

Reduce Your Legal Fees Now: “Unconventional” Dispute Resolution

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A PROFESSIONAL CORPORATION • ATTORNEYS



This paper reflects the personal views of the speakers in their individual capacity. It does not necessarily represent the views of McKool Smith, P.C. The information contained herein is intended for informational purposes only and should not be construed as legal advice or a substitute for obtaining legal advice from an attorney. Because of the possible unanticipated changes in applicable law, the speakers disclaim all responsibility for the legal effects or consequences for the interpretation of the information provided.

What do you buy/sell?



The Answer To Everyone's Question

Steve Miller: Jungle Love, 1977

Have Less Litigation

John DeGroot: www.settlementperspectives.com

What if ...

- You could know 75%-85% of everything you will ever know about a case in the first 60-90 days?
- You could use that knowledge to tailor your approach to resolve a dispute more quickly and cheaply than traditional litigation?
- “Unconventional Dispute Resolution”

Who is Talking About U.D.R.?



*“Value Challenge:
Reconnecting Value to Costs”*



“Building a Different Law Firm”



*“Alternative Billing Practice
Beyond the Billable Hour”*



“Evolution of the New Lawyer”

U.D.R. 101

1. Early Case Assessment
2. Change Your “BATNA”
3. Identify/Create Custom Procedures
4. Aligned Fee Agreements
5. To Get the Deal Done
6. But Be Prepared for Trial

Early Case Assessment: What?

The Facts

- Complaint, claims, defenses, counterclaims
- A timeline, relevant facts, witnesses and key dates
- Witness interview summaries
- The 10 best and worst documents for each side
- Current significant unknowable facts
- Evidentiary/documentary issues
- Likely trial themes
- Document map

The Law

- Claim and defense elements and burdens of proof
- Jury charge
- Appellate Court's relevant rulings
- Past verdicts in similar cases

The Forum and Opposition

- Court evaluation and report from recent trial or hearing
- Opposing party and counsel evaluation
- A memo outlining extra-judicial dynamics

Early Case Assessment: Why?

