

Problem-Solving Negotiations Exercise

Instructions

Purpose. This is a simple and comprehensive exercise that is designed to highlight the differences between positional and problem-solving negotiations as well as introduce the key features of the problem-solving approach. The exercise examines the difference between positions and interests, techniques for inventing options and creating value, a method for assessing options based on interests and objective standards, and the impact of the parties' BATNAs on the outcome.

Knowledge of Instructor. The instructor should have a solid understanding of the differences between positional and problem-solving negotiations.

Audience. Law students and lawyers

When Use Exercise. This exercise can be used in a negotiation, ADR, or mediation representation course to introduce the key features of problem-solving negotiations. The exercise also can be used for a one-class hour introduction in another substantive course (such as torts, family law, commercial law, etc).

Time. This exercise can be completed in thirty minutes to two hours depending on how much depth the instructor wants to explore.

Teaching Methods. The exercise calls for a blend of lecture, discussion, demonstration, and practice.

Assignment. This exercise can be done without giving an assignment. But, the participants will gain more if they have read Getting to Yes by Fisher, Ury, and Patton.

Fact Pattern. Any fact pattern that offers integrative opportunities can be used. The fact pattern should fit the interests of the participants. This exercise has been used with disputes involving business and employment contracts, matrimonial matters,

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and public policy issues. One example of a fact pattern with key questions is attached (see “Breach of Service Contract” problem.)

Administration of the Exercise. This exercise can be conducted in five distinct segments. At the beginning, you should divide the group into half, with one-half representing the plaintiff and the other half representing the defendant (See attached problem.). The instructor does not need to discuss the key features of positional and problem-solving negotiations before commencing the exercise. The concepts along with the lessons and insights will emerge as the exercise unfolds.

(1) Subdivide each side into smaller groups of three to answer question one at the end of the problem: What are the party’s legal positions in the litigation? The answer provides a useful starting point and should be obvious. Alternatively, if there is sufficient time, you can ask plaintiffs and defendants to pair off and negotiate a resolution--using a positional approach.

When debriefing, you can start by exploring how the familiar and routine lawyer work of developing legal positions can take the parties down the positional negotiation pathway. During the debriefing, you can introduce the key features of positional negotiations. You can explore how parties approach each other as adversaries and approach the dispute as distributive with a winner and loser. You can examine how initial positions are strategically influenced by initial offer strategies and are based on narrow legal rights. You also can consider why they are usually monetary. Especially if participants pair off to negotiate, you can show how initial positions are typically reinforced with adversarial arguments, tricks, and threats and how the exchange of positions results in a negotiation dance of offers, counter-offers and unimaginative compromises.

(2) Ask each side to reconvene their smaller groups to answer question two: What are the party’s interests? When debriefing, you can introduce the problem-solving approach by clarifying the crucial distinction between confining positions and broad interests. You can explore how an understanding of both sides’ interests can open the door to integrative possibilities.

(3) Ask the participants to engage in brainstorming of settlement options. First, you should establish ground rules for brainstorming (no evaluation of ideas and no one held responsible for ideas voiced). Then, you can explain that the purpose of brainstorming is to stimulate participants to think outside the legal box in order to create value. You can discuss how value can be derived from common and different interests. Finally, you can demonstrate brainstorming by facilitating the process among all the participants and recording the ideas on a blackboard. Or you

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can ask groups of 3-5 plaintiff and defendant representatives to brainstorm. The participants should experience both the benefits of brainstorming (that it really works!) and the benefits of separating it from assessing options.

(4) After brainstorming, ask participants to assess the options based on parties' interests and possible objective standards. (Objective standards may need to be defined.) As the assessment stage progresses, participants should see an integrative solution emerging and how the monetary aspects become less distributive or less important and as a result easier to resolve. Be sure to demonstrate how objective standards can be used to overcome distributive impediments along the way. You also can introduce the concept of BATNA and explore how it influences the assessment of options.

(5) At the end, summarize by comparing the results of the positional negotiation with the results of the problem-solving one. It should be evident how the problem-solving approach helped parties increase value (expand the pie) and produce a relatively better outcome for both parties.

Please send any comments and feedback to the author. Thank you.

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Breach of Service Contract

Franklin Hospital, a small regional hospital, entered into a three year contract with PT Service, a company that provides physical therapy. Under the contract, whenever a patient in the hospital needs physical therapy, the hospital contacts PT Service who then sends over a licensed physical therapist. The hospital agreed to pay PT Service an annual retainer of \$10,000 to cover the costs of maintaining a list of readily available physical therapists. The hospital also agreed to pay an hourly rate of \$100 for actual services rendered. Out of this \$100/hr., PT Service pays \$75/ hr. to the therapist.

During the first year of the service contract, Franklin Hospital received a number of complaints from patients about the quality of the physical therapy. Concerned about potential liability and the hospital's reputation, the hospital terminated the contract. The contract specifically gave the hospital the right to terminate for cause but the contract failed to define cause. PT Service claims that its quality of service was excellent, meeting the highest professional standards.

Upset that losing this contract may hurt its reputation in both the physician and hospital administration communities (important sources of referrals), as well as remove a steady stream of business, PT Service sued the hospital for wrongfully terminating the service contract. PT Service is seeking \$150,000 in damages, which consist of \$20,000 for the annual retainer over two years, \$60,000 for unpaid services, and \$70,000 for the anticipated profits over the remaining two years of the contract.

The attorneys for the hospital and service company decided to meet to try to settle the case. Try to settle the case.

(1) Legal Positions in Litigation

Franklin Hospital:

PT Service:

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(2) Parties' Interests

Franklin Hospital:

PT Service:

(3) Brainstorming Options for Resolution

(4) Selecting Options

Based on Interests

Based on Objective Criteria

Influenced by BATNA (Best Alternative to a Negotiated Agreement)

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