

Negotiation Final Paper  
Prof. Lande  
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## **Background**

The mediation went about as bad as I could have imagined. Fred, my opposing counsel for the dispute, and I had worked for a couple weeks on a plan to guide our clients, Dana and Jan, to an agreement that was not only satisfying for both parties but also in their best interests. Both attorneys agreed that it was best for this dispute to be settled outside of the courtroom for financial and emotional reasons. However, after the planned apologies of the clients and the parties' alternating visits with our mediator began, everything turned upside down. Through the mediator's guidance, the mediation became a series of offers and counter-offers that pitted one side against the other. What the attorneys had planned to be a cooperative exercise became a Positional exchange of offers that only included raw numbers and little explanations. We left the bargaining table with no agreement and I left with a series of questions. How did that just happen? Where did all that resistance come from? What happened between our last meeting and the end of this mediation?

I was able to generate answers to these questions, but these answers led me to more questions. I came to the conclusion that it was the mediation process and the mediator that switched the tracks for our planned negotiation. The mediator only encouraged the emotional concerns of the parties to be shared in the initial apologies and thereafter kept each party separated. A case ripe with emotional issues stemming from a parent's death was mediated in the Positional way a business dispute would be settled. "Fred" and I had agreed that the parties would have opportunities to explain their



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rationale when asking for something, but that never happened in our mediation. Both sides fell into the trap and started making Positional offers and counter-offers that ultimately led to a stalemate. I tried to think of what went wrong, but this only left me with more questions. What do you do when the greatest perceived barrier between two sides reaching an agreement isn't the opposing party? What do you do when it seems your mediation is actually pushing the sides farther apart than closer? What could I have done to avoid this?

### **Introduction & Discussion**

This paper will discuss three different approaches, which are not mutually exclusive, that I could have used, and sometimes did use, during the negotiation. These approaches are the Cooperative, Interest-based approach I anticipated using; the Positional (or Maximal-Result, Concessions-Oriented) approach the mediation dissolved into; or an Appropriate-Result, Consensus-Oriented (or Ordinary Legal) Negotiation. I will discuss each of these approaches and the techniques I could have used to practice these approaches. I will also discuss the possible positive and negative consequences for each technique.

#### Cooperative Approach

A cooperative, or mutual problem-solving, approach aims for the greatest gain to be made and the end goal is for both parties to be benefited by the agreement. John Lande, *Lawyering with Planned Early Negotiation: How You Can Get Good Results For Clients And Make Money* 65 (2011). The two sides hope to create more value than originally conceived by finding what subjective value each party might have in a distribution. The interest-based approach is especially helpful when the parties involved



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will have a continued relationship. *Id.* at 66. The approach generally includes more information sharing and discussion of opposing viewpoints in hopes of understanding what the parties value and how it can be best distributed. *Id.* at 68.

This was the approach I had chosen to go into the mediation with, and I think both parties would have been better off had I stuck with it. When the mediation became a series of offers and counter-offers with little to no context provided for the numbers offered, I could have pushed for information sharing and stressed the importance of our clients' interests. Instead, I started making offers that were made in hopes of garnering the most money for my client, despite what negative consequences this could have for the two brothers locked in this dispute. When I had discussed the distribution of assets with my client before the mediation, he had stressed to me that "fairness" was the most important thing to him. This non-monetary interest was lost in my reaction to the other side's offers.

A few ways I could have tried to steer the mediation back to a cooperative, interest-based negotiation are found in the readings from our class. I will discuss each and the possible positives and negatives that could have come from their usage.

*1. Begin by noting areas of agreement and disagreement and acknowledging the legitimacy of the other sides' interests. Id.* at 68.

The central issue of our dispute was the distribution of the family home and the financial investments. My client, Jan, had told me before the mediation that he didn't think it was necessary to kick his brother out of the family home in exchange for money. However, when the mediator shared an offer from Dana that was unacceptable, Jan and I quickly sent an equally unreasonable offer right back that could have only been satisfied



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with the sale of the home. What followed was a series of offers and counter-offers that moved slowly on each end of the spectrum.

