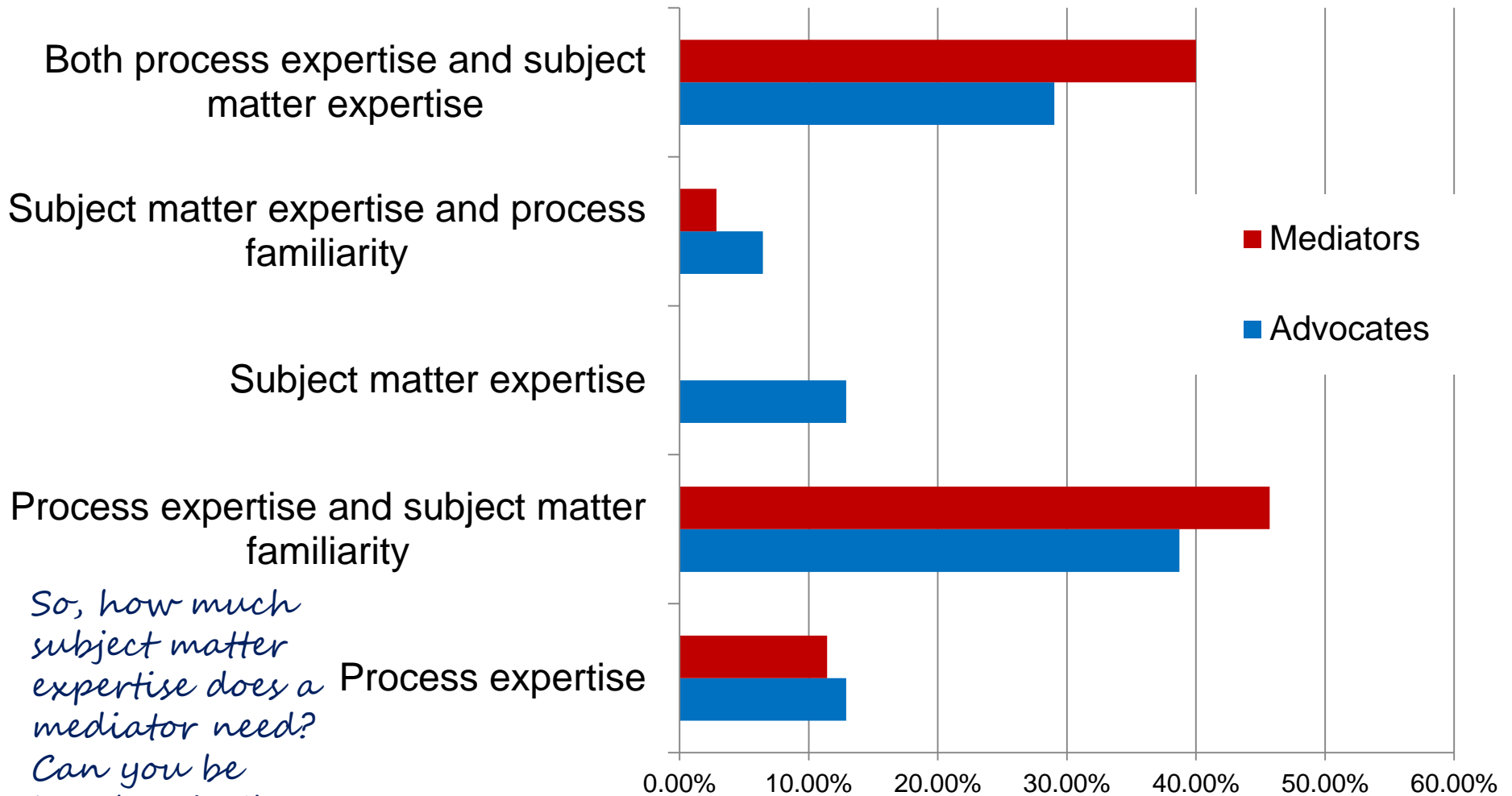
Availability Cascade = “Self-reinforcing process in which a collective belief gains more and more plausibility” through its regular/consistent repetition in public discourse.

Q9: What do you believe the typical client expects of their mediators?



Mediators and Advocates are generally aligned, but there seem to be two camps on the amount of subject matter expertise required.

Q18: What do you believe the typical mediator thinks they need?

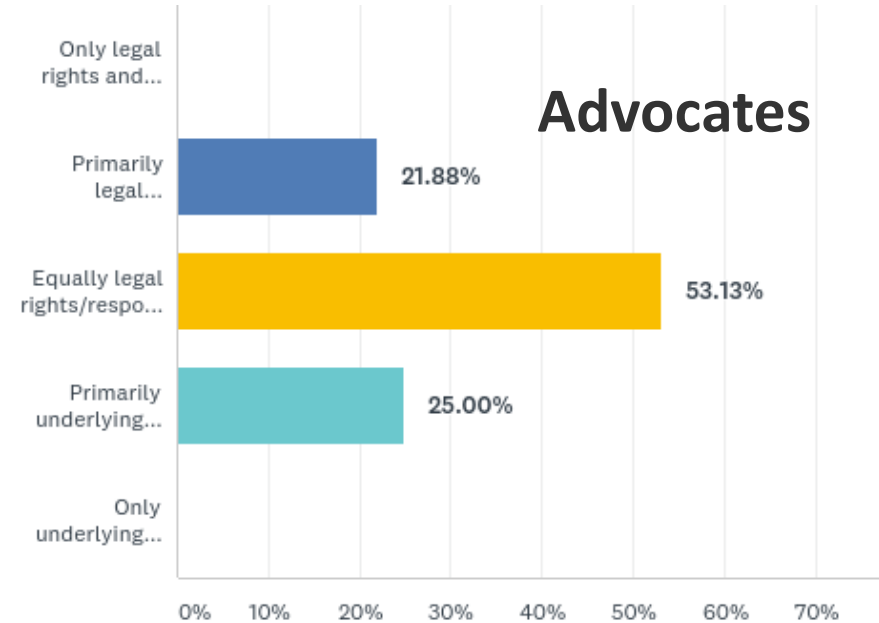
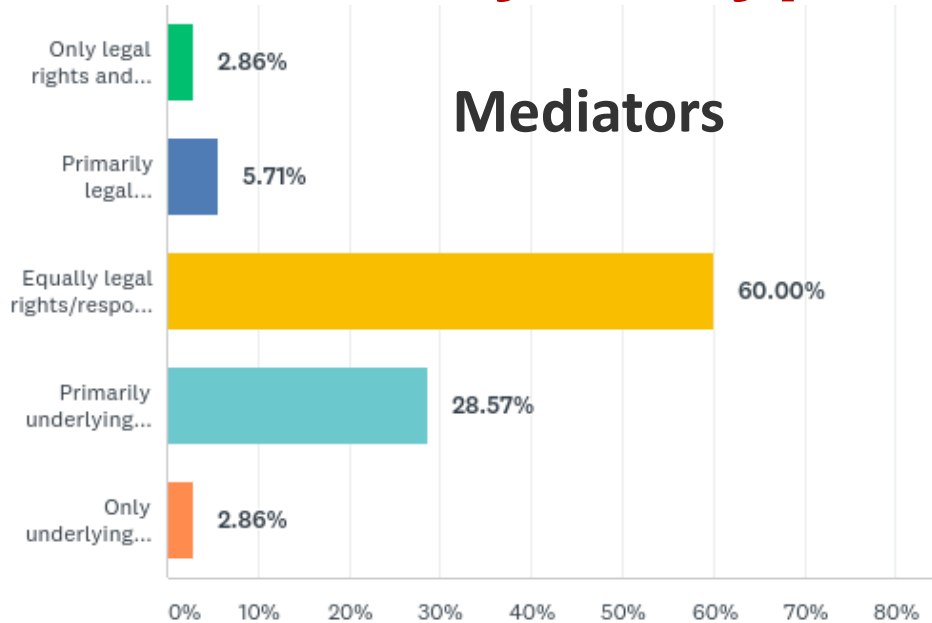


So, how much subject matter expertise does a mediator need?

Can you be "evaluative" without it?

When people take the mediator's point of view, they believe in more process expertise than when they take the client's point of view (slide 18).

Q10: What is the guiding focus in your typical mediation?



Answer options:

Only legal rights and responsibilities

Primarily legal rights/responsibilities and to a lesser extent underlying interests

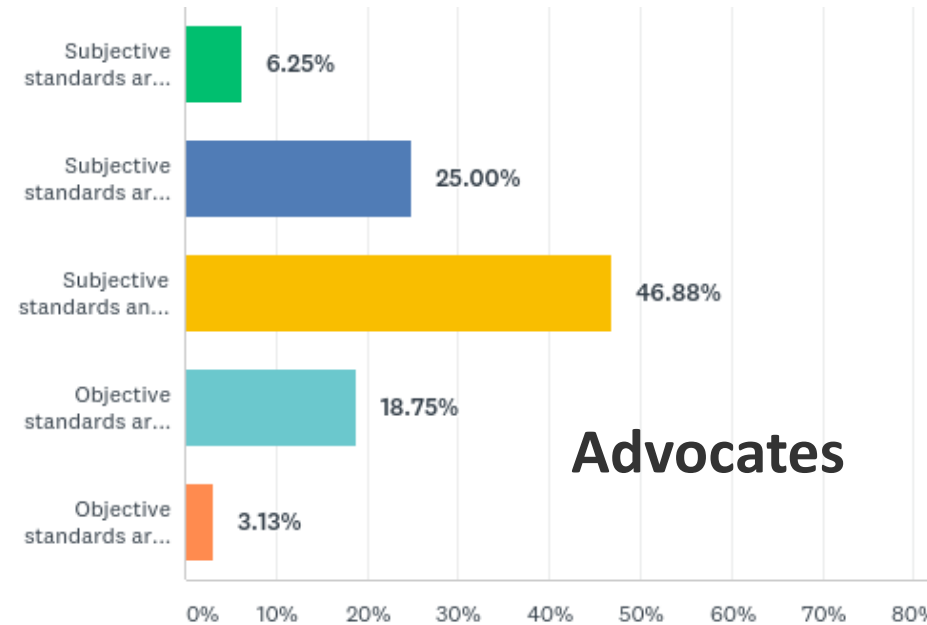
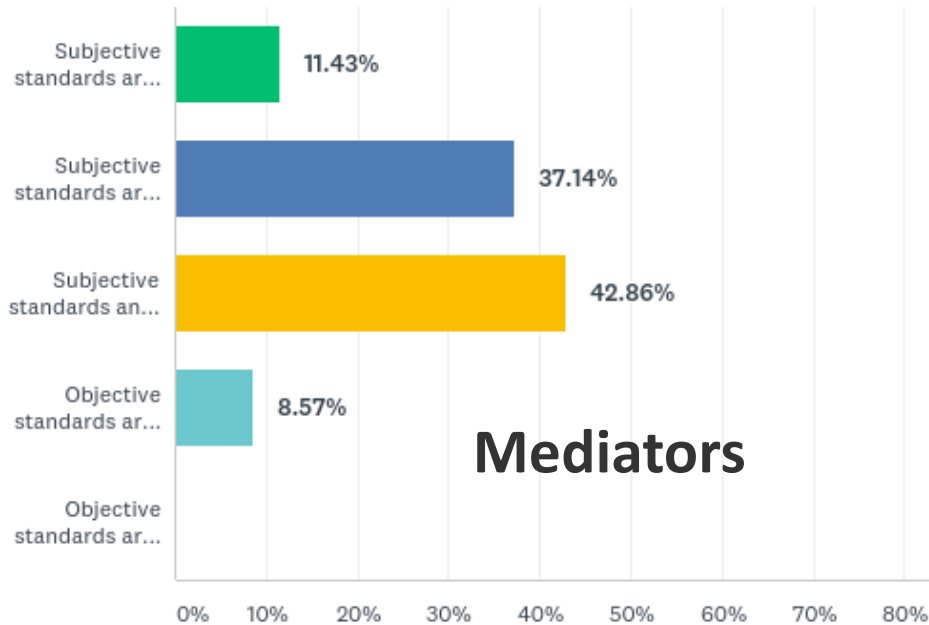
Equally legal rights/responsibilities and underlying interests

Primarily underlying interests and to a lesser extent legal rights/responsibilities

Only underlying interests

Advocates are more likely to prefer law to interests than mediators.

Q12: Which do you think is more important: subjective standards or objective standards?



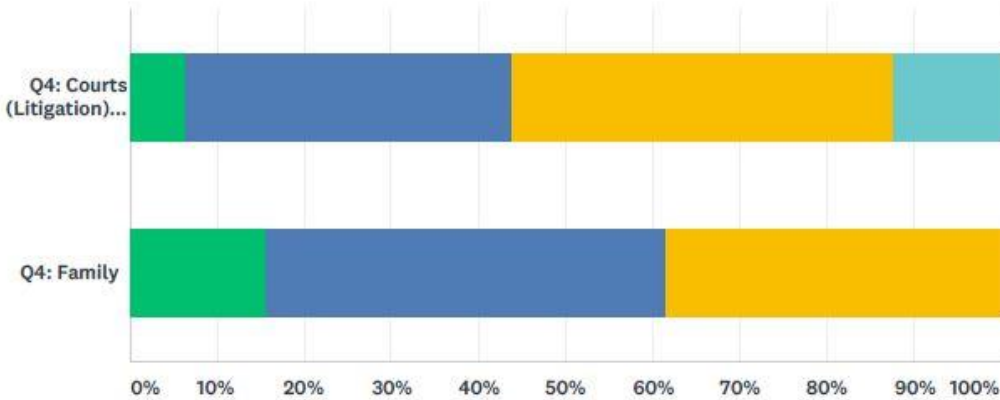
Answer Options:

- Subjective standards are much more important than objective standards
- Subjective standards are more important than objective standards
- Subjective standards and objective standards are equally important
- Objective standards are more important than subjective standards
- Objective standards are much more important than subjective standards

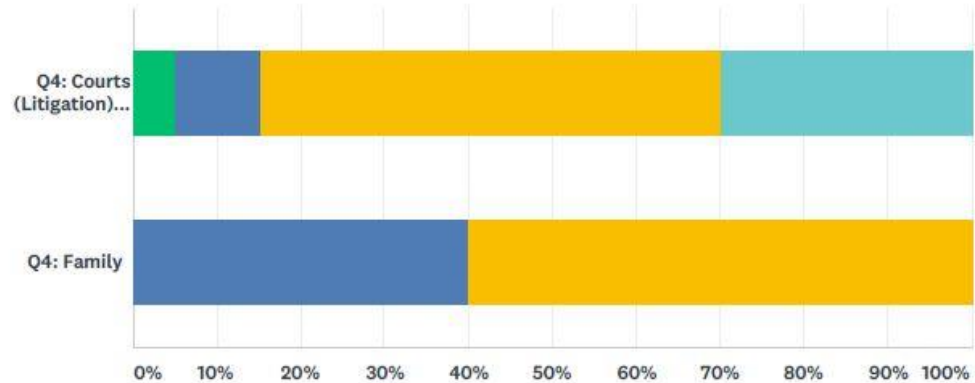
*Advocates are more likely to prefer the objective to the subjective.
What about the parties?*

Courts vs. Family

Mediators



Advocates



Not surprisingly, subjective standards are more important in family court.

- Subjective standards are much more important than objective standards
- Subjective standards are more important than objective standards
- Subjective standards and objective standards are equally important
- Objective standards are more important than subjective standards
- Objective standards are much more important than subjective standards

Mediator Motivations

- 1) Deal Maker Reputation (Settlement rate, Return business)
- 2) Power Balancer (Process)
- 3) Settlement is Good – Litigation is Bad
- 4) Advocate for the “Fair Result” (“helping the powerless”) (Substance)
- 5) Competitive (want to succeed whatever the game);
- 6) Utilitarian (want an outcome that maximizes happiness)
- 7) Biases, conscious or not, leak out
- 8) Need to feel earned fee
- 9) Satisfy parties



Self-Determination Theory (SDT)

SDT: everyone has a need to feel:

- **Competent:** to have an effect and attain valued outcomes
- **Related:** to feel connected to others.
- **Autonomous:** to self-organize and be concordant with one's integrated self.
- Self-determining parties choose their:
 - dispute resolution processes and
 - substantive agreements.



PARADOX: The more the mediator maximizes the parties' self-determination, the less the mediator satisfies her own.

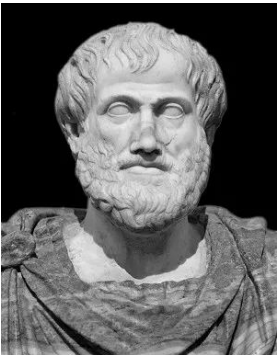
Mediators Use Rhetorical Tactics

Aristotle divides rhetorical arguments into three, not mutually exclusive, categories:

Logos: Logic stimulates need to feel competent

Ethos: Ethics, virtue, and goodness stimulate a party's need to feel related by communal norms

Pathos: Sympathy and emotion can satisfy a person's need to feel autonomous



Rhetoric presents existing information in a way that can manipulate a person's thinking. These "rhetoric-made" realities go to the heart of the mediator's craft, or do they?

Forensic: "Attempts to change what we see as the truth about the past" (E.g. "Is it possible their intent was [positive] ...")

Epideictic: "Attempts to reshape views of the present" (E.g. "You have a choice - fix blame or fix the problem.")

Deliberative: "Attempts to make the future" (E.g. "Wouldn't it be better to build a relationship vs. build a case?")

Mediator Ethical Challenges

- Rhetorical tactics impart power to mediators.
- Every mediator action exercises some form of power while mediating; so, let's own it for crying in the night!
- If we don't, how is it safe for parties to engage in mediation?
- Safer if we use ethical standards.



Mediator Approaches in Practice

Approach	“Transformative”	“Facilitative”	“Evaluative”
Negotiation Theory	Interest-Based Relational	Interest-Based Preference	Rights-Based Distributive
Mediator’s Value	Process	Process	Results
Central Actor	Client	Client	Attorney-Focused
Reference Points	Relationship	Relationship Preference	Legal Rights & Responsibilities
Communication Style	Listen	Explore	Argue
Goal	Fairness & “Resolution”	Prefer “Resolution”	Power & “Settlement”

If Freud, Jung, Rogers and Beck Were Mediators, Who Would the Parties Pick and What Are the Mediator's Obligation, 43 Idaho Law Review 643 (2007).

Mediator Approaches, continued

Approach	“Transformative”	“Facilitative”	“Evaluative”
Decision-Making Reference Points	Perceptions & Subjective Standards	Combination	Evidence & Objective Standards
Length of Sessions	Longer	In-Between	Shorter
Underlying Values	Self-Determination	Both	Protection of Rights
Disclosure Expectation	Full Disclosure	Full Disclosure Preference	“Secret” Information OK

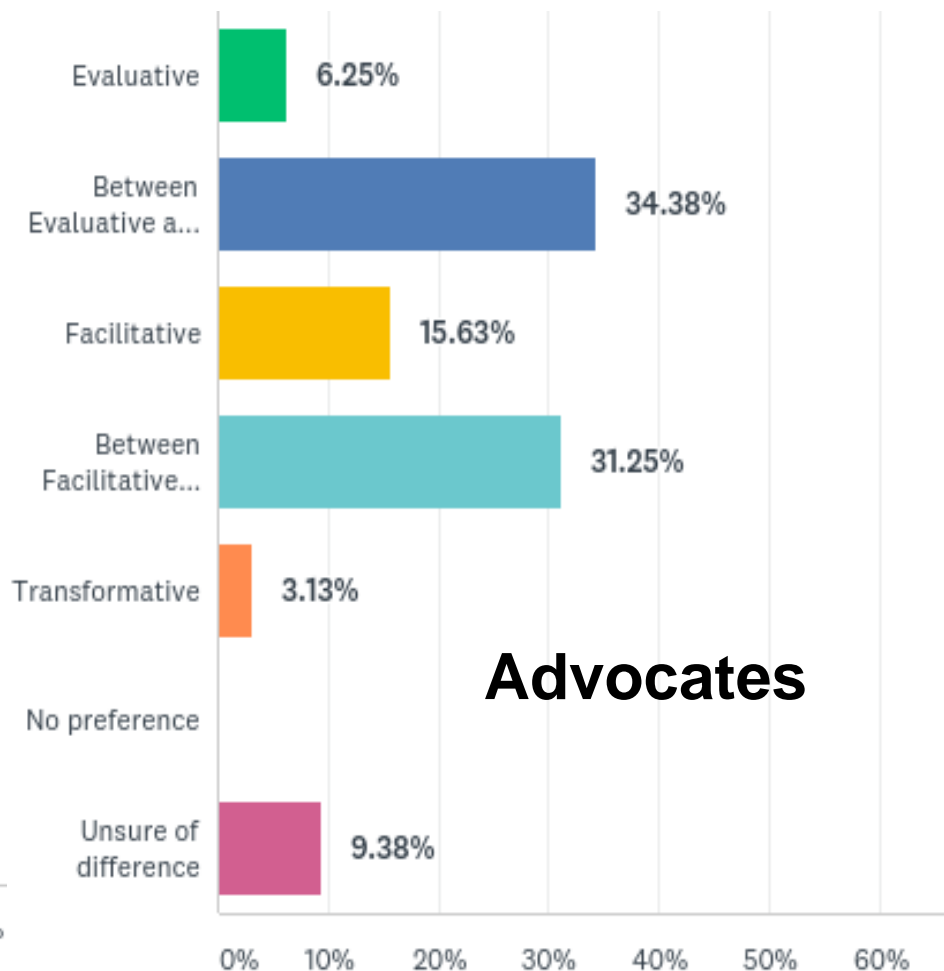
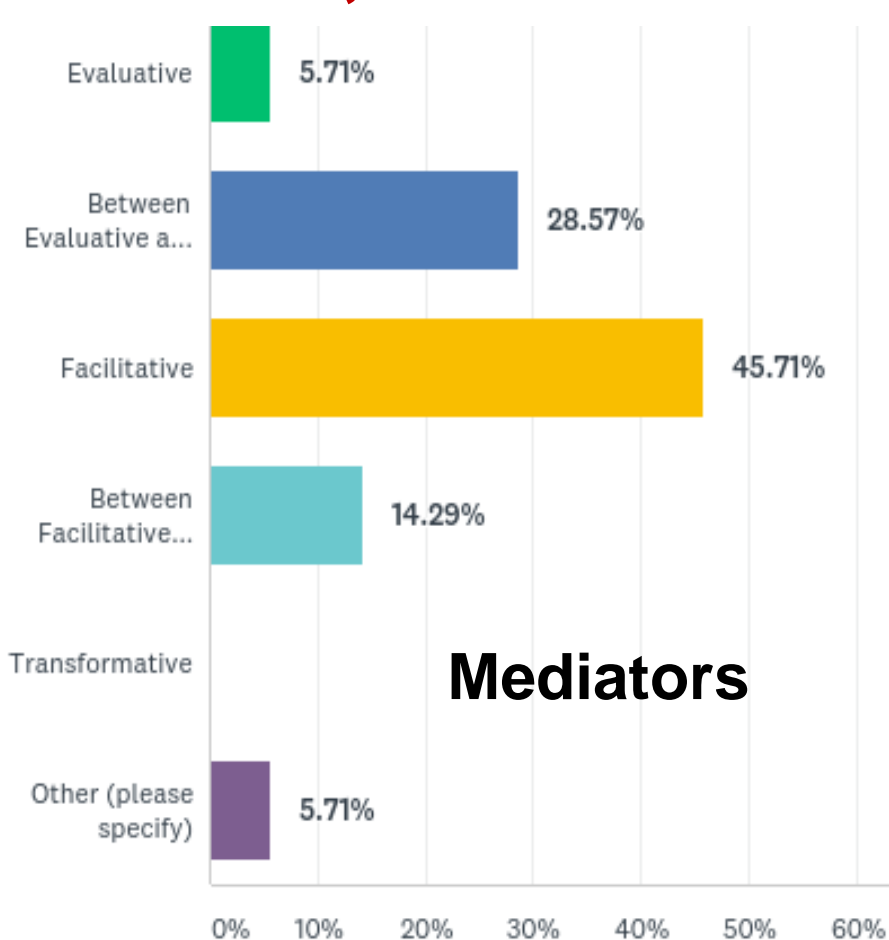
Mediator Approaches, continued

Approach	“Transformative”	“Facilitative”	“Evaluative”
Length Assumption	One or More Sessions	One or More Sessions	One Session
Mediator’s Skills	Process Expertise	Process Expertise & Subject Matter Familiarity	Process Familiarity & Subject Matter Expertise
Party’s Interests	Non-Economic	Economic & Non-Economic	Primarily Economic
Negotiation Style	Collaborative	Combination	Aggressive

Reality 1: Many Mediators use a Hybrid Approach.

Reality 2: There is dissonance surrounding what these terms mean on the ground.

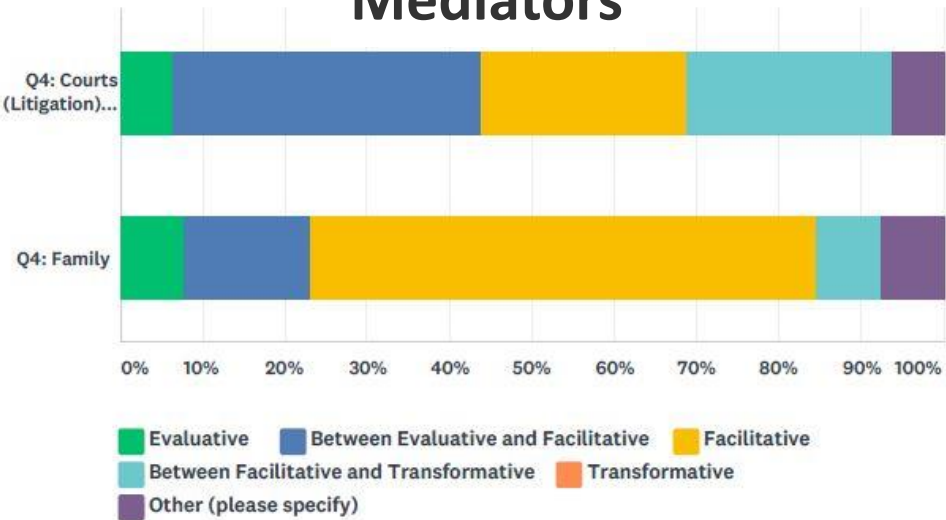
Q8: Mediator Approach: What do Mediators do, and what do Advocates Want?



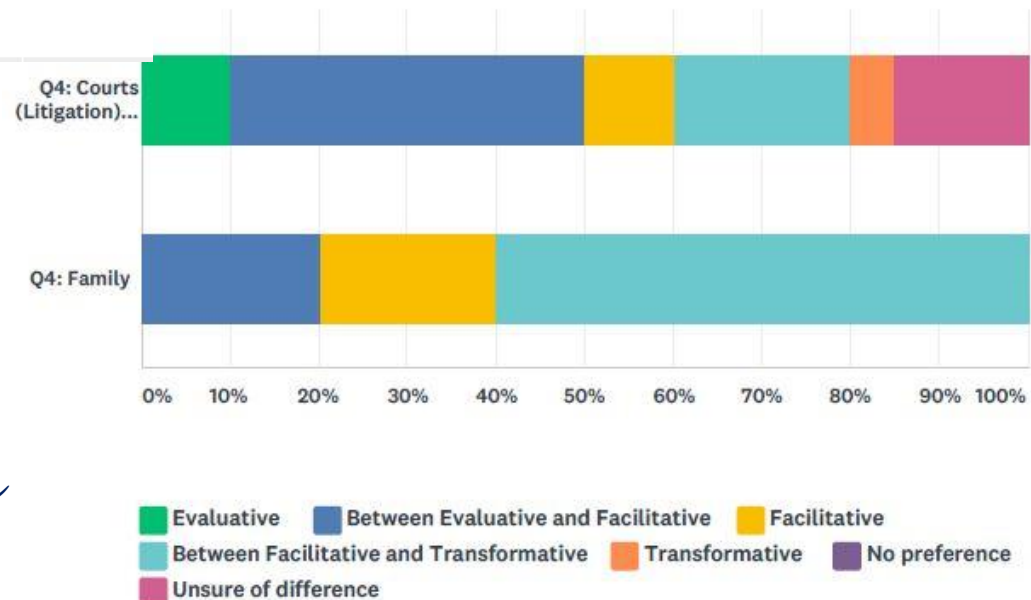
Advocates are more likely to prefer evaluative over facilitative, but 9% don't know the difference.

Courts vs. Family

Mediators



Advocates



Family law is more facilitative than court mediation.

Family law advocates are more likely to prefer a facilitative - transformative approach than the family law mediators.

Be Aware of the Intersection of Ethics and Approaches

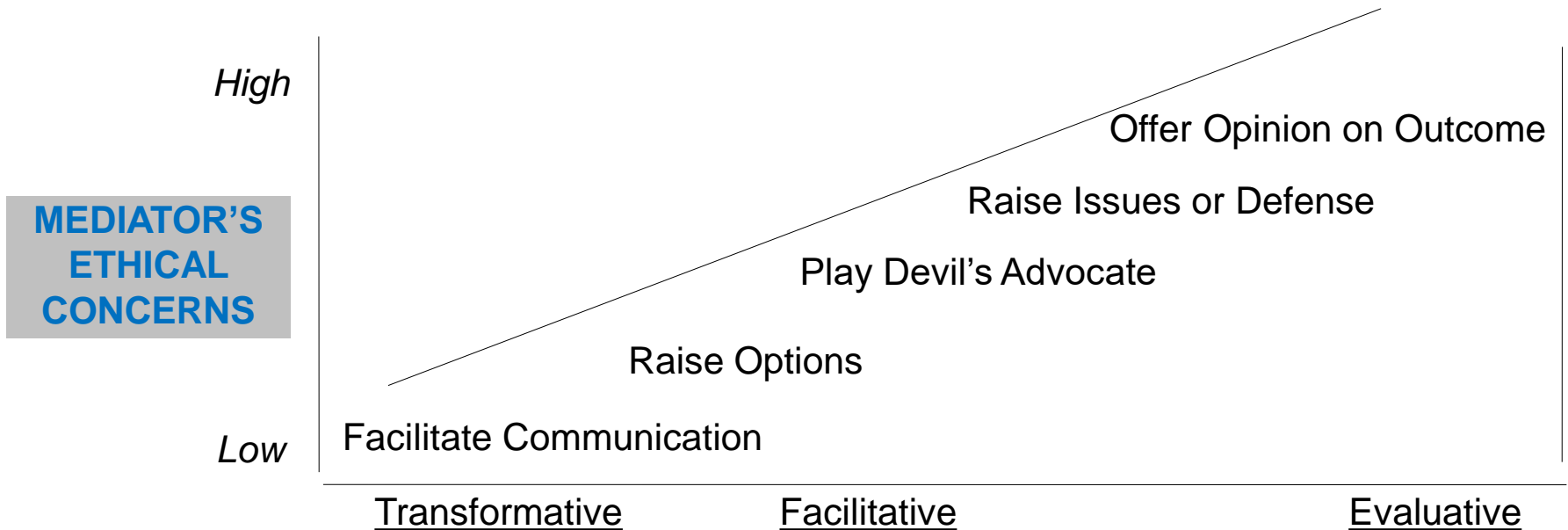


Table Exercise

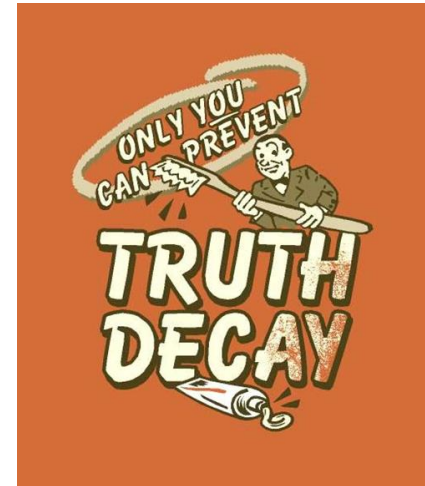
What say, you, about any of the above topics?

Two brilliant insights per table, please!



2) MANAGING “TRUTH” DECAY” AND COGNITIVE BIASES:

*NAVIGATE THE
INTERSECTION OF LOGIC
AND EMOTION*





“Do you swear to tell the truth, the whole truth, and nothing but the truth, even though nobody has any idea what that is anymore?”

