AIAF Toscana
Fondazione per la Formazione Forense dell'Ordine degli Avvocati di Firenze
Associazione Italiana Professionisti Collaborativi

Firenze, 12 maggio 2017

Overcoming Barriers to Settlement

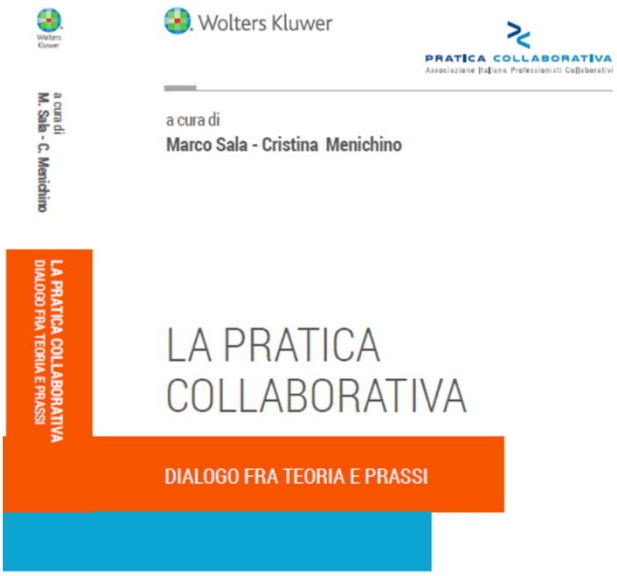
David A. Hoffman
Lecturer on Law, Harvard Law School
Boston Law Collaborative, LLC
www.BLC.law

Agenda

- Traditional, Competitive Negotiation
- The “Getting to ‘Yes’” Model of Negotiation
- Strategic Barriers to Settlement
- Psychological Barriers to Settlement
- Other Barriers to Settlement
- Impasse-Breaking Tools
- Questions?

Copyright 2017 - David A. Hoffman. Permission to reprint is hereby granted so long as distribution is free and this notice appears.

New Book



New Book

LA PRATICA COLLABORATIVA
Dialogo fra teoria e prassi

a cura di

MARCO SALA e CRISTINA MENICHINO

con contributi di

CINZIA CALABRESE - ANNA CASALI - SILVIA CORNAGLIA
FILIPPO DANOVI - R. PAUL FAXON - GARY FRIEDMAN
SHERRI GOREN SLOVIN - JACK HIMMELSTEIN - LAURA HOESCH
FRANCESCA KING - CARLA MARCUCCI
SHIREEN B. MEISTRICH - CRISTINA MENICHINO
CRISTINA MORDIGLIA - LAURA M. PIETRASANTA
MARCO SALA - ANDREA SALZA
DANIELA STALLA - ELISABETTA ZECCA

E DEI PROFESSIONISTI COLLABORATIVI AUTORI DEL CAPITOLO XI

Copyright 2017 - David A. Hoffman. Permission to reprint is hereby granted so long as distribution is free and this notice appears.

Questions

- How many are *not* lawyers?
- How many practice *only* family law?
- What percentage of your practice is family law?
- How many have training in Collaborative Law?
- How many Collaborative Law cases?
- How many mediators?

Traditional, Competitive Bargaining

- Arrange to negotiate on your own turf.
- Balance or slightly outnumber the other side.
- Time the negotiations to advantage.
- Lock yourself in.
- Designate one of your demands a “precondition.”
- When it is in your interest, make the other side tender the first offer.
- Make your first demand very high.
- Place your major demands at the beginning of the agenda.
- Use two negotiators who play different roles.
- Appear irrational where it seems helpful.
- Claim that you do not have authority to compromise.

Copyright 2017 - David A. Hoffman. Permission to reprint is hereby granted so long as distribution is free and this notice appears.

