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Jeffrey H. Hartje

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LAWYER'S SKILLS IN NEGOTIATIONS: JUSTICE IN UNSEEN HANDS

JEFFREY H. HARTJE*

The experienced lawyer knows that litigation tools, seemingly pointed like arrows at the trial courtroom, most often find their mark in the resolution of the dispute in negotiation. Skillful representation in developing a sound relationship with a client or in pleading, discovery and motion practice anticipates the bargaining process and serves as a solid foundation for a beneficial compromise.¹ Yet very little is known of the skills lawyers employ in negotiation. The private negotiation of disputes is most often an unseen operation.²

Lawyers negotiate disputes in disparate areas of law. Whether one is negotiating plea bargains, corporate disputes or personal injury actions, an ubiquitous process emerges: it is a process of the resolution of disputes or modification of the legal status quo between disputants through compromising their legal positions or exchanging some other social, economic or psychological *interest* or value with the end of mutual benefit. Negotiation may be so basic as to be a part of human nature. Generally, successful negotiation requires three fundamental prerequisites: (1) the issue is negotiable-subject to compromise or solution; (2) the negotiators are interested in giving as well as taking, so meaningful *exchange* can occur, and (3) the negotiating parties trust one another to some extent, even if only on the basic issue: compromise or the accommodation of interests may be beneficial to both parties.³

An understanding of timing and context, a knowledge of human behavior, and a complete understanding of communication skills is essential for a skilled negotiator. Respect for the value of thorough factual and legal preparation is mandatory, together with familiarity with bargaining approaches and the attributes of bargaining power and creativity.

Negotiation as a lawyer operation may test many, if not all, of the com-

* Associate Professor of Law, Gonzaga University School of Law; B.A., 1964; J.D., 1967, University of Minnesota.

1. Bargaining and negotiation are used interchangeably. In some discussions, negotiation is viewed as a subprocess of bargaining. See, e.g., Gulliver, *Case Studies of Law in Non-Western Societies*, in *LAW, CULTURE AND SOCIETY* 11, 18 (L. Nader ed. 1969).

2. See G. WILLIAMS, *LEGAL NEGOTIATION AND SETTLEMENT* 15 (1983).

3. See Mathews, *Negotiation: A Pedagogical Challenge*, 6 *J. LEGAL EDUC.* 94, 95-97 (1953).

mon operational skills⁴ well-trained lawyers are presumed to possess. At a minimum lawyer operational skills include:

1. Legal research.
 - a. Finding and managing law
 - b. Finding and managing the facts.
2. Use of legal reasoning, interpretation and use of language.
 - a. Organization and manipulation of abstract concepts through inductive and deductive reasoning processes.
 - b. Writing, drafting and interpreting language.
 - c. Communication skill
 - i. Argument/persuasion as advocate.
 - ii. Development of attorney-client relationship and guidance as counselor.
3. Decision-Making.
4. Managing the psychology of practice-interpersonal skills.⁵

The purpose of this article is to identify and explore the processes and dynamics of lawyer negotiation at the skill level. Part I, Operational Skills in Preparation for Negotiation, examines processes and subprocesses of negotiation to develop a background for understanding the potential areas of lawyer skill involved in the operation of negotiation in Section A. Section B explores the preparation skills involved including the analysis and development of a negotiation theory of the case which requires an understanding of the substance of the negotiation, norms, precedent and power combined with fact management and effective characterization of the facts of the case. Section C examines the comparative values of negotiation as an alternative dispute resolution process prefatory to a discussion of skilled lawyer-client decision making, collaboration and counseling in Section D. Part II examines operational skills in a negotiation including communication skills in persuasion and reasoned arguments in Section A. Section B examines skilled use of language for learning, the exchange of information, concessions and questioning in negotiation. Management of the psychology of negotiation is assayed in Section C and

4. See Condlin, *Socrates' New Clothes: Substituting Persuasion for Learning in Clinical Practice Instruction*, 40 MD. L. REV. 223, 228 n.11 (1981) (law school instruction as educational methodology or subject matter should better articulate its theory of lawyer operations); see also Probert & Brown, *Theories and Practices in the Legal Profession*, 19 U. FLA. L. REV. 447, 458 (1966) (lawyers do not view lawyer operations in practice, such as negotiation, as law related). It is unclear whether lawyers and law schools, until recently, viewed such operations or activities as negotiation as pieces of "patterned conduct" of lawyers involving anything other than intuition and trial and error experience. *But cf.* Rutter, *A Jurisprudence of Lawyers' Operations*, 13 J. LEGAL EDUC. 301 (1961) (distinction between operations and skills).

5. *Cf.* SECTION ON LEGAL EDUCATION AND ADMISSION TO THE BAR, ABA, *LAWYER COMPETENCY: THE ROLE OF THE LAW SCHOOLS 9-10* (1979) (list of fundamental skills); Rutter, *supra* note 4, at 312-24 (same).

Section D examines the issues in the ethics of negotiation. Section E looks at drafting and other skills in the process of closure of the agreement.

I. PREPARATION FOR NEGOTIATION - OPERATIONAL SKILLS

A. *The Nature of Negotiation Processes*

Negotiation is the primary tool in determining legal controversies.⁶ While some amount of intuitive skill is involved in the makeup of a good negotiator, it is a necessity for the student of the art to recognize the processes and lawyer competencies involved.

1. Subprocesses and Dilemmas

Negotiating most often is a process of exchanges,⁷ involving the awareness of several underlying subprocesses.⁸

In many negotiation settings the negotiators must recognize that they are attempting to solve one another's problems to reach a just compromise. Negotiation is a cooperative enterprise. This recognition lies at the root of the nature of compromise—that by open and mutual seeking of solutions a result will occur that will benefit all parties.⁹ Certain elements of the process should be understood. A win or lose approach by either party generally exacerbates a bargaining situation and reinforces the need of the other to "win."¹⁰ A problem-solving process emphasizes those issues where both parties can gain from

6. G. WILLIAMS, ENGLAND, FARMER & BLUMENTHAL, *EFFECTIVENESS IN LEGAL NEGOTIATION IN LAW AND PSYCHOLOGY: RESEARCH FRONTIERS* (1976), *quoted in* H. EDWARDS & J. WHITE, *PROBLEMS, READINGS AND MATERIALS ON THE LAWYER AS A NEGOTIATOR* 8-28 (1977). The authors cite studies in the federal courts which found that 91.6% of cases commenced were resolved without the necessity of trial. Studies in state and local courts indicate that 70-90% of cases filed were resolved by settlement. More recent studies do not significantly change these results. *See* G. WILLIAMS, *supra* note 2, at 18.

7. R. FISHER & W. URY, *GETTING TO YES* 10-14 (1981). Because of difficulties with the ethics and effectiveness of hard versus soft styles of negotiators and problems inherent in traditional bargaining, the sequential taking and exchanging of positions, negotiators should move beyond bargaining to a "problem-solving" approach.

8. *See* C. KARRASS, *THE NEGOTIATING GAME* 55-66, 127-45 (1970); R. WALTON & R. MCKERSIE, *A BEHAVIORAL THEORY OF LABOR NEGOTIATIONS* 4-6 (1965).

9. This approach to negotiation has been labeled "integrative bargaining," as opposed to "distributive bargaining" in which parties are bargaining over a finite share of a total sum or resource. C. KARRASS, *supra* note 8, at 127; R. WALTON & R. MCKERSIE, *supra* note 8, at 4-5.

10. C. KARRASS, *supra* note 8, at 128; *see* Aubert, *Competition and Dissensus: Two Types of Conflict and of Conflict Resolution*, 7 J. CONFL. RES. 26, 26-28 (1963).

agreement by cooperation rather than competition.¹¹ The "problem-solving" attitude may avoid the zero sum¹² game that is generally involved in share bargaining. The questions should be: Is there a way to settle this case so that everyone gains? Are there solutions available that will satisfy the disputants' interests and needs without elevating the potential for competition?

The nature of litigation often forces positions on lawyers through the strategies necessary to secure a party's goals. Dollar values are assigned to the parties' interests and lawyers frequently bargain over a share of a total sum. Every dollar one party wins the other loses.¹³ One party may be demanding a result that is completely inconsistent with the other party's interests. The outer limit of share bargaining is exemplified by child custody contests which may often be a clear "either/or" situation, foreclosing bargaining. Because each party wants the child, one of the prerequisites for bargaining is absent: there can be no mutual benefit.¹⁴ Share bargaining offers the potential of a high degree of competition and conflict. The goals of the lawyer-negotiator are to resolve the conflicts and exchanges to his/her client's advantage or redefine a win/lose situation by a creative characterization of the issues involved so that a negotiated solution is possible. Suppose in a custody case it is discovered that the adverse party is seeking custody because of a belief that one's client is not providing necessary medical care. An alternative characterization of the real issue or the unearthing of the basic interest lying under the position may transform a non-negotiable custody setting into a fruitful situation for resolution on the issue of the appropriate level of medical care.¹⁵

The negotiator is constantly reconciling his goals and attitudes with the aims and instructions of the client.¹⁶ The negotiator's question may be: How far can I go in advocating and seeking a bargaining result that is inconsistent with my personal values? Must I advance all of my client's demands, even those that are unreasonable? This phenomenon must be understood and resolved or it may detract from the larger bargaining setting. A key issue is often the lawyer's view of the lawyer-client relationship.

Connected with personal bargaining is the phenomenon of client bargaining. A lawyer often negotiates with the client about the client's expectations. For example, the lawyer may seek for good reason or bad to reduce his client's expectation level so that when the bargaining is completed, the negotiator will

11. C. KARRASS, *supra* note 8, at 128-130.

12. The zero sum comes from the balance of the "winner's" gains against the "loser's" losses. See Morgenstern, *Game Theory*, in 6 INT'L ENCYCLOPEDIA SOC. SCI. 62, 62-65 (1968).

13. *Id.*

14. See *supra* text accompanying note 3.

15. See K. HEGLAND, TRIAL AND PRACTICE SKILLS IN A NUTSHELL 279-86 (1978); Fisher, *Fractionating Conflict*, 93 DAEDALUS 920, 926-28 (1964).

16. See Mayesh, *Counseling the Client—Assessing the Risks and Benefits of Litigation*, 2 PREVENTIVE L. REP. 107 (1984); text accompanying note 214 *infra*.

have achieved a negotiating goal: a goal that was low from the beginning.¹⁷ This subprocess that goes on in lawsuit negotiation has serious implications for the necessary phenomenon of collaboration between lawyer and client and the ethics of bargaining.¹⁸

Negotiation occurs about the interpersonal approach the bargainers take to one another. Attitudes have to be modified sufficiently to allow a problem-solving process and the mutually beneficial exchange of information. Five attitudinal relationships can exist in bargaining circumstances: (1) extreme aggression; (2) mild aggression for deterrent purposes to avoid a weak point; (3) mutual accommodation; (4) open cooperation; and (5) direct collusion with the opponent.¹⁹

A negotiator must decide which of these relationships is appropriate from a strategic and ethical standpoint. Bargaining concerning the negotiator's relationship goes on in every negotiation.²⁰

Recent insightful literature exploring processes of principled vs. positional²¹ negotiation, cooperative vs. competitive²² lawyer interactions and dispute or norm-centered negotiation vs. rule-making or strategic negotiation²³

17. This approach is apparently widespread in personal injury practice, at least on the anecdotal level, "low balling" the client. It is an ethically dubious practice.

18. See Part II(D)(7) *infra*.

19. C. Karrass, *supra* note 8, at 131.

20. *Id.*

21. See generally R. FISHER & W. URY, *supra* note 7. The Harvard Negotiation Project has developed a theory of successful and principled dispute resolution that has five elements. From the beginning to the end of any negotiation, both parties work toward knowing their best alternative to the negotiated agreement. The substance of the dispute is separated from the relationship between the parties so that each party can be cordial to the other but bargain thoroughly on the issues. Objective criteria are sought that aid this process and that lead to agreement on principles. The focus is on interests, not on the taking of positions. Finally, invention of mutually advantageous options can contribute to successful negotiation of an agreement.

22. See generally G. WILLIAMS, *supra* note 2. In a comprehensive study of lawyers' characteristics while negotiating, Williams found that "cooperatives" were rated more effective negotiators than "competitives." Both types of "effectives were perceived as highly experienced, ethical, trustworthy and honest. They were realistic, controlled, rational, analytical and thoroughly prepared on the facts and law, but they were creative, adaptable and perceptive in reading their opponent's cues as well as skillful in affirmatively learning from them. They understood their cases and their opponent's case and strategy."

23. See generally Eisenberg, *Private Ordering Through Negotiation: Dispute Settlement and Rulemaking*, 89 HARV. L. REV. 637 (1976). Eisenberg has suggested that negotiations occur with an awareness that, if an agreement is not reached privately, then an unknown and potentially "winner take all" decision will be made by a stranger, the judge, in an adjudication of the dispute by a court of law. The alternative to this decision is private ordering, where the parties settle disputes that have arisen from past behavior and, attempt to regulate future behavior by creating mutually

provides a useful foundation for an understanding of negotiating processes and lawyer skills in lawsuit negotiation.

Dichotomous categories are extremely useful for analysis,²⁴ but they are sometimes troublesome in practical application. Lawyer negotiation often involves balancing tensions between problem-solving and positioning, cooperation and competition, reasoned normative argument and blatant emotional plea.²⁵ The difference between a good negotiator and a poor negotiator is skilled sensitivity in determining what approach to take in the given situation that the lawyer is facing²⁶ and how to effectively handle the series of dilemmas that negotiators face. Virtually every bargaining setting presents the opportunity to creatively resolve shared interests and to bargain over competing goals.²⁷ In every negotiation there are cooperative and competitive elements. A cooperative element exists when negotiators believe that they will gain more by negotiating than by not negotiating. A competitive element exists when both negotiators have conflicting preferences or contending interests that may be difficult to reconcile. In any range of possible agreements the push for a solution more favorable to one side than the other will always trigger competition. When negotiators commit themselves to attempt to agree, each is dependent on the other for the result. All negotiation is aimed at achieving certain results, but those results are only possible if the other negotiator agrees to them. This situation is sometimes described as "result" or "outcome" dependence.²⁸ This dependence creates a goal dilemma. Each negotiator in a distributive share dispute wants an agreement as favorable to his client as possible, a result that is arguably mandated by the Code of Professional Responsibility,²⁹ but for a negotiator to attempt to maximize his position may result in such a dubious proposed agreement for the other side that a stalemate is inevitable.³⁰ On the other hand for *one* negotiator to abdicate this responsibility in his or her desire

agreed upon rules that take the form of a legally enforceable contract. The general theory of the efficacy of private ordering is that compliance with the terms of a settlement increases with the voice that parties have in reaching the agreement. Private ordering also allows solutions to be better tailored to the needs of disputants and those solutions tend to be in fact more "principled."

24. See Heilbroner, *The Dialectical Vision*, NEW REPUBLIC, Mar. 1980, at 25-26.

25. D. FISHER, WHAT EVERY LAWYER KNOWS 84-85 (1975).

26. See D. ROSENTHAL, LAWYER AND CLIENT-WHO'S IN CHARGE? 109-10 (1974); cf. G. WILLIAMS, *supra* note 2, at 28-29. Both authors recognize that flexibility is a characteristic that is mandatory for a competent negotiator.

27. See R. WALTON & R. MCKERSIE, *supra* note 8, at 18.

28. D. JOHNSON & F. JOHNSON, JOINING TOGETHER 297 (1982).

29. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-101(A)(1)-(3) (1979).

30. See, e.g. G. WILLIAMS, *supra* note 2, at 73. See generally C. OSGOOD, AN ALTERNATIVE TO WAR OR SURRENDER (1962) (all or nothing, maximalist strategy very often results in stalemate).

to maximize a client's realistic goal invites untenable advantage to the *other*, in the absence of a matrix of alternatives that could yield maximum advantage to both parties.³¹

Each negotiator, armed with authority and input from the client, seeks an agreement that is the best that can be done in the face of the other's resistance or opposition. Since there is rarely an obvious or inevitable "right" result, each negotiator must decide before the negotiation begins, and sometimes during the negotiation, what a reasonably optimal solution should be for one's client and for the other party and its lawyer.³²

Another characteristic of the negotiation process is that the negotiators are dependent upon each other in most cases, not only for the negotiated result but also for information about a possible solution.³³

Information can be secured in one of two ways: each negotiator can openly and honestly share preferences, needs and expectations or each can attempt to hide, conceal or manipulate them in the hope of maximizing the outcome for the client. The dilemma is whether to trust. There is almost a schizophrenic aspect to this negotiator's dilemma. Often a negotiator cannot know what outcome he should seek or what his expectations should be until he learns through the negotiations process what the other negotiator's expectations seem to be.³⁴

The complexity and danger of the dilemma of trust creates the tension between competitive/positional and cooperative/problem-solving negotiation. The problem solver/cooperative has presumed that the rewards of openness and trust are worth the risk; the competitive bargainer has presumed the opposite. The competitive bargainer's failure to trust creates high risks of stalemate, the problem solver's trust, if not carefully controlled, may create a risk of exploitation.³⁵

2. Processual Models

In *time-pressured* labor management bargaining the process of negotiation follows three phases: Phase I, in which the negotiators behave in a very

31. See generally Harnett, Cummings & Hamner, *Personality, Bargaining Style and Payoff in Bilateral Monopoly Bargaining Among European Managers*, 36 *SOCIOMETRY* 325 (1973) [hereinafter cited as Harnett].

32. See Part I(E)(2), *infra*. See generally S. SEIGEL & L. FOURAKER, *BARGAINING AND GROUP DECISION MAKING* (1960). In H. RAIFFA, *THE ART AND SCIENCE OF NEGOTIATION* (1982), a set of seller's negotiators were told not to attempt to get as much in a share bargain because of the desirability of later amicable relationships with the other side. In other words "don't maximize—let them win a little." The sellers did better than they usually did maximizing. *Id.* at 58.

33. See P. GULLIVER, *DISPUTES AND NEGOTIATIONS, A CROSS CULTURAL PERSPECTIVE* 20-29 (1979).

34. *Id.*

35. See Harnett, *supra* note 31, at 342.

aggressive non-conciliatory fashion and stake out hard-nosed positions through oratorical fireworks. Phase II is a "hard-bargaining" phase in which the parties carefully examine one another's positions, seek areas of potential compromise, and listen for concessions or retreat. The parties attempt manipulation through extensive use of techniques and tactics. Phase III is a crisis phase in which deadlines approach. The parties abandon sham postures and take more realistic positions. Client bargaining takes place as negotiators return to their clients or constituents and bargain over client aspirations. As the deadline approaches, substantial bargaining occurs with alternatives posed at a dizzying rate. Skilled bargainers invariably take advantage of the less-skilled or ill-prepared during this phase.³⁶

From his survey of negotiation literature, Gerald R. Williams describes a similar process and identifies four "stages" in *legal* negotiation: (1) orientation and positioning, (2) argumentation, (3) emergence and crisis and (4) agreement or final breakdown.³⁷

In the first stage the negotiators begin to deal with one another and establish negotiating approaches and attitudes that will affect the overall negotiation.³⁸ They may stake out their positions, which vary substantially depending on strategic³⁹ and client considerations. A negotiator may adopt a maximalist strategy of asking for more than she or he expects to obtain, an equitable strategy of taking a position that is fair to both sides, or an integrative strategy which seeks to develop alternative solutions to find the most attractive combination for all concerned.⁴⁰

If a position is taken, commitment to that position is part of the strategy to create credibility and lower the adversary's expectations. The power of that commitment is directly dependent, as in the argumentation stage, on the strength of norms, principles and precedent.⁴¹

The stage two argumentation replicates many of the argumentation processes with which lawyers are familiar. Information is exchanged, evaluated and critiqued; the case issues emerge and some concessions are exchanged. Stages three and four trace the development of consensus through time pressures, concessions and closure or stalemate. Crucial to closure of an agreement is the lawyer's drafting ability in solidifying and memorializing the

36. See generally A. DOUGLASS, *INDUSTRIAL PEACEMAKING* (1962).

37. G. WILLIAMS, *supra* note 2, at 70-85.

38. *Id.* at 72.

39. The term "strategy" as used by Williams and most writers appears to be taken from T. SCHELLING, *THE STRATEGY OF CONFLICT* 3 n.1 (1960) ("The term 'strategy' is intended to focus on the interdependence of the adversaries' decisions on their expectations about each other's behavior. . . .").

40. Ramberg, *Tactical Advantages of Opening Positioning Strategies*, in G. WILLIAMS, *supra* note 2, at 73.

41. Eisenberg, *supra* note 23, at 639.

settlement.⁴²

Philip Gulliver, in his most recent study of negotiation,⁴³ and Walton and McKersie⁴⁴ in the labor management arena postulate analogous "stages" in the negotiation process and the flow of information between negotiators. Gulliver describes two simultaneous interrelated processes in negotiation: a repetitive exchange of information that moves the negotiation through developmental stages from the beginning of the negotiation to its conclusion.⁴⁵ The information exchange perceived by Gulliver and others is a process of exchanged persuasion and learning about preferences and expectations that may reinforce the negotiator's existing preferences and positions or may require changes, depending upon the impact of the information.