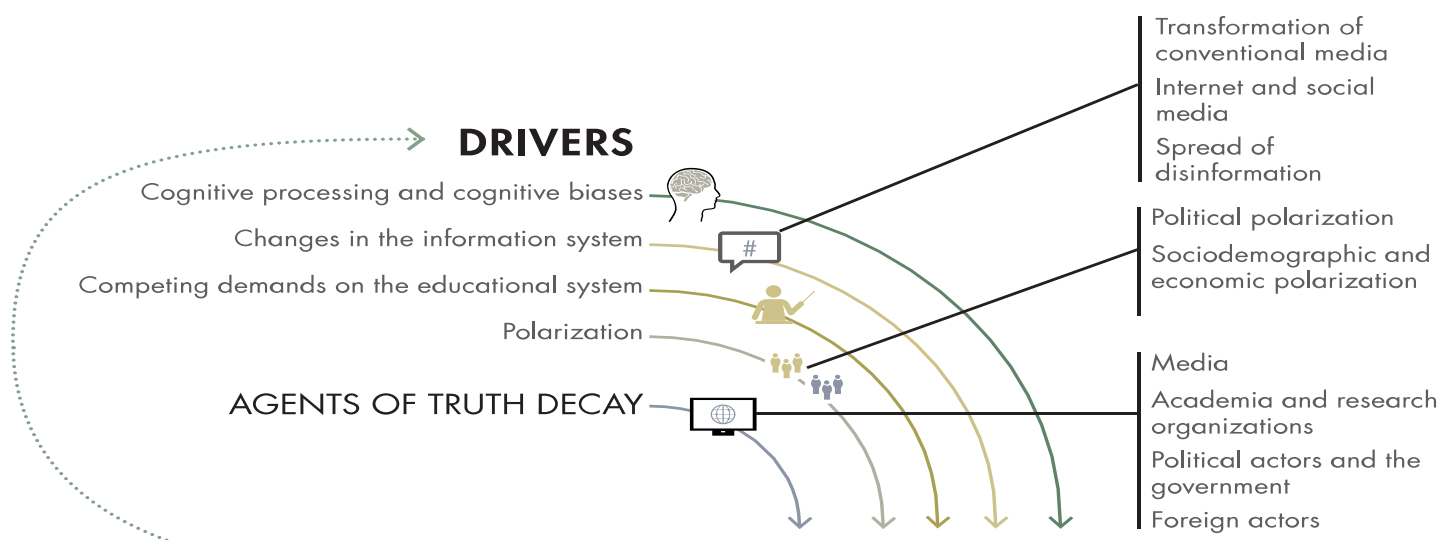


**DESCRIBE
THIS,
PLEASE**

Truth Decay Roadmap

- How do people form their opinions and beliefs, and ultimately what they decide is “true”?
- Explore Rand’s Truth Decay Model to illuminate how the overreliance on opinion and a decay of trust in institutions impacts mediators, specifically those working in an institutional environment.
- Do mediators have an obligation to help parties find the “Truth” or should we simply help them discover their “truths?”





TRUTH DECAY'S FOUR TRENDS

- Increasing disagreement** about facts and data
- A blurring of the line** between opinion and fact
- The increasing **relative volume and resulting influence of opinion** over fact
- Declining trust** in formerly respected sources of factual information

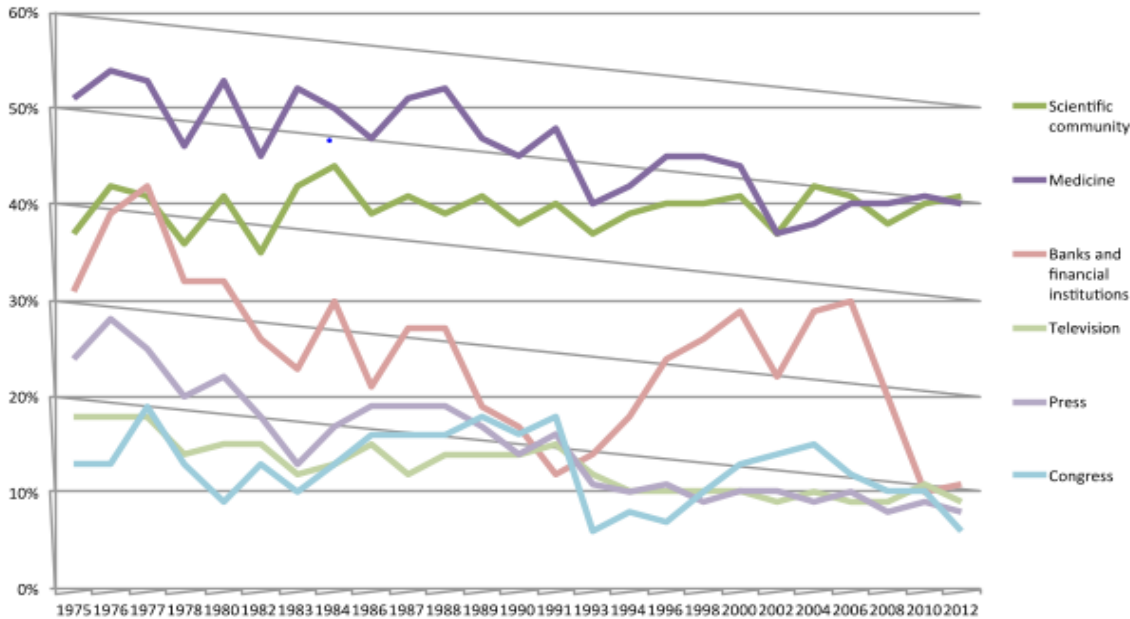
CONSEQUENCES

at the personal, community, national, and international levels

- Erosion of civil discourse
- Political paralysis
- Alienation and disengagement
- Uncertainty

Kavanagh, J & Rich, M. D. (2018). *Truth Decay: An Initial Exploration of the Diminishing Role of Facts and Analysis in American Public Life*. Santa Monica, CA: RAND Corporation.

Truth Erosion Leads to Trust Erosion



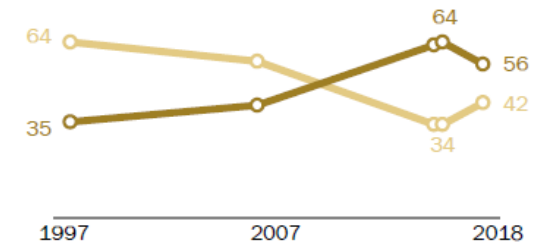
Source: NSF

18% of Americans Trust the Government in 2017

Most have little or no confidence in political wisdom of the American people

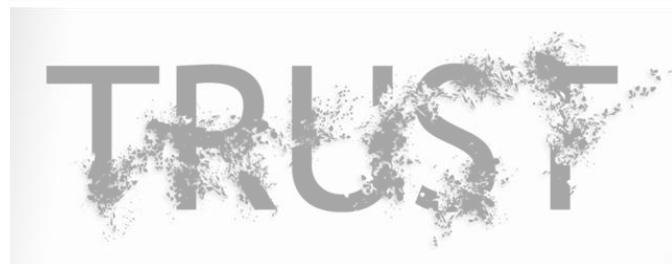
% saying they have ___ of trust and confidence in the wisdom of American people in making political decisions

○ Very great/Good deal ● Not very much/None



Note: Don't know responses not shown.
Source: Survey of U.S. adults conducted March 7-14, 2018.

PEW RESEARCH CENTER



No confidence in wisdom of people

http://www.people-press.org/2017/12/14/public-trust-in-government-1958-2017/?utm_source=newsletter&utm_medium=email&utm_campaign=newsletter_axiosam&stream=top

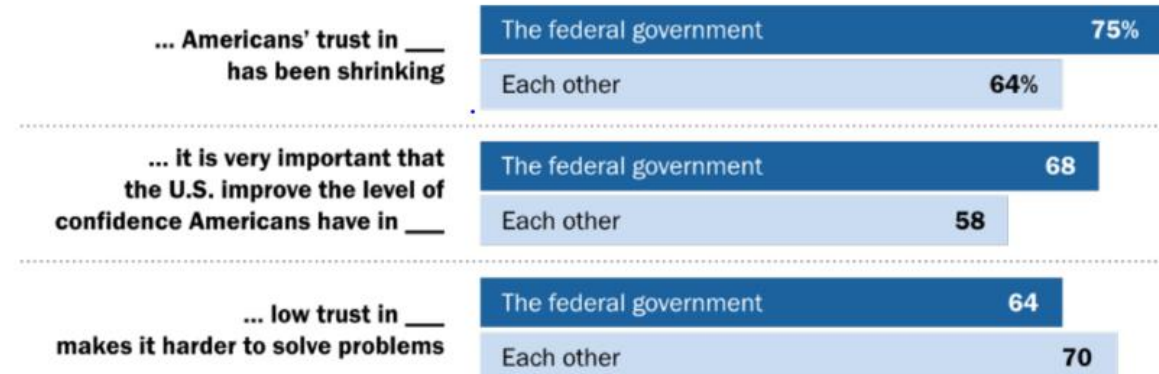
The Limits of Political Tribalism

Change in support for policy positions among voters
before and after group discussions

Most Americans would move toward the center on policies including health care, immigration and the minimum wage if Republican and Democratic voters spent more time together face-to-face — or at least that's the takeaway from "America in One Room," a social experiment conducted over a single weekend last month in Dallas.

Americans think their distrust of the federal government and each other is a problem that gets in the way of solving issues

% of U.S. adults who believe ...



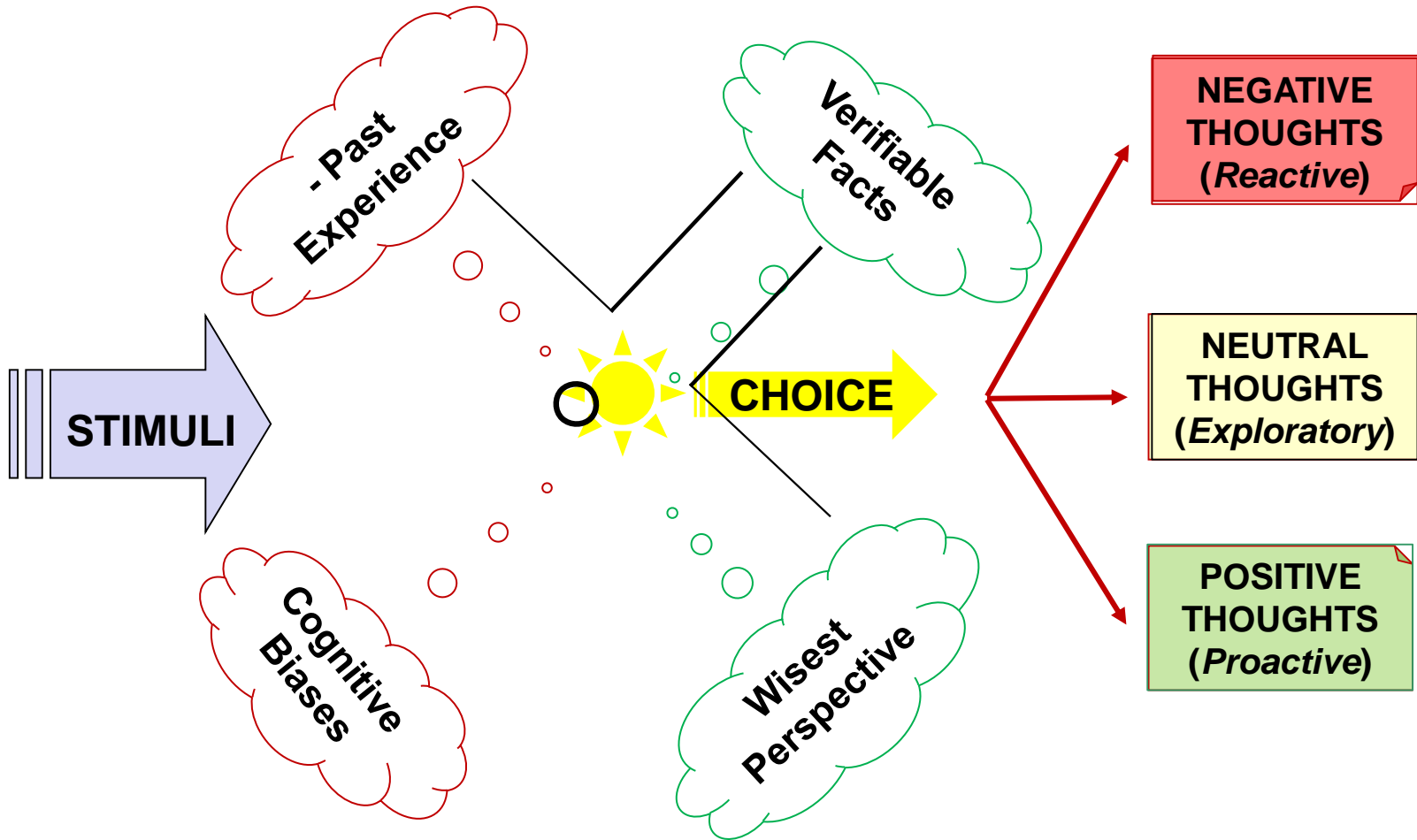
Source: Survey conducted Nov. 27-Dec. 10, 2018.
"Trust and Distrust in America"

PEW RESEARCH CENTER

https://www.people-press.org/2019/07/22/trust-and-distrust-in-america/?utm_source=newsletter&utm_medium=email&utm_campaign=newsletter_axiosam&stream=top
https://www.axios.com/the-limits-of-political-tribalism-america-one-room-f23c22e0-7ab2-4aef-9358-4f4e603ffc24.html?utm_source=newsletter&utm_medium=email&utm_campaign=newsletter_axiosam&stream=top

Understand the Intersection of Logic & Emotion

“Our life is what our thoughts make it ...” Marcus Aurelius





“The days of the bartender-psychologist are over, but I can help you settle any disputes!”

Understanding How People Think

System 1

- Generally automatic, affective (emotional).
- “Mental Shortcuts”- heuristics
- Efficient - few resources needed
- Examples:
 - localize the source of a specific sound
 - complete the phrase "war and ..."
 - display disgust when seeing a gruesome image
 - read a text on a billboard
 - drive a car on an empty road

System 2

- Slow, effortful, conscious, rule-based
- Used to monitor System 1
- Takes lots of resources
- Examples:
 - dig into your memory to recognize a sound
 - determine the appropriateness of a behavior in a social setting
 - count the number of A's in a certain text
 - park into a tight parking space

We rely on System 1 more than we like to admit

What are Cognitive and Implicit Biases?

1) **Cognitive Biases** = Shortcuts in our thinking make our judgments irrational. Our mind misfires in predictable ways and can cause errors in judgement.

- System 1
- All judgment and decision errors – not learned but pre-programmed
- Can only hope to adjust afterward, can't avoid!

2) **Implicit Biases** = The attitudes that affect our understanding and decisions in an unconscious manner. Typically referring to social prejudices.

- Activated without our awareness – System 1
- Can be both favorable and unfavorable assessments
- Built on learned social stereotypes



Why do We Have Cognitive Bias?

COGNITIVE BIAS CHEAT SHEET BECAUSE THINKING IS HARD



1 TOO MUCH INFO

SO ONLY NOTICE...

- CHANGES
- BIZARRENES
- REPETITION
- CONFIRMATION



2 NOT ENOUGH MEANING

SO FILL IN GAPS WITH...

- PATTERNS
- GENERALITIES
- BENEFIT OF DOUBT
- EASIER PROBLEMS
- OUR CURRENT MINDSET



3 NOT ENOUGH TIME

SO ASSUME...

- WE'RE RIGHT
- WE CAN DO THIS
- NEAREST THING IS BEST
- FINISH WHAT'S STARTED
- KEEP OPTIONS OPEN
- EASIER IS BETTER



4 NOT ENOUGH MEMORY

SO SAVE SPACE BY...

- EDITING MEMORIES DOWN
- GENERALIZING
- KEEPING AN EXAMPLE
- USING EXTERNAL MEMORY

BY @BUSTER
HTTP://BIT.LY/THINKING-IS-HARD

We're So Darn Human!

- **Confirmation Bias:** Only using or seeking out information that confirms their beliefs; devaluing information that doesn't fit with existing beliefs.
- **Naïve Realism:** The human tendency to believe we see the world objectively and without bias. We assume that others who do not share the same views must be ignorant, irrational, or biased.
- **Cognitive Dissonance:** The uncomfortable feeling people get when holding two “competing” ideas in mind at once. This compels us to get rid of the troubling thoughts by rationalizing our behavior or dehumanizing others.

Our Own Biases:

Assume you are subject to psychological traps and your intuition is not always reliable!

Don't assume they are irrational when they may be just uninformed or haven't yet told you what's really going on.

Extra Credit:

Prejudice: <https://implicit.harvard.edu/implicit/demo>
<http://www.understandingprejudice.org/iat/index2.htm>

Core Philosophy: <http://www.selectsmart.com/PHILOSOPHY>

Morality: <http://www.philosophyexperiments.com/moralityplay/Default.aspx>

Cognitive Biases and Tips for Handling Traps

Mediator Tips

<p>Anchoring: Getting stuck on the first offer/number they see and being unable to break free of that starting point. All other moves are in relation to that offer/number.</p>	<ul style="list-style-type: none"> • Reality Testing • Tie to legitimate outside standards. • Anchoring happens if they feel under pressure to make a decision. • Give them time and be ready to give them more if they feel under pressure to make a quick decision.
<p>Availability Bias: Tendency to rely on information that is more readily available to them. Example: It's easy to think of the last fatal plane crash, but harder to think of a specific car crash, making people think planes are more dangerous than cars.</p>	<ul style="list-style-type: none"> • Ask, "What information will they be relying upon and will the decisionmaker find it reasonable?" • Have them research, focus on facts, and avoid relying on gut instinct.
<p>Confirmation Bias: Only using or seeking out information that confirms their beliefs; devaluing information that doesn't fit with existing beliefs.</p>	<ul style="list-style-type: none"> • Ask them to consider multiple perspectives. • Have them seek out people that challenge their opinions or ask you to be the "devil's advocate."

Cognitive Biases and Tips for Handling Traps

Mediator Tips

<p>Construal Biases: Parties think others hold more extreme views than they do. For example, believing the employer in a union negotiation want to offer zero vacation days.</p>	<ul style="list-style-type: none"> • Reality testing: Test their assumptions and have them put on their “third party” hat to see what an objective observer might think about the situation. • Investigate these assumptions with the other side.
<p>Endowment Effect: People value things they already own more than others value them because they see the concession as a loss of what is theirs.</p>	<ul style="list-style-type: none"> • Use open-ended questions to uncover underlying interests. • Normalize and help them decide what’s best with a cost/benefit analysis.
<p>Fairness: Parties reject deals if they perceive their norms of fairness will be violated by accepting. Related, The Just World Hypothesis: Most clients prefer a just world and therefore presume it exists – and that things happen for fair reasons.</p>	<ul style="list-style-type: none"> • Reality testing: Is the judgment likely to be fair? Is it unfair or just normal concessions in the process of negotiation? • VECS and use open-ended questions to uncover their real interests.

Cognitive Biases and Tips for Handling

Traps

Mediator Tips

Framing Effects: Decisions are heavily influenced by the way they are presented. For example, you can buy beef that is 75% lean or buy beef that is 25% fat. Which would you prefer? Additionally, people tend to avoid risk with a gain frame but seek risks with a loss frame.

- Be mindful in how you present options. Are you presenting it as them avoiding a loss or gaining something?
- Consciously decide whether to frame as a loss or a gain.

Fundamental Attribution Error: Tendency to assume other's actions are because of their characteristics (e.g. rude or selfish) rather than their situation (stressed or challenged by something external).

- Suggest they be generous in interpreting the other side's actions.
- What are the reasons you might act as they are/have?

Overconfidence Bias: When clients place too much faith in their own knowledge and opinions. Often combined with **Anchoring**, meaning clients act on hunches because they have an unrealistic view of their abilities or the situation.

- "What sources of information do you tend to rely on for big decisions?"
- "Are these fact-based?"
- "Has our information been gathered systematically?"
- "Who else will have information?"

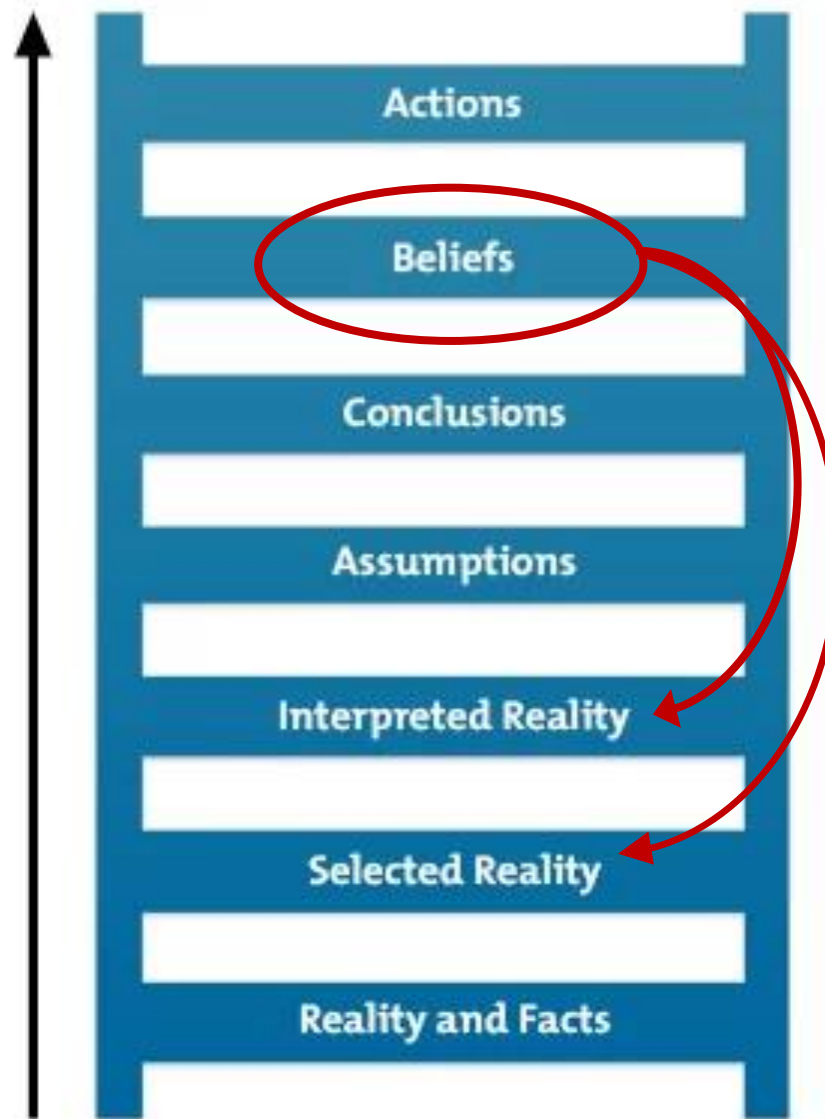
Cognitive Biases and Tips for Handling

Traps

Mediator Tips

<p>Reactive Devaluation: Dismissing a proposal from others on the assumption that it is either motivated by self-interest, or less valuable, or simply because they make them. “I don’t like that idea because they proposed it.”</p>	<ul style="list-style-type: none">• Walk them through a cost/benefit analysis to overcome their initial gut rejection.
<p>Recency Bias: tendency to overvalue the latest information available. People think the most recent information holds the most influence. Primacy: the reverse.</p>	<ul style="list-style-type: none">• Ask, “What information will they be relying upon and will the decisionmaker find it reasonable?”• Give them facts so they will be less likely to rely on gut instinct.• Repeat the facts, especially the ones that hurt.
<p>Sunk Costs: People tend to “throw good money after bad,” favoring options where we have already incurred substantial costs, even though these costs are gone.</p>	<ul style="list-style-type: none">• Help them with System 2 thinking by doing a cost/benefit (BATNA) analysis.• Help them realize that all options have the same future cost, because costs incurred are already lost.

Ladder of Inference



The Ladder Explained

- Reality and facts are at the bottom. From there, parties:
 - Experience reality/facts selectively based on their beliefs and experience;
 - Interpret what they mean;
 - Apply assumptions, often without challenging them;
 - Draw conclusions based on their interpreted facts and assumptions;
 - Develop beliefs based on those conclusions; and
 - Take actions that seem "right" because they are belief-based.

- Creates a vicious cycle. Soon they are literally jumping to conclusions by missing facts and skipping steps in the reasoning process.

Ladder of Inference Audit

Help parties audit the way they make inferences using the following questions. Have them imagine what their wisest friend would think, how the other person involved might answer these questions, or how they might feel one year from now.

- What are the basic facts?
- Are these all of the facts (subtext: not just the ones you've chosen because they fit your belief)?
- What are all the possible interpretations of those facts?
- What assumptions are we making?
- Is there a provable basis for our assumptions?
- What other facts are out there and how could they impact our analysis?
- What actions should we take based on this new analysis?
- Why is this the "right" thing to do?

The Rational – Emotional Divide

- As mediators, we know a lot about how to analyze the facts and law, the odds of winning, and the likely outcome.
 - Our dominant culture values the “rational” approach.
- But the parties are human (like us!) – often complex, social, and emotional beings that can make decisions that aren’t always rational.
 - Emotions are, for better or worse, the dominant driver of most people when they are making meaningful decisions.
 - It’s much easier to be rational when we are not inside the conflict our self!

Bargaining in the Shadow of the Law?

Researchers examined access to legal information to understand how the shadow of the law influences parties' expectations and strategies.

Positive Law: Statutes, case law, and formal legal sources

Folk Law: Law as depicted in informal sources such as online materials and popular media

- Parties use many sources of folk law; positive law may provide less influence than folk law
- There are multiple “shadows of the law” depending on where parties are getting their information
 - Different understandings may exist for parties from distinct socio-economic or cultural backgrounds

Towards a Better Understanding of Lawyers' Judgmental Biases

Lawyers are prone to overconfidence bias and self-serving judgements of fairness when acting as advocates.

- **Need for Cognitive Closure:** A motivational desire for clear answers over ambiguity
- People with a high need for closure showed more intense self-serving bias when asked about judicial predictions and fair value assessments.
- This bias could be mitigated through de-biasing interventions for judicial predictions.

Words Matter



“Facts” = something that has actual existence:
objective reality

“Truths” = the body of real things, events, and
facts, the state of being the case

“Beliefs” = a state of mind in which confidence
is placed in some person or thing,
considered to be true or held as an
“Opinion.”

“Trust” = assured reliance on the character,
ability, strength, or truth of someone
or something. Often lacking when
“Values” are not aligned.

Which of the following should mediators focus on most?

A. Facts

B. Truths

C. Beliefs/Opinions

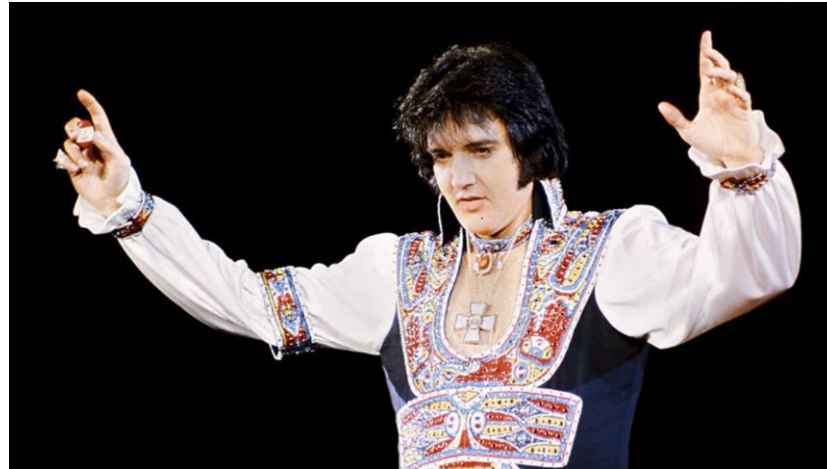
Perceptions of Truth in a Mediation

- Is there one “Truth” when it comes to the content of our mediations or does everyone have their own “truth?”
- “*They Saw a Game*” – Hastorf and Cantril (1952)
 - Students watching a football game (the same tape!) constructed different realities on objective measurements depending on their affiliation with one team or the other.
- Reality is constructed and how should mediators deal with Truth Decay if the parties each have their own “truth”?

Operationalizing Mediation Standards

- Does **Self-Determination** outweigh your concerns?
- Can you maintain your **Impartiality** if you feel a party's relationship with the "truth" seems unfair to you? How would you do that?
- While you're not anyone's lawyer, does knowing or not knowing the "Truth" effect your obligations surrounding **Competence**?
- Is their participation in good faith if they're "too flexible with the truth?" Did you discuss your "truth" concerns with them? **Good Faith Participation**?

Don't Forget ...



**“Truth is like the sun;
you can shut it out for a time,
but it ain’t going away.”**

Table Exercise

So, what say, you, about truth in mediation?

or

What are the cognitive biases you see in mediation and how do you handle them?

Homework: What are your cognitive biases and how do you manage them?



TOOL TIME

“Objective reality is not
the whole scope of the
human condition”

Tim's Older Brother, Sam



How do Parties Arrive at the Truth?

- Five key criteria parties use to evaluate the “truth”:
 - General acceptance by others,
 - Amount of supporting evidence,
 - Compatibility with their beliefs,
 - General coherence of the statement, and
 - Credibility of the source of the information
- Parties are looking for “fluent processing” and “cognitive simplicity.”



Schwarz, N., Newman, E., & Leach, W. (2016). Making the truth stick & the myths fade: Lessons from cognitive psychology. *Behavioral Science & Policy*, 2(1), pp. 85-95.

Varol, O. (2018) Facts don't change people's minds. Here's what does. Retrieved from <https://ozanvarol.com/how-to-change-a-mind-yours-or-someone-elses/>

Tools a Mediator Should Use, if a Mediator Should Use Tools?

What if it's easier for the parties to dispute the facts than it is to alter their deepest beliefs? The mind doesn't follow the facts.

Backfire Effect = When people's core beliefs are challenged, and they end up feeling even stronger about them.

People's previously held beliefs may have made sense given the information they had and remind them it's ok to update based on new information.

Give them a “Way Out With Dignity. (W.O.W.D.)

Varol, O. (2018) Facts don't change people's minds. Here's what does.
Retrieved from
<https://ozanvarol.com/how-to-change-a-mind-yours-or-someone-elses/>

More Tools

- **Help parties understand *how* they determine “facts”:**
 - Normalize cognitive biases and changes in points of view (e.g., Anchoring, Fundamental Attribution Error, Confirmation Bias, Reactive Devaluation, etc.)
 - Help them be more open to the “facts” of others
- **Help parties understand *what* the facts are:**
 - Create an agreed-upon basis for “strong and reliable” information
 - Engage in joint fact-finding
- **Help parties with their non-fact-based processes to make decisions and form beliefs:**
 - Help them “explore vs. debate”

Tools, continued

- **Help people determine what is important to them**
 - External reference points of fairness such as: Justice, Equity, Fairness, Law, Cultural Norms, etc.
 - Others?
- **Help each understand what is important to the other**
 - Focus on where they do agree
 - Get to a “truth” they can live with
- **Normalize the idea that each may have their “truth”**
 - It’s ok that they each see things differently if the issue is their “truths,” but if it’s not ...
 - If a party has their “truth,” perhaps it’s OK for the other person to have theirs

How Power Affects Impressions

Does a person's power affect the way we judge their other traits?

- People infer more negative traits for powerless others than for powerful or power-irrelevant others.
 - Positive traits: competent, honest, funny, etc.
 - Negative traits: insecure, lazy, rude, etc.
- People are benevolent when inferring traits of powerful people. But for powerless people they choose negative and positive traits.
- We are biased to think positively of powerful people.

Tools, continued

- Give them time – We use shortcuts especially when time-pressured. Full-blown emotions are short-lived, 10 minutes can reduce the effects.
- Break problems into digestible chunks
- Ask them:
 - “Have you seen _____ (relevant bias) in others?”
 - “I fall in that trap from time to time. Do you ever fall into it?”
 - “Knowing we all have biases, what do you think now?”

Fruehwald, Edwin S., Understanding and Overcoming Cognitive Biases for Lawyers and Law Students: Becoming a Better Lawyer Through Cognitive Science: Chapter One - An Introduction to Cognitive Biases (2018). Understanding and Overcoming Cognitive Biases for Lawyers and Law Students: Becoming a Better Lawyer Through Cognitive Science (2018); ISBN-13: 978-1985130135. See, SSRN: <https://ssrn.com/abstract=3120662>

“We all have excessive confidence in what we believe we know, and we fail to recognize our apparent inability to acknowledge the full extent of our ignorance and the uncertainty of the world we live in.” Kahneman

Normalize Their Reactions

Explain: “We’re all so darn human and our first reactions are not always reliable. I’m confident you will make a good choice when the time comes.”

