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# Classic Negotiation Techniques

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# CLASSIC NEGOTIATION TECHNIQUES

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## I. INTRODUCTION

Lawyers negotiate repeatedly, frequently without appreciating the fact they are bargaining. They do so with their own partners, associates, and legal assistants, with their own clients, and with outside private and public sector parties on behalf of their clients. They negotiate in person, over the telephone, through the mail, and via e-mail transmissions. Most have had minimal training with respect to this critical professional skill. They do not appreciate how structured bargaining interactions are, and they have limited knowledge with respect to the various techniques proficient negotiators employ during their interactions.

Bargaining interactions involve six formal stages.[1] During the Preparation Stage, negotiators gather the information they need to interact effectively with their counterparts.[2] They work to obtain the relevant fac-

1. *See generally* Charles B. Craver, *The Negotiation Process*, 27 AM. J. TRIAL ADVOC. 271 (2003).

2. *See* Part II, i*nfra*.

tual, economic, legal, cultural, and political information. They then determine their bottom lines, their aspiration levels, and their planned opening offers. Once this stage is complete, they begin to interact with their counterparts and enter the Preliminary Stage.[3] Many impatient persons fail to appreciate the importance of this stage, because they do not realize how critical it is for bargaining parties to establish rapport and positive tones for their interactions. The next segment is the Information Stage during which the participants seek to determine what each side hopes to achieve and the interests underlying the positions being articulated.[4] After the parties have created a joint surplus, they move into the Distributive Stage during which they begin to divide the items on the table.[5] Near the end of the Distributive Stage as the participants approach definitive terms, they enter the Closing Stage during which they work to achieve formal agreements.[6] Although many negotiators consider this the end of the bargaining process, proficient bargainers appreciate the need to move into the Cooperative Stage during which they work to see if there is any way they can expand the joint surplus and simultaneously enhance their respective results.[7] This article will move through the six stages, and explore the different techniques participants should employ to enable them to achieve beneficial and efficient accords.

Throughout the bargaining process, participants have to decide which techniques they should employ to advance their interests. Three factors will significantly influence the decisions they make in this regard. What is their own personality? They should usually select tactics that suit their personality. A laid-back person might find it difficult and not credible for them to use a highly aggressive technique, while an aggressive individual might find it hard to behave in a laid-back manner. What are the personalities of the persons with whom they are interacting? Against highly aggressive counterparts, they might employ more confrontational techniques than they would with more laid-back counterparts. What are the particular circumstances involved? When someone has a power imbalance favoring their own side, they may employ more aggressive techniques than they might if the other side possessed superior power.

## II. PREPARATION STAGE [ESTABLISHING LIMITS AND GOALS]

The Preparation Stage is probably the most significant part of bargaining interactions, and the participants are not yet dealing directly with each other.[8] Individuals who are thoroughly prepared generally

3. *See* Part III, *infra*.
4. *See* Part IV, *infra*.
5. *See* Part V, *infra*.
6. *See* Part VI, *infra*.
7. *See* Part VII, *infra*.
8. *See* Craver, *supra* note 1, at 273–86.

achieve more beneficial results than those who are not, because knowledge constitutes power at the bargaining table.[9] Well prepared negotiators possess the knowledge they need to value their impending interactions, and to develop a greater confidence in their positions than their less prepared counterparts.[10] Their projected confidence undermines the convictions of counterparts, and induces those persons to question the validity of their own positions.[11]

1. Gather Own Side Information

The best way to obtain information from clients involves the use of strategic questions. When individuals are employed to negotiate for others, they should begin to ask the relevant persons questions designed to enable them to determine what they need to know to effectively advance their client interests.[12] What are the pertinent factual, economic, and business issues? They should begin with general inquiries designed to induce their principals to talk. As they get further into this stage, they should resort to more specific questions that will enable them to focus on the most relevant factors. If clients might be able to do business with other parties, what are the terms they might be able to obtain from those parties?

Lawyers must then research the relevant legal doctrines that might influence their impending interactions. Once they explain the pertinent legal principles to their clients, they must begin to ascertain what the clients hope to obtain from their counterparts. If they are contemplating business transactions, what are they willing to provide to their counterparts, and what d they wish to obtain for themselves?[13] If they are endeavoring to resolve legal conflicts, what do they have to achieve in order to forego formal litigation? Although lawyers are used to thinking rationally and objectively, they should not ignore emotional considerations. Where someone thinks they have been treated badly by a business partner, a treating physician, or a coworker, they may wish to obtain an admission of responsibility from the relevant person and a sincere apology. Someone who believes they were denied a promotion due to discriminatory considerations might be willing to give up much of the back pay they are due if they are promised an immediate promotion to the position in question. A series of questions can help legal representatives appreciate

9. *See* ORAN R. YOUNG, *STRATEGIC INTERACTION AND BARGAINING*, *IN* BARGAINING: FORMAL THEORIES OF NEGOTIATION 10–11 (Oran R. Young, ed., 1975); *see generally* RONALD M. SHAPIRO & GREGORY JORDAN, DARE TO PREPARE: HOW TO WIN BEFORE YOU BEGIN (2008).

10. *See* MICHAEL C. DONALDSON, FEARLESS NEGOTIATING 68–69 (2007).

11. *See id.*

12. *See* JOHN LANDE, LAWYERING WITH PLANNED EARLY NEGOTIATION: HOW YOU CAN GET GOOD RESULTS FOR CLIENTS AND MAKE MONEY 86–89 (2011).

13. *See* SHAPIRO & JORDAN, *supra* note 9, at 47–51.

the underlying interests of their clients and the degree to which clients value such items compared with monetary considerations.[14]

It can be beneficial to divide the different items into three separate categories.[15] Which items are "*essential*", without which no final deal is likely? Which are "*important*" – terms they would like to obtain, but would trade for essential items? Which are "*desirable*" – what they would like to get, but would be willing to give up for anything of greater value. Through the questioning process, lawyers must similarly determine the relative value of the items within each of these three categories. Which of the "essential" items might the clients trade for a more critical term? Which of the "important" issues are more or less significant than the other "important" terms, and what are the relative values of the "desirable" items? By obtaining this vital information, lawyers can begin to understand which items in each category they should endeavor to obtain and which they might be willing to trade for other items within the same category.

2. Determine Bottom Line, Goals, and Planned Opening Offer

Once attorneys think they have gathered all of the relevant information from their clients, and have conducted the requisite legal research, they must ask their clients and themselves three critical questions. First, what happens to their side if no agreement is achieved?[16] If potential business deals are being explored, what other parties might their clients deal with and what terms might they be able to obtain from those persons?[17] If litigation is involved, what is the probability the claimant will prevail, and the likely outcome if that party does win? What are the transaction costs involved? This is what Roger Fisher and William Ury like to characterize as this side's BATNA – their Best Alternative to a Negotiated Agreement.[18] Most negotiators simply call this their "bottom lines" – how far their side will go before they end the negotiation and accept their non-settlement alternatives.

After they have determined their bottom lines, the lawyers and their clients must determine their aspirations – what do they really wish to achieve from this interaction? Individuals who begin their interactions with elevated goals achieve more beneficial terms than those who begin with modest objectives.[19] It is thus important for negotiators to establish

14. *See* ROGER FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 101–11 (Bruce Patton ed., 1981).

15. *See* HOWARD RAIFFA ET AL., NEGOTIATION ANALYSIS 129–47 (2003).

16. *See* CRAVER, *supra* note 1, at 277–80.

17. *See* LEIGH L. THOMPSON, THE MIND AND HEART OF THE NEGOTIATOR 20–21 (3d ed. 2005) (how to calculate expected values).

18. *See* FISHER & URY, *supra* note 14, at 101–11.

19. *See* Russell B. Korobkin & Joseph W. Doherty, *Who Wins in Settlement Negotiations?*, 11 AM. L. & ECON. REV. 162, 175, 183; Dan Orr & Chris Guthrie, *Anchoring, Information, Expertise, and Negotiations: New Insights from Meta-Analysis*, 21 OHIO ST. J. DISP.

elevated goals, but targets that are realistic. They appreciate the fact that if their goals are wholly unrealistic, they will most likely be unable to achieve agreements due to the fact their aspirations are unattainable.[20]

Negotiators must finally decide what their opening positions should be. Some individuals naively believe that if they begin with modest opening offers, their counterparts will respond in kind and they will have pleasant and cooperative interactions. This concept is unfortunately incorrect due to the impact of *anchoring*.[21] When they begin with modest proposals, their counterparts actually move away from them psychologically and begin to believe they will obtain far better results than they initially expected. On the other hand, when they begin with elevated proposals, their counterparts begin to think they will not be able to obtain terms as beneficial as they thought, and they lower their expectations. Nonetheless, it is critical for negotiators to begin with offers they can logically explain, otherwise they will lose credibility and seriously discourage their counterparts.[22]

3. Place Selves in Shoes of Counterparts

When negotiators have established their bottom lines, their aspirations, and planned opening positions, they frequently make the mistake of thinking that they are ready to commence discussions with their counterparts. They fail to appreciate a critical part of the Preparation Stage. They must try to place themselves in the shoes of their counterparts and ask themselves about the strengths and weaknesses affecting those parties.[23] Litigators should employ formal and informal discovery techniques to obtain the pertinent information possessed by their counterparts. Transactional negotiators should carefully consider the way in which market factors may be affecting their counterparts. How much do those parties need to reach agreements?[24] What non-settlement alternatives may be available to them? Negotiators must also begin to consider the way in which their counterparts value the items to be exchanged? If the same items are important to both sides, they are "distributive" terms. If particular items are valued much more by one side than by the other, they are "integrative" terms that should end up on the side that values them

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RESOL. 597, 624–25 (2006); Russell Korobkin, *Aspirations and Settlement*, 88 CORNELL L. Rev. 1, 20–30 (2002) [hereinafter *Aspirations and Settlement*].

