Making Offers and Other Concessions

From JAY FOLBERG, DWIGHT GOLANN, THOMAS STIPANOWICH & LISA KLOPPENBERG, RESOLVING DISPUTES: THEORY, PRACTICE & LAW, Chapter 5 (2d ed. 2010)

E. The Timing of Demands and Offers

As we noted earlier, the timing of offers and demands may vary between positional and interest-based approaches. Positional bargainers tend to make demands and offers early. Their initial interaction may commence with the presentation of a demand. The filing of a lawsuit without prior negotiation of the claim is one way to assert a demand and start negotiations. In contrast, interest-based negotiators seek information from their counterpart and prefer to establish a positive relationship before discussing proposals. One purpose of the information sought and perhaps exchanged is to discover interests that might lead to an acceptable solution that creates value, even if there might later be more competitive bargaining to allocate the added value.

Whether you prefer a competitive or cooperative approach, there will be negotiations in which you must decide if it is better to make the first offer or invite an offer from the other side. (Offers and demands are used here synonymously.) If choosing to make the first offer, should it be extreme, modestly favorable, exactly what you expect, or equitably calculated to be fair to all and maximize collective value? If the first offer is made by the other side, should you flinch, as recommended by Dawson, counteroffer immediately, or process the offer and come back with an exaggerated counteroffer or one closer to your reservation point? How does formulating the initial offer relate to what we have learned about perceptions, ripeness, anchoring, preparation, the role of expectations, and trust?

The negotiation guidebooks are full of advice on making offers, much of it contradictory. There appears to be consensus that in distributive negotiations, more extreme or aggressive offers result in more favorable outcomes. (However, an exaggerated offer can come before or after learning the other side's opening position.) This consensus, focused on distributive negotiation, doesn't help you on how to start an integrative negotiation. The first selection below, which is based on Professor Williams's extensive empirical research of lawyer negotiators, weighs the advantages and disadvantages of three different opening strategies. Each strategy assumes that both sides seek to establish the illusion that they are inalterably committed to their opening positions. The second excerpt explores when to make the first offer and how to respond to an initial offer. It reviews the power of the first offer as an anchor, which you learned about in Chapter 3.

Gerald R. Williams and Charles Craver, *LEGAL NEGOTIATION*

79, West Publishing (2007)

…The lawyers articulate their opening positions. At this early stage in the dispute, that exchange is not as simple as it appears. The facts are not all in, the legal questions are not fully researched, and unforeseen developments loom on the horizon. In the face of these uncertainties, the

negotiators must leave themselves a certain amount of latitude, yet they must develop credible opening demands and offers…

[T]here are essentially three strategies that can be used in framing an opening position…. Negotiators may adopt the *maximalist strategy* of asking for more than they expect to obtain, they may adopt the *equitable strategy* of taking positions that is fair to both sides, or they may adopt the *integrative strategy* of searching for alternative solutions that would generate the most attractive combination for all concerned. Each strategy has its own strengths and weaknesses.

Maximalist Positioning

Arguments for maximalist positioning begin with the assumption that the opening position is a bargaining position, and that no matter how long bargainers may deny it, they expect to come down from them to find agreements. Maximalist positioning has several advantages. These position statements effectively hide the bargainer's real or minimum expectations, they eliminate the danger of committing to an overly modest case evaluation, they provide covers for them while they seek to learn real opponent positions, and will very likely induce opponents to reduce their expectations. They also provide negotiators with something to give up, with concessions they can make, to come to terms with opponents. This last factor may be especially important when opponents also open high, and negotiators are required to trade concessions as they move toward mutually agreeable terms. These advantages may lead many to believe that negotiators who make high opening demands, have high expectations, make relatively small and infrequent concessions, and are perceptive and unyielding fare better in the long run than their opponents.

