

## *Attributes of Litigation & Negotiation*

*by Stephen Gaddis*

<b>Characteristic/Attribute</b>	<b>Litigation/Adjudication</b>	<b>Negotiation/Private Dispute Res.</b>
The Parties	<u>It's a performance:</u> Time to dress up Time for best behavior Appear concerned, caring Appear reasonable, fair	<u>It's time to settle up, move on:</u> No emphasis on attire No need to pretend Be true to yourself, feelings Be clear on your needs, wants
The Lawyers	<u>The lawyer as advocate:</u> Be argumentative Present facts in most favorable light for client Avoid, omit unfavorable facts, law	<u>The lawyer as counselor:</u> Be persuasive Present facts in way most conducive way to effect best settlement Be thorough to achieve finality
Behavior in the Forum	Payoff for negative comments, name-calling, telling stories Comments intended to slant outcome No payoff for truth, praise Challenge the integrity, credibility Can bully other side by cost of litigation (discovery), lawyer's conduct & temperament, speech Shotgun approach to issues ("cut with a cleaver") Use all weapons to win case war Obfuscate	Comments are heard in context, then set aside for parties to move on Free to express oneself, true feelings and goals Payoff for accuracy, cooperation Personality issues taken away Level the playing field – excessive discovery avoided, reduce direct contact of parties, lawyers Focused approach to issues ("cut with a scalpel") Use all tools to achieve settlement Get to the ultimate facts
Neutral Person: Judge v. Mediator - Arbitrator	Appear distant, detached Listen, then decide FOR the parties	Is interested, involved, caring Listen, dialogue, then interact WITH
Criteria Applied -- Core Values	Consistency with statutory law and precedential case law Positional bargaining Consistency -- results in like cases must be same to be fair by law Where's Waldo? Just find the facts and apply legal precedent Incentives to hide information	What the parties want; what appears best for them & children Interest negotiation Custom tailor solutions to the individual case for the best results Brainstorming – think "outside the box" to reach the best options Incentives to fully disclose
Process Formalities	Rigid adherence to law, case law and civil rules Rules of Evidence used as a game Exclude information to get to most favorable outcome "What are the objective facts?"	Less formality, outcome determined by counsel, parties and nature of case No formal gamesmanship, trickery Include all information to get to the best outcome "What do you believe is true?"
Language	Win-lose "Opposing" or "adverse party" Conflict, competition, compromise Compromise to avoid loss	Win-win "Other person" or "parent" Listen, accept, understand, synthesize Accommodate to find agreement
Outcome, Parties' Feelings at Outcome	Binary, "either-or" decision made and imposed by a stranger Judge "did not hear me" Frustration at process Outcome is imposed on parties "It's not fair – I want to appeal!" Success is achieved if all parties feel equally bad and unhappy	Accommodate all interests, outcome is fully agreed by parties Parties were heard Parties feel relieved, satisfied Parties "own their outcome" Dispute is resolved, let's move on Success achieved if all parties feel good and accept the result as fair