2007 Survey by Cogent Research on behalf of LexisNexis

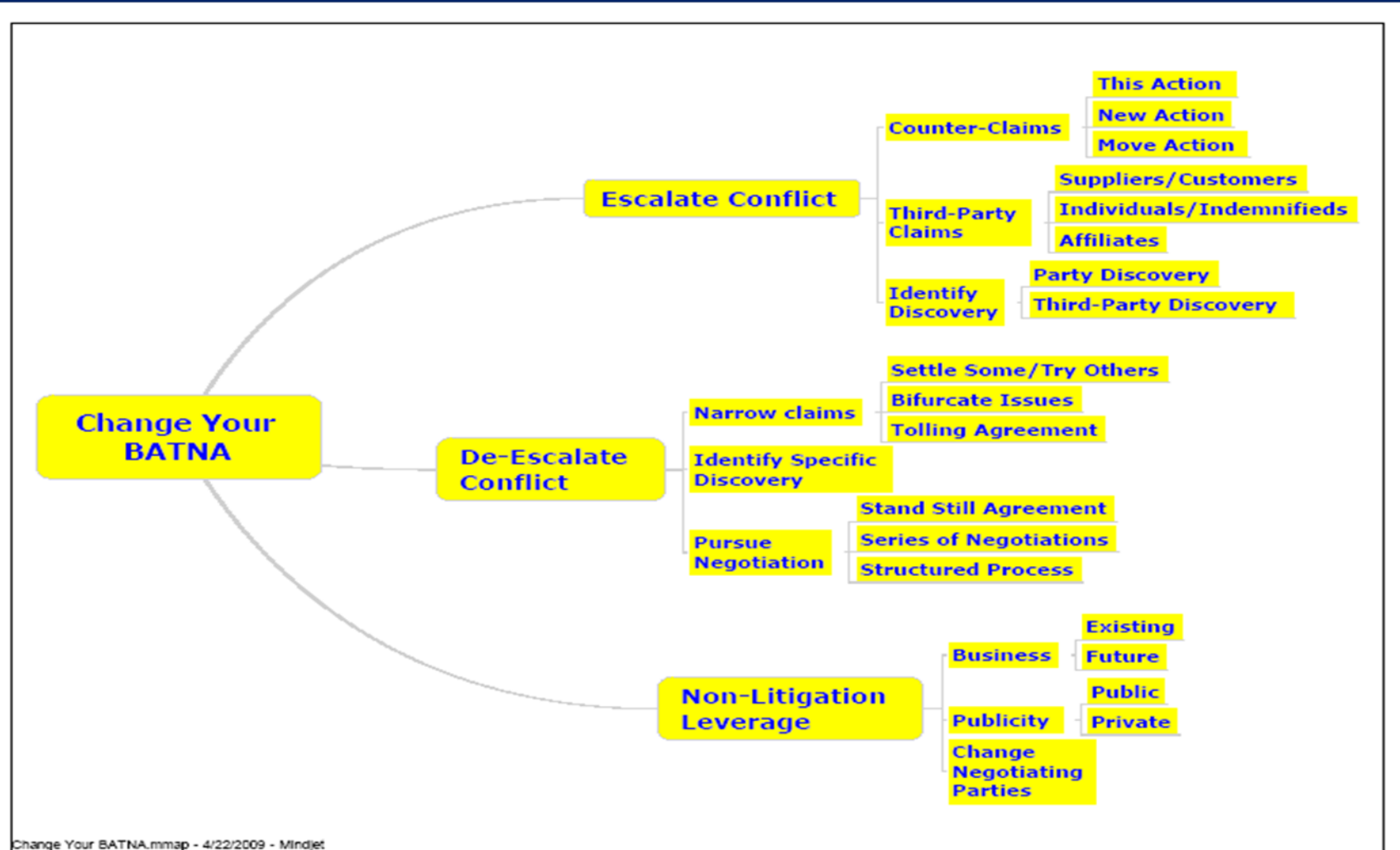
1. ECA resulted in favorable outcomes in 76% of cases.
2. ECA reduced litigation costs in 50% of cases.
3. 64% of attorneys said time is the greatest barrier to effective case assessment.
4. 66% of attorneys said they could improve case assessment skills.

Early Case Assessment: How?

Best Practices

- Identified Objectives
- Tiger Team
- Concentrated Effort
- Specific Deadline
- Joint Buy-in
- Joint Presentation

Change Your "BATNA"



Optional Procedures

Non-binding Arbitration
Early Discovery Exchange
Unilateral Presentation
Summary Jury Trial
Competitive Mock Trial
Shared Focus Study
Retired Judge
Court Conducted Mediation
Court's Mediator
Council of Wise Wo/Men
Stay for Specific Discovery
Mediator's Proposal
Two Witness Saturday Trial
Post-Dispute Arbitration



Optional Structures



High/Low
High/Low Baseball
Bifurcation
Initial & Contingent Payment
Time Limits
Fee Limits
Discovery Limits
Rule 68 Offer
Mix and Match