The potential benefits of the maximalist position need to be weighed against its potential demerits, which are those associated with competitive/adversarial strategies…. The most important weakness is the increased risk of bargaining stalemates. Competent opponents will prefer their non-settlement alternatives to the unreasonable demands and supporting tactics of the maximalist negotiators, unless the opponents themselves can devise effective strategies to counter such maximalist behaviors. We observe in the data that competitive attorneys at all levels of effectiveness are rated as making high opening demands. Yet, by definition, effective competitive/adversarials use the strategy proficiently, while ineffective competitive adversarials do not. We are forced to conclude that in the legal context the maximalist strategy does not consistently bring high returns for those who use it—only for those who employ it effectively. How high demands can be without losing their effectiveness depends on several considerations. One is the nature of the remedy being sought. By their nature, contract damages are less inflatable than personal injury damages, for example, and negotiators who multiply their contract damages as they do their personal injury claims will undermine their own credibility. Another consideration is local custom. Specialized groups within the bar develop norms and customs that provide measures against which the reasonableness or extremism of demands can be evaluated. Not all high demands are the same. Some demands lack credibility on their face by their inappropriateness and lack of congruity in the context in which they are made. But the level of demands is not the sole factor. The data suggest that effective competitive/adversarial negotiators are able to establish the credibility and plausibility of high demands by relying on convincing legal argumentation. Ineffective competitive/adversarials lack the skills to do this, and, in the absence of convincing support, their high demands lack credibility.

Finally, it should be noted that the effectiveness of high demands will depend upon the opponents against whom the high demands are made. In cases where opponents are unsure of the actual case values, high opening demands by maximizing negotiators have the desired effect. The opponents, unsure of case values, use the maximizer's high opening demands as standards against which to set their own goals. However, when the opponents have evaluated their cases and arrived at appropriate value judgments, the opponents interpreted maximizer high opening demands as evidence of unreasonableness. This causes maximizer credibility to be diminished, and the likelihood of bargaining breakdowns increases.

Equitable Positioning

Equitable positions are calculated to be fair to both sides. Their most notable proponent, O. Bartos, challenged the assumption of maximalist theorists that both sides to negotiations are trying to maximize their own payoffs or benefits. He argued that a competing value is also operative —that negotiators feel a cooperative desire to arrive at solutions fair to both sides. In support of this argument, he cited not only humanistic literature defending equality as an essential ingredient of justice, but also anthropological and sociological studies confirming the widespread existence and operation in society of an egalitarian norm of reciprocity. Bartos conducted numerous theoretical and experimental negotiation studies which lead him to believe that the human desire to deal fairly with others is preferable to a more competitive strategy.

This equitable approach is considered as the most economical and efficient method of conflict resolution. It minimizes the risk of deadlock and avoids the costs of delay occasioned by extreme bargaining positions. Bartos recommended that negotiators be scrupulously fair and that they avoid the temptation to take advantage of naive opponents. He cautioned that the equitable approach requires trust, which allows both sides to believe they are being treated fairly. Nonetheless, trust must be tempered with realism. It is out of trust that negotiators make concessions, but if their trust is not rewarded or returned in fair fashion, further concessions should be withheld until their opponents reciprocate. Equitable negotiators do not always open negotiations with statements specifying their desires to achieve mutually beneficial solutions. Rather, they open with positions that show they are serious about finding fair agreement, and they trustingly work toward mid-points between their reasonable opening position and the reasonable opening positions of their opponents. Unless both sides come forward with reasonable opening positions, it will be difficult for one side to compel the other to move toward an equitable resolution. Referring back to the data on cooperative/problem-solving and competitive/adversarial negotiators, we intuitively suspect that Bartos' equitable negotiators are cooperative/problem-solvers. This observation is borne out by the extremely high ratings received by cooperative/problem-solving attorneys on characteristics such as trustworthy, ethical, honest, and fair. Just as with our analysis of maximalist positioning by competitive/adversarial attorneys, it must be pointed out that the use of equitable positioning by cooperative/problem-solving attorneys does not always generate satisfactory results. It is obviously satisfactory as used by effective cooperative/problem-solvers, but it is likely to be deficient when used by ineffective cooperative/problem-solvers. We must conclude that the positioning strategy, whether maximalist or equitable, does not guarantee success. Whichever approach is used, it must be employed with care and acumen or it will not be effective.

Integrative Positioning

Integrative Positioning involves more than opening demands and offers. It describes an attitude or approach that carries through the other stages of the negotiation, and is an alternative to pure positional bargaining. The most effective advocates of this method have been Roger Fisher and William Ury who advise negotiators to avoid positioning completely. Among business people, the method is seen as the art of problem solving. Integrative negotiators view cases as presenting alternative solutions, and they believe that chances for reaching agreements are enhanced by discovering innovative alternatives reflecting the underlying interests of the parties, and seeking to arrange the alternatives in packages that yield maximum benefit to both parties. This strategy is often identified with exchange transactions involving many variables, and is generally seen as having limited utility in personal injury actions, for example, where the fundamental issue is how much money defendants are going to pay plaintiffs—a classic distributive problem….