The book *Beyond Winning* encourages negotiators to not just respond reactively to an opposing party's approach by fighting fire with fire. I could have agreed that Dana could be able to keep the house, but explained that we disagreed on what financial obligations should be attached to that agreement. I could have conceded that Jan understood that Dana needed a place to live and that their mother had wanted for Dana to live there. One possible positive from this approach is that it could have disarmed the opposing counsel and led to more reasonable offers being made. However, this might have been seen as a sign of weakness and allowed for Dana to feel justified in his original offer.

*2. Reflect on and discuss with the other side what may have caused the negotiation problems (such as misunderstandings, mistaken assumptions, and cultural differences) and possible ways to get back on the right track. John Lande, Lawyering with Planned Early Negotiation 100 (2011).*

The mediator's choice to keep each side separated almost nullified the rapport that I had built with Fred. Without context or an understanding of the other side's interests in making an offer, it seemed impossible to participate in a cooperative dispute resolution. It would have been a smart idea to ask for both parties to meet at the same time and discuss the problems they were seeing. Fred and I had discussed how we would guide our clients toward an agreement by letting them hear the other side out and reframing those statements for our clients. We believed that one of the greatest barriers to an agreement



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before the mediation was a lack of communication. The communication actually became worse as we went through the mediation.

If we had asked for a meeting where we would reflect on disagreements and think of possible solutions we could have moved past the impasse created by the lack of communication between the parties. My client had told me, in our meetings before the mediation, that he wanted to be treated like an equal family member. When I asked him how much financially this meant to him, he was unable to come up with a figure saying that it meant “a whole lot.” Being a part of a discussion with his brother about communication gaps and possible solutions might have given him the feeling of inclusion that he had been unable to put a dollar amount on when I asked him. This could have produced the breakthrough we needed to make some compromises and come to an agreement. Conversely, it also could have led to more confrontation and even worse communication if either side took the unreasonable offers that were being exchanged personally.

3. *Have a conversation between the lawyers without the clients. Id.* at 102.

Fred and I had established a great rapport in our meetings leading up to the mediation and I feel like that relationship was squandered when we didn't interact during the mediation. I knew that the plan we had worked out wasn't being followed and that this wasn't the dispute resolution we had envisioned. I had planned to lean on this relationship to garner support from Fred in convincing his client our offers were fair and had also planned to support Fred in his offers to my client if they were reasonable. Had I been in the room with Fred as I was making these offers, I would have felt more accountable to him and the relationship we had formed. I would have made more



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reasonable offers to help my colleague. However, the presentation and attitude of our mediator did not reflect the relationship Fred and I had established. The discussions with the mediator were not cooperative and it seemed that my requests for information were being lost in translation or the answers were not being reported to me.

I could have asked for a moment to speak with opposing counsel and see what he was thinking. The two of us had brainstormed ideas to help us reach an agreement in previous meetings and we could have done this again. A meeting with just us would have allowed us to truly represent our viewpoints without fear of offending or losing the confidence of our clients. This tactic could have helped us redirect the mediation back to the cooperative approach we had previously agreed to. One possible negative consequence would be the clients thinking that the attorneys were working together without regard to the clients' needs behind closed doors.

#### Positional Approach (or Maximal-Result, Concessions-Oriented)

The Positional approach usually includes each side trying take as much as possible for itself. *Id.* at 58. This is called a “zero-sum” situation, where each side’s gain is directly comparable to the other side’s loss. *Id.* Lawyers usually demand more than they hope to get at the outset and then decrease their offer while negotiating, hoping the other side will concede at the highest gain possible.

When the mediator presented me with the other side’s unreasonable offer, without any explanation as to where the numbers came from, and encouraged me to come up with a number to send back, I adopted the Positional approach I had inferred from the offer. Instead of thinking of how the offer might serve both parties interests, I began to think of



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how we could get my client the most money out of the deal. Numbers, rather than interests, became the topic of discussion.

Here are a couple of the techniques I could have used in a Positional approach to our negotiations and the positive and negative externalities that might have followed.

