***Introduction***

Many of the negotiation principles discussed in this paper are derived, in large part, from the principles set forth in *Getting to Yes: Negotiating Agreement without Giving In*, by Roger Fisher, William Ury, & Bruce Patton (2nd Ed.), and *Never Split the Difference: Negotiating As If Your Life Depended On It*, by Chris Voss. Practically every day of our lives – no matter what stage, station, or circumstance we occupy – we negotiate to get what we want: whether it be a job offer, buying property, or bedtime with the kids. Face it – every aspect of life involves negotiations. That’s why negotiation is a fact of life. And whether we like it or not, we are all negotiators.

The problem is that ubiquity does not ensure skill, and conventional wisdom does not guarantee success. Relying too much on obvious strategies – such as being hard or soft; tough or smooth; positional or relational; generous or stingy; conflictual or cooperative; aggressive or passive – will not yield a negotiated resolution, especially when the chasm between the two sides is vast. Add to this already difficult situation the social, strategic, psychological, and tactical complexities of mediation and you begin to see that this is not a land for voyagers who are travelled or even worse, practitioners who are ill-prepared.

For example: the hard negotiator sees any situation as a contest of wills in which the side that takes the more extreme positions and holds out longer fares better. In the end, the hard position exhausts the negotiator and his or her resources and harms the relationship with the other side. The soft negotiator does not fare much better. The soft negotiator wants to avoid personal conflict and is ready to agree to just about anything. However, the soft negotiator often ends up exploited and feeling bitter.

Neither the hard nor soft negotiator will leave the mediation truly satisfied because the mediation will have like reached an impasse. So, if neither hard nor soft negotiations work, is there another option? ***The answer is YES – all of the above depending on the particular point that you find yourself in during the mediation! We call this the Circumstantial Diner Menu Approach to Mediation or as Aristotle said, “all things are good in moderation,” and we’ve added: “including moderation.”*** That means that effective advocacy in mediation requires you to be prepared, polished and engaged so that you can identify and correctly exploit opportunities on behalf of your client by the best means and methods available to you.

In this paper, you will learn the Do’s, Don’ts, and How To’s of mediating employment disputes from some of the leading experts in the field. These experts will teach you that you do not have to be just a hard negotiator or just a soft one in mediations, that you can be both hard *and* soft and ultimately be a successful negotiator.

**Do’s:** *Understand the Difference Between Mediation and Arbitration*

Before we delve into the practical Do’s, Don’ts, How To’s of employment mediation, let’s start off by briefly compare and contrast mediation and arbitration – what hat they both in have in common and what are the key differences between the two.

Mediation and arbitration have exactly two things in common: they are both types of ADR (alternative dispute resolution), and they are both private and strictly confidential.

Conversely, arbitration and mediation have many differences: In an arbitration, the parties submit their dispute to a neutral third party with coercive authority – i.e., a single arbitrator or a panel of arbitrators, who then manages the case to a resolution through arbitral procedure and award. It is a binary process that each party has little control over, and which yields a win and a loss to the respective parties involved. With arbitration, the gloves are off – there is formal discovery, parties are under oath, and decisions are legally binding and subject to very limited appeal. In short, arbitration is litigation by private means.

We will leave for another day the horrors associated with forced arbitration in the employment context, which forces employees to surrender the safeguards of public litigation and access a constitutionally enshrined jury of one’s peers, for a private ADR process that strictly limits discovery, does not require a reasoned award, and greatly insulates arbitral decisions from appellate review. And for what consideration you might ask: simply to have the right to work!

Mediation, on the other hand, features a neutral third-party known as the mediator, who facilitates constructive dialogue between the adverse parties. However, the mediator cannot dictate terms of resolution to anyone because the adverse parties retain their respective control over their dispute. The mediator merely acts as guide and referee as the parties navigate their claims and defenses towards resolution. With mediation, you are seeking to avoid a lawsuit, and opting to meet with someone who is trained to guide a productive discussion between you and the adverse party or parties towards resolution. Mediation is entirely voluntary, requiring all parties to agree to mediation, and, ultimately, to achieve settlement.