Gulliver's developmental stages are similar to those described by Williams⁴⁶ but marked by swings from "coordinating" to "antagonistic" negotiat-

42. G. WILLIAMS, *supra* note 2, at 81-85.

43. See generally P. GULLIVER, *supra* note 33.

44. See generally R. WALTON & R. MCKERSIE, *supra* note 8.

45. See P. GULLIVER, *supra* note 33, at 81-84; see also Haynes, *The Process of Negotiations*, 1 MEDIATION Q. 75 (1983) (Haynes uses Gulliver's cyclical model to dissect a family dispute). Gulliver describes the cyclical and developmental process:

A simple analogy is a moving automobile. There is the cyclical turning of the wheels (linked to the cyclical action of the valves, pistons, etc.) . . . that enables the vehicle to move, and there is the actual movement of the vehicle from one place to another. The latter process depends on the former but the *raison d'être* of the automobile is its spacial movement. In negotiation, somewhat similarly, there is a cyclical process comprising the repetitive exchange of information between the parties, its assessment, and the resulting adjustment of expectation and preferences; there is also a developmental process involved in the movement from the initiation of the dispute-its conclusion-some outcome-and its implementation. . . . Briefly, the pattern of repetitive exchange (the cyclical process) is that, in turn, each party receives information of various kind from the other and in response offers information to him. There is, however, more than merely communication. There is cognition and learning. Received information is interpreted and evaluated by a party and added to what he already knows or thinks he knows. Thus a party may be able to learn more about his own expectations and preferences, about those of his opponents, and about their common situation and possible outcomes. Learning may induce changes in the parties' preference and set his strategies or it may reinforce his existing position. Learning may raise the need for more information from the opponent and/or the need to give futher information to him so that he may be induced to learn and therefore be persuaded to shift his position to something more favorable to the party. Depending on the kind of learning the party makes the tactical choice concerning the purpose and content of his next message which is then proffered to his opponent. In turn, the other party goes through the same procedure and then offers his information to the first party . . . and so on. Thus, one might say the wheels turn and the vehicle moves. P. GULLIVER, *supra*, note 33, at 81-84.

46. G. WILLIAMS, *supra* note 2, at 70-85.

ing approaches depending on the issues and the stage of negotiation.⁴⁷ The management of the psychology of the bargaining is important in reaching shared solutions rather than stalemate.

Walton and McKersie describe a three-phase process in which negotiators first identify the case issues in dispute through the exchange of information; second, locate and explore alternative solutions and third, find the best result and agree to it. The negotiator in phase one presents issues and information in the light most favorable to his client and carefully edits and selects the information the opponent will hear. In phase two and three, a more open and creative approach is developed to initiate, explore and persuade regarding the mutually profitable results available.⁴⁸

An examination of these negotiation processes, an understanding of the place of rule, principle and precedent in negotiation⁴⁹ and an evaluation of recent material on perceived lawyer effectiveness⁵⁰ suggest that effective negotiation is not one "skill" but a lawyer operation⁵¹ depending upon a congerie of common lawyer skills that can be extracted from the bargaining process and analyzed to some degree.

B. *A Negotiation Theory of the Case—Managing the Law and Facts, Power, Precedent and Other Norms*

1. Theory of the Case—Doctrinal Analysis

The approach of the practicing lawyer to negotiation is immersed in theory, although he or she may view it as practical and deny its theoretical aspects. "A person cannot act without theory. He could not walk, read or drive an automobile without generalizations in living habits and assumptions to make it reasonable to pursue the value of each goal-directed act. Once you start using words, you generalize and theorize."⁵²

Whether or not it is articulated, lawyers operate on a theoretical basis when formulating arguments and reasoning from precedent and other normative standards. Lawyers mesh the world of facts, precedents and norms. At its most abstract, a theory is a generalized description of things or events. Lawyers theorize in order to facilitate the development of rules to explain the simi-

47. See Aubert, *supra* note 10, at 26-42; cf. Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963) (The authors document cooperative and antagonistic bargaining behavior by negotiators depending on the nature of the issue discussed).

48. See generally R. WALTON & R. MCKERSIE, *supra* note 8.

49. Eisenberg, *supra* note 23, at 649-53.

50. See G. WILLIAMS, *supra* note 2, at 24-30.

51. See Probert & Brown, *supra* note 4, at 449-54; Rutter, *supra* note 4, at 305-06.

52. Probert & Brown, *supra* note 4, at 450.

larities of the functioning of the subject matter in the theory. They are trained in the study of legal doctrine in the familiar process of synthesizing, analyzing, distinguishing and reconciling cases with the underlying inductive and deductive generalization processes that accompanies the theoretical development of rules.

On the practical level, a negotiating theory of the case is a set of loose generalizations that are on one hand, the lawyer's plan of action, and on the other, the "best face" perspective on the case.

The negotiating theory of the case will usually be a generalization based on reasoning from the factual material in the case. A deductive argument or inference follows the syllogistic form: Persons related by blood to a party are biased in their testimony. (Major premise.) "X is related by blood to a party." (Minor premise.) "Therefore, X is biased in his testimony." (Conclusion.) Sometimes the theory may be partly inductive. The inductive form of inference is this: "This witness is related by blood to a party." (Thesis.) "Therefore, he is biased in his testimony." (Conclusion). The distinctions are important between the two types of reasoning. The inductive or empirical process is based on experience and allows for other explanations of possible inferences or results. The deductive process virtually eliminates other explanations and points unerringly to the conclusion sought.

The negotiating theory of the case should be a deductive or inductive generalization in which the lawyer has carefully thought out and eliminated virtually every other factual inference that may be available to the other negotiator to explain away the force of the theory. The theory should also be a deductive or inductive generalization from the facts which addresses the question of *why* the client should receive a certain *result in the negotiation*.⁵³ An example of a negotiating theory to characterize a medical malpractice case from the defendant's standpoint might be: Healer having followed all approved procedures is attacked by an ungrateful patient.⁵⁴

Thus, a negotiating theory of the case is a generalization, a characterization and a plan of action.

The theory should be based on a firm foundation of facts and fair inferences from those facts. The facts that primarily support the theory should be very strong in that they should be undisputed or uncontestable—clearly admissible documents, excellent photographs, admissions, independent witnesses, clear scientific facts and the like. While there may be a realm of factual ambiguities or contingencies involved in the negotiation of facts (those facts that can be objectively determined later or conditionally assumed for purposes of settlement), the ultimate settlement is going to rely upon hard and verifiable facts. The theory of the case should have those highly reliable facts as a foun-

53. Cf. G. VETTER, *SUCCESSFUL CIVIL LITIGATION* 21-33 (1977) (importance of developing a theory of the case for civil trial strategy).

54. *Id.* at 27.

dation. The theory should not be inconsistent with other reliable facts and should have a common sense appeal.

In each case there are several ways to characterize or describe what is at stake in the negotiation. The negotiating theory of the case should be as broad and solid a statement as possible without engaging in wishful thinking about any part of the case.⁵⁵ An effective development of the negotiating theory of the case lends organization and allows conceptualization of the issues in the negotiation. For example:

The client-farmer purchased a "lemon" tractor whose defects became manifest during the farmer's use of the tractor. The motor of the tractor seized and the client-farmer was thrown to the ground. The farmer was injured and the tractor no longer works. The client-farmer refuses to pay any amount for the tractor. He was purchasing it from the dealer on installments. During the purchase of the tractor, certain express warranties were made to the client-farmer in addition to the implied warranties existing in such a sale.

There are a number of generalized characterizations of this case:

1. "Client is disputing with the tractor salesman as to what was said and has protection under the law of sales." This theory statement is quite narrow and minimizes the legal protections conferred upon buyers under basic statutory schemes. The issue becomes: Whom do you believe?

2. "Client-farmer has been physically injured and deceived by the cynical use of representations combined with warranty disclaimers and has been exploited by the defendant through illegal collection practices." This statement illustrates that for the farmer the broader the generalized characterization of the negotiating theory, the more favorable are the issues to discuss. The potential effect on other consumers of such conduct; the question of broad, deceptive practices; the use of adhesive-type provisions in the contract; the effect of misrepresentations which ultimately lead to the loss of the benefit of the bargain as well as personal injury. Each of these become topics of negotiation discussion.

Implicit in any statement of a negotiating theory of the case are statutory policies, case law doctrines and normative propositions seen in their operational context. Whether articulated or intuitive, the formulation of the negotiating theory of the case has to be an exercise in the lawyer's ability to use the language to abstract from a single event, fact or circumstance, the generalized doctrinal, normative and equitable position for the client in the negotiating setting. Even in a discussion of only a part of the negotiation operation, one can see that at the foundation of the exercise of virtually every professional operation of the lawyer lie a number of crucial interrelated skills.⁵⁶

55. *Id.* at 31.

56. *See* Rutter, *supra* note 4, at 319; text accompanying note 5 *supra*.

2. Managing the Facts

The lawyer's ability to *order* the facts and events in the process of problem-solving may be the primary operating skill.⁵⁷

In preparation for negotiation, the lawyer divides his approach to the facts into three areas: (1) hypothecating facts, (2) discovering facts, and (3) presenting facts.⁵⁸

(1) *Hypothecating facts.* In developing a negotiating theory of the case lawyers reason from the particular specific events or facts to a conclusion in order to develop a convenient handle or characterization for a negotiating posture in the case. In hypothecating facts the lawyer reverses this process by reasoning from the desired conclusions, theory or hypothesis to the probable

57. See Rutter, *supra* note 4, at 316. Rutter has described the lawyer's fact management task as follows:

When I speak of "fact management," in necessarily rather abstract terms at this point, I go far beyond the multiple-distilled and sharply contoured facts as they appear in appellate opinions and as they may be used in formulating doctrinal positions. In the chaos of experience confronting the lawyer at the operating level, facts do not appear with the subject-headings and elaborate subdivisions of a key number system. The lawyer's skills in ordering and molding involves a process of total immersion in the grubby minutiae of undifferentiated factual chaos and a circumferential sensitivity to facts radiating out in all directions, to be seen and heard buzzing around the ears, as well as those in front of the nose.

This is not achieved by crossing off items on a check-list nor by settling for the fuzzy images of the impressionist. It demands rather the concrete visualization of facts and events in all their microscopic detail, seen imaginatively, and at the same time through the sharply focused lens of photographic reality. In ordering the chaos, the lawyer proceeds by discovering the relationships between initially unrelated segments of the picture and then placing these relationships in their future relationship to a total reality, so far as it can be seen. For the lawyer, factual interrelationship includes the bearing of all applicable law. In a sense, the law becomes part of the total mass of facts, albeit a special kind of facts.

Id. at 316-17.

58. *Id.* at 331. Rutter has proposed sequential steps of facts in the lawyer's operations: a fact ladder. (1) The highest rung involves appellate facts as they appear in appellate opinions. (2) One rung down are facts found by the trial court. These facts may be similar to appellate facts but often are not articulated and are only found by inference in a jury verdict. (3) Litigative facts are proofs submitted by the lawyer represented by sworn testimony and exhibits culled and screened by the law of evidence. (4) Pre-litigative facts are the source of litigative facts, that is products of investigation, interviews with witnesses, documents, photographs, models, hospital records, technical scientific facts, and scientific material. (5) Non-litigative facts are the mass of factual material discovered by the lawyer most of which never get into court. (6) Original facts are original events from which all of the others start. All of the others are essentially assertions or propositions about the original facts. *Id.* at 331.

facts that are supportive of the conclusion and pursues lines of inquiry based on these predicted facts. After doing some legal research, interviewing the client and completing some investigating, the lawyer will develop a working hypothesis as to what happened in the case which will point him in the direction of more facts which need to be developed and discovered. In this part of the fact management operation, the lawyer is using his reasoning skill to tell him where to look and what to look for, much like a physical scientist postulating the existence of subatomic bodies. He moves from conclusions and inferences to the data that would support the inferences. He asks himself, "if my theory is true—what else would be true?" This same process is engaged to anticipate and predict the opponent's theory.

The lawyer hypothecates the potential facts that support the adverse theory partly from allegations in the pleadings and partly from hypothecation. The operation points to facts that the lawyer hopes are not there. In either case, if the facts necessary to the theory of the case or any subhypothesis do not exist, the lawyer has to revise the hypothesis, go back to the client for additional information, or find ways to discredit or undermine the negative facts.

(2) *Fact Discovery.* The operative factors involved in discovery and developing investigative or "pre-litigative facts"⁵⁹ is the subject of much discussion in lawyer skills literature.⁶⁰

(3) *Presenting Facts in Negotiation.* The issue of what facts to present in bargaining can be a complex one. The nature of the fact hierarchy developed in negotiations ranges from undetermined facts to unequivocally agreed upon facts between the negotiators. The lawyer's skills are well spent prioritizing the categories of facts based on the relevance of those facts as a function of their necessity to a settlement agreement.

Such an hierarchy might be: (1) agreed facts necessary for settlement and facts of common knowledge that are without question indispensable to an agreement; (2) hard facts or "high card" facts that are disputed: these disputed facts are substantially uncontestable because they are based on admissions, clear answers to interrogatories, admissible authentic documents, photographs, undisputed scientific fact or opinion, or facts from independent and unimpeachable witnesses; (3) disputed admissible facts supported by witnesses and subject to persuasive objective verification; (4) disputed admissible facts supported by partisan witnesses but not subject to persuasive objective verification; (5) ambiguous proof and facts from a party upon which there is no corroboration.

How any hierarchy of fact is presented and used in negotiation will vary widely in disputes. It is often suggested that some disputed or unknown facts

59. *Id.*

60. See, e.g., R. SIMMONS, WINNING BEFORE TRIAL: HOW TO PREPARE CASES FOR THE BEST SETTLEMENT OR TRIAL RESULT 408-12 (1974).

can be assumed for provisional purposes in an attempt to develop solutions based on the assumed truth of those facts.⁶¹ Settlements generally turn on facts at the high rungs of the probative hierarchy: those facts comprising categories one and two above. The acceptance of facts from any category in the hierarchy in negotiation is much more likely than in litigation.⁶²

In managing this hierarchy of facts, lawyer negotiators present their selected versions of the facts to one another knowing which outcomes are likely to result from their own selected versions. In effect, what happens in the negotiating process is that the competing factual versions are somehow rephrased, bypassed, ignored or otherwise accommodated until a version develops that allows for compromise.⁶³ In combining these "managed facts" with basic equities and legal norms, a negotiating theory of the case helps to narrow and fix the objects of the dispute by defining both factually and doctrinally what is to be decided in the negotiation. While an emphasis on legal doctrine helps to define the normative framework of the dispute, the absence of a focus on the client's equities can ignore potential "person-oriented" norms and equities that are the sources of much fruitful compromise in negotiation.⁶⁴

3. Precedent, Norms and Other Power

Central to several of a lawyer's operational skills is the ability to manipulate abstractions with the use and interpretation of language.⁶⁵ Lawyers in negotiation and in most everything they do bridge the gap between facts based on direct observation and immediate experience to intentionally abstract and completely generalized normative rules.⁶⁶ The availability and skillful use of alternative language through increasingly generalized statements to describe a factual situation when applying precedent and doctrine is basic to the lawyer's ability to interpret norms and rules. The understanding of rule formulation which, as expressed in a "case," generalizes a fact situation, and not necessarily the facts of that case, is a basic part of a lawyer's abstracting skill.

The management of "legal norms" is more than the application of rules to diverse factual situations. It is a discipline that allows the discovery of rules in the process of determining similarity or differences between cases. In managing precedent negotiators present to one another competing examples, gener-

61. See, e.g., Eisenberg, *supra* note 23, at 657.

62. *Id.* at 658.

63. See J. COLLIER, *LAW AND SOCIAL CHANGE IN ZINACANTAN* 96 (1973), cited in Mather & Yngvesson, *Language, Audience, and the Transformation of Disputes*, 15 *LAW & SOC'Y REV.* 775, 777 (1981) (similar phenomena in process of mediation).

64. Fuller, *Mediation—Its Forms and Functions*, 44 *S. CAL. L. REV.* 305, 328-30 (1971).

65. See Rutter, *supra* note 4, at 318-24; text accompanying note 5 *supra*.

66. See Northrop, *The Epistemology of Legal Judgments*, 58 *Nw. U.L. REV.* 732, 747 (1964).

alizations, analogies or legal appraisals. Just as in the competing factual evaluations, the negotiators ultimately *choose* the appropriate analogies, examples or generalizations and *ignore* or *rephrase* them in order to accommodate the compromise process.⁶⁷

The competing definitions of a dispute articulated by each negotiator order facts and invoke norms in particular and predictable ways that generally reflect the personal interests and values of the respective clients. Although empirically we know very little about what goes on in the patterned conduct of negotiation, we know from simulated examples⁶⁸ that negotiators construct a "paradigm of argument" which paints a picture of relevant events and actions in terms of a factual hierarchy of importance, terms of implicit or explicit normative principles which are rule based, client based, community based or power based.⁶⁹

In the negotiation of disputes the process of elaborating various normative referents encompasses all of the principles mentioned above and more. Many of the client, community or power based norms would be invalid, irrelevant, or ignored by a court.⁷⁰

Most negotiations involve parties that have some joint interests even though they may not have a continuing relationship. Elements of the bargaining will involve "claim of right"⁷¹ arguments based on rule and precedent; either informal, party-oriented or legal and normative arguments, which involve societal, religious, equitable and individual values. A negotiator's skill is effectively utilized working to affect an adverse party's perception of the respective panoply of norms, principles, equities, benefits and bargaining power in order to influence the adverse party's weighing process and his choice of the settlement alternative against the risks of litigation. A successful result may ultimately depend upon appearances of reality: bargaining leverage and persuading the other negotiator to embrace one's definition of principle, reality and priority of norms.

An understanding of all the participants' needs and goals and the balance of real and perceived effective power between negotiating parties are components of negotiating skill. The recognition of relevant and existing norms between the parties through the equities of the case is a key issue in preparing for negotiation.

One normative referent involves the concept of legitimacy: those matters

67. See E. LEVI, AN INTRODUCTION TO LEGAL REASONING 225 (1979).

68. See the transcripts of two negotiations that were simulated by experienced lawyers in G. WILLIAMS, *supra* note 2, app. at 149-91.

69. See Mather & Yngvesson, *supra* note 63, at 780-81.

70. See Eisenberg, *supra* note 23, at 643-45 (description of conflicting, colliding and person-oriented norms which form a legitimate body of principle together with precedent that is effectively used in negotiation).

71. See Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 356-60 (1978).

that are so overwhelmingly true and good that they cannot be argued about, a source of normative power that appeals to cultural values that are beyond dispute. The right of a seller in a capitalistic system to make a profit is an example of a principle with legitimacy and substantial normative power.

The idea of principles, moral or ethical norms at stake that require vindication through the client and through the client's lawsuit, also creates normative power. The value inherent in the principle may represent a favored class—for example, consumers. An example of stating a normative principle would be: "The courts are going to recognize the notion that negotiation of a term in a contract is the key to the validity and acceptance of any contract term. The fundamental issue is that the consumer understands what he has agreed to."

Commitment to a cause or client may be an effective normative vehicle.⁷² All of the "should" arguments are involved in negotiation when lawyers discuss the "equities" of their cases—the nature (right or wrong) of the client's acts and the personal characteristics (good or bad) of their clients.⁷³

In many bargaining settings in which the issues and disputes are sharply defined by written pleadings, a powerful defendant may not have any incentive to negotiate because bargaining may be an ineffective utilization of its power. Institutional or corporate defendants have a natural advantage in the litigation process because by its nature it is time consuming, delay oriented and expensive. Such defendants have a superior "capacity" in litigation because of their experience with it.⁷⁴

An appraisal of the balance of power is often carefully unstated in negotiations. Parties and their representatives often operate under the *fiction* of equal bargaining power, but they understand implicitly the power realities of the contest. While the legal acceptability of the facts, norms, and precedents elaborated in the negotiations are key elements in the balance of power, other power issues often surface. Detailed knowledge of the facts and command of other information is going to affect the other party's perception of the power balance and influence his or her behavior. Many lawyers evaluate their cases by looking to basic economic truths of law practice. Often the lawyer's loyalty and commitment to the case is determined by the client's advance payment or overall ability to pay. A fee arrangement or institutional situation that gives

72. See C. KARRASS, *supra* note 8, at 61.

73. See Eisenberg, *supra* note 23, at 643 (role of act-oriented norms in dispute resolution).

74. See Galanter, *Why the "Haves" Come Out Ahead: Speculation on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 96, 107-14 (1974); Wanner, *The Public Ordering of Private Relations, Part Two: Winning Civil Court Cases*, 9 LAW & SOC'Y REV. 293, 305-06 (1975). Galanter demonstrates the natural advantages organizational defendants should have. Wanner, from data on cases litigated in three large cities, demonstrates that organizations are generally more successful than individual litigants. *Id.*

an economic advantage in terms of the availability of the lawyer to work on the case will affect the power balance in the negotiation.⁷⁵

One side may have pressing financial reasons that point toward settlement. One side may be financially distraught to the point that bankruptcy is inevitable. A client may be ultimately "judgment proof." The elimination of a source for collection of a judgment or the likelihood that if a judgment is achieved it would be discharged, are powerful incentives to settlement. On the other hand, the economic power of large institutional clients is always a source of negotiating power.

In many cases, the prospect of going to trial carries with it the likelihood of publicity from the media and sometimes pressure from the public. While lawyers have a basic ethical responsibility concerning publicizing their cases, publicity about a case may have an adverse psychological effect on one side or the other. Business organizations and individuals react in response to public pressure and peer pressure.⁷⁶ Publicity may irrevocably characterize the conflict detrimentally. Publicity may fossilize otherwise fluid positions in the negotiations because of fear on the part of parties of public loss of face.