20. *See Aspirations and Settlement*, *supra* note 19, at 52.

21. *See* DANIEL KAHNEMAN, THINKING FAST AND SLOW 119–28 (2011); *Aspirations and Settlement*, *supra* note 19, at 30–36.

22. *See* G. RICHARD SHELL, BARGAINING FOR ADVANTAGE: NEGOTIATION STRATEGIES FOR REASONABLE PEOPLE 160–61 (1999).

23. *See* GRANDE LUM, THE NEGOTIATION FIELDBOOK: SIMPLE STRATEGIES TO HELP NEGOTIATE EVERYTHING 58 (2011); Russell B. Korobkin, *A Positive Theory of Legal Negotiation*, 88 GEO. L.J. 1789, 1797–99 (2000).

24. *See* DEBORAH M. KOLB & JUDITH WILLIAMS, EVERYDAY NEGOTIATION: NAVIGATING THE HIDDEN AGENDAS IN BARGAINING 62 (2003).

more highly in exchange for terms their counterparts value more. In some cases, both sides want identical results with respect to certain items, such as confidentiality provisions. These are "compatible" terms they should be sure to include in their final accords.

The final thing negotiators must consider during the Preparation Stage is the strategy they plan to use during their interaction. How do they visualize moving from the parties' opening positions to final accords? Do they contemplate a series of small position changes or a few larger position changes? What bargaining techniques do they plan to employ to further their interests, and what tactics do they expect their counterparts to use? How do they plan to counteract the techniques they think their counterparts will employ? At this point, they should be ready to commence direct dealings with the individuals on the other side.

## III. PRELIMINARY STAGE [ESTABLISHING RAPPORT AND TONE FOR INTERACTION]

When legal representatives begin to interact formally with their counterparts, they often make the mistake of moving right into the substantive discussions. They fail to appreciate how important it is to establish or reestablish rapport with the persons on the other side and to create positive bargaining environments.[25] During this Preliminary Stage, they should look for common interests they can share with one another.[26] They may be from the same geographical areas, they may have attended the same law school, or they may enjoy the same music or sports. Persons who can identify and share such common interests enhance the likelihood they will like each other and develop mutually beneficial relationships.[27] Warm eye contact and a pleasant demeanor can also contribute to a mutually beneficial environment. They should also try to get on a first-name basis, since this personalizes their interaction far more than when people refer to each other as Mr. or Ms. so-and-so.

Negotiators should also seek to create positive bargaining environments. Studies have found that individuals who commence bargaining encounters in positive moods negotiate more cooperatively and are more likely to use problem-solving efforts designed to maximize the joint returns achieved.[28] On the other hand, people who begin their interactions

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25. *See* Jean R. Sternlight & Jennifer K. Robbennolt, *Good Lawyers Should Be Good Psychologists: Insights for Interviewing and Counseling Clients*, 23 OHIO ST. J. DISP. RESOL. 437, 502–04 (2008).

26. *See* DANIEL GOLEMAN, SOCIAL INTELLIGENCE 29–30 (2006).

27. *See* CHRISTOPHER W. MOORE, THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT 184–85 (3d ed. 2003).

28. See Clark Freshman et al., *Article: The Lawyer-Negotiator as Mood Scientist: What We Know and Don't Know About How Mood Relates to Successful Negotiation*, 2002 J. DISP. RESOL. 1, 15 (2002); Joseph P. Forgas, *On Feeling Good and Getting Your Way: Mood Effects on Negotiator Cognition and Bargaining Strategies*, 74 J. PERSONALITY & SOC. PSYCHOL. 565, 566–74 (1998).

in negative moods negotiate more adversarially and tend to generate less efficient results. It is thus highly beneficial for persons commencing 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 likelihood the parties will interact cooperatively and maximize their joint returns.

What should negotiators do when they encounter highly adversarial counterparts? If they do nothing, the interaction is likely to be unpleasant and inefficient. On the other hand, if they take the time to use "attitudinal bargaining" to modify the behavior of such persons they can often improve the environment.[29] They should politely, but forcefully, indicate that such adversarial conduct will not be mutually beneficial. Transactional bargainers might indicate that their clients are looking for beneficial, long-term relationships, and indicate that they do not wish to do business with parties who behave so competitively. Litigators could suggest that their counterparts must have no interest in resolving the dispute amicably, and suggest that they cease negotiating and move directly into the discovery process. Once the individuals on the other side begin to appreciate the fact that their adversarial conduct is not likely to further the bargaining process, they would be inclined to modify their behavior and move in a more positive direction.

On those rare occasions when individuals must interact with highly offensive counterparts whose behavior they simply cannot alter, they should look for ways to decrease the degree to which their adversaries can negatively impact their side. Instead of meeting in person where such individuals can repeatedly insult them until they lose control, they should communicate primarily through telephone discussions or e-mail exchanges. When counterparts begin to insult them during telephone talks, they can indicate that they have another call they must accept, and break off the interaction until they calm down. When they receive highly offensive e-mail messages, they can take time to regain control before they respond aggressively. Persons who are especially angered by counterpart e-mails, can type out exceptionally offensive replies, but carefully click on "cancel" instead of "send." This process may make them feel better, without actually escalating the adversarial situation. Once they have calmed down, they can then prepare appropriate replies.

Some parties plan to conduct most or all of their bargaining interactions through e-mail exchanges rather than in person, either because of the distance between the negotiating individuals or because of their preference for Internet communications. Persons planning to negotiate primarily through e-mail exchanges should appreciate the benefits to be derived from conducting brief Preliminary Stages through short telephone

29. *See generally* William Ury, The Power of a Positive No: How To Say No and Still Get to Yes (2007); William Ury, Getting Past No: Negotiating Your Way from Confrontation to Cooperation (1993).

conversations. Empirical studies have shown that even five or ten minute telephone exchanges prior to e-mail interactions significantly increases the probability the participants will behave more cooperatively, reach more agreements, and achieve more efficient results than cohorts who negotiate through e-mail without such preliminary phone conversations.[30]

## IV. INFORMATION STAGE [VALUE CREATION]

Once the Preliminary Stage is finished, the parties begin to discuss the substantive issues, and they move into the Information Stage. During this part of the process, the participants endeavor to determine the items they have to share with each other.[31] They want to find out what their counterparts wish to obtain, and to understand the particular interests underlying those items. Skilled bargainers also begin to look for ways the parties might be able to expand the overall pie to be divided, recognizing that in most situations the parties do not value each item identically and oppositely. The more efficiently the participants are able to expand the joint surplus, the more efficiently they should be able to conclude their interaction.[32]

### 1. Use of Information Seeking Questions

The most effective way to elicit information from counterparts is to *ask questions*.[33] During the preliminary part of the Information Stage, many negotiators make the mistake of asking narrow inquiries that can be answered with brief responses. As a result, they tend to confirm what they already suspect. It is far more effective to begin this stage with broad, open-ended information-seeking questions that are designed to induce counterparts to talk.[34] The more those persons talk, the more information they directly and indirectly disclose. Bargainers who suspect something pertaining to a specific area should formulate several expansive inquiries pertaining to that area. The persons being questioned frequently assume that the askers know more about their side's circumstances than they really do. As a result, they tend to over-answer the broad questions being asked, providing far more information than they

30. *See* Janice Nadler, *Rapport in Legal Negotiation: How Small Talk Can Facilitate E-mail Dealmaking*, 9 HARV. NEGOT. L. REV. 223 (2004); Leigh Thompson & Janice Nadler, *Negotiating Via Information Technology: Theory and Application*, 58 J. OF SOC. ISSUES 109 (2002).

31. *See* Robert H. Mnookin, Scott R. Peppet & Andrew S. Tulumello, *Beyond Winning: Negotiating To Create Value In Deals And Disputes* 11–43 (2000).

32. *See id.* at 28–43.

33. *See* DONALD G. GIFFORD ET AL., LEGAL NEGOTIATION: THEORY AND APPLICATIONS 102–03 (2d ed. 2007); Jeswald W. Salacuse, THE GLOBAL NEGOTIATOR: MAKING, MANAGING, AND MENDING DEALS AROUND THE WORLD IN THE TWENTY-FIRST CENTURY 48–52 (2003); Thompson, *supra* note 17, at 60.

34. *See* RUSSELL KOROBKIN, NEGOTIATION THEORY AND STRAGETY 8–9 (2d ed. 2009).

would have in response to narrower inquiries. Even after counterparts appear to have answered articulated questions, if the questioners remain silent, wait patiently, and appear to expect further comments, they often induce counterparts to disclose more information.

Once negotiators think they have obtained a significant amount of general information, they should begin to narrow their inquiries to confirm what they have heard and to begin to explore more specific areas.[35] They should begin to employ "what" and "why" questions. The "*what*" inquiries are designed to determine the specific issues valued by their counterparts, while the "*why*" inquiries are designed to elicit the particular interests underlying those items. When they think that their counterparts have sought to avoid direct responses to these questions, to preclude the disclosure of particular information, the questioners should reframe their inquiries in a way that compels definitive replies.[36] It is critical for negotiators to appreciate the interests underlying counterpart demands, especially when they are not amenable to the terms being sought. If they appreciate the underlying issues of concern to their counterparts, they might be able to contemplate alternatives that might be acceptable to their own side while satisfying the underlying interests of their counterparts.

The questioning process not only enables negotiators to elicit counterpart information, but it may also enable them to seize control over the bargaining agenda.[37] They can steer the discussions in the direction they wish to go, allowing them to avoid the exploration of issues they prefer to ignore. They can thus focus on the items they hope to obtain, and avoid discussing topics that may undermine their interests.