**Do’s:** *Prepare Seriously and Meticulously for Mediation*

1. Have a well-thought-out theory of the case (TOT-C) – this is your overall strategy; what you do in mediation are your tactics;
2. Provide confidential briefs to the mediator. Make your brief persuasive. You want to think of your brief as a mini-summary judgement opposition.
3. Anticipate the other side’s arguments and be sure to weave your responses to their arguments into your affirmative case.
4. Recognize obvious weaknesses in your case and address them. It is a bad look for an attorney to attempt to avoid the weaknesses in their case. Any mediator (or any judge or arbitrator for that matter) will look down upon any attorney who attempts to hide their weaknesses.
5. Prepare your client well. This cannot be underscored enough. Your client should be prepared to tell their story to the mediator (and opposing counsel) at the outset of mediation.
6. Don’t think that just because the nature of mediation is informal and non-adversarial, and the mediation process emphasizes team building and contextualization over competitive advantage, that you and your client can just casually drive towards your objectives. If you do, you will likely have been out-negotiated and squandered the great opportunity presented by the mediation to obtain meaningful and (presumably) relatively early closure for your client.

**Do’s:** *Recognize the Three-Act Play of Mediation*

Act One is the joint session where the opposing sides and the mediator meet and – depending on what was discussed during the pre-mediation call – respectfully explain their respective realties to each other (without argument, crosstalk, or raised voices) after the mediator articulates their particular approach to mediation. Act Two is the caucusing by each side to discuss the various facts and issues in the case with the mediator playing the diplomate as they shuttle back and forth addressing the strengths and weakness of each side’s case with the other side. So, when the mediator is with you and your client, they will be mostly discussing the weakness of your claims and the strengths of the other side’s defenses. But rest assured, a good mediator will do exactly the obverse with the other side in an effort to gain some traction with both sides and move them closer together. Finally, Act Three is exactly the same as Act Two, except that the only thing that is addressed in Act Three is money – plain and simple bid and ask.

**Do’s:** *Set the Stage Well*

* Consider telling the opposing counsel that you will split the costs of mediation with them upfront, but if there is a settlement then the employer will cover all of the costs. This achieves two purposes: (1) it demonstrates seriousness of purpose on your part because you are willing to have “skin in the game” -- with this in mind, the employer is more inclined to engage in mediation.
* Consider having your client present their case in the joint session instead of you. Why? It’s an unparalleled opportunity for your client to demonstrate their bona fides as a witness and thereby increase the value of their case by focusing on their potential impact on a jury or other fact-finder. The client’s simple story should be chronological, follow a narrative arc, and answer the questions who, what, and how? The client’s tone should be engaging but serious; the client’s demeanor should be respectful but firm; the client’s objective should be to contextualize not argue; the client’s focus should be on what happened to the employee, not what the employer did to the employee.
* Consider having your client show emotion at the mediation. So long as the emotion assists you in maximizing leverage. Emotion should only be demonstrated if natural; the most persuasive emotions are somber resolve and earnest conviction.
* Be sure that you put forth a good initial demand. Generally speaking, 1/3 or 50% of your initial demand is where you will end up, so start strong, but within reason. With that said, be careful not to up your initial demand unless there is a change in circumstances between the time you made the initial demand to the and the mediation reasonably require such a move. For example, you may need to up your opening number because your client suffers some sort of retaliation from the employer after you disclose your initial demand.

Beware, however, that upping your initial demand will disrupt the mediation at least temporarily, especially because the employer’s attorney will almost certainly cry bad faith. An effective alternative that depends on how much margin you have built into your initial demand is to maintain your initial demand but calibrate your monetary moves to reach the desired bottom line. If you stick with your initial demand despite the retaliation, then you can convey to the mediator and opposing counsel that you are willing to continue to act in good faith but that your flexibility is greatly impaired.

