2003

The Negotiation Process

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THE NEGOTIATION PROCESS[1]

By Charles B. Craver[2]

I. INTRODUCTION

Lawyers negotiate constantly. They negotiate on the telephone, in person, through the mail, and through fax and e-mail transmissions, They even negotiate when they do not realize they are negotiating. They negotiate with their own partners, associates, legal assistants, and secretaries; they negotiate with prospective clients and with current clients. They then negotiate on behalf of clients with outside parties as they try to resolve conflicts or structure business arrangements of various kinds.

Most attorneys have not formally studied the negotiation process. Few have taken law school courses pertaining to this critical lawyering skill, and most have not read the leading books and articles discussing this topic. Although they regularly employ their bargaining skills, few actually understand the nuances of the bargaining process. When they prepare for bargaining encounters, they devote hours to the factual, legal, economic, and, where relevant, political issues. Most lawyers devote no more than ten to fifteen minutes on their actual negotiation strategy. When most attorneys commence bargaining interactions, they have only three things in mind that relate directly to their negotiating strategy: (1) their planned opening positions; (2) their bargaining objectives; and (3) their bottom lines.

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As bargaining encounters unfold, lawyers move from their opening positions toward their goals. Most do not do this in a structured and carefully planned manner. Since they think of negotiations as wholly unstructured interactions, they wing it. They follow their instincts and hope for the best. If they only understood how structured bargaining encounters are, they could greatly improve their negotiation proficiency. They would appreciate the purpose of each stage and know the best way to accomplish their objectives in each. They would no longer feel lost when something unexpected occurs, and they would be able to obtain better results for their clients. They could also achieve more efficient agreements that would maximize the joint returns for both parties.

This article will explore the six stages of the negotiation process, and will explain the purposes of each. We will begin with the importance of thorough preparation, recognizing that knowledge is power when people negotiate. We will then discuss the preliminary stage during which bargaining parties establish their identities and the tone for their substantive talks. The information exchange will be evaluated, to be sure individuals know the best ways to obtain relevant information from others and the most effective way to disclose their own critical information. This stage allows the participants to articulate their respective needs and interests to let each side know which items are more or less important.

Once the information exchange is finished, the distributive bargaining commences, as the participants seek to claim for their respective sides what is available for division. If the distributive portion of the process functions well, the parties will move toward an agreement and enter the closing part of their interaction. Once they achieve an agreement, many negotiators part company to allow someone to draft the terms of their agreement. They omit the cooperative

phase in which they should work to expand the overall pie and maximize their joint returns.

It does not matter whether lawyers negotiate to resolve disputes or to structure business transactions. A more thorough understanding of the bargaining process will improve their ability to obtain optimal terms for their clients. It will also diminish the anxiety they experience when they negotiate, which is often caused by their lack of understanding of the overall process. Attorneys will begin to enjoy their bargaining interactions, as they move through the various stages from preparation to efficient final agreements.

II. THE PREPARATION STAGE: ESTABLISHING LIMITS AND OBJECTIVES

> If you know the enemy and know yourself, you need not fear the result of a hundred battles. If you know yourself but not the enemy, for every victory gained you will also suffer a defeat. If you know neither the enemy nor yourself, you will succumb in every battle.[3]

Persons who thoroughly prepare for bargaining encounters generally achieve more beneficial results than those who do not, because knowledge constitutes power at the bargaining table.[4] Well prepared negotiators possess the knowledge they need to value their impending interactions, and they exude a greater confidence in their positions than their adversaries. Their confidence undermines the conviction of less prepared opponents and causes those persons to question their own positions. As less prepared advocates subconsciously defer to the greater certainty exhibited by their more knowledgeable adversaries, they tend to make more frequent and greater concessions.

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[3] SUN TZU, THE ART OF WAR 43 (J. Clavell ed.,1983).

[4] *See* ORAN R. YOUNG (ed.), BARGAINING: FORMAL THEORIES OF NEGOTIATION 10-11 (1975).

A. CLIENT PREPARATION

When attorneys are asked to negotiate on behalf of clients, they must elicit all of the relevant factual information possessed by those clients. They must also determine what those clients hope to achieve through legal representation. Clients frequently fail to disclose their real underlying interests and objectives when they talk with lawyers, because they only consider options they think attorneys can obtain for them. It is thus critical for lawyers to carefully probe client interests and goals, and to listen intently to client responses.[5]

Persons who say they wish to purchase or lease specific commercial property may suggest that they are only interested in that location. When they are asked probing questions regarding their intended use, it may become apparent that alternative locations may be acceptable. Knowledge about these alternatives enhances this side's bargaining power by providing viable options if the current discussions do not progress satisfactorily. Clients contemplating the investment of resources in other firms should be asked about their ultimate objectives. Are they willing to invest their assets in a single venture, or would they prefer to diversify their holdings? Are they willing to risk their capital to achieve a higher return or would they prefer a less generous return on an investment that is likely to preserve their initial investment? Is a business seller willing to accept future cash payments, shares of stock in the purchasing firm, or in-kind payments in goods or services provided by the purchasing company?

Clients who initially ask for monetary relief through the litigation process may have failed

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[5] *See* Leonard L. Riskin, *The Contemplative Lawyer: On the Potential Contributions of Mindfulness Meditation to Law Students, Lawyers, and Their Clients*, 7 HARV. NEGOT. L. REV. 601, 649-650 (2002); ABRAHAM P. ORDOVER & ANDREA DONEFF, ALTERNATIVES TO LITIGATION 32-33 (2002).

to consider alternative interests. Someone contemplating a defamation action may prefer a retraction and a public apology to protracted litigation. A person who thinks she was wrongfully discharged from employment may prefer reinstatement and a transfer to another department instead of a substantial monetary sum. A victim of alleged sexual harassment may prefer an apology and stay-away promise from the harasser to monetary compensation and likely future difficulties. If attorneys do not ascertain the real underlying interests of their clients, they may ignore options that may enhance their bargaining positions and help them achieve optimal agreements.[6]

As lawyers explore client interests and objectives, they must try to determine the degree to which the clients want the different items to be exchanged. Most legal representatives formally or informally divide client goals into three categories: (1) essential; (2) important; and (3) desirable. "Essential" items include terms clients must obtain if agreements are to be successfully achieved. "Important" goals concern things clients want to acquire, but which they would be willing to exchange for "essential" or other "important" items. "Desirable" needs involve items of secondary value which clients would be pleased to obtain, but which they would exchange for "essential" or "important" terms.

For each item to be negotiated, attorneys should try to determine how much clients value different levels of attainment.[7] For example, money may be an "essential" issue for a person who has sustained serious injuries in an automobile accident. The client may consider the first

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[6] *See* ROGER FISHER & WILLIAM URY, GETTING TO YES 101-11 (1981).

[7] *See* HOWARD RAIFFA, NEGOTIATION ANALYSIS: THE SCIENCE AND ART OF COLLABERATIVE DECISION MAKING 129-147 (2003).

$200,000 critical, both to make up for lost earnings and to enable him to pay off unpaid medical bills and increased credit card debt. While the client would like to obtain more than $200,000, he may only consider amounts above $200,000 "important," rather than "essential." As a result, the client may not consider $400,000 to be twice as beneficial as the initial $200,000. His lawyer may have to obtain $500,000 or even $600,000 before the client would consider the sum achieved twice as good as the first $200,000. Lawyers preparing for bargaining encounters must make these calculations for each item to be negotiated. Only by appreciating the degree to which the client values different amounts of particular commodities can they hope to obtain results that will most effectively satisfy the client's underlying interests.

Attorneys must similarly ascertain the relative values of the various items to be negotiated within each broad category. Does the client value Item A twice as much as Item B or two-thirds as much? How does Item C compare to Items A and B? It helps to mentally assign point values to the various items to enable legal representatives to understand how they can maximize overall client satisfaction. Legal advocates can use this relative value information to decide which items to seek and which items to trade for other terms the client values more highly.

When determining client objectives, lawyers should avoid the substitution of their own values for those of their clients, realizing that client interests must guide their negotiation strategy. Attorneys should be hesitant to tell clients they are wrong when they articulate preferences the lawyers find strange. While it is appropriate for legal representatives to probe stated client goals to be certain the clients appreciate the available alternatives, they should not

disregard client interests with which they do not agree.[8]

Negotiating lawyers should not be constrained by judicial authority or usual business practices. Negotiators can agree to any terms that are legal. Clients often prefer results that could not be achieved through adjudications (*e.g.*, retractions in defamation actions or apologies in harassment cases) or which might not be consistent with usual business arrangements (*e.g.*, in-kind payments). Lawyers should not ignore these possibilities merely because courts could not award them or many business leaders would not approve them. So long as client interests are maximized, such considerations should be irrelevant.

Once client interests and goals are ascertained, lawyers must educate clients about the negotiation process. They should emphasize the compromises that may have to be made and begin to prepare the clients for the offers they are likely to obtain. It is best to do this in a cautious manner to avoid the undue elevation of client expectations. If client expectations become excessive, settlement discussions might be doomed from the beginning. On the other hand, if client expectations are unusually low, lawyers should carefully suggest the possibility of more generous results and ask for the time they will need to see if they can achieve more beneficial terms. Clients should also be educated about the time it is likely to take to reach satisfactory agreements. If they fail to provide their legal representatives with adequate time to negotiate, they undermine the effectiveness of their own advocates.

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[8] Under Model Rule 1.2, "A lawyer shall abide by a client's decisions concerning the objectives of representation . . . and shall abide by a client's decision whether to accept an offer of settlement of a matter." THOMAS D. MORGAN & RONALD D. ROTUNDA, 2002 SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY 9 (2002).

B. LAWYER PREPARATION

Once lawyers have ascertained the relevant factual information and the underlying interests and goals of their clients, they must become thoroughly familiar with the relevant legal doctrines, economic aspects, and, where pertinent, political agendas. They must develop cogent legal theories to support their positions, and anticipate the counter-arguments they expect opposing counsel to make. Negotiators confronted by anticipated claims are unlikely to have their confidence undermined by those contentions.

1. *Calculating Own and Opposing Side's Bottom Lines*

After attorneys become familiar with the relevant factual and legal matters affecting their own side, they must determine their bottom line – *i.e.*, their Best Alternative to a Negotiated Agreement (BATNA).[9] What are the best results they could realistically hope to obtain through other channels? It is critical for negotiators to have a set bottom line to be certain they will not enter into agreements that would be worse than what would happen if no accords were obtained.[10]

Negotiators who are initially unable to evaluate the results of nonsettlements must take the time to develop alternatives. This is especially important for transactional experts. Their client may be seeking a buy-sell agreement with a single firm or a licensing arrangement with one party. Are there other potential purchasers or sellers they should contact? Other potential

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[9] *See* ROGER FISHER & WILLIAM URY, *supra* note 6, at 101-111. Some litigators, especially defendants, use the term WATNA (Worst Alternative to a Negotiated Agreement) to establish their bottom line.

[10] *See* Russell Korobkin, *A Positive Theory of Legal Negotiation*, 88 GEO. L.J. 1789, 1797 (2000); SAMFRITS Le POOLE, NEVER TAKE NO FOR AN ANSWER 60-61 (2nd ed. 1991).

license partners? As alternatives become numerous, they may wish to create decision trees that graphically depict the strengths and weaknesses associated with each option.[11] Each limb represents a different alternative, with the advantages and disadvantage of each option being listed with the likelihood of obtaining those results. This visual approach makes it easier for many individuals to appreciate the comparative values of the different options.

When the alternative to a negotiated agreement is an administrative, arbitral, or judicial proceeding, lawyers must carefully assess the likely outcome of the adjudication process. They must review the pertinent factual circumstances and legal doctrines, and then evaluate such subjective factors as witness credibility and the sympathetic nature of the parties involved. When they attempt to assess the probable trial result, they must not only predict which party is likely to prevail and with what degree of probability (*e.g.*, 50% or 70% likelihood), but also the expected amount of such an award.[12]

Suppose the plaintiff has a 20 percent chance of obtaining a $500,000 verdict, a 30 percent chance of obtaining a $400,000 verdict, a 30 percent chance of obtaining a $300,000 and a 20 percent chance of a verdict for the defendant. The expected law suit value would be:

0.20 (20%) x $500,000 . . . . . $100,000
0.30 (30%) x $400,000 . . . . . $120,000
0.30 (30%) x $300,000 . . . . . $90,000
0.2 (20%) x. $0 . . . . . $0

Expected Value: $310.000

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[11] *See generally* JOHN S. HAMMOND, RALPH L. KEENEY & HOWARD RAIFFA, SMART CHOICES: A PRACTICAL GUIDE TO MAKING BETTER DECISIONS (1999).

[12] *See* LEIGH THOMPSON, THE MIND AND HEART OF THE NEGOTIATOR 84-85 (1998).

Attorneys representing clients in litigation situations should appreciate the fact that plaintiffs tend to over-estimate the probability of success and the amounts likely to be awarded, while defendants tend to under-estimate these factors.[13] Plaintiff representatives should thus discount their expected outcome, and defendant representatives should slightly amplify their predicted result.

The monetary and nonmonetary transactional costs associated with settlement and nonsettlement must also be considered. Litigants must recognize that the monetary and psychological costs of trial must be *subtracted from* the anticipated plaintiff's outcome, because these costs would diminish the value of any plaintiff judgment.[14] Since the defendant would have to incur these costs no matter who prevails at trial, these defense costs have to be *added to* the defendant's expected result.

