BASICS OF NEGOTIATION

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1. BASIC PRINCIPLE, WITHOUT WHICH NEGOTIATION IS IMPOSSIBLE

Successful negotiation requires compromise from both sides. Both parties must gain something, and *both parties must lose something*. You must be prepared to give something up to which you believe you are entitled. You cannot expect to defeat your opponent or "win" a negotiation by either the power of your negotiating skills or the compelling force of your logic. This is not to say that good negotiating ability is irrelevant. In most cases, a range of possible outcomes exists. A skilled negotiator often can achieve a settlement near the top of the range.

2. MISCELLANEOUS LEGAL PRINCIPLES, IN NO PARTICULAR ORDER

- Rule 68 provides that a defendant may make a written offer of judgment, and if the plaintiff refuses it, plaintiff becomes liable for all the litigation costs if plaintiff does not do better at trial.
- The judge is permitted to participate in negotiation as long as he or she acts as a catalyst, encouraging settlement but not taking sides. If the judge becomes too actively involved, he or she may become biased against a party who is reluctant to settle, disqualifying the judge from presiding further.
- In most cases in which a settlement is reached, court proceedings can be terminated without obtaining judicial approval. Just file a stipulation of dismissal signed by all parties. See Rule 41.
- Court approval of settlements must be obtained in a few cases, especially if claims by minors are involved.
- A negotiated settlement is a contract, controlled by the law of contracts.
- Generally speaking, an agreement need not be in writing unless it involves real property, is within the statute of frauds, or a writing is required by local rule.
- If the agreement was procured through fraud or duress, is based on a mutual mistake, or lacks consideration, it may be void. Therefore, if you lie about the facts, misrepresent the law, or otherwise deliberately deceive your opponent in order to gain a bargaining advantage, the agreement you reach is voidable.
- If a settlement is breached, contract law applies in determining the remedies available to the aggrieved party -- specific performance, compensatory damages, or treating the agreement as rescinded.
- Conduct and statements made during unsuccessful negotiations are inadmissible at trial on the main issues of liability and amount of damages. See R. Evid. 408.

3. ETHICAL CONSIDERATIONS

A. HONESTY VS. GAMESMANSHIP

Several ethical questions arise constantly in negotiation.

- Must negotiations be conducted in good faith, without deception or trickery?
- May a lawyer resort to cleverness and benign deception in order to reach a fair And just result?
- May a lawyer take advantage of weaknesses and mistakes by his or her opponent and accept

an unjust settlement?

- May a lawyer "bluff" during the negotiation game?

The answers to these basic ethical questions are far from clear. Some people argue that negotiations must be conducted with truthfulness and candor, and that a lawyer ethically may seek only just resolutions. The kind of all-out partisan advocacy appropriate in a courtroom may not be proper in negotiation.

In the American Bar Association's 1908 Canons of Professional Ethics, Canon 15 reflected this feeling that a lawyer had a moral obligation to be fair. It stated that "nothing operates more certainly to . . . foster popular prejudice against lawyers . . . than does the false claim . . . that is it is the duty of the lawyer to do whatever may enable him to [win] his client's cause." Instead, the lawyer is exhorted to "obey his own conscience and not that of the client." Canon 22 required "candor and fairness" when dealing with other lawyers. The 1969 Model Code of Professional Responsibility forsook this ideal, eliminating the requirement of candor and replacing the lawyer's obligation to obey his or her conscience with EC 9-2: "A lawyer should determine his conduct by acting in a manner that promotes public confidence in the integrity . . . of the legal system and the legal profession."

The latest revision, the ABA Model Rules of Professional Conduct, returns to the basic idea that you owe an ethical obligation of candor to your opponent. Rule 4.1 states that in "the course of representing a client a lawyer shall not knowingly make a false statement of material fact or law to a third person," a term that includes the opposing party in a negotiation. It would therefore be improper to actively deceive your opponent. For example, it is unethical to suggest a settlement of $100,000 because that is the maximum under your client's insurance policy, when you know she has $250,000 coverage.

B. CONCEALMENT AND DECEPTION

The ethical prohibitions against making deliberate misrepresentations during negotiation are clear. Rule of Professional Conduct 4.1 prohibits you from knowingly making a false statement of law or fact at any time during your representation of a client. The rule provides no exception permitting false statements during negotiation. It covers not only false statements about the facts of the case but also false and misleading statements made to facilitate reaching a favorable agreement. Nevertheless, this is probably the most frequently violated ethical rule.

The prohibition against active misrepresentation does not appear to require that you correct your opponent's misunderstanding of the facts or law, as long as you do nothing to encourage it. The Committee on Professional Ethics has stated that while a lawyer is under a duty not to mislead the opponent by misstatement or silence, he or she is under no duty to disclose the weaknesses of the client's case or correct his or her opponent's misconception of the law, even if a wrong or unjust result is reached. Rule 4.1 of the Model Rules of Professional Conduct continue to make it acceptable to take advantage of an opponent's misunderstanding. Proposed language in the 1981 Final Draft of the Model Rules that would have prohibited failure to disclose facts when such a failure would be the equivalent of making a material misrepresentation was not enacted.

Nevertheless, in extreme cases even passive deception may be unethical. If you conceal facts that you know would cause your opponent to break off negotiations completely, and permit a settlement to be based on material false assumptions, you may have acted unethically. For example, it is certainly unethical for a plaintiff's attorney to proceed with negotiations in a civil case if the client has died.

C. PROTECTING THE INTERESTS OF YOUR CLIENT

During negotiation, lawyers often forget that they are there to represent the interests of a client, not to engage in a battle of wits with another attorney. This gives rise to two common ethical violations: revealing confidential information without permission, and failing to adequately communicate with the

client.

Rule 1.6 of the Model Rules of Professional Conduct prohibits a lawyer from revealing a client confidence unless the client has given informed consent to its disclosure. Yet, lawyers routinely inform the opposing party about facts learned from their clients in order to bolster the strength of their cases, or reveal some damaging piece of information about their clients in order to show that the lawyer is bargaining in good faith. Lawyers also tend to denigrate their clients' positions on some issues or distance themselves from a client's unreasonable demands, as if the lawyer were negotiating on his or her own behalf. All of these are unethical.

Rule 1.4 of the Model Rules requires the lawyer to maintain prompt and reasonable communication with the client.