Deepax Malhotra and Max H. Bazerman, *Negotiation Genius*

27, Bantam Books (2007)

Should You Make the First Offer?

The primary benefit of making a first offer in negotiation is that it establishes an *anchor*. An anchor is a number that focuses the other negotiator's attention and expectations. Especially when the other party is uncertain about the correct, fair, or appropriate outcome, they are likely to gravitate toward any number that helps them focus and resolve their uncertainty. As it turns out, first offers tend to serve this purpose well: they anchor the negotiation and strongly influence the final outcome….

The power of anchors is substantial. Research has shown that anchors affect even those with negotiation experience and expertise. In one remarkable demonstration of the power of anchors, professors Greg Northcraft and Margaret Neale invited real estate agents to evaluate a house that was for sale. The agents were allowed to walk through the house and neighborhood, and were given the Multiple Listing Service (MLS) information sheet that provided details about the house, including its size and dimensions, the year it was built, the amenities included, etcetera. They were also given detailed information about other properties located in the same neighborhood. The information provided to each agent was identical with one exception: the ''list price'' on the MLS sheet that was given to the agent was randomly picked from one of the following: (a) $119,000, (b) $129,000, (c) $139,000, or (d) $149,000. In real estate, the list price is the ''first offer'' made by the seller. Thus, this study manipulated the first offer to see whether it would affect the perceptions of experienced real estate agents. After seeing the house and reading all of the information, agents were asked to evaluate the house on four dimensions:

1. What is an appropriate list price for this house? *(Appropriate List Price)*
2. What do you estimate is the appraisal value of this house? *(Appraisal Value)*
3. As a buyer, what is a reasonable amount to pay for the house? *(Willingness to Pay)*
4. What is the lowest offer you would accept as the seller? *(Lowest Acceptable Offer)*

[The chart] graphs the responses to these questions by agents who were provided each of the list prices. As you can see, agents were strongly influenced by whichever list price they were arbitrarily assigned! On every measure, those given a higher list price thought the house was worth more than did those given a lower list price. Furthermore, when the agents were asked whether their answers had been influenced *at all* by the list price given to them on the information sheet, more than 80 percent of them said no.

…[W]hether you should make the first offer or not depends upon how much information you have. If you believe you have sufficient information about the other side's reservation value, it pays to make a reasonable (i.e., *sufficiently* aggressive) opening offer that anchors the discussion in your favor. If you suspect that you may not have enough information about the ZOPA [zone of possible agreement], you'd be wise to defer an opening offer until you have collected more information. In this case, it may even be a good idea to let the other party make the first offer. You might forgo the opportunity to anchor the negotiation, but you also avoid the downside of not anchoring aggressively enough. Notice that a lack of information can also lead you to anchor *too* aggressively, demanding an amount that might offend the other side and drive them away. In other words, asking for too little diminishes the amount of value you can capture; asking for too much diminishes your chances of consummating the deal….

How Should You Respond to Their Initial Offer?

When the other parry makes the first move, you become vulnerable to the effects of anchoring. Because anchoring effects can be very subtle, this is likely to be true even if you are aware of these effects. However, there are a number of ways you can protect yourself from being overly influenced by the other side's anchor:

Strategy 1: Ignore the Anchor

The best thing to do in the event that the other party makes an aggressive first offer—whether high or low—is to ignore it. This doesn't mean you should pretend you didn't hear it. Rather, respond to this effect: ''Judging by your offer, I think we might be looking at this deal in very different ways. Let's try to bridge that gap by discussing….'' In this manner, you can shift the conversation to an entirely different topic, one that allows you to reassert control of the discussion.

Strategy 2: Separate Information from Influence

Every offer is a combination of *information* and *influence.* The other party's offer tells you something about what she believes and what she wants (information), but it also has the power to derail your strategy (influence). Your task is to separate the information contained in the particulars of the offer (and the way in which it was made) from the other side's attempt to influence your perceptions. The best way to stave off influence is to stick to your original game plan. If you walked in with a prepared first offer, don't allow the other side's anchor to soften it. This does not mean that you should ignore substantial information that changes your beliefs about the actual ZOPA. For example, if the other side has just provided credible evidence that she has an attractive offer from a competitor of yours, this might be reason to adjust your

counteroffer. However, it is important to realize that anchors will affect perceptions and counteroffers even in the absence of any real information provided to you. For example, the negotiator's mind can sometimes fail to distinguish between these two statements:

- *Information and Influence:* ''We have received a better offer from Company X. As a result, we think your initial offer is low. We would like you to increase it to $7 million.''
- *Influence Only:* ''As you know, there are other companies with whom we do business. We have spoken with them. As a result, we think your initial offer is low. We would like you to increase it to $7 million.''