Say, “I sometimes catch myself reacting to suggestions from the other side. It helps when I don’t respond immediately and give myself time to objectively consider the situation.”

Because parties often think otherwise, explain **Correlation** is a connection between two variables. It doesn't necessarily mean that one caused the other. **Causation** is when one variable causes another ... and that’s what we have to prove.



3) “50 WAYS” TO BREAK AN IMPASSE: ***THE MECHANICS***

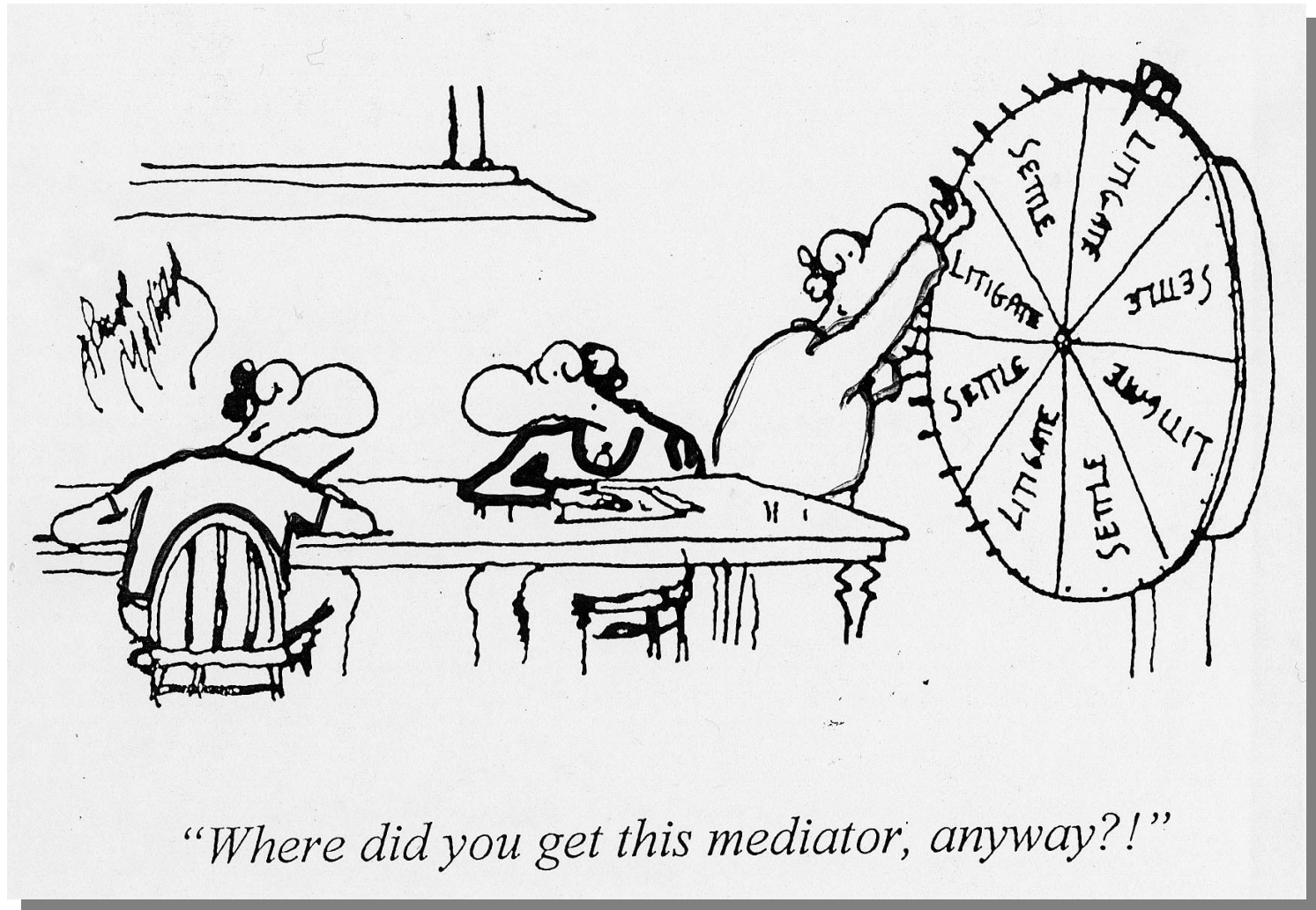
The impasse is all inside your head", I said to them.

The deal is easy if you take it logically.

I'd like to help you in your struggle, don't you see ...

*There must be 50 ways to
break an impasse*

Full Disclosure



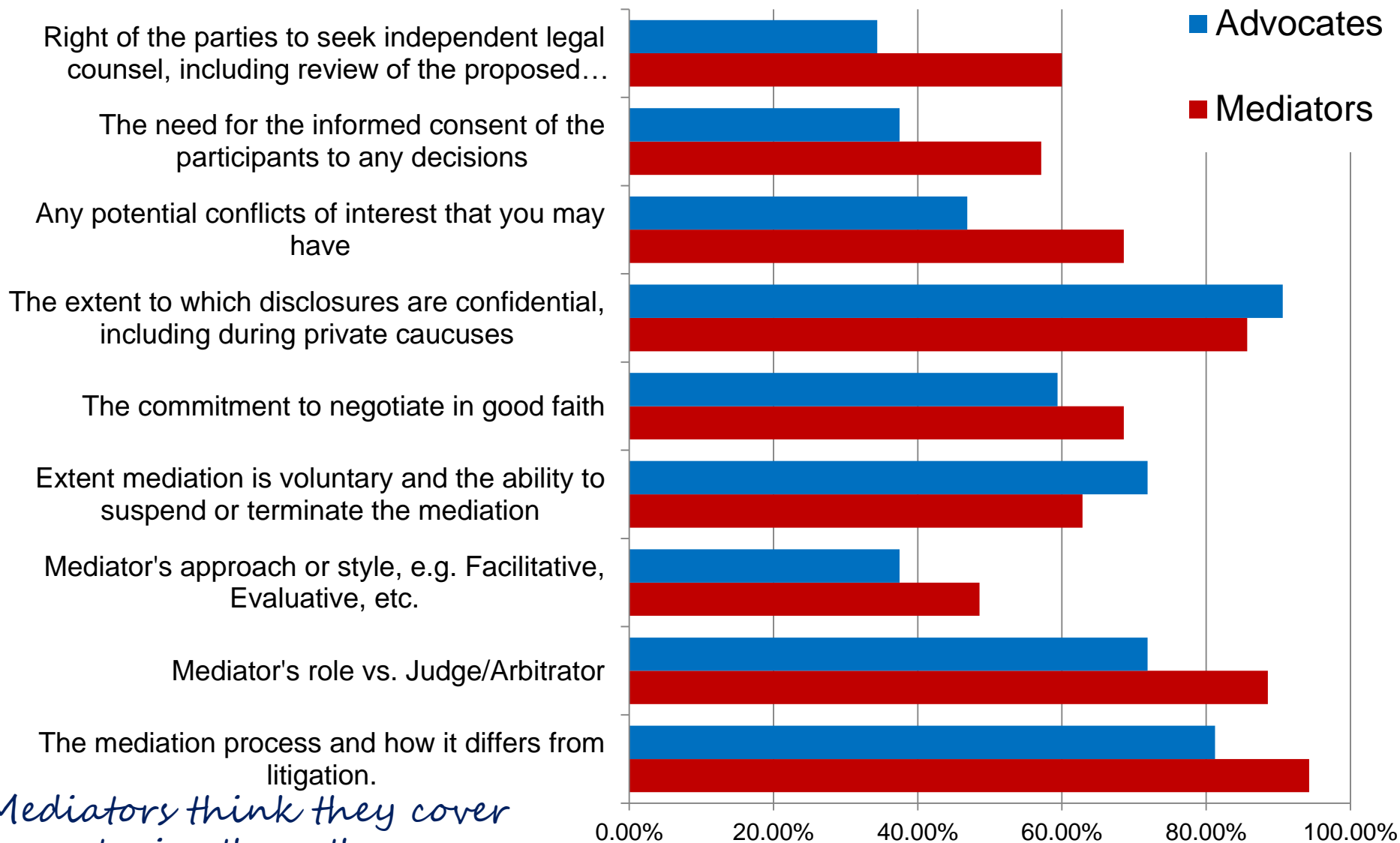
**Acceptability of Tools is a Function of
Your Mediator Approach**

Pre-Mediation Session Tools: Mediation is a process, not an event!



PLAY LIST
[Rocky](#)

Q7: What do mediators typically discuss prior to substantive content?



Mediators think they cover more topics than the advocates hear.

Opening Letter: Tips

(Mediation is a Process – not an Event)

- Voluntary process that affords all parties the best opportunity to explore a dispute in a confidential environment and reach agreement. I can personally attest to its success in cases ranging from “admiralty to zoning.”
- Enclose your Agreement to Mediate and Memo of Understanding.
- End time: “until completed” vs. “all day”
- Each party, or as a less desirable option, a representative with ***complete authority*** to fully resolve all issues is present. Please notify me immediately if this is not possible.
- Pre-session exchange of key documents and mediator as “discovery master”
- Discuss Confidentiality
- Call after receiving submissions and chat them up. My favorite opening line in a playful tone: “So, what the hell is going on here?”

... and Pre-Session Submission Requests

1. A brief review of the procedural status of the case
2. A brief factual overview
3. Identification of the key factual and legal issues
4. A bullet-style list of your factual/legal strengths
5. A candid, bullet-style list of the other party's factual/legal strengths, along with your response
6. The underlying non-monetary needs of *both* parties
7. A history of settlement discussions including the last proposals and “whose court you think the ball is in”
8. Your view as to the past and current barriers to settlement
9. Highlighted copies of the key documents and pleadings
10. A summary of any other helpful information
11. A list of the key persons so I can check for “conflicts”

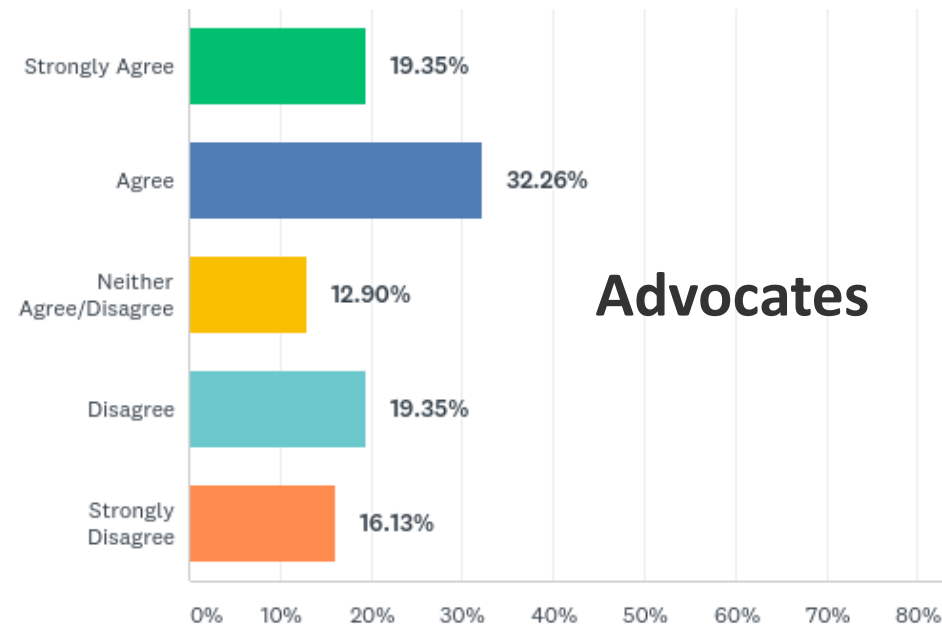
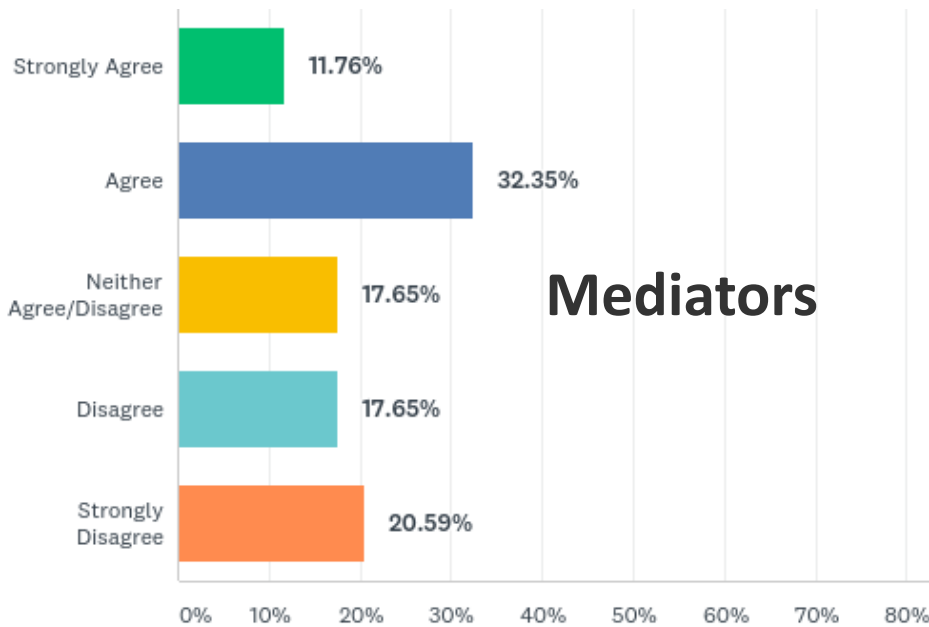
Exchange with Opposing Counsel or Mediator's Eyes Only?

Opening Statement Tips

- **EXPLAIN ROLES & GROUNDRULES**
 - Your Role: What it is and What it is not.
 - Order of “presentations” – same as court
 - Full opportunity to speak
 - Save settlement proposal for caucus
- **CONFIDENTIAL (Secret, Non-DISC & INADMIS)**
 - What is said here stays here: Will not testify
 - Exceptions Required by law & A/M
 - Public Records & Open Meetings
- **CAUCUS**
 - Private meeting ~ Confidential
 - Ask questions and go through risk analysis
 - Will likely feel impatient with pace
- **IMPASSE**
 - You’ll want to leave three times!
- **QUESTIONS and COMMITMENT**
 - Work hard toward resolution



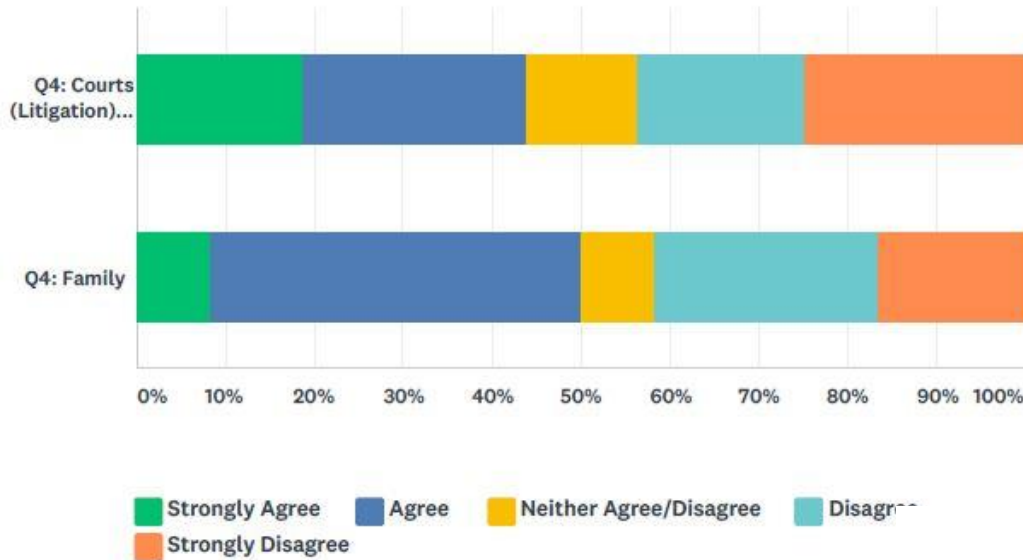
Q30: "Unless directly told otherwise, the mediator may decide what information to share and when to ... with the other party."



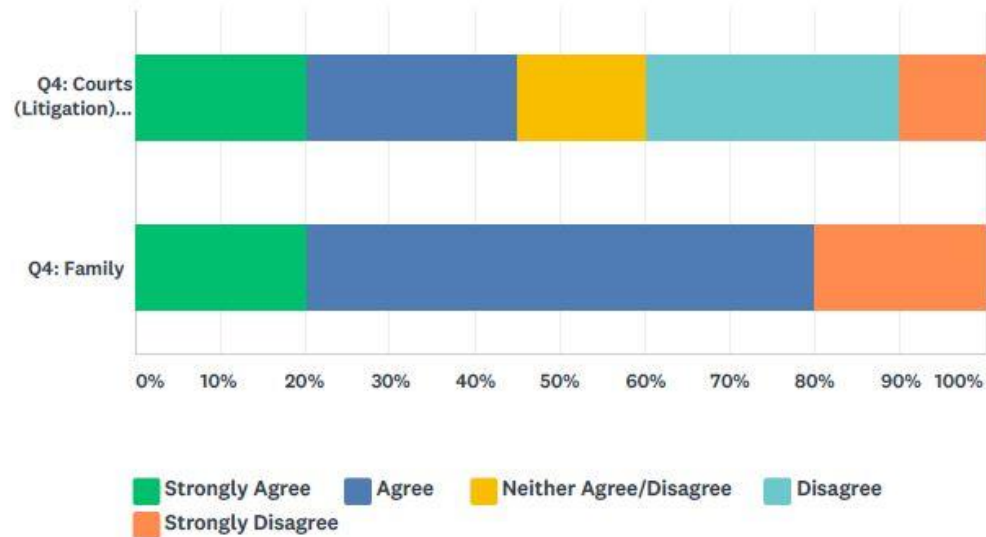
Both advocates and mediators are similarly split.

Courts vs. Family

Mediators



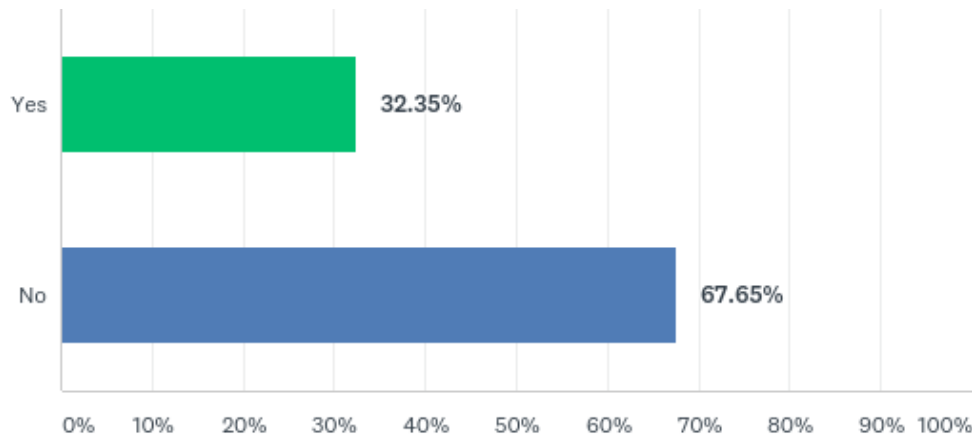
Advocates



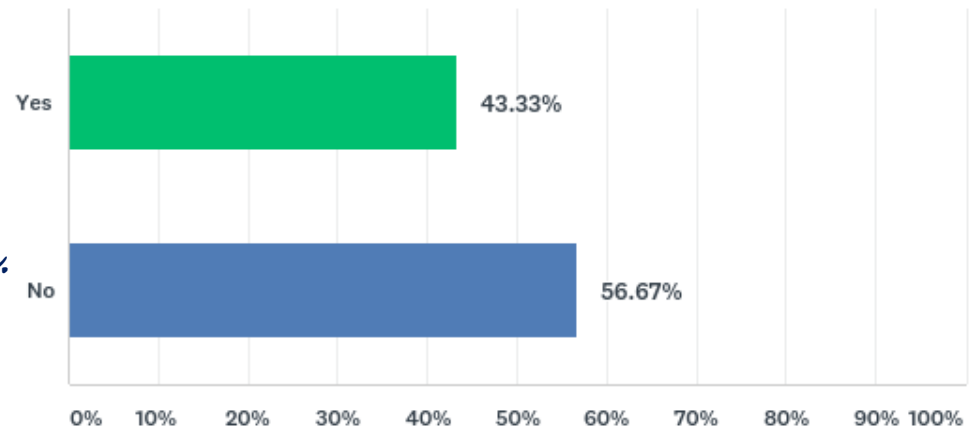
Family folks are more likely than court folks to agree..

Q28: Do you believe there should be an exception to mediator confidentiality for attorney malpractice?

Mediators



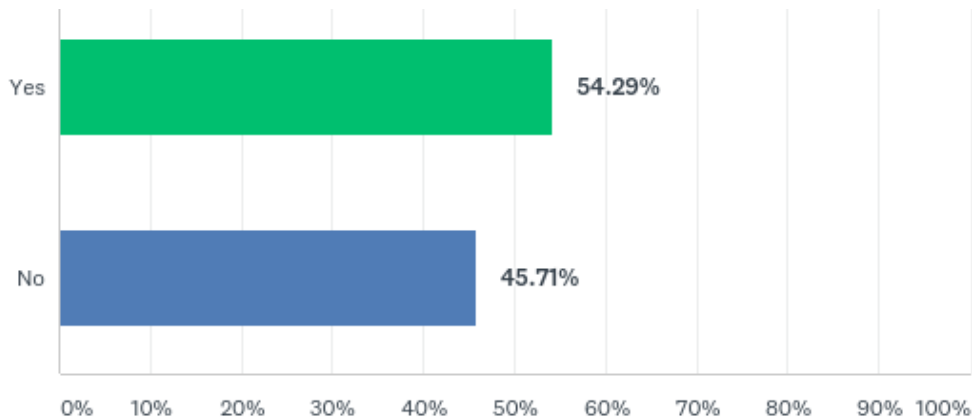
Advocates



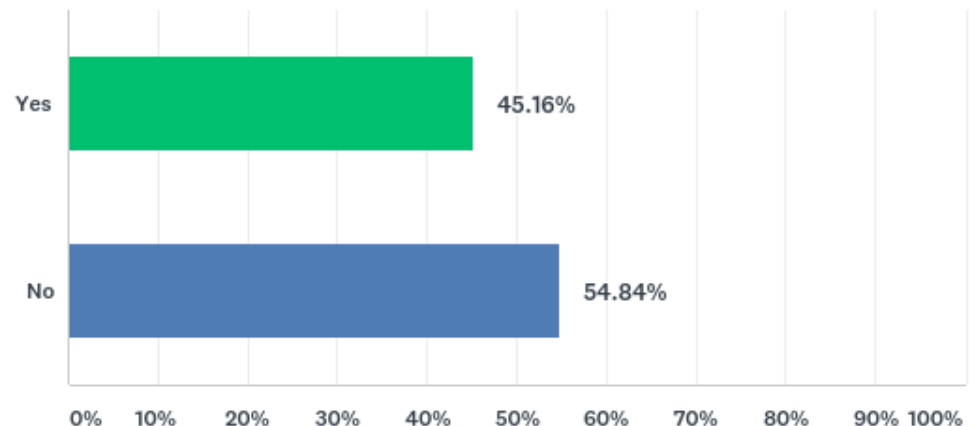
You are split on this with a majority favoring an exception.

Q29: Do you believe there should be an exception to mediator confidentiality for ethical complaints?

Mediators



Advocates



You are pretty split on this.

Session Tools



Mediation: Basic Steps

Step 1: Identify the Stated Problem

- **Understand Their Positions and Arguments**
- **Have them tell their story**
 - *What concerns would you like to see addressed today?*
- **State the issue in a neutral way**
- **Be an active observer, give equal time**
- **Enforce ground rules**
 - *Can we speak one at a time?*
- **Ask vs. tell:** Ask questions to clarify facts and the feelings around the facts. Use short, open-ended questions
 - *Please tell me more about... or Is there anything else I need to know?*

- **Stay attuned to body language & vocal tone**
- **Neutralize the “Attack-Justify-Blame” Spiral**
- **Use active listening & reflective feedback (VECS)**
 - *This is frustrating.*
 - *I appreciate your willingness to say...*
- **Summarize the issues in a neutral way**
 - *So the situation from your perspective is...*
 - *My understanding of what you have said so far is.... Did I miss anything?*
 - *Is there anything that you want me to understand that you don't think I understand yet?*



Step 2: Explore the Real Issue

- **What are the underlying values, needs and interests of each party?**
 - *What are you concerned about?*
 - *What bothers you most about that?*
 - *What do you understand I am saying about that?*
 - *What assumptions are they/you making? How can we test these assumptions?*
 - *What are possible ways that would allow us to _____?*
 - *So besides needing to assure that there is _____, what other conditions must this solution satisfy?*

- **What are the common interests?**
 - *It sounds like we are both interested in _____.*

- **What are the consequences of not settling or resolving the matter? Best case? Worst case? Most likely case?**
 - *If we don't resolve this, what will happen next (time, cost, etc.)?*
- **What else is going on? ✓ risk tolerance, ✓ decision-making styles, ✓ conflict styles colliding, ✓ other sources of tension**
- **Summarize interests and needs of each party**
 - *Could we list all of the needs and interests on the board to make sure we have everything so we can identify shared interests?*
 - *We have a lot of things in common. For example, _____ . Let's use these as a basis for crafting a fair agreement.*

Step 3: Develop Possible Solutions

- **Let's suggest possible solutions**, thinking creatively & realistically
 - *Let's list all of the options and then explore the up-side and down-side of each before we even discuss what to do.*
 - *Which one of these (needs or interests) would you like to talk about first?*
- **Explore O.P.T.I.O.N.S.** (Only Proposals That Include Other's Needs Succeed)
- **If you get stuck, move back to Interests, re-
reframe, and/or spend more time helping them
navigate the intersection of logic and emotion**

- **Look at the solutions that satisfy common interests and/or competing interests that can be paired to fashion a resolution**
 - *It would appear that the first two suggestions would both _____.* So are you saying if I do _____, then will you do _____?



- **List all the objective standards external to the parties that could be used as a reference point to assess fairness** (e.g., past practice, industry standard, jury results, prime rate, etc.)
 - *Are there any other criteria we need to use to evaluate these proposed solutions?*

Step 4: Select & Implement a Solution

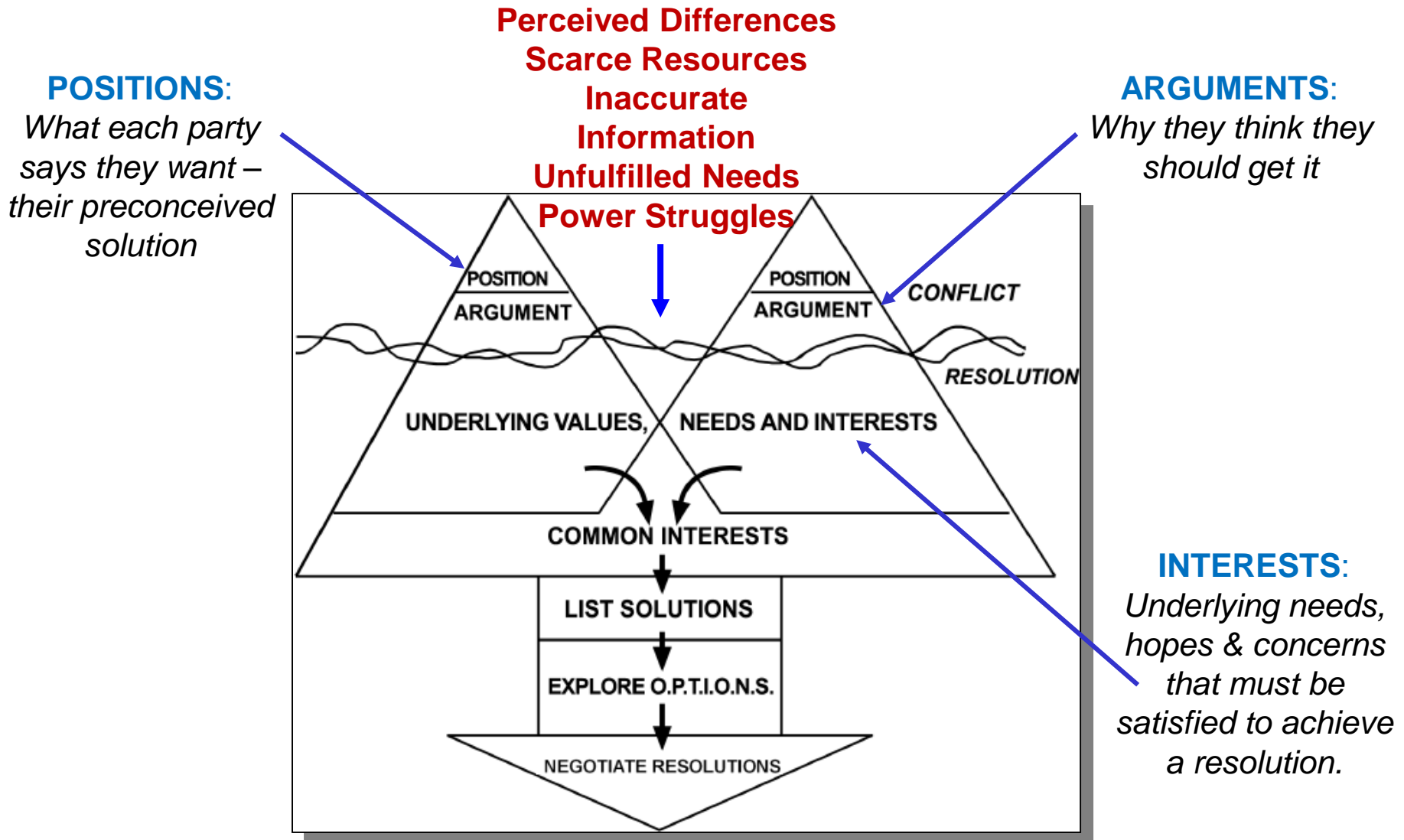
- **Negotiate a winning solution using the Umbrella Question**
How can we address _____,
While at the same time _____,
Thereby, _____.
- **If stuck, move back to option-generating**
- **Check to see if it meets all parties interests, now and in the future**
 - *Would that meet our need for...?*
- **Do a reality check to ensure a complete deal**
 - *Who will do what, when, where and how?*
- **Confirm that all parties agree and write a balanced agreement**
- **Agree on what to do if there are problems down the road**
- **If no agreement is reached, discuss how to process the dispute in a way that is more satisfying and effective than the traditional method**

Use “SWAP-LION” As Your Cheat-sheet

- S**trengths: Where are you strong?
- W**eaknesses: Where will the other side say they are strong?
- A**lternatives: If the conflict is not resolved, what will happen?
BATNA Analysis (Decision Trees and Tables)
- P**erspectives: **Theirs** – What is driving the controversy? What do they need to agree on resolution? Why?
Yours – What is driving the controversy? What do they need to agree on resolution? Why?
- L**ist **I**nterests: Party A, Party B, Common, Prioritize
- O**ptions: Brainstorm multiple options for resolution.
Separate the process of *inventing* from negotiating.
- N**egotiation: Tie proposals to legitimate objective standards.
Get permission to discuss basis with other side.

S,W and **A**: Direct to Attorneys / **P** and **LI**: Direct to Party / **O** and **N**: Both

Explain Anatomy of a Negotiation



Ask Open-Ended Questions Especially if They “Turn” on You

“Tell me more about that ...”

“What are you feeling right now?”

“Would it be helpful if ...?”

“Do you have any suggestions on how we can ...?”

“We all want a fair result. What standard can we look to?”

“What do you think I’m missing in assessing this situation?”

“We’re momentarily stuck, how can we get back on track?”

“If you had to pick between these two options, would you rather be proven right or successful?”