> *Rule 1.4 Communication*
>
> *(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.*
>
> *(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.*

The comments to the rule emphasize that:

> *[A] lawyer negotiating on behalf of a client should provide the client with facts relevant to the matter, inform the client of communications from another party and take other reasonable steps that permit the client to make a decision regarding a serious offer from another party. A lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case should promptly inform the client of its substance unless prior discussions with the client have left it clear that the proposal will be unacceptable. Even when a client delegates authority to the lawyer, the client should be kept advised of the status of the matter.*

Despite this clear mandate that the client be kept informed so that the client can decide whether to accept or reject an offer of settlement, lawyers routinely reject settlement offers within their authorized bargaining range without even communicating them to their clients because they believe they can "do better." If the tactic is successful, of course, the client is unlikely to complain. However, if you reject an offer without talking to the client and then *fail* to settle, you have breached your ethical duty to your client.

D. BARGAINING DIRECTLY WITH OTHER PARTY

If the opposing party is represented by an attorney, ethical rules proscribe bypassing the attorney and attempting to settle directly with the client. Rule 4.2 of the Model Rules of Professional Conduct states that during the course of representing your client, you shall not "communicate about the subject of the representation with a party" you know to have an attorney, unless you have the prior consent of that lawyer. This prohibition extends to prosecutors who may wish to try to cut a deal with one of several co-defendants in order to build a case against the others.

A more difficult question is the propriety of negotiating directly with a person who does not have an attorney. Insurance companies frequently are accused of quickly offering unconscionably small settlements to people injured in accidents before they have the chance to contact attorneys or contemplate large damage claims. The Model Rules are ambiguous. Rule 4.1. forbids you from lying. Rule 4.3 forbids you from pretending to be disinterested, and the comment to that rule forbids "giv[ing]

advice to an unrepresented person." No rule says anything about making settlement offers. Therefore, you presumably could make a settlement offer to an unrepresented person, but you could not advise that person to accept it. The Model Rules do not, however, impose a special duty of fairness when dealing directly with a lay person unfamiliar with the negotiation process, nor do they make it unethical to take advantage of an unrepresented person's ignorance.

E. THREATENING CRIMINAL PROSECUTION AND SIMILAR COERCIVE ACTIVITY.

Under the 1969 ABA Model Code of Professional Conduct, it was unethical for "a lawyer [to] present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter." This provision was dropped when the ABA enacted the Model Rules of Professional Conduct. There now seems to be no provision against trying to force a settlement by threatening criminal prosecution, disclosing the opponent's status as an illegal alien, filing an ethical complaint against a physician, etc. Despite the absence of a provision in the Model Rules, this tactic is probably unethical. At the least, it constitutes deceit and misrepresentation if you do not intend to go through with it.

Whether or not it is unethical, it may be criminal. See *State v. Harrington*, 128 Vt. 242, 260 A.2d 692 (1969) (lawyer found guilty of attempted extortion for threatening to disclose adultery and turn other information over to the IRS unless defendant agreed to settlement).

4. PREPARATION

A. UNDERSTANDING YOUR CASE

It is axiomatic that you cannot negotiate a case successfully unless you understand it. You must be fully familiar with the facts, the controlling law, and the persons who are involved in it. You should have completed your interviews, discovery, and research into the applicable substantive, procedural, and evidentiary law, so that you can analyze the strengths and weaknesses of your case and your opponent's. You must know the arguments you will make about why you are entitled to a verdict and exactly what damages are reasonably recoverable. In other words, you must be ready for trial.

Analyzing and understanding your case involves something other than creating arguments that might be possible if you can stretch the law or the facts. It cannot be done from an emotional perspective from which you attempt only to create plausible arguments favoring your client. You first must analyze the whole case objectively, as a juror would see it. You must be able to recognize where your case is strong, where it is weak, and what kind of verdict you are *realistically* likely to get from a jury. Otherwise, how can you decide what to demand, what to concede, and when to stop negotiating and take your chances at trial?

The kinds of factors that affect the strength of your case include more than just whether the admissible evidence is legally sufficient to entitle you to a verdict on a particular issue. The list of factors that go into evaluating your case is long. Some of them are listed below:

- Does the complaint state one or more legal causes of action that will survive a motion to dismiss?
- Can the plaintiff offer enough evidence on any of its causes of action to survive a directed verdict motion? Are you sure the victim or major eyewitnesses will testify?
- Can the defendant offer enough evidence on any of its defenses to survive a direct verdict motion?
- In what posture will the case go to a jury? What causes of action and defenses will probably remain in the case at that time?
- What are the chances that the jury will find in your favor on the question of liability?
- If the case involves comparative fault, how will the jury allocate fault between the two sides?

Even in cases where the comparative fault doctrine does not apply, will the jury make a practical application of it during their deliberations and reduce plaintiff's damages?

- If the jury finds for plaintiff on liability, what is the most likely range of possible damage awards? In criminal cases, what sentence will a judge actually give?
- Is there an emotional factor that will cause the jury to increase or decrease plaintiff's damage award, or a judge to raise or lower a sentence? For example, if the jury likes the plaintiff, they may award higher damages. Are any young children involved?
- Will the defendant be seen as having a "deep pocket?" and the plaintiff as being in dire need of money?
- Does the case involve any controversial issues, such as drunk driving, abortion, allegations of sexual harassment, and so forth, likely to provoke extremely emotional reaction by some jurors?
- Who are the lawyers on each side? How good are they?
- Will the jury find out about the previous history and character of a plaintiff, victim or defendant? Will the plaintiff be able to introduce evidence of insurance?
- How much extra would it cost to go to trial?

B. SETTING YOUR BARGAINING RANGE IN CIVIL CASES

The first step in negotiation planning is to set your bargaining range. You first need to estimate the range of likely results if the case went to trial. What is the best *realistically* probable outcome and what is the worst likely result? At this stage, you can safely ignore the remote possibility that an irrational jury would do something improbable.

To set your bargaining range, you need to establish the upper and lower limits. The upper limit obviously is your best case scenario. Setting the lower limit is a more difficult process. In consultation with your client, you must set a point at which you would rather take your chances at trial than accept a settlement offer. To establish a realistic bargaining limit, you must predict the likelihood of receiving a favorable verdict and the probable amount of such a verdict, and the extra cost in going to trial.