The first statement provides some (but not much) substantive information that should prompt you to think about whether to accept, challenge, or question the statement being made. The second statement simply reiterates what you already knew, but uses phraseology that helps the other side emphasize its anchor. Thus, you have every reason to ignore this statement.

Strategy 3: Avoid Dwelling on Their Anchor

Many negotiators believe that if someone anchors aggressively, you should push them to justify the anchor, thereby exposing the frivolous nature of their extreme demands. This is a dangerous strategy. Why? Because the more an anchor is discussed in a negotiation, the more powerful it becomes. If you ask the other party to justify their offer or discuss it further (e.g., ''How did you come up with that number?''), you increase the power of that anchor to define the negotiation parameters. Almost always, your counterpart will find a way to frame the negotiation such that their offer makes at least a modicum of sense.

On the other hand, you do not want to miss out on the opportunity to learn something new about the deal or about your counterpart's perspective. To resolve this dilemma, try the following: if you are surprised by their offer, probe a little to find out if there is in fact any substantive new information that you can obtain. If no such information is forthcoming, quickly shift attention away from the anchor by sharing your own perspective and defining the negotiation in your terms.

Strategy 4: Make an Anchored Counteroffer, then Propose Moderation

Finally, if it is not possible to ignore or dismiss the other party's anchor, you should offset its influence by making an aggressive counteroffer. In doing so, you retain the ability to capture as much of the ZOPA as possible. However, countering aggression with aggression comes at a risk: the possibility that both parties will become entrenched and reach an impasse. To mitigate this risk, you should offset their anchor with an aggressive counteroffer, and then suggest that you need to work together to bridge the gap. In addition, you should offer to make the first move toward moderation by discussing your own perspective (i.e., by justifying your aggressive counteroffer). This allows you to deflate their anchor while shifting from an aggressive exchange to a quest for common ground. For example, in response to an aggressive anchor, you might say:

Well, based on your offer, which was unexpected, it looks like we have a *lot* of work ahead of *us.* From our perspective, a fair price would be closer to $X [your counter-anchor]. I will explain

to you how *we* are valuing this deal, but it appears to me that if we are to reach any agreement, we will both have to work together to make it happen.

Strategy 5: Give Them Time to Moderate Their Offer Without Losing Face

If the other party's initial offer is *very* extreme—far outside the ZOPA—you may need to inform them that their offer is not even a basis for starting the discussion. This assertion should be followed by information regarding your own perspective and a candid invitation to reopen negotiation—from a very different starting point….

To illustrate the point that your first offer or demand should not be so extreme that your opponent walks out of the room, consider the following scene from a popular book and movie. The non-fiction story chronicles the negotiation and trial of the claims of eight families in Woburn, Massachusetts, who sued the corporate owners of a tannery and chemical plants for cancer-related illnesses and deaths of their children. Even food and gifts could not prevent an impasse.

Jonathan Harr, *A CIVIL ACTION*

277, Vintage Books (1996)

After a few minutes, the lawyers took their assigned seats at the table. Schlichtmann began talking about how he and his partners took only a few select cases and worked to the exclusion of all else on those. (This was Schlichtmann's way of saying there was no stopping them.) He said he wanted a settlement that would provide for the economic security of the families, and for their medical bills in the future. The families, he continued, weren't in this case just for money. They wanted an acknowledgment of the companies' wrongdoing, Schlichtmann said, a full disclosure of all the dumping activities.

''Are you suggesting there hasn't been a full disclosure?'' Facher asked. ''No,'' said Schlichtmann, who was suggesting exactly that, but now made an effort to avoid confrontation. ''But as part of a settlement, we want a disclosure that the judge will bless.'' Another condition of settlement, he added, was an agreement that the companies clean their land of the toxic wastes, and pay the costs for cleaning the aquifer.

None of the defense lawyers had touched any of the food or drink. As Schlichtmann spoke, he saw Facher reach for a bowl of mints on the table and slowly unwrap the foil from one. Facher popped the mint into his mouth and sucked on it, watching Schlichtmann watch him.