**Don’ts:** *Do Not Engage in Dogmatic Positional Bargaining (DPB)*

Dogmatic positional bargaining is an approach that frames negotiation exclusively as an adversarial, zero-sum exercise focused on claiming rather than creating value. In the end, untempered positional bargaining is inefficient, produces unwise outcomes, and damages relationships.

**DPB produces unwise agreements because n**egotiators who bargain only over positions are typically reluctant to back down. Parties become so interested in “saving face” that they lose sight of what else they might gain.

**DPB is ineffective because i**n positional bargaining, negotiators often try to best their counterpart by opening with an extreme position and then focus only on [how to counteroffer](https://www.pon.harvard.edu/daily/dealmaking-daily/how-to-counteroffer-in-business-negotiation/) without budging. Extreme offers and small concessions can drag out the negotiation process much longer than it needs to be.

**DPB harms the relationship because**it often becomes a needless “contest of wills,” with each side trying to pressure the other to back down. The result is often anger and resentment.

For the reasons stated above, positional bargaining is the least effective way to approach mediation. Instead, attorneys should take an interest-based approach, but before we can explore that approach, there are a few steps we must take first.

**Do’s:** *Keep in Mind, Negotiators Are People First*

As we noted above, DPB harms the relationship between parties. The nature of the two parties’ relationship can have a major impact on the outcome of the mediation. Research has shown that stronger relationships lead to greater empathy and cooperation in mediation as well as increased attention to the other’s needs and better decision-making.

When relationship preservation is the goal, you will even find that parties are willing to make concessions to enhance the relationship. The connection among the parties in an employment dispute mediation is incredibly important, and wise leaders understand the benefits of fostering a strong relationship when engaging in mediation.

This is why when you are laying the groundwork for a strong relationship, it’s important to remember that each counterpart is a person who has different values, cultural backgrounds, perceptions, and emotions, and will entangle their values, backgrounds, perceptions, and emotions with the issue both parties are discussing.

You must understand that people tend to pick out and focus on those facts that confirm their prior perceptions and to disregard or misinterpret those that call their perceptions into question. Also, people are wholly unpredictable, they are biased, they are at times illogical.

If you want to build a strong relationship, you need to understand them empathetically; the power of their point of view, and to feel the emotional force with which they believe in it. It’s not enough to know that they see things differently.

So, as you think through your case, and the person that will be sitting across from you, be sure to take a moment to:

1. "Put yourself in their shoes.” Doing so will help to ensure that your proposals are consistent with their values.
2. Try to explore the causes of both their emotion and yours.
3. Actively listen to them.

And once you have implemented these three steps, and recognized your counterpart for individual they are, only then can you take the next step in an in**terest-based approach.**

**Do’s:** *Give Opposing Counsel a Stake in the Process*

Now that we have established that opposing counsel is a human being replete with their own thoughts, emotions, and individual experiences that shape their worldview, we can take the second step in effectively mediating employment disputes by giving them a stake in the process.

The idea is to make so that all parties are working together, attacking the problem, not each other.

If the opposing counsel feels as though they are not involved in the process, they are unlikely work towards a settlement yet alone approve any settlement. It is that simple. If you want the other side to accept a disagreeable conclusion, it is crucial that you involve them in the process of reaching that conclusion.

 Even if the terms of an agreement seem favorable, the other side may reject them simply out of a suspicion born of their exclusion from the drafting process. *Understand,*the feeling of participation in the process is perhaps the single most important factor in determining whether a negotiator accepts a proposal. In a sense, the process *is* the product.

**Do’s:** *Do, Nevertheless, Engage in Tactical Positional Bargaining (TPB) When Advantageous*

TPB should be deployed sparingly, but when necessary or opportune it should be used with swiftness and force. Basically, TPB takes advantage of your opponent’s mistake. For example, if your opponent bluff’s and says that they will never pay “six figures” on the particular case they are mediating but for some reason you know that they will consider forcing the issue in order to break them or make them bid against themselves. This may cost some of the relationship you have worked to build with your opponent in the mediation, but if it gives you a sustainably dominant position in the bargaining that will have a better result for your client, then do it!