Any negotiation may combine in its elements the existential particularity of the concrete facts, client equities developed from those facts, community interest norms that may develop from future application of a litigated result, the use of precedent and the analysis of power.⁷⁷

4. The Substance of the Negotiation

The lawyer's negotiation theory of the case has to be based on an analysis of the *real* issues in the negotiation. Issues that are set for negotiation are often the express representatives of inarticulated needs, expectations, aspirations and interests of the disputants. An understanding of the real needs and interests in every negotiation may enable the negotiator to analyze what covert aspirations exist on either side of the negotiating table and aid in adapting alternative methods of dealing with the adverse party's expectations and overt issues.

Dr. Chester Karrass presents a simple theory of expected-satisfaction that serves to illustrate well some basic issues in two-party negotiation.

The expected-satisfaction theory may be summarized in terms of seven basic propositions:

Proposition 1: Negotiation is not simply a good deal for both parties. While each must gain something, it is improbable that they will gain equally.

75. See Johnson, *Lawyers' Choice: A Theoretical Appraisal of Litigation Investment Decisions*, 15 LAW & SOC'Y REV. 567, 569-601 (1981).

76. See, e.g., R. WALTON & R. MCKERSIE, *supra* note 8, at 392-98, 402-03, 405-06; Mather & Yngvesson, *supra* note 63, at 778-80.

77. See generally Coons, *Approaches to Court Imposed Compromise—The Uses of Doubt and Reason*, 58 NW. U.L. REV. 750 (1964).

Proposition 2: No two value systems are likely to be the same . . . men have more or less the same needs but achieve different degrees of satisfaction from reaching goals.

Proposition 3: In every negotiation the potential exists for the parties to maximize their joint satisfaction at no loss to either. The more intense the search for joint improvement the more likely people will be to find superior solutions. This process of joint improvement is called problem-solving bargaining.

Proposition 4: In every negotiation there is a point reached at which the gains of one party are won at the loss of the other. This process of rationing is called share bargaining.

Proposition 5: All transactions are based on future expectations of satisfaction. No two men are likely to estimate future satisfactions in the same way.

Proposition 6: In the last analysis it is not goods, money or services that people exchange in the process of negotiation but satisfaction. Material things represent only the more visible aspects of a transaction.

Proposition 7: A negotiator can only make assumptions about an opponent's satisfactions, expectations and goals. One important purpose of negotiation is to test these assumptions. The opponent's real intentions can only be discovered by a process of vigorous probing because he himself may be only dimly aware of them.⁷⁸

The substance of much negotiation is satisfaction of the parties' needs and interests that underlie a demand for an amount of money. It has been claimed that *the* basic skill in negotiation is not exchanging or compromising between positions and issues, but reconciling underlying interests.⁷⁹

In a simple "satisfaction" graph there may be a range where relative levels of satisfaction between the parties may be reconciled, albeit for different reasons. At this point, or in this range, both parties are satisfied to a greater or lesser degree. This area is often called, in a simple two-party negotiation, the bargaining range.⁸⁰ Every negotiated settlement will not fall within the bargaining range. The result of the bargaining is dependent on a number of other factors such as risk aversion, negotiating skill and the parties' perception of transaction costs. A settlement that falls within the bargaining range will be a successful compromise and will represent for the parties the best that she or he could do in the situation based on preferences, needs, expectation and assessment of the other party. The bargaining range in negotiations between lawyers for each party falls in many cases within the least favorable outcome she or he would accept in lieu of going to trial and the least favorable outcome the opponent would accept in lieu of going to trial.⁸¹

Plaintiff who was injured in a minor automobile accident has sued for

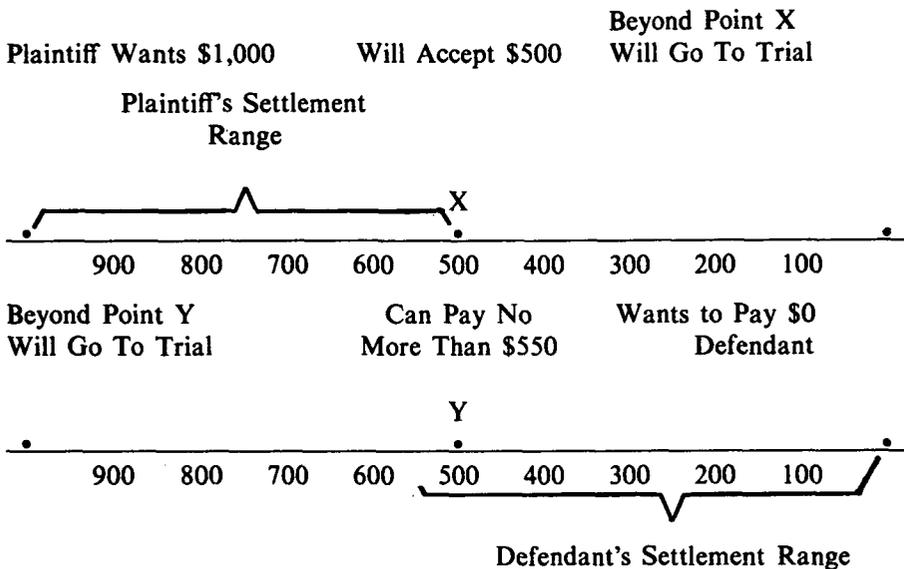
78. C. KARRASS, *supra* note 8, at 144.

79. See R. FISHER & W. URY, *supra* note 7, at 43.

80. G. BELLOW & B. MOULTEN, *LAWYERING PROCESS* 487 (1978).

81. See, e.g., Eisenberg, *supra* note 23, at 660 n.63.

\$1,000. The defendant who feels that he was not at fault wants to pay nothing. Plaintiff will accept \$500 to avoid incurring the expense and inconvenience of going to trial. Defendant can pay not more than \$550 in settlement.⁸²



In this illustration the bargaining range is between \$550 and \$500 and only a settlement within that range will satisfy the needs of both parties. In some cases a major object of the negotiation is attempting to hypothecate the bargaining range as a basic point of reference. The monetary bargaining range and a dollar figure is only the overt representation of something either party may desire. The real substance of the bargaining may, for the plaintiff, be vindication or revenge; for the defendant, avoidance of further antagonism and disruption where the prospect of litigation has a "nuisance value." The basic object and the substance of the interaction between negotiators is an attempt to satisfy the needs or interests that motivate every type of human behavior.⁸³ The graph represents the simple fact of negotiation: Settlement requires satisfying both parties' needs and interests.⁸⁴

The lawyer uses his analytical skill to discover underlying needs and interests from surface issues stated by the client and the other party.

82. These points, X and Y, are sometimes called resistance points or reservation prices—the very minimum that plaintiff will accept; the maximum defendant will pay. See H. RAJFFA, *supra* note 32, at 45-63 (probabilistic analysis of this circumstance).

83. See A. MASLOW, *MOTIVATION AND PERSONALITY* 107-22 (1954). Maslow lists seven basic human needs as they effect behavior: physiological needs, safety and security needs, love and belonging needs, esteem needs, needs for self-actualization, needs to know and understand, and aesthetic needs. *Id.* at 80-98.

84. See, e.g., G. NIERENBERG, *FUNDAMENTALS OF NEGOTIATING* 82-108 (1973).

At a lawyer's operation level, we can see the interplay of skills in preparing for negotiation involving: (1) management of doctrinal and fact analysis; (2) the manipulation of abstractions of language in the development of theory of the case; (3) developing and elaborating the normative context of the negotiation; and (4) discovering the real substance of the bargaining.

C. The Suitability of Negotiation As a Dispute Resolution Process.

Every case may not be appropriate for negotiation. The available choices most often will be litigation or negotiation. Adversarial litigation or adjudication is the basic procedure in the United States and the American legal system for the resolution of conflicts between people. This is the formal procedure which calls for zealous representation of the warring parties by trained and diligent lawyer-advocates whose fealty is owed to the clients solely. The workings of that adversarial machine will mandate the emergence of the truth. Justice will flow to the parties and the greater social good will be done. The above over-simplification captures the essence of the partisan advocate adversarial model. Within that model, the American lawyer owes his and her unqualified duty to the individual party or client and, at least by custom, owes a duty to the mechanical system

A basic problem with the traditional partisan advocate role mechanism in terms of its efficiency as a dispute resolution approach arises partially because the professional relies on a reflexive response to how best to help a client resolve a difference with another. Law schools, whatever the merits regarding reaching rigorous thought patterns, may be the spawning grounds for competitiveness, aggressiveness, and selfishness. The entry into law school is itself based on competitive academic and test-taking criteria. Academic success there, which in turn opens the door to prestigious professional positions, is extremely competitive, leading to a rank ordering of graduating students. Most of the material for study are, or concern, judicial decisions, usually appellate opinions which are seen as contests between parties who are regarded, often because of the result of the contest, as right or wrong, winners or losers. Professional education seems to inculcate in students a competitive view of themselves and explicitly teaches competitive partisan advocacy as an ultimate process. "[L]aw schools train their students more for conflict than for the gentler arts of reconciliation and accommodation. . . . [Their teaching] of the capacity to think like a lawyer has . . . helped to produce a legal system that is among the most expensive and least effective in the world."⁸⁵

The danger for lawyers is that the mind set of partisan advocacy *imputes* to clients a very limited set of objectives and a narrow scope of alternatives to resolve those objectives, often pulling clients kicking and screaming into the adversarial arena. Hostility presupposed, is created often where it might not

85. Bok, *A Flawed System of Law Practice and Training, Report to Harvard Overseers for 1981-1982*, reprinted in 33 J. LEGAL EDUC. 570, 582-83 (1983).

have arisen. To the extent that partisan advocacy draws its beneficiaries into the litigation process, it very often taxes them heavily in anxiety, time and money. Institutionalized partisan advocacy tends to render difficult human conflicts, such as divorces, more difficult to resolve, money claims, such as those associated with personal injury cases, more socially costly, resulting in the resolution machinery, the courts, becoming impossibly backlogged. The antidote for lawyers is an analysis in every case of the propriety of various approaches to dispute resolution for application in the specific dispute.⁸⁶

1. Nature of Outcomes; Availability of Affecting Factors

Because of the accommodative nature of negotiation, a wide range of facts and norms can be taken into account in attempting to resolve the dispute. The win or lose characteristic of adjudication limits the range of available remedies and focuses on the most trustworthy and probable facts and the most prominent and acceptable rules for decision.⁸⁷ Litigation as a choice is limiting both in terms of a restricted outcome (win or lose) and the available justifications for a resolution. Negotiation is more likely to create a tailored solution to a dispute and offer a full range of consideration of critical facts and normative issues whether or not they would be acceptable in litigation.

2. Relationships

The adversarial nature and competitiveness of litigation exacerbates existing hostilities between parties in dispute and often creates bad feelings between lawyers representing the parties.⁸⁸

Where social relationships between the parties are a priority, they may not wish to risk the relationship to the alienating characteristics of litigation. Where relationships are significant and are important beyond the particular dispute the accommodation and reconciliation aspects of negotiation may suggest that it will be the dispute resolution process of choice.⁸⁹ Further, relationships that are "multi-plex," that are continuing and involve many valued interests, may demand a compromise settlement which will allow the relations to continue. Those disputes that arise out of a one issue relationship or "simplex relationship" will often rely upon adjudication or arbitration, which leads to win or lose decisions. In limited relationships clear winning may be more important than relational continuity.⁹⁰

86. J. HARTJE & M. WILSON, *LAWYERS' WORK* 1-2 (1984).

87. See Eisenberg, *supra* note 23, at 654.

88. See Nilsson, *A Litigation Settling Experiment*, 65 A.B.A. J. 1818, 1820 (1979).

89. See, e.g., M. GLUCKMAN, *THE JUDICIAL PROCESS AMONG THE BAROTSE OF NORTHERN RHODESIA* 18-23 (1955). The nature of the relationships in the Barotse society studied by Gluckman set restraints on the settlement process.

90. *Id.*; see also Fuller, *supra* note 71, at 362-70; Fuller, *Collective Bargaining*

In those disputes in which parties have a relationship and place a priority on its continuance, the element of "reconciliation" will give the parties an incentive to relax the stringency with which they might view the other party's claimed facts or norms. This aspect of relationships in negotiation allows the prediction that negotiation will show a high likelihood of success where parties have some on-going relationship.⁹¹ Stewart Macauley has documented the avoidance of conflict created by the trappings of the law as a way of building and keeping good business relationships; businessmen prefer not to use contracts in their dealings with other businessmen so as not to create dispute.⁹²

3. Issues in Dispute

The subject matter in dispute will often determine the choice between negotiation and litigation. Those cases in which the conflict of interest is extremely high⁹³ or parties are fighting over scarce resources⁹⁴ or resort to litigation may involve a norm or value that is not subject to compromise,⁹⁵ will not be negotiable.

4. Motives of the Parties

The choice of negotiation over litigation turns in many cases upon the motivation of a party. Clients seeking new legal developments or desiring an enunciation or clarification of the law, or even the secretly motivated client often prefer that an issue be litigated rather than privately compromised. Litigation is used as a skirmish or maneuver in economic or political warfare in some cases. The motivation of the party is to expose the opponent to the inconvenience, expense, disgrace or publicity of "involvement", with no concern about the end result of the dispute.⁹⁶ Litigation has begun to equalize power in those situations in which a party with a secure and powerful position fails to acknowledge legitimate grievances of a less powerful party.⁹⁷ A party may use

and the Arbitrator, 1963 WIS. L. REV. 3, 8-10 (both articles discuss the nature of "polycentric" problems which because of the complexity and interdependence of facts and relationships are unsuitable for adjudication).

91. See, e.g., Eisenberg, *supra* note 23, at 649.

92. Macauley, *supra* note 47, at 64-65; see also Nader & Todd, *Introduction to THE DISPUTING PROCESS—LAW IN TEN SOCIETIES* 17-18 (L. Nader & H. Todd ed. 1978) (role of social relationships in the disputing process).

93. See Thibaut & Walker, *A Theory of Procedure*, 66 CALIF. L. REV. 541, 551 & n.29 (1978); Walker & Thibaut, *An Experimental Examination of Pretrial Conference Techniques*, 55 MINN. L. REV. 1113, 1116-21 (1971).

94. Nader & Todd, *supra* note 92, at 13.

95. See generally Fiss, *The Social and Political Foundations of Adjudication*, 6 LAW & HUM. BEHAV. 121, 128 (1982).

96. Felstiner, *Influences of Social Organization on Dispute Processing*, 9 LAW & SOC'Y REV. 63, 63 n.1 (1974).

97. See Eisenberg, *supra* note 23, at 672-75.

the litigation process to fulfill a quest for power.⁹⁸ It has become increasingly acceptable in our society to use litigation as a tool to insure fairness and to advocate particular ideologies or notions of equality.

A disputing process or forum should be examined in order to understand its likelihood for satisfying basic party needs through its process. Each party to some degree or another needs substantive satisfaction: a result that is fair and stable; a resolution of the issues and underlying interests of the party without unnecessary cost or damage. Negotiation has a broader range of potential result that is likely to bring substantive satisfaction.

Concerns involving issues of procedural and psychological satisfaction that must be analyzed in the selection of a dispute resolution process are more ephemeral. Problems of ultimate party satisfaction are usually attended to in attempting to prevent factors leading to dissatisfaction with the results of the negotiation. These issues should be dealt with in preparation by choosing appropriate resolution machinery. Assuring procedural satisfaction involves attending to a party's feelings of involvement, equity or ownership in the disputing process. Negotiation provides a high level of procedural satisfaction for the parties.⁹⁹ This is generally analyzed as if parties negotiate without lawyers. Negotiation can be a highly rewarding procedural experience for clients when they are actively involved by their lawyers in the process.¹⁰⁰

Psychological satisfaction for disputing parties may be frustrated where gut-level anger or hostility arising from the dispute has not been ventilated or vindicated in the resolution process so that the party is emotionally satisfied. In choosing a disputing process and planning an ultimate negotiation strategy, each of these notions of satisfaction have to be weighed. Lawyers have to take into account factors allowing for procedural fairness, regularity of procedure and the involvement of parties in the due process of negotiation. To the extent that it can be accomplished, clients who have been emotionally damaged or insulted because of the conflict must be somehow vindicated in the process.¹⁰¹

5. Access to Disputing Procedure; Time-Delay Factors

Difficulty in access to a litigation forum and time-delay are obstacles to the quick resolution of a dispute. Difficulties of access may involve problems in pleading or issues that are not recognized by the court system and in some

98. Felstiner, *supra* note 96.

99. See Thibaut & Walker, *supra* note 93, at 549.

100. See D. ROSENTHAL, *supra* note 26, at 168-69. See generally Spiegel, *Lawyering and Client Decisionmaking: Informed Consent and the Legal Profession*, 123 U. PA. L. REV. 41 (1979).

101. See W. LINCOLN & NATIONAL CENTER FOR COLLABORATIVE PLANNING IN COMMUNITY SERVICES, INC., *MATERIALS TO ACCOMPANY GENERIC COURSE IN NEGOTIATION AND MEDIATION* 91-96 (1982) (use of terms "substantive," "procedural" and "psychological" satisfaction).

situations, jurisdictional or cost barriers. In many jurisdictions backlogs in the courts create serious obstacles to the fast dispensation of results.¹⁰³ Negotiation has vast advantages over litigation in these two areas, assuming both parties are motivated to bargain.

6. Costs

The transaction costs involved in litigation are factors that encourage negotiation and other non-adjudicative approaches to dispute resolution.¹⁰³ For many years, lawyers have "eye-balled a case" and given their clients general estimates of cost factors that may be involved in litigation. The discussion would center around the attorney's fees that would be charged in order to try the case in court. For organizational or institutional parties many of the factors were completely in the hands of either corporate counsel or outside counsel and the parties made little effort to place any checks on the expenses of litigation. In many instances, litigation has transaction costs for parties that require high prices to be paid in anxiety, lost opportunity costs, business goodwill and damage to relationships.¹⁰⁴ Any serious analysis of cost must include a lawyer prediction of the probabilities of: (1) *exposure factors*, the likelihood of winning or losing on an issue of liability, the probable measure of damage and a prediction of success or failure on counterclaims, cross-claims or other responsive actions; (2) *Direct and indirect financial costs* must be accurately estimated, including the attorney's fees of all lawyers legal assistants, interns and investigators. Lost opportunity cost factors include payment to corporate officers and employees who have to sit for depositions or trials and those involved in investigation and travel to assist the lawyers and witnesses. Individual lost opportunity factors can be crucial. Lost wages for days spent in discovery processes in trial can cause a financial drain that has a significant impact on client choices; (3) *Subjective factors* have to be identified and quantified on the basis of prior experience and probabilities. Some individual clients pay incredibly high costs in their anxiety over litigation, costs often ignored by their lawyers in evaluating transaction costs. The potential for negative publicity or the disruption of advantageous relationships may have a price tag that needs to be factored into the case's total impact. A litigated case may have a precedent value for future conduct that greatly exceeds the actual dollar value of the case should the party win.

A careful exploration and understanding of the factors involved in "risk aversion," the avoidance of "decision-regret" notions and a client's basic atti-

102. Friedman, *Legal Rules and the Process of Social Change*, 19 STAN. L. REV. 786, 801-03 (1967).

103. See CORPORATE DISPUTE MANAGEMENT xv-xxi (E. Green ed. 1982) [hereinafter cited as CDM].

104. See H. RAIFFA, *supra* note 32, at 73-77; CDM, *supra* note 103, at 306-308, 324-327; Friedman, *supra* note 102, at 801; Macaulay, *supra* note 47, at 63.

tude toward the uncertainty of risk is extremely important.¹⁰⁵ Many client choices are influenced by attitudes toward risk. Individuals who cherish certainty over risk are "risk-averse" while those who prefer to risk certain outcomes are "risk-seeking or risk-preferring." Attitudes toward risk apparently are influenced by the nature of the risk encountered. If one stands to benefit there is a greater tendency to be "risk-averse;" to choose a sure thing over the risk. For example, if given the choice of receiving \$100 as a certainty or a 75% chance of receiving \$200 and a 25% chance of receiving nothing, generally one will choose the \$100 in the pocket over the risk of a greater gain. When facing an out-of-pocket loss, one will choose the risk to avoid loss over the certainty of loss. That is, one will gamble on the 25% of the odds that say no loss will be sustained rather than to choose the smaller loss figure (\$100) that is a certainty.

The bald implication of preference findings is that certain plaintiffs will be disposed to seek settlement and certain defendants will be disposed to resist settlements in favor of litigation. Large institutional parties have a distinct advantage in that they have a better "probabilistic" feel for the courtroom and can unemotionally play the long-run averages in the face of time.¹⁰⁶ This observation is confirmed by Galanter's findings comparing the likely success at trial of small plaintiffs-individuals or small entities called "one-shotters" against large companies and institutions—"repeat players."¹⁰⁷ Large defendants facing potential losses will tend to prefer the risk of litigation, while small plaintiffs looking at anticipated gains will tend to be risk averse and avoid litigation. The case for negotiation is often made by a careful analysis of the real transaction costs involved in the litigation and the likely risk preference of specific clients.¹⁰⁸

7. Uncertainty of Result

The uncertainty of result in court should foster a party's motivation towards negotiation. Indeterminant results, either factual or because of an ambiguity over the proper rule to apply, are classic cases for a compromise (negotiated) result. Litigation will give the risk-preferring party, even where he is blameworthy, the opportunity to gamble to avoid responsibility. Negotiation tempers the nihilism of result gambling, the uncertainty and unpredictability of all-or-nothing outcomes. Further, trial outcomes often ignore the true responsibility between the litigating parties. It is a rare human encounter in

105. See generally Kahneman & Tversky, *The Psychology of Preferences*, SCI. AM., Jan., 1982, at 160.

106. See H. RAIFFA, *supra* note 32, at 76-77.

107. Galanter, *supra* note 74, at 97-104. This probabilistic advantage could be part of what Galanter calls a superior "capacity" for litigation. See also Eisenberg, *supra* note 23, at 654 n.47 (effect of transactions costs on benefits secured by adjudication).