### 2. Active Listening

Proficient negotiators actively listen to what their counterparts are saying.[38] They maintain supportive eye contact to encourage counterpart disclosures, and to discern nonverbal signals. They use smiles and occasional head nods to encourage further responses from counterparts. They not only hear what is being said, but also recognize what is not being addressed, and they understand that omitted subjects may suggest weaknesses their counterparts do not want to address.

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35. *See* THOMAS F. GUERNSEY, A PRACTICAL GUIDE TO NEGOTIATION 62–63 (1996).
36. *See* GIFFORD, *supra* note 33, at 104.
37. *See* JOHN ILICH, THE ART AND SKILL OF SUCCESSFUL NEGOTIATION 141–42 (1973).
38. *See* ABRAHAM P. ORDEROVER ET AL., ALTERNATIVES TO LITIGATION: MEDIATION, ARBITRATION, AND THE ART OF DISPUTE RESOLUTION 23–26 (2002); RONALD M. SHAPIRO & MARK A. JANKOWSKI, THE POWER OF NICE 76–77 (revised ed. 2001).

### 3. Careful Disclosure of Own Information

When individuals prepare for bargaining interactions, they have to decide several critical issues. What information do they plan to disclose to their counterparts, and how do they plan to disclose it? What information would they prefer to withhold, and how do they plan to avoid the discussion of these areas? Some persons think that open candor is a virtue when they negotiate, and they readily volunteer their important information. As they naively disclose their interests and objectives, their statements may not be heard well by counterparts who are not listening intently to such statements. Even when counterparts do hear what is being said, they frequently discredit what they hear due to "reactive devaluation."[39] They assume the disclosures are self-serving and manipulative, 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 counterpart questions. When they answer counterpart inquiries, the questioners listen more carefully to what they say. They also attribute those disclosures to their questioning capabilities and accord what they hear more respect. When negotiators disclose their critical information in response to counterpart inquiries, they should also do so in a logically supportable manner. They should provide succinct rationales supporting the terms they are requesting. This approach induces their counterparts to take their position statements more seriously, and makes it more difficult for those persons to dismiss their offers.[40]

### 4. Blocking Techniques

What should negotiators do when counterparts ask them about areas they would prefer not to address? They should appreciate the fact it is easier to avoid the disclosure of such information if their counterparts are not aware of the fact such information is being withheld. The most effective way to accomplish this objective is through resort to "blocking techniques."[41] The first thing they could do is simply ignore the inquiry they do not like, and continue the current conversation as if they never heard it. If they are able to get their counterparts caught up in their continued discussion, those persons may forget to restate their initial question. Someone asked a three or four part question can focus on the part he likes, and ignore the other parts. Someone asked a delicate question may over or under answer it. If asked a general inquiry, he can provide a narrow

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39. *See* MNOOKIN ET AL., *supra* note 31, at 165.

40. *See* JAMES C. FREUND, SMART NEGOTIATION: HOW TO MAKE GOOD DEALS IN THE REAL WORLD 122–23 (1992) [hereinafter Smart Negotiation]; ANTHONY R. PRATKANIS & ELLIOT ARONSON, AGE OF PROPOGANDA 26–27 (1991).

41. *See* ROBERT M. BASTRESS & JOSEPH D. HARBAUGH, INTERVIEWING, COUNSELING, AND NEGOTIATING 422–28 (1990).

response. On the other hand, someone asked a specific question can provide a general reply.

Negotiators asked about sensitive issues can misinterpret the question propounded. A counterpart asks about a particular topic, and they reply by indicating that the counterpart must be concerned about a different subject. They can then steer the discussion in the direction they would like to proceed. Questioners occasionally seek information of a confidential or privileged nature, hoping to catch the respondent off guard and inducing them to provide a quick response. Individuals asked about such areas should not hesitate to indicate that the questions are improper and refuse to reply.

### 5. Who Should Make First Offer

The last critical issues that should be contemplated during the Information Stage concerns which party should make the first offer. Some negotiators like to articulate initial offers, because they think this will enable them to seize control of the agenda.[42] If there is a well-defined settlement range and little room for puffing and embellishment, this approach might be entirely appropriate. On the other hand, if the settlement range is not so clear and one or both parties may have miscalculated the true value of their interaction, whoever goes first would disclose this misunderstanding and place himself at a disadvantage.[43] It can thus be highly beneficial to induce counterparts to go first, to see where they think the bargaining process should commence.

A second reason to elicit opening offers from counterparts concerns a phenomenon known as "bracketing." If negotiators can induce their counterparts to articulate the initial offers, they can *bracket* their own goals by adjusting their own opening offers to keep their objectives near the midpoint between the participants' respective opening positions.[44] For example, if one side is hoping to purchase a business for $15 million and they receive an opening offer from the owner for $18 million, they can reply with an offer of $12 million. As the parties make reciprocal concessions, there is a good chance they will end up near the $15 million figure being sought.

## V. DISTRIBUTIVE STAGE [VALUE CLAIMING]

Once negotiating parties have used the Information State to create a joint surplus, they must decide how to divide what they have discovered and then enter the Distributive Stage. Once negotiating parties have used

42. *See* DEEPAK MALHOTRA & MAX H. BAZERMAN, NEGOTIATION GENIUS: HOW TO OVERCOME OBSTACLES AND ACHIEVE BRILLIANT RESULTS AT THE BARGAINING TABLE AND BEYOND 27–30 (2007).

43. *See* ROGER DAWSON, SECRETS OF POWER NEGOTIATION 124–26 (3rd ed. 2011).

44. *See id.* at 21–23.

the Information Stage to create a joint surplus, they have to decide how they are going to divide what they have discovered and they enter the Distributive Stage. This is a relatively competitive portion of most bargaining interactions as each side works to claim a beneficial portion of the surplus for themselves. Legal negotiators rarely endeavor to divide 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. Negotiators rarely possess equal bargaining power and identical bargaining proficiency, and the participants with greater strength and skill are normally able to obtain more beneficial terms than their less powerful and less skilled counterparts. In addition, the parties are likely to value the various items differently, precluding any really detached comparison of the terms received by each.[45]

### 1. Articulation of Principled Positions

Persuasive negotiators begin the Distributive Stage with the articulation of *principled positions* that logically explain why they deserve what they are offering or seeking.[46] This approach bolsters their confidence in their own positions and undermines the confidence of less prepared counterparts. They are also prepared to begin with carefully planned concession patterns.[47] They know how they plan to transition from their opening positions to their ultimate objectives. They also plan to make *principled concessions* which they can rationally explain to their counterparts. This lets those persons know why they are making the precise position change being articulated and indicates why a greater concession is not presently warranted. It also helps them remain at their new position until they obtain a reciprocal concession from their counterparts.

Position changes must be carefully formulated and tactically announced. A thoughtful concession can signal a cooperative attitude and can communicate the need for the other side to provide a counteroffer if the process is to continue to move forward. No matter how planned concession patterns may be, negotiators must remain flexible since they are never sure how their counterparts will respond to particular position changes. If persons on the other side make generous position changes, negotiators should consider increasing their aspirations in recognition of the fact their counterparts may think they deserve more beneficial terms than they initially contemplated. On the other hand, if their counterparts make small position changes, they must be patient in recognition of the fact it may take a lot of time for those persons to move a sufficient distance to make mutual accords possible.

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45. *See* CHESTER KARRASS, THE NEGOTIATING GAME 144–45 (1970).
46. *See* MARTY LATZ, GAIN THE EDGE 183–87 (2004).
47. *See* SMART NEGOTIATION, *supra* note 40, at 130–41.

Legal negotiations almost always involve some degree of power bargaining as the participants endeavor to obtain beneficial terms for their respective clients with respect to the items both sides value.[48] To accomplish their objectives, participants employ various bargaining techniques designed to influence counterpart behavior. They also encounter diverse tactics being used by their counterparts to influence their behavior. It is vital for them to be able to recognize the techniques counterparts are employing, to enable them to counteract those tactics effectively.

### 2. Manipulation of Contextual Factors

Some individuals endeavor to gain a psychological advantage at the bargaining table by their manipulation of the contextual factors. They work to control the day, time, and location for their interactions.[49] When they are able to obtain concessions pertaining to these factors, it bolsters their confidence with respect to subsequent handling of the substantive issues. This approach also enables them to establish concessionary mentalities in counterparts, since persons who begin negotiations by conceding the date, time, and location for impending interactions often continue this pattern when the real items are discussed. It similarly enables them to interact in environments they have established and in which they feel most comfortable.

The concessionary predisposition of counterparts may be further heightened through feelings of obligation created when those persons are provided with complementary food and drink at the outset of their dealings. While some people may question whether insignificant gratuities could possibly influence recipient bargaining behaviors, most negotiators would prefer to be the providers of such generosities rather than the recipients.

### 3. Control of Agenda

Many people seek to advance their negotiation objectives through control of the bargaining agendas.[50] They endeavor to limit talks to the topics that are of interest to their own clients. Proficient negotiators can accomplish this objective by beginning the serious discussions with principled position statements that list the components of the deal they wish to achieve. They hope to resolve these matters in their favor before they tackle other items their counterparts may wish to raise. Even when they cannot control the total topics to be considered, they may be able to induce

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

49. *See* GUERNSEY, *supra* note 35, at 38–39; LATZ, *supra* note 46, at 214–28.

50. *See* PAUL ZWIER & THOMAS F. GUERNSEY, ADVANCED NEGOTIATION AND MEDIATION THEORY AND PRACTICE: A REALISITC INTEGRATED 81–85 (National Institute for Trial Advocacy 2005).

their counterparts to resolve certain terms important to their own side before other less significant subjects are addressed.