Schlichtmann talked for fifteen minutes. Then Gordon laid out the financial terms of the settlement: an annual payment of $1.5 million to each of the eight families for the next thirty years; $25 million to establish a research foundation that would investigate the links between hazardous wastes and illness; and another $25 million in cash.

Cheeseman and his partners took notes on legal pads as Gordon spoke. Facher examined the pen provided courtesy of the Four Seasons, but he did not write anything on his pad. Facher

studied the gilt inscription on the pen. It looked like a good-quality pen. These figures, he thought, were preposterous. They meant that Schlichtmann did not want to settle the case, or else he was crazy. Maybe Schlichtmann simply wanted to go to trial. This opulent setting, and Schlichtmann sitting at the table flanked by his disciples like a Last Supper scene, annoyed Facher. Where was Schlichtmann getting the money for all this?

When Gordon finished, silence descended.

Finally Facher stopped studying the pen. He looked up, and said, ''If I wasn't being polite, I'd tell you what you could do with this demand.''

Cheeseman had added up Gordon's figures. By Cheeseman's calculations, Schlichtmann was asking a total of four hundred ten million over thirty years. ''How much is that at present value?'' Cheeseman asked Gordon.

Gordon replied that he would rather not say. ''Your own structured-settlement people can tell you that.''

Facher took a croissant from the plate in front of him, wrapped it in a napkin, and put it into his pocket. That and the mint he had consumed were the only items the defense lawyers had taken from the sumptuous banquet that Gordon had ordered.

Cheeseman and his partners asked a few more perfunctory questions about the terms of disclosure, which Schlichtmann answered. Facher had gone back to studying the pen. ''Can I have this?'' he said abruptly, looking at Schlichtmann.

Schlichtmann, appearing surprised, nodded. Facher put the pen into his breast pocket. ''Nice pen,'' he said. ''Thank you.''

Then Facher got up, put on his coat, and walked out the door. Frederico, who had not uttered a word, followed him.

Cheeseman and his partners stood, too, and in a moment, they followed Facher.

Schlichtmann and his colleagues sat alone on their side of the table. Gordon looked at his watch. The meeting had lasted exactly thirty-seven minutes, he announced. ''I guess we're going to trial,'' Gordon added.

Schlichtmann was surprised, but only for a moment. He looked at his colleagues and shrugged. ''We're going to get a jury in two weeks,'' he said. ''The pressure's on them.''

Conway got up and paced the room and smoked a cigarette. He didn't feel like talking. There was nothing to discuss. They'd gotten nothing out of this so-called settlement conference, not even information from the other side. He put on his coat and, along with Crowley, walked up Tremont Street back to the office.

Questions and Note

12. How did Schlichtmann go wrong? What advice offered by Shell and by Williams and Craver might have been helpful for Schlichtmann in making his demand?
13. Might local custom and the experience of opposing counsel, as well as the evaluation done by the other side, have been contributing factors to the defense walkout in the above scene? What would you have done differently than Schlichtmann in this situation?

In formulating your first proposal, whether it be a demand or offer, it is advised that you determine the most aggressive proposal for which you can state a credible justification. Never demand so much or offer so little that you can't explain the reason for it. Be able to phrase your first offer as ''I propose this because…'' This will minimize the ''Schlichtmann effect.''

F. Bargaining

Bargaining takes many forms and is not confined to a specific stage in the negotiation process. The term ''bargaining'' is more associated with the competitive/distributive approach. Phrases like ''searching for solutions'' and ''problem solving'' are frequently used to describe a more cooperative/integrative approach. However, at some point in any negotiation there must be movement from the differences that brought the parties to the table toward the agreement that will resolve the dispute or create a deal. Whether the movement results from arguments and persuasion or from proposed principles and criteria may be more a matter of semantics and tone than of real difference. For example, lawyers in negotiating a settlement of a lawsuit may agree, expressly or implicitly, that legal principles and precedent will be the criteria for settlement. Does this reduce the role of argument and attempts at persuasion regarding what case precedent is most analogous and applicable to the matter in dispute? A hallmark of integrative negotiation is trading off a lower priority to satisfy one more personally important. Is this not a form of bargaining concession?