In its simplest form, the calculation works as follows: Suppose that a plaintiff lost a hand in a table saw accident. The evidence will show that despite a clear warning not to operate the saw without a protective cover in place, plaintiff had removed the cover. Plaintiff alleges defective design because the cover was cheap plastic easily removed or broken. You may estimate that the *most optimistic* scenario is a recovery for plaintiff around $250,000. However, you may calculate that a more likely average recovery is around $100,000, and you have only a 50% chance of a favorable verdict on liability. If it would cost an extra $5000 to go to trial, then the bottom of your bargaining range is $45,000.

All methods of arriving at a settlement value depend on three predictions: the amount of damages a reasonable jury would award if it found the defendant liable, the likelihood it will find liability, and the additional costs of going to trial. Many attorneys simply rely on averages -- either from their own experience or from sources that report typical jury awards, such as Jury Verdict Research, Personal Injury Valuation Handbooks (multi-volume set that reports average jury verdicts according to the kind of injury, gives the likelihood of a verdict, and provides information necessary to adjust the expected verdicts based on overall verdict trends in different localities and on secondary influences such as the age of the plaintiff and the percentage of permanent disability). The problem with using averages is that they are accurate only if you have an average case. For all the reasons discussed in the preceding section, your case may have many peculiar strengths or weaknesses that make it illogical simply to treat it as average. Every case should be evaluated on its own merits. That is, after all, the way the jury will treat it.

An estimate of the probable damage award consists of four components. First, uncontested

provable damages should be included in your estimate at their full value. This category includes documented special damages -- medical costs, property repair or replacement, lost wages and other out-of-pocket expenses -- about which amount there is no dispute. Second, disputed and undocumented special damages must be evaluated. You must decide how likely the jury is to award such damages. Most attorneys would include only a portion of a disputed amount, a percentage that corresponds to the likelihood of proving it. Third, intangible damages, such as pain and suffering, must be estimated. This is a difficult and imprecise calculation based primarily on the factors that affect whether jurors will want to provide the plaintiff with a substantial award -- the type of injury or disfigurement, the type of plaintiff, the obviousness of suffering, objective indications of pain such as heavy medication, length of hospital stay, and the permanency of the injury. Most attorneys rely on their experience or use a "multiplier" formula based on special damages; for example, that the pain and suffering award will be three times the special damages. Fourth, you must determine whether the law entitles the plaintiff to damages such as punitive or consequential damages, including in your estimate only those items the jury can award under the law.

Once you have estimated provable damages, you must determine your bargaining limit. This is a more complicated process than simply multiplying the odds of a plaintiff's verdict times the damages. Each party has transaction costs that keep increasing as the case drags on. To the extent that settlement saves (or increases) these costs, your bargaining limit is affected. You must take into account:

- Litigation costs.
- Settlement costs associated with the time attorneys must spend in negotiation, drafting proposals, etc.
- Fee shifting costs if the loser can be forced to pay the winner's attorney fees.
- Opportunity costs of delaying a resolution.
- Non-economic costs, such as damage to reputation if a public trial is held, or continuing mental distress while the case is pending.

Putting all this together, a plaintiff might determine a bargaining limit as follows:

1) P estimates a most likely recover of $100,000.

2) P estimates a 50% likelihood of getting a favorable verdict on liability, so P multiplies $100,000 by .50, which equals $50,000.

3) P estimates that litigation will cost $5000, so subtracts that amount from $50,000, and gets $45,000.

4) P estimates it would take twelve hours of attorney time to negotiate and draft a settlement, which would cost $1800, and adds that to the previous figure. The bargaining limit is now at $46,800.

5) Fee shifting is not an option for a personal injury case, so it does not change the calculus.

6) P figures it will take two years to get the case to trial, so that there is a $6000 opportunity cost.[1] The total is reduced by this amount, and now stands at $40,800.

7) The client decides that she would rather settle for as much as $2000 less than go to trial, because she does not want her prior psychiatric history becoming public, so P reduces the figure by that amount. P's bottom line is $38,800.

C. VALUING NON-MONETARY ISSUES

The negotiation of disputes will almost certainly require resolving nonmonetary issues. A plaintiff

[1] The value of having $50,000 today to invest at 6% interest, as opposed to getting the same $50,000 from a jury two years from now.

may want a nuisance removed, a letter of apology from the defendant, delivery of goods in partial performance of a breached contract, child visitation rights in a divorce, public withdrawal of a defamatory statement, a particular method of payment, and so on. Although such demands cannot easily be translated into dollars, there is an old saying that everything has its price. In a typical civil negotiation, a value must be put on them. For example, if the defendant is prepared to offer a maximum of $10,000 in settlement of a libel case, but the plaintiff demands a public retraction in addition to a monetary settlement, it is unreasonable to expect the defendant to give such a retraction in addition to the full $10,000. Both compensate the plaintiff; therefore, the defendant can expect the plaintiff to give up some economic compensation in return for the non-economic compensation. Both parties must place a value on the retraction. Is it so embarrassing to the defendant to apologize that he or she is willing to pay an extra $5,000 to avoid doing so? Is the retraction so important to the plaintiff that he or she is willing to give up all or part of the monetary damages? Only the client can answer these questions.

D. PLANNING THE NEGOTIATION

The actual negotiation can be understood as a recalculation of the bargaining limit by the parties working together. If the parties can agree on the value of damages, the likelihood of a finding of liability, and the transaction costs, then calculating a fair settlement is simply a matter of mathematics. However, because of the large number of estimates and approximations involved, only rarely will the parties agree on the numbers. Places where the parties disagree create disputes that must be resolved if you are to reach agreement. This dispute resolution forms the heart of the negotiation.

Your planning must identify areas of probable dispute and how you will compromise on them. This is a radically different approach than a trial plan. For trial, you prepare arguments and stratagems for how you will *win* a disputed issue. Your case theory contains a plan for explaining to a jury why you are *right* and your opponent *wrong*. For negotiation, you must abandon these winner-take-all attitudes. You do not win on disputed issues, you concede that both sides have legitimate points, and you *compromise*.

On any quantifiable dispute, such as dollars or percentages, three scenarios are possible: 1) the plaintiff and defendant have independently arrived at the same number; 2) plaintiff's bottom line is still higher than defendant's maximum limit; or 3) plaintiff's bottom line is lower than the defendant's maximum limit. If all cases fell into the first category, negotiation would be unnecessary. If all cases fell in the second category, negotiation would be impossible -- the defendant would rather go to trial than take the plaintiff's lowest offer, and the plaintiff would rather go to trial than accept the defendant's highest offer. Settlement discussions, therefore, must be premised on the third proposition: you can do better than your bargaining limit because your opponent is, for some reason, willing to give you more than you think an item is worth.