4. Numerically Superior Bargaining Team

Most legal negotiations are conducted on a one-on-one basis, with a single attorney interacting with a single counterpart. In some instances, however, parties attempt to gain a tactical and psychological advantage by including additional people on their bargaining team. They hope the extra participants will intimidate their lone counterpart. The added participants also make the team more capable of discerning the verbal leaks and nonverbal messages being emitted by the opposing individual.[51] Parties with expanded negotiating teams also think that since a lone counterpart has to observe, listen, plan, and speak simultaneously, they can confuse that counterpart with excessive verbal and nonverbal stimuli. In addition, the extra participants provide the group leader with significant feedback during separate caucus sessions in which they assess overall developments. When negotiators know that opposing parties will have several persons on their side of the bargaining table, it can be beneficial to bring one or two extra people to work on their side. These individuals can listen and watch opposing persons carefully, and provide important feedback during caucus sessions.

5. Use of Asymmetrical Time Pressure

During the Preliminary Stage of interactions, negotiators occasionally discover the existence of time constraints affecting their counterparts more than they are influencing their own side. This factor is frequently used by insurance company representatives who realize that claimants are overly eager to settle their cases expeditiously to avoid the two or three year wait for trial dates and to allow them to get on with their lives. By exuding unlimited patience, these insurance lawyers are often able to convince plaintiff attorneys to make greater concessions to enable them to achieve final settlements within the narrow time frames artificially established by their clients.[52]

Whenever possible, negotiators should try to withhold information that might suggest the existence of asymmetric time pressure.[53] Negotiators should also work with clients to induce clients to give negotiators the time needed to achieve beneficial results. They should explain the bargaining process and the time it takes to develop, and encourage those persons to allow the process to develop in a deliberate manner.

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51. *See* JAMES D. HODGSON, YOSHIHIRO SANO & JOHN L. GRAHAM, DOING BUSINESS WITH THE NEW JAPANESE 25 (Rowman & Littlefield Publishers, Inc. 2nd ed. 2008).

52. *See* SAMFRITS LE POOLE, NEVER TAKE NO FOR AN ANSWER 104–05 (2nd ed. 1991).

53. *See* DAWSON, *supra* note 43, at 175.

When transactional bargainers have certain deadlines that must be met and their counterparts do not appear to be operating under similar constraints, they can take preemptive action to neutralize this factor. They can announce at the outset of discussions that everything must be concluded by their deadline if mutual accords are to be achieved.[54] Through this approach, they can impose their time constraints on their counterparts, and deprive them of the opportunity to use this factor to their advantage.

### 6. Extreme Opening Offers

Inexperienced negotiators who are not sure where to begin their interactions frequently begin with extreme positions designed to provide them with a significant degree of bargaining discretion. In addition, even experienced negotiators use this technique to intimidate persons they do not think are particularly skilled.[55] People facing such truly unrealistic demands or offers should not casually indicate their displeasure with those positions because such behavior may lead their counterparts to think that their positions are not truly unrealistic. This may induce those persons to raise their aspirations in a way likely to generate non-settlements. Recipients of outrageous opening offers should immediately and unequivocally express their displeasure with those position statements, to disabuse the offerors of any thought their positions are not absurd. This is especially important with respect to counterparts who are unsure of their situations and who have articulated extreme positions to protect themselves. They expect their counterparts to quickly express their disapproval, and actually feel better when they do so. This confirms their preliminary view that their starting positions were excessive, and induces them to lower their expectations.

### 7. Probing Questions

Negotiators facing wholly unrealistic opening positions may generate a more accommodating atmosphere through the use of probing questions.[56] Instead of directly challenging seemingly unreasonable positions, negotiators can separate the different items into definitive components. They then propound a series of questions – beginning with the more finite terms that do not lend themselves to excessive puffing – designed to force counterparts to logically assess each aspect of their position. For example, if a claimant attorney was demanding $500,000 for a personal injury case, the defense lawyer could initially ask about the amount of current medical expenses. If they get a realistic response, they move on to the next

54. *See* SMART NEGOTIATION, *supra* note 40, at 148–49.

55. *See* DAWSON, *supra* note 43, at 16–21.

56. LOTHAR KATZ, PRINCIPLES OF INTERNATIONAL BUSINESS: SUCCESS STRATEGIES FOR GLOBAL NEGOTIATORS 167–68 (2008).

issue. If not, they point out that the receipts they have been provided show a much lower amount to induce the claimant representative to move toward that figure. They may then ask about current lost wages, likely future medical expenses, and future lost wages, seeking to induce their counterpart to provide them with realistic figures. When they get to more amorphous items such as pain and suffering, claimant lawyers may respond with elevated amounts. Nonetheless, when they add up everything, the total is likely to be far less than the figure initially articulated.[57]

### 8. Best Offer First

This technique is usually employed by persons who do not like the time consuming give-and-take of the conventional bargaining process and hope to achieve reasonable agreements expeditiously. Instead of beginning with elevated demands or minimal offers, they endeavor to determine where they believe that rational parties would end up, and begin at that point with positions they do not plan to alter. From their perspective this is "best-offer-first" bargaining, but from their counterpart's perspective it is "take-it-or-leave-it bargaining."[58] The individuals who employ this technique most frequently in the legal context are insurance adjusters and insurance company defense attorneys. They try to establish reputations as people who will make one firm and fair offer. If that entreaty is not accepted, they plan to go to trial.

A few individuals are able to employ this tactic effectively. They make reasonable offers in a non-threatening manner, and many of their initial offers are accepted. On the other hand, individuals using the best-offer-first approach often increase the probability of non-settlements. They offend their counterparts by treating them as if their input is entirely irrelevant. The natural reaction of such offer recipients is to simply reject the offers, even when they are reasonable. If persons contemplating a best-offer-first approach were sophisticated enough to begin with less generous opening offers and were to allow their counterparts to talk them up or down somewhat, they would be far more likely to achieve final accords. It is important for such people to appreciate the importance of the bargaining *process*. Negotiators who think the process has been fair and they have been treated respectfully tend to be happier with objectively less beneficial results than persons who think the process was not fair.[59]

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57. I use this approach frequently when I mediate employment law controversies and parties begin with wholly unrealistic offers. By the time the participants have answered my probing inquiries, they are much closer and relate much better than when they began.

58. *See* CHARLES CRAVER, THE INTELLIGENT NEGOTIATOR, WHAT TO SAY, WHAT TO DO, AND HOW TO GET WHAT YOU WANT—EVERY TIME 129–31 (2010).

59. *See generally* Rebecca Hollander-Blumoff, *Just Negotiation*, 88 WASH. U. L. REV. 381 (2010).

9. Multiple Equal Value Offers

When multiple issue negotiations are involved, some participants attempt to disclose their own relative item values and elicit similar information from their counterparts through the use of multiple equal value offers.[60] They formulate several different offers that vary what they are seeking and what they are willing to give to their counterparts, but which are all of equal value to their own side. Through this technique, they endeavor to let their counterparts know the relative values of the different items involved. They hope to induce their counterparts to let them know which of these diverse offers are preferable from their standpoint. Once the persons on the other side articulate offers disclosing to some degree the way in which they value the different terms, the participants can usually begin to appreciate how the issues can most efficiently be divided. If the use of multiple equal value offers is to function effectively, the negotiators must indicate, with some degree of candor, which items are essential, important, and desirable, and how much of each they hope to obtain. This approach allows each side to appreciate the other's basic interests, and encourages the development of mutually beneficial and highly efficient accords.

Individuals initiating the use of multiple equal value offers are counting on reciprocal candor from their counterparts. They have to a significant degree disclosed how they value the different items. If the persons on the other side counter with manipulative and disingenuous offers designed to exploit the initial offerors' openness, they may be able to claim an excessive share of the joint surplus created. A second risk concerns the articulation of an excessive number of package offers. Persons presented with three, four, or even five multiple item offers can usually do a good job of determining which alternatives are preferable. On the other hand, people presented with a greater number of options often become confused. They fail to evaluate the different options together, but instead make comparisons among separate and finite groups.[61] As a result, they may actually select a proposed package that does not optimally advance their own interests.

10. Range Offers

Negotiators occasionally phrase their monetary offers in terms of a range, rather than as a single figure -- *e.g,* "we would be willing to offer

60. *See* DEEPAK MALHOTRA & MAX H. BAZERMAN, NEGOTIATION GENIUS: HOW TO OVERCOME OBSTACLES AND ACHIEVE BRILLIANT RESULTS AT THE BARGAINING TABLE & BEYOND 100–01 (2007); DAVID A. LAX & JAMES K. SEBENIUS, 3-D NEGOTIATION: POWERFUL TOOLS TO CHANGE THE GAME IN YOUR MOST IMPORTANT DEALS 209–10 (2006).

61. *See* SHEENA IYENGAR, THE ART OF CHOOSING 183–215 (2010); *see generally* BARRY SCHWARTZ, THE PARADOX OF CHOICE (2004).

something in the $50,000, $60,000, or $70,000 area." This approach frequently suggests uncertainty in the mind of the offeror. A more carefully prepared individual would have determined the precise amount to be mentioned. Persons who wish to establish conciliatory bargaining environments may use range offers to evidence their reciprocity to compromise.[62] Recipients of such offers should focus on the most beneficial end of the spectrum – *i.e.*, persons seeking money should focus on the $70,000 figure while persons who have to pay something should focus on the $50,000 figure.

Bargainers should usually avoid range offers, because this approach tends to undermine the persuasiveness of their presentations. When they make "principled" opening offers, the figures provided should be definitive, based upon the underlying rationales used to support them. Nonetheless, when individuals are dealing with persons they know well and with whom they have good relationships, range offers can be employed to induce their counterparts to begin with realistic offers and to encourage positive interactions.[63]

### 11. Limited Client Authority

Many negotiators like to indicate during the early portions of their interactions that they do not possess final authority from their clients regarding the matters involved.[64] Some people who possess real authority employ this technique to reserve the right to check with their absent clients and reassess the terms tentatively agreed upon before accords can become final.[65] Other negotiators really do have constituencies that must ultimately approve preliminary agreements before they become operative.[66] The advantage of this approach –whether actual or fabricated – is that it permits the individuals employing this device to obtain psychological commitments from counterparts who are actually authorized to enter into binding commitments on behalf of their own clients.[67]

Negotiators who encounter counterparts who initially state that they lack the authority to bind their clients frequently find it beneficial to state

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62. *See* Daniel R. Ames & Malia F. Mason, *Tandem Anchoring: Informational and Politeness Effects of Range Offers in Social Exchange*, 108 J. PERSONALITY & SOC. PSYCH. 254 (2015).