108. See CPR, *supra* note 103, at 301-32.

which one party is totally at fault and the other blameless.¹⁰⁹

The more uncertain the trial results for both sides, the stronger and more principled the case for proposing negotiation with its broader and more flexible range of results and relative considerations.¹¹⁰

8. Accountability vs. Privacy

The importance of the public rendering of decisions by courts in litigation cannot be overstated. The value of the enunciation of norms and the establishment of precedent is a basic underpinning of our legal system. The negative impact of negotiated private settlements on *public issues* where members of the public are under-represented or unrepresented has yet to be fully assessed.¹¹¹

Every dispute must be examined carefully to ascertain the subjective impact public accounting of the dispute would have on the dispute and on associated transaction costs.¹¹² Privacy and confidentiality in many cases will add to the element of reconciliation that may be a powerful incentive in the negotiation process.¹¹³ Reconciliation may also be a significant factor in the psychological satisfaction that a disputant may derive from the negotiating process.

In the operational context of negotiation, there may be no more important skill than the lawyer's ability to analyze and determine when litigation is appropriate or when negotiation or some other dispute resolution procedure should be used to most competently resolve a dispute.

109. See Thibaut & Walker, *supra* note 93, at 548. The authors maintain:

As applied to litigation, whether civil or criminal, distributive justice generally takes the form of evaluating the relative weight of each party's claims for a favorable distribution of the outcomes and then rendering an *allocative decision that reflects these relative weights*. These claims are primarily arguments designed to maximize the party's perceived causal responsibility for, or contribution to, "good consequences" (such as potential heir's claim of a causal role in improving the value of property that is about to be divided) or to minimize the party's attributed responsibility for a charge of "bad consequences" (such as a claim of extenuating circumstances by a defendant charged with homicide).

Id. at 548-49 (emphasis added). This aspect of the litigation system is clearly exceptional. *Contra* G. WILLIAMS, *supra* note 2, at 14; Coons, *supra* note 77, at 755-71 (Unlike the result of "distributive justice" discussed by Thibaut and Walker, most adjudicative results are win/lose.).

110. See Part I(C)(1) *supra*.

111. See Fiss, *supra* note 95, at 128. See generally Suskin, *Environmental Mediation and the Accountability Problem*, 6 VT. L. REV. 1 (1981) (negotiated and mediated disputes may create difficulties for interested parties and the public since the private nature of the resolution often avoids public accountability).

112. See text accompanying notes 104-05 *supra*.

113. See Eisenberg, *supra* note 23, at 646.

D. Lawyer-Client Decision Making: Collaboration and Counseling.

There is a direct relationship between client participation and direction of the processes of litigation and negotiation and the client's subsequent view of the justice rendered by the process.¹¹⁴ Everything that has gone before in understanding lawyer skills at the operating level, fact finding and management, law finding and management, interpretation of the language and manipulation of abstraction and communication skills, comes together in the context of lawyer/client decision-making in negotiation.

Decision-making theory suggests that effective decision-making requires: (1) gauging an existing situation in terms of *what is known*, (factual data, doctrinal, normative and precedent information) and *what is desired* (client goals); (2) *generating alternatives* to reach those goals; (3) *projecting the probability* of the possible consequences of each outcome (prediction system); (4) *judging and choosing among the consequences* of the alternatives (value system criteria); (5) *acting on the decisions* that are made (implementation); and (6) reevaluating each step in the process as new information is gained.¹¹⁵

1. Preparing for Decision Making

We have already explored one of the steps in the decision making process by examining the potential choices of the litigation or negotiation alternatives as a dispute resolution process. The assistance to the client in decisions regarding negotiation goals requires as high a level of factual preparation as the negotiation or litigation itself. The governing or arguable law should have been carefully researched and absorbed. Statutory provisions, administrative regulations and case law should be fully understood and copies of the appropriate statutes or cases made for reference. An earnest attempt to assess or predict the various needs, interests and motivations of the adverse party should have been undertaken.

Lawyers often unnecessarily limit themselves in developing alternative solutions to those based on obvious or traditional alternatives. Many flaws in the traditional process of negotiation and contributory factors to stalemates are the result of limited imagination—creative solutions or alternatives have not been imagined; clients have not been exposed to creative proposals.¹¹⁶ Lawyers often trudge down the well-worn road that leads to only win/lose options, stalemate, debilitating costs and often disaffecting results at trial. The lawyer in the negotiation operation should constantly strive for creative alternate solutions to the party's anticipated or discovered needs and interests that avoid the

114. See D. ROSENTHAL, *supra* note 26, at 168-69; Lehman, *The Pursuit of a Client's Interest*, 77 MICH. L. REV. 1078, 1080-81 (1979); Spiegel, *supra* note 100, at 73-112; Thibaut & Walker, *supra* note 93, at 533.

115. See Gelatt, *Decision-Making: A Conceptual Range of Reference for Counseling*, 9 J. COUNS. PSYCH. 240-245 (1962).

116. See generally R. FISHER & W. URY, *supra* note 7, at 58-83.

predictable straightjacketed options that mandate stalemates or keep clients in the dark about proposals which may resolve the dispute.

2. Evaluating the Case

A central part of preparation for negotiation involves evaluation of the case.¹¹⁷ In order to properly evaluate a case for negotiation one must go back to the basic question: Upon what conditions will the client either settle or go to trial? Parties settle when it is more advantageous in their perception to take what is offered than risk incurring increased costs in seeking to recover more by litigation.

Properly evaluating a case, as any structured decision-making entails: (1) determining the real risks involved in litigation, the likelihood of prevailing and the probable result; (2) determining bargaining power and other controlling factors, including the litigation costs, indirect costs, and subjective factors; and (3) comparing and exploring creative alternatives that may promote the parties' needs and interests—resolutions that are not necessarily law or money oriented. There are rules of thumb and probability formulas for ascertaining the risk of a certain result of litigation. Often the risk and burden of predicting an outcome is not fully shouldered by the lawyer. Judgments are made and alternatives pursued without the necessary creative effort at careful decision-making between lawyer and client.

3. The Likelihood of Prevailing

This area of lawyer forecasting is most difficult. It calls upon the negotiator's courage and calm professionalism. But isn't it simple? Only apply the facts to the law and see what occurs. What law the court may apply remains obscure in some cases until jury instructions are given. What the real facts are is often in great dispute and may never be subject to disclosure. "Real" facts may only be disclosed in another version of reality: the jury verdict or judge's order. It is the frightening uncertainty of this exploration of who will win that is often the dominant factor creating bargained settlements.¹¹⁸ The uncertainty of risk and results should stimulate settlements, providing an area of risk reduction through bargaining. As the uncertainty of the result or the risk of losing increases, settlement will appear more attractive, depending on a client's risk preference characteristics. A negotiator's hard work is well spent in an effort to predict for the client the outcome of litigation on the merits. The client is owed one's skills as an objective judge rather than the zealous advocate. Strengths *and* weaknesses of the legal and factual circumstances of the

117. Gerald Williams calls case evaluation the missing lawyer skill. G. WILLIAMS, *supra* note 2, at 110 (quoting PRACTICING LAW INSTITUTE: EVALUATION AND SETTLEMENT OF PERSONAL INJURY CASES (N. Shane ed. 1976)) ("What needs to be done is make an educated guess based largely on experience, if you have experience.").

118. See Part I(C)(7) *supra*.

case must be coldly evaluated. The factual evidence and governing law should be viewed as by an innocent with an open mind; the zealotry of the advocate may have distorted the case, making it larger or stronger than it is.

Innumerable factors weigh on a result evaluation.¹¹⁹ A few that should be considered are:

a. *The Nature of One's Substantive Claim or Defense.* Is it novel, a fledgling theory, or the well-established product of defensible precedent or statute?

b. *The Law.* Is there ambiguity in the cases or statutes supporting the claims or defenses?

c. *The Factual Proof.* Can the case be proven? Does solid admissible evidence support the theories, claims or defenses—those facts at the upper rung of the proof priority ladder.¹²⁰

d. *The Witnesses.* Are the witnesses reliable and credible? If not, how crucial are they and how much impact will they have on the proof?¹²¹

e. *The Setting.* What is the track record of juries or judges in the locality on this kind of case?

The art of predicting is demanding but it is the core of a lawyer's skill in decision making with the client.

4. The Probable Judgment

One needs to establish a settlement value of the case. Assuming victory on the merits, one must attempt to evaluate the amount of damages that will be awarded or the precise nature of requested equitable relief. There are a number of rules of thumb or probability formulas for ascertaining a probable settlement value in personal injury cases; there are few in a civil rights case. Lawyers love formulas, one suspects because they give some comfort in the uncharted seas of prediction.

The settlement value of the case in gross terms is the result of the percentage chance of prevailing on the merits times the probable dollar verdict or judgment. The costs of litigation and the value of the award over time may also be considerations in many cases. Formulas are there to be used in negotiation. But the formula must have common currency. For example, the famous formula, or rule of thumb, in personal injury actions, "three times specials,"¹²²

119. "Lawyers can provide the basic information about each spouses' bargaining endowment—the applicable legal norms and the probable outcome in court if the case is litigated." Mnookin & Karnhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 985 (1979).

120. See Part I.(B)(2) *supra*.

121. See *id.*

122. The specials are liquidated damages—dollar amounts lost, e.g., because of missed employment, medical bills, property damage and other items of "out of pocket" damages. In some localities, the multiple is up to five or six.

is so ubiquitous because it is well understood. It has been perpetuated by insurance company personnel and insurance defense attorneys and is a part of the conventional wisdom of personal injury negotiation. The formula deals naught with the etherals of personal injury lore: pain and suffering, loss of earning potential and the like;¹²³ nor does it deal with costs of litigation, a key factor in case evaluation.

Personal injury representation is a vital area of lawyers' work where an example can serve as an illustration for case evaluation and preparation for negotiation in other cases. Simmons, in *Winning Before Trial*,¹²⁴ develops a settlement formula for personal injury cases. FSV (fair settlement value) equals PAV (probable average verdict) times PPV (percentage probability of a plaintiff's verdict) minus UV (the uncollectable portion of the verdict) minus PC (plaintiff's estimated cost in obtaining and collecting the verdict) plus DC (defendant's estimated cost of defense), plus or minus intangibles.

$$FSV = (PAV \times PPV) - UV - PC \quad DC \quad /- I.$$

The formula is useful because it gives insight in a shorthand way to important factors involved in any negotiation where damages in dollars are the specie of the negotiation. A formula assessment should emphasize what must be done in negotiations: a careful weighing and analyzing of a case's strengths and weaknesses, an evaluation of risk, transaction costs and likely results. The goal is a reasoned determination rather than an impulsive or rough rule-of-thumb assessment. The fair settlement value figure can be used as a goal between attorney and client, or the formula can be used to justify a reasonable offer or demand for settlement.

Each case must be carefully dissected to establish its likely result and its valuation. A feeling for the case or statutory law and the position of this case's legal circumstance within the whole is necessary. The facts are crucial. Some real evaluative effort is required in terms of monetary evaluation in those cases where money is the relief requested. Cases in which novel results are demanded require novel methods of evaluation.

For predictions of jury verdicts in personal injury cases, one should have access to services such as *PERSONAL INJURY VALUATION HANDBOOK*, published by Jury Verdict Research, Inc., which publishes jury verdicts by geographic region for particular types of injury, e.g., Concussion with Minor Injury—Tables of Verdict Expectancy, Specials, probability range, average verdict and examples of recent awards. See generally H. ROSS, *SETTLED OUT OF COURT* 176-231 (1970).

123. Maybe this is as it should be. The specials are hard, cold, quantifiable, no-nonsense items of damage that the jury will believe.

124. Simmons, *Winning Before Trial*, EXECUTIVE REPORTS CORPORATION 715-18 (1970).

5. Cost Savings

A key to the monetary cases is often the cost savings of settlement.¹²⁵ Real costs of litigation are a major factor in settlements and key elements in any serious or sophisticated formula to arrive at the settlement worth of a case. Such costs may be a significant part of the "risk" factor in the basic cost-risk-advantage formula. In "monetary" cases one will want to evaluate the probable outcome of litigation, the probable judgment, and hypothecate the additional transaction costs litigation will impose on both parties.¹²⁶

Assume that the parties have evaluated their cases and *each* anticipates that a jury will award the plaintiff \$20,000. If the case settles, without increased expenditure of attorney time, plaintiff receives \$20,000 and the defendant pays \$20,000. If the case is litigated, the jury will return the anticipated \$20,000. Each side will incur \$5,000 in attorney fees and other expenses. Plaintiff recovers \$15,000 and defendant pays \$25,000. This simple illustration shows the profound impact on settlement value that attorney's fees alone generally make. Solid information or even educated guesses concerning an adversary's costs of litigation can be crucial in arriving at a case's settlement value as well as in the evaluation of the overall risk/advantage concept.

In many disputes even if the client "wins," she loses. The potential nastiness and obnoxious side effects of a court imposed or jury determined litigation are serious issues that may affect a continuing relationship disastrously or result in gross burdens in time and money even for the "winner." Frank discussion of these issues with the client may have a profound effect on the settlement value of the case.

In preparing for decision-making with the client, the lawyer will "liquidate the past in order to shape the future" by fashioning a structured approach to govern the relationships and goals in a negotiation.¹²⁷

6. Decision Organization

Decision-making in negotiation, by virtue of its complexity, the limitations of the available information, and the problems with lawyer's ability to articulate or conceptualize the crucial information is a difficult and uncertain endeavor.¹²⁸ Virtually all decision-making is probabilistic in some sense.¹²⁹ Decision-making as a common lawyer skill involved with rough probabilistic estimates is envisioned even in the comments to the Code of Professional

125. See Part I.(C)(5), (6) *supra*.

126. *Id.*

127. See Rutter, *supra* note 4, at 327.

128. See E. MCGINNIES, *SOCIAL BEHAVIOR: FUNCTIONAL ANALYSIS* 410-21 (1976).

129. See generally J. VON NEUMANN & O. MORGANSTERN, *THEORY OF GAMES AND ECONOMIC BEHAVIOR* (1944); R. LUCEN & H. RAIFFA, *GAMES AND DECISIONS* (1957).

Responsibility:

In serving a client as adviser, a lawyer in appropriate circumstances should give his professional opinion as to what the ultimate decisions of the courts would likely be as to the applicable law.

The advocate may urge any permissible construction of the law favorable to his client, without regard to his professional opinion as to the likelihood that the construction will ultimately prevail.¹³⁰

Because of the difficulties of decision making, lawyers and clients may tend to use a number of simplifying approaches called "heuristics" to reduce the complexity of the information which must be integrated to yield a decision. The lawyer should be aware that often such simplifying strategies can lead to errors in judgment because of biases inherent in intuition and shortcuts or simplifications in decision-making.¹³¹ Decision aids should be developed to compensate for the fact that in the lawyer-client decision process, the participants' cognitive capacities are not adequate for the complexity of the task. Therefore, the lawyer should seek to engage in explicit calculations on probabilities and incorporate careful decision analysis and discipline.¹³²

The lawyer's assistance to the client in the decision-making process is part of a lawyer operation often described as counseling. It is a group of operational lawyer skills including decision-making skills, communication skills and inter-personal counseling skills.¹³³

7. Counseling—Lawyer-Client Collaboration in Decision-Making.

The lawyer's responsibility in the decision-making process after the necessary factual information is secured and goals are assessed is to present *alternatives* to the client, *predict* the legal consequences of each alternative and to involve the client in *acting* on the choice of decision.¹³⁴ This process is extremely important in negotiation. Most often lawyers and clients are going to be looking at the positive and negative consequences of the alternatives of trial and settlement. Key factors in this assessment are the economic, social, psychological and other consequences of either choice.¹³⁵

130. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-3, 7-4 (1979).

131. Saks & Kidd, *Human Information Processing and Adjudication: Trial by Heuristics*, 15 LAW & SOC'Y REV. 123, 126-45 (1981).

132. See generally H. RAIFFA, *DECISION ANALYSIS: INTRODUCTORY LECTURES ON CHOICES UNDER UNCERTAINTY* (1968); Tversky & Kahneman, *Belief in the Law of Small Numbers*, 76 PSYC. BULL. 105 (1971). Howard Raiffa has made giant strides in assisting with decision-making heuristics in *THE ART AND SCIENCE OF NEGOTIATION*, *supra* note 32. See *id.* app. A for two graphic decision making heuristics, one from Howard Raiffa, the other from Professor Don Ellis.

133. See text accompanying note 5 *supra*.

134. See text accompanying note 114 *supra*.

135. D. BINDER & S. PRICE, *LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH* 158-72 (1977).

In counseling clients lawyers cannot know their client's basic needs, as that word is understood in our discussion of the satisfaction or need theory since the client in many cases has not articulated properly or clearly his or her needs or is simply only dimly aware of them. This is why lawyers cannot appropriately make decisions on their own that will provide client satisfaction, thus, the requirement for attorney-client collaboration in the counseling process. An example might clarify the point:

Ms. C has brought an action against Right County for violation of her civil rights during an illegal search of her house. The search occurred at the behest of a bail bondsman assisted by three police officers who were in search of her husband, an escaped burglar. The bail bondsman and the police officers rudely and roughly went through her house searching drawers and dressers and every item in sight. They entered the bedroom where her two children were sleeping, disturbed them and caused them to react in a hysterical fashion. As they left, one of the officers inexplicably struck Ms. C in the face with his flashlight causing a severe contusion and requiring her to quickly jerk her head backwards straining her neck. Ms. C's court costs and attorney's fees are now respectively \$500 and \$2,000. Right County has offered \$3,000 in settlement of the dispute.

Ms. C's attorney has evaluated the case and states that there is a good chance of obtaining a judgment for \$5,000. He feels that liability clearly exists here and the only issue is the amount of damages that will be awarded by the trier of fact. The additional costs of litigation, mainly attorney's fees, are going to be \$1,000. The attorney has stated that there is a small possibility that the judgment could go as high as \$7,000 or as low as \$1,000.

In evaluating the case and making a decision, Ms. C and her lawyer have established that there are a number of positive and negative consequences to either alternative: settlement or litigation.

Economically positive: An economically positive consequence of accepting the *settlement* offer would be \$3,000 in hand, right away without any additional court costs or attorney's fees and no loss of income occasioned by time taken at trial. The positive consequences of the *litigation* alternative would be a very good chance of the recovery of \$5,000 with some chance of recovering \$7,000.

Socially positive: Socially positive consequences of *settlement* may be the elimination of publicity involving the case embarrassing to Ms. C. The personal and socially positive consequences of *litigation* could be the satisfaction of Ms. C's present husband who wants to go forward with the suit and prove that the county was in error as a matter of principle.

Psychologically positive: There are many psychologically positive consequences of either alternative as well. Ms. C, if she *settles* for the amount the county has proposed, avoids the anxiety and concern about the litigation which is a constant problem to clients facing the possibility of trial. A positive psychological consequence of *litigation* is that Ms. C has put the county to the test and made her best effort to obtain reasonable compensation for the wrong

the county did to her.

Economically negative: A negative economic consequence of *settlement* is that Ms. C gives up an excellent chance at \$5,000 for an additional investment of \$1,000.

Socially negative: A negative social consequence of the *settlement* alternative may be that Ms. C courts her present husband's disfavor by dropping the suit. That is balanced against the positive result of eliminating any potential publicity.

Psychologically negative. A negative psychological consequence of *settlement* is that Ms. C may feel that she is a coward if she avoids her day in court as a result of choosing the settlement alternative. She feels the amount offered is not enough to compensate her fully. Her ideas of fairness and justice have to receive strong consideration. The negative personal or psychological consequence of *litigation* is her basic anxiety about going to trial and the risk-taking involved in giving up a sure thing,¹³⁶ a sure amount of money balanced against the investment of additional money with the possibility of ending up a loser.

One can see that commonly in such a process, intangibles may outweigh the tangible. There is no real way Ms. C's lawyer can determine which ephemeral alternative discussed can provide her with the greatest satisfaction. There is no basis for evaluating what Ms. C's greatest satisfaction would be. The lawyer in attempting to engage the collaborative process in order to arrive at a set of goals, decisions or a negotiation strategy is using very imperfect tools. One must attempt to obtain from Ms. C the general importance of each of the consequences discussed and aid her in prioritizing these consequences so that a negotiating goal is obtained. This task may involve invoking Ms. C's intuitive weighing process or maximizing the lawyer's ability to articulate and forecast the likelihood of each of the relevant consequences. The lawyer's job at this point is to help the client develop and state a goal so that the negotiation can go forward to attempt to achieve the goal.

The collaborative process goes forward successfully when each participant, lawyer and client, forecasts and decides priorities in his or her area of competence. Ms. C, with counseling help from her lawyer in articulating results or probabilities can best decide the impact of the social, psychological and economic consequences of the litigate-settle choice at this point in time.¹³⁷ Her lawyer is in the position to forecast legal results based on factual circumstances. Her chances: A good chance (75% or .75) of \$5,000 for an additional investment of \$1,000. A smaller chance at \$7,000 (50% or .5) for the same

136. See text accompanying note 105 *supra*. Ms. C is likely to be risk averse at least in comparison with the County. This should be taken into account in the decision process.