This phenomenon can be explained by transaction costs and risk factors. Even if both sides evaluate the case in the same way, for example, at a fifty percent chance of a $100,000 verdict, their bargaining limits will be different. The defendant may be willing to give not only the $50,000, but also an additional $10,000 to avoid fixed litigation costs and the risk of an aberrationally large verdict. Thus, the defendant is willing to give the plaintiff more than the plaintiff expects. Similarly, the plaintiff may be willing to settle for $5,000 less than $50,000 because plaintiff faces similar risks. Both parties will therefore be content if the case settles anywhere between $45,000 and $60,000.

The picture is complicated by two factors that can either widen or narrow the settlement range. First, the sides may have access to different information that affects the probable outcome of an issue. For example, a defendant sued for negligence may admit to his attorney that he was negligent, causing the defense to evaluate the likelihood of a plaintiff's verdict at 90%, rather than 50%. Alternatively, the defense may discover a new eyewitness who confirms the defendant's denial of negligence, a discovery that reduces the defense's evaluation of the likelihood of a plaintiff's verdict on liability to 25%.

Second, the two attorneys simply may have evaluated the available information differently, one calculating the likelihood of a verdict at fifty percent, the other at sixty percent.

It should be obvious that, while your client will accept a settlement at the bargaining limit, he or she would prefer to do better. The following sections discuss some common suggestions about how pre-negotiation planning can help achieve as favorable a settlement as possible within the range of potential agreement.

1. *Agenda*

Settlement is rarely a discussion of one issue. In most cases, the parties will have to compromise on many issues, each with its own range of possible resolutions. Negotiation, therefore, does not usually consist of exchanging lump sum offers and counteroffers, but is broken down into a series of mini-negotiations over the individual disputes. It is impossible to even conduct rational negotiation, then, unless the parties understand this concept and agree on an agenda that defines the disputes to be resolved and places them in some kind of order.

Many negotiators believe that this agenda plays a crucial role in the bargaining process. You should plan in advance the issues you want to raise, and the order in which you would like to talk about them. You probably should do this in writing and bring your proposal to the bargaining table. Of course, your opponent might bring a different agenda, requiring that you negotiate about the negotiation itself -- which issues will be discussed, their order, and the procedure for structuring the process.

Defining the issues themselves should not prove difficult if you have a theory of the case. Your theory should already tell you which claims you will pursue, which you will drop, and which of your opponent's claims you think are groundless. It will tell you also what the components of damages are: what kinds of injuries can plaintiff be compensated for and are they provable?

Some negotiators suggest that the best order is to raise major issues first. But what constitutes a "major" issue? Some negotiators place first those issues that are objectively important -- where the most money is at stake. If agreement can be reached on the big-money issues, it will facilitate later bargaining over smaller amounts. If agreement is not reached, the parties can move to less important issues to try to start some momentum toward settlement. This approach assumes that if you start on the simple issues and a compromise cannot be reached, the parties may give up.

Other negotiators suggest putting issues that are *subjectively* important first. They suggest that the items on which you must reach an agreement of a certain kind should be first, whether or not they involve the most money. Negotiators who use this approach offer two justifications. It may enable you to obtain concessions on the most important issues during the initial "honeymoon" period when the other side wants to show its good faith. If not, then you can break off negotiations without wasting further time. You know immediately if an acceptable compromise is not possible.

This may be the best approach if you client has any non-negotiable demands. It may be that there are issues on which your client is unwilling to negotiate. For example, a defendant faced with a criminal antitrust charge may refuse to enter a guilty plea because of the likelihood of treble damages in a pending civil suit, but may be willing to plead nolo contendere. A party to a divorce action may demand custody of children and be unwilling to settle without such an agreement. If the issue is genuinely nonnegotiable, it should be placed first on the bargaining agenda as a precondition. Why take up everyone's time on other issues if your opponent cannot agree to your precondition?

Most negotiators, however, prefer to raise at least some of the minor issues or the issues favoring their opponents first. They want to begin the bargaining session by making concessions, appearing reasonable, and establishing a pattern of cooperation. They want to dispel their opponent's fears that they will be "tough negotiators." The expectation is that by building a favorable atmosphere and some momentum, they will get concessions in return as the issues become more important.

2. *First offer strategy*

Skilled negotiators are in general agreement that the plaintiff's first offer should be high but reasonable, and the defendant's low but reasonable. Your offer should indicate your good faith while leaving you sufficient room to bargain and still settle above your limit. There are two reasons for this: 1) the other attorney probably will not accept your first offer because he or she assumes you have left yourself bargaining room, and 2) you want to allow a margin of error in case there is a more favorable settlement range than you expected. On the other hand, an extreme demand that far exceeds the reasonable settlement value of the case is counterproductive -- it tells the other side either that you have not come to negotiate in good faith or that you have valued the case too optimistically for your own side. In either case, your opponent is likely to terminate negotiation.

Your first offer not only should be reasonable, it should appear reasonable to your opponent. A lump sum offer, encompassing many small issues, unsupported by an explanation of its component parts, does not appear reasonable; it appears arbitrary. If you explain how you arrived at it -- the damages you included, the demands you have dropped, and whether you have compensated for the possibility of an adverse verdict on liability -- your offer will appear reasonable. Furthermore, your explanation will help focus on the contested issues that must be negotiated. The reasons you will put forward should be planned along with your offer.

Negotiators also agree about who should make the first offer, although unanimity in this instance is not the same as being right. Almost without exception, they advise you to force the other side to make the first offer. The reasons given for this include: 1) that whoever makes the first offer gives an impression of weakness (that he or she really wants to settle); 2) that the other side may have so misvalued the case that they offer far more than you would have asked for; or 3) that you may have misvalued the case so that your opening offer would have been disastrous. Such fears seem misplaced. In the first place, both sides probably want to settle or they would not be wasting time negotiating; you give away no secrets by making an offer. In the second place, if both sides have prepared the case thoroughly, it is extremely unlikely that first offers will be unexpectedly favorable or disastrous.

The most obvious problem with this bizarre advice is that it makes negotiation impossible. If neither attorney is willing to make the first offer, what do they do -- sit there and stare at each other? It also is inconsistent with the advice that you should try to control the agenda. How can you control the agenda if you are unwilling to make the first move? The advantages of controlling first impressions far outweigh the imaginary fear that you will display weakness. It enables you to focus the negotiations on your own agenda and may cause your opponent to move toward your offer or to reevaluate his or her estimate of the settlement value in your favor. Besides, what do you care if your opponent thinks you are weak? No consequence flows from it, as long as you are not <u>actually</u> weak.