63. *See id.*

64. *See* DAWSON, *supra* note 43, at 49–60; KATZ, *supra* note 56, at 124–126.

65. Although some people might consider such misrepresentations unethical under Model Rule 4.1 which makes it improper for lawyers to knowingly misrepresent material fact or law, Comment 2 makes it clear that misstatements during bargaining interactions regarding client values and settlement intentions do not pertain to "material" fact. I think that statements regarding client authority reflect client settlement intentions, and are thus exempt from Rule 4.1 coverage. *See generally* Charles B. Craver, *Negotiation Ethics for Real World Interactions*, 25 OHIO ST. J. ON DISP. RES. 299, 305–311 (2010).

66. *Id.* at 346.

67. *Id.* at 312.

that they similarly lack final client authority over the issues being discussed. This allows them to "check" with their own absent principals before they enter into binding commitments. Even when persons think counterpart representations regarding client authority are false, it is rarely helpful to challenge those statements directly. It is usually more effective to articulate firm offers to such people, and then to encourage them to check with their absent clients to see if the proposed terms are acceptable.

### 12. Lack of Client Authority

Legal representatives occasionally receive phone calls from counterpart agents who would like to know their thoughts regarding the issues at hand. The caller asks the recipient of the call what his/her side hopes to achieve from the impending interaction. When the call recipients openly disclose their opening positions, they are told that the suggested terms are wholly unacceptable. If the callers are then asked what their own side would be willing to provide, they indicate that they lack the authority to put any offer on the table.

It is impossible to bargain meaningfully with people who lack the authority to speak for their own clients. The participants who possess actual client authority can only bid against themselves by articulating consecutive opening offers. Negotiators should not succumb to this approach. If they are willing to do so, they may disclose their initial offers. When the unauthorized callers criticize their position statements, they should ask the callers to state their own positions. When they indicate that they lack the authority to do so, they should be told to obtain such authority and to state their side's positions before the talks can continue.

### 13. Flinch/Krunch

When negotiators receive opening offers from others, they frequently generate consecutive opening offers through the use of the flinch or krunch.[68] As soon as they receive their counterpart's offer, they pull back and look shocked, physically indicating their clear disappointment with the terms proposed. If their flinch/krunch is effective, they often generate additional opening offers from the persons on the other side.

The flinch/krunch can be especially effective when employed by individuals who appear to be sincerely shocked by the inadequacy of the other party's initial position. This technique can be similarly employed during later discussions to demonstrate the total inadequacy of counterpart concessions. After new positions are articulated, if the recipients of those offers can openly demonstrate how unacceptable those terms are, they may be able to induce the offerors to make additional, unreciprocated position

68. *See* DAWSON, *supra* note 43, at 32–35; JIM THOMAS, NEGOTIATE TO WIN 86–100 (2005).

changes. Persons who encounter this tactic should not allow the actors to induce them to make consecutive concessions. They should stay with their originally-articulated positions, and ask the people on the other side what they are prepared to offer. They should make it clear that no further position changes will be forthcoming without reciprocal movement by the other side.

### 14. Limited Time Offers and Decreasing Value Offers

During the early stages of some interactions, particularly those of relatively modest value, negotiators occasionally make fairly realistic offers or demands which they say must be accepted by specified dates, or they will be entirely withdrawn.[69] Negotiators who employ this approach should establish reputations as people who carry out their stated intentions, and should carefully apprise their counterparts of their exact intentions in this regard. This maximizes the likelihood their initial proposals will be accepted by counterparts who feel time pressure to consummate final deals.

A few persons carry this approach one step further by informing their counterparts that if they do not accept their opening offers, the offerors will either increase their demands or decrease their offers.[70] Unless they have a specific basis for such a threat, such as they will begin the discovery process and expend increased monetary sums, they should be hesitant to use such an approach. Once they begin to move away from their counterparts, they greatly increase the likelihood the bargaining process will end.

People presented with limited time or decreasing value offers can occasionally avoid the impact of such tactics by simply ignoring them. They can wait until several days past the stated deadlines, and contact their counterparts. If they begin the new discussions as if they do not remember any such threats, they can often induce the persons on the other side to move forward with the talks as if no such threats were made.

### 15. Argument

The bargaining technique employed most frequently by lawyers involves both legal and non-legal arguments.[71] When the facts support their positions, attorneys emphasize the factual aspects. When legal doctrines support their positions, they cite statutes, regulations, judicial decisions, and scholarly publications. When appropriate, they may also cite eco-

69. *See* KATZ, *supra* note 56, at 139–140.

70. *See* SMART NEGOTIATION , *supra* note 40, at 79–81.

71. *See* GERALD R. WILLIAMS, A LAWYER'S HANDBOOK FOR EFFECTIVE NEGOTIATION AND SETTLEMENT 79–81 (1983).

nomic or business considerations. Although these arguments are presented in a detached manner, they are not used to elucidate, but rather to persuade counterparts.[72] They employ seemingly objective standards to bolster their claims, and frame the issues to be resolved in ways that lend moral support to their own positions.[73] Persons who possess greater bargaining strength tend to argue in favor of equitable distributions that favor their own side, while persons with less power tend to argue for egalitarian distributions.[74]

### 16. Real or Feigned Anger

The use of real or fake anger during the critical portions of bargaining interactions may convince counterparts of the serious nature of one's position.[75] It may intimidate opposing parties into making concessions in an effort to keep the bargaining process moving forward. Empirical studies have found that negotiators facing angry counterparts tend to lower their expectations and make more generous concessions, especially when they do not possess beneficial, non-settlement alternatives.[76] Although true anger may occasionally be displayed during bargaining encounters, proficient negotiators almost never lose their tempers. They employ carefully orchestrated anger that is designed to intimidate anxious counterparts. People confronted with such behavior should ask themselves whether their positions are as unreasonable as these actors are trying to suggest.

### 17. Aggressive Behavior

Aggressive behavior is usually intended to have an impact similar to that associated with real or feigned anger.[77] It is employed to convince counterparts of the seriousness of one's position. It can also be used by anxious individuals to seize control of the bargaining agenda. By behaving in an overly assertive manner, negotiators may be able to dominate the discussions. This technique is most effectively employed by naturally aggressive individuals whose behavior suits their personalities. Less assertive persons who endeavor to adopt an uncharacteristically aggressive

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

73. *See* SHELL, *supra* note 22, at 104–05

74. *See* Richard Birke & Craig R. Fox, *Psychological Principles in Negotiating Civil Settlements*, 4 HARV. NEGOT. L. REV. 1, 34–35 (1999).

75. *See* KATZ, *supra* note 56, at 150–51.

76. *See* Gerben A.Van Kleef, Carsten K.W. De Dreu & Anthony S.R. Manstead, *The Interpersonal Effects of Anger and Happiness in Negotiations*, 86 J. PERSONALITY & SOC. PSYCH. 57 (2004); Gerben A. Van Kleef, Carsten K.W. De Dreu & Anthony S.R. Manstead, *The Interpersonal Effects of Emotions in Negotiations: A Motivated Information Processing Approach*, 87 J. PERSONALITY & SOC. PSYCH. 510 (2004).

77. *See* KATZ, *supra* note 56, at 146–48.

approach do not feel comfortable, and are often unable to project a credible image.

Aggressive negotiators, especially those who use abrasive tactics, should carefully monitor their counterparts for nonverbal indications of excessive frustration and stress. They should look for clenched teeth, crossed arms and legs, increased gross body movement, and similar signals. If they do not monitor such signs, they may generate unintended bargaining breakdowns.

### 18. Irrational Behavior

A few negotiators attempt to gain a bargaining advantage through seemingly irrational behavior.[78] Some of these persons attribute the irrationality to their absent clients, while others exhibit their own bizarre conduct. These individuals hope to convince their counterparts that their side cannot be dealt with logically. Opposing parties must either accept their one-sided demands, or face the consequences associated with non-settlements.

Very few lawyers or their corporate clients are truly irrational. If they were, they would be unable to achieve consistently beneficial results in a highly competitive world. In most instances in which bizarre behavior is encountered, the actors are crazy like a fox – using feigned irrationality to advance their bargaining objectives. The most effective way to counter contrived irrationality is to ignore it and respond in an entirely rational manner. As soon as such manipulative counterparts caucus to consider proposed terms, they cease their illogical conduct and rationally evaluate the proposals on the table.

On rare occasions, negotiators may encounter truly irrational counterparts. It is impossible to deal with such persons logically. They are incapable of evaluating bargaining proposals and non-settlement options in a realistic manner. People dealing with such persons must either give in to their positions, or accept their non-settlement alternatives.

### 19. Walking Out/Hanging Up Telephone

During critical parts of bargaining interactions, participants occasionally walk out or discontinue telephone discussions to convince their counterparts that they are unwilling to make further concessions.[79] Once the participants have narrowed the distance between their respective positions, these individuals storm out or loudly end telephone talks in an effort to induce risk-averse counterparts to close all or most of the remaining gap. This approach may induce anxious opposing parties to give in.

Bargainers should not permit this type of bullying behavior to intimidate them into unwarranted concessions. They should never run after

78. *See id.* at 126–27.
79. *See id.* at 153–55.

persons who have walked out of the room, or immediately re-phone people who have deliberately terminated discussions. Such conduct would be viewed as signs of weakness to be exploited. They should instead give their counterparts time to calm down and reflect on the current positions on the table. They should also reassess their own non-settlement alternatives to be sure they do not succumb to unreasonable counterpart demands.