*1. Look for options that would make one party better off with little or no cost to the other, taking advantage of differences in valuations, expectations, risk preferences, and time preferences. Id. at 101.*

There were a few opportunities to use Dana's values of assets in the estate against him. The most effective would have been the house. Dana saw the house as more than just a financial asset but also as a place he could live. A place he had lived with his late mother and could live in with his partner. This home had more sentimental value to Dana than Jan and this could have been exploited. Dana also voiced a desire to keep certain pieces of artwork. We could have initially denied this request in hopes of using it as a bargaining chip later. These tactics would allow us to trade these values for more money, which was my client's main interest in the assets of the estate.

If I had not agreed up front to allow Dana to keep the paintings, as a sign of good faith in our cooperative mediation, I could have used them to get something my client really wanted, like one of the investment stocks. I could have also offered a deal that included continuing to live in the house in exchange for cash paid to Jan in addition to the mortgage. The materials detailed how Dana could have taken out an additional mortgage for the money Jan wanted. This plan would allow Jan to receive additional money from an asset he had little emotional attachment to. This plan would have taken advantage of Dana's valuation of the paintings and home in hopes of getting the most money.



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However, this is probably a negative consequence given that wasn't Jan's highest priority in this deal. Fairness was his chief concern. Jan's "fair" deal might not have required the extra mortgage if he understood his brother's financial situation, but this was never presented to him by his brother as a result of the mediation process chosen.

*2. Note the losses that would result from continued disputing. Note that it does not make sense to justify continued disputing because of "sunk costs" that already have been incurred, as parties are unlikely to recover them in any case. John Lande, Teaching Students to Negotiate Like a Lawyer, 39 Washington University Journal of Law & Policy (forthcoming 2012).*

In this problem, there is an obvious difference in disposable income between the clients. Jan would most assuredly be able to afford the costs of litigation more than Dana. Dana might not even be able to pay for the case to go to trial. Even if his attorney were to agree to a contingency fee, the amount of money he could win in a trial would be greatly depleted by his legal fees.

I could have requested that the mediator relayed this information to Dana and his attorney during the exchange of offers to help him realize the benefit to making a deal. Jan was definitely in a better position to ride out litigation than Dana and this was a position of power. Positions of power are to be exploited when arguing in a predominantly Positional negotiation. This could possibly backfire if Jan realized the potential costs he was facing should the case move into litigation. Even though he had more money available, does not mean that Jan would want it to be spent. Jan might become more demanding of an agreement to save him money, too. This could weaken our bargaining position as well.



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Appropriate-Result, Consensus-Oriented (ARCO (or Ordinary Legal Negotiation))

An ARCO negotiation uses the facts of the case to assess the appropriate result using the applicable legal norms. John Lande, *Teaching Students to Negotiate Like a Lawyer* (forthcoming 2012). These legal norms would incorporate not only the black letter law, but also the practice culture where the dispute is being decided. *Id.* These negotiations usually do not include numerous offers and counter-offers, but rather each attorney doing their due diligence to find analogous situations in the local legal community and their results. *Id.* These results would help the attorneys cooperatively shape a settlement. *Id.*

As discussed in Prof. Lande's writing *Teaching Students to Negotiate Like a Lawyer*, it is difficult to give students the legal background needed for an ARCO negotiation. In this case, it was especially difficult because the attorneys were students without any practical knowledge in the field and very few of us had taken coursework that was relevant to the dispute. However, some research was done and analogous cases were found. During our mediation absolutely no mention of the legal norms was made between parties. This seems highly unrealistic and I believe that this, along with the lack of communication mentioned previously, might have ruined our attempt at dispute resolution. For this approach to be successful we should have been sharing legal research prior to the mediation itself, but unfortunately we had not been.