A similar expected-value analysis should be performed by persons preparing for transactional encounters. Suppose the owner of a firm is deciding how much they should expect to obtain from the sale of their corporation. Let's assume the owner believes there is a 10 percent chance the business will sell for $50 million, a 30 percent chance it will sell for at least $45 million, a 60 percent chance it will sell for at least $40 million, a 90 percent chance it will sell for at least $35 million, and a 100 percent chance it will sell for at least $30 million. What would be the expected value of the firm?

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[13] *See* HOWARD RAIFFA, *supra* note 7, at 146-47.

[14] Even if the plaintiff is suing under a fee-shifting statute that authorizes awards of attorney fees to prevailing plaintiffs (*e.g.*, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k) (2000)), they may have other monetary costs and will have definite nonmonetary costs that still have to be considered.

0.10 (10%) x $50,000,000 . . . . . $5,000,000
0.20 (30% - 10%) x $45,000,000 . . . . $9,000,000
0.30 (60% - 30%) x $40,000,000 . . . . $12,000,000
0.30 (90% - 60%) x $35,000,000 . . . . $10,500,000
0.10 (100% - 90%) x $30,000,000 . . . $3,000,000

Expected Value: $39,500,000

The client must now be asked how much money she really has to obtain to sell her business. She may have to have at least $35 million, and would not accept anything below that figure. How willing is she to hold out for the possibility of a higher amount? The attorney and client must determine how risk averse or risk taking the client is willing to be. A risk taker may be willing to hold out for $45 million, while a risk averse seller may not be able to hold out much past $40 million.

Once attorneys have determined their own side's expected value, they often think they have completed this part of the evaluative process. The many lawyers who come to this conclusion ignore an equally important part of the preliminary equation: their *opponent's* expected value.[15] Legal representatives should employ formal and informal discovery techniques to obtain the relevant information possessed by the opposing party. They must ascertain, to the degree they can before they begin to directly interact with those individuals, the needs and interests of their adversaries. This will allow them to predict the items they want that are of minimal importance to the other side, and which terms the other side wants that are not valued by their own client. They must also attempt to determine the alternatives available to the other side if no agreement is achieved through the current negotiations. If the other side's nonsettlement options are worse than this party's external options, this side has greater bargaining power. The

[15] *See* Russell Korobkin, *supra* note 10, at 1797-99.

cost of a nonsettlement to this side is less onerous than the cost of nonconcurrence to the other party. An appreciation of opponent nonsettlement alternatives also allows this side to prepare a negotiation strategy that will culminate in an offer that should be preferable to the opposing side's nonsettlement options.

When negotiators endeavor to understand their own client's strengths and weaknesses and those of the other side, they must avoid the tendency to over-estimate their own weaknesses and to under-estimate the weaknesses of their opponent.[16] Lawyers become intimately familiar with their own client's situations, and tend to amplify their areas of vulnerability. They assume, usually incorrectly, that opposing counsel are as aware of this side's weaknesses as they are, ignoring the fact they should be able to conceal many of their side's difficulties when they interact with their adversaries. Attorneys should estimate what negative information the other side is likely to obtain regarding their own client's circumstances.

Lawyers must similarly review the limited information they have generated about their opponents. Many negotiators overlook the negative factors affecting their adversaries, because those pieces of information have been carefully camouflaged. They thus accord their opponents greater strength than they deserve. To counteract this tendency, negotiators must ask themselves what negative factors may be affecting their adversaries. If they were representing the other side, what would they be concerned about?

Plaintiff representatives should consider whether the defendant is willing to assume the expense of defending a case it is likely to lose and estimate the negative publicity the defendant

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[16] *See* Daniel Kahneman & Amos Tversky, *Conflict Resolution: A Cognitive Perspective* in BARRIERS TO CONFLICT RESOLUTION 45, 46-47 (Kenneth Arrow, Robert Mnookin, Lee Ross, Amos Tversky & Robert Wilson, eds. 1995).

thinks, even irrationally, may result from a public adjudication. Defense counsel should ask whether the plaintiff can afford to hold out until the scheduled trial date, which may be a year or two away. Does the plaintiff wish to have his integrity and/or competence challenged in an open forum? An attorney representing a patent holder should ask herself how much the prospective licensee needs – and can develop – the technology being discussed. The lawyer for the potential licensee must ask what other parties might exploit the new technology as effectively as his client.

2. *Establishing Elevated Aspiration Levels*

Attorneys preparing for bargaining encounters must recognize that persons who begin their interactions with elevated goals obtain more beneficial results than individuals who begin with modest objectives.[17] These goals should always be well above their bottom lines if negotiators hope to obtain optimal results.[18] Bargainers should not establish modest objectives merely to avoid the possibility they might not obtain everything they want.[19] While high aspiration bargainers might not achieve their ultimate goals, they usually obtain better results than negotiators with lower objectives.

Consistently successful negotiators establish elevated aspiration levels before they commence interactions with opponents. They ascertain the pertinent factual, legal, and economic issues, and estimate the most generous results they could reasonably hope to obtain. They then

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[17] *See* Russell Korobkin, *Aspirations and Settlement*, 88 CORNELL L. REV. 1, 4, 20-30 (2002); ROGER DAWSON, SECRETS OF POWER NEGOTIATING 16-17 (2nd ed. 2001); MAX H. BAZERMAN & MARGARET A. NEALE, NEGOTIATING RATIONALLY 28 (1992).

[18] *See* SAMFRITS LePOOLE, *supra* note 10, at 62-63.

[19] *See* RICHARD SHELL, BARGAINING FOR ADVANTAGE 32-33 (1999).

increase their objectives and work diligently to formulate arguments that make their seemingly excessive goals seem reasonable. Less certain adversaries tend to defer to the overt confidence exuded by these more thoroughly prepared participants.[20]

Proficient negotiators focus primarily on their aspiration levels when they bargain. They only rely upon their bottom lines when they have to decide whether to continue interactions that appear to be unproductive. Less skilled bargainers tend to focus excessively on their bottom lines throughout their interactions. Once they attain these minimal objectives, they relax knowing that some agreement will be achieved, and they no longer work hard to surpass their bottom-lines. Observant opponents can discern their relaxed states and become less generous with respect to subsequent concessions. These bottom-line oriented negotiators thus settle for less generous terms than their cohorts who continue to focus on their aspiration levels throughout their bargaining encounters.[21]

When individuals prepare for negotiation interactions, they should establish generous – but realistically attainable – objectives. If their goals are entirely unreasonable, they may discourage opponents and induce those persons to think that mutually acceptable agreements are unattainable.[22] Unusually elevated aspiration bargainers may encounter an additional problem. Once they get into the negotiation and realize that their objectives are not achievable, they may lose this important touchstone and move quickly toward their bottom lines. When bargainers

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[20] *See* Jennifer Gerarda Brown, *The Role of Hope in Negotiation*, 44 U.C.L.A. L. REV. 1661, 1675 (1997).

[21] *See* RICHARD SHELL, *supra* note 19, at 24-32.

[22] *See* Russell Korobkin, *supra* note 17, at 62-63.

determine that their preliminary aspirations are unrealistic, they should take a short recess and establish new goals they believe are attainable. This gives them elevated benchmarks, well above their bottom lines, which they can use to guide their further negotiation efforts.

3. *Formulating Elevated but Principled Opening Offers*

Advocates who commence bargaining interactions with raised expectations recognize that it is impossible for even skilled negotiators to accurately calculate the value of impending encounters solely from their own side's perspective. Until they begin to interact with their opponents, they are not certain regarding the degree to which those individuals want or need the prospective deal. If their adversaries feel compelled to achieve accords, they may accept less beneficial terms to ensure the desired results. If their opponents are willing to risk the consequences associated with nonsettlements, they may hold out for more generous conditions. By beginning the process with heightened position statements, bargainers can preserve their options until they are able to determine whether their assumptions regarding opponent needs and desires are accurate.

Many persons are hesitant to formulate excessive opening positions for fear of offending their opponents. Nonetheless, proficient negotiators attempt to develop the most extreme positions they can rationally defend.[23] They realize that if their initial offers are wholly unrealistic, they will feel awkward when they try to justify their positions and undermine their credibility. On the other hand, they understand that if they begin with modest offers, they immediately place themselves at a disadvantage. When in doubt, negotiators should select more,

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[23] *See* RICHARD SHELL, *supra* note 19, at 160-61.

rather than less, extreme opening positions.[24] It is far easier to retreat from excessive positions than it is to counteract the negative impact of inappropriately diminished offers.

Some individuals commence bargaining encounters with modest proposals hoping to generate reciprocal behavior by their opponents. Opening offers that are overly generous to adversaries are likely to have the opposite effect due to the impact of a phenomenon known as "anchoring."[25] When people receive better offers than they anticipated, they question their own preliminary assessments and *increase* their own aspiration levels. They expect to obtain more beneficial results than they initially thought possible, and they make initial offers more favorable to their own side. This psychological phenomenon significantly disadvantages advocates who make overly generous opening offers. Bargainers who begin with parsimonious opening offers have the opposite impact. Adversaries begin to think they will not be able to achieve the results they preliminarily hoped to attain, and they lower their expectations. As opponents decrease their aspiration levels, they expand the parties settlement range and increase the probability of settlement. The lowering of adversary goals simultaneously enhances the likelihood the persons who began with less generous offers will obtain final terms more favorable to their own clients.

I demonstrate the impact of anchoring to attorneys by giving them identical fact patterns describing an automobile accident. The participants are told they represent the defendant. One half of the participants are informed that the plaintiff lawyer has demanded $60,000, while the

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[24] *See* ROGER DAWSON, *supra* note 17. At 13-18; HERBERT KRITZER, LET'S MAKE A DEAL 54-55 (1991). *See generally* Russell Korobkin & Chris Guthrie, *Psychological Barriers to Litigation Settlement: An Experimental Approach*, 93 MICH. L. REV. 107 (1994).

[25] *See* Russell Korobkin, *supra* note 17, at 30-36; RICHARD SHELL, *supra* note 19, at 161-62; Russell Korobkin & Chris Guthrie, *supra* note 24, at 138-42.

other half are told the plaintiff attorney has demanded $30,000. I ask the participants how much they think they will have to pay to resolve this claim. The persons facing the $60,000 demand respond with significantly higher figures than the people facing a $30,000 demand.[26]

When negotiators formulate their initial offers, they should develop principled rationales they can use to explain how they arrived at their stated positions.[27] Litigators should thus carefully explain the exact basis for their offers. How have they valued the past and expected future medical expenses and compensation loses? How have they valued the pain and suffering? Transactional bargainers should do the same thing. How have they valued the real property, building and equipment, accounts receivable, patents and trade marks, good will, etc.? The development of a specific value supported by such logical explanations demonstrates a firm commitment to that position.[28] It also makes it more difficult for opponents to dismiss such positions without careful consideration of the supporting rationales.[29] A principled opening offer often allows the initiating party to accomplish one other important objective – it may enable that party to define the bargaining agenda. If the opponent responds by referring to the different components used to support the first side's opening position, this will enable the initiating party

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[26] *See* Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 787-94 (2001) (describing the results of a similar study involving magistrate judges asked to estimate the value of identical fact patterns containing different plaintiff demands).

[27] *See* JAMES C. FREUND, SMART NEGOTIATING 122-23 (1992); JOHN ILICH, DEAL-BREAKERS & BREAK-THROUGHS 112 (1992).

[28] *See* STEFAN H. KRIEGER, RICHARD K. NEUMANN, JR., KATHLEEN H. McMANUS & STEVEN D. JAMAR, ESSENTIAL LAWYERING SKILLS 282-83 (1999).

[29] *See* ANTHONY R. PRATKANIS & ELLIOT ARONSON, AGE OF PROPAGANDA 26-27 (1991).

to dictate the basic areas to be discussed.

4. *Choreographing the Impending Interaction*

Once legal representatives have determined their bottom lines, aspiration levels, and opening offers, they must plan their bargaining strategies. How do they envision moving from where they begin to where they would like to conclude their encounter? Do they anticipate a number of small concessions or a few large position changes? What bargaining techniques do they think would most effectively move their opponents toward their objectives? At what point during their interaction do they plan to take a firm stand, hoping to generate beneficial final terms? The more negotiators visualize a successful transition from their opening positions to their desired results, the more likely they are to be successful.

Proficient negotiators appreciate the importance of planning to reach ultimate offers that will be considered attractive by reasonably risk averse opponents. If their offers are wholly unacceptable, it is easy for adversaries to accept the less onerous consequences associated with nonsettlements. On the other hand, most people find it difficult to reject definitive offers that are at least as good as what they think they might achieve through their nonsettlement alternatives.

It is beneficial for negotiators to appreciate the impact of gain-loss framing.[30] When people are offered certain *gains* and the possibility of greater gains or no gains, most tend to be risk averse and accept the certain gains. On the other hand, when persons are offered certain

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[30] *See* Chris Guthrie, *Prospect Theory, Risk Preference, and the Law*, 97 NW. U. L. REV. 1115, 1117-27 (2003); Russell Korobkin, *Aspirations and Settlement*, 88 CORNELL L. REV. 1, 14-15 (2002); Chris Guthrie, Jeffrey Rachlinski & Andrew Wistrich, *supra* note 26, at 794-99; Amos Tversky & Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, 211 SCIENCE 453 (1981); Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 ECONOMETRICA 263 (1979).

losses and the possibility of greater losses or no losses, they tend to be risk takers hoping to avoid any losses. It thus behooves bargainers to formulate offers that appear to provide sure gains to their opponents. This is usually easy for transactional negotiators who are contemplating the purchase or sale of businesses or the licensing of new technology, because both sides view the potential results of these interactions as gains.

