

Generating Options

- Ensure participation by all parties
- Use a common interest as a touchstone
- Consider mutual development of objective standards for acceptable agreements
- Ask neutral non-threatening questions
 - *“What do you most hope can be done here?”*
 - *“What would it take to overcome the barrier you raised?”*
- Brainstorm (and many variations)
- Consider Model Solutions
 - *“Does anyone know what “x” did when faced with a similar problem?”*
- Develop plausible hypothetical scenarios (“What if...”) or contingent agreements
- Separate consideration of each issue
- Offers and counteroffers
- Link issues to develop package agreements
- Link trades
- Suggestions by the mediator (as a last resort)

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Why Objective Criteria?

- Produces agreements that *both* parties perceive to be fair (and thus, lasting and less susceptible to attack)
- Supports the relationship between the parties
- Minimizes attacking, defending, and senseless compromising
- More efficient

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Developing Objective Criteria

- Objective criteria should be:
 - mutually agreed upon
 - legitimate (i.e., recognized by "neutral" outsiders as an appropriate basis for decision making)
 - practical (i.e., measurable or workable)
- You should develop objective standards governing both substance and procedure

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Objective Criteria Hypothetical

You represent a widget manufacturer/ supplier renegotiating a contract with a retailer who has sold your client's widgets in the past. What objective criteria might you use to set the price of widgets?

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Possible objective criteria (“convention”)

- Prior price
- Prior price adjusted for:
 - Inflation
 - Costs of production
 - Retail costs
 - Advertising costs
- Price of like goods
- Price other retailers will pay
- Price agreed customary in the industry

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Brainstorming

- Don't evaluate
- Emphasize quantity not quality
- Record every idea
- Set a time limit
- Piggyback -- one idea prompts another
- Encourage zany or far-out ideas

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Other “Creativity” Techniques

- Visualization
- Atlas of Approaches
- Flipping or Reversal
- WWCD (What would Croeses* do?)

See Brown, J. 2006. Creativity and problem-solving. In *The negotiator's fieldbook: The desk reference for the experienced negotiator*, edited by A. K. Schneider and C. Honeyman. Washington, DC: American Bar Association. Jennifer Brown.

*Croeses: "Croesus (rhymes with Jesus) was the supremely rich king of Lydia (modern Turkey), reigning from 560 to 546 B.C. His wealth came from mining gold... His lavish gifts and sacrifices made his name synonymous with wealth.

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Evaluating Options

- Does the solution meet the parties' needs or interests?
- Does the solution meet the parties' idea of fairness or justice?
- Compare options
- Assess long and short-term impact of options

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Evaluating Options

- Focus on benefits of settling or not settling
- Focus on costs of settling or not settling
- Consider whether solution allows attorneys and experts to be paid
- Consider ...
 - BATNA (best alternative to a negotiated agreement)
 - WATNA (worst alternative to a negotiated agreement)
 - MLANTA (most likely alternative to a negotiated agreement)

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Reality Testing

- Timing is important
- Showing you understand the parties' views is important
- Using the norms accepted by the parties as legitimate is important
- Tone is important (Genuinely curious? Are you educating? Persuading? Browbeating?)

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Reality Testing – Sample Questions

- ❑ “If you were in the other party’s situation, would you accept the proposals that you are making now, or would you expect that more should be offered?”
- ❑ “What do you think the other side will view as reasonable here?”
- ❑ “Is the offer fair in light of likely expectations regarding the negotiation process?”
- ❑ “Would you like to see your position reported on the front page of the local paper? *The New York Times*?”
- ❑ “Is the offer in line with community, legal or other norms?”
- ❑ “Is the demand in line with other negotiated agreements or court decision on similar issues or under similar conditions?”

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General Questions to Get Parties to “Reality test” in a Litigation Setting

- “To win at trial, you would need to establish certain facts and defeat the other side’s arguments. You may be virtually certain that you can convince a judge or jury about some issues and much less certain about others. Which elements of your case do you think that there is some risk of losing? This might be because of the way the law is interpreted or the availability and strength of the evidence supporting your argument.”
- “Realistically, what is the percentage probability that the judge or jury would decide against you on XYZ issue?”
- “[Alternatively:] Realistically, do you think that there is a low, medium, or high probability that the judge or jury would decide against you on XYZ issue?”
- “Parties in this kind of case often struggle to prove XYZ. In your case, do you think that you might have a problem with this issue? What do you think that the other side will argue about XYZ? How do you plan to address that?”
- “At trial, many judges or juries would have questions about XYZ. What makes you think that the judge or jury will see this issue the same way that you do?”
- “How sure are you about your assumptions about what would happen in court? What would you need to do to increase your confidence that you would win?”

Questions to Help Assess Likely Court Outcomes, Adapted from LITIGATION INTEREST AND RISK ASSESSMENT: HELP YOUR CLIENTS MAKE GOOD LITIGATION DECISIONS (ABA 2020) by Michaela Keet, Heather Heavin, and John Lande.

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