1. *Attorneys share legal research and facts that they believe would influence an appropriate result that could be garnered in a trial court. Id. at 7.*



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Fred and I did very little sharing of our legal research going into the mediation. We both agreed on what the legal elements were for my client's claim, but did not discuss any of the cases we had found that might shed light on what an appropriate result would be. We instead focused on our client's interests and how we could foster an agreement that would make both of them happy. In retrospect, I believe our approach might have been naïve. As Prof. Lande's article discussed, most lawyers seek results in settlements that are not only desirable to their clients but also reasonable under the law. *Id.* at 8.

Fred and my broad understanding that we would work together to satisfy our clients' interests while supporting each other's reasonable requests was not guided by any legal standard. We should have shared our legal research so that we would have informed understandings of what legal norms would be used in our negotiation. Though we didn't have to use the case names or even the details from the cases in front of our clients during the mediation, we could have had a shared understanding of what kinds of offers might actually happen in court. The negative side of this could be handing over a case to Fred that undermined our side and weaken our bargaining position.

*2. Attorneys use the legal norms to guide their offers and their reactions to counter-offers. Id.* at 7.

I could have provided Fred with the cases I had found that were on point and he could have done the same for me. We could have met again to discuss what we each thought was an appropriate result and then started to work toward an agreement based on that.



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This would have given us a much stronger framework to go into the mediation with. Even without direct communication from Fred, we would have already limited the scope of our negotiations some by sharing a reasonable standard that we each at least understood. The unreasonable offers probably wouldn't have been exchanged and we would have been able to present more palatable offers to each other. A possible negative consequence of this tactic is that could limit the offers we would make to the other side. The mediation didn't take place in a courtroom and wasn't bound by precedent. Allowing that precedent to impact pre-trial negotiations could detract from our bargaining position.

### **Conclusion**

My initial reaction was to blame the mediator and the mediation procedures chosen for our failure to come to an agreement in what seemed to me to be an open and shut dispute resolution. However, after reflecting on what happened leading up to and during our mediation, I see that I could have done a better job. A cooler head and a more rational approach would have allowed me to continue using an Interest-based approach when faced with adverse offers. A more calculated strategy would have allowed me to make a better Positional stance to take advantage of the opposition's evaluation of certain estate assets. And finally, more collaboration and legal research sharing would have allowed for better Ordinary Legal Negotiating.

I went into the mediation thinking that I should choose one of the negotiation approaches if I was going to be successful, but now I see that I should have practiced all of them at the appropriate times. Even if we had done a traditional negotiation and not a mediation, I still would have needed to incorporate all of these approaches to reach the best outcome for my client.



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There is definitely value to each of these approaches. I think the approach that I have learned to appreciate the most in this class is the Interest-based approach. My personality lends itself to more of a Positional approach, but my newfound appreciation I have for the opposing parties' interests is probably the most valuable lesson I've learned in this class. I've learned that there is more to take pride in as an attorney than just garnering the best result for your client. By considering the other side's interests you not only show the opposing counsel and his or her client that you're a human being, but also that you want a fair outcome for all involved. I've come to realize that I don't want to be focused only on the results for my client.

That said, I do still find value in the Positional approach. I believe that being a zealous representative of your client is still an important duty of an attorney. I think I've learned not to overvalue this approach. Just because you have a position of bargaining power, doesn't mean you have to flex those muscles every opportunity you get. Listening to Wally Bley talk about attorneys that might have the better case accepting less because of their relationship and future considerations helped me understand this.

Finally, I think the law school experience in general has helped me understand the value of the Ordinary Legal Negotiation. This type of negotiation, I believe, is what separates attorneys from the rest of the population. It is our ability to discern the law and its consequences that makes our services so valuable. Going into a negotiation without an understanding of the law and appropriate results begs for unreasonable offers and demands to be made. A negotiation without a shared understanding of the law is the same kind of negotiation two laypeople would have. I think it is in this type of negotiation that experienced attorneys are most valuable. They know the norms, they know the Judges,



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and they know the law. I will make sure that in my practice I seek as many opportunities to get better in this type of negotiation as possible.

I think I see why good negotiators are so valuable. They are able to weigh their own interests, their clients' interests, opposing counsel's interests, the other parties' interests, and the legal system's interests all at once.



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