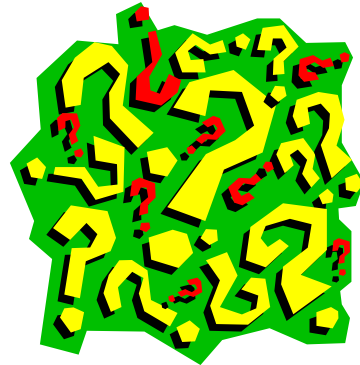


Ask Effective Questions

- Who, what, when, where, why, and how?
- I want to understand this from your perspective, would you please tell me again...?
- I know you realize any solution needs to work for both of you. Do you have any suggestions on how we can improve the proposals?
- They have presented an X-part proposal for your consideration. Should we discussed the proposals one at a time or as a package?
- Is there some external reference we can look at to assess fairness?
- Maybe we should examine perceptions. What assumptions are you or they making?

More Effective Questions

- What are the personal (and business) ramifications from (your perspective) (their perspective) if we can't reach an agreement?
- What would you think if they proposed...?
- What do you think they are misinterpreting? What do you think they believe you are misinterpreting?
- We appear to be momentarily stuck, what can we do to get back on track?
- If we can't get this settled, what happens next?



Questions for Deeper Understanding

- Amplify Contradictions & Widen the Lens
 - How do you decide which information to trust?
 - Is there any part of the [other side's] position that makes sense to you?
- Ask Questions that Get to People's Motivations
 - What do you want the other side to understand about you?
 - What do you want to understand about the other side?
- Listen More and Better
 - How do you feel, telling this story?
 - Where does that (feeling, emotion, paranoia, distrust...) come from?
- Expose People to the Other Tribe & Counter Confirmation Bias
 - What do you think the other group wants?
 - Help me make sense of this, because other people are saying...

Questions from this great resource:

<https://thewholestory.solutionsjournalism.org/2>

[2-questions-that-complicate-the-narrative-](https://thewholestory.solutionsjournalism.org/2-questions-that-complicate-the-narrative-47f2649efa0e)

[47f2649efa0e](https://thewholestory.solutionsjournalism.org/2-questions-that-complicate-the-narrative-47f2649efa0e)

Consciously Decide Whether to Caucus

Why Do We Do Them? Test the Default Assumptions About If/When to Caucus.

Reasons For:

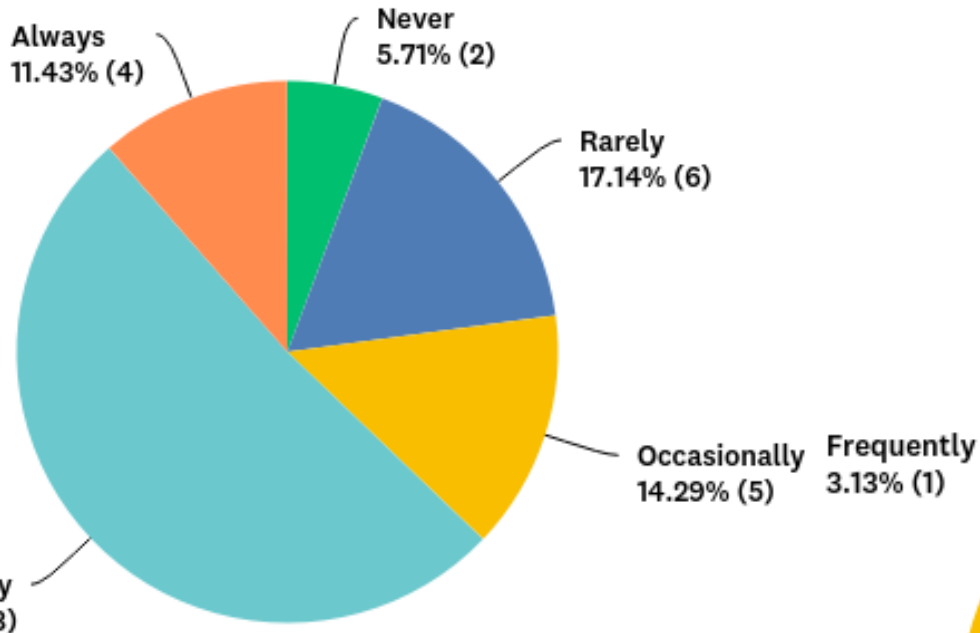
Reasons Against:



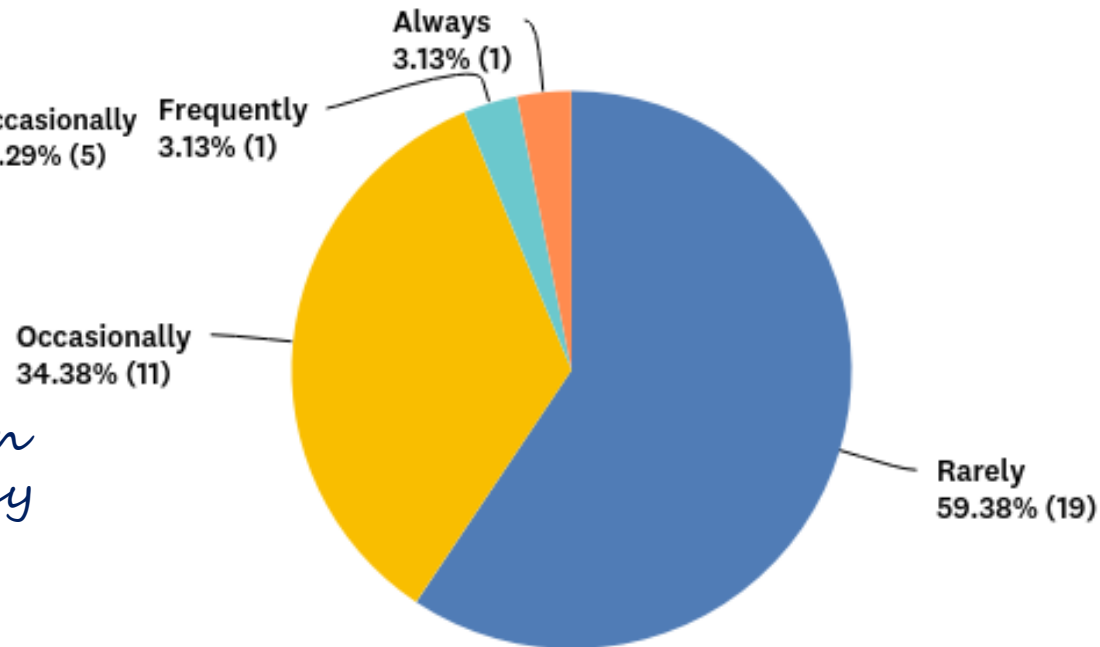
“The days of the bartender-psychologist are over, but I can help you settle any disputes!”

Q11: How often do you use/prefer joint sessions beyond the initial one?

Mediators



Advocates



Mediators prefer joint session work more than advocates by a significant margin.

Caucus Tips and Mechanics

Considerations:

1. Whom to meet with first?
 - A) Your gut feeling as to who needs to vent most
 - B) Party with Burden of Proof
 - C) Party that made the last proposal
2. Give parties “homework” to do while waiting. Some of the best work happens when the parties have time for private reflection.
3. Some of our best work is done when we are NOT in the room!

Use an Inter-Caucus Worksheet

(Confidential – for Mediator only)

Party _____

Caucus # _____

What specific needs or interests would be satisfied by reaching a settlement today?

For you:

For the other side:

If you could create the fairest resolution of this conflict (i.e., objectively fair to all parties and satisfying their respective needs and interests), what would it look like?

And why is it fair to all concerned?

Disclosure Issues

Always close with authority to disclose. Be specific in terms of what you want to disclose. Alternative: ask “What do you want me to disclose?” or “Is there anything I can’t disclose?”

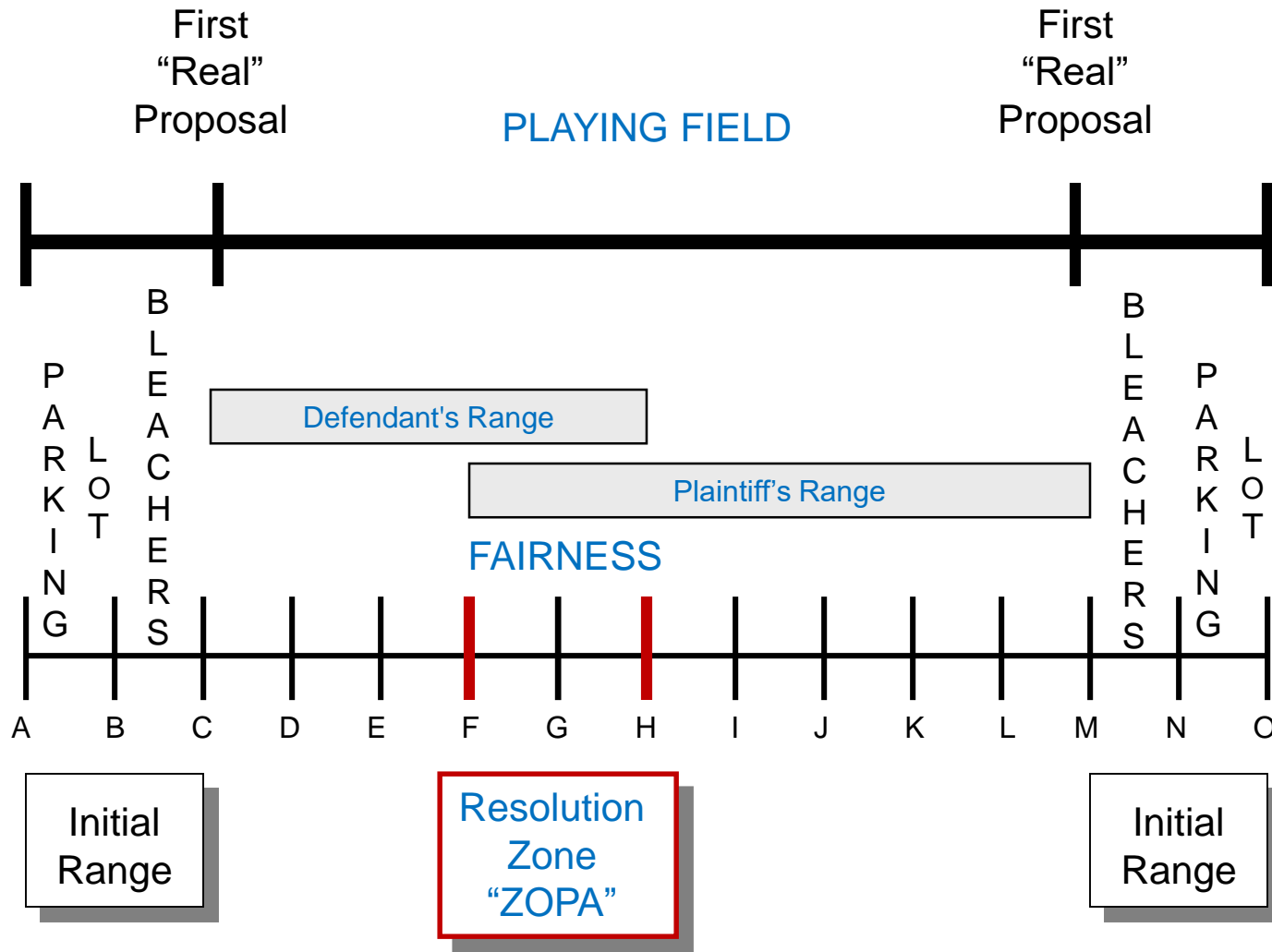
Types of information received in confidence:

1. Must be disclosed – **Mandatory**
 - Settlement offers/proposals
 - Specific directives (“I want you to tell them that...”)
2. May be disclosed – **Discretionary**
 - Everything else you have the authority to disclose (e.g., strengths, objective standards, etc.)
 - Conditional Disclosures: Don’t Take the Bait!
3. Must not be disclosed – **Non-Discretionary**
 - Everything that you do not have authority to disclose

Decision-Making In the Intersection of Logic and Emotion

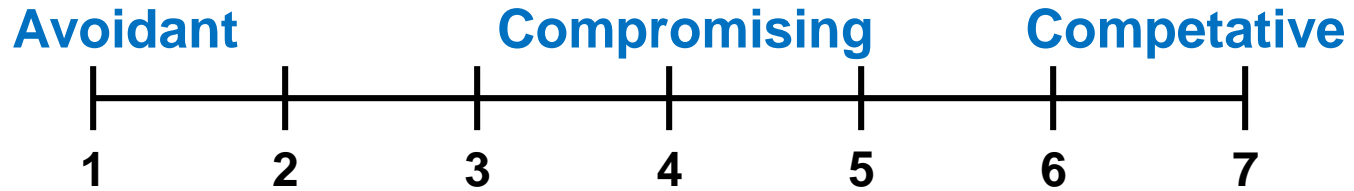


Explain The Typical Settlement Dance



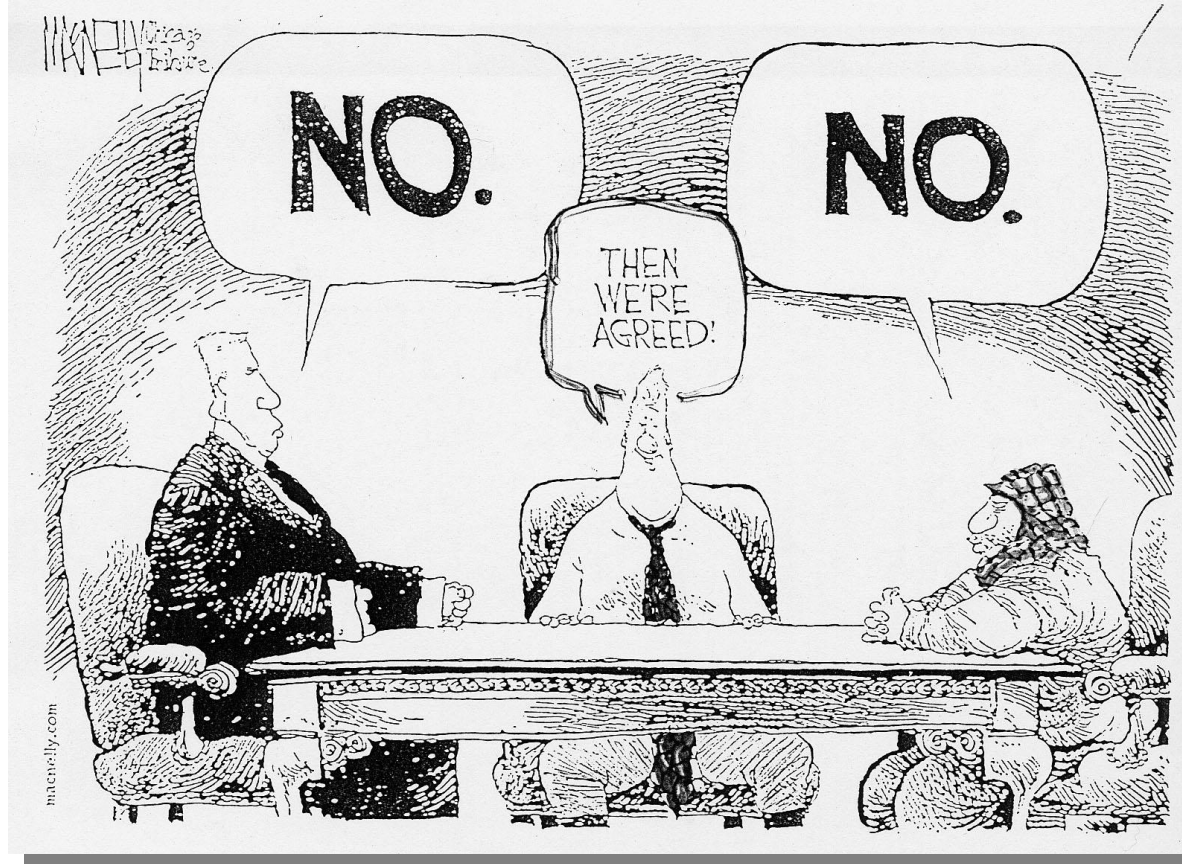
Explain The Three Impasses to Normalize the Frustration

Thomas-Kilmann Lite




X = You

O = Other



Manage Their Cognitive Conflict

“Cognitive Conflict” = Importance x Uncertainty

- 
- 1) High Importance and High Uncertainty
 - 2) High Importance and Low Uncertainty
 - 3) Low Importance and High Uncertainty
 - 4) Low Importance and Low Uncertainty

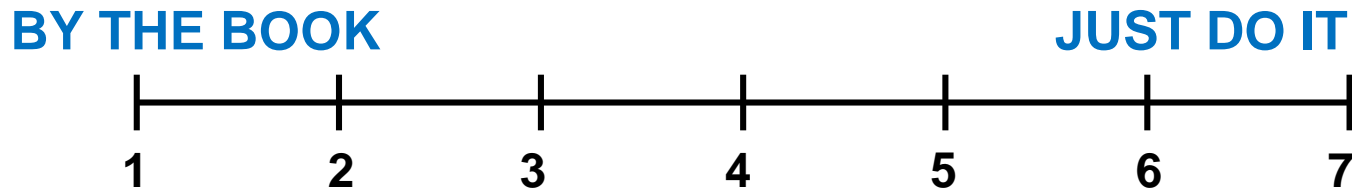
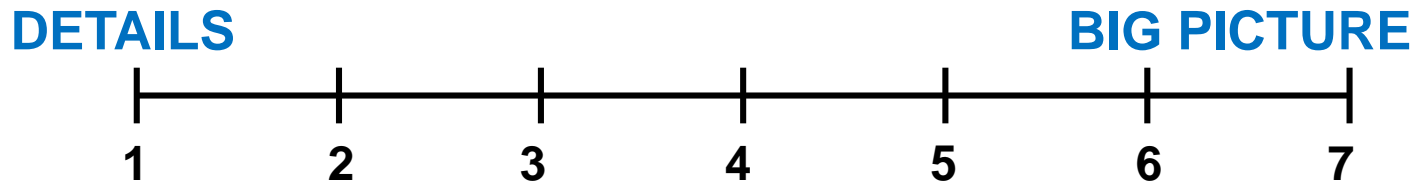
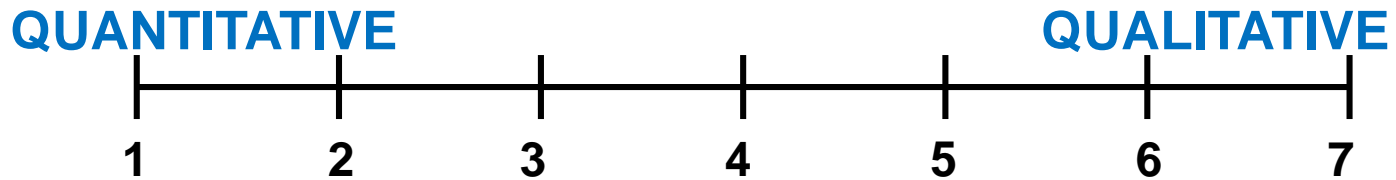
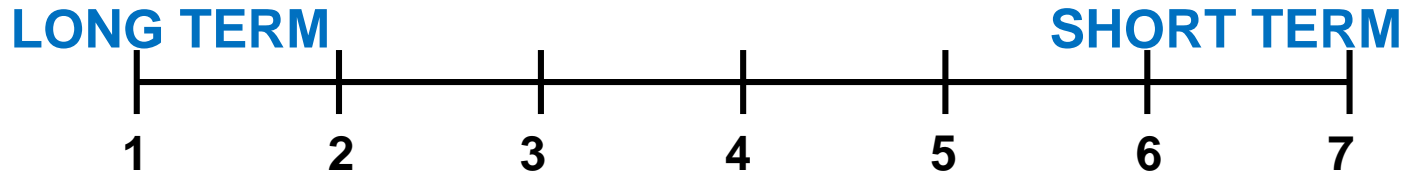
Too Much Cognitive Conflict Can Create Panic
Too Little Cognitive Conflict Can Create Apathy

It is the mediator's job to help strike the right balance.

Janis, I. L., & Mann, L. *Decision Making: A psychological analysis of conflict*. NY: Free Press.

Berlyne, D. E. *Structure and Direction in Thinking*. NY: Wiley.

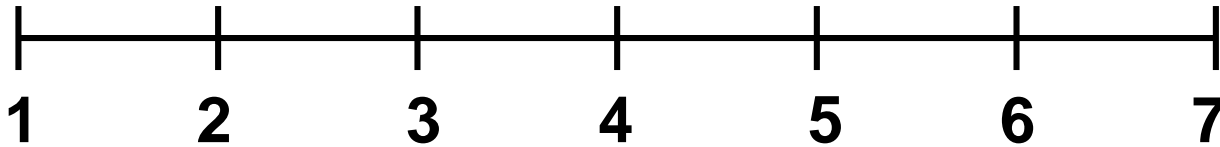
Explore Their Decision-Making Preferences



Manage Dissonance in Risk Preferences

AVERSE

EMBRACING



“You say it’s a win-win, but what if you’re wrong-wrong and it all goes bad-bad?”

Expected Value Theory: A rational person will always choose the alternative with the greatest “expected value.” The “expected value” is the likely outcome discounted by the percentage chance that the outcome will occur.

How “Rational” are You?

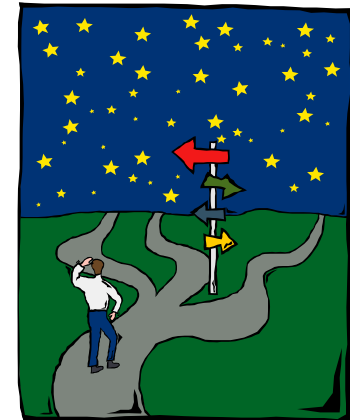
- If you choose to exit now through Door 1, you get an envelope with \$200.
- If you choose Door 2, you get a sealed envelope randomly pulled from a bag.
- 20% of the envelopes contain \$1,000 and 80% are empty.

Which do you choose?

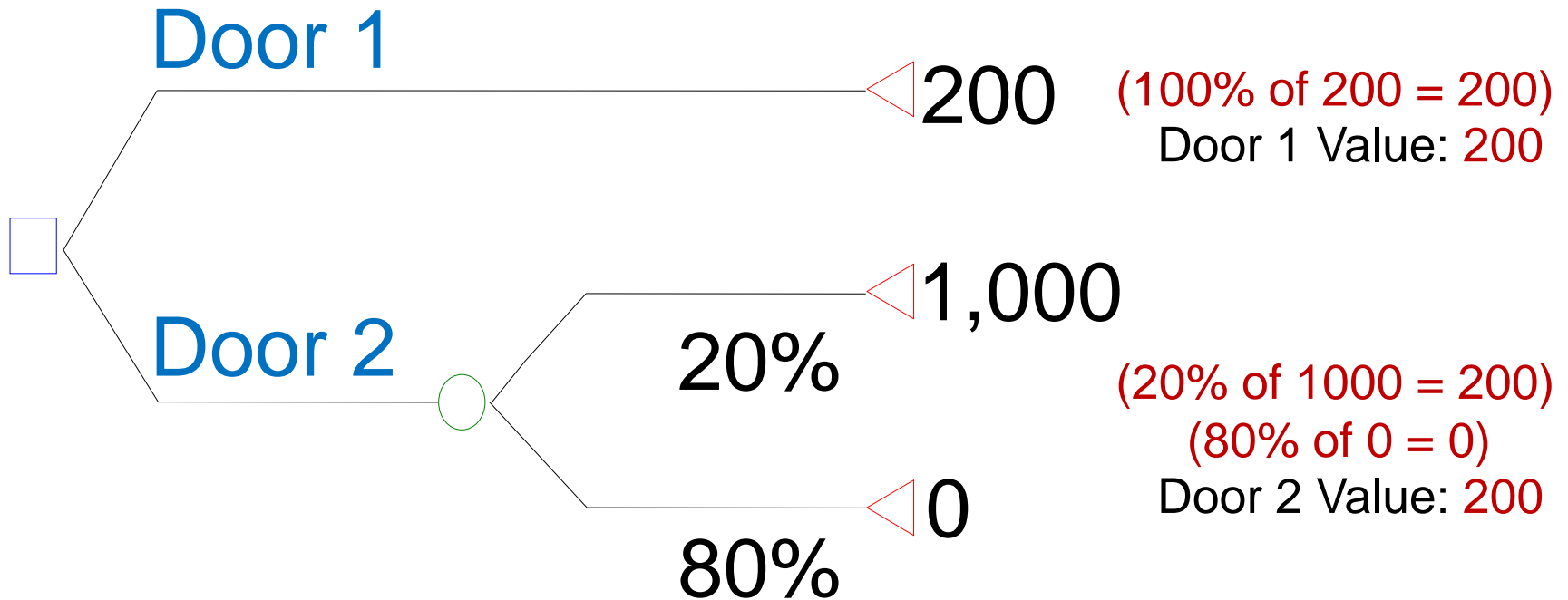
How “Rational” are You?

- The doors are now locked. If you go out Door 1, you will be required to pay \$200.
- If you choose Door 2, you get a sealed envelope randomly pulled from a bag.
- 20% of the time you will be required to pay \$1,000. 80% of the time you leave for free.

Which do you choose?



The Decision Tree



- People tend to avoid taking risks when it means losing secure gains: “positive frame”
- People tend to accept risk to avoid a certain loss: “negative frame”
- Risk-taking is not necessarily a personality characteristic

Litigation Outcome Survey: Only 15% Got it Right!

4,500 cases and 9,000 settlement decisions studied

Compared trial results with rejected pre-trial offers/demands

Obtained results equal to or worse:

Plaintiffs: 61% of time

Defendants: 24% of time

Average Decision Error:

Plaintiffs: \$43,100

Defendants: \$1.14M

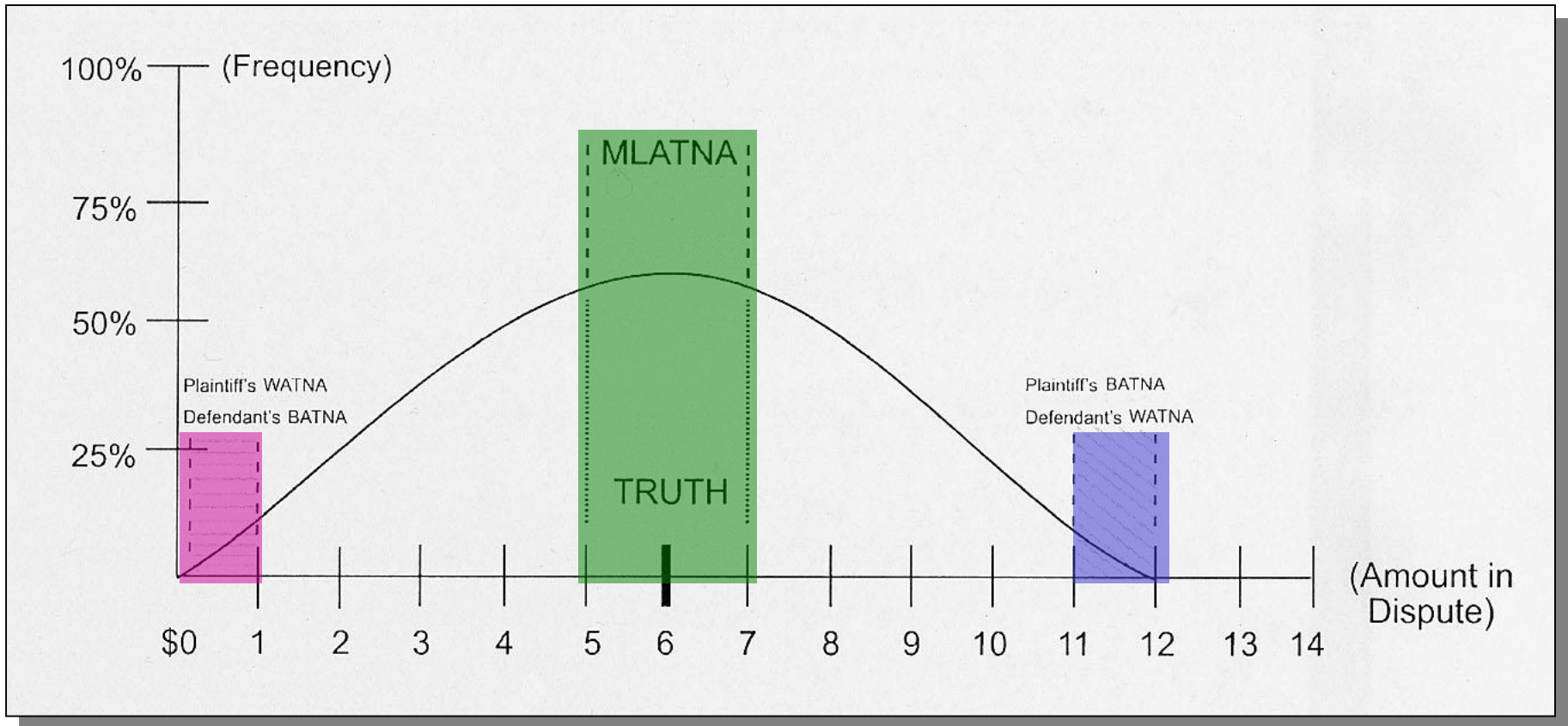
Father Guido Sarducci's Five Minute University



PLAY LIST
[Happy](#)

Have Them Visualize Unbiased “BATNA”

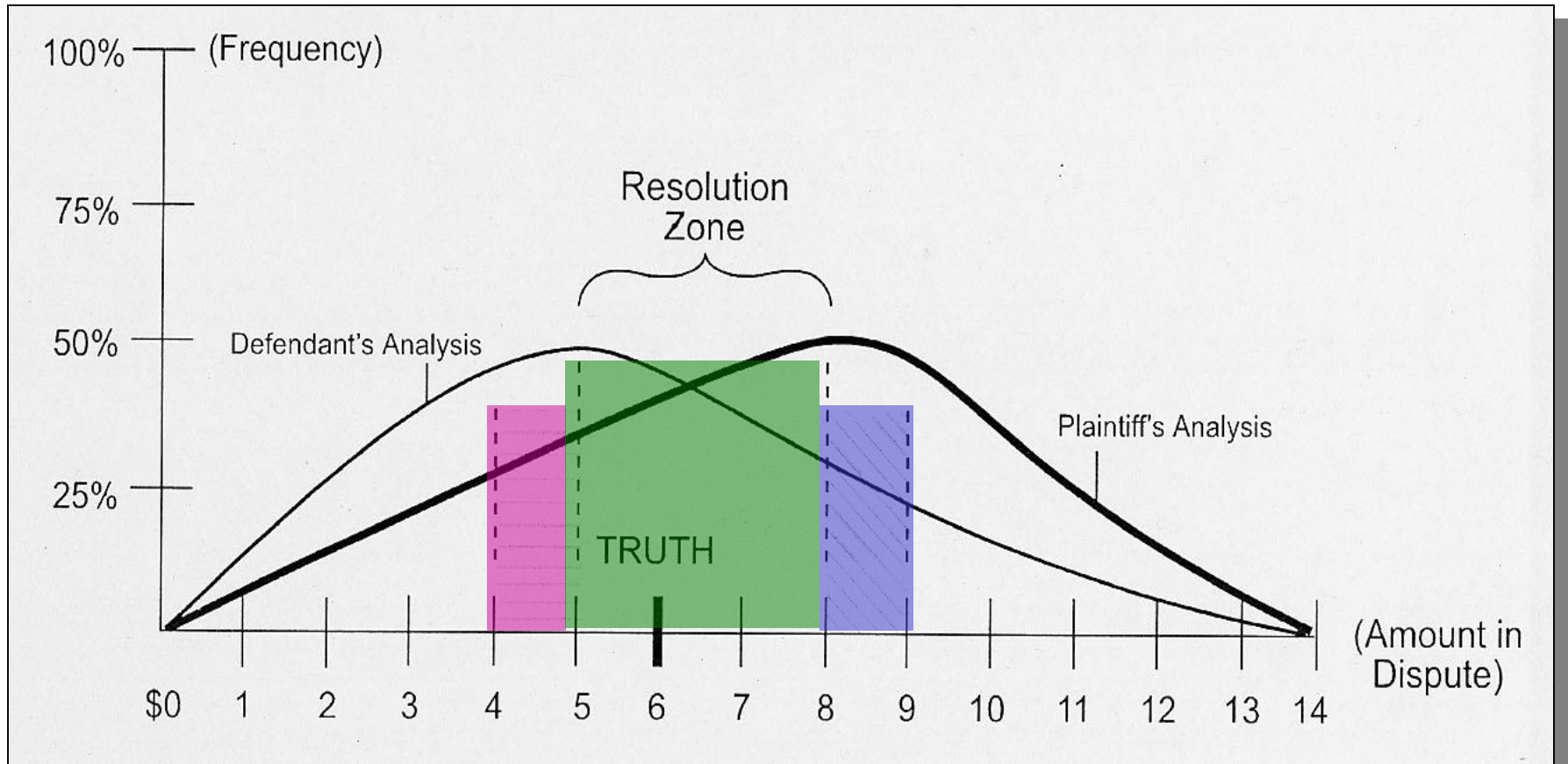
“Best Alternative To a Negotiated Agreement”



WATNA = **W**orst **A**lternative to a **N**egotiated **A**greement

MLATNA = **M**ost **L**ikely **A**lternative to a **N**egotiated **A**greement

Mediator's Analysis of "Biased" BATNA and the "Resolution Zone"



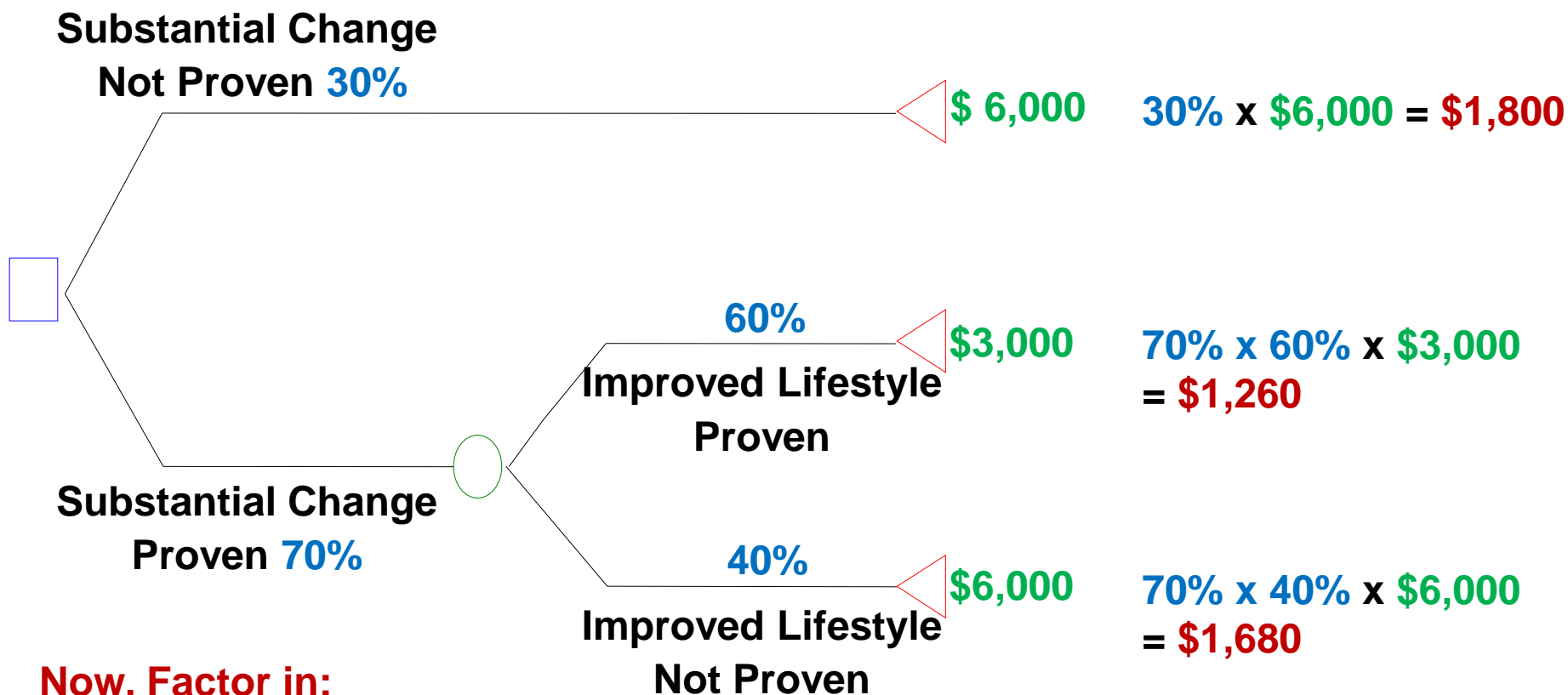
The "Resolution Zone" is Usually Bordered by the Peaks of the Two Curves

Do a BATNA Analysis with Them

- Cost to prepare for briefing/argument
- Cost of oral argument
- If argued case 100 times, what % of time would you get a favorable result? Probability of remand, reversal, or affirmance?
- Likelihood of appeal to Supreme Court
- Length of time there
- Time value of money, opportunity costs: disruption of business, life, benefit of minimizing uncertainty



Support Modification Decision Tree



Now, Factor in:

Court Costs, Attorney Fees, Interest, Tax Issues, Lost Time/Wages, Lost Opportunity, etc.