137. See H. RAIFFA, *supra* note 32, app. A for heuristic assistance in such decisions.

investment.¹³⁸

The narrative example illustrates two processes characteristic of counseling and negotiating phenomena: (1) the collaborative decision-making process by which attorney and client work together to clarify goals, assess probabilities and sometimes arrive at a course of action, and (2) the investment risk-cost benefit phenomenon—what are the investment risks and costs of going forward to litigation and the advantages to be gained by a trial vs. settlement. Are the advantages to be gained worth the risks or costs to secure them?

E. Preparation for Negotiation.

1. Assessing the Conflict

A great deal of thinking and analysis has gone into developing conflict-assessment devices in recent years particularly in the area of multi-party negotiation. A conflict assessment device allows the lawyer to analyze various factors in the negotiation in order to obtain a clear understanding of the causes and characteristics of the specific dispute.

The negotiator must identify all people and constituencies that have a stake or an interest in the dispute and why they have an interest. The lawyer should assess the values and interests that guide the actions of all parties. The conflicting and common aspects of these matters should be assimilated.

Goals and the overt positions of each party should be identified and the sources of information that the parties are relying upon for their overt positions should be understood. The sources of power for each party and their attitudes toward one another and the negotiators' prospective attitudes are significant. If appropriate, analysis of the prior relationship between the parties should be carefully done to determine whether there are obstacles or patterns of behavior that might affect the negotiation. Finally, a careful assessment of the substance, as represented by the overt issues at stake, should be completed including how these issues are represented by precedent, norm, principle, power and the discovered facts.¹³⁹

138. A decision matrix or decision tree setting out probabilities may be contrived for each such analysis. See *id.* Howard Raiffa suggests that "human" value intangibles can be manipulated and assigned numerical values using the "multiple, attributable utility" theory. Address by Howard Raiffa, Section Program, Alternative Dispute Resolution, AALS Annual Meeting (Jan. 7, 1984).

139. See Lincoln, Colosi, McGlennon, Bingham, Moore, & Carpenter, *Dispute Assessment Tool*, in W. LINCOLN, N. HUELSBERG & NATIONAL CENTER FOR COLLABORATIVE PLANNING AND COMMUNITY SERVICES, INC., MATERIALS TO ACCOMPANY GENERIC COURSE IN NEGOTIATION AND MEDIATION 68-79 (1983) [hereinafter cited as W. LINCOLN] (description of useful assessment device).

2. Identifying Causes of Resistance To Settlement

Lawyers tend to prepare their cases in the true adversarial mode, developing its strengths and focusing on the opponent's weaknesses. Insufficient specific attention is paid by the lawyer to the anticipated causes of resistance to proposals to settle the dispute. When discussing developing a negotiation theory of the case and fact management, the lawyer reasons from the general to the specific in order to derive the unknown facts or rationales possessed by his or her bargaining adversary. Similarly, the lawyer must try to envision the other side's reaction and resistance to specific proposals that are advanced. It is always useful to examine a number of common potential areas of resistance and conflict. A negotiator should anticipate resistance and be capable of persuading his opposite: (1) of the substance of the legal authority, norm, or principle that legitimizes his proposal; (2) the ability of the negotiator to implement the proposal—to carry out and make good on the offer; (3) that the proposal, if agreed to will be durable and feasible for its duration; that he or she can demonstrate to his opposite ways in which the proposal can be positively presented to the constituents, clients, or others to whom he or she is responsible; (5) of the feasibility and authenticity of information in the proposal or data underlying the proposal or the technology that is its underpinning; (6) that he or she can demonstrate how the proposed offer of settlement will meet basic interests and substantively satisfy the overt issues in the dispute; (7) how the proposal benefits the needs, interests, aspirations and goals of the parties that underlie the issues in dispute; (8) that impasse and the result of impasse (usually litigation) will create risk and generate costs in excess of those that reasonably might be anticipated as a result of the proposal; (9) that the proposal is consistent with his opposite's own ideas allowing him to "own" the idea that is the root of the proposal.¹⁴⁰

3. Breaking Down Issues in Dispute

In the preparation for negotiation, particularly in complex disputes, it is helpful to organize the overt issues by breaking the dispute into distinct and manageable parts in order to deal with the larger dispute more effectively.¹⁴¹ This simple organizational approach is called "problem fractionation." Most lawyers in analyzing and organizing their negotiation regimen will come upon this approach. This division allows a more manageable confrontation of a diffuse conflict, but it may create a time-consuming and frustrating process in negotiation. The more issues that proliferate for conflict and confrontation, the more likely a negotiation may stalemate. The resolution of subissues may, however, create a momentum of compromise and problem-solving that carries

140. See J. HARTJE, *ALTERNATIVES IN DISPUTE SETTLEMENT FOR LAWYERS* 360-61 (1984) (unpublished materials on file with the author).

141. See generally Fisher, *supra* note 15. See also W. LINCOLN, *supra* note 101, at 121 (examples of problem fractionation in different contexts).

through the entire range of the dispute.

4. Identifying "Agreements in Principle."

A conceptual converse of breaking down of issues into subissues is agreement in principle. An agreement in principle is an attempt to create an attitude of settlement toward the larger dispute or group of contentious issues before attempting to assail each detailed subissue or interest buried in the dispute. If carefully planned in advance, this approach can create a settlement momentum that *bypasses* hot subissues. The agreement in principle operates like a treaty that states "we are united in agreement on the larger issues, let us not allow the details to stand in our way."¹⁴²

5. Organizing Issue Development

Once the collaborative counseling process has been engaged and negotiation decisions have been made, it is useful to develop a strategy of issue and position development. This process involves an analysis of how to carefully and systematically *define* and prepare the *order* in which issues or interests and one's position on issues and interest unfolds during the negotiation. This can be done in graphic form through an issue position development instrument.¹⁴³

This heuristic device allows a concrete representation of a client's *interests* and the interests of the opposite party and requires careful listing of the factual *issues* that represent those interests for negotiation. It also aids in requiring a priority ordering of the issues to be negotiated and the bargaining development for each. The instrument uses a number of descriptive terms—bottom line, fall back position, and initial position. A bottom line (resistance point or reservation point) is the point at which the red light goes on in negotiation. This is the line that the negotiator and client in preparation have planned to be the perimeter beyond which the bargaining absolutely does not travel.¹⁴⁴ In the graphic tool, the bottom line is used as a "trip wire"¹⁴⁵ or guiding discipline allowing some margin in reserve—hence reservation point. The instrument requires an order of completion which requires the attorney and client to evaluate first underlying interests, then issues representing interests, the consequences of impasse and then the respective positions that the negotiator will take. The instrument requires scrutiny of priorities in a flow that runs from minimum expectations to highest preference.¹⁴⁶

142. See, e.g., W. LINCOLN, *supra* note 101, at 131.

143. See *id.* at 87-90.

144. R. FISHER & W. URY, *supra* note 7, at 103. A bottom-line position may be misleading and useless because negotiation is so much dependent on the communication and information from the other party which has the potential of changing the minimal expectation of a negotiator, at any point in the bargaining. *Id.*

145. *Id.* at 106.

146. See *id.* app. A (Position Development Instrument).

Such a heuristic cannot serve as a literal map for negotiation. It does not deal with a major issue in negotiation: how to get from one issue or position to another if you are engaged in positional bargaining. It does not deal with the communication of offers or concessions, nor can it aid in linking issues or packaging a particular solution. Some would criticize it because it encourages positional bargaining rather than "problem solving." It does allow a visual representation of serious matters in a negotiation and mandates a careful analysis of those matters in a prioritized fashion.

II. OPERATIONAL SKILLS IN NEGOTIATION

A. *Communication Skills-Persuasion, Reasoned Argument.*

Legal negotiation often involves the lawyers in "reasoned argument"¹⁴⁷ in which they present to one another competing analogies of case law and facts and finally, if they settle, accommodating or ignoring the differences. This "jury argument" form of negotiation is common. The real goal of the argument is to demonstrate how a jury or judge might react favorably.¹⁴⁸ Each lawyer negotiator will have a preferred result and settlement goal; each hopes to move the other through reasoned and persuasive argument.¹⁴⁹ In many ways, the appeal is analogous to the lawyer's approach in the courtroom with the judge or the jury setting the standard for acceptability or rejection of the various arguments. The negotiator/lawyer will marshal facts, norms, precedent and power in order to engage in a persuasive discourse not unlike the classical rhetorical exercises.¹⁵⁰

Lawyer's who believe in the persuasive power of skillful argument should examine the settings in which such arguments are used. In negotiation, the context in which our skills are utilized should be as carefully examined as in the traditional settings, with the negotiator as the audience. Each negotiator (audience) represents unique bundles of predisposition and prejudices and will respond to argument differently based on those individual social inclinations. The facts presented and the law characterized are not some ultimate reality, but are presented, conformed and colored to suit adversarial preferences. Yet

147. Fuller, *supra* note 71, at 366.

148. See, e.g., G. WILLIAMS, *supra* note 2, at 149; 152, 153-55, 158-60. On each of those pages, one of the negotiating lawyers invokes the jury as the third-party audience, the critical mind to which their arguments will be directed.

149. See Eisenberg, *supra* note 23, at 667 n.87. Eisenberg cited an example of the force of persuasion in negotiation. Bill Veeck, the baseball club owner in B. VEECK, *THE HUSTLER'S HANDBOOK* (1965), in recognition of the persuasive power of Branch Rickey, moved to limit that power by limiting the negotiation channel to a go between, a bell boy. *Id.*

150. See J. HARTJE & M. WILSON, *supra* note 86, at 109-46; see, e.g., R. STUCKEY, *PRESENTATION ON NEGOTIATION TO THE 1982 AMERICAN ASSOCIATION OF LAW SCHOOL CLINICAL CONFERENCE* (MARCH 1982).

one's preferences are not the preferences of the negotiator/lawyer sitting on the opposite side of the table. It is fair to assume that she is sitting there waiting to refute whatever was said and to reduce it to shambles or demonstrate it utter nonsense.¹⁵¹

The "jury argument" in negotiation is an admission by both negotiators that they cannot persuade one another, but can only persuade through the non-present, third-party jury which is the true judge of the argument. Even while skillful lawyers admit the basic fallacy in attempting to persuade one another, careful attention is made to the art of persuasion through the jury argument artifice. If one were to analyze negotiation/persuasion, one would likely find five important aspects of classical rhetoric: (1) Invention (determining what to say); (2) Arrangement (determining order of presentation); (3) Style (determining the manner of presentation); (4) Memory and (5) Delivery¹⁵² In persuasive efforts, lawyers consider whether or not to make emotional appeals or appeal to the equities of emotion—those sustaining human principles that are beyond controversy. Appeals are made to reason, ethics¹⁵³ and values represented by precedent and norms.

The argument may even be constructed in a formal ordered way. First, one may argue the legal *principle* that the case represents from case law, statute or administrative regulation. The *policy* or the *norm* inherent in that legal principle is stated and then compared to the *factual situation* of the case to demonstrate, in the present circumstances that the *facts fit within the principle* or its spirit. Finally, it may be claimed that the result sought in terms of negotiation goals will satisfy the inherent policy. All of this is with an eye to the fictitious jury or judge.

A lawyer's skill can be effectively used in understanding the force of persuasive communication in the operation of negotiation: the elements of order and emotional, ethical and logical appeals.

Yet, negotiation is about persuasion *and* learning. The arts of persuasion are used in a coercive sense. The implicit threat is made that "if you do not settle with me on the terms I suggest because I possess this information, principle, power and equitable posture, the argument that I have just presented is going to be accepted by a judge or jury to your detriment." It is the movement that is occasioned by this coercion that may potentially result in settlement. Much of what we know about skilled effectiveness in negotiation involves enhancing a learning process.¹⁵⁴

151. S. LANGER, PHILOSOPHY IN A NEW KEY ix (1971), cited in Condlin, *supra* note 4, at 234 n.28 (description of the "debater's" mentality that privately judges communication and then seeks to refute or discredit its force).

152. ARISTOTLE, RHETORIC 24 (W. Rys. Roberts trans. 1954).

153. An ethical appeal in the rhetorical sense referred to the speaker and how he was perceived by the audience.

154. See R. FISHER & W. URY, *supra* note 7, at 19-30; P. GULLIVER, *supra* note 33, at 83-88.

B. *Communication Skills - Language of Learning, Exchanging Information, Concessions And Questioning in Negotiation.*

1. Learning in Negotiation

Robert Condlin has identified certain approaches or responses to the ambiguity of language and behavior. The two responses he identifies are the persuasion mode and a learning mode.¹⁵⁵ He describes the persuasion mode as an approach in which the person is involved in asserting or developing his interpretation of an ambiguous communication. The learning mode is a response to an ambiguous communication in which the person investigates and attempts to understand and clarify the communication independently.¹⁵⁶ These constructs are useful in envisioning and discussing communication in negotiation. In the elaboration of reasoned and persuasive argument the negotiator appeals not to his fellow negotiator in an effort to educate him but to coerce him with the force of his argument to the imaginary jury or judge.

This persuasion is met by a listener attributing meaning to the ambiguous part of the communication and thereby combining the speaker's content and the listener's interpretation. The listener privately judges the communication generally with a negative and predatory view. While the communication is being detailed, the listener is already attempting to destroy or refute the content of the communication and may privately evaluate whether he agrees or disagrees and why. The listener, then responds to the communication. This process continues in a cyclical fashion. The persuasion mode is competitive rather than additive, private rather than public, self-protective rather than risk-taking, rational rather than emotional.¹⁵⁷ The result of the persuasive mode are quick, focused and simple explanations for complex phenomenon rather than the generation and testing of more sophisticated hypotheses. "The premium the mode places on taking and defending positions causes people to concentrate on the quality of their own comments[,] often to the detriment of hearing the valuable aspects of others' statements".¹⁵⁸

The learning mode involves inquiry, the process of obtaining information about another's communications; "owning up," the process of sharing with another the intellectual and emotional reactions to their statements; and testing, the process of eliciting and assessing reaction to one's own views in order to decide whether to agree or disagree.¹⁵⁹ Inquiry might involve the discovery and fleshing out of the basis of other person's communication including the information or experience upon which it is based and the inferences or interpretations from that information. Inquiry may involve suspending judgment and

155. Condlin, *supra* note 4, at 231.

156. *Id.*

157. *Id.* at 238.

158. *Id.* at 245.

159. *Id.* at 246.

questioning rather than agreeing, disagreeing, or rebutting the communication, or it might encourage the other to continue to elaborate rather than appearing to reject or to "jump into the exchange."¹⁶⁰ Owning up involves sharing ideas and feelings in order to express the complexities of emotion and thought and reactions based on statements of direct "data."¹⁶¹ Testing, the third aspect of the learning mode, is the comparison of one's beliefs and information with the other person and its measurement against some criteria of validity.¹⁶²

The Condlin typology may be useful in its insightful analysis and seeming description of the skilled interpersonal communication involved in problem solving (learning mode) versus positional (persuasive mode) bargaining and helping enhanced understanding of cooperative vs. competitive psychological approaches in negotiation.¹⁶³ Both behaviors are necessary for the explication of ambiguous communications. This identification of complimentary modes of dealing with ambiguous communications can be a useful construct in understanding communication in negotiation. Much of what is described as persuasion we have examined.¹⁶⁴ Much of what is seen as the learning mode is found in approaches to negotiation which are called "problem solving," "collaborative" or "cooperative."¹⁶⁵ A dynamic is presented of openness, inquiry and questioning. The learning mode suggests fairness in its approach by explicitly stating the data from which one proceeds to make conclusions, allowing room for supplementation, and encouraging the other to express contrary information or material for mutual evaluation.

Implicit in these descriptions of negotiating behavior is the use of inquiry and questioning approaches. "Learning" questioning can help achieve a number of goals that permeate the remaining discussion of exchanging information, concessions, confirming approaches and using hypotheses to lay out optional settlement alternatives. The openness, encouragement and flexibility described in the learning mode can be accomplished by a lawyer's interpersonal counseling and questioning skills. These are skills employed throughout the lawyer's repertoire of operations. "Active listening"¹⁶⁶ or "role reversal" is an approach that replicates the learning behavior described above. A negotiator encourages his opposite to continuing talking by appropriate responses. He then accurately and completely paraphrases the other's position, arguments, concerns and feelings in a way that indicates comprehension of those matters, before requesting supplementation, testing and expressing conflicting matters.

160. *Id.* at 236.

161. *Id.* at 237.

162. *Id.* at 237-38.

163. R. FISHER & W. URY, *supra* note 7, at 22-40, 51-57, 70-83; J. RUBIN & B. BROWN, *THE SOCIAL PSYCHOLOGY OF BARGAINING AND NEGOTIATION* 182-95, 200-06 (1975); G. WILLIAMS, *supra* note 2, at 20-40, 42-54.

164. *See* Part II(a) *supra*.

165. *See supra* note 163; *see also* C. KARRASS, *supra* note 8, at 124; G. NIERENBERG, *supra* note 84, at 184-95.

166. *See* D. BINDER & S. PRICE, *supra* note 135, at 25-37.

Active listening expresses a sincere interest in understanding the other person's position, feelings and perspective. The use of role reversal in questioning and active listening can be helpful in changing a win-lose oriented negotiator into a problem-solving oriented negotiator. It may assist two problem-solving oriented negotiators to understand each other and help to find creative integrations of their client's interests. Lawyer skills in questioning using active listening techniques can clarify misunderstandings of the other's positions, assist in increased understanding of the other's position, and aid in one's ability to perceive the issue from the other's perspective.¹⁶⁷ The skillful use of role reversal and active listening can result not only in a reevaluation of the issue on the table, but a change in attitude toward it.¹⁶⁸ The negotiator who uses the learning mode will be perceived as a trustworthy negotiating partner.¹⁶⁹ Active listening facilitates constructive management of conflicts and can significantly aid in the settlement of negotiations.¹⁷⁰ Brief guidelines for such an approach suggest that the person using the approach: (1) restate the other person's expressed ideas and feelings in one's own words rather than parodying the words of the other person; (2) begin the reflected remarks with "you think" "your position is. . .", "you feel. . ." "it seems to you. . .", or "I understand you to feel. . .". This emphasis focuses on the other person and clarifies whose position is being expressed and comprehended; (3) avoid any indication of judgment or disbelief in paraphrasing the other person's statement. It is important to refrain from interpreting, blaming, persuading, or advising; (4) make the non-verbal messages congruent with the verbal paraphrase; (5) be interested in and open to the other person's ideas and feelings and concentrate on what the other person is trying to communicate.¹⁷¹ This approach allows sincere attempts to enhance communication and listening through understanding as well as questioning. It allows for an equity in presentation of points of view and information and allows for subsequent inquiry, fair response and testing of that information in the same above-board, non-manipulative way.

Active listening or role reversal approaches using questioning in which the listener reflects, clarifies or reacts to communications of another person are techniques used by skilled lawyers in counseling, interviewing, fact gathering, depositions, discovery, jury voir dire and virtually throughout the lawyer verbal skills repertoire.

Testing approaches in negotiation involve questioning as well. Testing questions seek to evaluate the feasibility of proposals, the seriousness with which proposals are presented, hypothecate alternative scenarios in which a negotiating proposal might be implemented, and seek or request objective standards to be used to measure specific proposals. Some examples of testing

167. D. JOHNSON & F. JOHNSON, *supra* note 28, at 292.

168. *Id.*

169. *Id.* at 309.

170. *Id.*

171. *Id.*

questioning are: (testing feasibility) "How would the parties specifically implement that proposal and how much would it cost to do that?" "Why do you think my client can afford to pay that much?" (testing seriousness) "How would that proposal work in detail on a practical level?" "How do you see your proposal operating five years down the road when the party's situations have changed?" (testing alternatives) "How would that proposal work in detail on a practical level?" "If you were serious about that proposal would you be willing to let the measuring device be the Consumer Price Index for the last year?" (testing for availability of objective standards) "Can we use sales of similar buildings in the area over the last six months to establish a sales price?"

The irony of most negotiation is that two things are being bargained for: specific demands which are on the table and made openly and the real needs of the parties, which are often covert. Adversarial mistrust often creates or exacerbates the deceptive characteristics of some bargaining. An important part of any negotiation strategy involves the accumulation of necessary information to assess a client's needs and evaluate his case. A second important part is assessing the *other* parties' unstated needs, interests, resistance or reservation points, which are often ill-expressed by a bargaining "position."

Hard work, through fact finding and management, discovery, investigation, research and analysis provides some of the necessary information. The bargaining process itself can provide a substantial part of the remainder.¹⁷²

2. Information Exchanges

Information gathering is always easier preceding an informal bargaining confrontation. Once the formal discussions begin, the participants often become defensive: they put on their "game faces." Information about the other sides real needs may be scarce, so one should start early. Each contact, meeting or telephone call should be used to elicit information that may prove useful. Clues will be given concerning the level of preparation for the case and knowledge of the law and the facts. Casual inquiries will often yield information on the type of business done by opposing counsel, the type of organization or persons represented that may aid the negotiation.

Other clients, judges, secretaries, clerks, or attorneys who have negotiated with the adverse party may willingly respond with information about the other side and its attorney if a nonthreatening approach is used.

Everyone has a track record and one can learn from other's experience. All of this casual information plugs into vital factors in the negotiation: What is the opponents's resistance point, time pressure, costs of litigation or assessment of the value of the case? This information will also be the beginning point in the negotiator's attempt to change the other side's perception of those costs and risks. By the time one enters a formal negotiation, which may be in

172. See P. GULLIVER, *supra* note 33, at 83-85.

a single conference or a series of informal contacts or telephone calls, one should have a substantial amount of information with which to negotiate effectively.