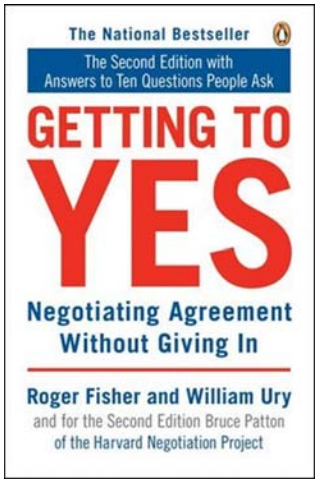
Traditional, Competitive Bargaining

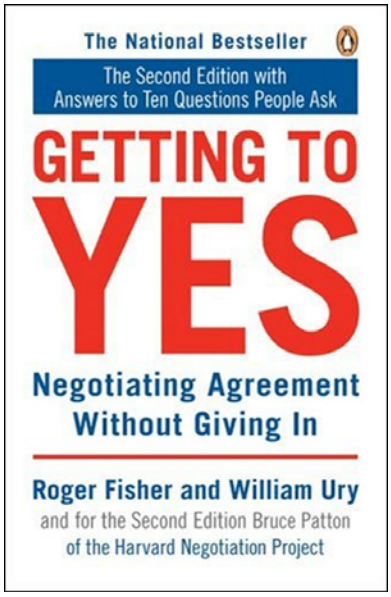
- Manipulation
- Trickery
- Bullying

"Intolerable Cruelty"

Copyright 2017 - David A. Hoffman. Permission to reprint is hereby granted so long as distribution is free and this notice appears.

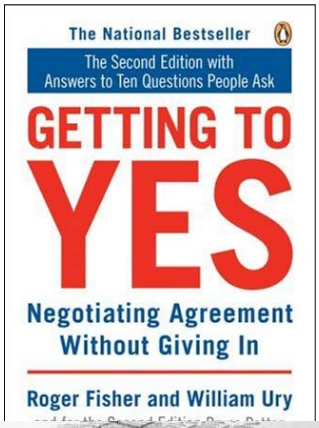
Basic Elements of Principled, Interest-Based Negotiation

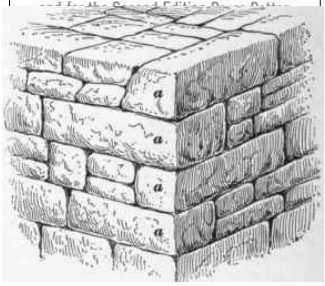




- Separate the people from the problem
- Shift focus from positions to interests
- Generate options to achieve joint gains
- Look for principled benchmarks to resolve disputed issues
- Consider BATNA (best alternative to a negotiated agreement)

Copyright 2017 - David A. Hoffman. Permission to reprint is hereby granted so long as distribution is free and this notice appears.





Foundation = Rationality

Strategic Barriers to Settlement

- Adverse Selection
- Prisoner's Dilemma
- Differing Objectives

Copyright 2017 - David A. Hoffman. Permission to reprint is hereby granted so long as distribution is free and this notice appears.

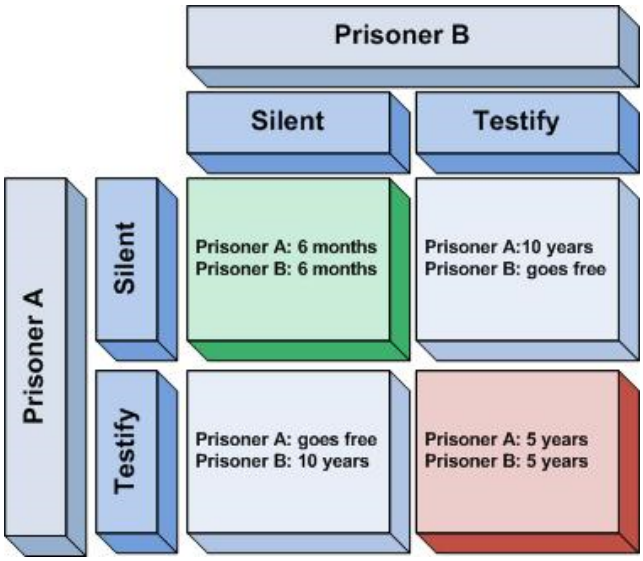
Adverse Selection - the problem of secret information

Plaintiff	***Defendant***
Demands $10 million	*Offers $1 million*
Willing to take $3 million	*Willing to pay $3 million*

"ZOPA" – zone of possible agreement

***Solution**: Use an intermediary – such as a mediator or Collaborative Law coach – to speak confidentially with each side and broker a deal.*

The Prisoner's Dilemma



Copyright 2017 - David A. Hoffman. Permission to reprint is hereby granted so long as distribution is free and this notice appears.

The Prisoner's Dilemma

Solutions:

- *Promote candor and communication*
- *Disaggregate the negotiation*
- *Test for cooperation*
- *Use an intermediary – such as a mediator or Collaborative Law coach – to speak confidentially with each side to promote trust and broker a deal.*

Differing Objectives

- What if the other side doesn't want a 'win-win' solution?