Aligned Fee Agreements

Contingent

Hybrid

Volume Discount

Reduced Rate with
Target Bonus

Monthly Retainer

Flat Fee

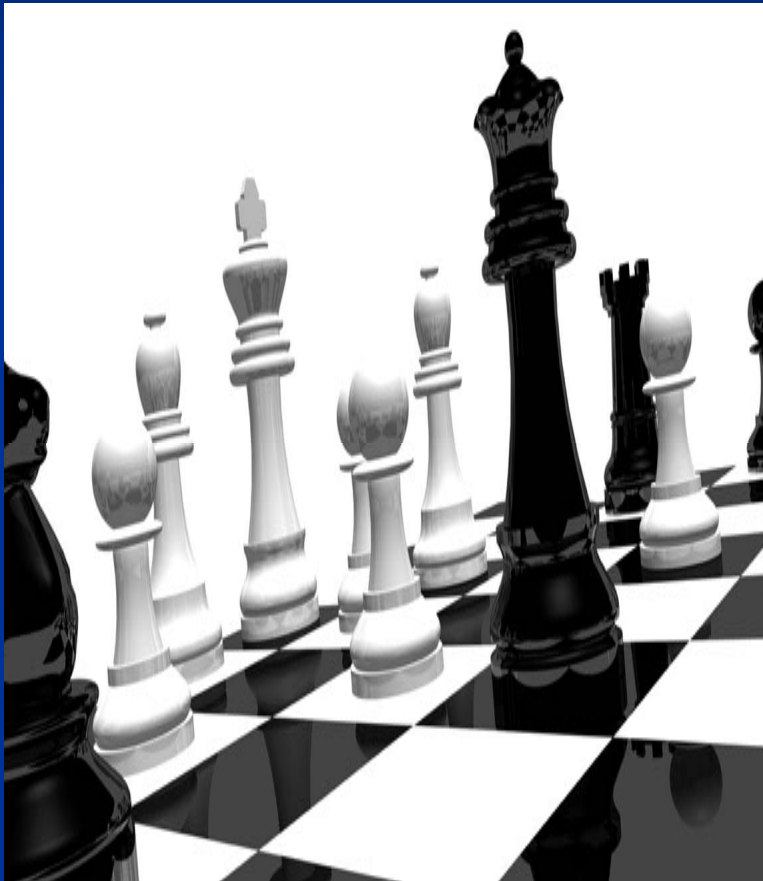
Decreasing Rate

Early Resolution Bonus

Mix and Match



Classical Negotiation Strategy



Phase I

Oratorical Fireworks

Phase II

Measured Concessions
Deliberate Confusion
Position Testing

Phase III

Search for Real Resistance
Crisis and Resolution
United Central Negotiators

Chester L. Karass, *The Negotiating Game*
(Rev. Ed. 1992)

The Relationship

Team Continuity
Relationship Managers
Legacy Work Product
Systematic Feedback
Litigation Prevention
Consulting
Free Information Flow
Conflict Waivers
Recommendations
Defined Objectives
Accountability



To Get the Deal Done

“Worldly wisdom teaches that it is better for the reputation to fail conventionally than to succeed unconventionally.”

John Maynard Keynes

But Be Prepared for Trial

-or-

“...and now a word from our sponsor”

The McKool Smith Method: Trial Preparation

Catalog the Evidence

- Fact memo: every relevant fact known about the case
- Proof outline: trial proof and evidence prepared during discovery
- Exhibit indices: by issue, number & chronology

Publish and Refine Strategies

- Jury scripts
- Prepare opposition's case
- Jury test, evaluate results, and retest

Team Coordination

- Action list/accountability
- Team meetings
- Monthly/weekly status reports

19 Trials '05-'08

- *Wells Fargo v. Wachovia* (2005)
- *Medtronic v. Cordis* (2005 Arb.)
- *Holly v. Frontier Oil* (2005)
- *Brooktrout v. Eicon* (2005)
- *Tivo v. Echostar* (2006)
- *Paice v. Toyota* (2006)
- *Applied Biosystems v. Applera* (2006 Arb.)
- *Franklin & Cardwell v. LeBlanc* (2006 Arb.)
- *TGIP v. AT&T* (2007)
- *Avid v. Datamars* (2007)
- *Visto v. Seven* (2007)
- *CAC v. Microsoft* (2007)
- *Medtronic v. Boston Scientific* (2008)
- *Anascape v. Nintendo* (2008)
- *Pioneer v. Samsung* (2008)
- *Rambus v. Hynix* (2008)
- *Candela v. Palomar* (2008)
- *Parrish v. NFL* (2008)
- *Pioneer v. Samsung* (2008)



2008: More Top 100 Verdicts than Any Other U.S. Law Firm

#12 Medtronic Vascular Inc. v. Boston
Scientific Scimed Inc.

#36 Pioneer Corp. v. Samsung SDI Co. Ltd.

#74 Adderley v. National Football League
Players Association

#100 Anascape Ltd. v. Microsoft Corp.



Questions?

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