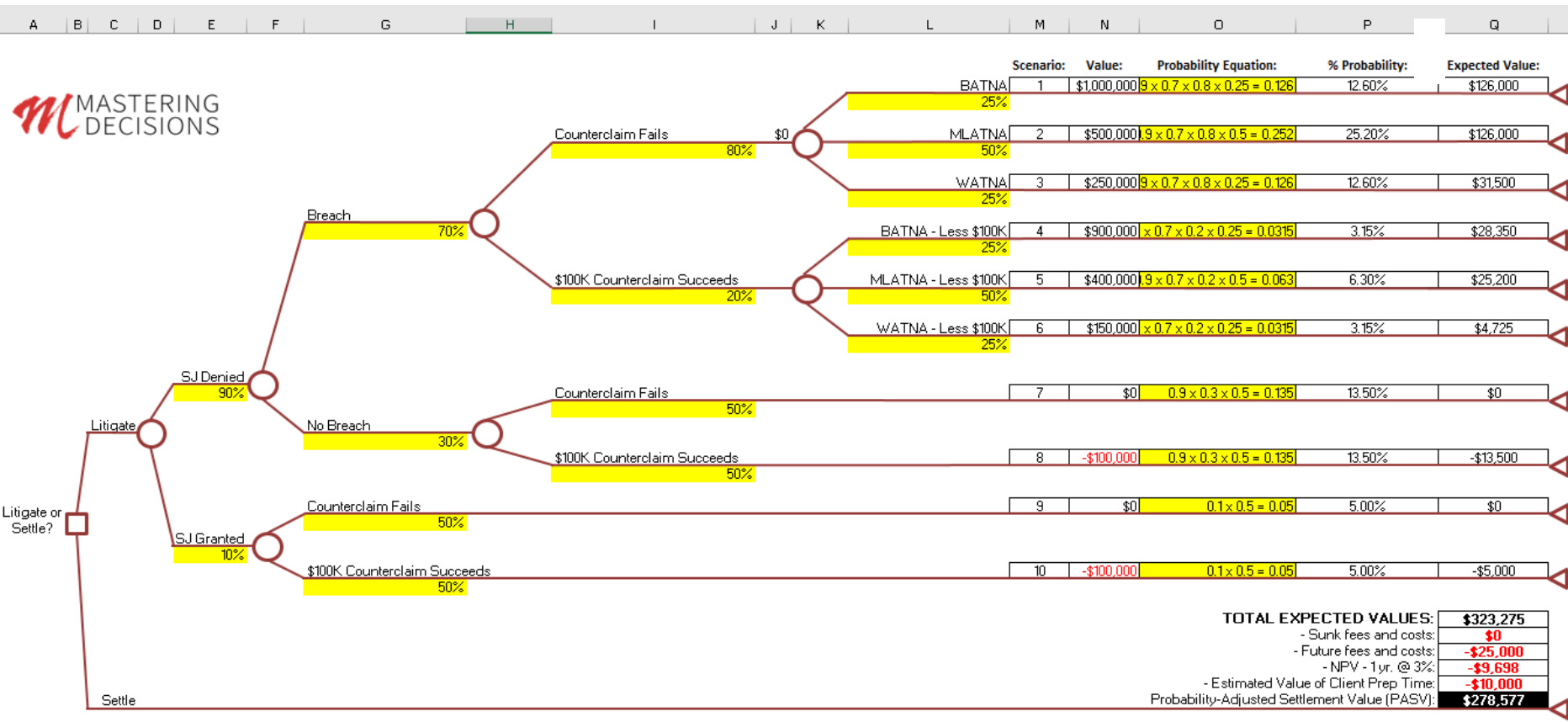
Risk x Reward
Preliminary Result:
\$4,740

Then, Consider:

Non-Economic and Subjective Factors to see if it's worth the fuss.

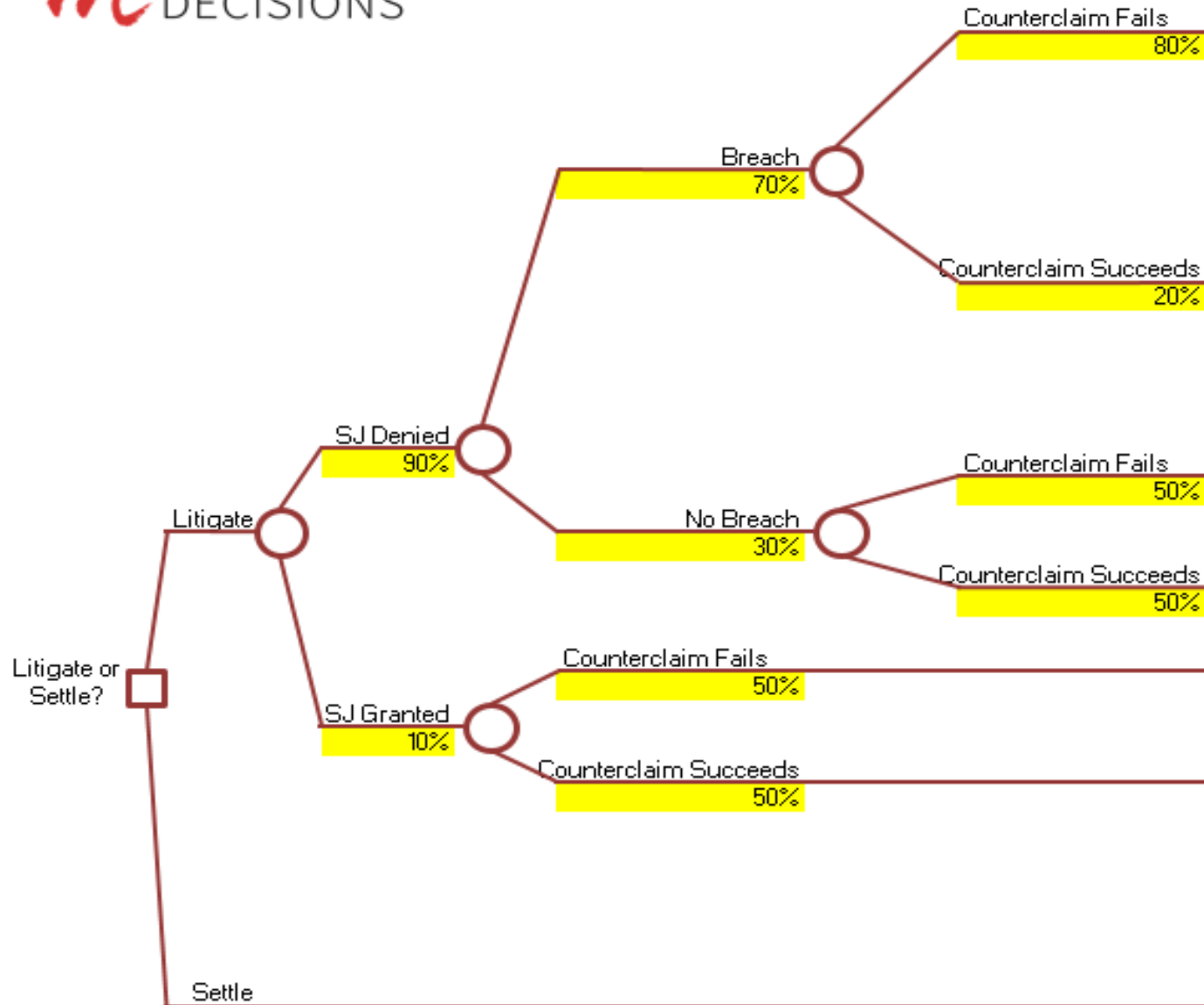
Complicated Decision Tree & Table

Step 1: Litigate or Settle a \$1M Contract Claim with \$100K Liquidated Damages Counterclaim and No Fee Shifting Provision? Plaintiff's Perspective: Risk x Reward 2016 © Mastering Decisions



Adapted from Marjorie Corman Aaron, Handbook of Dispute Resolution, Jossey-Bass, Chapter 13 (2005)





	Scenario:	Value:	Probability Equation:	% Probability:	Expected Value:
\$0	BATNA 25%	1 \$1,000,000	$0.9 \times 0.7 \times 0.8 \times 0.25 = 0.126$	12.60%	\$126,000
	MLATNA 50%	2 \$500,000	$0.9 \times 0.7 \times 0.8 \times 0.5 = 0.252$	25.20%	\$126,000
	WATNA 25%	3 \$250,000	$0.9 \times 0.7 \times 0.8 \times 0.25 = 0.126$	12.60%	\$31,500
-\$100,000	BATNA - Less Counterclaim 25%	4 \$900,000	$0.9 \times 0.7 \times 0.2 \times 0.25 = 0.0315$	3.15%	\$28,350
	MLATNA - Less counterclaim 50%	5 \$400,000	$0.9 \times 0.7 \times 0.2 \times 0.5 = 0.063$	6.30%	\$25,200
	WATNA - Less counterclaim 25%	6 \$150,000	$0.9 \times 0.7 \times 0.2 \times 0.25 = 0.0315$	3.15%	\$4,725
		7 \$0	$0.9 \times 0.3 \times 0.5 = 0.135$	13.50%	\$0
		8 -\$100,000	$0.9 \times 0.3 \times 0.5 = 0.135$	13.50%	-\$13,500
		9 \$0	$0.1 \times 0.5 = 0.05$	5.00%	\$0
		10 -\$100,000	$0.1 \times 0.5 = 0.05$	5.00%	-\$5,000



SUM OF EXPECTED VALUES:	\$323,275
- Sunk fees and costs:	\$0
- Future fees and costs:	-\$25,000
- NPV - 1 yr. @ 3%:	-\$9,698
- Estimated Value of Client Prep Time:	-\$10,000
ability-Adjusted Settlement Value (PASV):	\$278,577

Step 2: Considering Subjective Factors



Criteria:	Precedent	Strategic Advantage / Lost Opportunity	Need for Money / Ability to Pay	Collectibility	Need for Certainty
Measures:	Where on the scale is your desire to establish or not establish a precedent best served? EXAMPLES: reputation, legal, policy, principal, privacy, publicity, disclosure of confidential information, trade secrets, etc.	Where on the scale best represents the balance between the need for better strategic business advantages and minimize lost business opportunities? EXAMPLES: Position for sale or acquisition of another business, preserve relationships, fend off competitors, access new products / markets, alternative activities to do with time/money, etc.	Where on the scale best represents the balance between need for money and the ability to pay out money? EXAMPLES: Cash flow, strategic reserves, need for the capital, etc.	How does the defendant's ability to pay increase or decrease with the settle – litigate option? EXAMPLES: Market considerations, credit worthiness, credible threats of bankruptcy, etc.	Where on the scale best represents the balance between need for certainty and the desire for optimal result? EXAMPLES: Result of litigation, be it settlement or trial, is a meaningful factor in other important decisions, etc.
Weight:	25%	30%	15%	5%	25%

= 100%

Rate the criteria with the dropdowns below using the values in the key. If you rate a factor at "0," it means you are ambivalent, meaning it does not induce you to take more or less than the weighted average prediction.

3	2	-2	0	3	= 1.8
---	---	----	---	---	-------

Scale:

Litigate
3
2
1
0
-1
-2
-3
Settle



Step 2: Continued

Based on the result above, decide how much to adjust the Decision Tree Amount (up or down) to account for subjective factors:

PASV from Decision Tree:

\$278,577

+

Adjustment Amount:

10.0%

=

Adjusted PASV:

\$306,435



MD MASTERING
DECISIONS

Step 3: Consider Impact of Cognitive Biases 2016 © Mastering Decisions
See, <http://www.masteringdecisions.com/#intro>

Impasse Busting Potpourri



[PLAY LIST](#)
[YMCA](#)

Words Matter

Use

Proposals

Resolve

Firm Proposals

And



Instead of

Positions

Compromise

Non-negotiable

But

Mud thrown is ground lost!

Retrenching – Parties posture by retreating from pre-session offers. Only works if new law or new “killer” fact. In pre-session communication, explain the importance of keeping the negotiations moving forward and urge that last offers not be taken off the table. Determine settlement history in advance of session.

Party or advocate states hard line opinion at outset and/or is arbitrary or emotional –

- Develop rapport before pressing for proposals
- Consider using Confidential Offers

“I won’t bid against myself!” – Use Conditional Offer

One party gives you maximum authority up front and asks you to negotiate the best deal – You cannot negotiate for any party. Avoid the psychological block when a “bottom line” is put out too early

Legitimate outside standards – Tie proposals to them

Silence – Can be motivating

Set a deadline – “90/10” or **Extend time** – Recess

Pro Se – Jury Instructions. “I get it, but unfortunately, the law isn’t always fair.”

Soft therapy – (you sense they are missing something) ... “Have you had an opportunity to ...”

Two proposals that tease out true needs – (e.g. money or reinstatement)

Multiple Equivalent Simultaneous Offers: Three proposals that tease out true needs. E.g.

	1	2	3
Forklift Features			
Price			
Payment Terms			
Warranty/Service			

Disparate time spent in different caucuses – “I’ll spend as much time with you as you need. It doesn’t matter where we start – only where we end.”

Suggest non-monetary items – e.g. permit conditions, give to charity, letter of recommendation, etc.

Ask parties for help – why are we at impasse, any suggestions for moving forward, what are your fears, or what are your hopes

Consider Shared Expert – One expert agreed to by the parties or mediator selects

Suggest giving gap to charity – Their best self

They ask you to convey something you know will not facilitate the process – Start with, “I’ll do that if you want me to.” Pause. Then ask, “What impact will that have on our ability to get this resolved?”

Ask party, “what would you like to hear them say to you if they got it?” – How would it sound to you if they were to ‘got it,’ and interpret ‘it’ back to you?”

Call an attorney-only or party-only caucus –
Usually for “reality therapy”

Summarize agreements – Show progress, express optimism, and encourage movement

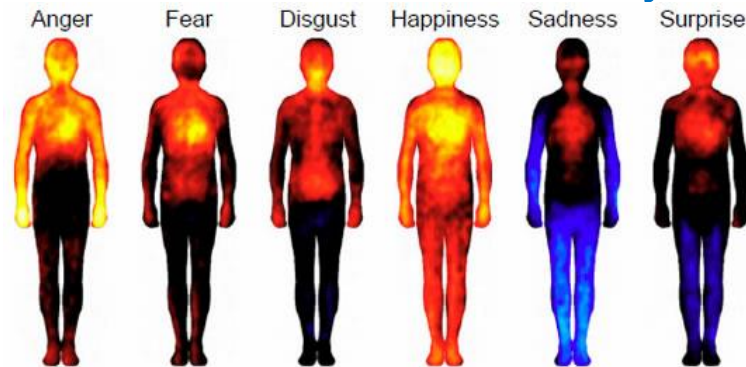
Ask what additional movement they would be willing to make if the other side would say “yes” to their new proposal – Know when to back away



Emotions Impact Decision Making and It's Not Random!

- Anger and fear can affect risk perception:
 - **Angry people:**
 - more optimistic about future events (approach)
 - they see less risk
 - **Fearful people:**
 - more pessimistic about future events (avoid)
 - they see greater risk

Emotions serve a purpose and create differing motivations.
We need to understand them to satisfy our parties' core



When We Misjudge Feelings, Which Way Should We Err?

Researchers asked the question: Is it worse to overestimate or underestimate other people's emotional responses? They examined the consequences of being wrong both ways.

- Accurate assessments of other people's perspective and emotional responses is essential for successful social interaction and is very difficult!
- Seven experiments showed that underestimating the intensity of other people's emotional responses leads to more negative evaluations than overestimating others' emotions.
- People believe that underestimation is indicative of lower efforts and empathy.
- Erring on the side of overestimating others' feelings may be an optimal strategy for social interactions.

Klein, N. (2019). Better to Overestimate than to Underestimate Others' Feelings: Asymmetric Cost of Errors in Affective Perspective-Taking. *Organizational Behavior and Human Decision Processes* 151: 1-15

Reframing

Translate “positions” into “interests” by diving below the waterline of adversarial banter. Help others focus on their “real” needs versus stated positions.

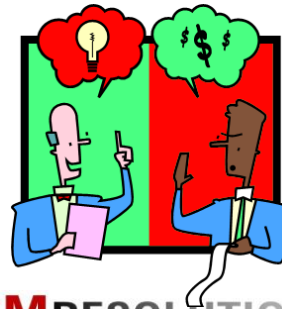
EXAMPLE: “I want a flex schedule!”

REFRAME #1: “It sounds like being available so you can meaningfully contribute to your kid’s development is important to you.”

REFRAME #2: “If you had predictable time off during the week, would that help?”

Homework: Practice

1. You can't see the big picture!
2. I refuse to play games and drag out these negotiations!
3. We won't do that!
4. I don't understand what you are saying!
5. Your proposal is ridiculous!
6. *Your examples...*



If They Vent, VECS Them

- **Validate**
 - Acknowledging people for talking: *“I appreciate your willingness to say...”*
- **Empathize**
 - Identify with another’s views:
“This is tough.”
- **Clarify**
 - Open-ended questions to clarify issues or meaning: *“What bothers you most about this situation?”*
- **Summarize**
 - Setting the stage to move toward a cooperative resolution:
“Let’s back up and review... so, where do we go from here?”

If you can’t do this with genuine sincerity, don’t do it!

Look for Their Interests When They Vent

Dive Below Waterline of Adversarial Banter

Accomplishment (measurable achievement, getting job done)

Autonomy (right to self-govern, self-reliance, self-sufficiency)

Balance with Personal Life (order, tranquility)

Competition (winning or beating others)

Cooperation (helpfulness, being involved in team activities)

Courage (standing up for your beliefs)

Creativity (using imagination, being innovative)

Dignity (true worth, respect, self-esteem)

Efficiency (effective resource allocation and implementation)

Equality (equal opportunity for all)

Excitement (adventure, challenge)

Fairness (equitable process and outcome)

Honesty (sincerity, truthfulness, integrity)

Leadership (exercising influence with others)

Loyalty (sense of duty and mutual caring)

Money (having it, financial security)

Objectivity (Use merit and facts – not subjective standards)

Recognition (acknowledgment, admiration from others)

Responsibility (get the job done, others depend on you)

Self-confidence (belief in your talents and abilities)

Stability (consistency, “balanced” or little change)

Check Your Cultural Assumptions

Characteristics	Stereotypical Legal Culture	Another View
Focus	Individual	Group
Communication Pattern	Direct and specific, eye contact	Indirect and ambiguous, limited eye contact
Approach	Risk-taking is valued, make demands, confrontation	Caution is valued, don't make demands, non-confrontational
Conflict Comfort Level	More comfortable	Less comfortable
Goals	Reach settlements, win, task accomplishment	Preserve relationships, save face, harmony
Respect For:	Rights, legal precedent	Responsibilities and tradition

Characteristics	Stereotypical Legal Culture	Another View
Escalation Signals	Spontaneous frankness or bluntness, raised voices	Vagueness or roundabout approach, don't speak
Participants	The actual parties	Larger community/ extended family
Who Assists?	Law enforcement, attorneys, impartial neutral	Trusted, known intermediaries, elders
Setting	Formal	Informal
Language	Precise language and word choice valued	Meaning conveyed by words, inferences, interpretation
Ethics	Professional codes	Community expectations

Consider Emotional Expressiveness/Restraint Conflict Styles

Emotional Expressiveness	Emotional Restraint
Overt display of emotions	Disguised display of emotions
Control emotions by “externalizing”	Control emotions by “internalizing”
Visible display of feelings through nonverbal behavior	Minimal display of feelings through nonverbal behavior
Expansive vocalization	Constrained vocalizations
Sensitive to constraints on expressing own feelings	Sensitive to hurting feelings of other party
Relational trust through emotional commitment	Relational trust through emotional maturity
Emotional information necessary for credibility	Emotional suppression necessary for credibility

Umbrella Question Tool



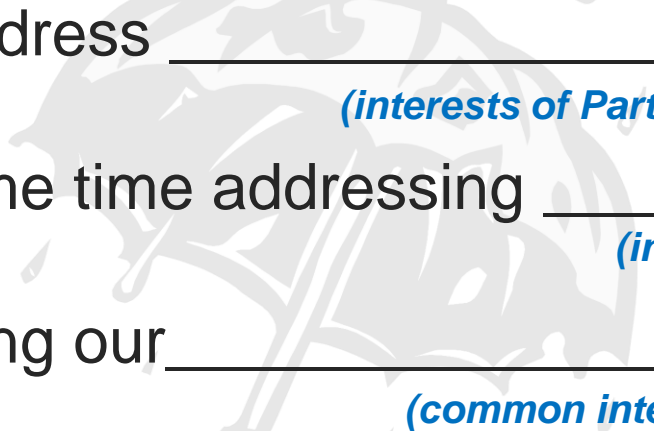
Shift Scheduling Problem

How can we assure adequate shift coverage, while also respecting the need to plan personal lives, thereby meeting our financial objectives and the fair distribution of work?

The Business Deal

How can we fairly and cost-effectively address Brown's need to get its product to market, while at the same time protect Green's distribution rights, thereby satisfying your common need for profitability and viability?

The Umbrella Question Outline



How can we address _____
(interests of Party A)

while at the same time addressing _____
(interests of Party B)

thereby satisfying our _____ ?
(common interests)

Table Exercise or Homework

Practice the Umbrella Question with a Real Case



PLAY LIST
Stayin Alive

Umbrella Question Tips

- Short vs. Long
- Whose Interests Do You Lead With?
- If Neither Work?
- Incorporate Values and Interests

**“There’s no such thing as good writing –
just good re-writing!”**

Sister Mary Fintan, Sam’s 6th Grade Teacher

Suggest an apology – full, partial, or just an acknowledgment or recognition of the “yuck”

Be aware of the “Half-Ology”

Package deal points – including elements that are not as important or costly, or, **Unbundle deal points** – to tease out the roadblock

Give them a reason to let them sleep tonight – what to tell their “Shadow Jury”

Give them hope that they can survive this – “normalize” their emotions

Use Irony With a Smile to Shift Their Focus

Ask them if they want to, “Build a Relationship and Fix the Problem” or “Build a Case and Fix Blame?”



Then, Ask if They Need a “Resolution” or a “Settlement”

	“Resolution”	“Settlement”
Definition	Durable, Satisfying Solution	Walk Away Equally Unhappy
Getting the Deal	Slower	Faster
Acceptance	Sooner	Later
Result	Success	Compliance
Maintenance	Low	High
Iceberg Location	Above Waterline	Below Waterline

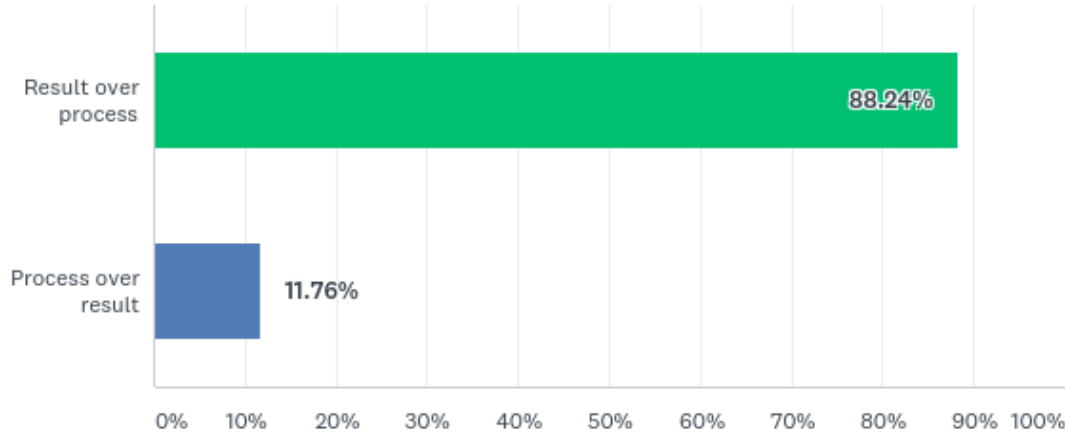
Ask if they want to **“Build a Relationship and Fix the Problem”**

or

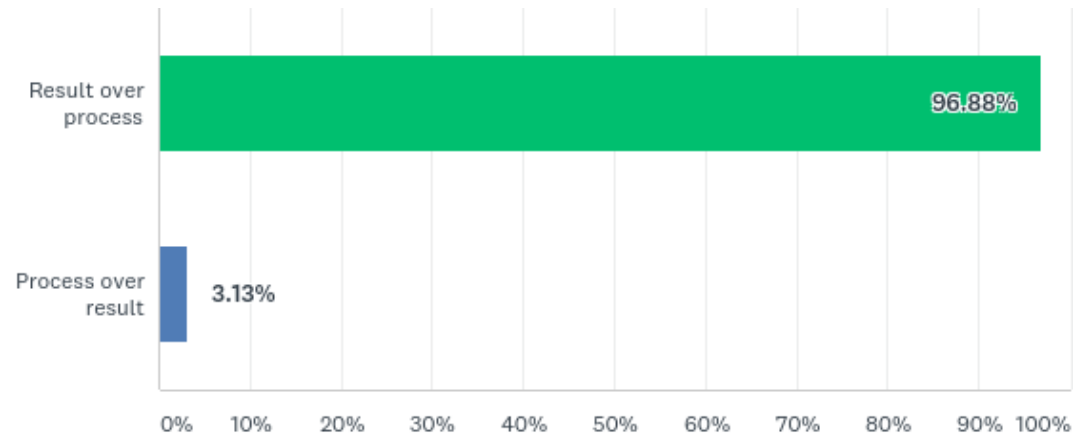
“Build a Case and Fix Blame?”

Q25: If the parties had to, which of the following would they typically pick?

Mediators



Advocates



So much for process, we want results ... we want results!

Presenting Choices to Others: Positivity and Certainty Bias

How do people that are responsible for presenting choices to others choose which options to present?

- Choice architects: People who present choices to others
 - Decide between presenting choice sets that are positive or certain vs. choice sets that are negative or risky
- Across 13 studies involving diverse samples and contexts, choice architects show a bias to present choice sets with positive or certain options
- Can cause choice architects to use influence strategies that backfire



Educate Attorneys

The “Skilled” vs. “Average” Negotiator:

- Made twice as many comments regarding long-term considerations and considered twice as many options.
- Made three times as many comments about common ground.
- Tested the other party’s understanding and summarized previous points more than twice as often.
- Seldom used heated or emotional behaviors to attack the other party or defend their position.
- Offered commentary about feelings almost twice as often (e.g., fairness and motives for proposals).
- Asked more than twice as many questions.
- Did not require “issues sequencing.”



... and Give Clients Tips

- 1) Seek first to understand, then to be understood because suspending judgment is the foundation of clear thought.
- 2) Explore – Don't debate. Attack the problem – Not the person.
- 3) Listen for agreement – not disagreement.
- 4) Ask questions, don't restate your position.
- 5) Don't prepare your response while they are talking.
- 6) Don't interrupt.
- 7) Treat the person's values, needs and interests with respect.
- 8) Manage your reactivity and take responsibility for your actions.
- 9) Keep focused on your vision and values.
- 10) Be assertive about the need to collaborate.

Blessed are the flexible, for they shall not be bent out of shape!

- Gumby's Spiritual Advisor

Preempt the “Oh, by the way...” Play – Bring it up when they are 80% of the way to settlement. Get all terms on the table before proceeding into the “Resolution Zone.”

Bifurcation – Suggest bifurcating the dispute and submitting the disputed portion to arbitration (e.g., settle the main claims and arbitrate the attorney fee portion.) Mere suggestion of bifurcation can break impasse.