20. Negative Threats/Warnings and Affirmative Promises

Most legal negotiations involve the use of overt or implicit statements regarding the negative consequences that would result if agreements are not achieved. Litigators mention the likelihood of extended trials, while transactional attorneys suggest the willingness of their clients to structure deals with other parties. Such statements are employed to convince counterparts that the cost of disagreeing with proposed offers is greater than the cost of acquiescence.[80]

When the speakers indicate that their side will impose the negative consequences being mentioned, these are considered overt *threats*, while the mention of negative consequences that would be imposed by courts or the market place are considered less direct *warnings*.[81] Effective threats must be clearly communicated to counterparts, and they must be proportionate to the action the user is seeking.[82] Insignificant threats are likely to be ignored, while excessive threats may be dismissed as irrational.[83] Individuals contemplating the use of overt threats should remember how critical it is for their side to be willing to carry out the threatened action if their counterparts do not move in the right direction, since their failure to do so would significantly undermine their credibility.

Less confrontational negotiators usually endeavor to avoid the use of overt threats. They recognize that when adverse results are likely to occur if no agreements are achieved, it is usually beneficial to articulate the negative probabilities as more subtle warnings, rather than overt threats.[84] Overt threats are direct affronts to counterparts and frequently generate hostile reciprocal behavior, while warnings are more indirect and less confrontational, making them more palatable to listeners.[85] In addition, warnings are often more credible due to the fact the speakers

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

81. *See* KATZ, *supra* note 56, at 151–52.

82. *See id.*

83. *See* RICHARD NED LEBOW, THE ART OF BARGAINING 92–93 (1996).

84. *See* JON ELSTER, BARRIERS TO CONFLICT RESLOLUTION 252–53 (Kenneth Arrow et al. eds., 1995); *see also* SMART NEGOTIATION, *supra* note 40, at 212–13; FRED IKLE, HOW NATIONS NEGOTIATE 62–63 (1964).

85. *See* ROBERT MAYER, POWER PLAYS 64–65 (1996).

are suggesting that negative effects will result from the actions of third parties over whom the speakers exercise minimal or no control.[86]

At the opposite end of the spectrum from negative threats and warnings are affirmative *promises*.[87] A promise does not involve the suggestion of negative consequences, but rather consists of "an expressed intention to behave in a way that appears to be beneficial to the interests of another."[88] For example, instead of threatening legal action if a counterpart does not alter their current position, a negotiator indicates that if the other side provides a more generous offer, she will respond with a better offer of her own. The affirmative promise provides a face-saving way for opposing sides to act more congenially toward one another, because it promises reciprocal action in response to an appropriate change by the other party. When neither side appears willing to announce a new position unilaterally, for fear their counterparts will not respond in kind, they can suggest that both sides write down new positions that will be disclosed simultaneously.

### 21. Silence and Patience

Silence is an extremely effective bargaining technique which is often overlooked by negotiators.[89] Less proficient negotiators fear silence. They are afraid that if they cease talking, they will lose control of the interaction.[90] When they continue to express their thoughts, they tend to disclose, both verbally and nonverbally, information they may not have intended to divulge, and they frequently make unplanned concessions.[91] When confronted by further silence from counterparts, they continue their verbal leakage and concomitant loss of control.[92]

When negotiators have something important to convey, they should say it succinctly and become silent. They need to provide their listeners with the chance to absorb what has been said, which is especially important when position changes are being articulated. They should then quietly and patiently await responses from their counterparts. If those persons remain silent for prolonged periods, the initial speakers should casually review their notes or look out the window as if they have all day.

Individuals involved in bargaining interactions must appreciate the fact that it takes time for the process to unfold – and for persons with elevated aspirations to appreciate the need to lower their sights. Persons

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86. *See id.*

87. *See* DEAN G. PRUITT & JEFFREY Z. RUBIN, SOCIAL CONFLICT: ESCALATION, STATEMENT, AND SETTLEMENT 51–55 (1986).

88. JEFFREY Z. RUBIN & BERT R. BROWN, THE SOCIAL PSYCHOLOGY OF BARGAINING AND NEGOTIATION 278 (1975).

89. *See* LEIGH STEINBERG, WINNING WITH INTEGRITY 171 (1998).

90. *See id.*

91. *See* MARK MCCORMACK, WHAT THEY DON'T TEACH YOU AT THE HAVARD BUSINESS SCHOOL 108–11 (1984).

92. *See id.*

who accelerate developments due to impatience usually obtain less favorable and less efficient results than they would have obtained had they been more patient. Offers that may well have been acceptable if they had been 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. This is why it is critical for participants to let the process develop slowly and to avoid rushing toward terms that are not nearly as beneficial as those they could obtain later.

22. Rational and Emotional Appeals

Negotiators who are presented with objective arguments that seem to undercut their positions frequently counter those logical assertions with rational or emotional appeals. They use rational appeals to challenge the foundations underlying the other side's contentions, as they attempt to demonstrate the lack of any legal or factual basis for the positions being articulated.

When bargainers are unable to rationally undermine counterpart assertions, they may formulate emotional appeals designed to diminish the effectiveness of those claims. This technique can be especially effective when employed against emotional counterparts. Intelligent persons who would have no difficulty countering objective arguments often find it difficult to counter emotional appeals that make them feel guilty about the positions they are asserting.

23. False Demands

Alert negotiators occasionally discover during the Information Stage that their counterparts desire items that are not particularly valued by their own side. When such knowledge is obtained, many persons endeavor to take advantage of the situation. They disingenuously indicate how important these terms are to their own side, and try to claim them for themselves. If they can convince their counterparts that these issues are of major value to their own clients, they may be able to obtain relatively significant concessions in exchange for terms they do not really value.

The major risk associated with false demands concerns the possibility their counterparts may give in to their claims and provide them with terms they do not really value. It could be disastrous for them to attempt to rectify such a tactical error with a straightforward admission of deceit, since this might impede further bargaining progress. They should instead tentatively accept the terms in question. As the interaction evolves, they should be able to exchange these items for other more desired topics.

### 24. Alleged Expertise

Some individuals attempt to overwhelm bargaining counterparts with excessive factual and/or legal details that are not particularly relevant to the basic interaction. They cite factual matters and/or legal doctrines that are of no meaningful concern to the negotiating parties. They hope to bolster their own bargaining confidence through demonstrations of their thorough preparation and knowledge, and to intimidate counterparts who have not developed such detailed knowledge.

People should not allow counterparts to overwhelm them with factual or legal minutiae. When someone tries to focus upon marginally relevant details, he should be praised for his preparation and be asked to concentrate on the more salient items. He should be asked to summarize his positions without the need for repeated reference to superfluous data.

### 25. Disingenuous Consecutive Concessions

When negotiators lose track of the offers and counteroffers being made, they occasionally place themselves at a disadvantage by inadvertently making unreciprocated position changes. They normally do not realize they are making such unilateral concessions. Recipients of such unilateral changes should encourage further concessions by questioning the sufficiency of the position changes being articulated, or through patience and prolonged silence following each concession.

Some negotiators endeavor to use contrived consecutive concessions to create feelings of guilt and obligation in their counterparts. For example, they may be contemplating a move from their current demand for $500,000 to a new demand of $400,000. Instead of making a principled $100,000 concession, they adopt a different approach. They first move to $450,000, with an appropriate explanation for their position change. After a reasonable amount of discussion, they move to $420,000, accompanied by a suitable rationale. They finally move majestically to $400,000. At this point, they indicate that they have made three unanswered concessions. They hope to induce unsuspecting counterparts to respond with a greater counteroffer than would have been generated by a direct move from $500,000 to $400,000.

Recipients of consecutive concessions should become suspicious when they are specifically apprised of their occurrence by counterparts who have made them. Truly confused concession-makers are not aware of the fact they have made consecutive position changes. If they are clearly cognizant of their behavior, the recipients of their apparent largesse should realize that this technique is probably being employed as a bargaining strategy. They should not be overly impressed by the consecutive nature of the concessions, but should instead focus on the aggregate movement involved.

26. Uproar – "Chicken Little"

Negotiators occasionally threaten dire consequences if mutual accords are not achieved. They indicate that the predicted havoc can only be avoided if the other side agrees to the terms they are offering. Careless bargainers may be influenced by this devious technique, if they focus entirely on the damage they might suffer if the extreme consequences were to occur. When dire situations are threatened, the recipients of such threats must ask themselves two critical questions. First, what is the probability the promised havoc would occur if no agreement were achieved? In many instances, they would realize that no devastation is likely to result from their refusal to give in to counterpart demands. Second, if there is a possibility the promised cataclysm might take place, how would that event affect the *other side*? A careful assessment may indicate that the negative consequences would be far greater for the threatening party than they would be for the side being threatened. If this were true, the threatening party would have more to lose if no accord was achieved, and he would be under greater pressure to avoid a non-settlement.

27. Brer Rabbit – Reverse Psychology

In *Uncle Remus, His Songs and His Sayings* (1880), Joel Chandler Harris created an unforgettable character named Brer Rabbit. The story involves a rabbit who is captured by a fox. The rabbit employs reverse psychology to effectuate his escape. While the fox is contemplating his fate, the rabbit says:

> I don't care what you do with me, so long as you don't fling me in that brier-patch. Roast me, but don't fling me in that brier-patch . . . Drown me just as deep as you please, but don't fling me in that brier-patch. . .skin me, snatch out my eyeballs, tear out my ears by the roots, and cut off my legs, but don't fling me in that brier-patch.

Since the fox wanted to punish Brer Rabbit, he chose the alternative the rabbit seemed to fear most. He flung him in the brier-patch, and Brer Rabbit escaped!