3. Initial Probing¹⁷³

Prior to the beginning of serious bargaining, attempts should be made in an informal context to sound out the other side's reactions to various proposals so that one can attempt to measure their resistance points, level of preparation, bargaining style and motivating interests. Generally because of adversarial mistrust, many lawyers will not communicate beyond small-talk or posturing until a perceived reciprocal risk takes place. The shared risk in negotiation is the disclosure of information to receive information in return.¹⁷⁴

4. Listening for Information In A Negotiation Setting

In competitive settings negotiating parties rarely give the other side any hard or useful information about real interests because of adversarial mistrust. Information is often communicated only for strategic purposes.¹⁷⁵ A negotiator must be disciplined and use effective listening. Careful concentration on what is going on can result in significant information about the other side's feelings about issues, motivations and real needs. Attentive listening means not only hearing and observing what is said, but also understanding what is omitted and why. For example, when one hears generalities, fudging, evasion, circumvention, it most likely means polite lying is going on. This should be a clue leading to important information that may be secured by specific questioning in order to clarify what is actually being said.

5. Cues — Intentional and Unintentional

A question does not even have to be answered to supply useful information. Often messages or cues are sent whose meaning may be ambiguous and require interpretation.¹⁷⁶ We are all familiar with the nervous laugh, the startled expression, the quick comeback, the unnaturally long pause, all of which may indicate that a question exposed a sensitive or important issue. The response may prove a clue to what the answer could have been. The information that can be gleaned from unintentional clues may be extremely helpful if used by the aware negotiator to confirm or change his tentative appraisal on a number of core issues.

173. See G. WILLIAMS, *supra* note 2, at 72-73. Williams describes this as orientation and positioning.

174. See P. GULLIVER, *supra* note 33.

175. Mnookin & Karnhauser, *supra* note 119, at 972-73.

176. See E. PETERS, *STRATEGY AND TACTICS IN LABOR NEGOTIATIONS* 148-62 (1955).

These cues may be the (1) unintentional verbal cue, the word used conveys an inadvertent message, as in a Freudian slip; (2) the inapposite verbal cue, in which the voice inflection or emphasis states something other than the words being spoken; (3) conduct cues, body language expressed in posture; eye deflection or contact, facial expressions, hand and leg movement where one sits, who talks first and so on.¹⁷⁷

The study and meaning of these cues has become very popular in recent years. The field has been named proxemics—examining people's movements in close space. Reading cues is only a function of the listening and observation sensitivity that should be possessed by the skilled negotiator. Cues should be used to reflect upon prior careful assessments rather than to attribute universal meanings to isolated gestures or reactions. The deflected eye when delivering a first offer confirms the obvious.

6. Calculated Listening

People like to fill silence with talk, even negotiators and especially lawyers. An information approach which involves silence is calculated listening. Much like active listening and role reversal¹⁷⁸ this behavior involves demonstration of a willingness to listen to the other side in an understanding way, and to reinforce the other side's talking by expressing sympathy and understanding. In addition to the "learning" benefits described earlier, often the other party will fill the air and the silence with useful information.

7. Confirming Approaches

In most negotiations, it is reasonable to request that each of the adversaries' factual assertions or definitions of the legal issues be confirmed by hard evidence—inspection of the underlying documents or the file, or a reading of the cases in question. An acceptance by the opposing party of the attempt to obtain confirmation is likely to lead to more information and give a clue as to the strength of the case and the interests of the other party. A rejection of objective requests to confirm factual assertions or legal conclusions also provides information about the accuracy of the information and the good faith of the negotiator. Confirming information is similar to, but should not be confused with, a negotiator's attempts to request outside "objective standards" as a means of breaking through positional posturing.¹⁷⁹ The former may control a blow-hard bargainer and require hard data, the latter often provides a neutral language for a solution to the parties' needs and reinforces concessions.

177. See, e.g., Suggs & Sales, *Using Communication Cues to Evaluate Prospective Jurors During the Voir Dire*, 20 ARIZ. L. REV. 629, 634-37 (1978).

178. See text accompanying notes 166-71 *supra*.

179. See text accompanying notes 171-72 *supra*; see also R. FISHER & W. URY, *supra* note 7, at 91-96 (The use of objective standards takes an issue in bargaining outside of the will and informational base of the negotiator).

8. Offers and Demands

In negotiation the offer or demand often functions much as an overture in a musical play. It sets the tone, it conveys information about what is to come, but only in a vague and general way. Many offers or demands may initially conceal real agendas and needs. They obviously function as information devices as well. An offer or demand may convey in a credible statement the minimum the party can give or accept. It must be credible in order to spur a response that may provide some clue to an opponent's interests or settlement preferences. Offers and demands also represent positions that may inhibit problem-solving by ignoring, in many cases, the real desires and concerns of the parties.

(a) *The First Position*

It is generally the case that most negotiators believe the initial position of their adversary to be negotiable.¹⁸⁰ Aggressive negotiators often make a large initial demand or a low offer to allow for errors in both one's evaluation of the case and the other side's assessment of the position, which may be even more favorable.¹⁸¹ It appears that negotiators that are not sure of their evaluation of the case tend to use the opening position to set their own goals.¹⁸²

Because of the difficulties involved and the belief that taking the first position by offer or demand puts one on the defensive and shows an eagerness to settle, many lawyers wait for the other side to first take a position. This conventional wisdom has led to compulsory settlement conferences and much "courthouse step" negotiation.¹⁸³

(b) *Reducing Offers - Increasing Demands*

An attempt to retreat from the negotiation trend by increasing a demand or withdrawing or reducing an offer during the give and take, is in most cases deadly to the bargaining. One who engages in such conduct cannot be seriously regarded by an adversary in most cases and will be accused of violating an established norm in negotiation: "bargaining in good faith."

There are situations where the value of the case increases over time, or

180. The glaring exception to this observation is the technique called "Boulwareism," which entails stating initially one's position by offer or demand and not moving. This was a technique employed by Lemuel R. Boulware, a former officer and negotiator for General Electric.

181. G. WILLIAMS, *supra* note 2, at 73.

182. See G. WILLIAMS, *supra* note 2, at 7 (recent study of Des Moines negotiations in which the high opening bid seemed to affect the amount of the settlement).

183. Courthouse step negotiation is the familiar practice of discussing settlement for the first time virtually on the courthouse steps the morning of the trial. See generally J. HARTJE & M. WILSON, *supra* note 86, at Ch. 7.

conditions which prompted an offer have changed. These changes in position are justified and can be explained. Only rarely will such a retreat be ethically or practically justified at the bargaining table. When the other side will not bargain at all, uses tactics contrary to compromise, or engages in bad faith conduct, the withdrawal of an offer or increase in a demand may be justified. Stalemate should not be feared if one's opponent will not respect established bargaining norms and the basic goals of negotiation.

9. Concessions, Communications and Commitments

Two negotiators have been talking for some time. No problem-solving approaches emerge to unravel this share bargaining setting. Negotiator A has a flat injunction from her client that she must settle this minor contract dispute for no more than \$1,500. Negotiator B has been instructed to obtain as much as possible for her client, but to settle the case. After much skirmishing, Negotiator A seriously makes her first offer of \$1,000. Negotiator B states that the offer is wholly inadequate but makes no counter demand. More skirmishing. Time passes. The negotiation is dead still. A and B are each thinking that she must make an additional concession. Each argues to herself the advantages of a concession at this time; to avoid stalemate and antagonize the client: to be "reasonable" and be "negotiating in good faith,"—normative appeals that can be employed to move the negotiation. Negotiator A offers \$1,400 without explanation. What will Negotiator B assume about A's budget and resistance point? (The maximum dollar point beyond which A will go to trial?) B will assume that A has \$1,600, \$1,800, \$2,000 or more to spend; A will not really resist or stalemate if pressed to \$1,600 or above.

Why? Two reasons: (1) the increments between \$1,000 and \$1,400 are so great that the logical expectation of a resistance point has to be more than \$1,500, and (2) the second offer becomes an extremely damaging concession because it is irrational.¹⁸⁴

A is on a concession escalator. She has offered two concessions without requiring any exchange or counter concession. She has failed to support or justify either concession by showing it has a rational basis or that she now is at a firm figure. B will never believe that A has only \$1,500 to spend. B will accept only amounts above \$1,500 or stalemate and go to trial.

Even recent law graduates who admit ignorance of negotiation are able to generally describe the process as a series of offers and counter offers. The example above illustrates aspects of most bargaining between inexperienced or untrained participants. The *de facto* capitulation is a result of viewing negotiation primarily as a positional numbers game and ignoring the dynamics of language, persuasion and reasoning. Concessions, offers or demands that are

184. See T. SCHELLING, *supra* note 39, at 34; C. STEVENS, STRATEGY AND COLLECTIVE BARGAINING NEGOTIATION 77-96 (1963); W. ZARTMAN, THE NEGOTIATION PROCESS: THEORIES AND APPLICATIONS 81 (1978).

not carefully explained or justified with specificity and persuasiveness, will not be perceived as credible. Further, the magnitude or frequency of concessions often communicates an unmistakable message about an opponent's resistance point.¹⁸⁵

In the hypothetical above, the second concession came as a result of the excruciating choice between weakening one's bargaining position by concession or risking stalemate. Often in the successful negotiation, reciprocal concessions are the language of bargaining. Concessions and conciliatory behavior sometimes encourage the opponent's expectations and intransigence lowers expectations.¹⁸⁶ One has Hobson's choice. Concessions are damaging to one's bargaining status (real and as perceived by the other side), yet compromise is most often impossible without them.

The interest satisfaction and problem-solving aspects of compromise in most bargaining ultimately dominate the concern over temporary loss of position represented by a concession. Negotiators must trust to a certain extent that compromise concerns will prevail and that mutual concessions will ultimately result in a beneficial settlement. Together with this trust must exist skilled understanding of concession behavior.

Each concession must be carefully thought out in advance and a fallback position on an issue understood.¹⁸⁷ In order to avoid the expected psychological result of a concession, one must make sure that the new point where the bargaining rests is a firm stopping point: a commitment point beyond which one cannot go, at least on the basis of any concessions or arguments advanced so far in the bargaining.

Thus, a concession should emerge in four parts:

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

Example: (Plaintiff's attorney Jones in a false arrest and false imprisonment civil rights case:)

- (1) I have reconsidered our discussion of our request for \$10,000 in

185. See C. STEVENS, *supra* note 184, at 77-96.

186. See Chertkoff & Conley, *Opening Offer and Frequency of Concession as Bargaining Strategies*, 7 J. PERS. & SOC. PSYCHOLOGY 181, 184-86 (1967).

187. See Part I(E)(5) *supra*.

punitive damages. For the sake of argument, I will agree that *Morgan v. Smith* could be read to support your contention that punitive damages might not be available in a case of this type even though the trend in the cases is clearly in our favor. Look at *Gitsdorf v. Watson*. Because of the uncertainty in the courts on this issue, I might be willing to recommend to my client a reduction of the amount to \$8,500 and discuss it under our general damages claim. I realize your client's aversion to the label "punitive." Although my client would like to deter this type of conduct in the future, I might be able to convince her that it does not matter what label we place on any particular type of damage.

(2) The \$8,500 figure represents a fair approximation of jury awards in this area for general damages in wrongful detentions of this duration, at least in my last review of jury verdicts. I am certain I cannot sell her on any lesser figure regardless of what we call it. She feels already as if we are letting your client off the hook in terms of publicity and accountability by talking settlement.

(3) If you will reconsider a written public apology by your people to be published in the paper, this might satisfy her on that point. She feels that people think she is some kind of criminal simply because she was arrested and detained.

(4) If we can agree on the amount and this general approach, I think we can draft the language of the letter to absolve her of the "criminal" implications and talk in terms of perhaps honest mistake as far as your client is concerned.

The example roughly illustrates the four part concession development; but it shows also other attributes of effective concession communications.

10. Inventing Alternatives

One of the core issues in the concession dilemma between A and B was the real or perceived position loss or weakness involved in making a concession, even a carefully reasoned and justified concession. In the example, Jones is offering an invented or hypothetical scenario that communicates a readiness to concede if her opposite concedes.¹⁸⁸ The conditional concession represents a movement toward accommodation with a minimal risk of position loss. The client must ratify the concession after Smith (defendant's attorney) signals that he is willing to compromise as well, perhaps with a modified version of the invented scenario. Further, Jones *valued* the concession so that it can be translated into the language of a lawsuit negotiation. Because of the invented and qualified scenario, Jones will be able to explore Smith's perception of the respective interests or needs of the parties. Jones is taking a conditional concession risk in an environment of protection in exchange for the potential rewards of reshaping the bargaining: from positional (share bargaining) to interest

188. R. FISHER & W. URY, *supra* note 7, at 59-83 (the process of generating a variety of possibilities before deciding avoids many of the problems inherent in "positional" bargaining—the sequential taking and giving up of positions).

(problem-solving) bargaining; from posturing deadlock to mutual concessions.

Smith's total rejection of the need-accommodation signal may represent a violation of the established norms in bargaining: a refusal to negotiate or indifference to the needs of his client. Such offenses to the conventional norms could ultimately strengthen the hand of Jones.

Should Smith not engage in the collaborative endeavor with Jones, Jones still has the tools for the hard bargainer's game. The invented possible solutions can be honorably withdrawn in face of Smith's "intransigence and failure to bargain in good faith."

Much of what we have discussed in surveying the nature and dynamics of the bargaining process has involved creating logical approaches and problem-solving designed to improve the bargaining environment. Much of what goes on in negotiation does not appeal to logic or reason to make things happen. Solving problems skillfully and honorably for one's client depends on the ability to recognize aspects of a psychological process in which logic and appeals to reason play only a small part.

C. *Managing the Psychology of Negotiation.*

1. Dealing With Anger

Participants often approach a bargaining setting with a calculated attitude toward the process and particularly toward the other side. Sometimes an emotional attitude is parlayed into a technique designed to exact concessions or lower an adversaries' bargaining expectations. Displays of anger or personal hostility toward one's opponent are often seen in bargaining. Anger may accurately communicate the seriousness of a position when displayed in response to the rejection of an offer, or it may be feigned in order to manipulate. Anger may intimidate: it may cause an opposing negotiator to question his bargaining position. The use of anger or personal animus in a negotiation is more likely to harden a position, provoke an angry response and transform an adversary into a visceral opponent—one who not only disagrees with your view but who despises you as a human being.

Often in bitter disputes the negotiation event may be the first opportunity for the adversaries or their lawyers to really square off. The likelihood of emotional fireworks is high. Anger or another powerful emotional response is understandable and is going to affect the bargaining. If possible, emotions should be talked about, acknowledged by the parties and dealt with as any other fact involved in the bargaining. If the background of the dispute is exceptionally hostile, ground rules prohibiting a rehashing of the angry past may help defuse a volatile bargaining session.

It may be best to respond to anger, real or feigned, by listening without reacting or interruption, until the speaker has completed his attack, acknowledge his anger and move to any substance contained in the outburst if possible.

Thus: "I can understand that my client's conduct makes you angry—his conduct appears irrational but this is what he is concerned about . . . (substance) . . . his conduct is just his way of trying to deal, perhaps ineffectively, with that issue." This focus, whether the anger is real or feigned, comes back to the merits without ignoring potentially pent up emotions, allows the speaker a release if the anger is real, and permits him to "talk tough" without affecting the issues of substance.

Finally, in most disputes the parties and their lawyers may be better psychologically prepared to shed blood than work towards compromise. An angry, fearful, hostile response creates an environment in which cooperation or meaningful bargaining becomes extinct because the obstacles to agreement are compounded by palpable "personal" factors.

2. Aggression As An Obstacle

Hard bargainers are aggressive. Aggressive negotiators "win." These statements are representative of the conventional wisdom in negotiation. Aggressiveness as an approach is seen in the negotiator that attacks: he attacks his adversary's case law, grasp of the facts, argument and ultimately his proposals for settlement. He may do this as an approach or maneuver or because of an aggressive personality. Conventional wisdom and some studies seem to support the notion that the aggressive hard bargainer normally "prevails" in bargaining. Without a thorough study of the context of the bargaining, such generalizations are misleading. Moreover, recent empirical data seems, in a general way, to contradict conventional wisdom.¹⁸⁹

Aggressiveness cannot be an effective approach, in that it may stimulate a retrenchment of positions or foster defensiveness. Those who are naturally cooperative, problem-solving or conciliatory, should be cautious about adopting an aggressive mein as a negotiating attitude.

3. Competitive/Hard Bargaining—Winning or Losing

At the close of every major labor negotiation or the completion of a negotiated international agreement, the media analysis of the event invariably pronounces a winner or a loser. The media's "post game" dissection of the 1982 NFL players' strike pronounced the owners as victors, the players as losers, based on prenegotiation positions taken in statements to the media, even though any careful look would show that the interests of both sides had been substantially served by the agreed compromise. The winner/loser phenomenon institutionalized by our culture and its adjudicative process finds its expression in approaches to negotiation.

The hard, competitive bargainer takes the share bargain or zero sum game approach with every negotiation. The competitive bargainer is concerned

189. See G. WILLIAMS, *supra* note 2.

with winning against a perceived adversary. In addition to possessing a very competitive attitude, this bargainer employs a posturing approach which is designed to lower the opponent's expectations. Generally hard competitive bargainers take extreme initial positions¹⁹⁰ and attempt to express their commitment to their position by emotional approaches including anger, personal hostility and aggressive behavior. Hard bargainers attempt to avoid making any concessions and are unlikely to reciprocate when one concedes them something. When a concession is made, it is minor and often just before stalemate. A hard bargainer will claim (often) that he has no authority to settle or even make concessions or that he really wants to go to trial. Any attempt to settle is simply a courtesy to the opponent, not really an earnest desire to reach agreement.

Hard competitive bargainers operate in a world of mistrust. The communication that is used is most often designed to deceive or intimidate. Information that is received directly from the other side is disregarded. When competitive bargainers get together, the result is that:

It [the competitive process in bargaining] stimulates the view that the solution of the conflict can only be of the type that is imposed by one side on the other by superior force, deception, or cleverness—an outlook which is consistent with the definition of the conflict as competitive or win-lose in nature. It leads to a suspicious, hostile attitude which increases the sensitivity to differences and threats while minimizing the awareness of similarities. . . . Since neither side is likely to grant moral superiority to the other, the conflict is likely to escalate as one side or the other engages in behavior that is morally outrageous to the other side.¹⁹¹

Deutsch's effects seem to be descriptive of much lawsuit negotiating. Much that is oppressive, inhumane or simply not moral about approaches to negotiation is inherited from mimicking the highly adversarial, conflict oriented, "litigation as warfare" style of the adjudicative process for resolving disputes in the bargaining process.

In addition to its embrace of adversarialism as an approach, the adjudicative model overemphasizes to lawyers that there are general rules of *law* that will govern and resolve a particular dispute. While lawyers are provided some substantive touchstones and departure points that lend order and a measure of predictability of outcome in bargaining, (if you have the good precedent, your reservation price is higher) this aspect of the adjudicative model may obscure, for the lawyer who reflexively follows it, the fact that effective negotiation seeks a fair and enduring result for the disputants rather than the vindication of a rule or law or a determination of who is right or wrong or who wins or loses.

The adversarial aspect of our present system may militate toward a zeal-

190. See note 178 *supra*; see also G. WILLIAMS, *supra* note 2, at 73.

191. C. DEUTSCH, *CONFLICTS: PRODUCTIVE AND DESTRUCTIVE*, *CONTEMPORARY SOCIAL PSYCHOLOGY* 161 (1973).

ousness with which lawyers, confident in their adversarial roles, exacerbate the dispute, provoke their adversaries, and prolong the disagreement by adhering to "legal" positions rather than by exploring meritorious solutions.

Lawyers bargain in the sometimes obscuring shadow¹⁹² of the adjudicative-competitive model, often to the detriment of their clients. Lawyers are barely able at times to distinguish the silhouettes of rational solutions that are not law, money or win/lose oriented.

4. Cooperative Bargaining

It should be remembered that one's choice of personal approach is limited by an overall goal or strategy. A strategy that has "settle" as its only limit will have markedly different techniques employed in negotiation than a specific and more demanding goal. Often a negotiator has to evaluate the psychology of bargaining in view of the parties' relationship. If disputing parties have an ongoing relationship that needs to be preserved, the substantial risk-taking that is presented by the threat of trial may be out of the question.¹⁹³ Those tactics that are characteristic of hard bargaining may be counterproductive if they threaten the continued existence of the relationship. Sometimes in this setting a lawyer may adopt an overall problem-solving attitude that is essentially more gentle and cooperative. This style has sometimes been characterized as a "soft" negotiating approach which may be vulnerable if paired against someone playing a "hard" bargaining game. Fisher and Ury, in their critique of "positional bargaining" set up the ironical contrast between these two styles of negotiating which they assert are the two choices of positional bargaining strategies available to most people.¹⁹⁴ While the contrasts of hard

192. See Mnookin & Karnhauser, *supra* note 119, at 950.

193. See Part I.(C)(2) *supra*.

194.

<i>Soft</i>	<i>Hard</i>
Participants are friends.	Participants are adversaries.
The goal is agreement.	The goal is victory.
Make concessions to cultivate the relationship.	Demand concessions as a condition of the relationship.
Be soft on the people and the problem.	Be hard on the problem and the people.
Trust others.	Distrust others.
Change your position easily.	Dig into your position
Make offers.	Make threats.
Disclose your bottom line.	Mislead as to your bottom line.
Accept one-sided losses to reach agreement.	Demand one-sided gains as the price of agreement.
Search for the simple answer: the one they will accept.	Search for the single answer: that one you will accept.
Insist on agreement.	Insist on your position.

or soft positions is exaggerated, the comparison of stereotypic attitudes serves to illustrate how psychological insights to negotiation may avoid stalemate or domination.