Appeal to Ego: I’m going to ask you to consider some negative information. 95% of folks can’t do that, but I’m confident you can. [Then, Reality Test]

Suggest or Use Hybrid Processes:

- A) MED-ARB:** the parties agree if a settlement is not reached, the mediator becomes “arbitrator” and issues a binding award. Concern is that the parties will be less candid with the mediator if that person may wind up “arbitrating.” The “fix:” do MED in joint session.

- B) MED-ALOA:** Mediation and Last Offer Arbitration – Parties make one last attempt, and if unsuccessful, process converted into binding arbitration. Neutral *must* select either the last offer or last demand. Mediator can become arbitrator or parties pick new one. This is baseball arbitration.

- C) ARB-MED:** the neutral conducts a hearing and issues a sealed award. Parties then talk settlement with the mediator and the envelope is destroyed if settles. Otherwise, envelope is opened. **(Variation: ARB-MED-ALOA)**

Enlist “Uncle Sam’s” Tax Assistance

- Wages
- Pain and Suffering (P & S):
 - Caused by Physical Injury
 - No Physical Injury
- Punitive Damages
- Interest
- Straddle Tax Years
- Attorney Fees
 - Contingent Fee
 - Statutory Fees
 - Fees on Physical Injury
 - Fees on Combo Physical and P & S
 - Deductibility: Itemized Deduction ?
- Involve CPA or Tax Attorney Upfront



Project Confidence It Will Settle



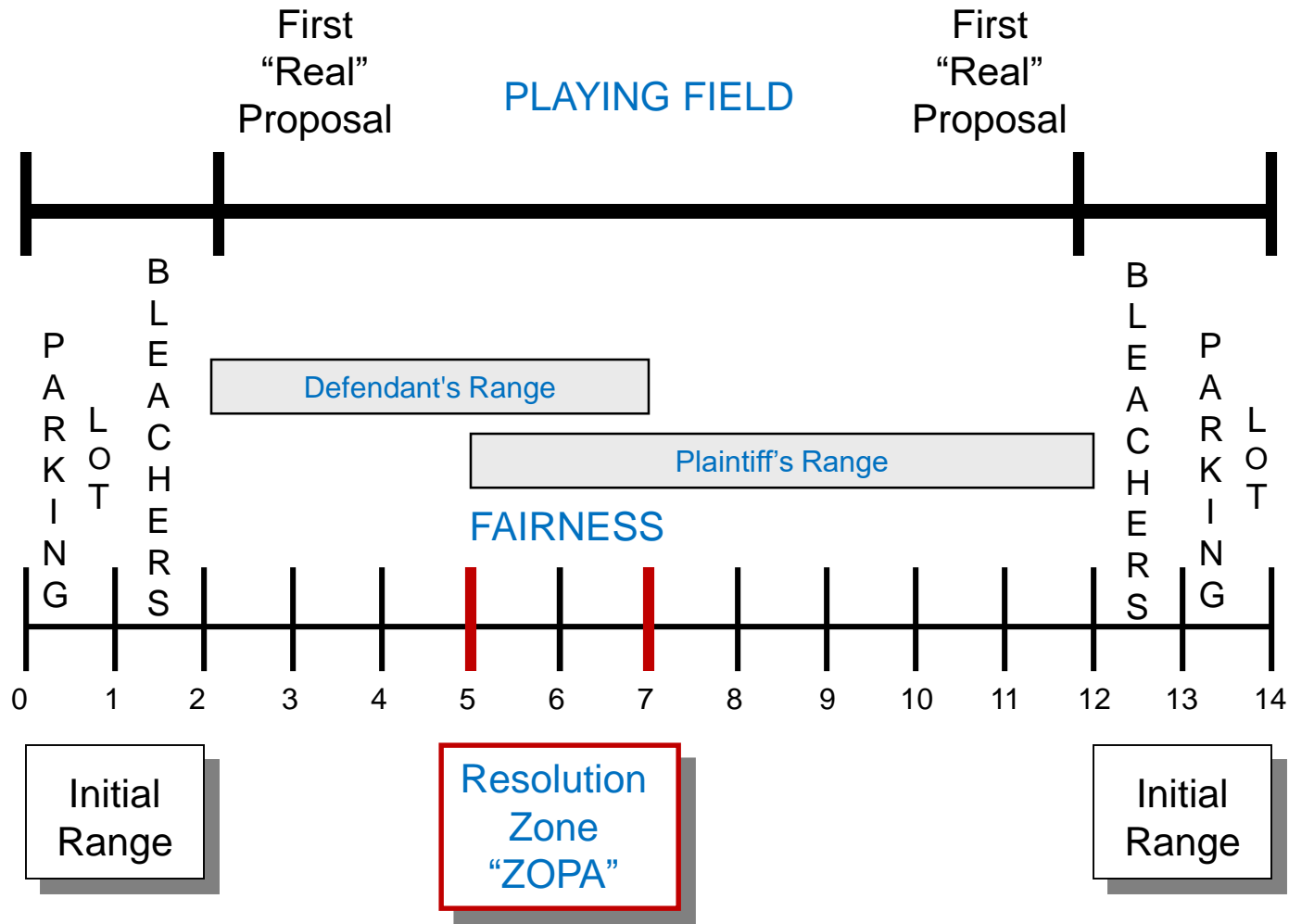
Example:

*Impasse is simply the place
where we get tired.*

*I'm the Energizer Bunny of
Resolution*

Be the Energizer Bunny of Resolution!

Holy Trinity of Impasse Breaking



Explain the "Tricks" or "Tools" in Joint Session

Give Them a Choice

“Look, here are some options for you to consider:”

- 1) End the mediation
- 2) Make another proposal
- 3) Go back into (caucus or joint session)
- 4) Consider one of the following
impasse-breaking tools

“I’m happy to chat about the pros and cons, leave so you have time to think (talk with your attorney,) or brainstorm other options, etc.

What works best for you?”

Explain How They Work

In the Beginning: Normalize, and if doesn't work, try Conditional Offer

P opens @ 13, then D @ 1 (Normalize)

2nd Move: P @ 12, then D @ 2 (First Impasse)

Normalize, and if doesn't work, **Conditional Offer**:

“Ask P, if D went to 3, would you go to X (11)?”

You can ask D first if you think that will work.

Keep going until they are at 7 and 5.

1. Conditional Offer Technique

Defined: An offer/proposal that may be disclosed only if a certain condition is met.

Conditions may be:

Movement: “You’re at 13. If they move off 1, what would you put on the table?”

To specific place: “You’re at 13. If they move from 1 to 2, what may I convey?” (Encourage parallel moves)

Range: “You’re at 13. There at 1. If they go above 2, what may I convey?”

Response: May get a conditional response to a conditional offer.

Outside the Resolution Zone: Conditional Offer or Confidential Settlement Offer

When they are at 5 and 7, they are outside the Resolution Zone and you are likely to have the second impasse.

Remind them you said there would be three in your opening statement, it normalizes the dynamic.

If they won't do a conditional offer, explain the confidential settlement offer tool.

Your goal is to get them to 6.7 and 5.7.

2. Confidential Settlement Proposal

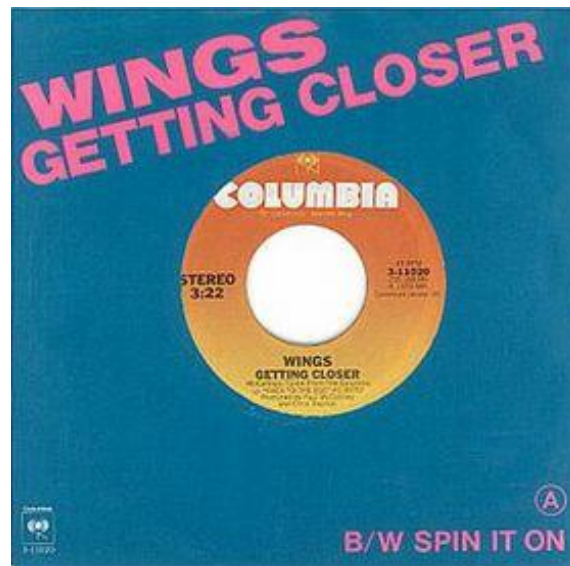
Defined: Mediator obtains what is “pretty damn close” to their bottom line – not their actual bottom line! The structure allows for private testing of a proposal only the mediator will know.

Three Possibilities:

- 1) Numbers are the same and the case settles
- 2) Numbers “overlap” – never seen it happen!
- 3) The “gap” is:
 - a) Not bridgeable: mediation is over
 - b) Might be bridgeable: ask for new confidential numbers
 - c) Bridgeable: ask if they want you to:
 - i) Disclose gap in general terms
 - ii) Disclose actual number(s)
 - iii) Mediator’s Proposal (Frequent Pick)

Inside the Resolution Zone, But You Don't Feel Comfortable, making a **Mediator's Proposal** Yet:

Use the **Confidential Settlement Offer** Technique in Order to Get Them to 6.5 and 5.5.

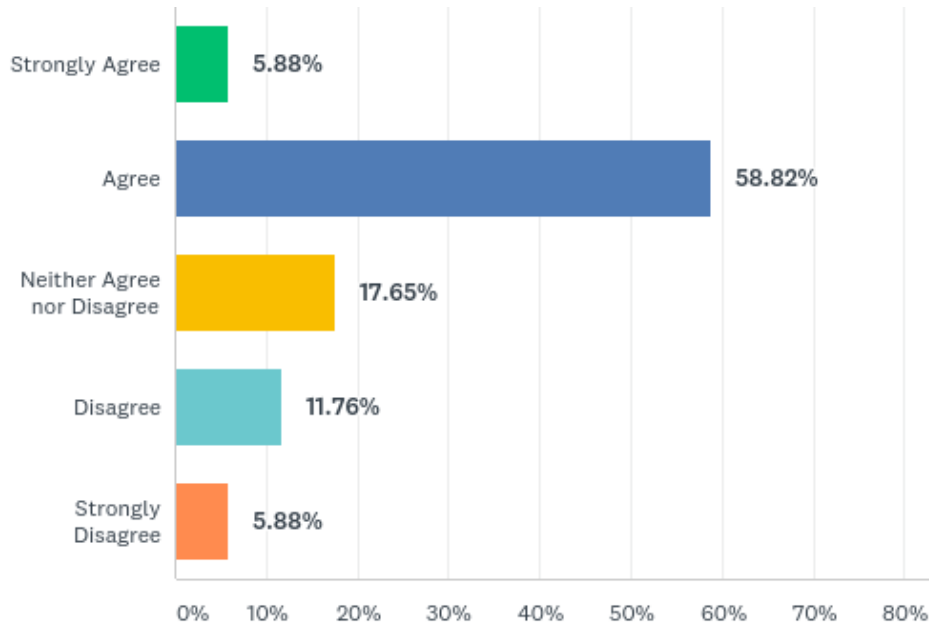


3. Mediator's Proposal

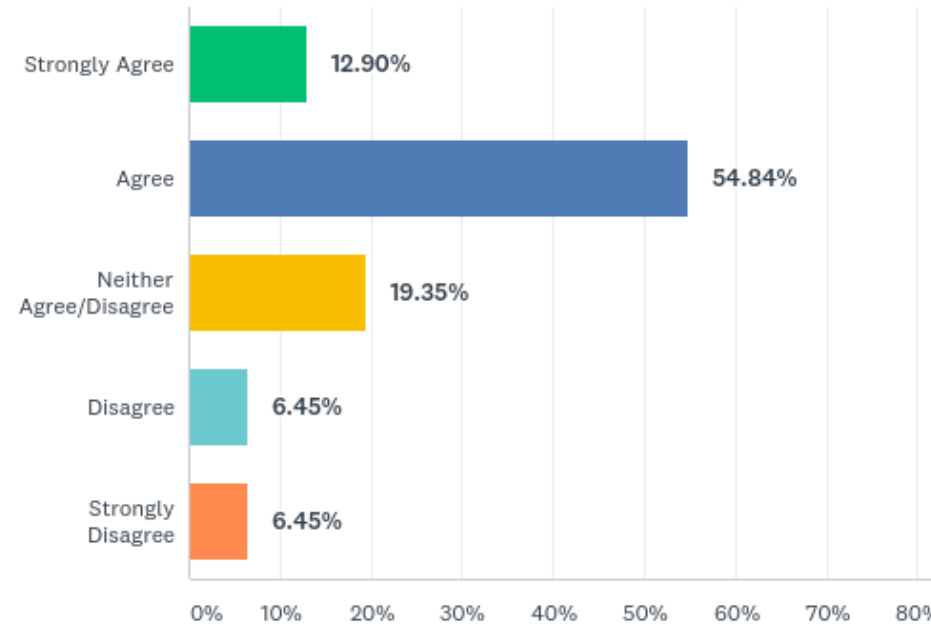
- Defined:** A solution proposed by the mediator to each side in caucus.
- Use:** The Last “Trick” or “Tool.” Usually for economics but can be used for the few remaining terms.
- Mechanics:** Mediator explains the procedure and asks for permission to offer a confidential proposal. Not FMV; rather a solution that the mediator believes both sides may accept. If one party says YES and the other NO, the party who said NO will not be told that the other was willing to accept the solution.
- Proposal:** Based on their BATNA analysis, risk tolerance, saved transaction costs, and your gut instinct. Can't be the arithmetic midpoint.

Q31: “A ‘Mediator’s Proposal/Solution’ is an appropriate tool.”

Mediators



Advocates



Most like the Mediator Proposal Technique, but ~15% don't.

Avoid Giving Opinions

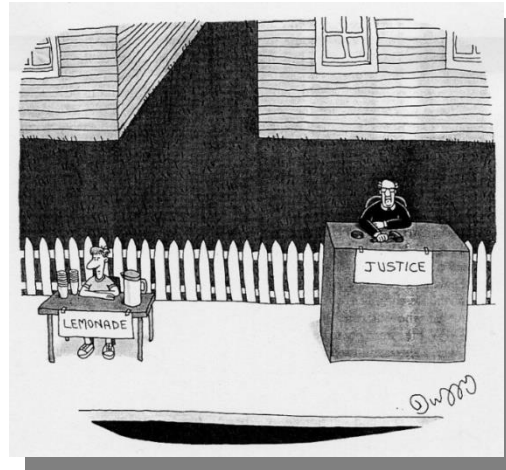
You cannot help forming opinions, but you should refrain from giving them until the bitter end, if at all, unless they want an evaluative mediator approach.

- Opinions tend to validate one party at the expense of other
- Your opinion is not the issue – the burden is on the parties to convince the other side
- Deflect their request by asking them to give you questions to direct to the other side to help them reevaluate
- Mediators are often surprised at settlements because the parties decide what is in their own best interest
- Disassociate from problem – it belongs to the parties
- Mediator only has limited exposure to case
- This is not your role as stated in opening statement

When You Give Opinions

Some mediators adopt an “evaluative” approach and give their opinions as to the probable outcome of specific issues (factual and/or legal) and/or the overall case.

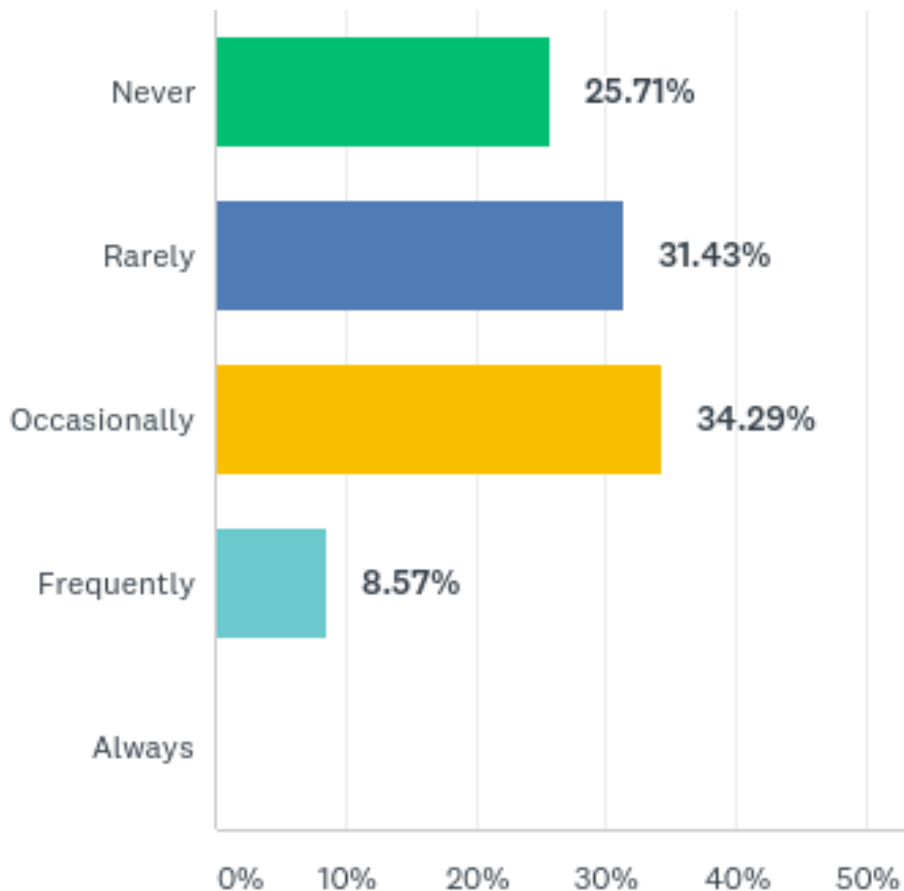
If you are going to do it, first ask permission (in joint session) and discuss advantages and disadvantages of doing so. If they agree, do it on individual issue(s) first, before opining on the ultimate outcome.



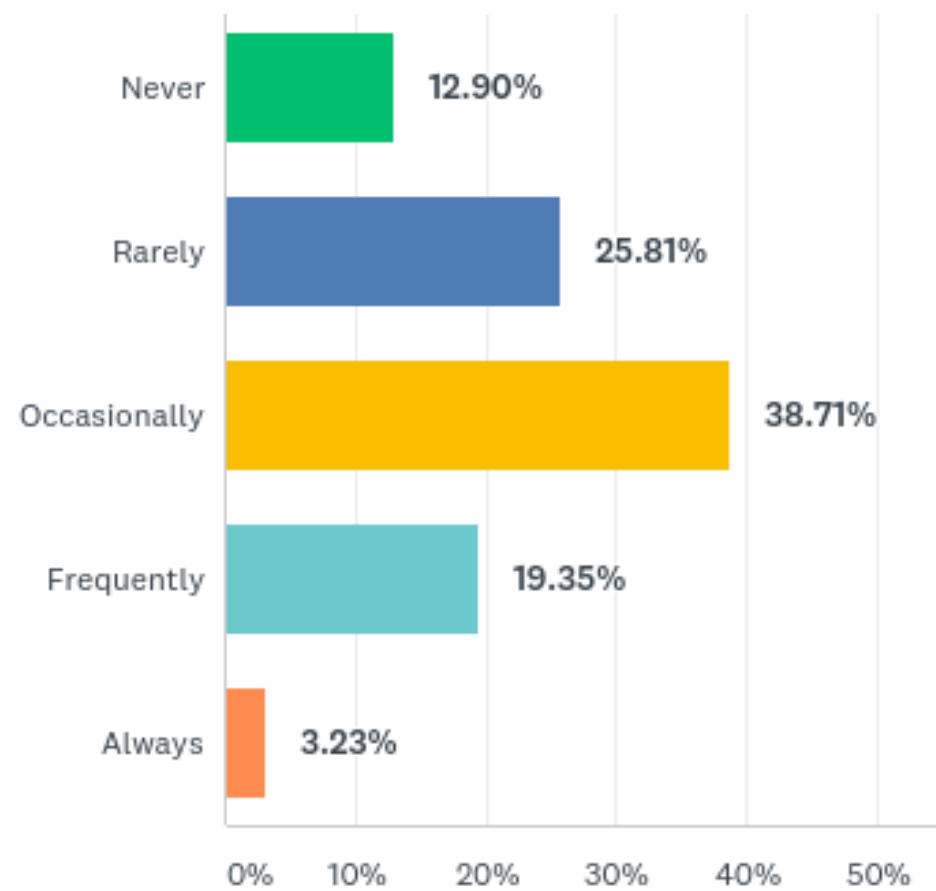
More often than not, a “Mediator’s Solution” (not “Opinion”) Works

Q21: How often do mediators express an opinion about the likely outcome?

Mediators



Advocates



Advocates think mediators give more opinions than mediators do.

Table Exercise and Debrief

Practice the Big Three



When All Else Fails, Try Humor

- Study found people exposed to a funny video before negotiating more easily came to resolutions
- People who laugh in response to a conflict are more likely to shift their thinking from one solution to seeing many
- Humor can be used to relieve tension and help manage emotions.
- Refocusing attention on less threatening aspect of event can reduce threat.

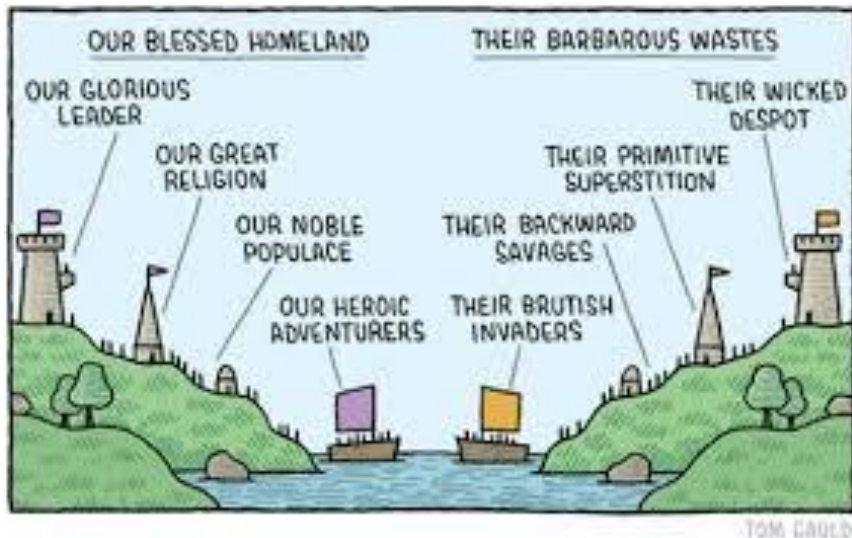


Example:

Kenny Hold it vs. Willy Make it

Whitney Meers, *The Funny Thing About Mediation: A Rationale for the Use of Humor in Mediation*, 10 *Cardozo Law Review* 657 (2009). Jacquelyn Smith, 10 Reasons Why Humor Is a Key to Success at Work, *FORBES.COM*, May 2013

Humor Humanizes, Normalizes, and Builds Trust



- Establishes connection between opposing parties
- When they see each other as human, it is a lot easier to resolve the dispute
- Other studies suggest people that demonstrate a sense of humor are more likely to be viewed as trustworthy and approachable

It Softens the Blow



Do you have a card that stops short of saying, I'm sorry, yet vaguely hints at some wrongdoing?

- Humor allows you to say things without putting others on the defensive
- Allows them to “save face”

*Example: “Don’t Jew me down”
I could have said, “You, anti-Semitic bastard ... this mediation is over.”
Instead, I said, “...”*

“I hate bigots and ...”

Scripted Improv

(I've used each of these successfully!)

- 1) When no one speaks: “Best looking and most intelligent person” or “audience participation portion of the mediation”
- 2) Lawyer Caucus: “Time to speak in Latin ...”
- 3) Coming back after caucusing ... Have you missed me? When was last time you told the truth!
- 4) “Assholian” behavior
- 5) Setting up BATNA with MLATNA
- 6) Oh, by the way play preemption
- 7) Expert Witness =
- 8) Consultant =
- 9) 82.397% of all stats are made up on the spot
- 10) If you don't have the facts argue the law ...
- 11) Pro Tem Judge Epiphany

Scripted Improv, cont'd.

- 11) The Latin version of BS =
- 12) Hey, fairness is getting the long half
- 13) Beauty of my gig is parties don't know where I am
- 14) Comment on Pictures of Wife and Kids on Lawyer's desk:
A) Come with frame? B) Your wife must be VERY good looking
- 15) Attorney is, how should we say, "a Zealous Advocate:"
A) Wry Smile B) Olympics 1 – 10
- 16) Settlement Dance: Don't care where you start ... just where you finish
... slow dance, twist, line dance, rock & roll ... it's up to you.
- 17) System works, but not always fair. OJ is still looking for Nicole's killer.
- 18) Failed Humor:
A) That's all I had,
B) Courtesy laugh, and
C) CLE speaker told me it would work!

Table Exercise and Debrief

Audience Participation Competition



Bust Your Butt to Get a Deal ... While Laughing at Your Own Foibles!

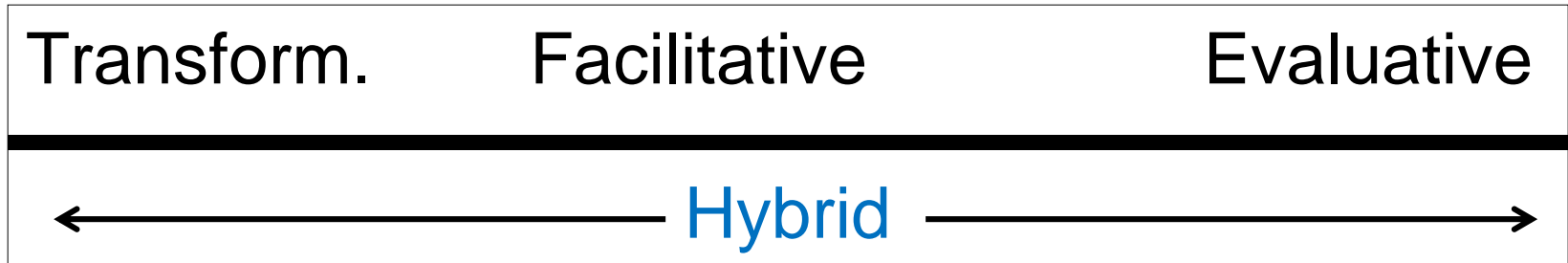
- End of successful mediation tying up loose ends
- One of the attorneys said, “Sam, sorry we had to bust your butt today.”
- I replied, “No problem. I thought you were all quite well behaved.”
- He said, “Turn around!”

I did and said,

***“What ... Aren’t your boxers
supposed to match your tie!”***



Change Mediator Approach



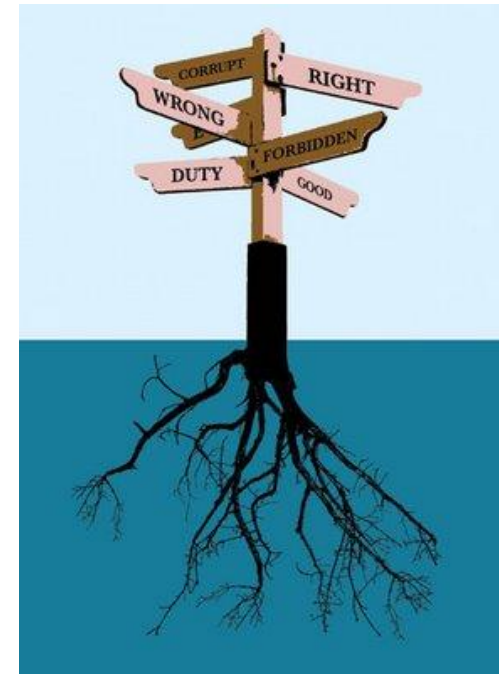
If Freud, Jung, Rogers & Beck were Mediators – Who would the Parties Pick?
43 Idaho Law Review 643 (2007)

Remember Our Mediator Ethics



"Let's just go with the commandments and work out ethics later."

1. Self-Determination
2. Impartiality
3. Conflicts of Interest
4. Competence
5. Confidentiality
6. Quality of Process
7. Communications by Mediator
8. Fees and Other Charges
9. Advancement of Mediation Practice



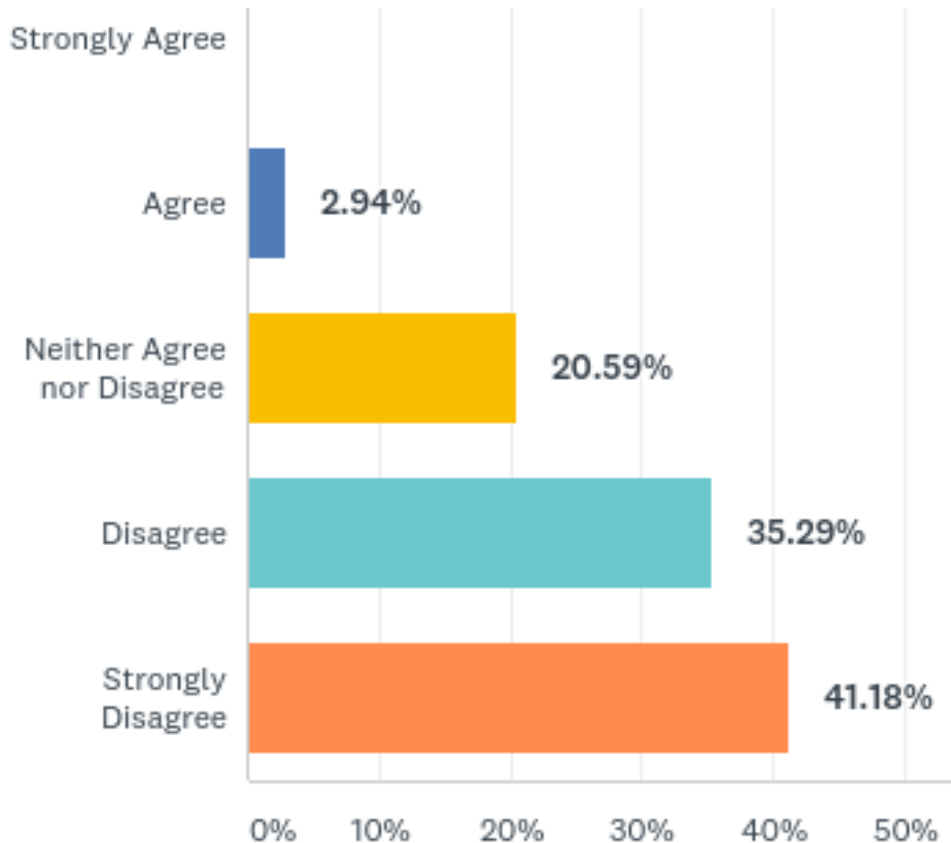
Close the Deal and Minimize Settlement Remorse

- 1) Have all bases been covered – any loose ends? Is the “deal” sustainable, durable and enforceable?
- 2) Who will do What, When, Where, and How?
- 3) Get a written agreement ... at a minimum, an informal memorandum of understanding with statement about finality and “settlement czar” provision
- 4) What will you do if problems develop in the future?

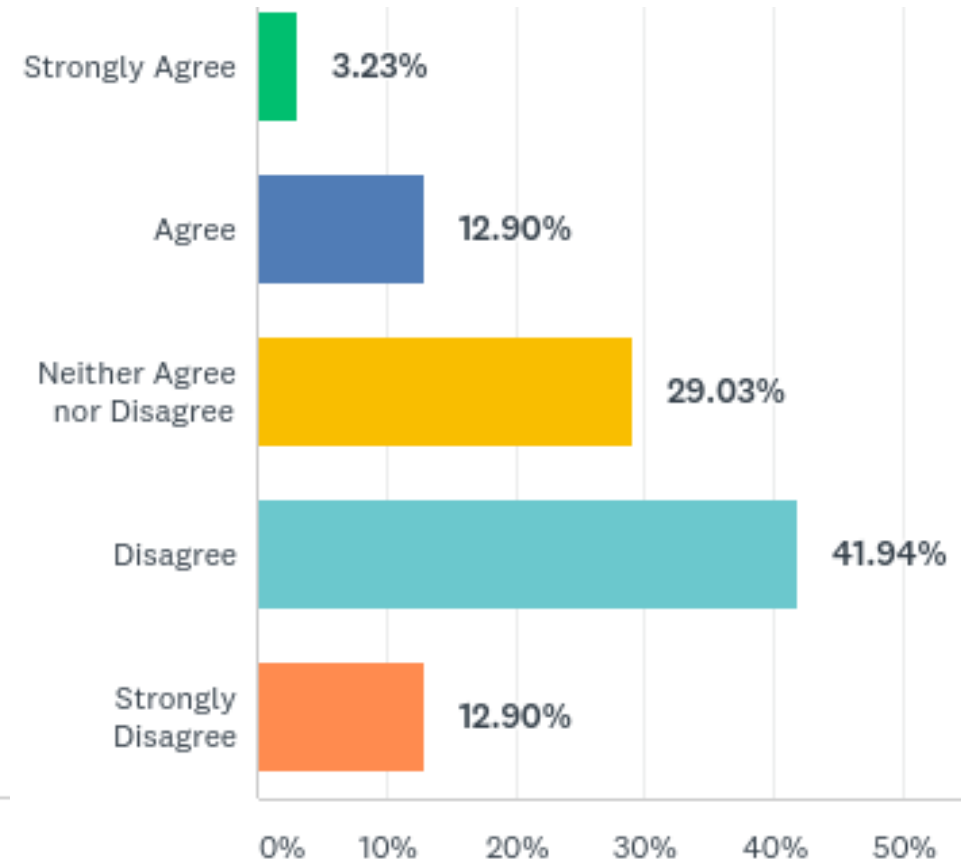


Q38: Consider mediation successful if no agreement.