Defense attorneys have the benefit of gain-loss framing, since their settlement offers always provide the prospect of certain gains to plaintiffs – and to plaintiff counsel who are usually being compensated under contingent fee arrangements. Plaintiff lawyers, however, appear to be demanding sure losses from defendants. This induces defendants to be more risk taking, hoping to avoid any losses at trial. If plaintiff attorneys can reframe their offers – explaining to defendants that for this sum of money the defendants' problems will be alleviated – they may induce defendants to behave in a more risk averse manner. This approach would encourage defendants to view these offers positively, rather than negatively.

Buyers and sellers of tangible and intangible goods should also understand the impact of the "endowment effect."[31] People who own goods others wish to purchase tend to overvalue those items, while individuals who are thinking of buying goods possessed by others tend to undervalue those items. Persons contemplating the sale of goods should thus try not to overvalue the property they are selling, and prospective purchasers should not be offended by seemingly excessive seller aspirations. Objective assessments of the actual value of the properties in question should encourage both sellers and buyers to moderate their expectations and allow them

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[31] *See* Russell Korobkin, *The Endowment Effect and Legal Analysis*, 97 NW. U. L. REV. 1227 (2003).

to move toward mutually acceptable terms.

Bargainers must finally contemplate the contextual factors for their interaction. When and where would they prefer to meet with their adversaries? At their own office, their opponent's office, or a neutral site? If they schedule sessions at their own office, how should they arrange the furniture? Competitive bargainers tend to set up furniture arrangements that are adversarial. For example, they may have a square or rectangular table with chairs on opposite sides in a combative configuration. Cooperative negotiators may use a round or oval table, and have the participants sit on adjacent, rather than opposite, sides, in a less confrontational configuration. Manipulative bargainers may provide raised, comfortable chairs for themselves and short, uncomfortable chairs for their opponents, hoping to place their adversaries at a psychological disadvantage.[32]

III. THE PRELIMINARY STAGE: ESTABLISHING NEGOTIATOR IDENTITIES AND TONE FOR THE INTERACTION

Lawyers who have previously interacted at the bargaining table are usually familiar with each other's negotiating styles. They are generally able to commence new negotiations without having to formally establish preliminary ground rules. Nonetheless, they should still take the time to reestablish cordial environments that will contribute positively to their impending discussions. Individuals who have not had extensive prior dealings with one another should expect to spend the initial portion of their interaction establishing their personal and professional identities and the tone for their subsequent discussions.

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[32] *See generally* MICHAEL KORDA, POWER: HOW TO GET IT, HOW TO USE IT 194-202 (1975).

During the preliminary portion of bargaining interactions, lawyers should look for common interests they share with opponents. They may be from the same city or state, they attended the same college or law school, their children attend the same schools, they enjoy the same music or sports, etc. Persons who can identify and share such common interests enhance the probability they will like each other and develop mutually beneficial relationships.[33]

Attorneys who are unfamiliar with the negotiating styles of opposing counsel should try to obtain pre-negotiation information from other people in their own offices and from other lawyers they know. Can they expect their opponents to behave in an open and cooperative manner in which they seek to achieve mutually beneficial results or in a closed and adversarial fashion in which they try to maximize their own side's results?[34] Can they anticipate candor or dissembling from those persons? What types of bargaining techniques can they expect the other side to employ?[35]

Attorneys who encounter seemingly cooperative opponents should try to determine whether those people's apparent predisposition toward cooperative interactions is consistent with their actual behavior. Is their own openness being reciprocated by opponent candor? Until they verify this fact, they should not disclose excessive amounts of critical information regarding their own situations. They might otherwise permit manipulative adversaries to create false impressions

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[33] *See* CHRISTOPHER W. MOORE, THE MEDIATION PROCESS 184-85 (3rd ed. 2003).

[34] *See* Charles B. Craver, *Negotiation Styles: The Impact on Bargaining Transactions*, DISPUTE RES. J. 48 (Feb.-Apr. 2003).

[35] *See generally* Charles B. Craver, *Frequently Employed Negotiation Techniques*, 4 CORP. COUNSEL'S Q. 66 (1988).

of cooperation, so they can take advantage of one-sided disclosures by this side.[36] If lawyers find that their preliminary openness is not being reciprocated by their opponents, they should be less forthcoming with their own important information to avoid exploitation by opportunist adversaries.

Studies indicate that competitive individuals tend to behave competitively regardless of the behavior of their opponents, while cooperative persons tend to behave like those with whom they interact – cooperatively with other cooperative parties and competitively with competitive adversaries.[37] This phenomenon is generated by the fact that cooperative individuals see the world as composed of both cooperative and competitive persons, while competitive people believe that others usually behave in a competitive manner.[38] Although cooperative negotiators prefer to interact with other cooperative persons, they recognize that when they confront competitive opponents they must behave more strategically (*i.e.*, less openly) to avoid exploitation.

Some lawyers demonstrate overtly competitively tendencies at the outset of bargaining encounters. They deliberately create competitive office environments that are designed to make their opponents feel uncomfortable. Their furniture takes up most of their office, they give themselves raised comfortable chairs, and they provide their opponents with short uncomfortable

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[36] *See* Gary T. Lowenthal, *A General Theory of Negotiation Process, Strategy, and Behavior*, 31 KAN. L. REV. 69, 82 (1982).

[37] *See* JEFFREY RUBIN & BERT BROWN, THE SOCIAL PSYCHOLOGY OF BARGAINING AND NEGOTIATION 185 (1975).

[38] *See id.*; I. WILLIAM ZARTMAN & MAUREEN R.BERMAN, THE PRACTICAL NEGOTIATOR 25 (1982).

chairs. When they have to negotiate in other offices, they select seats directly across from – rather than adjacent to – their opponents to create adversarial environments. They are likely to sit with their arms folded across their chest, and exude minimal personal warmth. They often refer to adversaries as "Mr." or "Ms." _____ instead of by their first names, to permit them to depersonalize their interactions with people they psychologically view as their enemies.

As lawyers begin the Preliminary Stage, they should take the time to develop some rapport with opposing counsel. Through warm eye contact and a pleasant demeanor, they can establish a mutually supportable environment. This reduces the unproductive anxiety created by adversarial conduct. Negotiators should recognize that they can be forceful advocates without resorting to disagreeable tactics.[39] Individuals who equate offensive behavior with effective negotiating strategy will be doubly disappointed – their professional interactions will be increasingly unpleasant and they will find it more difficult to obtain optimal results for their clients.

The preliminary portion of bargaining encounters is critical, because the participants create the atmosphere that affects their entire bargaining transaction. Studies have found that persons who commence interactions in positive moods negotiate more cooperatively and are more likely to use problem-solving efforts designed to maximize the joint returns achieved by the participants.[40] On the other hand, people who begin their encounters in negative moods negotiate

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[39] *See* BOB WOOLF, FRIENDLY PERSUASION 34-35 (1990). *See generally* RONALD M. SHAPIRO & MARK A. JANKOWSKI, THE POWER OF NICE (rev. ed. 2001).

[40] *See* Clark Freshman, Adele Hayes & Greg Feldman, *The Lawyer-Negotiator as Mood Scientist: What We Know and Don't Know About How Mood Relates to Successrul Negotiation*, 2002 J. DISP. RES. 13, 15 (2002); Leigh L. Thompson, Janice Nadler & Peter H. Kim, *Some Like It Hot: The Case for the Emotional Negotiator* in SHARED COGNITION IN

more adversarially and tend to generate less efficient results. In addition, while negative mood participants are more likely to resort to deceptive tactics than others, positive mood actors are more likely to honor the agreements reached than their negative mood cohorts.[41] It is thus beneficial for individuals beginning bargaining encounters to take a few minutes to create supportive environments designed to create positive moods that should make their interactions more pleasant and enhance the probability the parties will interact cooperatively and maximize their joint returns.

Lawyers who have learned from previous personal dealings or from other reliable sources that particular adversaries approach negotiations in a competitive manner should initially try to demonstrate their willingness to engage in mutually cooperative behavior. Although they should be careful not to disclose too much significant information without receiving reciprocal disclosures, evidence indicates that cooperative conduct promotes the development of trust and contributes to the establishment of mutually supportive relationships.[42]

Attorneys who meet professionally for the first time often engage in games of one-upmanship. Individuals from prestigious firms or prominent government agencies emphasize their office affiliations. Some people may mention the well-known law schools from which they

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ORGANIZATIONS: THE MANAGEMENT OF KNOWLEDGE 142-44 (Leigh L. Thompson, John M. Levine & David M. Messick, eds.1999); Joseph P. Forgas, *On Feeling Good and Getting Your Way: Mood Effects on Negotiator Cognition and Bargaining Strategies*, 74 J. PERSONALITY & SOC. PSYCH. 565, 566-74 (1999).

[41] *See* Clark Freshman, Adele Hayes & Greg Feldman, *supra* note 40, at 22-24; Leigh L. Thompson, Janice Nadler & Peter H. Kim, *supra* note 40, at 142-44.

[42] *See* JEFFREY RUBIN & BERT BROWN, *supra* note 37, at 263. *See generally* WILLIAM URY, GETTING PAST NO (1991).

graduated. Individuals from less prestigious firms or less prominent law schools should not be intimidated by these types of disclosures. I have found no statistically significant correlation between student GPAs and their performance on my negotiation course exercises.[43] I would similarly expect no correlation between the overall reputation of law schools and the negotiation skills of their graduates. Successful students have high abstract reasoning skills, while proficient negotiators possess good interpersonal skills. Although the former capabilities help people gain admission to top schools, they have a minimal impact on negotiation performance.

Attorneys who encounter overtly competitive "win-lose" opponents should recognize that while they may not be able to convert those individuals into cooperative "win-win" negotiators, they may be able to diminish the competitive tendencies of those persons. Through friendly introductions, sincere smiles, and warm handshakes, they can try to establish more personal relationships. They can use a prolonged Preliminary Stage to enhance the negotiating atmosphere. They can attempt to sit in cooperative, rather than competitive, configurations. They can ask these opponents about their families or their colleagues, while making similar disclosures about themselves. If they can establish first-name relationships, they can accentuate the personal nature of the impending interactions.

If their preliminary efforts do not diminish the competitive behavior of opponents, lawyers may employ "attitudinal bargaining" to encourage more pleasant conduct.[44] They may indicate their unwillingness to view the bargaining process as a combative exercise, and suggest

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[43] *See* Charles B. Craver, *The Impact of Student GPAs and a Pass/Fail Option on Clinical Negotiation Course Performance*, 15 OHIO ST. J. DISP. RES. 373 (2000).

[44] *See* HOWARD RAIFFA, *supra* note 7, at 300-01.

the need to establish some preliminary ground rules for the interaction.[45] Litigators can suggest that if the other side prefers open hostility, a trial setting would be the appropriate forum due to the presence of a presiding official. Transactional negotiators may indicate that their clients are looking for mutually beneficial, on-going relationships that cannot be created and maintained through untrusting adversarial behavior.

When attitudinal bargaining fails to generate appropriate conduct, individuals who must interact with unpleasant opponents should try to control their encounters in ways that diminish the ability of offensive participants to bother them. For example, against a sarcastic and belittling opponent, they could use the telephone to conduct their discussions. When the other side's behavior begins to bother them, they can indicate that they have another call and break off talks. They can call back their adversary once they have calmed down.

Legal representatives need to appreciate the benefits that may be derived at the outset of a conflict-resolution discussion from an acknowledgment of the other party's plight and the issuance of a simple apology.[46] Most people only resort to litigation after all other efforts to resolve matters have failed. By then, the aggrieved persons are frustrated and angry regarding the perceived unwillingness of the responsible parties to acknowledge their contribution to the problem. If the seemingly responsible individuals indicate an appreciation of the injured party's

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[45] *See* HENRY S. KRAMER, GAME, SET, MATCH: WINNING THE NEGOTIATIONS GAME 264-65 (2001); LEIGH STEINBERG, WINNING WITH INTEGRITY 144-49 (1998).

[46] *See generally* Erin Ann O'Hara & Douglas Yarn, *On Apology and Conscience*, 77 WASH. L. REV. 1121 (2002); Taryn Fuchs-Burnett, *Mass Public Corporate Apology*, 57 DISP. RES. J. 27 (2002); Jonathan R. Cohen, *Advising Clients to Apologize*, 72 CAL. L. REV. 1009 (1999).

situation and state that they are sorry for what has befallen that party – without necessarily admitting legal responsibility – the aggrieved party may accept their expressions of sympathy and either accept their fate alone or work constructively to generate mutually acceptable resolutions.

Some people might suggest that an effective apology must include a clear admission of responsibility for the injuries suffered,[47] but I have not found this to be true. If someone sincerely sympathizes with the loss suffered by the other side or acknowledges the basis for that side's negative feelings, this act can significantly diminish the impact of those negative emotions, even if the sympathizer does not acknowledge personal responsibility. This is because such behavior often generates healing and forgiveness in the injured party, and allows that party to put the underlying issues to rest. This can be especially beneficial when the disputing parties hope to preserve on-going relationships.