**Do’s:** *Understand the Different Types of Mediators*

After you have come to terms with the fact that your adversary is not only a human being but also your teammate (because you have given them a stake in this process), time to select your mediator.

A good mediator will be strong enough to direct effective discourse and interject when digressions occur. The mediator uses effective management techniques to control unprofessional conduct and behavior not conducive to mediation.

However, much like doctors and counselors will use different strategies to achieve desired results, so too do mediators use different techniques. It is important for you to select a mediator best suited for the specific facts of your case. The three main styles are evaluative, facilitative, and transformative.

#### **Evaluative Mediators:**

A mediator who uses an evaluative approach is likely to be appreciated for his/her no-nonsense style. Mediators are more likely to make recommendations and suggestions and to express opinions. Instead of focusing primarily on the underlying interests of the parties involved, evaluative mediators may be more likely to help parties assess the legal merits of their arguments and make fairness determinations. Evaluative mediators are often attorneys, judges who have legal expertise in the area of the dispute.

#### **Transformative Mediators:**

A mediator with a transformative approach is likely to be appreciated for the time and space that he/she creates for all sides to really hear and understand one another.  Transformative mediators may create more space for emotions to be expressed through the process and to help support emotional healing along with the solution.  Transformative mediators are especially useful when conflicts are tied to more deeply personal issues including identities and relationships and when parties are seeking empowerment and recognition.

#### **Facilitative Mediators:**

In between these two ends of the mediation style spectrum are facilitative mediators.  This is the style of mediation that may be most familiar to people.  Facilitative mediators are appreciated for the ways they adapt based on the parties’ dynamic needs.  They may use techniques from both evaluative and transformative approaches. Using a facilitative style, a mediator asks questions, normalizes perspectives, and validates both parties’ points of view.

**Do’s:** *Be Open with Your Mediator*

Once you have decided on the mediator, it is time to make the mediator your ally, not your enemy. You do this by being open with them – sharing your evidence with them.

If you have the right mediator, then sharing your evidence with them will only help your client. Sharing your evidence makes your mediator feel like they are part of the team. That’s exactly what you want - you, the opposing counsel, and the mediator to form a solid three-person team working together to solve a problem.

Think of mediation as a team-oriented process; you have your team; the other side has its team; and the mediator has their team (them and the potential settlement. Thus, a good saying for mediation day is “teamwork can make the dream work.”

How much evidence do you provide the mediator? As a rule of thumb, about 90%. Up front You might want to hold a few of things back that could cut both ways or that might tip the scale if you’re close to sticking the landing, but otherwise you want to give them almost everything.

Also, you will want to understand the mediator’s rule as to what is confidential; the majority of mediators say that everything is **not** confidential unless you flag it for them.

With that said, there is one caveat - **do not** give the mediator your bottom line until an impasse is reached. Disclosing the bottom line to the mediator early in the process can result in a situation where counsel loses control of the process, and all the work is on the mediator to make the numbers work. More importantly, revealing the bottom line often leads to cases settling at that number.

And be mindful that the mediator will sometimes test you to determine what your bottom line is. But, if you can say no, say no swiftly and say nothing else.

**Do’s:** *Have A Pre-Mediation Telephone Conference with the Mediator.*

After you have provided the mediator with your evidence, Counsel should schedule a pre-mediation phone conference with the mediator, one to two weeks before the mediation. It is helpful if the mediator conducts separate conferences with both sides.

That way, counsel can openly discuss any concerns they may have going into the mediation, including any anticipated roadblocks to settlement. If your mediator does not typically schedule these types of calls, you should consider initiating such a call yourself and encourage the mediator to have a similar call with opposing counsel.

Pre-mediation phone conferences can be a treasure trove of information for the mediator, and they may allow the mediator to begin planning a strategy for anticipated trouble spots, so the mediation has a greater chance of success.