3. Concession patterns

Bargaining is not finished after the exchange of first offers; it has only begun. The negotiation will consist of a series of offers and counteroffers, arguments and posturing, as both parties cautiously make concessions that correspond to their uncertainties about potential weaknesses in their cases. Each uncertainty or weakness in your case presents an apparent risk; the amount of the concession depends upon the size of the apparent risk. You should determine in advance how much you will concede on each issue and how much concession you will demand. Bear in mind, however, that your prearranged concession plan cannot be inflexible. You will learn new information during the negotiation. If it becomes apparent that your opponent has identified a weakness that you had not considered, you may have to concede more than you had planned. Similarly, if your opponent fails to recognize one of your weaknesses, you may not have to concede as much.

Formulating a concession pattern requires that you make decisions about the size of the concessions you will make and the reasons for which you will compromise.

Litigators stress the importance of advance planning about the precise concession points you will use. Remember that your agenda represents negotiations within negotiations. For example, if you are negotiating a personal injury case, you will have to resolve issues of liability, comparative fault, medical damages, property damages, lost income, and pain and suffering. Within medical damages may be hospital bills, doctor fees, and the cost of physical rehabilitation. Your agenda might therefore look like this:

1. *Concede contributory negligence*
2. *Defendant's liability*
3. *Comparative fault*
4. *Property damages*
5. *Medical damages*
    a. *Hospital bills*
    b. *Doctor fees*
    c. *Rehabilitation*
6. *Lost income*
7. *Pain and suffering*

An initial offer to settle for $325,000 is really just a total of all the numbers that will eventually be plugged into this list.

Your concession points should be tied specifically to particular agenda items. For example, you may make a first offer on comparative fault at 80% (best case) and be prepared to go to 50% (worst case). Do you jump right from 80 to 50 if the defense vehemently refuses to consider 80? Or do you plan several stops in between? If you plan several stops, exactly what numbers will you offer and why? Suppose your own client had dropped a beer in his lap while driving, which caused him to suddenly hit the brakes, and that only one brakelight was working at the time he was rear-ended by a speeding Greyhound bus. You might plan to concede 20 percentage points on the drinking issue, and 5 points on each of the other safety issues, based on your estimate of how seriously they would affect a jury.

The process works the same way for dollar-amount concessions. Your client may have been out of work for fifteen weeks, and averaged 40 regular hours and 5 overtime hours a week, so you ask for 600 hours of lost income at $20 an hour plus 75 hours of overtime at $30 an hour, for an opening offer of $14,250. You are prepared to concede $2250 because the overtime is speculative, and another $800 because there were one-week layoffs during the summer.

In planning these concession points, experienced negotiators give the following general advice:

- Avoid large concessions because they weaken your credibility by communicating that your initial offer was not a serious one.
- Small concessions communicate that you have little room left to bargain, so they should be avoided unless the you are in fact running out of negotiating room. If your adversary erroneously believes you have no room left, he or she may terminate the negotiating session prematurely.
- Plan concession points on each issue in an order that permits you to move in ever decreasing amounts. This avoids the problem of making premature small concessions.
- Try to have many, rather than few, concession points (without appearing ridiculous). That may enable you to move in smaller increments than your opponent, and it will be easier for you to make small concessions to keep the negotiations rolling.
- Since you cannot change the facts and law, and since you will not be credible if you offer only a small concession on a major issue on which your position is weak, your planning must concentrate on how the issues will be defined. For example, if all medical expenses are

defined as one issue, the concessions will be large; if treated as separate issues of emergency room expenses, room costs, surgeon fees, medication, and operating room charges, each concession will be smaller.

4. *Bring Supporting Documents*

Part of your job as a negotiator is to sell your compromise proposals to your opponent. But bear in mind an important distinction: your job is not to "win" the negotiation by persuading your opponent to agree to your most optimistic position or give you everything you ask for in your opening offer. You must genuinely give something up (not just pretend to give up something you didn't really want anyway) if you expect to settle the case. But it is important that, when you make a concession and offer a reason for it, that you convince the other side of its soundness.

You can best accomplish this with facts. If plaintiff expects the defendant to accept $20 an hour as the basis for determining lost income, plaintiff must prove it -- produce a paycheck stub. If defendant expects plaintiff to concede a week's income because of layoffs, defendant must prove it -- produce the newspaper article announcing it. If either side expects to make a legal argument that attorney fees can be assessed to the losing side, bring the statute or case with you that says so. Do not expect your adversary to rely on your own assurances that a fact is true. Why should your opponent believe you? You are biased and would say anything to get a larger settlement.

The more documentation you can produce in support of a compromise, the more likely it is to be accepted. If you and your opponent are arguing about what the impact of the plaintiff's drinking will have on comparative fault -- you say 20%, the defendant says 30% -- if you cannot document your position, you will eventually have to either "split the difference" and accept 25%, or break off negotiations. But, if you can produce a page from a law journal article reporting a statistical study of traffic accident cases in which the authors conclude that drinking affected verdicts by 20%, then your opponent will probably have to concede that your figure is the more accurate one.

5. *Client sets bargaining limit.*

Ultimately, it must be your client who sets the bargaining limit, deciding on the bottom line of your negotiating range. You have the responsibility to advise your client and assist him or her in evaluating where a realistic bargaining limit should be set. This is not always an easy task if the client is unwilling to accept the possibility that he or she might lose.. If the client demands an unreasonable settlement or refuses to authorize settlement negotiations at all, you must either withdraw from the case or carry out your client's wishes. Many attorneys forget that it is the client's claim and that they are playing with the client's money.

5. CONDUCTING NEGOTIATIONS

A. BASIC PRINCIPLES: COOPERATION AND FLEXIBILITY

The evidence is overwhelming that cooperation is the surest road to successful settlement. Hostility, distrust, stubbornness, self-righteousness, conflict intensification, unjust demands, and attempts to gain unjustified advantages beget non-cooperation rather than concessions, and tend to cause a breakdown in the communication necessary to reach a settlement. The key ingredient in cooperation, however, is mutuality -- you cannot be unilaterally cooperative. If you are making concessions while your opponent is not, you are engaging in appeasement, not cooperative negotiation. Successful bargaining occurs when you are prepared both to be cooperative and to demand cooperation from your opponent.