Mediators



Advocates



Advocates more likely to equate success to settlement.

4) THE SURVEY CONTINUED ...

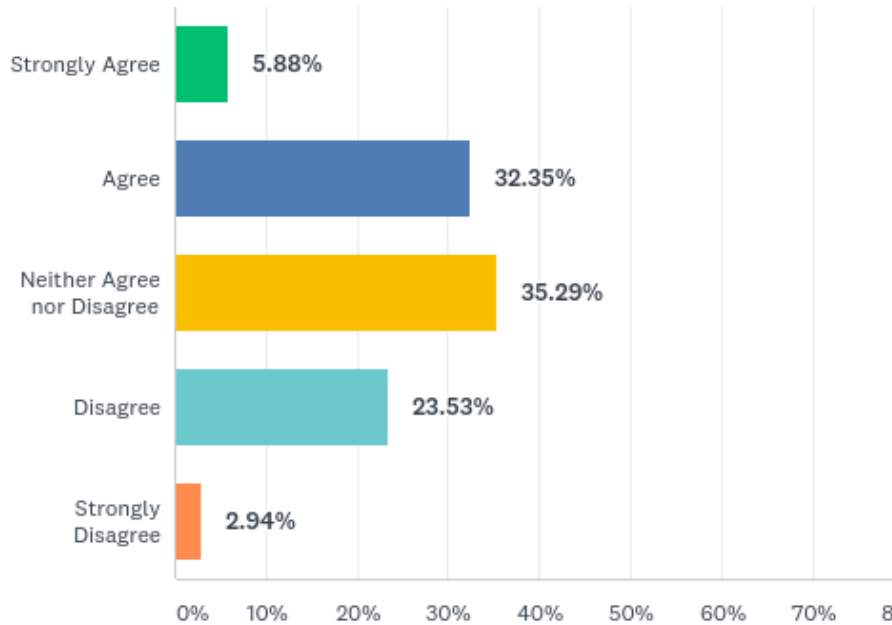
DISSONANCE:
IDENTIFY IT, OWN
IT, AND CHANGE IT.

[Whislte Baby](#)

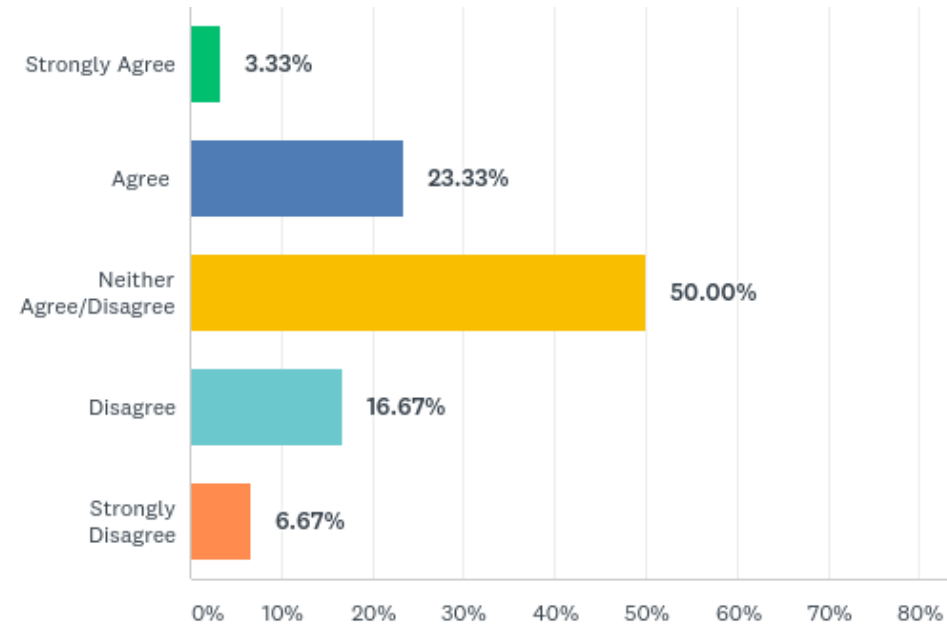


Q33: “Rectifying substantive power imbalances is an appropriate tool.”

Mediators

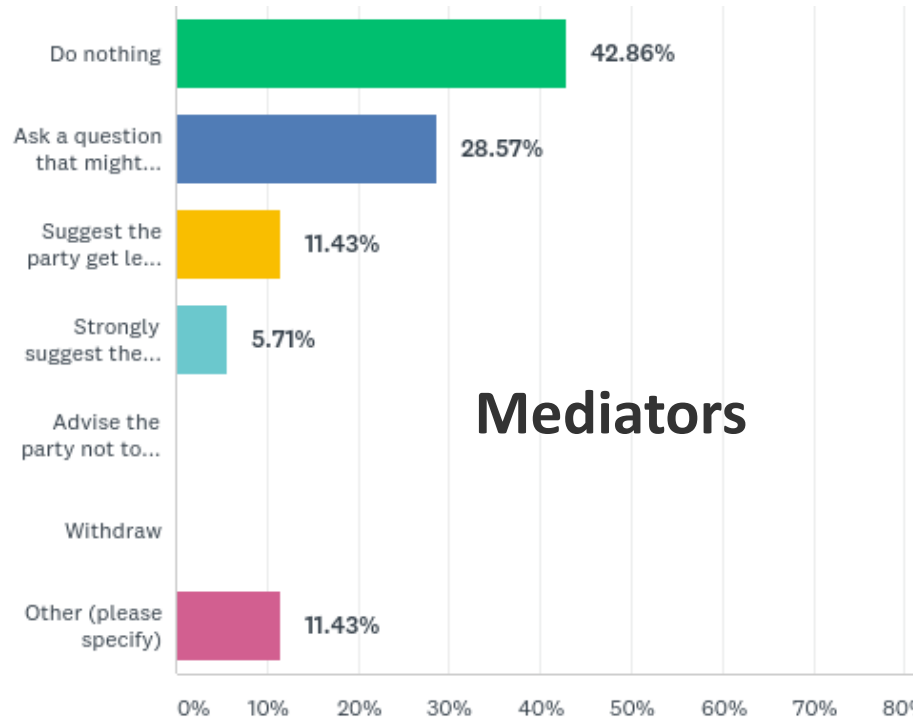


Advocates

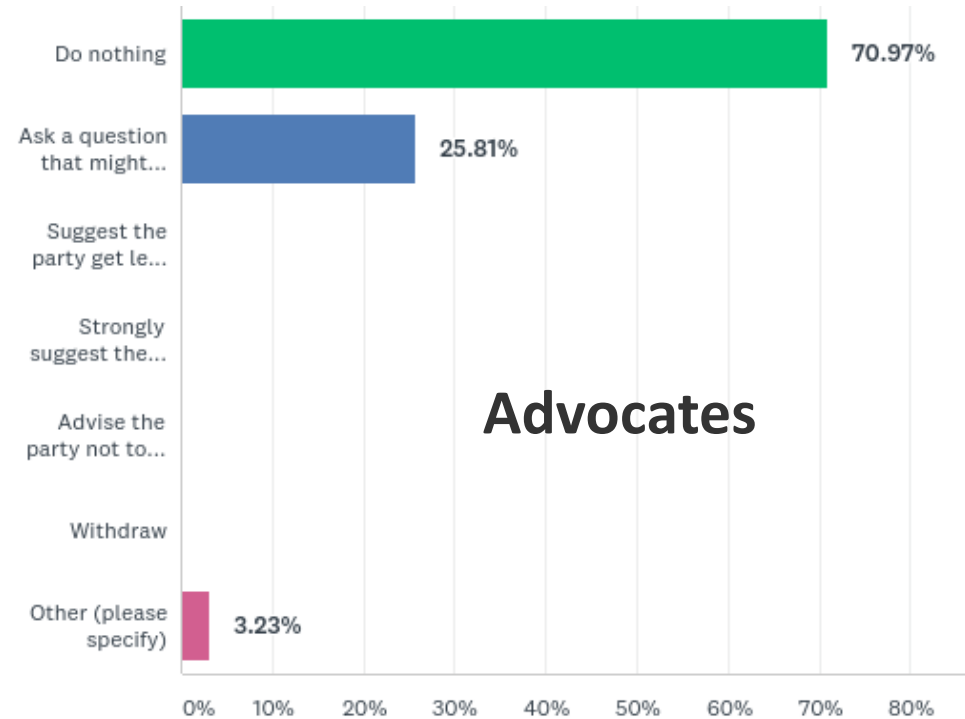


A bell curve on whether this is OK or Not OK.

Q17: What should mediator do when party about to make/accept proposal not as good as the result likely get ...?



Mediators



Advocates

Answer options:

Do nothing

Ask a question that might cause the party to rethink their decision

Suggest the party get legal or psychological advice

Strongly suggest the party get legal or psychological advice

Advise the party not to take the deal

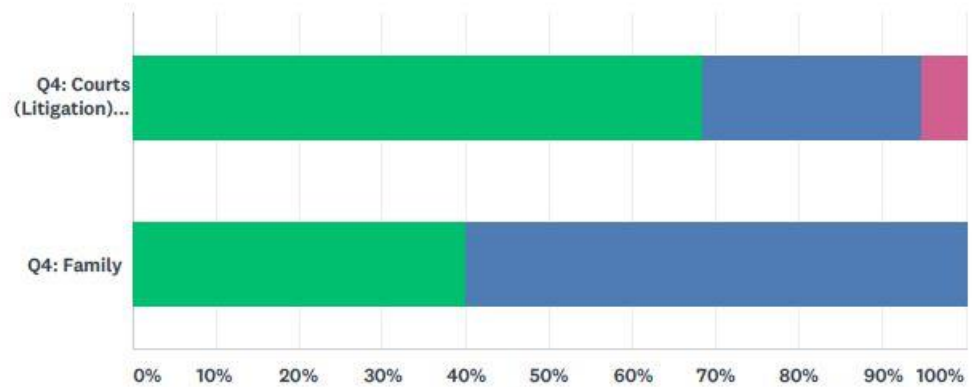
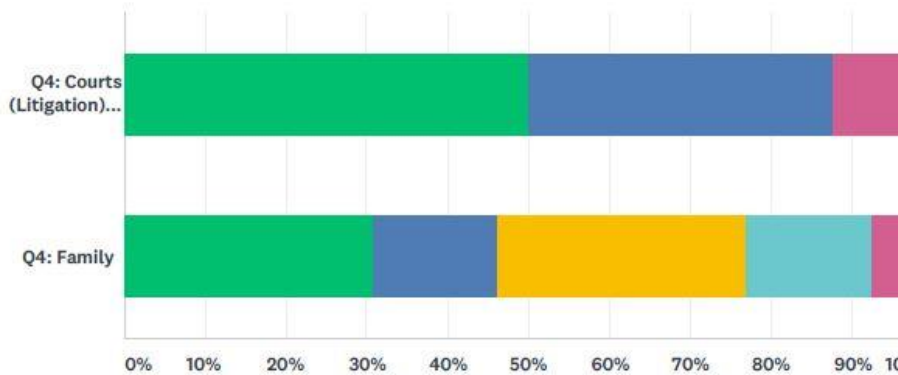
Withdraw

Advocates are much more likely to want the mediator to do nothing.

Courts vs. Family

Mediators

Advocates



■ Do nothing ■ Ask a question that might cause the party to rethink their decision
■ Suggest the party get legal or psychological advice
■ Strongly suggest the party get legal or psychological advice
■ Advise the party not to take the deal ■ Withdraw ■ Other (please specify)

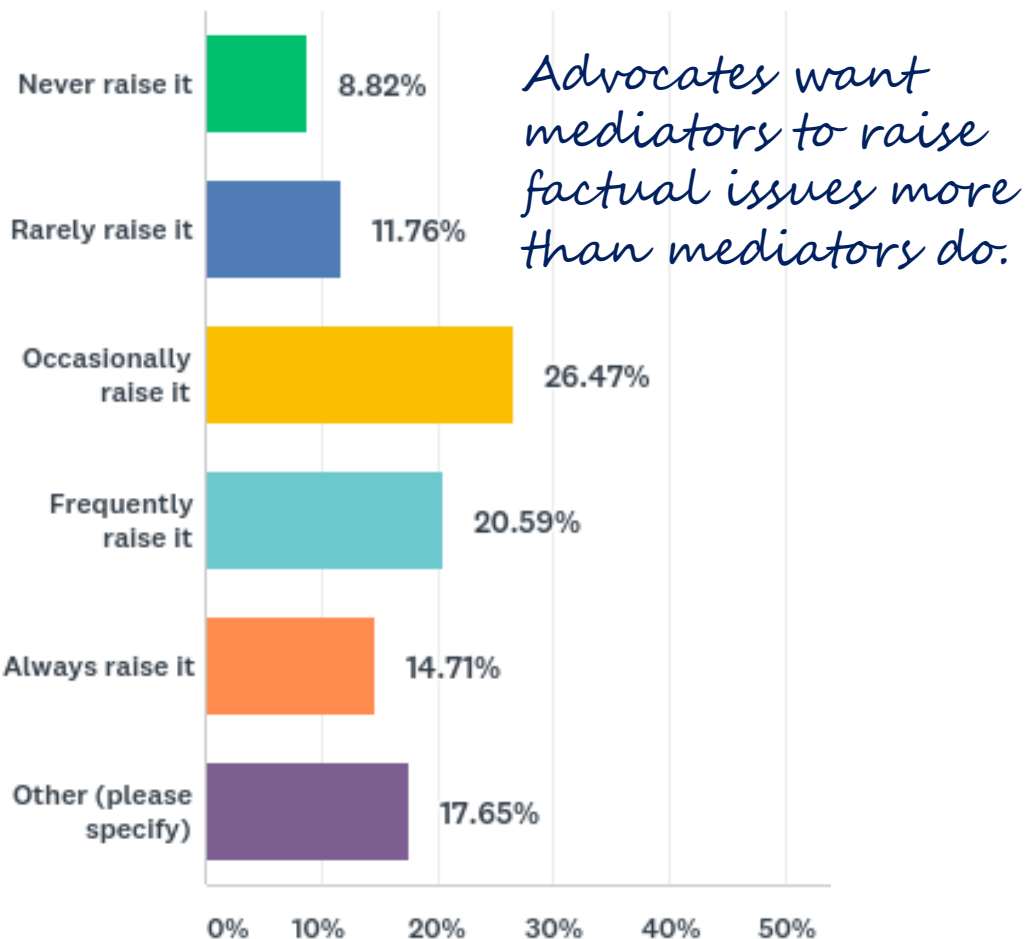
■ Do nothing ■ Ask a question that might cause the party to rethink their decision
■ Suggest the party get legal or psychological advice
■ Strongly suggest the party get legal or psychological advice
■ Advise the party not to take the deal ■ Withdraw ■ Other (please specify)

Doing nothing is less acceptable in the family law arena than in court.

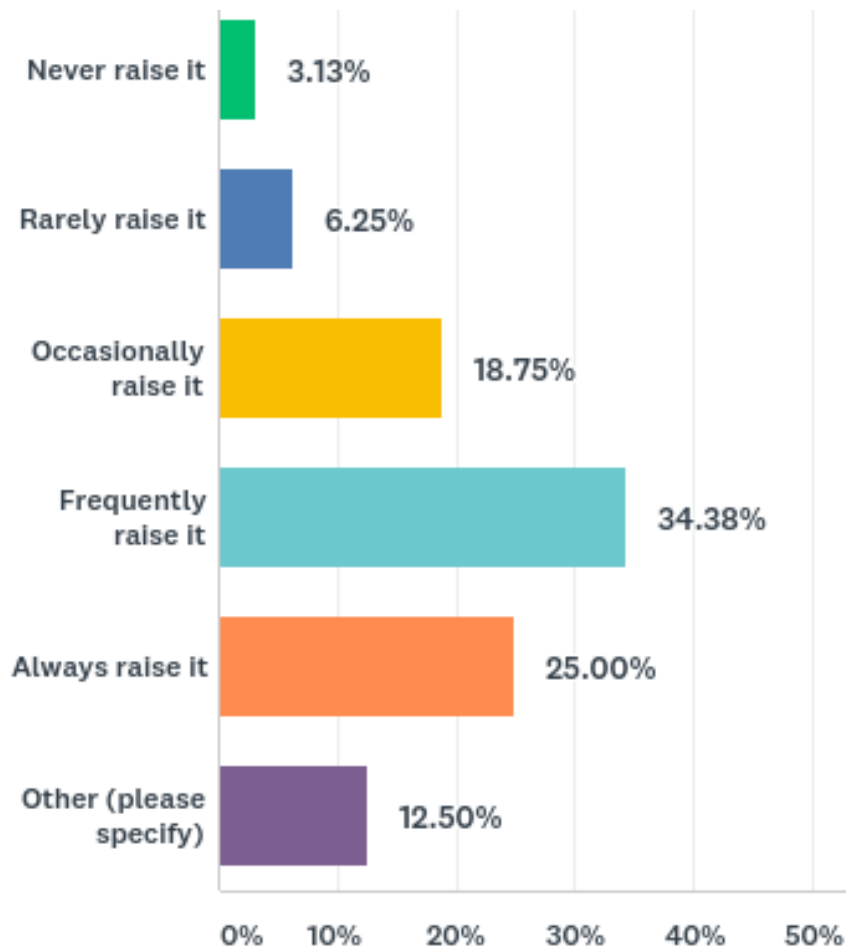
Family law mediators do more “nudging” than advocates want.

Q13: What should mediator do when one side does not raise an important fact ...?

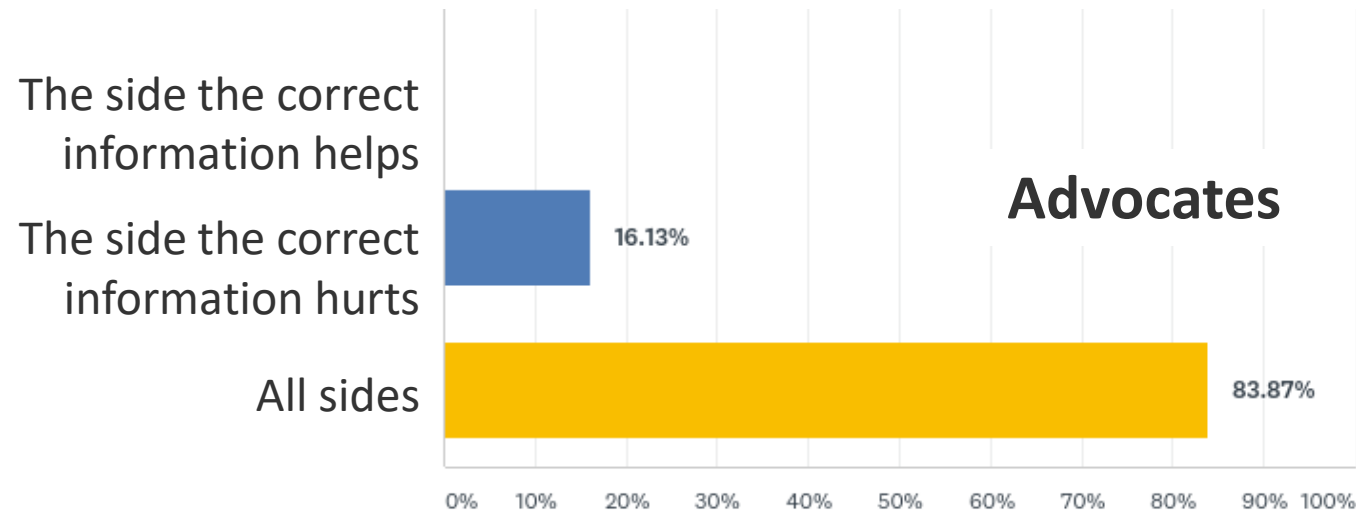
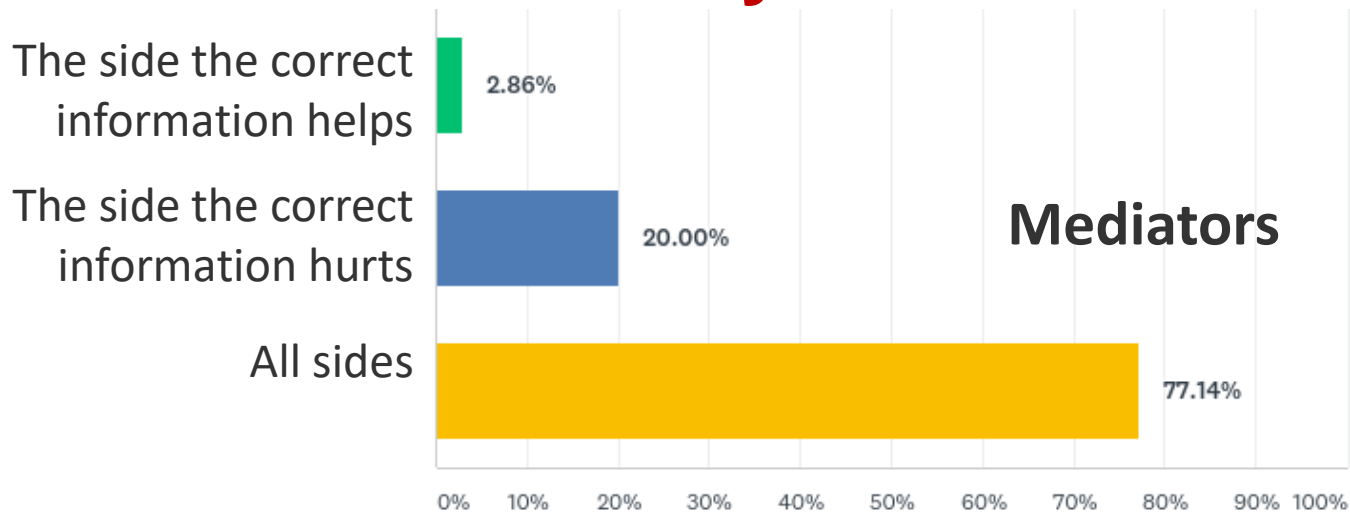
Mediators



Advocates



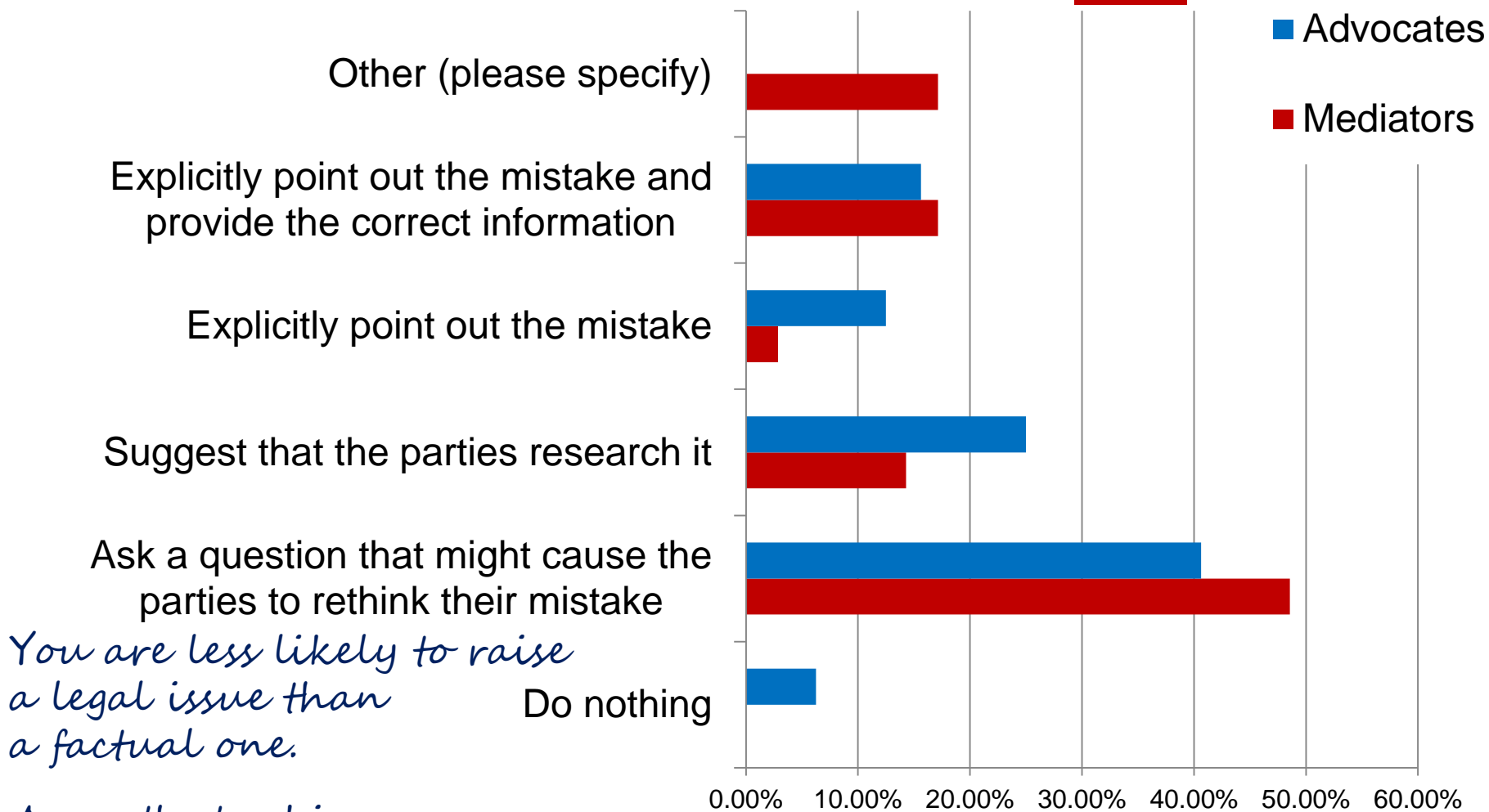
Q14: Assuming you do raise it, with whom are likely to raise it with?



The majority of you agree to tell both sides, but ~18% suggest you only tell the side it hurts.

Is using risk as a currency an OK mediator behavior?

Q15: What should mediator do when one side is mistaken about the law ... ?

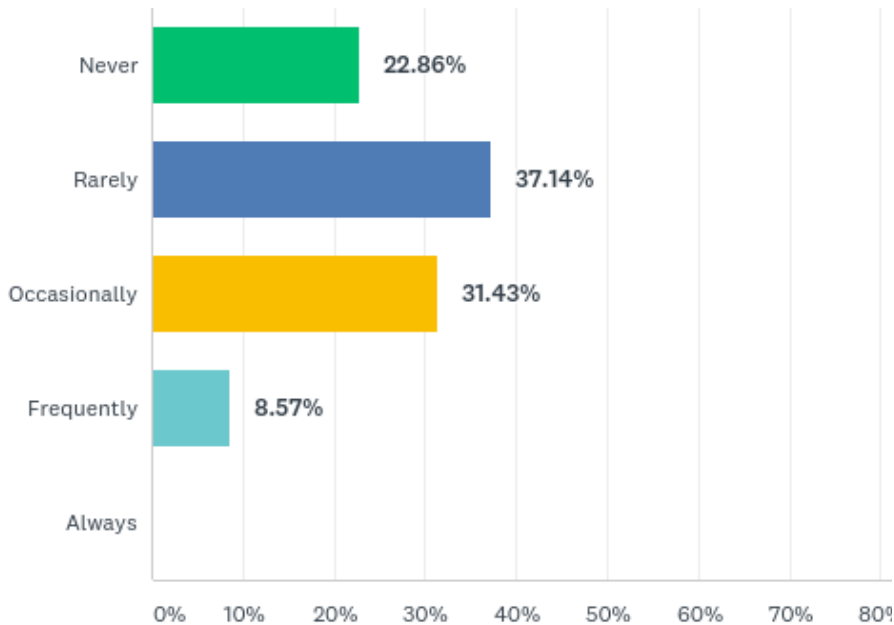


You are less likely to raise a legal issue than a factual one.

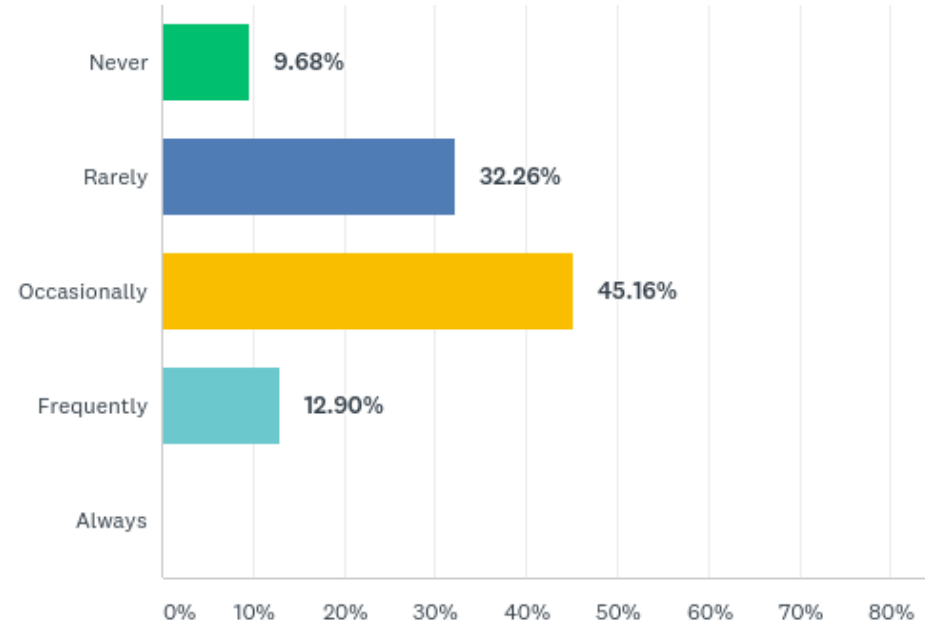
Agree that asking a question is good, but is it really an opinion dressed as a question?

Q19: How often does mediator express an opinion about the merits of an offer/demand?