**Don’ts:** *Engage in Surprise Negotiations*

At this point, the stage is set. You are about to begin mediation; you realize that your counterpart is more of a teammate than adversary; you are using the mediator as your ally, and all three of you are focused on settling the case while maintaining good relationships.

You have all the ingredients for a good settlement. The only thing that could ruin your chances of a good settlement and damage relationships is if you were to hit the opposing side with a surprise.

Good rule of thumb: it is not a good idea to wait until the mediation session to make a dramatically higher demand, or dramatically lower offer, without any advance notice to opposing counsel. For example, don’t wait until mediation to demand $1 million to settle if your client’s most recent demand before mediation was less than $200,000. At the very least, advise opposing counsel of your new demand before the mediation––including your underlying reasons for the change––so your opponent has time to process this information.

 Similarly, if money offered pre-litigation is no longer on the table, be sure to inform opposing counsel of that important fact before sitting down at mediation. Given that the parties, in some sense, are beginning the mediation farther apart than they had been before, even with pre-mediation warnings regarding changed numbers, the mediator will still have to work harder to resolve the dispute. Always be prepared to justify your new offer or demand with back-up information and supporting calculations.

**Do’s:** *Get Your Opponent to Say That’s Right!*

 Here we are – mediation day. It is exciting, but also a little nerve wrecking, but you got this. You have followed all the tips and now you are ready to negotiate a good settlement for your client.

Your focus will be on getting the numbers to flow, but at some point, things will reach an impasse. The other side will argue that there is no basis to go any higher, and the mediator may not understand why you are rejecting the current offer.

When this happens, you should turn your focus to getting both the mediator, and the opposing counsel through the mediator to say two magic words: “That’s Right.” These two words will immediately transform any negotiation.

They are the two words you need to hear before you can exert influence over someone and get them to really change their behavior. **Why?**

 Because you are looking to change both the mediator’s and the opposing counsel’s behavior. And as research has shown us, real change can only come when one person accepts their counterpart as he or she is – an approach known as unconditional positive regard. This is important to note because the vast majority of us, come to expect that love, praise, and approval are dependent on saying and doing the things people (initially our parents) consider correct.[[1]](#footnote-1)

That is, because for most of us the positive regard we experience is conditional, we develop a habit of hiding who we really are and what we really think, instead of calibrating our words to gain approval but disclosing little.

Which is why so few social interactions lead to actual behavior change. But eventually, if you are able to establish a connection and build trust, there will be a breakthrough moment when unconditional positive regard is established, and you can begin exerting influence.

That moment will be when you hear those two magical words – “that’s right.” The “that’s right” breakthrough usually does not come at the beginning of a negotiation. It’s invisible to the counterpart when it occurs, but they will have embraced what you’ve said. To them, it’s a subtle epiphany.

When you hear those two words, negotiations can proceed from a deadlock. It will have broken down a barrier that was impeding progress. It creates a realization point with your counterpart where they actually agree on a point without the feeling of having given in. Those words allow your counterpart to feel that they have assessed what you’ve said and pronounced it as correct of their own free will.

**Don’ts:** *Blame the Other Side*

Pointing fingers rarely advances the discussion. Review of facts and feelings is a normal part of mediation. However, you don’t want the review to become a blame session. Take a future focus in talks: where do you want to be? How can settlement correct the situation.

**How To’s**

We have devoted a lot of time discussing the Do’s and Don’ts of mediating employment disputes, but we have yet to touch upon the How To’s. This section will focus on the different technique’s attorneys can use to effectively mediate employment disputes and obtain good settlement for their clients.

**How To’s:** *Trigger a “That’s Right!” Using a Summary or Other Techniques*

 When you have reached an impasse and you are trying to have negotiations resume, trigger a “that’s right” using the following steps.