In most settings the ultimate goal of the negotiation or the normative values of the overall bargaining strategy should naturally mandate the choice of bargaining psychology.

A negotiator truly mindful of the need to preserve the parties' relationship and aware of the tendency of the hard bargaining-zero sum game toward stalemate should be professionally cognizant of the effect bargaining psychology may have on the ultimate resolution. In many cases where a relationship is paramount,¹⁹⁵ the need to compromise will substantially outweigh the need to win.¹⁹⁶ When one negotiates hard, a risk results that perils the parties' relationship. If one negotiates soft, a risk of dominance by a hard bargainer may develop unless one employs techniques that focus on the merits of the dispute, the interests of the disputants, and the needs of all of the participants.

The cooperative approach requires a fair degree of civility and sophistication on the part of bargainers and certainly a more pronounced emphasis on openness and trust than competitive approaches. Cooperatives have to see the short term and relational values inherent in a problem-solving approach and identify its characteristically open communication, trust and information sharing. All techniques are directed to the resolution of a mutually recognized problem. Cooperative problem-solving involves to some degree the following:

1. Recognizing that the resolution of the problem will be best accomplished by abandoning a win/lose approach.
2. Examining attitudes that promote win/lose or competitive approaches and defensiveness.
3. Changing highly adversarial or defensive behavior into a supportive approach that allows better communications. For example, rather than judge or evaluate—describe: "If I understand correctly, your client is concerned with her right to continued maintenance should she find a job. My client is concerned about the equity of that arrangement." Rather than: "your client's position that my client continue to pay alimony after she gets a job is ridiculous."
4. Develop discussions on "minor" shared problems, first to develop a

Try to avoid a contest of will.
Yield to pressure.

Try to win a contest of will.
Apply pressure.

Disparity between the parties' strengths

Large = extensive participation
Small = minor participation

Recalcitrance of client

Minor = extensive participation
Extensive = minor participation

195. See Starr & Yngvesson, *Scarcity and Disputing: Zeroing-in on Compromise Decisions*, 2 AM. ETHNOLOGIST 553, 564 (1975).

196. See Part I.(C)(2) *supra*.

problem-solving momentum, rather than attempt to control what is discussed or focus on one's strong points.

5. Rather than attempting to manipulate by various calculating bargaining strategies—spontaneously brainstorm or invent solutions that might resolve problems.

6. Empathize with the opponent's position or needs rather than ignoring them. Treat the respective interests or needs of the parties as equal rather than attempting to convince an opponent of the superiority of one's position.

7. Demonstrate a willingness to investigate issues rather than debate positions.

8. Both sides should work together to determine the facts through openly exchanging information rather than concealment or nondisclosure. Facts should be mutually agreed upon, jointly discovered or connected to outside objective criteria rather than be the subject of the negotiation. This view of facts in the problem avoids many adversarial, emotion laden arguments based on conflicting opinions as to what the facts are.

9. Develop solutions that respond to the parties' needs or interests in a creative way. Rather than making extreme demands or outrageous offers, focus on those matters that are susceptible of resolution for mutual gain. Avoid issues in which the success of one disputant results in loss for the other.¹⁹⁷

There is no doubt "problem-solving" or "principled" negotiation is going on in much lawyer negotiation, although we recognize much more readily the hard and competitive psychology. Cooperative problem-solving presents an approach that avoids much of the moral tension and manipulation involved in hard, competitive bargaining.

Often the other side will not play¹⁹⁸ or will attempt to exploit problem-

197. See, e.g., G. NIERENBERG, *supra* note 84, at 188. Fisher and Ury offer an excellent problem-solving program, which they call "principled bargaining." The steps are:

1. Separate the people from the problem. The participants are problem solvers. The goal of the negotiation is a wise outcome reached efficiently and amicably. Be soft on the people, hard on the merits. Focusing on the merits avoids issues of trust or distrust inherent in hard or soft bargaining.

2. Focus on the parties' interests not positions. Explore interests without fixing on a positional or bottom line approach.

3. Invent options for mutual gain. Develop multiple options to choose from for discussion, decide the most acceptable solution later.

4. Insist on objective criteria. Try to reach a decision based on standards independent of will. Reason and be open to reasons, yielding only to principle not pressure.

5. Develop A Best Alternative To A Negotiated Settlement. (BATNA) Plan what will be done if negotiations breakdown.

R. FISHER & W. URY, *supra* note 7.

198. R. FISHER & W. URY, *supra* note 7, at 113-47. They suggest, without being

solving behavior. A problem-solving, cooperative or principled approach cannot restructure a zero sum contest or a clear clash of disputants' needs or interests. And as Bellow and Moulton point out: "[T]he research that has been done on the subject, though inconclusive, suggests that initial overtures of cooperation may not be trusted or reciprocated unless they have been preceded by an initial period of uncooperativeness and pressure."¹⁹⁹ This phenomenon may be the result of a basic instinct to first lower the other side's expectations, or a function of simple prejudice about the combative nature of negotiation.

The effective bargainer cannot elect an either/or approach without sacrificing in some cases a client's interests. Like the complementary learning and persuasion modes in communication, an approach that is designed to be flexible, to synthesize concepts rather than adhere to a negotiating dogma, will best serve lawyers' morals, clients' needs and best attend the psychological hurdles in negotiation.

5. Responding to Psychological Ploys

Often strategic ploys or tactics may be employed to gain psychological advantage. A common rationale is that the negotiating technique, device or ploy is used to soften up the opponent, lower his expectation, make him uncomfortable in some cases, or at a minimum make him more psychologically amenable to settlement.²⁰⁰ Many so-called negotiation tactics involve nothing

wholly convincing, that there are ways of making hard bargainers cooperative. *See id.* ch. 7 ("What If They Won't Play? (Use Negotiation Jujitsu)"); *id.* ch. 8 ("What If They Use Dirty Tricks? (Taming the Hard Bargainer)").

199. G. BELLOW & B. MOULTON, *NEGOTIATION HANDBOOK—THE LAWYERING PROCESS* 156 (1981); *see also* H. RAIFFA, *supra* note 32, at 50 (Raiffa corroborates Bellow & Moulton's statement in his classroom experiments).

200. *See generally* J. HARTJE & M. WILSON, *supra* note 86, ch. 7, (tactical ploys and strategic behavior). Some of the common tactics employed in negotiation are:

A. Timing Tactics

1. *The Last Bite Tactic.* A negotiator seeks the accommodation of "one last matter" after the agreement has been completed. The bargainer is already mentally wining and dining in celebration of the compromise. Any additional demand seems consistent with agreement. The critical and objective ability to evaluate the client's or parties' best interest is clouded.

2. *Splitting the Difference.* One often hears the offer to split the difference during the concluding stages in a negotiation. Most negotiators know that splitting the difference is only effective when it is consciously used in conjunction with preceding offers and demands and, at a time when the split is favorable.

3. *The Preemptive Strike or Fait Accompli.* This tactic involves presenting the other side with an accomplished fact which achieves a goal in the negotiation and then sitting back to see what they will do about it. It is clearly an illegitimate bargaining tactic. It takes an item for discussion and compromise off the bargaining table to serve the advantage of one of the other

more than misrepresentations and the application of improper pressure which

of the disputants. When faced with the *fait accompli*, it is often useful to proceed with the negotiation as if it had not taken place, or assume that the act taken by the other side can be undone or will be undone as a contingent part of the final agreement.

4. *One Shot Bargaining—The One Fair Offer Or Demand.* Like the preemptive strike, this approach, sometimes called *boulwareism*, seems outside our normal understanding of the give and take phenomenon in bargaining. It was prohibited as an “unfair practice” in labor negotiations. The major drawback to the one firm and fair offer or demand is that no one believes it. See *supra* note 180.

5. *The Deadline.* It is common in negotiations that real or arbitrarily imposed time deadlines impose a result that favors one party. Arbitrary time deadlines are susceptible to verification as any other factual assertion in negotiation: “Why is it necessary that I respond to your offer within five days?” No good reason exists why one should be restricted by a time deadline, arbitrarily imposed, unless it suits a particular negotiating goal.

B. Authority Tactics

Another group of tactics depends upon the bargainer's relationship to his principal and representations concerning the negotiator's authority. There seem to be two common variants of the use of authority or failure of authority as a tactic to gain advantage in a negotiation:

1. *“The Mad Dog Client.”* The negotiator remains extremely agreeable, understanding and immune to the most persuasive arguments or creative solutions of his adversary because his client is a “mad dog” on this issue and simply would not agree. This allows the negotiator who uses it the security of never having to concede a thing on behalf of his aggressively demented client. In a negotiation so structured, movement toward compromise can come about only if the other side concedes.

2. *No Authority.* This involves giving the negotiator limited authority or tying him down to detailed instructions beyond which he may not travel. The standard climax in a “no authority” negotiation is when the agent discloses that he is absolutely happy with the agreement that has been worked out but that he has to report to his client to get the ultimate approval.

3. *Alliance.* Many times negotiators will use their client's association with an authority figure or an investigative authority as a bargaining tactic. “The Attorney General's Office is extremely interested in this action and is going to join as a party should this matter be litigated.” The technique is sometimes called “association and alliance.” It depends on the obvious psychological pressure that is applied by enlisting the participation and clout represented in a state or federal agency, or any ally having substantial power and prestige. The effectiveness of the technique depends on the reflected power of “the authority” and the dispiriting effect of being up against large numbers and significant resources.

C. Communication Tactics

1. *Trollope Ploy.* Another set of tactics involve the negotiator's approach to communications in the bargaining. One approach is called the “trol-

has nothing to do with the merits of the dispute. A response that seeks verifi-

lope ploy." When one bargainer communicates two messages, the tactic involves accepting and working with the message that one thinks is most advantageous and ignoring the other. A common example is the offer from an insurance adjuster to settle a car accident case for \$6,000 to \$8,000. The offer, of course, is \$8,000.

2. *Misdirection.* Other communication tactics involve use of misdirection. Often negotiators will stress matters that are niggling or unimportant in the negotiation in order to cover up or divert, attention from matters of substance or importance. Delaying an answer to a specific question or suspension of discussion of an issue until later or convening a caucus or a recess to consider a matter are all examples of a negotiation ploy called patience or forbearance. The tactic is designed to take the play and the negotiating momentum away from the other side and delay or avoid the discussion of their issues while focusing on the discussion of other issues.

D. Pressure Tactics

In any survey of common negotiating tactics, there is one group of ploys that deserves special mention—personal pressure tactics. There are lawyers who feel that it is appropriate in the zealous representation of their clients to make it personally hard on the other lawyer in the negotiation process. The goal is to psychologically wear down or soften up the opposition, so that concessions are made or bargains are struck partially in response to the negotiator's discomfiture. The principled negotiator should be sensitive to the non-meritorious or unethical approaches or tricks that are unfortunately often played by other lawyer-negotiators.

1. *Physical discomfort.* If one finds oneself negotiating, at the other side's office, sitting staring into the sun, in a chair that is three inches lower than all the other chairs in a room in which the temperature has been turned up to 90 degrees, one might suspect that the other side is using tactics designed to cause physical discomfort. Similar motives generate the kind of personal denigration or nonmeritorious attacks on one's client or oneself. Those who use such tactics care little for the niceties of professional decorum and are prepared to use reprehensible means to achieve their negotiating goals.

2. *Threats.* The use of the threat is one of the most talked about tactics in negotiation literature. A threat to go to trial, to withdraw an offer, to impose an arbitrary deadline, to call in the newspapers to publicize the matter, all involve pressure. The result of the pressure is hoped to cause a yielding, a retreat on positions or a desire to conclude negotiations promptly and generally to one's disadvantage. Every negotiation involves some implicit threats. The threat of deadlock, the threat of delay, the threat ultimately of trial with risky and potentially inequitable results, are all incidents of the normal lawsuit negotiation. However, the threat as a tactic of potential pressure is much used and abused in negotiations. Threats may, like a number of manipulative tactics, cause resistance and anger that ultimately will be counterproductive and interfere with the negotiation process.

3. *"Mutt and Jeff."* In team negotiation the "Mutt and Jeff" or "good

cation of assertions or applies outside objective standards generally can eliminate the potential for deception. In the case of attempted pressure tactics an insistence that the bargaining stick to merits usually nullifies such approaches. Often simply recognizing a tactic is enough to disarm it. Fisher and Ury suggest:

After recognizing the tactic, bring it up with the other side.

"Say, Joe, I may be totally mistaken, but I am getting the feeling that you and Ted here are playing a good-guy/bad-guy routine. If you two want a recess anytime to straighten out differences between you, just ask."

Discussing the tactic not only makes it less effective, it may cause the other side to worry about alienating you completely. simply raising a question about a tactic may be enough to get them to stop using it.²⁰¹

Any response in negotiating, whether it is a reaction to a manipulative tactic that has been recognized or a genuine rejoinder to an offer, should concentrate on the *merits* of the problem: [in response to a threat] "I am aware of the consequences if I fail to concede on the point you just raised. However, I think a solution to the problem is to resolve the issues here to our *mutual* satisfaction."

An alternative approach is to simply ignore the tactic, to allow a situation where the other side can "save face." One should search for ways to demonstrate to the other negotiator who has taken some position as a tactical ploy, that the desired revision of her position is consistent with the principles es-

guy, bad guy" tactic is sometimes seen. One of the team is friendly and the other is nasty or the team appears to have an internal conflict concerning its bargaining position. The technique is so notorious that it is easily recognized and has, or should have, very little effect. The goal of the tactic is to manipulate the adversary so that he takes the marginal concessions granted by the "soft liner" because they are vastly superior to what is offered by the "hard liner."

4. *Lock-In or Precondition Tactics.* A lock-in tactic is similar to the "take it or leave it" approach of Boulwareism, but the position taken is locked-in either by publicity or some form of inexorable commitment so that it is clear that one cannot be moved from the position without considerable loss of face.

Similarly, the use of a precondition to negotiation is simply a demand for an immediate concession as the carrot to keep the bargaining continuing. Both approaches are gambles and are contradictions where there has been an earlier agreement to negotiate. These tactics, like a number of those catalogued here, are inimical to the spirit of negotiation. Each places severe pressure on the good faith negotiator who seeks communication and discussion in order to solve the impasse in the case.

5. *Outnumbering.* Occasionally lawyers will attempt to outnumber the other side in order to dominate the agenda and to psychologically, if not literally, overwhelm the opposition. *Id.*

201. R. FISHER & W. URY, *supra* note 7, at 136.

poused by her prior commitments or the entire goal of the negotiation. Where a "tactical position" has been abandoned in favor of an approach on the merits the careful bargainer should minimize the shift in his opponent's position in order to cushion the impact of losing face as a result of deserting a position earlier announced as "final." When responding to a proposal embodied in a specific tactic it may be useful to keep the discussion flowing by treating it as an available alternative, unless it is too bizarre or illegitimate. Analyze the position represented by the tactical statement from the perspective of the interests of the disputants. If the tactical position or ploy is ludicrous, that will become apparent without any characterizing being done. Take the tactical assertion, modify it and build upon it so that it becomes a subject that can be successfully discussed rather than merely asserted as a position.

A tactic that is unconnected with any meritorious claim or any issue of substance must not influence the bargaining. The tactic must be ignored or nullified or the other side will be encouraged to continue to approach bargaining in that ritualized and willful way.

D. *Ethics in Negotiation—Is There Ethical Deception?*

It can be seen that the process of negotiating on behalf of a client may be a manipulative and a duplicitous endeavor which strains the professional conscience and individual morality. In a profession in which the first precept of professional responsibility was a "high-toned morality," negotiation can provide a stringent test. In one of the original statements dealing with the duties of a lawyer in his relationship to the public, the court, the profession and the client, the leading statement was as follows: "There is perhaps no profession after that of the sacred ministry, in which a high-toned morality is more imperatively necessary than that of the law."²⁰² Yet we know that our friends and our neighbors view the legal profession as one in which a lawyer will stoop to virtually any trickery on behalf of clients.

This image of lawyers has persisted over the centuries. Is it because the nonlawyer public is jealous of the lawyer's association with power, prestige and money? Or is it because lawyers feel in most of their work that they are entitled, like Metternich, to depend on cunning, calculation, and a willingness to employ whatever means justify the end of the client's objectives? This view may be supported by what we know about lawyer's ethics in negotiation. We know there is deception. Can it be justified? Does it serve a larger purpose than client or lawyer avarice or need to "win."

Let us examine the following situation. You have met with your client in a serious personal injury matter. You have prepared the case thoroughly and have discussed with the client your evaluation of the case and the client's goals

202. G. CHARSWOOD, AN ESSAY OF PROFESSIONAL ETHICS 55 (1876), cited in Rubin, *A Causerie on Lawyers' Ethics in Negotiation*, 35 LA. L. REV. 577, 578-79 (1975).

and needs. You have agreed that you will not settle the case for less than \$80,000. The next day your telephone rings. It is the insurance adjuster that you have been dealing with on the case. After ritualized justifications and posturing, he surprisingly offers \$90,000 to settle the case. What should you do? A number of approaches are available.

Most lawyers will have no difficulty in stating to the adjuster immediately that "My client will not take a penny less than \$100,000 *period* in this situation," or "Gee whiz Bob, I do not have any authority to settle at this point. That sounds a little low. Let me talk to the client and get back to you." Another option is: "Let me convey that to the client and get back to you." In the latter setting the lawyer would consult again with the client. The client would be advised that since \$90,000 is the first offer, the adjuster, according to negotiating lore, is bound to come up. The first offer cannot be believed, therefore, they should be able to get more than \$90,000 from the adjuster. All of the responses that seek more than \$90,000 are premised on the lack of credibility of the first offer. They are also founded upon the notion in the literature of lawyers professional responsibility that failing to take full lawful advantage of one's adversary may be unethical.²⁰³

Fidelity to the client is a highly salutary objective in most legal representation, but in many respects in negotiation, adherence to the client's needs provides the ethical underpinning as well as the articulated reason for questionable lawyer conduct—misrepresentation and distortion of information. The conduct that goes on in most negotiation is justified by lawyers on the basis that all lawyers understand what is going on. In virtually every statement of position lawyers are merely "puffing" like car salesmen, and any false statement or misrepresentations in negotiation are to be understood as puffing and discounted.

In a perceptive discussion, Judge Alvin Rubin has put his finger on the conventional ethical wisdom in negotiation:

To most practitioners it appears that anything sanctioned by the rules of the game is appropriate. From this point of view, negotiations are merely, as social scientists have viewed it, a form of game; observance of the expected rules, not professional ethics, is the guiding precept. But gamesmanship is not ethics.²⁰⁴

The existing Code of Professional Responsibility does not shed much light on the ethical difficulties in the area of lawsuit negotiating. In summary, the Code provides that a lawyer shall not *knowingly* make false statements of the law. He must not involve himself in the creation or preservation of evidence when he knows, or it is obvious that the evidence is false. He must not counsel or assist his client in conduct that he knows to be illegal or fraudulent, or knowingly engage himself in other *illegal conduct* or conduct contrary to disci-

203. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-101(1)-(3) (1979).

204. Rubin, *supra* note 202, at 586.

plinary rule or to conceal or knowingly fail to disclose that which he is *required by law* to reveal.²⁰⁵ The lawyer is urged to treat with consideration all persons involved in the legal process and avoid infliction of needless harm. He or she should be temperate and dignified, and refrain from all illegal and morally reprehensible conduct.²⁰⁶

Most of these prescriptions deal directly with the preparation or presentation of testimony or evidence in court and apply only tangentially to the negotiation context. The ethical considerations in two respects deal more directly with settlement negotiations. The Code provides that clients must approve all settlements,²⁰⁷ and that lawyers disclose potentially conflicting interests in a bargaining setting.²⁰⁸

The absence of guidance in the ethical literature has perhaps led to the moral ambiguity in negotiations and development of the rule of intelligently informed gamesmanship described earlier. For most lawyers the conventions in negotiation practice do not rise to the level of moral reprehensibility that could mandate a less manipulative approach to bargaining.

The duties owed to the client, albeit commendable, often inhibit deeper penetration of the moral issues in negotiation. An early look at the problem emphasized that the lawyer "is an instrument for the furtherance of justice and is under no obligation to aid his client in obtaining an unconscionable advantage. Of course, in the zone of doubt an attorney may and probably should get all possible for his client."²⁰⁹

The problem is and has been that the *zone of doubt* is virtually all encompassing. The zone of doubt theory suggests that in the hypothetical discussed above that to maximize the client's situation, the lawyer may be justified in flatly rejecting the first offer of \$90,000 and to seek more, knowing or surmising that the first offer is not the adjuster's bottom line, without even consulting with his client as to that course of action. This response is justified by the rationale of maximization of the client's interest.

Judge Rubin in a stirring effort attempted to narrow the zone of doubt and to redefine the issues in the ethics of negotiations:

[The lawyer] is enjoined to point out to his client, "those factors that may lead to a decision that is morally just." Whether a mode of conduct available to the lawyer is illegal or merely unconscionably unfair, the attorney must refuse to participate. This duty of fairness is one owed to the profession and to society; it must supercede any duty owed to the client.

. . . Client avarice and hostility neither control the lawyer's conscience

205. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(3), (5)-(8) (1979).