Mediators



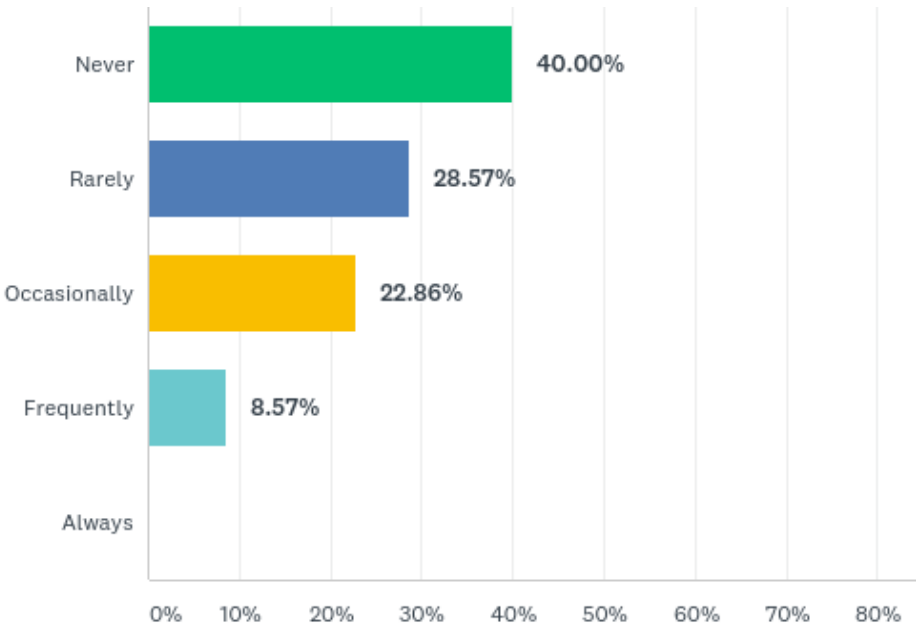
Advocates



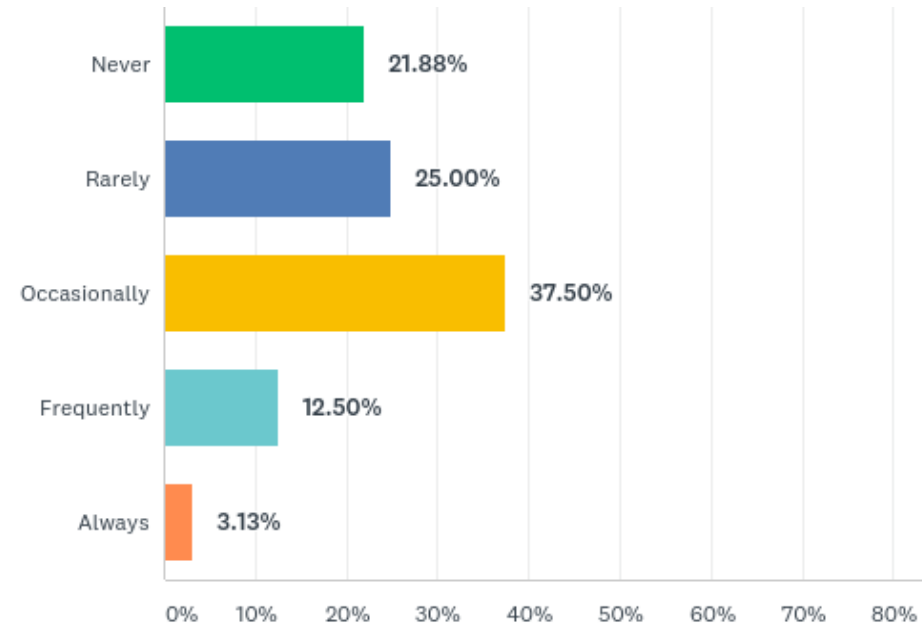
Advocates think mediators give more opinions than mediators do.

Q20: How often do you express an opinion about witness credibility?

Mediators



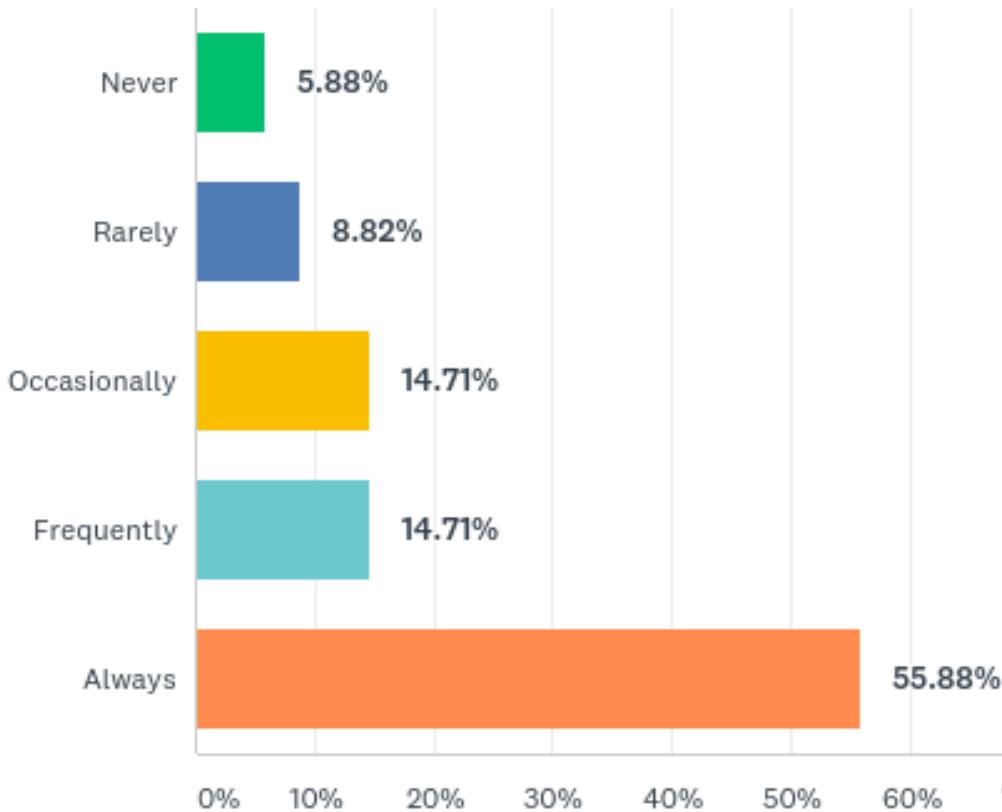
Advocates



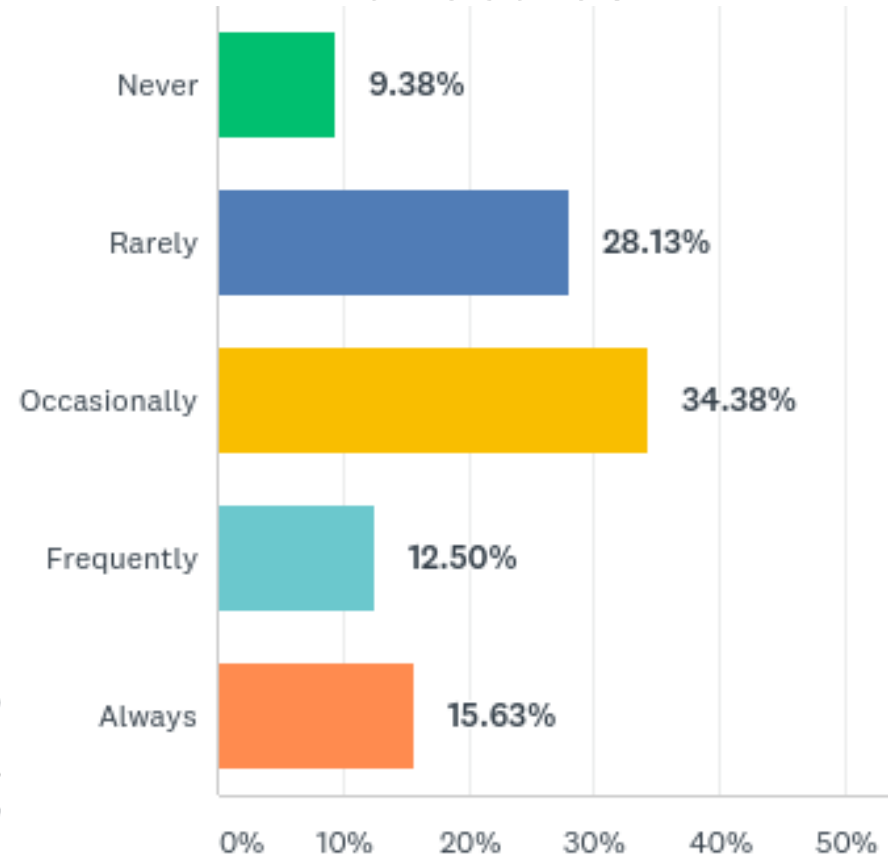
Advocates think mediators give more opinions than mediators do.

Q22: How often do mediators get permission before giving an opinion?

Mediators



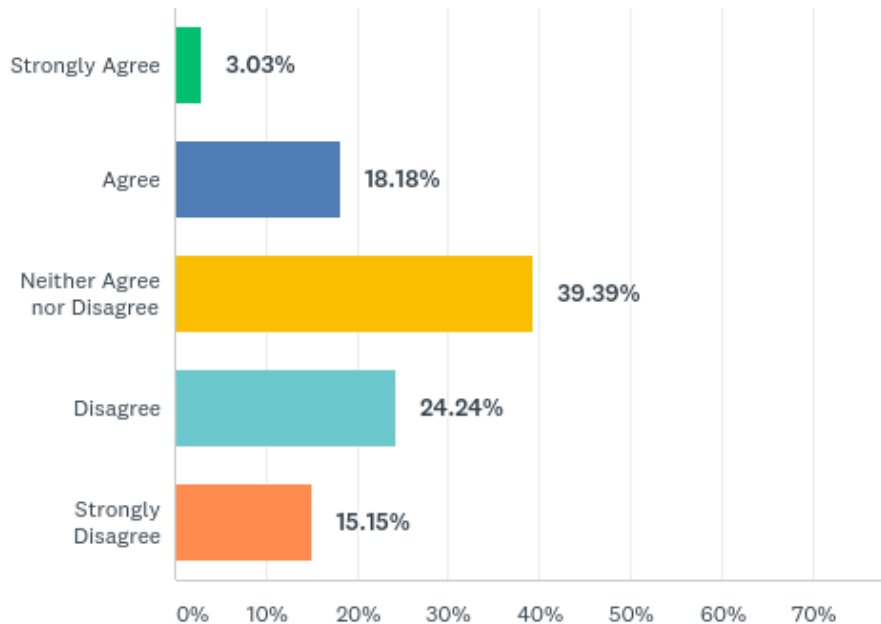
Advocates



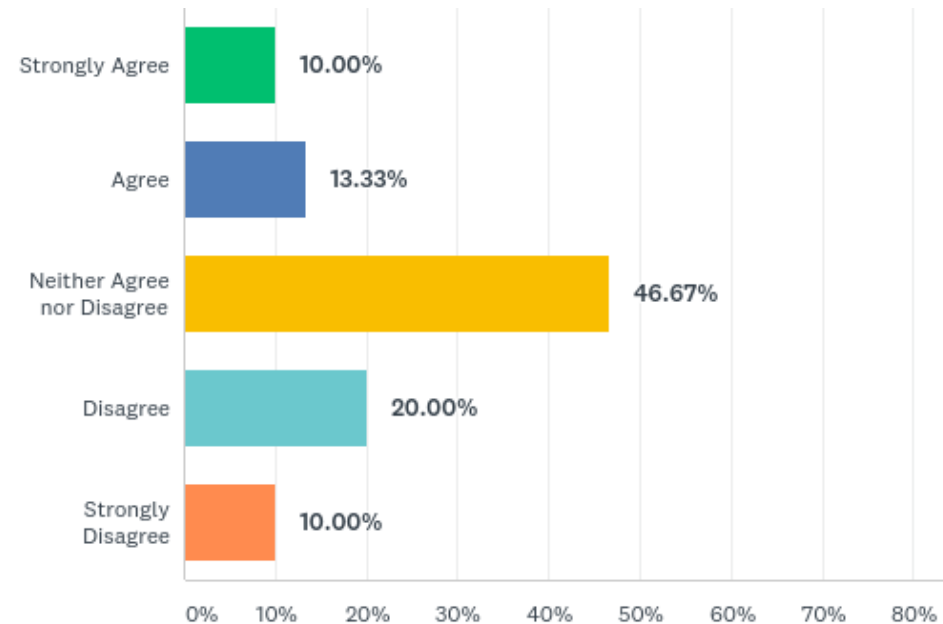
Mediators think they are asking, but advocates aren't hearing it.

Q35: “Assuming consent, it is appropriate to convert from mediator to arbitrator on language disputes.”

Mediators

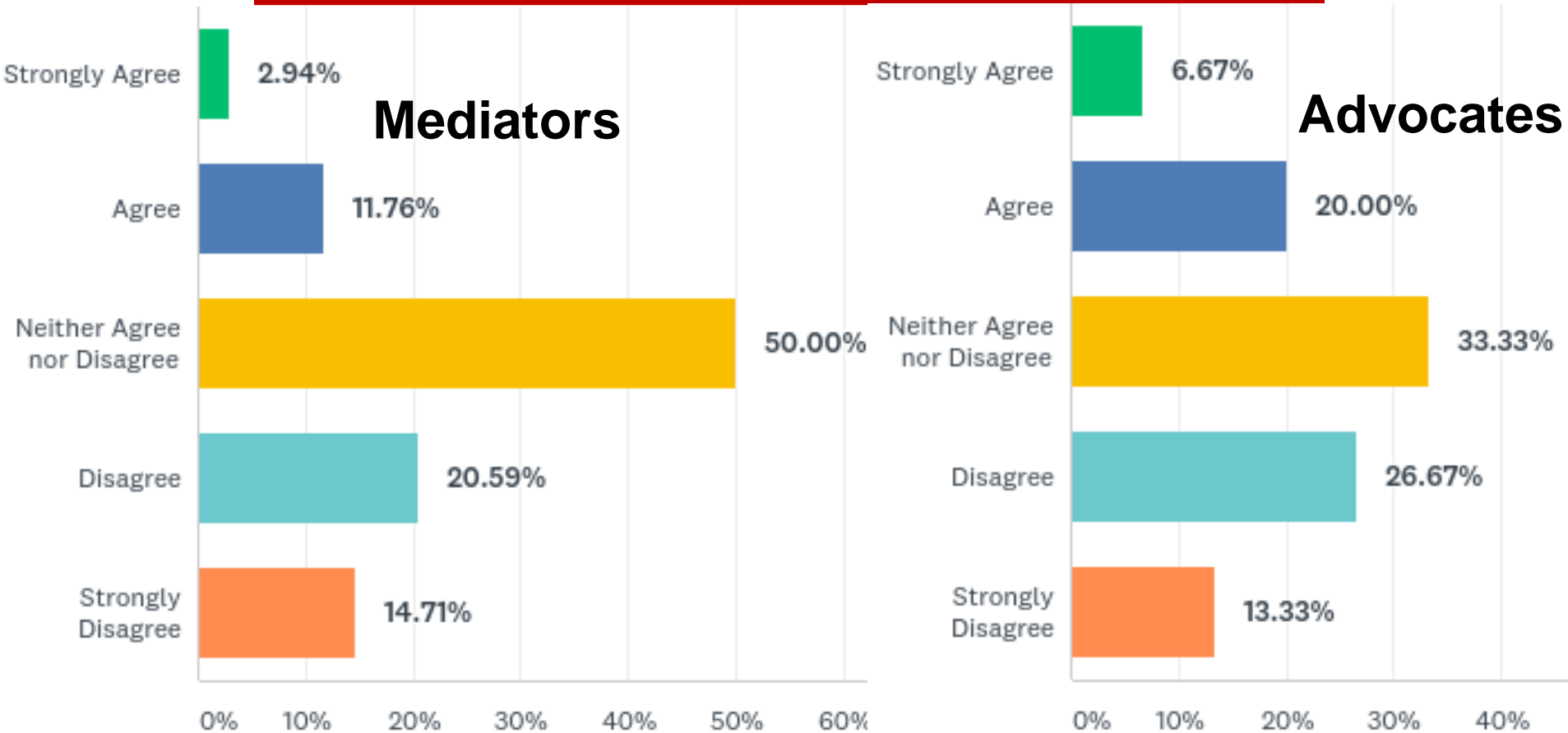


Advocates



Advocates slightly more open to post-session, mediator involvement.

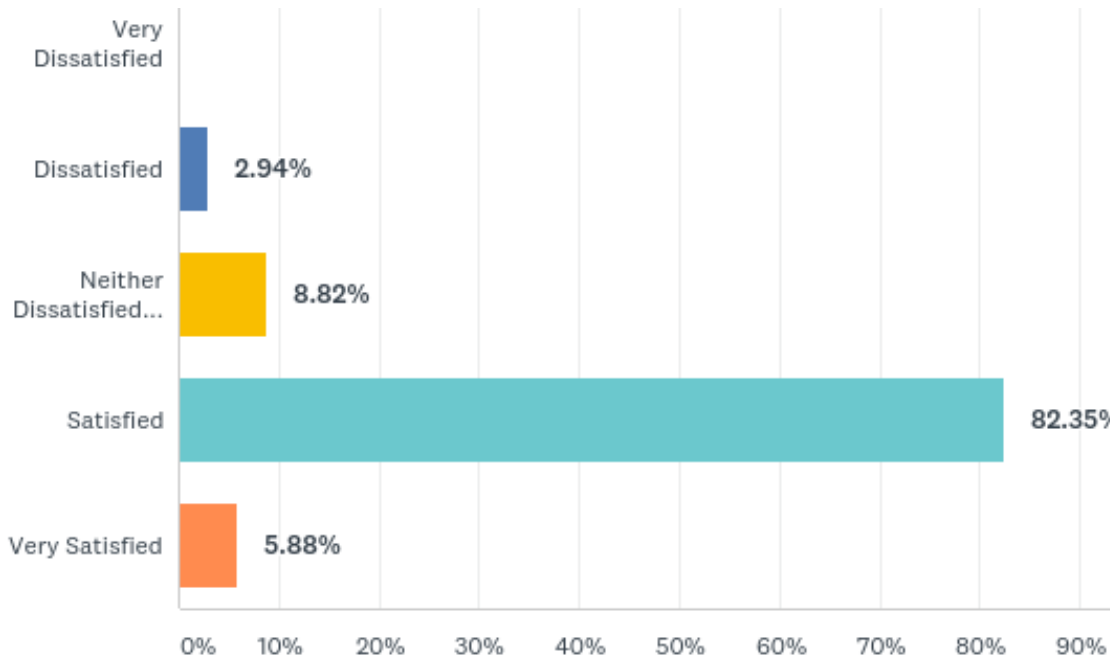
Q36: Assuming consent, is it appropriate to convert to arbitrator on post-settlement enforcement issues?



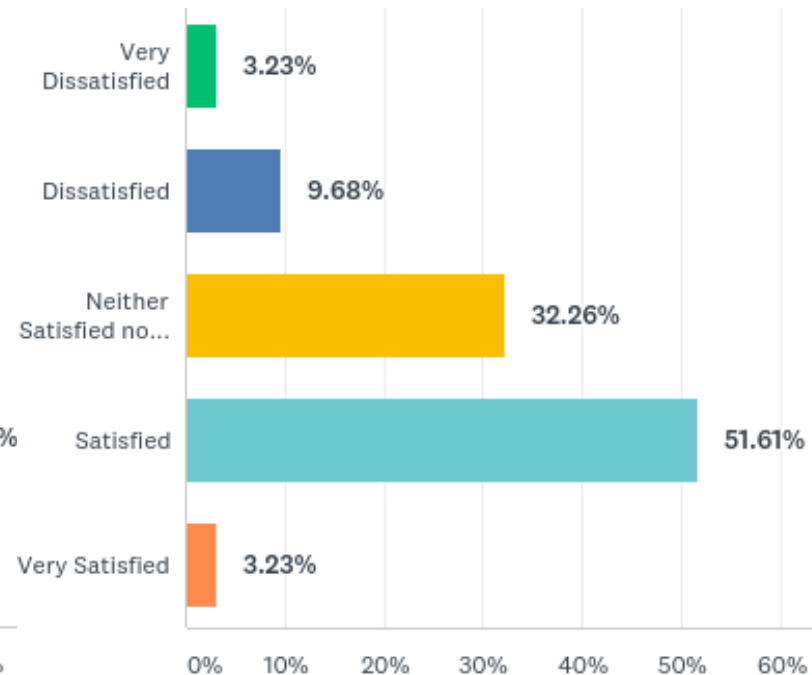
Advocates more open to post-settlement, mediator involvement.

Q39: How satisfied are the participants after mediation?

Mediators



Advocates



Mediators think the parties are happier than the advocates do.

Table Exercise

Dissonance: Identify it, Own it and Change it.



THINGS MEDIATORS SHOULD NOT DO



See Handout
Pages 1 & 2

THINGS ADVOCATES SHOULD NOT DO



See Handout
Pages 3 & 4

Table Exercise

“Saints” or “Sinners”



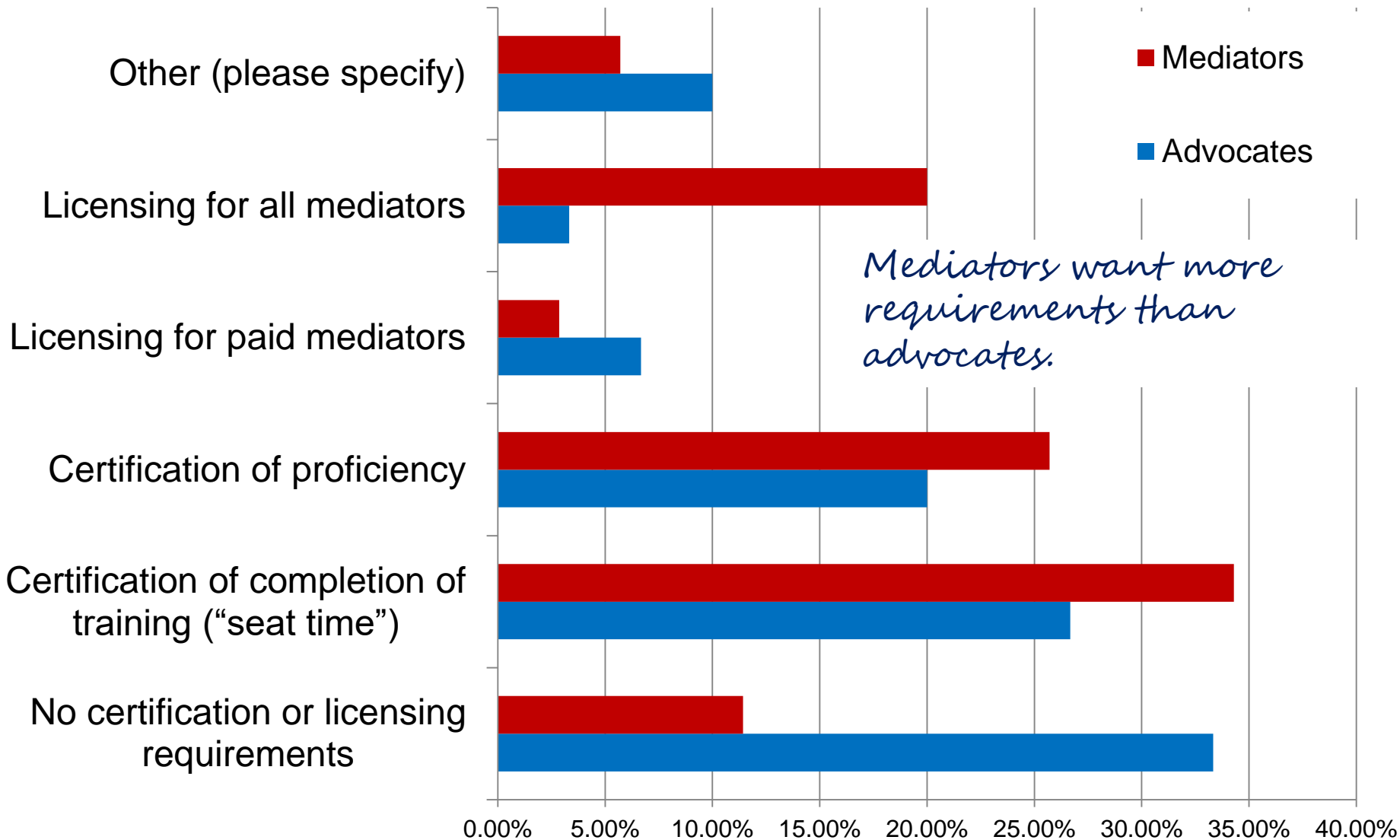
Big Group Discussion

Possible Solutions:

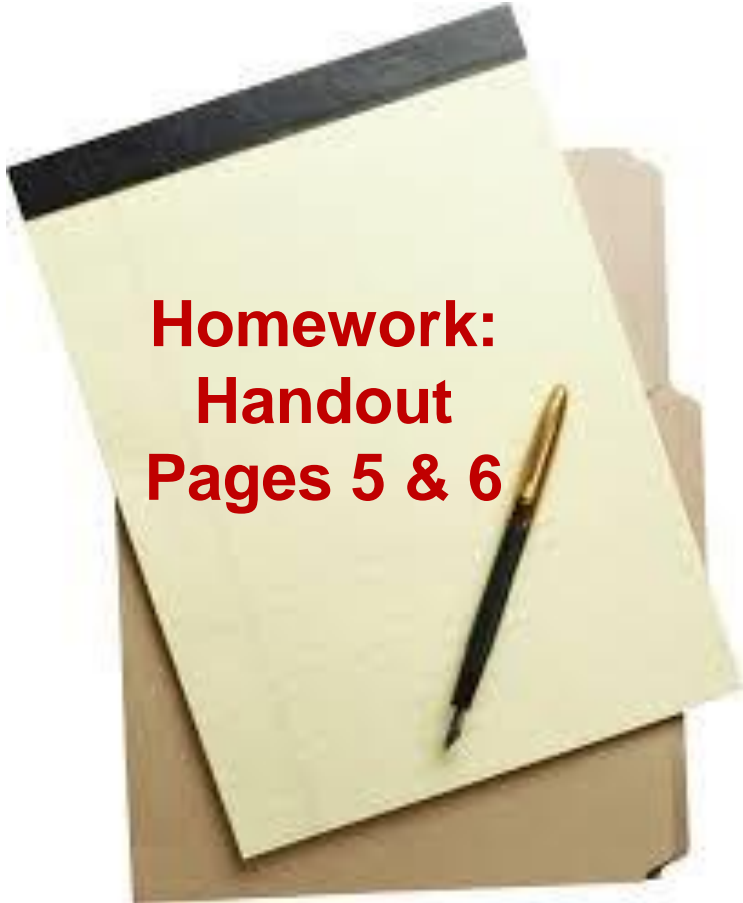
- a) More Robust Disclosure (Informed Consent = Party Self Determination) Attorneys should better vet potential mediators on what they tend to do under the circumstances described above, among others.
- b) Competency (Mediator Training)
- c) Better and Mandatory Standards of Practice
- d) Others?



Q27: With regard to Mediator Competency, which option do you prefer?



SUGGESTIONS FOR IMPROVING MEDIATION



**Homework:
Handout
Pages 5 & 6**

Closing Dance Number: Q and A

Dibert

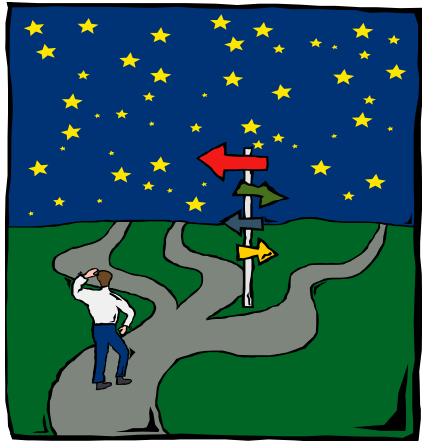


PLAY LIST

[Celebrate](#)

Pithy Poems

There was a mediator named Jim.
Parties' autonomy was critical to him.
He limited his tools
by following the rules,
And took pride when they settled, win/win.



There once was a mediator named Fay.
With the parties she held great sway.
By some she was maligned
For crossing the line;
But she settled her cases that way.

There once was a mediator named Stan,
Who had not an ethical plan.
He said to his fears, move over,
I'll try full disclosure.
Informed consent he found was great.
Now, the parties can mediate!

Sam's Drivel

- What if Jon Stewart and Stephen Colbert Reacted to Simon & Rhoades on Imperati on Bush and Folger! Mediate.com (September 2015).
- Ironically, Bush and Folger are Evaluative, Mediate.com (May 2015).
- Veils and Cloaks of Ignorance: Under-used Tools for Conflict Resolution, 30 Ohio St. Journal of Dispute Resolution 45 (2014-15).
- Why Does Anyone Mediate if Mediation Risks Psychological Dissatisfaction, Extra Costs and Manipulation? Three Theories Reveal Paradoxes Resolved by Mediator Standards of Ethical Practice, 29 Ohio St. Journal of Dispute Resolution (2014).
- If Freud, Jung, Rogers and Beck Were Mediators, Who Would the Parties Pick and What Are the Mediator's Obligation, 43 Idaho Law Review 643 (2007).
- Mediator Practice Models: The Intersection of Ethics and Stylistic Practices in Mediation, 33 Willamette Law Review 703 (1997)

Links to above articles at: <http://www.mediate.com/icm/pg23.cfm>

Humor Sources

- Clare Coburn, *Becky Batagol*, & *Kathy Douglas*, *How a dose of humour may help mediators and disputants in conflict*, 24 ADRJ 18 (2013).
- Jacquelyn Smith, *10 Reasons Why Humor Is a Key to Success at Work*, FORBES.COM, May 13, 2013, <http://www.forbes.com/sites/jacquelynsmith/2013/05/03/10-reasons-why-humor-is-a-key-to-success-at-work/2/#4d9acfb1c1a9>.
- Lawrence Robinson, Jeanne Segal, & Melinda Smith, *Managing Conflicts with Humor*, HELPGUIDE.ORG, Dec. 2015, <http://www.helpguide.org/articles/relationships/fixing-relationship-problems-with-humor.htm>.
- Linda E. Francis, *Laughter, the Best Mediation: Humor as Emotion Management in Interaction*, 17 SYMBOLIC INTERACTION 147 (1994).
- Melissa Smith & Jeanne Segal, *Laughter is the Best Medicine*, HELPGUIDE.ORG, Feb. 2016, <http://www.helpguide.org/articles/emotional-health/laughter-is-the-best-medicine.htm>
- Michael Nagler & Karen Ridd, *Humor as a Tool in Conflict Resolution*, DAILY GOOD, Jul. 8th, 2014, <http://www.dailygood.org/story/769/humor-as-a-tool-in-conflict-resolution-michael-nagler-and-karen-ridd/>.
- Phyllis Pollack, *To Build Rapport- Laugh Together*, Mediate.com, (Apr. 24, 2015).
- Wanda J. Smith, *Resolving conflict with humor in a diversity context*, 15 Journal of Managerial Psychology 606 (2000).
- Whitney Meers, *The Funny Thing About Mediation: A Rationale for the Use of Humor in Mediation*, 10 Cardozo Law Review 657 (2009).

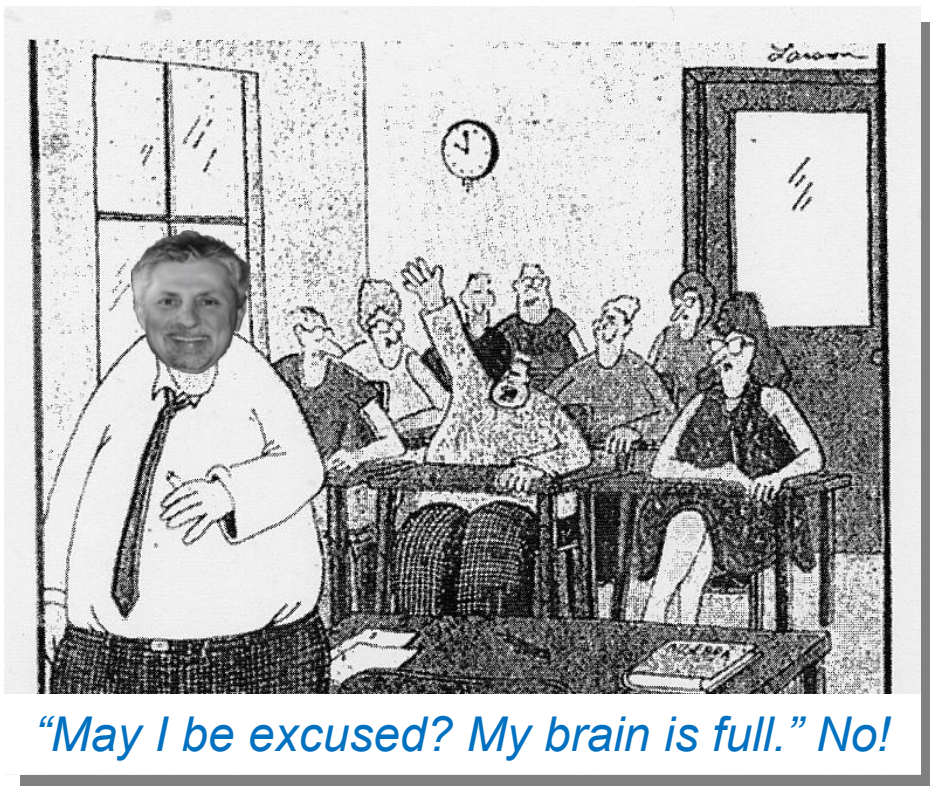
Next Step



As a result of today, I'm going to:

Program Evaluation

Thank You!



Federal Court and

- Tracy Uhrin
- Abby Tourville

Steering Committee:

- John Garvey
- Connie Rakowsky
- Melinda Gehris,
- Heather Scheibe Kulp

Each of You!

Glad You Came

Go Forth and Break Impasse!



I'm Out!

[Glad You Came](#)