The general conclusion implied by research is that cooperation begets cooperation;

> and, conversely, noncooperation begets noncooperation. But why should this be so? Bargainers ... are often concerned with intangible issues having to do with how they look in the eyes of others. In the presence of an adversary who behaves in consistently competitive fashion, the need to maintain or not lose face emerges as a central theme in the relationship and drives the bargainer to defend himself through competitive behavior. On the other hand, to the extent that one's adversary chooses to cooperate, a bargainer's need to maintain face (to look tough) is dramatically reduced, and he can and does risk the reciprocation of cooperation.[2]

Genuine cooperation requires flexibility, not just the appearance of flexibility. There is a real possibility that your pre-negotiation evaluation may have been too optimistic, evidence exists of which you are unaware, or you failed to consider an issue. If during bargaining you realize you have over- or undervalued your case, you must be prepared to modify your original expectations. Many lawyers know how to appear flexible, through pre-negotiation planning of concessions, but stubbornly cling to their initial evaluation even after new information becomes available during bargaining that changes the facts under which that evaluation was made.

For example, suppose a plaintiff's attorney has set a total bargaining limit of $40,000 based on an expected recovery of $10,000 medical costs and $30,000 for pain and suffering, but the defendant convinces her during bargaining that only $8,000 of the medical costs are recoverable. Many attorneys are not flexible enough to realize that their total bargaining limit now must be reduced because they had misvalued the case. Instead, it is common for bargainers to raise irrationally their limit on the remaining issue to try to make up the difference, stubbornly sticking to their original, incorrect appraisal.

B. PRELIMINARY NEGOTIATIONS: AGENDA, AUTHORITY, AND GROUND RULES

Social psychologists have found that bargaining effectiveness is usually increased if the channels of communication are structured in advance and agreed upon by both parties. Uncertainty about the ground rules of a negotiating session leads to competitive rather than cooperative behavior. Mutual discussion of the issues to be bargained produces better outcomes than unilateral planning. If the parties do not structure the negotiation, they take longer to reach agreement, remain farther apart on the issues, and are less yielding.

Despite this evidence, it is apparent that most lawyers do not negotiate over the agenda, preferring to keep their agendas hidden. This leads inevitably to competitive behavior in which both sides strive for psychological control over the negotiations, which in turn leads to antagonism and the breakdown of cooperation. Even those attorneys who recognize that this happens see little advantage in overt agenda negotiation, preferring the tacit agreement that arises from the process of exchanging offers. They argue that not only do agenda negotiations add more disputes to already contentious situations, but also attorneys never stick to any agreed-upon plan anyway.

One good way of beginning a discussion of agenda and ground rules is for you to prepare a written offer in advance and send it to the other attorney. In your letter, you can express concerns you have, suggest a timetable for discussion, provide a proposed agenda, and include your first offer. When the

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[2] Jeffrey Rubin and Bert Brown, The Social Psychologu of Bargainiong and Negotiation 270-72 (1975). The authors cite twenty-two studies that support this conclusion, but also cite eight studies that have found no systematic relationship between one party's cooperativeness and the behavior of the other party, and two studies finding that noncooperative behavior induced greater cooperation by the other party.

actual negotiation starts, you can suggest that you follow the outline of your proposal, unless your opponent has any objections. This forces even a reluctant attorney to discuss these preliminary issues.

Even though they might not see it as agenda negotiation, lawyers consistently recommend that there be at least one prenegotiation discussion -- the extent of the bargainers' authority to settle. Two aspects of authority affect whether a final settlement can be reached: whether the attorney has authority to bind his or her client, and, in situations involving multiple negotiators, which attorney has the ultimate authority. The simplest way to find out your opponent's authority in this regard is to ask.

Two other matters often are agreed upon in advance: the length of the session, and whether to use item by item or lump-sum negotiation. Time limits are important because they increase the likelihood of agreement and tend to result in reductions in demands and the elimination of bluffing as the "eleventh hour" approaches. Open-ended negotiation sessions tend to be just that -- sessions without end, in which the parties avoid final settlement and renege on tentative agreements. Negotiations also are affected by whether binding commitments are made item by item or only on lump sums. Of course, individual issues undoubtedly will be discussed one at a time and tentative agreements reached. However, many trial lawyers oppose making these settlements binding because a party who has gained an advantage may become harder to deal with as the pressure to settle diminishes, and one who has suffered a setback may be reluctant to continue. They argue that only if all agreements are contingent upon a final lump-sum settlement figure is there still as much pressure to settle at the end as there was at the start.

C. BARGAINING TACTICS[3]

Experienced negotiators have suggested tactics ranging from such relatively innocuous ones as offering to split the difference when deadlocked over a trivial amount, to outright lying and fraud. Obviously, tactics involving bluffing, lying, and fraud are unethical. They also are strategically unwise, because they will probably be found out, and may make your opponent unwilling to negotiate with you. Their use even may constitute grounds for invalidating the settlement. You also should not forget that, on the whole, cooperation begets cooperation and aggressive tactics beget aggressive counter-tactics.

Common negotiating tactics can be grouped into three categories: 1) procedural tactics, 2) tactics relating to the presentation of substantive issues, and 3) deadlock avoidance tactics.

1. Procedural Tactics.

- Blanketing is presenting many issues together. It can be used for a number of purposes. Many weak issues can be grouped together in hopes of achieving a concession on one or two of them. A single weak issue can be buried among strong ones. You may be able to discover how strong you opponent thinks he or she is on individual issues from the order in which he or she responds. Blanketing also can be used to gain agenda control. If you raise only a single issue, your opponent may take control of the next issue, but if you present a group of issues simultaneously, you may keep control during the entire discussion.
- Pairing is introducing two issues together so that you can make concessions on one and gain concessions on the other. This tactic often is used to present two of your weaker issues. If you discuss them separately, you might have to make concessions on both, but if taken together, you can demand one concession from your opponent, arguing that it is unfair for him or her to expect you to be making all the concessions.
- Retroactive pairing is reopening a settled issue and pairing it with a current issue to counter an unreasonable demand from your opponent. You can then demand that the issues be treated

[3]See Gerald Nierenberg, Fundamentals of Negotiating (1973).

together or that the current issue be dropped. Nierenberg uses the example of a labor negotiation in which the union demands a shorter workweek, and the employer replies that it can be considered only if the union is prepared to give up some of the holidays already agreed upon.