IV. THE INFORMATION STAGE: VALUE CREATION

Once the negotiators have established their identities and the tone for their interaction, the first substantive stage of the process begins. Lawyers can easily observe the commencement of the Information Stage, because this point coincides with a shift from small talk to questions regarding the other side's needs and interests. During this part of the process, the participants work to determine the items available for joint distribution. They hope to discern the underlying interests and objectives of the other party. Proficient bargainers also look for ways to expand the overall pie to be divided, recognizing that in most situations the parties do not value each of the

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[47] *See* Donna L. Pavlick, *Apology and Mediation: The Horse and Carriage of the Twenty-First Century*, 18 OHIO ST. J. DISP. RES. 829, 835-36 (2003); Deborah L. Levi, *The Role of Apology in Mediation*, 72 N.Y.U. L. REV. 1165, 1172-75 (1997).

items identically and oppositely. The more effectively the participants can expand the pie, the more efficiently they should be able to conclude their interaction.[48]

A. USE OF INFORMATION-SEEKI NG QUESTIONS

The optimal way to elicit information from opponents is to *ask questions*.[49] During the preliminary part of the Information Stage, many parties make the mistake of asking narrow questions that can be answered with brief responses. As a result, they merely confirm what they already know. It is more effective to ask broad, open-ended information seeking questions that induce opponents to speak.[50] The more they talk, the more information they directly and indirectly disclose. Lawyers who suspect something about a particular area should formulate several expansive inquiries pertaining to that area. The people being questioned usually assume that the askers know more about their side's circumstances than they actually do, and they tend to over answer the questions being asked, providing more information than they would have in response to specific questions. Only after negotiators have obtained a significant amount of information should they begin to narrow their inquiries to confirm what they think they have

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[48] *See* ROBERT H.MNOOKIN, SCOTT R. PEPPET & ANDREW TULUMELLO, BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES 11-43 (2000).

[49] *See* JESWALD W. SALACUSE, THE GLOBAL NEGOTIATOR 48-52 (2003); LEIGH THOMPSON, THE MIND AND HEART OF THE NEGOTIATOR 60-61 (1998).

[50] *See* RUSSELL KOROBKIN, NEGOTIATION THEORY AND PRACTICE 12-13 (2002); ABRAHAM P. ORDOVER & ANDREA DONEFF, ALTERNATIVES TO LITIGATION 20-22 (2002); JOHN ILICH, DEALBREAKERS AND BREAKTHROUGHS 68 (1992).

heard.[51] If opponents attempt to avoid direct responses to these questions, to prevent the disclosure of particular information, the questioners should reframe their inquiries in a way that compels definitive replies.[52]

The interrogation process not only enables questioners to elicit opponent information, but may also permit them to seize control over the early bargaining agenda.[53] Effective questioners can steer the discussions in the direction in which they wish to proceed, and avoid the exploration of issues they prefer to ignore. They can thus focus on the items they would like to obtain, while avoiding topics that may undermine their interests.

Skilled negotiators actively listen and carefully observe opponents during the Information Stage.[54] They maintain supportive eye contact to encourage further opponent disclosures and to discern verbal leaks and nonverbal clues. They use smiles and occasional head nods to encourage additional responses from adversaries who feel they are being heard. Active listeners not only hear what is being said, but recognize what is not being discussed, since they understand that omitted topics may suggest weaknesses opponents do not wish to address.[55]

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[51] *See* THOMAS F. GUERNSEY, A PRACTICAL GUIDE TO NEGOTIATION 62-63 (1996).

[52] *See* DONALD G. GIFFORD, LEGAL NEGOTIATION: THEORY AND APPLICATIONS 123 (1989).

[53] *See* JOHN ILICH, THE ART AND SKILL OF SUCCESSFUL NEGOTIATION 142 (1973).

[54] *See* ABRAHAM P. ORDOVER & ANDREA DONEFF, *supra* note 50, at 23-26; RONALD SHAPIRO & MARK JANKOWSKI, *supra* note 39, at 76-77; DANIEL GOLEMAN, WORKING WITH EMOTIONAL INTELLIGENCE 178-80 (1998).

[55] *See* HENRY S. KRAMER, *supra* note 45, at 234.

Advocates should proceed slowly during the Information Stage, because it takes time for the persons being questioned to decide what should be disclosed and when it should be divulged. Patient questioning and active listening are usually rewarded with the attainment of greater knowledge. Too many negotiators rush through the Information Stage, because they can hardly wait to begin the distributive portion of interactions.[56] When impatient bargainers conduct an abbreviated Information Stage, they usually miss important pieces of information and achieve agreements that are less beneficial than the accords they might have obtained through a more deliberate questioning process.

Since negotiators cannot impose their will on opponents, they must ascertain the underlying needs and interests of those parties and seek to at least minimally satisfy the basic goals of those participants. Through patient and strategically planned questioning, they can try to learn as much as possible about opponent interests, objectives, and relative preferences. What issues would the other side like to have addressed, and which terms are essential, important, and desirable? Which items do both sides consider essential or important, and which are complementary terms that can be exchanged in ways that simultaneously advance the goals of both parties?

B. BENEFITS OF INDUCING OPPONENTS TO MAKE FIRST OFFERS

Which side should make the initial offer, and does it make any difference who goes first? Some negotiators prefer to make the first offer because they think this approach allows them to

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[56] *See* MARK McCORMACK, WHAT THEY DON'T TEACH YOU AT HARVARD BUSINESS SCHOOL 152 (1984).

define the bargaining range and discourage wholly unrealistic opponent offers.[57] Even individuals who often go first recognize the risks of making the initial offer if they are not certain of the value of the items being exchanged. The use of preemptive first offers can be an effective technique when both sides have a realistic understanding of the items involved and have established a trusting relationship. When such factors are not present, however, I prefer to elicit first offers from my opponents for three reasons.

First, if one or both sides have miscalculated the value of the interaction, whoever goes first will disclose the misunderstanding and place themselves at a disadvantage. Even though proficient bargainers can frequently predict accurately the areas in which their adversaries will commence the process, they can never be certain. Their opponents may have over-estimated this side's strengths or over-estimated their own weaknesses, and their preliminary offer is likely to disclose this error.

A second reason to elicit first offers from the other side concerns a phenomenon known as "bracketing." If negotiators can induce their opponents to make the initial offers, they can *bracket* their goals by adjusting their own opening offers to keep their objectives near the mid-point between their respective opening positions.[58] For example, if plaintiff attorneys hope to obtain $500,000 and defense counsel initially offer them $250,000, they can begin with a demand of $750,000 to keep their $500,000 target in the middle. Since parties tend to move toward the

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[57] *See* LEIGH STEINBERG, *supra* note 45, at 52-53; JAMES C. FREUND, *supra* note 27, at 114-15.

[58] *See* ROGER DAWSON, *supra* note 17, at 18-20; Richard Birke & Craig R.Fox, *Psychological Principles in Negotiating Civil Settlements*, 4 HARV. NEGOT. L. REV. 1, 41 (1999).

center of their opening positions, due to the accepted obligation of bargaining parties to make reciprocal concessions, the people who go second can manipulate the central point and place their adversaries at a psychological disadvantage.

The third reason to induce opponents to make the initial offers concerns the fact that negotiators who make the first concessions tend to do less well than their adversaries.[59] People who make the first concessions tend to be anxious negotiators who make more and larger concessions than their opponents. Individuals who induce their adversaries to make the first offers have a good chance of persuading them the make the initial concessions. After their opponents make the initial offer, this side's opening position looks like a counter-offer. It is thus easy for this side to look to the other side for the first concession.

If anxious negotiators can be induced to make the first offers, adroit opponents may be able to induce them to "bid against themselves" by getting them to make consecutive and unreciprocated opening offers. The recipients of the other side's initial offer can flinch and look shocked by what they heard in an effort to get a less confident party to provide them with a more generous position statements.[60] They may accomplish the same objective by looking at the opening offeror and telling that person "you'll have to do better than that."[61]

It is not always easy to induce opponents to make the opening offers. In some situations, the usual business practices suggest that the party initiating the bargaining encounter should

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[59] *See* ROBERT M. BASTRESS & JOSEPH D. HARBAUGH, INTERVIEWING, COUNSELING, AND NEGOTIATING 493 (1990); HERBERT KRITZER, *supra* note 24, at 68.

[60] *See* ROGER DAWSON, *supra* note 17, at 29-31.

[61] *See id.* at 42-45.

begin the substantive discussions. For example, someone who has decided to sell her business may be expected to propose a price, and a person initiating a law suit may be expected to indicate what he wishes to obtain.[62] Despite this factor, skilled bargainers who might otherwise be expected to initiate the process may be able to induce less proficient opponents to do so. They may prolong the Preliminary Stage discussions and the early portions of the Information Stage until a less patient adversary simply articulates the first offer to get the substantive talks moving. They might alternatively begin the Information Stage by asking the opponent a number of questions that lead to a request for an opening position statement.

C. MULTIPLE ITEM NEGOTIATIONS

When numerous terms have to be negotiated, the participants have to ascertain the degree to which each side values each item. They often obtain this information from the way in which the serious discussions commence. It is unwieldy to bargain over twenty-five or fifty items simultaneously. As a result, most negotiators begin the real talks with a group of four or five terms. They generally begin with a group of either important or unimportant items. Anxious bargainers tend to start with a group of important items, thinking that if agreement can be reached on these terms the remaining issues should be resolvable. While this is true, it is also risky. When parties begin the substantive talks by focusing on the more important items, they often reach a quick impasse. The gap between the stated positions may seem immense, and the participants may conclude that no accord is possible. On the other hand, if parties begin with a discussion of the less significant terms, they can quickly achieve tentative agreements with respect to many of the issues to be addressed. As they reach agreement on twenty then forty and

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[62] *See* JOHN ILICH, *supra* note 53, at 169.

even sixty percent of the items to be covered, they emphasize the areas for joint gain and become psychologically committed to settlement.[63] As they approach the more controverted terms, they remember the success they have already achieved and do not want to allow the remaining items to prevent an overall accord.[64] In addition, the final items no longer seem as insurmountable as they would have if the parties had begun their discussions with those terms.

When the initial groups of items are raised, an active listener can learn a lot from the way in which the opponent begins the talks. If the adversary begins with a group of five items, four of which this side values and one of which it does not, most likely the other side values all five items. This side can try to trade the term it does not prefer for one of the other four it wishes to obtain. On the other hand, the opponent may begin with four unimportant items and one significant term. This would indicate that the adversary probably does not value any of these issues. This side may be able to trade the item it values for one or two of the other terms of little value without the other party realizing what it has given up.

D. HOW TO DISCLOSE AND WITHHOLD IMPORTANT INFORMATION

While individuals prepare for a negotiation, they must decide several things regarding their own side's information. What information are they willing to disclose, and how do they plan to divulge it? What sensitive information do they wish to withhold, and how do they plan to avoid the disclosure of these facts? People who resolve these crucial issues *before* they begin to interact with their opponents are more likely to have successful Information Stages than those

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[63] *See* MICHAEL WATKINS & SUSAN ROSEGRANT, BREAKTHROUGH INTERNATIONAL NEGOTIATION 21-22 (2001).

[64] *See* CHESTER KARRASS, THE NEGOTIATING GAME 72-73 (1970).

persons who do not think about these issues until they are forced to do so during the actual negotiations.

If the negotiation process is to develop in an efficacious manner, both sides have to engage in an information exchange. Some people consider this a straight-forward part of the interaction and see no need to employ manipulative tactics. Once the Information Stage begins, they directly tell their opponents what they wish to obtain and why they want those terms. They expect their candor to be reciprocated. They may be disappointed by competitive opponents who take advantage of this openness to obtain better terms for themselves.[65]

Negotiators who readily volunteer their critical information may encounter additional difficulties. As they naively disclose their interests and objectives, their statements may not be heard by opponents who are not listening intently to such statements. In addition, when adversaries do hear the information being disclosed, they tend to discredit it because of "reactive devaluation."[66] They assume the disclosures are manipulative and self-serving, and they discount much of what they hear.

Bargainers who want their important information to be heard and respected should disclose that information slowly in response to opponent questions. When they answer opponent inquiries with such disclosures, their adversaries hear more of what they are saying because people listen more intently to the answers to their own questions. In addition, opponents attribute these disclosures to their question capabilities and accord what they hear greater respect.

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[65] *See* HERBERT KRITZER, *supra* note 24, at 78-79.

[66] *See* ROBERT MNOOKIN, SCOTT PEPPET & ANDREW TULUMELLO, *supra* note 48, at 165.

When individuals indicate the items they would like to obtain through the negotiation process, they should do so through principled position statements. They should provide succinct rationales explaining why they think they deserve the terms they are requesting. This approach induces opponents to treat their position statements seriously, and it makes it difficult for adversaries to summarily dismiss their offers.[67]

What should negotiators do when opponents ask them about areas they would prefer not to address? They should appreciate the fact that it is much easier to avoid the disclosure of important information if their adversaries are unaware of the fact that knowledge is being withheld. The most effective way to accomplish this objective is through the use of "blocking techniques."[68] These tactics are regularly employed by politicians who do not wish to provide answers to sensitive questions that may cost them votes no matter how they respond. People who listen carefully to such politicians will be amazed by the number of inquiries that go unanswered.

The first blocking technique involves ignoring the question being asked. Negotiators who do not like a particular inquiry should continue the current conversation or change the discussion to other topics they would prefer to explore as if they never heard the question that was propounded. If they can get their opponents caught up in their continued talks, those persons may forget to restate their initial inquiry.