Adept negotiators frequently employ the "Brer Rabbit" approach to obtain beneficial terms from retributive win-lose counterparts who irrationally judge their success not by how well they have done, but by how poorly they think their adversaries have done.[93] Brer Rabbit bargainers subtly suggest to such opposing parties that they or their clients would suffer greatly if certain action was either taken or withheld, when they

93. *See* KATZ, *supra* note 56, at 127.

actually hope to obtain the very results being eschewed. They then ask for other items they do not really wish to obtain. Their adversaries are so intent on ensuring their complete defeat that they force on those persons the terms they appear to want least – *i.e.*, their real first choices. Such negotiators have to play the game to the end by asking if their counterparts could possibly give them something else, suggesting that their clients will be so disappointed if this is all they get. Their counterparts will then smile and refuse to make additional concessions.

Persons who decide to employ the Brer Rabbit technique must be sure to only use it against highly competitive win-lose counterparts. If they employ it against more cooperative win-win people, they may be given the very items they do not value.

### 28. Downplay of Counterpart Position Changes

When negotiators make concessions, they expect their counterparts to acknowledge their generosity. This enhances the likelihood their movement will generate appropriate counteroffers. A few individuals attempt to avoid their obligation to take reciprocal action by downplaying the significance of the position changes that have been given to them. They act as if the items that have been granted are of little or no value to their side. Bargainers should never permit counterparts to discount the value of sincere concessions. If something they have just given up is really not regarded highly by their counterparts, those persons should not mind if they took it back! It is amazing how quickly disingenuous counterparts protest when parties endeavor to regain concessions that have been disingenuously characterized as meaningless.

### 29. Feigned Boredom or Disinterest

Some negotiators try to appear completely disinterested or inattentive when their counterparts make their most salient assertions. This technique is intended to undermine the significance of the statements being made and the confidence of the speakers. Some people endeavor to counter these actions with more forceful and frequently louder assertions. These statements are likely to be received with equal distain. It is usually more effective to force such counterparts to be more involved in the interaction. They should be asked questions that cannot be answered with a mere "yes" or "no." They should be required to explain the specific weaknesses they perceive in the position statements they do not seem to respect. If they can be induced to participate more directly in the discussions, their previously displayed disinterest usually disappears.

30. Mutt and Jeff – Good Cop/Bad Cop

The Mutt and Jeff routine constitutes one of the most common – and effective – bargaining techniques.[94] A seemingly reasonable negotiator softens counterpart resistance by professing sympathy toward the "generous" position changes being made by the other side. When those persons begin to think that a final accord is on the horizon, the reasonable person's partner summarily rejects the new offer as entirely insufficient. The unreasonable participant castigates the counterparts for their parsimonious concessions and insincere desire to achieve a fair accord. Just as those persons are preparing to explode at the unreasonable participant, the reasonable partner assuages their feelings and suggests that if some additional concessions were made, she could probably induce her seemingly irrational partner to accept the new terms. It is amazing how diligently many people interacting with Mutt and Jeff bargainers strive to formulate proposals that will satisfy the unreasonable participant.

The Mutt and Jeff approach may even be employed by single negotiators. They can claim that their absent clients suffer from delusions of grandeur that must be satisfied if any agreements are to be achieved. These manipulative negotiators repeatedly praise their counterparts for their munificent position changes, but insist that greater movement is required to satisfy the excessive aspirations of their irrational principals. If they are successful with this approach, their counterparts will endeavor to satisfy the alleged needs of the missing clients.

Negotiators who encounter Mutt and Jeff tactics should not directly challenge the seemingly devious scheme being employed against them. It is possible that their counterparts are not really engaged in a disingenuous exercise. One may actually disagree with his partner's assessment. Allegations regarding the apparently manipulative tactics being used by those individuals would probably create a tense and unproductive bargaining environment – particularly when those people have not deliberately adopted a Mutt and Jeff style.

Individuals who encounter the Mutt and Jeff approach tend to make the mistake of allowing the seemingly unreasonable participants to control the interaction. They direct their arguments and offers to those persons in an effort to obtain their reluctant approval. It is more effective to include the reasonable participants in the discussions in an effort to obtain their acquiescence – before attempting to satisfy their seemingly irrational partners. In some instances, the more conciliatory counterparts may actually indicate a willingness to accept particular proposals that will be characterized as unacceptable by their partners. If the unified position of the people on the other side can be shattered in this fashion, it

94. *See* DAWSON, *supra* note 43, at 80–84; KATZ, *supra* note 56, at 122–24.

may be possible to whipsaw the reasonable individuals against their excessively demanding partners.

If the persons representing the other side are truly employing the Mutt and Jeff approach, the reasonable participants will never suggest their willingness to assent to the particular terms being offered. They will instead reiterate a desire to obtain the acquiescence of their unreasonable partners. When this occurs, the reasonable participants should again be asked – not whether their partners would be likely to accept the terms being proposed – but whether *they* would be willing to accept those conditions. Proficient reasonable participants will never indicate their acceptance of proffered terms, without the concurrence of their unreasonable partners, and it will become clear that the people on the other side are using wholly manipulative tactics.

### 31. Belly-Up

Some individuals use a bargaining technique that is particularly difficult for counterparts to deal with. They act like wolves in sheepskin.[95] They wear bedraggled outfits to the offices of their counterparts and indicate how commodious those environments are. They then profess their lack of negotiating ability and legal expertise in an effort to evoke sympathy and to lure unsuspecting counterparts into a false sense of security. They readily acknowledge the superior competence of their counterparts, and shamelessly admit their lack of ability. They then ask their counterparts what those experts think would constitute fair terms.

The epitome of the Belly-Up style was artfully created by actor Peter Falk in his Lt. Columbo police detective character.[96] That inspector seemed to bumble along during criminal investigations with no apparent plan. When he interviewed suspects, he did so in a wholly disorganized manner. By the time the suspects realized that Lt. Columbo really understood what was happening, they had already confessed and were in police custody.

Belly-Up negotiators can be especially difficult to deal with, because they refuse to participate in the normal bargaining process. They ask their counterparts to permit them to forego traditional auction bargaining due to their professed inability to negotiate competently. They merely hope their respected counterparts will formulate reasonable arrangements that will not unfairly disadvantage the unfortunate clients who have chosen such pathetic legal representatives. Even though their thoroughly prepared counterparts have established elevated aspiration levels and principled opening positions, the Belly-Up negotiators are able to in-

95. *See* KATZ, *supra* note 56, at 115–17.
96. *See* DAWSON, *supra* note 43, at 127–28.

duce them to significantly modify their planned approach. By the conclusion of the interaction, the Belly-Up bargainers have usually achieved magnificent accords for their clients, while the opposing lawyers have been left figuratively naked. The extraordinary aspect of this transaction is that the opposing negotiators feel gratified that they have been able to satisfy the underlying needs of their counterparts' poor clients.

Negotiators should never permit seemingly incompetent counterparts to evoke such sympathy that they change their planned approach and concede everything in an effort to formulate solutions that are acceptable to those pathetic persons. Instead of allowing such individuals to alter their planned approach, bargainers should begin with their originally formulated opening offers and require those persons to participate actively in the bargaining process. When Belly-Up counterparts challenge these opening proposals, they should be compelled to articulate their own proposals. They are more comfortable trying to evoke sympathy by criticizing the offers being made to them. Once such persons have been induced to participate in the usual give-and-take, they tend to lose most of their bargaining effectiveness.

### 32. Passive-Aggressive

Passive-aggressive negotiators can be as difficult to deal with as Belly-Up bargainers. Instead of directly challenging the tactics and proposals of their counterparts, they employ oblique, but aggressive, forms of passive resistance. They tend to pout when they are unable to obtain beneficial offers, and they resort to indirect obstructionism and procrastination to achieve their objectives. They may show up late for scheduled bargaining sessions or forget to bring necessary files or documents. They may exhibit personal ineptitude to frustrate the negotiation process and to generate concessions from impatient counterparts. They may even misplace unsatisfactory proposals sent to them and act as if they never arrived.

Since passive-aggressive individuals tend to react to problems and confrontations in an indirect manner, it can be particularly frustrating to interact with them. Instead of expressing their actual thoughts directly, they employ passive techniques to evidence their displeasure. People who deal with them should recognize the hostility represented by their passive-aggressive behavior. They are usually individuals who are dissatisfied with the negotiation process, and they may not feel comfortable participating in the usual give-and-take.

Persons dealing with passive-aggressive counterparts should endeavor to take away the ability of those people to disrupt interactions. They should try to obtain copies of important papers from other sources, in case their counterparts claim an inability to locate them. Since passive-aggressive negotiators do not say "no" easily, it can be helpful to present

them with seemingly realistic offers they cannot easily reject. Once tentative agreements have been achieved, persons bargaining with them should offer to prepare the necessary documents. Even when the passive-aggressive participants insist upon the opportunity to prepare these documents, their counterparts should draft their own documents in anticipation of their failure to do so. Once passive-aggressive negotiators are presented with such faits accomplis, they usually accept their fate and execute the proffered.

### 33. Splitting the Difference

One of the most common techniques used to achieve final agreements following detailed auction bargaining that has brought the participants close together involves splitting of the distance remaining between their most recent offers. Instead of threatening counterparts with nonsettlement consequences if final terms are not achieved, the moving parties use the face-saving "promise" technique to generate simultaneous movement. One indicates a willingness to close half of the remaining gap if their counterpart would do the same.

Individuals asked to split the outstanding difference should carefully consider the prior bargaining sequence before they readily assent to this proposal. They must first decide whether their counterparts were able to unfairly skew the apparent settlement range through an entirely one sided opening offer. They should also consider the prior concession pattern to see if one side may have moved far more than the other, or may have made more position changes than the other. If they decide that they would be giving up too much by accepting the mid-point between their current positions, they could offer to split the remaining distance between the proposed mid-point and their last offer. This approach would induce their counterparts to close 75 percent of the gap, while they only close 25 percent.