- Slicing the salami consists of seeking concessions in small increments -- like gaining possession of a salami one thin slice at a time. If you overtly try to take something big away from your adversary, particularly on a major issue, he or she is likely to put up a strenuous defense. However, if a big issue can be divided into smaller issues on which the stakes are low, cooperation and compromise may be easier to obtain.
- Limited authority is a tactic in which the scope of the negotiator's agency is temporarily limited by the client, or by turning part of the negotiation over to an associate with limited authority. It may occasionally be easier to obtain agreement on a couple of sub-issues first, and return to bargain more difficult issues on another day when a person with full authority will be present. This tactic has a potential drawback -- the other side may refuse to negotiate if the agent's authority is too narrow.
- Limits is a related tactic. You may set artificial limitations, especially time limits. Setting time limits can create an atmosphere conducive to compromise as long as both sides take the time limit seriously. This rarely happens because limits usually are arbitrary and bind no one. Some negotiators try to schedule bargaining sessions at times when natural time limits operate -- on Friday afternoons, a few days before Christmas or Thanksgiving, and so on.
- Boulwareism, named after a labor negotiator named Lemuel R. Boulware, is presenting a take-it-or-leave-it proposition. You make a fair offer at or near your bottom line and stick to it. This tactic is not recommended. Almost no one uses it, so you probably will not be taken seriously. Your opponent will misperceive your offer as a first offer, and will refuse it. This tactic invites the opponent to call your bluff and break off negotiations if the offer is unacceptable; therefore, it should be reserved for situations in which you are prepared to go to trial if the offer is refused.

2. Tactics relating to the presentation of substantive issues

- Association is a tactic in which you link an issue to a factor outside of the case likely to influence your opponent. For example, you can link your client's desire for a quick settlement to the opponent's patriotism if you represent a soldier about to be sent into combat. Most frequently, this tactic is used in criminal plea bargaining to link settlement to the opposing lawyer's self-interest in reducing a heavy caseload.
- Authority is a tactic familiar to all of you -- cite a case, statute, or document to support your position.
- Misdirection involves making an apparent move in one direction to divert attention from your real goal. The classic example of this is the story of Br'er Rabbit. The line between misdirection and outright fraud and lying is a fine one, however.
- Reversal involves acting contrary to normal expectations or normal procedures. For example, a union could propose that wages be cut if company profits go down. If management accepts this principle, it will be easier to negotiate that wages also should go up if profits go up.
- Mutt and Jeff is the familiar good cop/bad cop routine. Two lawyers for the same side feign an internal dispute concerning their position; one takes the hard line, offering almost no compromise, while the other appears to desire to make small concessions, and occasionally the "good lawyer" prevails. Lawyers opposing such a team may accept the marginal concessions because they seem substantial in relation to the position of the hard-liner.
- Trollope ploy is one in which a rejected demand is followed not by a concession but by a

stronger demand, encouraging the opponent to accept the milder of the two. It is often used in criminal cases, in which a defendant's refusal to bargain results in additional charges being filed, to "apply pressure." In a normal case, this ploy cannot hope to succeed, because the opponent will simply break off negotiations if you use this tactic. It can be used, however, by the more powerful side in a case where one side has a strong advantage.

- Cooling-off periods are an important tactic. Negotiation takes patience. Giving yourself time to think, to calculate, or to caucus with your associates can prevent you from being stampeded into an unwise agreement. Cooling-off periods can restore a level of decorum and rationality to emotionally charged bargaining.
- Silence is similar to a cooling-off period. Simply waiting the other side out may elicit a new concession or new proposal. Knowing when to stop talking and to let the other side respond is also crucial to effective negotiation.

3. Deadlock avoidance tactics

- Go to mediation by enlisting the help of a neutral person who can encourage settlement and suggest compromises. The judge is often willing to act in this role, or you can hire a mediation service.
- Use subcommittees -- assign one person from each negotiating team to try to resolve difficulties away from the negotiating table.
- Substitution is the assigning of new negotiators to take over when the original ones seem to have reached an impasse.
- Splitting the difference. This is probably the oldest negotiation tactic, used to reach final settlement when the parties are near agreement. Logically, this tactic makes little sense, because it is unrelated to any aspect of the case. It is unwise to use it unless the amounts in dispute are small.

D. COUNTERTACTICS

1. Making counteroffers

If you are negotiating in good faith and wish to facilitate settlement through cooperation, it would seem logical for you to respond to an offer with a counteroffer. This exchange of offers, accompanied by discussions of the reasons underlying them, helps isolate differences of opinion and helps structure the negotiation. Indeed, the wisdom of this approach is borne out by a number of experimental studies. Maximum cooperation is achieved when the parties alternate concessions. You may imagine that it is a good tactic to try to get your opponent to make several concessions in a row, and feel you are gaining an advantage in so doing. The problem is that if you fail to respond to a legitimate compromise with a compromise offer of your own, the party making the first move may feel betrayed. The result may well be a breakdown in negotiation.

Some attorneys who employ a more competitive negotiating technique try to delay the making of counteroffers as long as possible. They expect that their opponents will continue to submit lower and lower offers (make all the concessions) while they do nothing, only submitting a counteroffer when they believe the opponent is near his or her bargaining limit. This tactic, however, is likely to work only if the opponent is desperate to settle. Otherwise, he or she is unlikely to make a second offer or to continue negotiations at all unless you submit a counteroffer.

2. Dealing with Hard or Unreasonable Tactics

So far the discussion has assumed that both parties genuinely are interested in trying to reach a mutually beneficial settlement and understand that cooperation is the best way to achieve this.

However, you never can be certain that your opponent is negotiating in good faith unless he or she proves it by honest bargaining. How should you respond to hard tactics -- threats, ultimatums, unreasonable offers, stalling, and so forth -- that threaten to deadlock the negotiation and make settlement impossible? In most cases, you probably should accept the inevitable and terminate the discussion. Negotiation will not be successful unless both sides wish it to be.

(a) *Unreasonable First Offers*

Your opponent may make an unreasonable first offer for one of three reasons: he or she is not bargaining in good faith, has reached a very different estimate of the value of the case than you have, or is trying it only as an exploratory tactic to test your reaction. In the first two situations, the probability of eventually reaching a settlement is extremely small. In the third situation, if you indicate a willingness to consider the outrageous offer, your opponent may interpret your reaction as an indication that you are desperate to settle at any amount and may raise his or her bargaining limit. This also makes eventual settlement unlikely. Therefore, your reaction to an unreasonable first offer should be the same regardless of the reason it was made. You should be honest and tell your opponent that the offer is way out of line and indicates that agreement is probably impossible. You can either ask for justification or for a more rational offer, or you can make your own offer. It is then up to your opponent to decide whether he or she wishes to negotiate. You should not be afraid to break off negotiations that cannot result in agreement.