206. *Id.* EC 7-27, 7-10, 7-9.

207. *Id.* EC 7-7.

208. *Id.* EC 5-16, 5-17.

209. Herrington, *Compromise vs. Contest in Legal Controversies*, 16 A.B.A. J. 795, 798 (1930).

nor measure his ethics. Surely if its practitioners are principled, a profession that dominates the legal process in our law-oriented society would not expect too much if it required its members to adhere to two simple principles when they negotiate as professionals: negotiate honestly and in good faith; and do not take unfair advantage of another—regardless of his relative expertise or sophistication.²¹⁰

In evaluating the precepts proposed by Judge Rubin the question is posed, as in the matchup of the hard and soft bargainer—"What will happen when the 'idealistic' lawyer who conducts himself the way Judge Rubin suggests is pitted against the unscrupulous and dishonorable adversary?" The image is one of Billy Budd contesting against Darth Vader: the high road should be avoided because some will take advantage. Yet such mismatches exist constantly in present practice and are condoned and rationalized. The oral history of legal negotiation is filled with tales of the young lawyer taken in by the experienced guileful veteran who is simply operating under the existing rules of the game. It has been suggested that a remedial response to such mismatches "would discourage lawyers from striving for excellence and would ultimately be a detriment to the legal profession."²¹¹ The next time the youngster will know better.

Recognizing the need for some standards in legal negotiation and in an attempt to develop a broader normative approach, in 1980 the ABA Commission on Evaluation of Professional Standards elaborated not only a number of guiding principles for the negotiator but specific responses in a negotiation setting.²¹²

210. Rubin, *supra* note 202, at 593-94 (quoting MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-8 (1979)).

211. N. JACKER, NEGOTIATION TECHNIQUES, AN OVERVIEW L-105 (1982) (CLE Material from Washington State Bar Association).

212. *E.g.*, MODEL RULES OF PROFESSIONAL RESPONSIBILITY Rule 4 introduction (Discussion Draft 1980):

As negotiator, a lawyer should consider not only the client's short-run advantage but also his or her long-run interests, such as the state of future relations between the parties. The lawyer should help the client appreciate the interests and position of the other party and should encourage concessions that will effectuate the client's larger objectives. A lawyer should not transform a bargaining situation into a demonstration of toughness or hypertechnicality or forget that the purely legal aspects of an agreement are often subordinate to its practical aspects. When the alternative to reaching agreement is likely to be litigation, the lawyer should be aware that, although litigation is wholly legitimate as a means of resolving controversy, a fairly negotiated settlement generally yields a better conclusion. A lawyer should also recognize that the lawyer's own interest in resorting to litigation may be different from a client's interest in doing so.

A lawyer's style in negotiations can have great influence on the character of the negotiations—whether they are restrained, open, and business-like, or acrimonious and permeated with distrust. Whatever their outcome, negotia-

The draft rules required specifically that the client be informed of all settlement communications and that the lawyer take particular responsibility to see that acceptance of a settlement be a product of the client's judgment.²¹³

tions should be conducted in a civil and forthright manner. Nevertheless, it must be recognized that in negotiations a lawyer is the agent for the client and not an arbitrator or mediator. Negotiation is in part a competition for advantage between parties who have the legal competence to settle their own affairs. A lawyer as negotiator should not impose an agreement on the client, even if the lawyer believes the agreement is in the client's best interests. By the same token, a lawyer does not necessarily endorse the substance of an agreement arrived at through his or her efforts.

213.

Id. Rule 4.1 provided:

A lawyer conducting negotiations for a client shall:

- (a) Inform the client of facts relevant to the matter and of communications from another party that may significantly affect resolution of the matter;
- (b) In connection with an offer, take reasonable steps to assure that the judgment of the client rather than that of the lawyer determines whether the offer will be accepted.

Id. comment provided:

A lawyer should conduct negotiations with a view to maximizing the interest of the client. Ordinarily the interests of client and lawyer are harmonious in that a resolution advantageous to the client is correspondingly advantageous to the lawyer. However, the interests of lawyer and client can diverge. For example, in contingent fee litigation a substantial offer may be forthcoming before the lawyer has invested much effort in preparation of the case; at that point it may be in the lawyer's interest to accept the offer, while it might be in the client's interest to have the case more fully developed as a means of provoking a larger offer. Conversely, a lawyer compensated on an hourly basis has an interest in full preparation of a case apart from settlement. So also, a lawyer's interest in maintaining a reputation as a hard bargainer may lead the lawyer to disparage a proposal that the client might welcome as an end to an irksome controversy.

In some circumstances, variance between the lawyer's and the client's interest is unavoidable. The lawyer should present such divergence of interest to the client as openly and as objectively as possible. A lawyer who withholds a serious offer from an opposing party, or fails to disclose how it might affect the lawyer's own interest, in effect assumes a proprietary position in the transaction to the detriment of the client. Information about such an offer cannot be withheld because the lawyer believes accepting the offer would not be in the client's best interests; that is a matter for the client to decide. See Rules 1.3 and 1.4.

A lawyer should assume other lawyers will comply with the obligations imposed by this Rule. It is therefore inappropriate to circumvent opposing counsel in order to present facts or communicate an offer directly to the other party, for doing so undermines the negotiator's function. A lawyer's refusal to communicate an offer or position is a violation of a duty not only to the lawyer's client but also to the party who submitted the offer. In transmitting an

Draft Rule 4.2 made plain that fairness and above board dealing was the expected touchstone of negotiation: misrepresentations and failure to disclose certain material facts were prohibited. Draft Rule 4.2(b) stated:

A lawyer shall not make a knowing misrepresentation of fact or law, or fail to disclose a material fact known to the lawyer, even if adverse, when disclosure is:

(1) Required by law or the Rules of Professional Conduct; or

(2) Necessary to correct a manifest misapprehension of fact or law resulting from a previous representation made by the lawyer or known by the lawyer to have been made by the client, except that counsel for an accused in a criminal case is not required to make such a correction when it would require disclosing a misrepresentation made by the accused.²¹⁴

offer to the lawyer for another party, reference can be made to this obligation. If it appears that the opposing lawyer persists in refusing to transmit the offer, complaint may properly be made to the appropriate disciplinary authority; if the negotiation is conducted in the context of litigation, it is proper to inform the court.

(Citing MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-7; DR 7-104 (1979); ABA Comm. on Professional Ethics and Grievances, Formal Op. 326 (1970).

214. MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.2(b) (Discussion Draft 1980). The remainder of the rule read:

(a) In conducting negotiations a lawyer shall be fair in dealing with other participants.

(c) A lawyer shall not: (1) Engage in the pretense of negotiating with no substantial purpose other than to delay or burden another party; (2) Illegally obstruct another party's rightful access to information relevant to the matter in negotiation; (3) Communicate directly with another party who the lawyer knows is represented by other counsel, except with the consent of the party's counsel or as authorized by law.

Id. comment provided:

Fairness in negotiation implies that representations by or in behalf of one party to the other party be truthful. This requirement is reflected in contract law, particularly the rules relating to fraud and mistake. A lawyer involved in negotiations has an obligation to assure as far as practicable that the negotiations conform to the law's requirements in this regard.

Under the usually accepted conventions of negotiation, the parties have only limited duties of disclosure to each other. Generally, a party is not required to apprise another party of background facts or collateral opportunities for gain that may accrue as a result of a transaction between them. Facts that must be disclosed do not include estimates of price or value that a party places on the subject of a transaction, or a party's intentions as to an acceptable settlement of a claim, or the existence of an undisclosed principal except where nondisclosure would constitute fraud. A party is permitted to suggest advantages to an opposing party that may be insubstantial from an objective point of view. The precise contours of the legal duties concerning disclosure, representation, puffery, overreaching, and other aspects of honesty in negotiations cannot be concisely stated. They have changed over time and vary ac-

Draft Rule 4.3 required lawyers to look to the substance of an agreement to

ording to circumstances. They also can vary according to the parties' familiarity with transactions of the kind involved. Thus, the modern law of commercial transactions places duties of disclosure on sellers that go well beyond the classic rule of *caveat emptor*, and modern securities transactions often must conform to elaborate disclosure rules. It is a lawyer's responsibility to see that negotiations conducted by the lawyer conform to applicable legal standards, whatever they may be.

In negotiation as in litigation, a lawyer generally has no duty to inform an opposite party of relevant facts and circumstances. However, it is the lawyer's duty to be forthcoming when the lawyer or the client has misled another party with respect to a matter of fact or law, for in such circumstances the failure to act is the equivalent of actively misleading the other party. A lawyer should not induce a belief that the lawyer is disinterested in a matter when in fact he or she represents a client.

Whether there should be a further burden of disclosure on a lawyer has long been a matter of some controversy. Canon 41 of the Canons of Ethics required, in general terms, that "when a lawyer discovers that some fraud or deception has been practiced, he should endeavor to rectify it," if necessary by undertaking to "inform the injured person or his counsel." A more limited requirement was imposed by DR 7-102(B) of the ABA Model Code of Professional Responsibility. The competing considerations are clear but difficult to resolve. A lawyer could properly be regarded as having a professional responsibility to see that negotiations under his or her auspices are informed on all sides. However, to make a lawyer responsible for an opposing party's information about the matter in negotiation exposes the lawyer to charges of misfeasance that can be easily contrived, and exposes the transaction to additional risk of being legally avoided on the ground of mistake. The likelihood of these consequences is especially severe when the facts concerning the matter in negotiation are inherently uncertain or complex, or . . . [where] there is substantial discrepancy between parties' access to information about the matter. Counsel for the accused in a criminal case is subject to constraint against disclosing during negotiations facts that might incriminate the client. *See also* Rule 1.7.

Negotiation is ordinarily a voluntary process. The parties usually determine the agenda and procedure of negotiation, without the constraint of externally imposed rules or an external authority, such as a judge, to enforce them. The principal sanction supporting standards of decorum and fairness is that of breaking off negotiations, although in some situations, such as collective bargaining, there may also be legal sanctions to compel bargaining.

There are, however, limitations that should be observed by a lawyer in conducting negotiations. As an aspect of the duty to deal fairly with other parties, a lawyer should not engage in the pretense of negotiation when the client has no real intention of seeking agreement. In particular, it is dishonest to pretend to negotiate when the real purpose is to prevent the other party from pursuing an alternative course of action. More generally, a lawyer acting as negotiator should recognize that maintaining a fair and courteous tenor in negotiation can contribute to a satisfactory resolution. This is particularly

prevent a fraudulent, illegal or unconscionable result—if not to guarantee substantive fairness.³¹⁶

true when the parties to the negotiation have a continuing relationship with each other, as in collective bargaining or in negotiations between divorcing parents concerning child custody. An agreement that is the product of open, forbearing, and fair-minded negotiation can be a demonstration by the lawyers of the conduct that the parties themselves should display toward each other.

(Citing MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-10; DR 7-101(A)(1), 7-102, 7-104 (1979); ABA Comm. on Professional Ethics and Grievances, Formal Op. 337 (1974); Leubsdorf, *Communications with Another Lawyer's Client*, 127 U. PA. L. REV. 683 (1979); Rubin, *supra* note 577; Annot., 1 A.L.R.3d 1113 (1965)).

215. MODEL RULE OF PROFESSIONAL CONDUCT Rule 4.3 (Discussion Draft 1980) provided: "A lawyer shall not conclude an agreement, or assist a client in concluding an agreement, that the lawyer knows or reasonably should know is illegal, contains legally prohibited terms, would work a fraud, or would be held to be unconscionable as a matter of law."

Id. comment provided:

Although a lawyer is generally not responsible for the substantive fairness of the result of a negotiation, the lawyer has a duty to see that the product is not offensive to the law. There are many legal proscriptions concerning contractual arrangements. Being a party to some types of agreement is a penal offense. Some types of contractual provisions are prohibited by law, such as provisions purporting to waive certain legally conferred rights. Modern commercial law provides that grossly unfair contracts are unconscionable and may therefore be invalid. Such proscriptions are intended to secure definite legal rights. As an officer of the legal system, a lawyer is required to observe them. On the other hand, there are legal rules that simply make certain contractual provisions unenforceable, allowing one or both parties to avoid the obligation. Inclusion of such provisions in a contract may be unwise but it is not ethically improper, nor is it improper to include a provision whose legality is subject to reasonable argument.

A lawyer is not obliged to make an independent investigation of the circumstances of a transaction to assure that it is legally unimpeachable. Generally speaking, the lawyer is only obliged to act upon the basis of matters that the lawyer actually knows or reasonably should be expected to know in the circumstances, and upon reasonable suppositions about the resolution of doubtful questions of law. However, in certain situations the lawyer may be legally required to make a particular investigation or determination with regard to the regularity of a transaction; if so, the lawyer is bound by the prescribed standard of conduct. Moreover, a lawyer is not absolved of responsibility for a legally offensive transaction simply because the client takes the final step in carrying it out. For example, a lawyer who prepares a form contract containing legally proscribed terms is involved in a transaction in which the form is used, even though the lawyer does not participate in a specific transaction.

A transaction that works a fraud on another person is proscribed by law, and a lawyer should not be involved in such a transaction. This principle ap-

While the commission draft did not make radical proposals, the spotlight was placed on specific lawyer conduct in negotiation and the tenor of the comments was clearly consistent with the concerns articulated by Judge Rubin.²¹⁶

It is ironic to note that the specific approach taken to negotiation by the Commission draft was abandoned by the ABA delegates, the lawyers themselves, for a business as usual approach. Rule 4.1 as adopted by the ABA provides:

In the course of representing a client, a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person; or (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.²¹⁷

The adopted rule and the comments can clearly be viewed as a step backward from the aspirations of Judge Rubin and the Commission drafters of the model rule. The informed gamesman or the car salesman puffing rule is codified, although with some parameters. The comment to the rule in effect charges:

- (1) Do not believe in statements of price or value,
- (2) Do not believe statements regarding the parties' intention as to whether or not a settlement figure is acceptable, and
- (3) A lawyer does not have to disclose his principle unless failure to disclose would be fraud.

It is hoped that the enlightened guidance of the draft version of the rules

plies whether the defrauded party is a party to the transaction or not. Hence, a lawyer should not participate in a sham transaction whose purpose is to interfere with an obligation to a third party: a conveyance in fraud of creditors, for example, or a transaction involving tax evasion.

(Citing MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(7), (8) (1979)).

216. The references to Draft Rule 4.2 cited Judge Rubin's article, *supra* note 202.

217. MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.1 (ABA Adopted Draft 1983). *Id.* comment provides:

A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by failure to act.

This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are in this category, and so is the existence of an undisclosed principle except where nondisclosure of the principle would constitute fraud.

rather than the modest and somewhat jaded approach ultimately adopted will reach into lawyers' work in negotiation. It does not seem an extraordinary expectation to require truth and honor, if not full disclosure, as watchwords of our dealings with one another rather than the shifting morality of the used car lot. Each lawyer will have to reckon with the demands of clients to manipulate or deceive other lawyers and their own needs to manipulate clients for their own ends or the client's "best interests." Each lawyer will need to assess the extent to which the demands and expectations of the profession and clients will erode established moral positions. Negotiation is not a game but a serious and consequential endeavor for the benefit of clients and our system of justice. The gap between what is tolerated and what *should be* practiced is:

The difference between the true lawyer and those men who consider the law merely a trade is that the latter seek to find ways to permit their clients to violate the moral standards of society without overstepping the letter of the law, while the former look for principles which will persuade their clients to keep within the limits of the spirit of the law in common moral standards.²¹⁸

E. *Lawyer Skills in Closing the Agreement*

During the final negotiation stages statements such as "this is my best offer" or "we cannot agree to that amount" are much more definitive than when made earlier in the bargaining.²¹⁹ As the negotiation progresses, it is important for the negotiators at all times to know where they are precisely in the exchange of information and the solution to problems on substantive issues.

Negotiators should regularly review what has already been agreed upon and assess progress on the remaining issues under consideration. This review and progress assessment not only procedurally nails down slippery or difficult areas of agreement, it is psychologically motivating to the negotiators. The parties can see generally that significant inroads have been made toward compromise, perhaps even on the most knotty of issues. The review of the remaining issues allows the negotiating parties to make a realistic comparison as to how far they have come in the negotiation. This exercise is not only sound organizationally but useful from an emotional standpoint as well.

A periodic progress assessment will eliminate the likelihood of issues or concerns slipping through cracks later to reemerge and confound the seeking of closure.

When a final agreement is reached, the agreement should be specifically reviewed in all its detail prior to any discussion of drafting a settlement agreement. A conventional wisdom in negotiating is that one should seek to draft the final agreement so that if any ambiguity exists in the substance of the

218. P. CALAMANDREI, *EULOGY OF JUDGES 62* (1942) quoted in Rubin, *supra* note 204, at 587.

219. See P. GULLIVER, *supra* note 33, at 84.

parties' agreements one can resolve that ambiguity in favor of one's client in the written agreement. There should be no ambiguity when the written agreement is memorialized.

There are dangers inherent in the insistence on specific detailed agreements on all issues. It often develops that parties will agree in a general way about a detail but when that detail becomes more and more concrete and specific, the early agreement will break down. A difficulty in closing the agreement is caused by ignoring important details in the final product. Negotiators are tempted to look at a detail and if it is of an exacerbating nature, avoid dealing with it directly. A bypassing approach at the closing stage of negotiation can create later party dissatisfaction that causes disputing after the dispute was thought settled. Unsettled issues are ticking time bombs that will explode later to destroy the agreement. Although the effort involved in specifically working out the detail at the closing of the settlement may be arduous, it is better that the painstaking work be done during the negotiating process than risk the agreement be jettisoned because of dissatisfaction on the part of the parties. This effort is rewarded later in the drafting process in which the lawyer is attempting to crystallize and make predictable the completed meeting of the minds.

There is a feeling at the making of a negotiated settlement that once an agreement is reached verbally, emotionally or psychologically, the dispute is over. This reaction can be very misleading. A crucial part of the negotiating process is the skillful memorializing of the specific agreement of the parties so that it can serve a useful function for them.²²⁰

The drafter must first understand the operational function of the writing. If the agreement is to guide future conduct and establish a "legal" relationship, the doctrinal area should be carefully researched and made a subject of reference—statutes, treatises and other sources. The agreement should be drafted as specifically as possible and each issue dealt with in a specific fashion. Any areas of complexity should be defined.

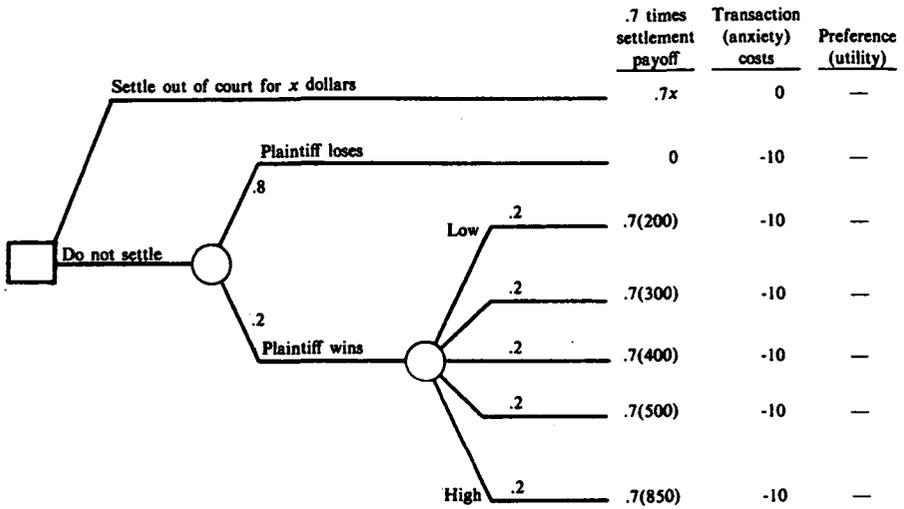
If the agreement is to be commonly worked with by lay parties, it should be carefully crafted to avoid "legalese", jargon or archaic uses. The drafter should avoid vague and overbroad language when defining the prescribed conduct of parties, conditions, substance or procedure.

III. CONCLUSION

The purpose of this paper is to suggest and highlight the unseen lawyer skills involved in the operation of negotiation. The extent to which lawyers understand the discrete application of common operational skills to each stage of the bargaining process may be crucial to the continuing exploration of negotiation as a central form of private dispute resolution.

220. See Rutter, *supra* note 4, at 338.

Appendix A



.Figure 15. Plaintiff's decision tree for the last stage of pretrial negotiations. (Costs are in thousands of dollars.)

From H. Raiffa, *The Art and Science of Negotiation*, p. 74.

1. 20 points must be distributed among the options for each standard.

DECISION-MAKING MATRIX

2. The standards are given a weight factor (multiple) which indicates their relative importance.
 1 to 10

STANDARDS		OPTIONS							
		Rating	Total	Rating	Total	Rating	Total	Rating	Total
SCORE ANY NUMBER FROM 1 to 10 ON EACH STANDARD		Multiple times the value = total							
GRAND TOTALS									

ISSUE-POSITION DEVELOPMENT INSTRUMENT

ISSUES- POSITIONS DISPUTANTS	INTERESTS	ISSUES	INITIAL POSITIONS	FALLBACK POSITIONS	BOTTOM LINES	IMPASS CONSEQUENCES
PARTY		1.				
		2.				
		3.				
RESPONDENT		1.				
		2.				
		3. NONNEGOTIABLE #2				

The flow of the instrument reads from left to right in the form above. However, when completing the instrument, you should complete the columns in the order indicated by the numbers at the bottom of the instrument.