1. Managing Concessions

Concessions are the compromises you make after your opening offer to move the negotiation forward, particularly in competitive bargaining. Usually the concessions you make are offered in return for those your negotiation opponent offers. Making concessions can be done strategically in recognition that the timing, amount, and nature of concessions are a form of communication by which each side sends signals about priorities and reservation points. The pattern of concessions forms a message. By carefully considering what you want to communicate you can manage concessions to shape the message, particularly about how close you are to your reservation point. (Diminishing concessions signal you are close.)

The timing of offering concessions can be telling and must also be considered carefully. Concessions given in rapid succession early on may signal risk aversion or desperation. Giving away too much in the initial stages of negotiation depletes the reserve of concessions that can be offered later, when they may be more appreciated.

By planning and using concessions strategically, you can influence the outcome of the negotiation. The flip side of anything that can be used strategically is that a similar or counterstrategy might be used to manipulate you. So be aware that the concession signals from a competitive bargainer can be deceptive and may mislead an adversary about how far the bargainer will go. The following reading is an exploration of concessions and their use, as explained by a leading negotiation trainer.

Theron O'Connor, *PLANNING AND EXECUTING AN EFFECTIVE CONCESSION STRATEGY*

Bay Group International (2003)

Concessions and the Negotiating Process

It is the concession piece of the negotiation process—the bargaining, the give-and-take, the ''horse-trading,'' what the parties are willing to give up in order to reach an agreement—that will be discussed here. There are two principal sets of tasks to consider. The first is how to create the most advantageous negotiation context within which a concession strategy can be implemented. The techniques to establish a favorable negotiation context are discussed elsewhere in this volume. The second critical consideration is how to effectively handle the *execution* of the concession strategy or plan once the context has been established. This piece will focus upon the execution phase.

It should be noted that the many parts of the negotiation process are not strictly sequential. Rather, they occur and reoccur throughout the negotiation and must be attended to iteratively. That is particularly true of concession patterns. Often attention to concessions is mistakenly deferred until late in the game and concessions are used tactically, rather than strategically, as a closing tool.

Planning and Executing an Effective Concession Strategy

Once a desirable negotiating context has been established, the concession strategy can be executed. Whether to concede, when to concede, what to concede, how to concede are among a number of important considerations to keep in mind in dealing with concessions. Skilled negotiators develop plans for managing the process of making concessions, and thereby exert more control over the negotiation process. Conceding without a plan can doom you to failure in negotiation.

Concessions Should Be Made Only as Required

Notwithstanding that a sophisticated concession strategy has been developed—replete with creative and cost effective negotiables—no concessions should be made unless they are demanded by the other side. If the other side is willing to accept the initial proposal, then there has probably been a failure to accurately gauge the unexpectedly high value perception of the other side and a failure to take a sufficiently ambitious opening position. That error ought not to be compounded by then freely granting concessions from the largesse that has been built into the

plan. While this should go without saying, there is often the temptation to ‘‘throw something in’’ simply because it is unexpectedly still there.

Concessions Should Be Made Slowly and Reluctantly

At the early stages of the negotiation, the focus should be on continuing to shape and influence the value perception of the other side and continuing to uncover and evaluate their wants and needs. With the range of reason advantageously set, it is imperative to hold the line and show resolve with respect to the value proposition and opening position. Reluctance to make concessions early on tends to increase their value in the mind of the other negotiator when they are in fact granted. Care should be taken, however, not to communicate too aggressive and inflexible a stance.

Try Not to Be the First to Make a Concession

If possible, get the other party to move first. Take the time to test the resolve of the other side by asking for concessions and suggesting ways that interests might be satisfied by them. First concessions can carry strong signals as to the flexibility of the other negotiator and can help calibrate the distance between the party’s positions. Do not hesitate to make a concession, however, if it seems necessary to keep the negotiation going.

Get Something in Return for Any Concession

Concessions should be made in the context of trades or exchanges rather than given simply to see if the other side’s point of satisfaction might be found. Demanding a concession in return both reinforces the value of what is being conceded and signals the resolve of the negotiator making the concession. It also helps to build the process of give and take and stimulate movement toward agreement.

First Concede Low Cost Negotiables That Represent High Value to the Other Side and Vice Versa

Having prioritized and ranked those things which might be offered to satisfy the wants and needs of the parties, it is important to evaluate each opportunity in terms of what might be offered that would be perceived to provide the highest possible value to the other side at the lowest cost. Likewise, in seeking concessions from the other side, it is important to seek concessions of high perceived value at comparatively low cost to them.