### 34. Nibble Technique

Some crafty lawyers "agree" to final accords with apparent client authority. Their counterparts are pleased with the agreements, and contact their own clients to give them the good news. Several days later, the negotiators contact their counterparts with seeming embarrassment and indicate that they did not really possess full authority to bind their clients. They sheepishly indicate that their principals are dissatisfied with several of the terms agreed upon and must obtain several additional position changes before they will accept the other terms.[97] Since their unsuspecting counterparts and their clients are now psychologically committed to

97. *See* DAWSON, *supra* note 43, at 85–92; KATZ, *supra* note 56, at 140–41; THOMPSON, *supra* note 17, at 103–09.

final deals and do not want to permit these few items to negate their previous efforts, they frequently agree to the requested modifications.

Persons challenged by "nibbler" counterparts often make the mistake of focusing entirely on the desire of their *own side* to preserve the final accords previously reached. They are afraid to let the agreements fall through over the few changes being sought, and they give in. They must take the time to direct their attention to the *opposing side*. If they were to ask themselves whether their counterparts would be willing to forego the accords achieved over these specific items, they would realize that those people also want to retain the terms already agreed upon. They are merely using this manipulative bargaining technique to obtain some final concessions.

When negotiators think they are dealing with counterparts who are endeavoring to employ the nibble technique to obtain post-agreement concessions, they need to react in a provocable manner and demand reciprocal changes of their own.[98] When their counterparts request the anticipated changes, they should indicate how relieved they are to address this matter due to the fact their own clients would like to have several terms modified. If their counterparts are actually in good faith and have clients who are sincerely upset about the topics raised, they will acknowledge the need for reciprocity and address the proposed exchanges. On the other hand, individuals who are disingenuously using the nibble technique to obtain several final unilateral position changes would be likely to deny the reciprocal changes being sought and insist that the parties honor the original terms agreed upon.

## VI. CLOSING STAGE [VALUE SOLIDIFYING]

Near the end of the Distributive Stage the participants begin to appreciate the fact a mutual accord is likely to be achieved. They feel a sense of relief, because the anxiety generated by the uncertainty associated with the bargaining process is about to be alleviated through the attainment of final terms. As the participants become psychologically committed to settlement, they must be careful not to move too quickly toward the conclusion of the interaction. The Closing Stage is a critical portion of bargaining interactions, since a majority of concessions tend to be made during the later portions of negotiations.[99] If they are careless, participants may forfeit much of what they obtained during the Distributive Stage.

Less successful negotiators tend to make excessive and even unreciprocated concessions during the Closing Stage in an effort to solidify the deal before them. They must remember that by this point in their inter-

98. *See* DAWSON, *supra* note 43, at 75.
99. *See* DAWSON, *supra* note 43, at 171.

actions, *both sides* have become psychologically committed to joint resolutions. Neither wants their prior efforts to culminate in failure. Negotiators must be careful not to make unreciprocated position changes, and to avoid overly large concessions. They should endeavor to move in concert with their counterparts.

The Closing Stage is not a time for swift action; it is a time for patient perseverance. Negotiators should continue to employ the techniques that got them to this point, with one critical exception – if they have previously employed some adversarial tactics, they should refrain from such behavior now. For example, this would not be a good time to walk out or hang up the telephone. It is important for them to keep the process moving inexorably toward final accords, and if they engage in any disruptive conduct, the process may come to a complete halt.

Patience and silence are two of the most effective techniques during the Closing Stage.[100] Negotiators should employ *principled concessions* that explain the reasons for their precise moves. After they announce position changes, they should become silent and patiently await their counterparts' responses. They should not contemplate further movement without reciprocity from the other side. They must continue to remember that their counterparts are as anxious as they are to achieve final terms.

This would not be a good time to employ negative threats or warnings suggesting the negative consequences that might result if no agreements are achieved. Parties should instead use the affirmative promise to generate joint movement. Temporary impasses can easily be overcome through the promise of concurrent position changes that enable the participants to move together in a face-saving manner.

Some negotiators seek to obtain an advantage during the Closing Stage by exhibiting calm indifference. They act as if they do not particularly care if final accords are achieved. If they can persuade anxious counterparts to believe they really are not concerned, those persons may be induced to close most of the distance remaining between the parties.[101] To counteract this possibility, the counterparts of such individuals should be careful not to make unreciprocated or excessive position changes. They need to be patient and make it clear that they will not continue to move toward final terms without simultaneous movement by these persons.

## VII. COOPERATIVE STAGE [VALUE MAXIMIZING]

Once the Closing Stage has been completed through the attainment of mutually acceptable accords, many persons naively think the bargaining process is finished and they decide which side will prepare the written documents. They fail to appreciate the fact that some items may have

100. *See* KATZ, *supra* note 56, at 132–34; STEINBERG, *supra* note 89, at 171.
101. *See* DAWSON, *supra* note 43, at 173–76.

ended up on the wrong side of the table due to the fact participants have over and under stated the value of particular issues during the Information, Distributive, and Closing Stages for strategic purposes.[102] Some terms valued more by Side A than Side B have ended up on Side B's side, while other terms valued more by Side B have been claimed by Side A. If the participants fail to consider this likelihood and explore possible exchanges that would simultaneously enhance their respective results, a meaningful amount of client satisfaction may be lost.

If the Cooperative Stage is to develop successfully, several prerequisites must be established. First, the parties must achieve tentative accords. If not, they continue to be in the Distributive or Closing Stage and must be careful not to do something that will simply favor their counterparts. Second, at the conclusion of the Closing Stage, one or both parties should suggest movement into the Cooperative Stage. It is critical that both sides recognize movement into the Closing Stage, because if one party attempts to move into that stage without the understanding of the other, problems may arise. The alternative proposals articulated by the moving party may turn out to be less advantageous to the other side than the terms already agreed upon. If the recipient of these new positions does not view them as incipient Cooperative Stage suggestions, they might suspect disingenuous competitive tactics by counterparts moving backwards. It is thus imperative that parties contemplating movement toward cooperative bargaining be sure their counterparts understand the intended transition. When such movement might not be apparent, this should be explicitly communicated.

Once the participants enter the Cooperative Stage, they should endeavor to discover the existence of previously unfound alternatives that might be mutually beneficial. They must work to expand the overall surplus they have to divide.[103] They may have failed to consider options that would more effectively satisfy the underlying needs and interests of one side with less cost to the other party. To accomplish this objective, the participants must be willing to candidly disclose the underlying interests of their respective clients. Even though they should have explored many of these factors during the prior stages, they may not have appreciated the benefits that might be obtained from certain options. The optimal way to explore different options is through neutral questions designed to elicit the preferences of counterparts. Would they prefer Item A or Item B? Would they be willing to trade Item X for Item Y?

Both sides must be quite open during the Cooperative Stage if the process is to function effectively. Through the use of objective and neutral

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102. *See generally* Charles B. Craver, *The Inherent Tension Between Value Creation and Value Claiming During Bargaining Interactions*, 12 CARDOZO J. CONFLICT RESOL. 1 (2010).

103. *See* MNOOKIN ET AL., *supra* note 31, at 11–43; FISHER & URY, *supra* note 14, at 58–83.

inquiries, the participants should explore their relative 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 thus not hesitate to think outside the box.[104] For example, an employee seeking compensatory damages for serious sexual harassment might be perfectly willing to reduce her monetary demands in exchange for an apology from her employer for not rectifying the situation more expeditiously and for a statement indicating that she is a valued worker. When one side asks the other if another resolution would be more beneficial than a prior agreement, the respondent must be forthright.

As the participants enter the Cooperative Stage, they must be careful to preserve their credibility. They may have been somewhat deceptive during the previous parts of their encounter with respect to their true client needs and interests. During the Cooperative Stage, parties hope to correct the inefficiencies that may have been created by their prior dissembling. On the other hand, if they are too open regarding their previous misrepresentations, their counterparts may begin to question the accuracy of many of their prior representations and seek to renegotiate the entire accord.[105] This would be a disaster. It is thus imperative that negotiators not overtly undermine their credibility when they seek to improve their respective positions during the Cooperative Stage.

Even during the Cooperative Stage there may be a competitive undercurrent, despite the seemingly win-win discussions taking place.[106] While the participants are using cooperative techniques to expand the overall pie and improve the results achieved by both sides, some individuals may employ some competitive tactics to enable them to claim more of the joint surplus generated. When they are offered an item that would substantially enhance their situation, they might indicate that it would be a slight improvement. They hope that this approach would enable them to obtain that important term in exchange for a relatively insignificant item they would be giving to their counterparts. To protect themselves from such exploitive behavior, negotiators should carefully explore the alternatives being mentioned. When a counterpart indicates that a new proposal would only be somewhat better, they should ask themselves how much they think that exchange would enhance the other side's true interests. They should endeavor to look for trades that logically seem to be of relatively equal value.

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104. *See generally* TOM KELLEY, THE ART OF INNOVATION (2001).

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

106. *See* MELISSA L. NELKEN, UNDERSTANDING NEGOTIATION 188–89 (2001).

## VIII. CONCLUSION

When individuals negotiate with others, they need to appreciate two important factors. First, how structured such interactions are. They should recognize the Preparation Stage, the Preliminary Stage, the Information Stage, the Distributive Stage, the Closing Stage, and the Cooperative Stage. They must appreciate what they should endeavor to accomplish in each stage. They must also appreciate the different negotiating techniques people may employ to advance their bargaining interests. They have to decide which techniques they should employ during the different stages to accomplish their basic objectives. They must also be able to recognize the tactics being used by their counterparts, to enable them to successfully counteract those techniques. Persons who understand the different stages and the relevant bargaining techniques significantly enhance the likelihood they will be able to generate good results for their own sides and mutually efficient results that benefit both sides.