

7th Annual State Bar of Michigan  
**Business Law Symposium**  
“Mediation Mastery”

**TOM MCNEILL**  
MCNEILL ADR

Lecturer, *The Art of Negotiation*

**February 13, 2025**  
5:00 PM – 9:00 PM  
The Gem Theatre, Detroit

Learn more & register: [bizsymposium.com](https://bizsymposium.com)



# Negotiating Resolution Without Giving In

Mediator Tips and Tales  
From a Recovering Trial Attorney

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# My Four Points of Emphasis

- 1) Mediation is a special, almost sacred opportunity for the clients to end conflict.
- 2) Mediation needs to be centered on the client.
- 3) Advocating the merits of your client's case all day long is not negotiation.
- 4) There is no "best way" to negotiate.

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# Tom as a Trial Lawyer:

“I want to “Win” at Mediation”  
(and settle sounds like a bad word)



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# The Reality:



Most clients do not want to litigate for three years or more.

(Or, at least, not as much as counsel is ready, willing and able to do)

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# The Reality:

Resolution **IS** Winning



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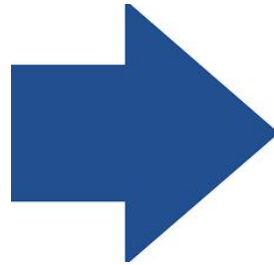
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# Tom as Mediator - Circa 2017-2023

I am deeply committed to fair and reasonable resolutions determined through principled negotiations – rooted in factual and legal merits and litigation and business risk, but over which parties and their counsel do not agree.

Translation:



Mediation is all about monetizing risk.

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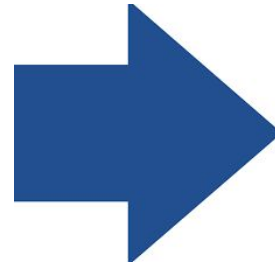
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# Tom as Mediator - Circa 2024-2025

I *also* believe in wise resolutions – ones that meet legitimate interests of each side, resolve conflicting interests fairly, that are durable and sustainable, and which preserve relationships wherever possible.

Translation:



Merits-based decision making is frequently overridden by a client's need to meet fundamental interests, not always disclosed to their counsel or the mediator.

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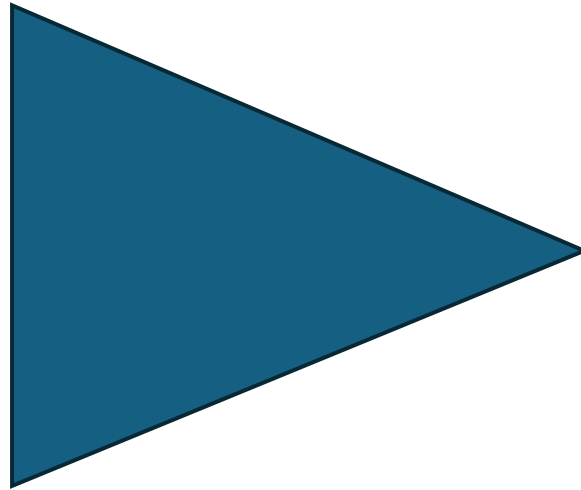
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# Mediation is “Triangulation”

Your Client

Their Client



The Problem – common shared goal of identifying a resolution that meets legitimate interests on both sides

“The best mediators and the best lawyers triangulate on solving the problem.”

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# Planning for Mediation

## ZOPA

## The Zone of Potential Agreement

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# Planning for Mediation

## Preparing the Client for Mediation:

- Discussing the merits and risks – from *each* side
- Spin the Chess Board and play the other side's pieces
- The Client's ZOPA – and why?
- Do you and your client differ? – and why?
- Anticipating the ZOPA of opposing parties – why is an “opposing” client in a different place than your client?



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# Mediation Day

- ❑ Which side will make the first offer?
- ❑ Opening Settlement Positions
  - Cash
  - Terms and conditions
  - “Anchoring” in relation to the ZOPA
- ❑ What happens when one or both sides start by anchoring too far outside the ZOPA?



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# Mediation Day – Pitfalls of Positional Bargaining

“Positional Bargaining” is the standard practice of simply trading numeric offers and counters that is:

- ❑ Inefficient, expends energy and leads parties to frustration and anger
- ❑ Seeks to improve the chance that the outcome is more favorable to you, by starting at an extreme position, stubbornly holding it, making small concessions while the other side does the same
- ❑ Conceals real interests that are actual drivers in resolution
- ❑ Results in impasse and stalemate, requiring mediator intervention



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# Mediation Day

Moving from Merits Advocacy to  
Negotiating Resolution – Shifting to  
Triangulation

When to do it?



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# Questions



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