Someone being asked a three or four part question can focus on the part she likes and ignore the rest. If she can induce her opponent to focus on the part being addressed, he may never

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[67] *See* JAMES C. FREUND, *supra* note 27, at 122-23*;* ANTHONY R. PRATKANIS & ELLIOT ARONSON, *supra* note 29, at 26-27.

[68] *See* ROBERT M. BASTRESS & JOSEPH D. HARBAUGH, *supra* note 59, at 422-28; JAMES C. FREUND, *supra* note 27, at 64-65.

return to the other parts of the initial inquiry. A person being asked a delicate question may over or under answer it. If he is asked a specific question, he can provide a general response. If asked a general inquiry, he can give a narrow response. He might alternatively misinterpret the question being asked. An opponent asks about a particular topic, and he responds by indicating that the opponent must be concerned about a different subject. He then steers the discussion in the direction he would like to see it progress. If he can induce his adversary to focus on the new area being discussed, that person may fail to restate the original inquiry.

Questions occasionally seek information of a confidential or privileged nature. The person asking these questions hopes to catch the respondent off guard and induce that person to provide an answer. When negotiators commence bargaining interactions, they should determine what information they are not willing to disclose. What information concerns confidential lawyer-client communications? What information is privileged (*e.g.*, attorney work product)? They should be prepared to respond to opponent inquiries pertaining to these areas by indicating that they concern confidential or privileged matters they are not willing to discuss. Once adversaries realize they are not going to answer these questions, those persons will move on to other areas.

E. EXPLORING UNDERLYING NEEDS AND INTERESTS OF PARTIES

When an expansive settlement range exists between the bottom lines of the two sides, the participants should be able to achieve accords. Their resulting agreement, however, will probably not be a Pareto superior solution – where neither party could enhance its present circumstances without simultaneously worsening the other side's situation. If the parties can thoughtfully explore their respective underlying interests and rely upon objective standards to guide their

discussions, they should be able to expand the overall pie and enhance the benefits to both sides.[69]

Although many legal practitioners consider the negotiation process an inherently adversarial endeavor, they should appreciate the benefits that may be derived during the Information Stage from the use of nonadversarial questioning techniques. Too many bargainers make the mistake of assuming that the parties have a fixed amount of goods to be divided – *i.e.*, identical value systems and analogous utility functions that generate zero-sum transactions.[70] If they replaced leading questions, intended to challenge the positions being taken by opponents, with more neutral questions designed to elicit the underlying needs and interests of the other side, the negotiators could more easily look for areas that would allow joint gains.[71]

Even entirely monetary transactions do not have to be regarded as zero-sum endeavors. The two sides may have quite different preference curves with respect to the value of money. In addition, through the use of in-kind payments consisting of goods or services, the parties may convert their interaction into a non-zero-sum transaction. A purchaser of a company may agree to

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[69] The use of integrative bargaining techniques to maximize the joint returns achieved by the negotiating parties will be discussed in connection with the Cooperative Stage, *infra*. If the parties fail to explore their underlying interests and needs during the Information Stage, it makes it less likely that they will be able to make the exchanges during the subsequent Cooperative Stage that will generate efficient results.

[70] *See* Richard Birke & Craig R. Fox, *supra* note 58, at 30-31; James J.Gillespie, Leigh L. Thompson, Jeffrey Loewenstein & Dedre Gentner, *Lessons from Analogical Reasoning in the Teaching of Negotiation*, 15 NEGOT. J. 363, 367 (1999).

[71] *See* HOWARD RAIFFA, *supra* note 7, at 198-201; ROBERT M. MNOOKIN, SCOTT R. PEPPET & ANDREW S. TULUMELLO, *supra* note 478 at 11-44; Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 U.C.L.A. L. REV. 754, 813 (1984); ROGER FISHER & WILLIAM URY, *supra* note 9, at 41-57.

provide $50 million in cash and $15 million in goods or services. The seller believes she just sold her firm for $65 million, while the purchaser thinks he only paid $59 million, because it only cost $9 million to generate the goods and services valued by the seller for $15 million. The parties may alternatively provide for some future payments that may be considered beneficial by both sides.

People involved with multi-item negotiations must appreciate the fact that the parties probably value the various items quite differently. This enables them to look for exchanges that can simultaneously benefit both sides.[72] For example, individuals negotiating the terms for a marital dissolution may be discussing their primary residence and vacation home, their SUV and sports car, custody of their two young children, child support payments, and possible alimony. They may be arguing over joint custody, when only one spouse really wants primary parenting responsibilities. If the spouse who does not strongly desire primary parenting obligations is provided with adequate visitation rights, he or she may provide the other person with the primary residence in which to continue living with the children and the SUV needed to transport the children, in exchange for the vacation home and the sports car. They can then talk about child support payments and possible alimony.

If negotiators hope to expand the overall pie and ultimately explore beneficial exchanges that may simultaneously benefit both sides, they must initially classify the goals sought by their respective sides as "essential, " "important," and "desirable." They must then endeavor to determine during their information exchanges the degree to which their own side's goals conflict

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[72] *See* RONALD M. SHAPIRO & MARK A. JANKOWSKI, *supra* note 39, at 101-03; Michael Watkins, *Principles of Persuasion*, 17 NEGOT. J. 115, 124 (2001).

with the objectives of the other side.[73] In some instances, both parties may actually desire the identical distribution of the items in question ("shared needs"), allowing them to enhance their respective interests at the same time. In other situations, each may wish to attain independent objectives that do not conflict with the interests of their opponent ("independent needs"). In only some areas do both parties wish to claim the identical items for themselves. Even with respect to these "conflicting needs" the two sides must ascertain the degree to which each prefers the terms in question. One may consider them "essential," while the other may only regard them as "important" or "desirable." The party with a higher preference should be willing to trade terms of lesser value to obtain the items they prefer to get. Only when the parties both value conflicting needs identically are both going to vie for them. In these areas, even trades of similarly valued terms can move the parties toward final accords.

V. THE DISTRIBUTIVE STAGE: VALUE CLAIMING

The transition from the Information Stage to the Distributive Stage is usually visible. The participants cease asking each other what they want and why they want it, and begin to talk about what they have to have or are willing to give up. During the Information Stage the focus is primarily upon *opponents*, as the negotiators try to ascertain what is available for distribution and determine the degree to which the other party values the items to be exchanged. During the Distributive Stage, the focus is on our *own sides* as we – and our adversaries – begin to claim the items we discovered during the previous stage.

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[73] *See* HOWARD RAIFFA, *supra* note 7, at 199-201; MICHAEL WATKINS & SUSAN ROSEGRANT, *supra* note 63, at 22-23; Carrie Menkel-Meadow, *Aha? Is Creativity Possible in Legal Problem Solving and Teachable in Legal Education?* 6 HARV. NEGOT. L. REV. 97, 109-111 (2001).

No matter how much altruistic negotiators try to create win-win bargaining environments, there will always be items both sides wish to obtain. Most proficient legal representatives hope to claim more of the conflicted terms for their own clients. In their book *The Power of NIce*, Ron Shapiro and Mark Jankowski unambiguously articulate this philosophy: "[W]e're out to achieve *all* (or most) of *our* goals, to make *our most desirable deal*. But the best way to do so is to let the other side achieve *some* of *their* goals, to make their acceptable deal. That's **WIN-win**: big win for your side, little win for theirs." [74] Throughout the Distributive Stage, the parties compete for these mutually desired terms.

Legal negotiators rarely endeavor to divide up the available items in an egalitarian manner, because there are seldom truly objective standards that can be employed to determine what each side "deserves" to receive.[75] Negotiators rarely possess equal bargaining power and identical bargaining proficiency, and the participants with greater strength and skill should be able to obtain more beneficial results than their weaker opponents. In addition, the parties are likely to value the various items differently, precluding any really detached comparison of the terms received by each.[76]

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[74] RONALD M. SHAPIRO & MARK A. JANKOWSKI, *supra* note 39, at 5 (emphasis in original).

[75] If an indigent person and a millionaire are walking down Fifth Avenue and simultaneously find ten one-thousand dollar bills on the sidewalk, would it be most equitable to divide their lucky find $5000 each? Should the indigent person get the entire $10,000, because the millionaire does not need more money, or should they divide the $10,000 in proportion to their respective net worths (with the pauper receiving ten cents!), since anything beyond that paltry sum would be an "unfair windfall" to the penurious participant?

[76] *See* CHESTER KARRASS, *supra* note 634 at 144-45.

A. CAREFULLY PLANNED CONCESSION PATTERNS

Persuasive bargainers begin the Distributive Stage with the articulation of "principled" positions that rationally explain why they deserve what they are offering or seeking. This bolsters their confidence in their own positions, and undermines the confidence of less prepared opponents in their own positions. Proficient negotiators also begin with carefully prepared concession patterns.[77] They know how they plan to move from their opening offers to their final objectives. They may intend to make several deliberate, but expansive, concessions, or prefer to employ a series of incremental position changes. They know that this aspect of their strategy must be thoughtfully choreographed to maximize their bargaining effectiveness. They try to make only "principled" concessions that they can rationally explain to their adversaries. This lets others know why they are making the precise position change being articulated, and indicates why a greater modification is not presently warranted. This approach also helps them to remain at their new position until they obtain a reciprocal concession from the other side.

The timing of concessions is important. Many anxious negotiators find it difficult to cope with the uncertainty indigenous to the bargaining process, and they often make rapid – and occasionally unreciprocated – concessions in a desperate effort to generate accords. They ignore the fact that 80 percent of position changes tend to occur during the last 20 percent of interactions.[78] People who attempt to expedite transactions in an artificial manner usually pay a high price for their impatience.[79]

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[77] *See* JAMES C. FREUND, *supra* note 27, at 130-41.

[78] *See* ROGER DAWSON, *supra* note 17, at 171.

[79] *See* SAMFRTIS LePOOLE, *supra* note 10, at 72.

Concessions must be carefully formulated and tactically announced. If properly used, a position change can signal a cooperative attitude; it can also communicate the need for a counteroffer if the opponent intends to continue the bargaining process. If carelessly issued, however, a concession can signal anxiety and a loss of control. This may occur when a position change is announced in a tentative and unprincipled manner by an individual who continues to talk nervously and defensively after the concession has been articulated. Such behavior suggests that the speaker does not expect immediate reciprocity from the other side. When one encounters such individuals, they should subtly encourage them to keep talking, since this approach may generate additional, unanswered concessions.[80] To avoid this problem, proficient negotiators announce their position changes with appropriate explanations, then shift the focus to their opponents. By exuding a patient silence at this point, they indicate that reciprocal behavior must be forthcoming if the interaction is to continue.

Professor Jeffrey Hartje has suggested that a concession should emerge in a four-part process:

> (1) A well reasoned, carefully justified relinquishment of a previous position.
>
> (2) The arrival at a new bargaining point to which the negotiator is committed for reasons of principle, fairness, cost, precedent, logic, client direction, lack of authority, and so forth.
>
> (3) An extraction, on the basis of the spirit of compromise and good faith bargaining, of a counter concession with a willingness to entertain further discussion.
>
> (4) Any concession and a new commitment point should be articulated in the language of

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[80] *See* John C. Harsanyi, *Bargaining and Conflict Situations in Light of a New Approach to Game Theory* in BARGAINING: FORMAL THEORIES OF NEGOTIATION 74, 80-81 (Oran R. Young, ed. 1975).

the parties' needs or interests rather than some mechanical position or posture.[81]

The exact amount and precise timing of each position change are critical. Each successive concession should be smaller than the preceding one, and each should normally be made in response to an appropriate counteroffer from the opponent. If a subsequent change is greater than the prior ones, this may signal that the conceding party is adrift. If successive concessions are made too quickly, this may similarly indicate a lack of control. Following each change, the focus should be shifted to the other side. Patient silence will let the other party know that they must reciprocate to keep the process moving.[82]

Although negotiators should carefully plan their concession patterns in advance, they must remain flexible in recognition of the fact that opponents do not always react to position changes as initially expected. Participants must thus be prepared to change their planned behavior as new information regarding adversary strengths, weaknesses, and preferences is obtained.[83] They should not only be prepared to adjust their aspiration level, when appropriate, but also be ready to alter their concession strategy based upon mutually acknowledged objective criteria.[84] They must be patient, recognizing that a particular interaction may take longer to complete than they originally anticipated. When concessions are small and the issues are numerous and/or complex, negotiators must allow the process to develop deliberately. If they try to hasten the transaction in an unnatural

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[81] Jeffrey H. Hartje, *Lawyer's Skills in Negotiations: Justice in Unseen Hands*, 1984 MO. J. DISP. RES. 119, 167 (1984).

[82] *See* ANTHONY R. PRATKANIS & ELLIOT ARONSON, *supra* note 29, at 180-81.

[83] *See* P GULLIVER, DISPUTES AND NEGOTIATIONS: A CROSS-CULTURAL PERSPECTIVE 100 (1979).

[84] *See* ROGER FISHER & WILLIAM URY, *supra* note 6, at 88-89.

way, they may place themselves at a tactical disadvantage.[85]

Negotiators should always remember their nonsettlement options and preliminarily established resistence points as they approach their bottom lines during bargaining interactions. They must recognize the fact that it would be irrational to accept proposed terms that are less beneficial than their external alternatives. As the Distributive Stage unfolds and they approach their resistence points, many advocates feel greater pressure to settle, when they should actually feel less pressure to achieve accords. When the terms being offered by opponents are not much better than their nonsettlement options, participants approaching their bottom lines possess more – not less – bargaining power than the offerors. They have little to lose if no agreements are achieved, thus they should not be afraid to reject the disadvantageous proposals on the table. Instead of exuding weakness, as many negotiators do in these circumstances, they should project strength. Since their opponents are likely to lose more than they lose from nonsettlements, they can confidently demand further concessions as a prerequisite to any final accord.