1. **Effective Pauses.** Silence is powerful.
2. **Minimal Encouragers.** Use simple phrases, such as “Yes,” “OK,” “Uh-huh,” or “I see,” to effectively convey to the other person you are paying full attention to them.
3. **Mirroring.** Listen and repeat back what was said to you.
4. **Labeling.** Give the person’s feelings a name and identify with how they felt.
5. **Paraphrase.** Repeat what the other person said, but in their words. It shows you really do understand and aren’t merely parroting his concerns.
6. **Summarize.** A good summary is the combination of rearticulating the meaning of what is said plus acknowledgement of the emotions underlying that meaning (paraphrasing + labeling = summary). One you have effectively summarized their plight, that only response is, “that’s right.”

The goal is to get the other person to say, “that’s right.” If they say ‘you’re right’ nothing has changed. If anything, hearing ‘you’re right’ is a disaster. “You’re right” is what you say to placate someone – get them to stop bothering you for a bit.

**How To’s:** *Developing Your BATNA*

The Best Alternative to a Negotiated Agreement (BATNA) is the standard against which any proposed agreement should be measured. It protects you from accepting terms that are too unfavorable while simultaneously protecting you from rejecting terms that would be in your best interest to accept.

 Your BATNA is flexible; allowing you to explore creative solutions. Compared that to no BATNA, and it’s like negotiating with your eyes closed. Why? Because without a BATNA, you are engaging in negotiations with only a bottom line to protect you. As you know full well, a bottom line by its very nature is rigid; almost always certain to be *too* rigid. Having a BATNA is freedom. Not only does it allow you to vigorously explore what you will do if you do not reach an agreement, thus greatly strengthening your hand, but also helps you to produce a solid agreement with the assets you have. **The better your BATNA, the greater your power.**

To develop your BATNA you must do three things:

1. Invent a list of actions you might conceivably take if no agreement is reached
2. Improve some of the more promising ideas and converting them into practical alternatives; and
3. Select, tentatively, the one alternative that seems best.

If you’re wondering whether you should disclose your BATNA to the other side, the answer as it often is in life is, *it depends.* Depends on the other side’s thinking. If your BATNA is extremely attractive or if the other side thinks you lack a good alternative when in fact you one, it might be wise to let the other side know. On the other hand, if your BATNA is worse for you than they think, best to stay quiet or risk weakening your already weak hand.

**How To’s:** *Negotiation Jujitsu*

 If developing your BATNA does not work, consider another strategy: negotiation jujitsu. This approach focuses on what opposing counsel *might* do. It counters the basic moves of positional bargaining in ways that direct their attention to the merits.

 Let’s say for example that the other side announces a firm position, you may be tempted to criticize and reject it. If they criticize your proposal, you may be tempted to defend it and dig yourself in. If they attack you, you may be tempted to defend yourself and counterattack. In short, if they push you hard, you will tend to push back. Yet if you do, you will end up playing positional bargaining. It simply locks them in or locks you in or both.

 Instead, when they assert their positions, do not reject them. When they attack your ideas, don’t defend them. When they attack you, don’t counterattack. Break the vicious cycle by refusing to react. Sidestep their attack and deflect it against the problem. Just like in martial arts, don’t match strength with strength, use your skill to sidestep their force and turn it into your strength.

 Do not attack their position, look behind it. Look for the interests that lay behind their attack. Seek out the principles that their attack reflects and think about ways to improve it. You want to assume that every position they take is a genuine attempt to address the basic concerns of each side; ask them how they think it addresses the problem at hand. Their position is but one option.

When thinking about position versus interests, think of it like this: *Your position is something you have decided upon. Your interests are what caused you to decide.*

Do not defend your ideas, invite criticism and advice. Be open to reworking your ideas in light of what you learn from them, and thus turn any criticism in the process of working toward an agreement into an essential ingredient of that process. Remember what we said earlier: teamwork makes the dream work. When the other side sees you incorporating their ideas into your thinking, they are more inclined to find an agreement that works for both sides.