Use a Concession Pattern Designed to Leverage Fundamental Interests

Concession patterns communicate predictable messages to the other side. Holding firm and making one big concession at the end sends one message; making one large early concession and then holding firm sends another message. Making incremental but growing concessions sends one message; making incremental but diminishing concessions sends another message. Driving value early on and then executing a concession pattern of a large concession first and then

progressively smaller ones often can be the most powerful pattern of all. It communicates resolve, then flexibility, and then diminishing returns moving toward closure.

Conclusion

It is critical to the ultimate success of the negotiation to deal with the concession process early on—even prior to initial contact—both to build the most advantageous context and to develop a strategy for execution of the concession plan. The context-building activities, anchoring, framing, positioning, setting high opening targets, discovering interests and negotiables, and managing emotions and behaviors, help to develop a robust value proposition and to stretch the range-of-reason within which an optimal outcome can be achieved.

Concession execution guidelines help to ensure that the negotiator will not give up too much too soon and that an appropriate balance will be maintained between self-interested competitiveness on the one hand and relational collaboration on the other. The concession execution guidelines are:

No Concession Unless Needed

Get the Other Party to Make First Concession

Concede Slowly and Reluctantly

Get Something in Return

Concede to High Value from Low Cost/Vice-Versa

Use Advantageous Pattern

Rigorous integration of both phases, building context and concession execution—from beginning to end—create the highest likelihood of successful negotiation.

Problem 1

Assume you are negotiating a personal injury claim on behalf of an injured pedestrian, and liability is not clear. You have spoken with the insurance claims adjuster five times. Each time you have conceded an additional $1,000 off your initial written demand of $80,000, while offering new information or arguments in support of your claim. What do you think the adjuster might be communicating to you with each of the following concession patterns (he would use only one of these four patterns), and how would each pattern influence your recommendation to your risk-averse client about accepting a $47,000 settlement after your fifth round of negotiation?

	A	*B*	*C*	*D*
1.	$0	$3,000	$40,000	$47,000

2.	$0	$6,000	$45,000	$47,000
3.	$0	$12,500	$46,500	$47,000
4.	$0	$25,000	$47,000	$47,000
5.	$47,000	$47,000	$47,000	$47,000

2. Value-Creating Trades and Brainstorming

A type of bargaining also occurs in cooperative, problem-solving negotiation. The focus is more on finding the best fit of interests rather than on gaining a one-sided advantage. The following reading proposes a way to generate value-creating options and trade-offs. The technique of brainstorming to generate more creative options based on different interests and values is described.

Robert H. Mnookin, Scott R. Peppet, and Andrew S. Tulumello,
BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES

37, Harvard University Press (2000)

Generate Value-Creating Options

Now…look for value-creating trades. But this is not as easy as it might appear. Many negotiators jump into a negotiation process that inhibits value creation. One side suggests a solution and the other negotiator shoots it down. The second negotiator proposes an option, only to be told by the first why it can't work. After a few minutes of this, neither side is willing to propose anything but the most conventional solutions. This method mistakenly conflates two processes that should be engaged in separately: generating options and evaluating them.

It often helps to engage in some sort of brainstorming. The most effective brainstorming requires real freedom—however momentary—from practical constraints…. [There are two ground rules for brainstorming.]

- No evaluation
- No ownership

Premature evaluation inhibits creativity. We are all self-critical enough, and adding to our natural inhibitions only makes matters worse. When brainstorming, avoid the temptation to critique ideas as they are being generated. This includes avoiding even congratulatory comments about how great someone else's idea is, murmurs of approval, and backslapping. When you signal such approval, you send the implicit message that you're still judging each idea as it is generated—you're just keeping the *negative* comments to yourself. That does not encourage inventiveness. The goal is to liberate those at the table to suggest ideas. One person's idea may seem crazy, but it may prompt another person to suggest a solution that might otherwise have been overlooked. There will be time enough for evaluation. The idea behind brainstorming is that evaluation should be a separate activity, not mixed with the process of generating ideas.

The second ground rule of brainstorming is: *no ownership of ideas*. Those at the table should feel free to suggest anything they can think of, without fear that their ideas will be attributed to them or used against them. Avoid comments such as: ‘‘John, I’m surprised to hear you suggest that; I didn’t think you believed that idea made much sense.’’ John should be able to suggest an idea *without believing it*. Indeed, those at the table should feel free to suggest ideas that are not in their best interests, purely to stimulate discussion, without fear that others at the table will later take those ideas as offers.