As the Distributive Stage develops, the parties frequently encounter temporary impasses. The participants are attempting to obtain optimal terms for their respective clients, and each is hoping to induce the other to make the next position change. Individuals who have viable external options should not hesitate to disclose – at least minimally – this critical fact. The more their adversaries know about these alternatives, the more likely they are to appreciate the need for more accommodating behavior. It is usually most effective to convey this information in a calm and non-confrontational manner.[86] Bargainers who refuse to divulge the scope of their nonsettlement

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[85] *See* JEFFREY RUBIN & BERT BROWN, *supra* note 37, at 145.

[86] *See* JAMES C. FREUND, *supra* note 27, at 47.

options at critical points often fail to achieve accords that may have been attainable had their adversaries been fully aware of their actual circumstances.

Despite the competitive nature of distributive bargaining, a cooperative/problem-solving approach is more likely to produce beneficial results than a competitive/adversarial strategy.[87] The former style permits the participants to explore the opportunity for mutual gain in a relatively objective and detached manner.[88] The latter approach, however, is more likely to generate mistrust and an unwillingness of the negotiators to share sensitive information.

When specific offers are met with unreceptive responses, negotiators can employ their questioning skills to direct the attention of opponents toward the areas that may generate joint gains. This may enable them to elicit information from their adversaries regarding their underlying interests and goals.[89] As they obtain helpful insights pertaining to the other side's value system, they should divulge information concerning their own side's objectives. This approach may permit the parties to generate a minimal degree of trust and encourage the participants to employ a problem-solving approach.

No matter how effectively negotiators have been interacting, they occasionally find

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[87] *See generally* Andrea Kupfer Schneider, *Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style*, 7 HARV. NEGOT. L. REV. 143 (2002). In her empirical study of attorneys in Milwaukee and Chicago, Professor Schneider found that while 54 percent of cooperative/problem-solving lawyers were considered by their peers to be effective negotiators, only 9 percent of competitive/adversarial bargainers were viewed as effective. *Id.* at 167. On the other hand, while only 3.5 percent of cooperative/problem-solving negotiators were rated ineffective, 53.3 percent of competitive/adversarial bargaainers were.

[88] *See* DONALD GIFFORD, *supra* note 52, at 16-18.

[89] *See* MAX H. BAZERMAN & MARGARET A. NEAL, NEGOTIATING RATIONALLY 90-95 (1992).

themselves moving toward an impasse. Before they permit an impending stalemate to preclude further talks, they should consider other options that may enable them to keep the process moving.[90] They may reframe especially emotional issues in an effort to find more neutral language that may be more acceptable to both sides. They may temporarily change the focus of their discussions, ceasing to talk about the issues on which they have been concentrating and moving to other issues that may regenerate stalled discussions. They may briefly talk about recent political events, sports, weather, mutual acquaintances, or similar topics, hoping to relieve their bargaining tension. It can be helpful to recount a humorous story that will humanize the participants and remind them not to take the current circumstances too seriously.

Some negotiators try to prevent impasses by changing their bargaining environments. They may rearrange the furniture into a more cooperative configuration. They may alternatively move to another location, hoping that a change of scenery may induce altered behavior. On some occasions, the participants may determine that negotiator personalities have created communication difficulties. When this occurs, they may consider a change in bargaining team compositions. If new people are brought in, they may be able to regenerate stalled talks both because of the absence of prior interpersonal conflicts and the introduction of new ideas.

Parties encountering bargaining difficulties may request the assistance of a mediator. Such a neutral facilitator can often reopen blocked communication channels and induce the negotiators to reframe emotional issues and refocus their efforts on less controverted items they have been ignoring. If the mediator can get the parties to explore areas for joint gains, their temporary impasse may be broken. When they return to the issues on which they were fighting, both sides

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[90] *See* ROGER DAWSON, *supra* note 17, at 66-71.

may be less contentious because of the progress they have made on other less conflicted terms.

When the bargaining atmosphere becomes unusually tense, it may be beneficial for the parties to take a break to allow themselves to cool off and reconsider their positions. They should carefully review their nonsettlement alternatives and contemplate unexplored bargaining options that may enable them to expand the pie and generate better joint agreements. Before they recess the talks, however, they should set a firm date for their next session. If they fail to do this, each may be hesitant to contact the other lest they appear weak.

B. POWER BARGAINING

The Distributive Stage generally involves some degree of power bargaining, as the participants attempt to obtain optimal results for their respective clients concerning the items both sides value.[91] The purpose of this approach is to induce opponents to think they have to provide more generous terms than they actually have to provide. This objective may be accomplished by inducing those persons to reassess their own situations. Have operative weaknesses been ignored or inappropriately minimized? Have their strengths been over-estimated? Negotiators may expand their own power by convincing adversaries that they possess greater strength or less vulnerability than their opponents think they do.[92] They may casually mention possible nonsettlement options their opponents may not think are available to them, or suggest ways they can avoid negative consequences the other side thinks they will suffer if accords are not achieved.

Self assurance is one of the most important attributes possessed by successful negotiators.

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[91] *See generally* Gerald B. Wetlaufer, *The Limits of Integrative Bargaining*, 85 GEO. L.J. 369 (1996).

[92] *See* SAMUEL B. BACHARACH & EDWARD J. LAWLER, BARGAINING: POWER, TACTICS AND OUTCOMES 60-63 (1981).

They exude an inner confidence in their positions, and always appear to be in control of the situation. They do not appear to fear the possibility of nonsettlements, suggesting to opponents that they have developed alternatives that will protect their clients if the current negotiations are unproductive. These factors cause less certain adversaries to accord these persons more power and respect than they objectively deserve.

Proficient bargainers always commence their interactions with high and well supported aspiration levels, while less skilled negotiators often begin with deflated goals, fearing that their initial demands may engender hostility if they are not modest. The confidence exhibited by the more prepared negotiators with higher aspirations frequently causes less prepared bargainers with lower goals to doubt the propriety of their minimal objectives. They assume the high goal participants possess beneficial nonsettlement alternatives, and accord them greater respect than they deserve.

Negotiators must appreciate the fact that there is no such thing as actual bargaining power, but merely the parties' perceptions of it. If participants accord their opponents greater authority because of the confidence exuded by those persons, the effective power possessed by those people expands greatly. Their demands are likely to be met by the participants who assume that their own nonsettlement alternatives are worse than those possessed by the more certain negotiators. Before these uncertain individuals make excessive concessions, they need to reassess the actual circumstances. They should carefully review their own nonsettlement alternatives, and then estimate what would be likely to happen to their opponents if no accords were achieved. An objective reappraisal may convince them that they possess more power than they initially thought.

C. COMMON POWER BARGAINING TACTICS

During the Distributive Stage, the participants employ various techniques to advance their interests. Some are used in isolation, while others are employed simultaneously. These tactics are generally designed to keep opponents off balance and to induce them to think they have to make greater concessions if the bargaining process is to continue. Negotiators should carefully plan their own techniques, and anticipate and prepare for the tactics they think the other side will use.

(1) *Argument*

The negotiating tactic employed most frequently by lawyers involves legal and nonlegal argument.[93] When the facts support their positions, they emphasize the factual aspects of the transaction. When legal doctrines support their claim, they cite statutes, regulations, judicial decisions, and scholarly publications. Public policy may be cited when it advances client positions. When appropriate, economic and/or political considerations will be used.

Negotiators do not really use arguments to elucidate, but rather to convince opponents to give them what they wish to achieve.[94] Persuasive advocates are persons who are able to provide adversaries with seemingly valid reasons to provide them with their objectives. They employ apparently objective standards to bolster their claims. They also frame the issues to be resolved in ways that lend moral support to their own positions.[95] Individuals with greater bargaining power tend to argue in favor of equitable distributions that favor their own side, while persons with less

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[93] *See* GERALD WILLIAMS, LEGAL NEGOTIATION AND SETTLEMENT 79-81 (1983).

[94] *See* Robert Condlin, *Cases on Both Sides: Patterns of Argument in Legal Dispute-Negotiation*, 44 MD. L. REV. 65, 73 (1985).

[95] *See* RICHARD SHELL, *supra* note 19, at 104-05.

power tend to argue for egalitarian distributions.[96]

Persuasive arguments have to be presented in a relatively even-handed and objective manner if they are to appeal to opposing parties.[97] They are most effective when presented in a logical and orderly sequence that will have a cumulative impact upon the recipients. Instead of merely restating arguments, speakers should restate them in different forms that are designed to enhance their persuasiveness.

Proficient bargainers work to develop innovative arguments they hope have not been anticipated by opponents. Once adversaries are forced to internally question their previously developed rationales supporting their own positions, they begin to suffer a loss of bargaining confidence. The weakening of their underlying positional foundations causes them to seriously consider the legal and factual interpretations being offered by their adversaries.

Effective assertions should be presented in a comprehensive, rather than conclusionary, manner.[98] Relevant factual and legal information should be disclosed with appropriate detail to enhance the credibility of the assertions being advanced. Negotiators who ignore this factor will frequently be challenged by effective counter arguments challenging the factual and/or legal assumptions underlying their conclusionary presentations.

Lawyers should not ignore the potential persuasiveness of well-crafted emotional appeals.[99] While most attorneys are intelligent people who can easily counter logical assertions,

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[96] *See* Richard Birke & Craig R. Fox, *supra* note 70, at 34-35.

[97] *See* ROBERT M. BASTRESS & JOSEPH D. HARBAUGH, *supra* note 59, at 437-38.

[98] *See id.* at 435-37.

[99] *See id.* at 439-40.

they often find it difficult to ignore emotional presentations that generate guilt or compassion. Advocates should thus formulate arguments that are designed to elicit emotional responses, because these appeals may produce beneficial results.

(2) *Threats, Warnings, and Promises*

Almost all legal negotiations involve the use of overt or implicit threats. Transactional negotiators indicate that they will deal with other parties if this side does not sweeten its offer, while litigators suggest that they will resort to adjudications if they do not get what they want at the bargaining table. Threats are employed to convince opponents that the cost of disagreeing with proposed offers transcends the cost of acquiescence.[100]

Less confrontational negotiators try to avoid the use of formal "threats," preferring to use less challenging "warnings." Instead of threatening to personally impose negative consequences on their opponents if they do not change their positions, these people caution their adversaries about the consequences that will naturally result from their failure to accept mutual accords.[101] These "warnings" do not concern action that the declarants plan to take, but events that will independently evolve if no settlements are achieved. The negative effects may be imposed by absent clients, judges, or the market place.

When adverse consequences are likely to occur, it is usually beneficial to articulate the

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[100] *See* Thomas C. Schelling, *An Essay on Bargaining* in BARGAINING: FORMAL THEORIES OF NEGOTIATION 319, 329-34 (Oran R. Young, ed. 1975).

[101] *See* JAMES C. FREUND, *supra* note 27, at 212-13; FRED C. IKLE, HOW NATIONS NEGOTIATE 62-63 (1964).

negative possibilities as "warnings" rather than "threats."[102] Threats are direct affronts to opponents and often induce reciprocal behavior; warnings are more indirect, based on what a third party will do, making such warnings more palatable to listeners.[103] In addition, the warning device enhances the credibility of the negative consequences being discussed, since the speakers are suggesting that the adverse effects will result from the actions of third parties over whom they exert minimal or no control.

At the opposite end of the spectrum from negative threats and warnings are affirmative "promises."[104] A "promise" does not involve the suggestion of negative consequences, but rather consists of "an expressed intention to behave in a way that appears beneficial to the interests of another."[105] For example, instead of threatening legal action if an opponent does not alter her current position, a negotiator indicates that if the other side provides a more generous offer, he will respond with a better offer of his own. The affirmative promise provides a face-saving way for opposing sides to move jointly toward each other, because it promises reciprocal action in response to a change by the other party.

Threats, warnings, and promises convey significant information concerning the transmitter's perception of the opponent's circumstances. Threats and warnings disclose what the

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[102] *See* Jon Elster, *Strategic Uses of Argument* in BARRIERS TO CONFLICT RESOLUTION 236, 252-53 (Kenneth Arrow, Robert H. Mnookin, Lee Ross, Amos Tversky & Robert Wilson, eds. 1995).

[103] *See* ROBERT MAYER, POWER PLAYS 64-65 (1996).

[104] *See* DEAN G. PRUITT & JEFFREY Z. RUBIN, SOCIAL CONFLICT 51-55 (1986); Schelling, *supra* note 99, at 335-37.

[105] JEFFREY RUBIN & BERT BROWN, *supra* note 37, at 278.

threatening side thinks the listener fears, while promises indicate what the promisor believes the recipient hopes to obtain. People given threats, warnings, or promises may be able to use these tactics to their own advantage. If, for example, if an adversary suggests through a threat or warning that she believes that this side would lose more from a nonsettlement than it would actually lose, it may be beneficial to disabuse the threatener of this misperception to prevent her from over-estimating this side's need to reach an agreement. Conversely, if the other side appears to desire a particular item for his client that is not valued by this side, an adroit negotiator can try to extract some other meaningful term in exchange for this item.