Some attorneys play the I-can-be-more-childish-than-you game, and counter an unreasonable first offer with a similarly unreasonable offer of your own. Obviously, this is a silly tactic if your goal is to reach a settlement.

(b) Failure to Make an Offer (Not Bargaining in Good Faith)

Your opponent may refuse to make an offer or counteroffer. He or she may try to force you into changing your own offer (making concessions) without making any counter-proposal. You may be asked to change your first offer because it is too high or low, or your opponent may tender a few offers and then stop making concessions. Effective negotiation requires that both sides cooperate. If your opponent stops, it is pointless for you to continue. You should never bid against yourself.

(c) Deadlocks

If your opponent refuses to make further concessions before you have arrived at an agreement, you have reached a deadlock. Deadlocks are more likely to occur when negotiating a component issue than in the exchange of lump-sum offers. A number of tactics are available when you are deadlocked. If the parties are far apart, if the issue is important enough, or if you have no bargaining room left, you may have to break off negotiations. It may be that your opponent genuinely cannot settle within your limits.

In many deadlocked situations the parties will be close to agreement, the issue unimportant in relation to the whole controversy, or your opponent's last offer will be within your bargaining range, so that breaking off negotiations and going to trial is a disproportionate response. Available alternatives include:

- Offering to split the difference, if the two side are close.
- Offering to trade concessions, one party conceding on this issue and the other conceding on another deadlocked issue.
- Combining the deadlocked issue with several related issues (this may require reopening an earlier agreement) and trying to negotiate the package.
- Making a final compromise offer at your bargaining limit, making it clear that it is a take-it-or-leave-it proposition.

(d) Attempts to Reopen Settled Issues

Your opponent may attempt to reopen an issue on which agreement had been reached or may try to change a negotiated agenda by adding a new issue. Obviously, this kind of tactic amounts to "unnegotiating." If unjustified, it demonstrates bad faith, and it should not be tolerated. If the negotiations are allowed to start to unravel, progress has stopped and begun to move backwards. Probably the best response is to demand that the negotiations continue, and suggest to your opponent that he or she wait until a final agreement is worked out, at which time he or she can accept or reject the package. Another tactic that can make this problem less likely to occur is to write down the points of agreement as they are reached -- it may be harder for your opponent to try to reopen an agreement that has been reduced to writing.

On some occasions, a brinkmanship response -- which, in effect, threatens to break off negotiation unless the other side drops its demand to reopen or add an issue -- may be disproportionate to the controversy. Your opponent may have a valid reason for wishing to reopen an agreement. He or she may have made a mathematical error in arriving at an amount, may have discovered new facts that alter the premises on which an issue was negotiated, or may be trying to work out a way around an impasse. Before you take precipitous action, you should consider carefully whether your opponent's request is justified. Also, if the settled issue resulted in an agreement disproportionately in your favor, and you still had bargaining room left, it is probably better to reopen than risk an eventual rejection of the final settlement proposal.

(e) Walkouts

Your opponent may terminate the negotiations at any time. You have no control over whether he or she chooses to bargain or decides to go to trial. A walkout may be a genuine expression of your opponent's inability or unwillingness to negotiate further, or may be just a tactic to scare you into a major concession. In either case you have two choices: offer a concession to encourage the other side to return, or do nothing and hope your opponent makes overtures to reconvene. If you have bargaining room, you probably should offer a concession. On the other hand, if you are already at or near your bargaining limit, or have already made several concessions in a row, you should wait for the other side to be reasonable. Do not let a walkout panic you into going below your bargaining limit.

E. FACE-TO-FACE, TELEPHONE, OR WRITTEN NEGOTIATION.

Negotiations can be conducted in three ways: in a face-to-face meeting between attorneys, over the telephone, or by an exchange of written offers. Is there any reason to prefer one of these methods over the others? Negotiators seem to prefer face-to-face bargaining, because it allows you to judge your opponent not only by what he or she says, but also by how the negotiator appears. Face-to-face negotiation also allows you to present visual or other sensory evidence to support your position. For example, bringing a jar of effluent to a negotiating session may help convince negotiators representing a chemical plant that you easily can prove to a jury that the smell is a nuisance. Experiments by psychologists have shown that greater cooperation is achieved if both parties can see and hear each other than if they are isolated.

F. PRESENCE OF CLIENT AT NEGOTIATION.

In almost every episode of the television series "L.A. Law," the lawyers bring their clients with them to a negotiation session. There are some possible reasons for doing this --it will show the client you are working on the case, it will make final agreement easier, and, if the client is a good witness or has suffered sympathetic injuries, it may convince your opponent that you can present a good case to the jury.

However, the dangers (amply illustrated on L.A. Law) usually far outweigh these small

advantages:

- The client may make damaging admissions or be goaded into making threats, unaware of the consequences of the statements
- Because of unfamiliarity with bargaining tactics, the client may be influenced by your opponent's tactics into agreeing to an unfavorable settlement
- The presence of the client prevents you from using the tactic of limited authority
- The client's actions, such as showing surprise at your tactics or eagerness to accept an opponent's offer, may limit your bargaining ability
- The client's presence may distract your attention from the negotiation.

Social psychologists agree that the client's presence interferes with successful negotiation because the attorney will become concerned with his or her appearance to the client, and will try to be a tough negotiator. Steven Penrod et al., The Implications of Social Psychological Research for Trial Practice Attorneys, in Psychology and Law (D. Muller ed., 1984). For these reasons, clients rarely are present during civil negotiations. Although the same reasons militate against having a client present during plea bargaining, in practice it is somewhat more common for a criminal defendant to be present during bargaining, especially if the defendant has something to trade, such as testimony against confederates.

6. FINAL AGREEMENT.

Should the final agreement be written and formalized, and if so, who should draft it? The answer to the first question would seem to be that it must be written and signed by both parties if it is to have any binding effect. The answer to the second question is that you should not abdicate your responsibility for the drafting of the agreement. Most negotiators recommend that you should volunteer to write up the agreement yourself, so that you can be sure that your client is completely protected. In reality, however, the agreement itself usually will have to be negotiated -- from an outline through various drafts, until both sides agree on its wording -- so that it makes little difference who prepares the final draft.

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