In preparing for negotiations, brainstorming is often employed behind the table with colleagues in order to generate ideas. For many negotiators, however, it may feel very dangerous to engage in this activity with someone on the other side. Our own experience suggests, nevertheless, that by negotiating process clearly, brainstorming can also be productive across the table.

How do you convey these ground rules to the other side? You can get the point across without sounding dictatorial or rule-obsessed. Just explain what you’re trying to achieve and then lead by example…. Generating these possible options may broaden the parties’ thinking about the terms of their negotiated agreement.

Many of these options demonstrate that a negotiator’s interests can often be met in a variety of ways. And often the simplest solution is to compensate one side by adjusting the price term…to accommodate the parties’ needs and concerns…. In many deal-making situations, such ‘‘side-payments’’ can be an effective way to adjust the distributive consequences of value-creating moves….

What happens to interest-based, collaborative problem-solving when you turn to distributive issues? Some negotiators act as if problem-solving has to be tossed overboard when the going gets tough. We could not disagree more. In our experience, it’s when distributive issues are at the forefront that problem-solving skills are most desperately needed…

Sometimes, of course, you won’t be able to find a solution that satisfies both sides. No matter how hard you try, you will continue to disagree about salary, the amount to be paid in a bonus, or some aspect of a dispute settlement. Norms may have helped move you closer together, but there’s still a big gap between the two sides. What should you do?

Think about process. How can you design a process that would fairly resolve this impasse? In a dispute settlement, you might be able to hire a mediator to address the distributive issues that are still open. Is there anyone both sides trust enough to decide the issue? Could you put five possible agreements into a hat and pick one at random?

Procedural solutions can often rescue a distributive negotiation that has reached an impasse. They need not involve complicated alternative dispute resolution procedures that cost money and time. Instead, you can often come up with simple process solutions that will resolve a distributive deadlock and allow you to move forward.

Changing the Game

Not everyone approaches negotiation from a problem-solving perspective. The basic approach described in this chapter—with its emphasis on the sources of value creation and the importance of a problem-solving process—obviously departs from the norm of adversarial haggling. To be a problem-solver, a negotiator must often lead the way and change the game….

Conclusion

The tension between value creation and value distribution exists in almost all negotiations. But as our teaching and consulting have shown us, many people tend to see a negotiation as purely one or the other. Some people see the world in zero-sum terms—as solely distributive. We work hard to demonstrate to people that there are nearly always opportunities to create value. Others believe that, with cooperation, the pie can be made so large that distributive questions will disappear. For these negotiators, we emphasize that there are always distributive issues to address….

The problem-solving approach we have suggested here will not make distributive issues go away or this first tension of negotiation disappear. But it does outline an approach that will help you find value-creating opportunities when they exist and resolve distributive issues efficiently and as a shared problem….

Question

14. Assume you represent the plaintiff family suing for wrongful death of a husband/father killed by a drunk driver. Bargaining has reached an impasse, with your last demand at $1 million and the defendant's last offer at $800,000 (combining a $500,000 insurance limit and defendant's personal funds). Would you consider brainstorming? If you knew that the affluent defendant was facing sentencing for vehicular manslaughter and a letter from your client could be beneficial to her, would this open the door to value creation? The following letter was written to the sentencing judge following brainstorming, which resulted in settlement of the case. (All names have been changed.) Is an ethical problem raised by the use of this letter to settle a wrongful death claim against a drunk driver?

    To whom it may concern:

    We are the mother and surviving widow of the deceased, David Baron, whose death has left us and his three young sons behind. We write this letter to request leniency for Ms. Dorian.

    Mistakes were made by both Ms. Dorian and David, and we have all paid an enormous price. At this point, we do not believe that these consequences should be further multiplied by sending Ms. Dorian to jail.

    We understand that this was an isolated incident of drinking and driving for Ms. Dorian and she seems truly sorry for what happened. She has taken steps to deal with the drinking problem and she has done her best to compensate us and the three boys for our

loss. We believe it is time for everyone to put this tragedy behind them and to begin building new lives in its aftermath.

We want to ask that Ms. Dorian be placed on probation for a period of time. We would like to see her participate in programs and organizations for victims and substance abusers in the criminal justice system. We think David would agree.

Thank you for your time and consideration.

Sincerely,

Judith Baron and Martha Baron