Proficient negotiators tend to transmit affirmative promises more frequently than they do negative threats or warnings.[106] This surprises many bargainers, because most people remember disruptive threats and warnings more than face-saving promises, causing them to over-estimate the number of threats and warnings they encountered. The use of promises increases the likelihood of mutual accords, while the use of threats and warnings reduces this probability.[107]

Negotiators who plan to employ threats to advance their agendas should appreciate the characteristics of effective threats. The proposed negative consequences must be carefully communicated to opponents, and the threatened result must be proportionate to the action the user is seeking. Insignificant threats are ignored as irrelevant, while excessive threats are dismissed as irrational.[108] In addition, bargainers should never issue ultimatums they are not prepared to

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[106] *See id.* at 282.

[107] *See id.* at 286.

[108] *See* RICHARD NED LEBOW, THE ART OF BARGAINING 92-93 (1996); Gary T. Lowenthal, *A General Theory of Negotiaiton Process, Strategy, and Behavior*, 31 KAN. L. REV. 69, 86 (1982).

effectuate, because if their bluffs are called and they back down, their credibility is lost.[109]

Negotiators who are threatened with negative consequences if they do not change their current positions must always consider a critical factor. What is likely to happen to their side if no agreement is reached with the other side? If their external alternatives are preferable to what would be the result if they acceded to their opponent's threat, they should not be afraid to maintain their present positions. If they wish to preserve a positive bargaining atmosphere, hoping that continued discussions will cause their adversaries to move in their direction, they can simply ignore the threat.[110] If they behave as if no ultimatum has been issued, the other side may be able to withdraw the threat without suffering a loss of face.

(3) *Ridicule and Humor*

Humor can be used by people during the Preliminary Stage of the bargaining process to help them create more positive environments. Studies indicate that the use of humor can increase the likability of the communicators.[111] This approach can help negotiators develop more open and trusting relationships with opponents. Humor may also be employed during the Distributive Stage to induce adversaries to accept proposals they might otherwise be hesitant to accept.[112] When negotiations become unusually tense, a one-liner can remind the other side that the parties should not be taking the situation so seriously.

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[109] *See* RICAHRD NED LEBOW, *supra* note 108, at 107; ROBERT MAYER, *supra* note 102, at 64.

[110] *See* ROBERT M. BASTRESS & JOSEPH D. HARBAUGH, *supra* note 59, at 461-62.

[111] *See* K. O'Quin & J. Aronoff, *Humor as a Technique of Social Influence*, 44 SOC. PSYCH. Q. 349 (1981).

[112] *See id.* at 354.

Ridicule and humor can be employed by negotiators to indicate negative responses to poor proposals. For example, a derisive smile or sarcastic laughter may be used in response to an especially one-sided offer to demonstrate how unacceptable it is. If employed skillfully, this approach may embarrass an opponent and induce that person to make another more reasonable offer. If used less proficiently, such behavior may anger the other side and create an unproductive environment.

Some individuals use humor to disparage opponent offers without offending the offerors. In response to an extreme demand, they may ask, with a smile, if the other party also would like to obtain their first born child or a quit claim deed to Mars. This tactic may disconcert the person who just made the demand, because he may not be sure whether this respondent is serious or kidding. A similar approach may be used by someone who has to raise a delicate subject that may offend the opponent. If they raise it in a jocular manner, their adversary may not be sure they meant what they just communicated. This may soften the impact on the person affected.

(4) *Silence*

Silence is an extremely effective bargaining tactic often overlooked by negotiators.[113]

> Only the amateur fears to be silent for a moment lest interest lag. He depends solely on words to capture attention. The artful performer knows that rhythm patterns require silence too, and nothing is more dramatic and effective than a long motionless pause after a statement. It permits absorption of the thought. It permits reflection. But more important, it compels attention to what has been said as if an italicized finger had been pointed at it.[114]

Less competent negotiators fear silence. They are afraid that if they stop talking, they will

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[113] *See* LEIGH STEINBERG, *supra* note 45, at 171.

[114] LOUIS NIZER, THINKING ON YOUR FEET 26 (1963).

lose control of the interaction. They remember the awkwardness they have experienced in social settings during prolonged pauses, and they feel compelled to speak. When they prattle on, they tend to disclose, both verbally and nonverbally, information they did not intend to divulge, and they frequently make unintended concessions.[115] When confronted by further silence from adversaries, they continue their verbal leakage and concomitant loss of control.

When negotiators have something important to convey, they should succinctly say what they have to say and become silent. There is no need to emphasize the point with unnecessary reiteration. They need to give their listener the chance to absorb what has been said.[116] This approach is especially critical when concessions are being exchanged. Bargainers should articulate their new positions and quietly and patiently await responses from the receiving parties. If the prolonged silence makes them feel uncomfortable, they should review their notes or look out the window. Their calm patience indicates to the other side that they expect a response before they continue the discussions.

Negotiators who encounter impatient opponents who exhibit an inability to remain silent should use extended pauses to their own advantage. After talkative adversaries make position changes, they may become disconcerted if they receive no responses. As their anxiety increases, they may be induced to say more and even bid against themselves through the articulation of unreciprocated concessions.

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[115] *See* MARK McCORMACK, WHAT THEY DON'T TEACH YOU AT HARVARD BUSINESS SCHOOL 108-11 (1984).

[116] *See* ROBERT MAYER, *supra* note 103, at 30.

(5) *Patience*

Persons involved in bargaining interactions must appreciate the fact the process takes time to unfold. Individuals who seek to accelerate developments usually obtain less favorable and less efficient results than they would have attained had they been more patient. Offers that would have been acceptable if conveyed during the latter stages of a negotiation may not be attractive when conveyed prematurely. The participants have not had sufficient time to appreciate the fact that a negotiated deal is preferable to their external alternatives.

All negotiators experience some anxiety created by the uncertainty that is inherent in bargaining encounters. Individuals who can control the tension they experience and exude a quiet confidence are generally able to achieve better deals than less patient persons. They exhibit a stamina that indicates that they are prepared to take as long as necessary to attain their objectives. Less patient opponents often give in, because they are unwilling to take the time they have to expend to generate better results for their own side.

Negotiators who hope to use their own stamina to wear down less patient adversaries should develop pleasant styles that help them keep the process going when circumstances become difficult. If the bargaining environment becomes unusually tense, they might use short breaks to alleviate the tension. If they can convince their opponents that they will continue the process until they achieve their goals, they will frequently obtain capitulations from less committed adversaries.

(6) *Guilt, Embarrassment, and Indebtedness*

Some negotiators seek to create feelings of guilt or embarrassment in opponents for the purpose of inducing those persons to accede to their demands. They cite insignificant transgressions, such as someone showing up late for a meeting or forgetting to bring an

unimportant document, hoping to disconcert adversaries. They wish to make the others feel so uncomfortable that they will try to regain social acceptability by doing something nice for them. When someone tries to place a bargaining participant at a disadvantage over a small oversight, they should simply apologize and move on without feeling the need to give up something of substance.

(7) *Voice and Language*

Some negotiators are afraid to raise their voices during interactions for fear of offending opponents. They fail to appreciate the beneficial impact that can be achieved through the strategic use of loudness. Controlled voice volume can be a characteristic of persuasiveness. When individuals talk in a louder voice, others tend to listen. So long as the raised voice is not viewed as inappropriately aggressive or offensive, it does not hurt to speak more loudly when someone really wants to be heard.

Many persons think they will be more persuasive negotiators if they use more intense language during their interactions. Studies show, however, that low intensity discussions are likely to be more persuasive than high intensity presentations.[117] This seeming anomaly is due to the negative reaction most negotiators have toward high intensity persuasive efforts. High intensity speakers seem manipulative and offensive, while low intensity presenters tend to induce opponents to be less suspicious of and more receptive to their entreaties.

C. NEGOTIATORS MUST REMEMBER THEIR NONSETTLEMENT OPTIONS

Throughout the Distributive Stage, negotiators should always remember their *current*

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[117] *See* ROY J. LEWICKI, JOSEPH A. LITTERER, JOHN W. MINTON & DAVID M. SAUNDERS, NEGOTIATION 214 (2nd ed. 1994).

nonsettlement alternatives. It is no longer relevant what they were six months or a year ago, when these individuals began to prepare for the present interaction. The passage of time has generally affected the options that were previously available. The discovery process may have strengthened or weakened the case of litigators, while changes in the business market may have influenced the value of the transaction being discussed. Has the market improved the situation of the firm being purchased or sold? Are the technology rights being licensed worth more or less than they were a year ago?

If bargainers fail to appreciate changes in the value of the present interactions, they may enter into arrangements that are not better than what they would have had with no agreement. They must always remember that bad deals are worse than no deals. When nonsettlement alternatives are presently more beneficial than the terms being offered at the bargaining table, they should not hesitate to walk away from the current discussions. They should do this as pleasantly as possible, for two reasons. First, when their opponents realize that they are really willing to end the interaction, their adversaries may reconsider their positions and offer them more beneficial terms. Second, even if the current negotiations fail to regenerate and no accord is achieved, the parties may see each other in the future. If they remember these talks favorably, even if they were not successful, future negotiations are likely to progress more smoothly than if these talks ended on an unpleasant note.

VI. THE CLOSING STAGE: VALUE SOLIDIFYING

Near the end of the Distributive Stage, the participants realize that a mutual accord is likely to be achieved. They feel a sense of relief, because the anxiety generated by the uncertainty

of the negotiation process is about to be alleviated by the attainment of a definitive agreement. Careful observers can often see signs of relief around the mouths of the negotiators, and they may exhibit more relaxed postures. As the bargainers become psychologically committed to settlement, they may move too quickly toward the conclusion of the transaction.

The Closing Stage represents a critical part of the bargaining process. The majority of concessions tend to be made during the concluding portion of negotiations,[118] and overly anxious participants may forfeit much of what they obtained during the Distributive Stage if they are not careful. They must remain patient and allow the Closing Stage to develop in a deliberate fashion.

Less successful negotiators tend to make excessive and unreciprocated concessions during the Closing Stage in an effort to guarantee final agreements. When they are asked about this behavior, they usually indicate that they did not want to risk the possibility of nonsettlements at this stage of the process. They suggest that the accords they achieved were better for their clients than the results of no accords. When asked how interested their opponents were in final agreements, they seem dumbfounded. They completely ignored this critical factor.

By the conclusion of the Distributive Stage, *both sides* have become psychologically committed to a joint resolution. Neither wants their prior bargaining efforts to culminate in failure. Less proficient negotiators focus almost entirely on their own side's desire for an agreement, completely disregarding the settlement pressure affecting their opponents.

As the Closing Stage commences, *both sides* want an agreement. It is thus appropriate for both parties to expect joint movement toward final terms. Negotiators should be careful not to make unreciprocated concessions, and to avoid excessive position changes. They should only

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[118] *See* ROGER DAWSON, *supra* note 17, at 171.

contemplate larger concessions than their adversaries when their opponents have been more accommodating during the earlier exchanges and the verbal and nonverbal signals emanating from those participants indicate that they are approaching their resistance points.

The Closing Stage is not a time for swift action; it is a time for patient perseverance. Negotiators should continue to employ the tactics that got them to this point, and they should be well aware of their prior and present concession patterns. They should endeavor to make smaller, and, if possible, less frequent position changes than their opponents. If they fail to heed this warning and move too quickly toward a conclusion, they are likely to close most of the gap remaining between the parties.

Patience and silence are two of the most effective techniques during the Closing Stage. Negotiators should employ "principled" concessions to explain the reasons for their exact moves. Following each announced position change, they should become silent and patiently await the other side's response. They should not prattle on and disclose their anxiety, and they should not contemplate further movement without reciprocity from the other side. They must remember that their adversaries are as anxious to achieve final terms as they are.

When negotiators reach the Closing Stage, they should recognize that the time is ripe for settlement. It is imperative that they keep the process moving inexorably toward a satisfactory conclusion. While they should continue to use the techniques that got them this far, they should eschew the use of disruptive tactics such as walking out hanging up the telephone. If someone breaks off discussions at this crucial point, it may take days or even weeks for the parties to again achieve auspicious settlement conditions. Instead of employing negative threats or warnings, they should use affirmative promises that permit joint movement in a face-saving manner. Temporary

impasses can be easily overcome through the promise of concurrent position changes that allow the parties to move together.

Skilled bargainers are often able to obtain a significant advantage during the Closing Stage by exhibiting a calm indifference. If they can persuade their anxious opponents that they really do not care whether final terms are achieved, their adversaries may be induced to close most of the distance remaining between the parties.[119] As those participants make more expansive and more frequent concessions in an effort to guarantee an agreement, they significantly enhance the terms achieved by this side.

The Closing Stage can be a highly competitive portion of the negotiation process. It often involves a substantial number of position changes and a significant amount of participant movement. Negotiators who think that this part of the interaction consists primarily of cooperative behavior are likely to obtain less beneficial results than strategic opponents who use this stage to induce naive adversaries to close most of the outstanding distance between the two sides. As they plan their closing strategies, negotiators must remember that their adversaries also wish to attain final accords. Their opponents may be even more anxious in this regard than they are. If they carefully and deliberately move toward agreement, they may induce their more anxious opponents to give them better deals than they deserve.

VII. THE COOPERATIVE STAGE: VALUE MAXIMIZING

Once the Closing Stage has been successfully completed through the attainment of a mutually acceptable agreement, many persons consider the negotiation process finished. While

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[119] *See id.* at 173-76.

this conclusion may be correct with respect to zero sum problems, such as the immediate exchange of money, where neither party could improve its results without a corresponding loss to the other side,[120] it is certainly not true for multi-issue encounters. Nonetheless, many participants in multi-issue bargaining assume a fixed pie that cannot be expanded.[121] This is rarely correct, due to the different client preference curves involved.[122] As a result, it is generally possible for the negotiators to formulate proposals that may expand the pie and simultaneously advance their respective interests.