Copyright 2017 - David A. Hoffman. Permission to reprint is hereby granted so long as distribution is free and this notice appears.

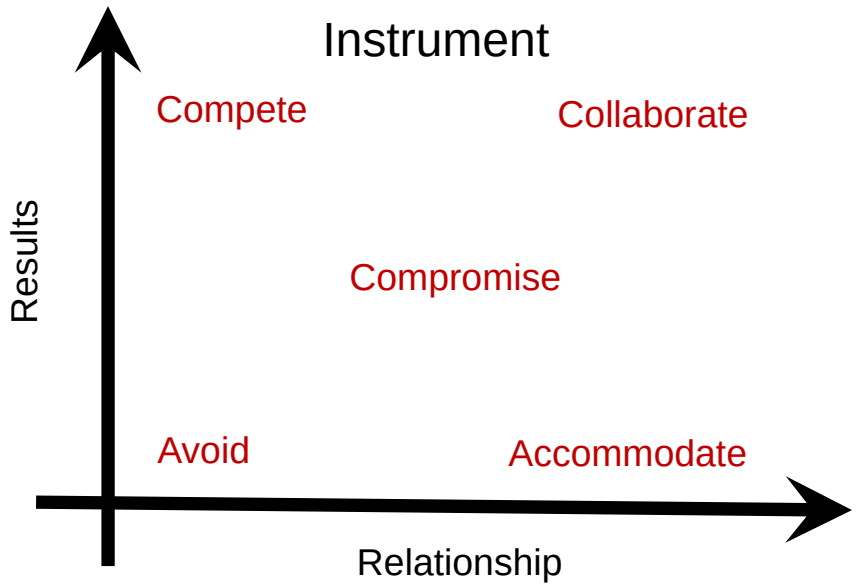
Thomas-Kilmann Conflict Mode Instrument

<u>Conflict Styles</u>

- Avoid
- Accommodate
- Compete
- Compromise
- Collaborate

[How many have tried this instrument?]

Thomas-Kilmann Conflict Mode Instrument



Copyright 2017 - David A. Hoffman. Permission to reprint is hereby granted so long as distribution is free and this notice appears.

When volunteers playing the Prisoner's Dilemma Game cooperated with one another, the "reward circuits" of their brains were activated, the same regions that are activated when certain drugs are taken or when good fortune befalls us

TIME IN PARTNERSHIP WITH CNN

Monday, Nov. 26, 2007

Success Depends on Others Failing

By Laura Blue/London

Reward mechanisms in the brain depend on how well you think other people are doing, a new neurological study suggests. The findings, published in the Nov. 23 issue of the journal *Science* are the first to lend physiological proof to a longstanding theory among contemporary economists: that people are affected not only by their own achievements and income, but also by how they stack up against their neighbors.

The study, by cognition experts and economists at the University of Bonn in Germany, looks at the brain regions that process reward. Nineteen pairs of subjects performed a series of tasks, estimating the number of dots on a screen, while their brains were scanned. Each time a subject answered correctly, he or she won a cash prize but the prizes were not always the same. Players could see whether their opponents had answered correctly, and how the prize money was distributed.

The researchers were especially interested in the set of outcomes where both players answered correctly. For any given prize value, the brain's reward response was bigger if the other player earned less. Players on average were more pleased with a 60 euro prize when the other player got just 30 euros, for example, than they were if both players earned 60 euros, or if the other player got more.

Copyright 2017 - David A. Hoffman. Permission to reprint is hereby granted so long as distribution is free and this notice appears.

Cooperation and Competition: Lessons from Evolutionary Psychology

- *Reciprocal altruism – i.e.,* ***cooperation***

AND / OR

- *Social hierarchy – i.e.,* ***competition***

Differing Objectives

What if the other side doesn't want a 'win-win' solution?

<u>Solutions</u>:

- Step up to the balcony: 'name the game
- Normalize
- Identify the costs (e.g., relationship)

Copyright 2017 - David A. Hoffman. Permission to reprint is hereby granted so long as distribution is free and this notice appears.

Psychological and Other Barriers to Settlement

Questions

Copyright 2017 - David A. Hoffman. Permission to reprint is hereby granted so long as distribution is free and this notice appears.