 Ask Questions and Pause. Questions allow the other side to get their points across and let you understand them. They pose challenges and can be used to lead the other side to confront the problem. Questions offer no target to strike at, no position to attack.Good questions do not criticize, they educate.

One final jujitsu move to keep in mind is silence. Silence is your friend, not your foe. If the other side makes a proposal or an attack you regard as unjustified, the best thing to do may be to sit there and not say a word. Silence often creates the impression of a stalemate that the other side will feel impelled to break by answering your question or coming up with a new suggestion. As one of my mentors once said, “when I listen, others talk.”

**How To’s:** *Taming the Hard Bargainer*

Principled negotiation is all very well, but what if the other negotiator deceives you or tries to throw you off balance? Or what if they escalate their demands just when you are on the verge of agreement?

The best way to counter these tactics is to engage in principled negation about the negotiating process. Here are three steps to follow when negotiating the rules of the negotiation game:

1. recognize your adversary’s tactic;
2. (ii) raise the issue with the mediator explicitly.
3. question the tactic’s legitimacy and desirability. By engaging in this three-step process, you now have the opportunity to negotiate about the rules of the game.

**How To’s:** *Mirroring*

It is one of the simplest yet effective techniques in any negotiator’s repertoire. Through simple repetition, you can gather vital information in a negotiation and put your counterpart at ease. Mirroring is the repetition of key words used by your negotiating partner. It is an essential negotiating tool to use at the bargaining table. The technique can be especially effective when you're repeating words that your counterpart has just spoken. The same is true when you’re exchanging numbers in the third act of the mediation. Mirroring means you are countering your opponent’s move with a move of equal magnitude – i.e., they go up $10,000 in their offer and you come down $10,000 in your demand commensurately. Conversely, “breaking the mirror “is when you come down less than your opponent went up in order to convey dissatisfaction (or at least skepticism) regarding the good faith inherent in your opponent’s position.

**How To’s:** *Push to an Impasse*

To push to an impasse, you can do one of two things: (i) you can declare an (active) impasse and ask your opponent for a detailed rationale of their position, or (ii) cause a (passive) impasse by not responding to your opponent’s last move. Either way, pushing to impasse is a strong and definitive move that effectively ends the mediation, so use it sparingly. Ideally you should not allow an impasse until you think you know your opponent’s bottom line at that moment and they, as well, know yours.

**How To’s:** *Be Last to Draw a True Line but First to Cross a False One*

If your opponent draws a line in the sand that is intolerable to you, cross it immediately and challenge your opponent; it the line in the sand drawn by your opponent is meaningless or of little importance to you, either ignore it or honor it – which ever you believe gives you more negotiating leverage; if you have a line in the sand you must draw for your opponent, leave it until all other bargaining has occurred. You are generally in a stronger negotiating position when your opponent is asking you for something, rather than when you are asking your opponent for something. For example, if your opponent tells you they will not pay six-figures for your client’s case, and you know that your client must get at least six figures for their claims, be the first to say that won’t work for your opponent. If, on the other hand, your client is willing to take marginally less than six figures, then be the last between you and your opponent to admit that. cloak must get tell them that you will not negotiate until we get to six figures. Let me them know you are serious.

**How To’s:** *Be Consistent*

Flexible good faith is the coin of the realm in successful negotiations. Reward your opponent’s good faith and flexibility by affording them the same or better treatment; by that same token, however, punish your opponent’s duplicity or recalcitrance with a forceful rejection that threatens impasse or disengagement.

**How To’s:** *Keep the Numbers Flowing*

The longer the employee can keep the monetary discussion going, regardless of the increments, the better it is for him or her because the employee is the payee, and the employer is the payor. There are various methods to keep the numbers moving so an impasse doesn’t occur. For example, if you’re at $110,000 and your opponent just made a move to $40,000, your opponent is signaling to you (via the language of the midpoint) that they want to settle for $75,000 (i.e., the sum of the two respective negotiating positions divided by two). If you, however, only have authority to settle for $90,000, then you could suggest a hypothetical bracket of $75,000 to $90,000, which brings the midpoint up to $82,000 and gets you within striking distance.