Once a tentative accord has been reached through the distributive process, the negotiators should contemplate alternative trade-offs that might concurrently enhance the interests of both parties. The bargainers may be mentally, and even physically, exhausted from their prior discussions, but they should at least briefly explore alternative formulations that may prove to be mutually advantageous. During the Information Stage, the parties often over- or under-state the actual value of different items for strategic reasons. During the Distributive and Closing Stages, they tend to be cautious and opportunistic. Both sides are likely to employ power bargaining tactics designed to achieve results favorable to their own circumstances. Because of the tension created by these distributive techniques, Pareto superior arrangements are rarely attained by this

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[120] Even when the only issue to be negotiated concerns the payment of money by one party to another, there may be room for cooperative bargaining. If the parties can agree upon in-kind payments (*e.g.*, the provision of goods or services) or future payments, the receiving party may still obtain what it wants but at less cost to the other side. It thus behooves even money traders to contemplate alternative payment schemes that might prove mutually beneficial.

[121] *See* Ricahrd Birke & Craig R.Fox, *supra* note 58, at 30-31.

[122] *See* ROBERT MNOOKIN, SCOTT PEPPET & ANDREW TULUMELLO, *supra* note 48, at 14-16.

point in the negotiation process. The participants are likely to have only achieved "acceptable" terms. If they conclude their interaction at this point, they may leave a substantial amount of untapped joint satisfaction on the bargaining table.

In simulation exercises, it is easy to determine the extent to which negotiators have successfully used the Cooperative Stage. By comparing the aggregate point totals attained by the two sides, one may assess the degree to which they maximized their joint results. For example, where two opponents might potentially divide 800 points between themselves, some participants with proficient cooperative skills may reach an agreement giving them a combined total of 750 to 800 points. On the other hand, less cooperative groups may end up with a joint total of 550 to 600 points. These results graphically demonstrate to the participants the benefits to be derived from cooperative bargaining. Had the latter negotiators been able to discover the 200 to 250 points they missed, both would have left the table with more generous terms.

If the Cooperative Stage is to develop successfully, several prerequisites must be established. First, the parties must achieve a tentative accord. Second, at the conclusion of the Closing Stage, one or both parties should suggest movement into the Cooperative Stage. If one side is concerned that the other will be reluctant to progress in this direction until a provisional agreement has been attained, it can suggest that both parties initial the terms they have already agreed upon. Although proficient negotiators may occasionally merge the latter part of the Closing Stage with the introductory portion of the Cooperative Stage, most bargainers only move into the Cooperative Stage after they have reached a mutually acceptable distribution of the pertinent items.[123]

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[123] *See* ROGER DAWSON, *supra* note 17, at 172-73.

It is crucial that both sides recognize their movement from the Closing to the Cooperative Stage. If one party attempts to move into the Cooperative Stage without the understanding of the other, problems may arise. The alternative proposals articulated may be less advantageous to the other participant than the prior offers. If the recipient of these new positions does not view them as incipient cooperative overtures, she might suspect disingenuous competitive tactics. It is thus imperative that a party contemplating movement toward cooperative bargaining be sure her opponent understands the intended transition. When such a move might not be apparent, this fact should be explicitly communicated.

Once the participants enter the Cooperative Stage, they should seek to discover the presence of previously unfound alternatives that might be mutually beneficial. They must work to expand the overall pie to be divided between themselves.[124] They may have failed to consider options that would equally or even more effectively satisfy the underlying needs and interests of one side with less cost to the other party.[125] To accomplish this objective, the participants must be willing to candidly disclose the underlying interests of their respective clients. Although they should have explored many of these factors during the Information, Distributive, and Closing Stages, they may not have done so with complete candor for strategic reasons. Each may have over- or under-stated the value of different items to advance their competitive interests. Once a tentative accord has been achieved, the parties should no longer be afraid of more open discussions.

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[124] *See* ROBERT MNOOKIN, SCOTT PEPPET & ANDREW TULUMELLO, *supra* note 48, at 11-43; ROGER FISHER & WILLIAM URY, *supra* note 6, at 58-83.

[125] *See* CHESTER KARRASS, *supra* note 634 at 145.

Both sides must be quite open during the Cooperative Stage if the process is to function effectively. Through the use of objective and relatively neutral inquiries, the participants should explore their respective needs. They should use brainstorming techniques to develop options not previously considered. They should not be constrained by traditional legal doctrines or conventional business practices, recognizing that they can agree to anything that is lawful. They should not hesitate to think outside the box.[126] When one side asks the other if another resolution would be as good or better for it than what has already been agreed upon, the respondent must be forthright. It is only where the parties have effectively explored all of the possible alternatives that they can truly determine whether their initial agreement optimally satisfies their fundamental needs.

As the participants enter the Cooperative Stage, they must be careful to preserve their credibility. They may have been somewhat deceptive during the Information, Distributive, and Closing Stages with respect to actual client needs and interests. In the Cooperative Stage, they hope to correct the inefficiencies that may have been generated by their prior dissembling. If they are too open regarding their previous misrepresentations, however, their opponents may begin to question the accuracy of all their prior representations and seek to renegotiate the entire accord.[127] This would be a disaster. It is thus imperative that negotiators not overtly undermine their credibility while they seek to improve their respective positions during the Cooperative Stage.

It is important for persons participating in cooperative bargaining to appreciate the

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[126] *See generally* TOM KELLEY, THE ART OF INNOVATION (2001).

[127] *See* Robert Condlin, *Bargaining in the Dark: The Normative Incoherence of Lawyer Dispute Bargaining Role*, 51 MD. L. REV. 1, 44-45 (1992).

competitive undercurrent that is present even during these seemingly win-win discussions. While participants are using cooperative techniques to expand the overall pie and improve the results achieved by both sides, some may also employ competitive tactics to enable them to claim more than their share of the newly discovered areas for mutual gain. For example, if the participants discover an additional "250 points"[128] of client satisfaction that can be divided between themselves, there is nothing that requires them to allocate 125 points to each side. If one party realizes that a proposed modification of the existing agreement could increase her client's situation by 150 or even 200 points, she might disingenuously indicate that the new proposal would be a "slight improvement" to allow her to make her opponent think the new proposal would only expand the overall pie by 75 or 100 points. She would then give her adversary 35 to 50 points, and retain the other 100 to 150 points for her own side.

To protect themselves from such exploitative behavior, negotiators should carefully explore the alternatives being mentioned. When an adversary indicates that a new proposal would be somewhat better, they should ask themselves how much the new position would be likely to enhance opponent interests. They should already have a fairly good idea of the other side's underlying needs and interests from the Information and Distributive Stages, and they should be suspicious of any value representations that contradict their prior understandings.

When the Cooperative Stage is finished, the participants almost always have a final

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[128] In my Legal Negotiation course, I assign point values for each item to be negotiated to apprise students of the relative values placed on the different terms from their respective client perspectives. When representing real clients, attorneys should mentally do the same thing, as they probe underlying client needs and interests. The "essential" terms should have a higher value than the "important" terms, which should be valued more than merely "desirable" issues. While lawyers may not assign exact point values for each item, they should have a good idea of the comparative value of the different terms.

agreement. It is helpful for negotiators to remember how beneficial it is to leave their opponents with the feeling they got a good deal. If they have this impression, they are more likely to honor the accord and to behave cooperatively when the same people have to negotiate in the future. Some advocates work to accomplish this objective by making the final concession on a matter not highly valued by their own side.[129]Even a minimal position change at this critical point is likely to be appreciated.[130] Others try to accomplish the same goal by congratulating their adversaries on the mutually beneficial agreement achieved.[131] Bargainers must be careful, however, not to be too effusive. When negotiators lavish praise on their opponents at the conclusion of interactions, those individuals may become suspicious and think they got poor deals.

Once final agreements have been achieved, the parties often hang up the phones or depart for home, thinking that they are finished. As a result, they may fail to ensure a complete meeting of the minds. Before then conclude their interaction, participants should briefly review the specific terms they think have been agreed upon. They may occasionally find misunderstandings. Since they are psychologically committed to agreements, they are likely to resolve their disagreements amicably. If they did not discover the misunderstandings until one side drafted the accord, there might be claims of dishonesty and recriminations. It is thus preferable to confirm the basic terms, before they conclude their encounter.

At the conclusion of the bargaining process, one party will usually be expected to draft the terms agreed upon. Most proficient negotiators like to reserve the drafting process to themselves,

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[129] *See* ROGER DAWSON, *supra* note 17, at 102-03.

[130] *See* LEIGH STEINBERG, *supra* note 45, at 215.

[131] *See* ROGER DAWSON, *supra* note 17, at 143-44.

recognizing that they will do a better job of drafting the provisions from their own side's perspective than will the opposition. Honorable negotiators would not think of changing what had been agreed upon, recognizing that such behavior would be completely unethical. Nonetheless, they would select language they think favors their side.

If the opposing party drafts the final agreement, the side receiving that draft should go over it carefully. First, do they like the language that has been chosen for each term? If not, they should not hesitate to mark up the draft with a pen or pencil. Second, is there anything in the draft that was never discussed? Nothing is "boilerplate" until both parties have agreed to it. Someone who encounters a new provision should not hesitate to raise the matter with the other side. Third, has anything the negotiators agreed upon been omitted from the draft agreement? When parties draft accords, they tend to focus on the issues that most affect their own side. If they are not careful, they might forget to include certain provisions that are of interest to their opponents. Since draft reviewers tend to focus on the specific language included, they may fail to recognize the omission of non-essential provisions. As the reviewers read the draft provisions, they should check off the parts of their notes pertaining to those terms. When they are done, they should look for any areas of their notes not yet checked off.

Once persons have reviewed opponent drafts, they will almost always have some questions about the precise language used or terms that were included or omitted. They should not assume disingenuous behavior by their adversaries, because very few attorneys would think of using deceptive practices when drafting final accords. They should instead assume honest disagreements and contact the drafters to clarify the uncertain terms. In almost all cases, the negotiating parties will resolve their disagreements and achieve final language that is mutually acceptable.

VIII CONCLUSION

Most individuals who negotiate regularly think of their interactions as unstructured events. If they appreciated how structured bargaining encounters are, they would feel more comfortable and achieve better results. They would understand what they should accomplish during each stage. Throughout the Preparation Stage, they have to ascertain the relevant facts, legal issues, economic concerns, and, where relevant, political considerations. Once they have gathered these crucial pieces of information, they have to ask themselves three questions. What happens to their side if they fail to reach an agreement with the other party? The answer to this question defines their bottom line. The second part of this same question focuses on the nonsettlement options available to the *other side*. By comparing their own nonsettlement alternatives with those available to the other party, they can determine which side possesses greater bargaining power. They must thus establish beneficial objectives, recognizing the direct relationship between aspiration levels and bargaining outcomes. They must finally determine where to begin the encounter, realizing that anchoring will cause opponents to be emboldened by generous offers and have their confidence undermined by less generous position statements.

During the Preliminary Stage, the parties establish their identities and the tone for the interaction. It is beneficial to establish positive negotiating environments, because these tend to generate cooperative behavior and more efficient agreements. If participants do not like the way in which opponents begin bargaining encounters, they can use attitudinal bargaining to establish ground rules for their interactions.

Once the Preliminary Stage is finished, the parties move into the Information Stage, during

which they endeavor to determine what is available to be divided between themselves. The best way to obtain information about opponent interests and goals is to ask questions – preferably broad, open-ended questions that force the other side to talk. The more they speak, the more they disclose. Negotiators should not assume a fixed pie, and should look for ways to expand the areas to be divided to maximize the joint returns achieved by the parties. It is helpful to go beyond the stated positions of the parties to look for alternative formulations that might be mutually beneficial.

After the Information Stage, during which the parties work to create value, they move into the Distributive Stage, during which they claim value. This is a highly competitive part of bargaining encounters, and negotiators should have thought-out concession patterns that are likely to result in terms they find advantageous. During this portion of interactions, negotiators employ arguments, threats, warnings, promises, silence, patience, and similar tactics designed to advance their interests. Bargainers should carefully monitor concession patterns to be sure one side is not taking advantage of the other.

Near the end of the Distributive Stage the participants see an agreement on the horizon, and enter the Closing Stage. If they get this far, they are likely to achieve final accords, but they should not rush the process. They should avoid unreciprocated concessions of their own, while trying to induce their opponents to close more of the gap remaining between their current positions. The more anxious party that hopes to achieve definite terms quickly tends to close more of the gap, providing the other side with an unwarranted gain.

As the parties complete the Closing Stage, they should move into the Cooperative Stage during which they hope to be sure they have agreed upon efficient terms. They should look for

ways to expand the pie and simultaneously improve their respective positions. During their previous discussions, both parties have over- and under-stated the true value of items for strategic purposes. As a result, items one side values more than the other may have ended up on the wrong side. If they can ascertain these terms and make efficient trades, they can reach the Pareto superior point at which neither side can gain without the other losing something.

Negotiators who are aware of the different stages of the bargaining process will understand what is occurring at each point, and they will know what they should be doing during each. They will be better prepared negotiators, and appreciate the best way to advance their interests. They can also ensure efficient agreements that maximize the joint returns attained by the bargaining parties. As a result, they will enjoy their bargaining encounters more and achieve better results.