**Do’s:** *Keep Your Most Tactical Move Towards the End*

Keep a proverbial card up your sleeve when possible, which allows you to tip the balance in your client’s favor at the most critical moment – whether it’s making an epic monetary move that shifts the paradigm, or introducing a key piece of information that adds risk to your opponent’s case, and consequently increases the value to your case, make sure you time it to have the maximum impact as a game-changer.

**Do’s:** *Understanding and Influencing Your Counterparts in Negotiation*

Before we finish, it’s important to note the role the digital era plays in negotiations. We cannot underscore this enough – negotiators need to learn how to navigate the digital era and reckon with its promising uses, best practices, and common pitfalls. In particular, they need to prepare for disruption, including by proactively cultivating digital influence, alliances, and resilience, as well as auditing key vulnerabilities to head off problems before they become fatal to important deals.

If negotiators want to use social media to learn about, influence, mobilize, or neutralize others in negotiations, though, they also need to keep in mind any [privacy or ethical concerns](https://www.negotiate.com/walking-an-ethical-tightrope/) that social media brings into play.

This new paradigm requires negotiators to update their strategies. Because the digital era is changing every aspect of dealmaking, negotiators need to take a comprehensive, “3-D approach” to understand and prepare for how social media can impact the negotiation process. Particularly in today’s hyperconnected, 24/7 world, the reality of negotiation almost always extends beyond primary negotiators to involve other potentially influential parties.

Winning strategies must incorporate traditional “at the table” tactics (the 1st dimension), deal design (2nd dimension), and setup moves “away from the table” (3rd dimension) that are essential in shaping outcomes. Adapting this 3-D lens to the internet era, we have found that social media can sharply enhance negotiating effectiveness in four import ways:

1. Social media can help negotiators reliably **learn** about the full set of parties who may be relevant to a negotiation, including those with potential influence away “from the table.” It often reveals information about these parties’ personalities, interests, perceptions, sources of information and influence, relationships, and how groups may respond to a potential deal. As this goes both ways, it’s smart to regularly perform rigorous “red teaming” exercises — in which a friendly team assumes the perspective of an opponent — to understand your own possible vulnerabilities.
2. It offers a mechanism to wield effective **influence**, both directly and indirectly. That may include framing messages that resonate, invoking credible sources and surrogates, and informing the creative design of high-value/low-cost proposals that respond to parties’ true interests.
3. It makes it possible to **mobilize** coalitions of supporters who can shape the situation “at the table” by swaying key decision makers “away from the table” — especially at pivotal moments.
4. Finally, it can be used to neutralize, inoculate against, outflank, creatively placate, convert, or otherwise deal with actual and potential deal opponents.

**Don’ts:** *Don't Say “Take It or Leave It” or “Last Best Final” Unless You Mean It*

Finally, don’t say “take it or leave it” or “last, best, final” until you absolutely have to, and you absolutely mean it.In other words, say what you mean and mean what you say––especially in mediation. Remember that every move is being carefully weighed and evaluated by the other side. If you really have no more moves to make, you necessarily declare an impasse. If there is still room to negotiate, however, sending a message that you are done negotiating when you’re actually not may result in closing the negotiations for good when that was not your intention.[[2]](#footnote-2)

1. *See* Rogers, Carl. (1951). *Client-Centered Therapy: Its Current Practice, Implications and Theory*. London: Constable. ISBN 1-84119-840-4. [↑](#footnote-ref-1)
2. When I once asked an opponent in a mediation why they had come back to the table with an offer after we had rejected their take it or leave it (tioli) offer, they said because a “take it or leave it” offer is not like a “last best final” (lbf) offer; the outcome for the former dependents on your next action, while the latter is final once said. In my experience, I’ve found that semantical nuance is lost on most negotiators so when you say either tioli or lbf mean it or you will lose credibility. [↑](#footnote-ref-2)