Preparation, BATNAs & Power, Goal-Setting

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

B. Getting Ready to Negotiate

Watching a good negotiator or hearing about an effective negotiation can give the impression that it comes easily and that success is the result of intuitive ability, cleverness, and quick thinking. However, similar to trial practice, appellate advocacy, or any other disciplined endeavor, success in negotiation is in large part the result of planning, research, and preparation. The famous quote by Antoine de Saint-Exupery that ''a goal without a plan is just a wish'' is applicable to negotiation.

The following excerpt provides a helpful blueprint for effective negotiation preparation that is likely to maximize results in most bargaining situations by refining your BATNA and reservation point, as well as by anticipating your opponent's bargaining zone.

1. Preparation

Russell Korobkin, *A POSITIVE THEORY OF LEGAL NEGOTIATION*

88 Georgetown L.J. 1789 (2000)

[The author posits two negotiation situations, one a potential transaction for the purchase by Esau of Jacob's catering business and the other a potential settlement of a suit by Goliath against David for battery.]

All observers of the negotiation process agree that painstaking preparation is critical to success at the bargaining table… ''Internal'' preparation refers to research that the negotiator does to set and adjust his own RP [reservation point or price]. ''External'' preparation refers to research that the negotiator does to estimate and manipulate the other party's RP.

1. Internal Preparation: Alternatives and BATNAs

A negotiator cannot determine his RP without first understanding his substitutes for and the opportunity costs of reaching a negotiated agreement. This, of course, requires research. Esau cannot determine how much he is willing to pay for Jacob's business without investigating his other options. Most obviously, Esau will want to investigate what other catering companies are for sale in his area, their asking prices, and how they compare in quality and earning potential to Jacob's. He also might consider other types of businesses that are for sale. And he will likely consider the possibility of investing his money passively and working for someone else, rather than investing in a business.

Alternatives to reaching an agreement can be nearly limitless in transactional negotiations, and creativity in generating the list of alternatives is a critical skill to the negotiator. The panoply of alternatives is generally more circumscribed in dispute resolution negotiations. If Goliath fails to reach a settlement of some sort with David, he has the alternative of seeking an adjudicated outcome of the dispute and the alternative of dropping the suit. Most likely, he does not have the choice of suing someone else instead of David, in the same way that Esau has the choice of buying a business other than Jacob's.

After identifying the various alternatives to reaching a negotiated agreement, the negotiator needs to determine which alternative is most desirable. Fisher and his coauthors coined the appropriate term ''BATNA'' — ''best alternative to a negotiated agreement'' —to identify this choice. The identity and quality of a negotiator's BATNA is the primary input into his RP.

If the negotiator's BATNA and the subject of the negotiation are perfectly interchangeable, determining the reservation price is quite simple: The reservation price is merely the value of the BATNA. For example, if Esau's BATNA is buying another catering business for $190,000 that is identical to Jacob's in terms of quality, earnings potential, and all other factors that are important to Esau, then his RP is $190,000. If Jacob will sell for some amount less than that, Esau will be better off buying Jacob's company than he would be pursuing his best alternative. If Jacob demands more than $190,000, Esau is better off buying the alternative company and not reaching an agreement with Jacob.

In most circumstances, however, the subject of a negotiation and the negotiator's BATNA are not perfect substitutes. If Jacob's business is of higher quality, has a higher earnings potential, or is located closer to Esau's home, he would probably be willing to pay a premium for it over what he would pay for the alternative choice. For example, if the alternative business is selling for $190,000, Esau might determine he would be willing to pay up to a $10,000 premium over the alternative for Jacob's business and thus set his RP at $200,000. On the other hand, if Esau's BATNA is more desirable to him than Jacob's business, Esau will discount the value of his BATNA by the amount necessary to make the two alternatives equally desirable values for the money; perhaps he will set his RP at $180,000 in recognition that his BATNA is $10,000 more desirable than Jacob's business, and Jacob's business would be equally desirable only at a $10,000 discount.

Assume Goliath determines that his BATNA is proceeding to trial. He will attempt to place a value on his BATNA by researching the facts of the case, the relevant legal precedent, and jury awards in similar cases, all as a means of estimating the expected value of litigating to a jury verdict. If Goliath's research leads to an estimate that he has a 75% chance of winning a jury verdict, and the likely verdict if he does prevail is $100,000, then using a simple expected value calculation ($100,000 × .75) would lead him to value his BATNA at $75,000.

For most plaintiffs, however, a settlement of a specified amount is preferable to a jury verdict with the same expected value, both because litigation entails additional costs and

because most individuals are risk averse and therefore prefer a certain payment to a risky probability of payment with the same expected value. Goliath might determine, for example, that a $50,000 settlement would have the equivalent value to him of a jury verdict with an expected value of $75,000, because pursuing a jury verdict would entail greater tangible and intangible costs such as attorneys' fees, emotional strain, inconvenience, and the risk of losing the case altogether. If so, Goliath would set his RP at $50,000. On the other hand, it is possible that Goliath would find a $75,000 verdict more desirable than a $75,000 pretrial settlement. For example, perhaps Goliath would find additional value in having a jury of his peers publicly recognize the validity of his grievance against David. If Goliath believes that such psychic benefits of a jury verdict would make a verdict worth $10,000 more to him than a settlement of the same amount (after taking into account the added risks and costs of litigation), he would set his RP at $85,000….

Internal preparation serves two related purposes. By considering the value of obvious alternatives to reaching a negotiated agreement, the negotiator can accurately estimate his RP. This is of critical importance because without a precise and accurate estimation of his RP the negotiator cannot be sure to avoid the most basic negotiating mistake—agreeing to a deal when he would have been better off walking away from the table with no agreement.

By investigating an even wider range of alternatives to reaching agreement and by more thoroughly investigating the value of obvious alternatives, the negotiator can alter his RP in a way that will shift the bargaining zone to his advantage. Rather than just considering the asking price of other catering companies listed for sale in his town, Esau might contact catering companies that are not for sale to find out if their owners might consider selling under the right conditions. This could lead to the identification of a company similar to Jacob's that could be purchased for $175,000, which would have the effect of reducing Esau's RP to $175,000 and therefore shifting the bargaining zone lower. Goliath's attorney might conduct additional legal research, perhaps exploring other, more novel, theories of liability. If he determines that one or more alternative legal theories has a reasonable chance of success in court, Goliath might adjust upward his estimate of prevailing at trial—and therefore the value of his BATNA of trial—allowing him to adjust upward his RP.

2. External Preparation: The Opponent's Alternatives and BATNA

Internal preparation enables the negotiator to estimate his RP accurately and favorably. Of course, the bargaining zone is fixed by *both* parties' RPs. External preparation allows the negotiator to estimate his opponent's RP. If Esau is savvy, he will attempt to research Jacob's alternatives to a negotiated agreement as well as his own alternatives. For example, other caterers might know whether Jacob has had other offers for his business, how much the business might bring on the open market, or how anxious Jacob is to sell—all factors that will help Esau to accurately predict Jacob's RP and therefore pinpoint the low end of the bargaining zone. This information will also prepare Esau to attempt to persuade Jacob during the course of negotiations to lower his RP….

It is worth noting that in the litigation context both parties often have the same alternatives and the same BATNA. If plaintiff Goliath determines that his BATNA is going to trial, then defendant David's only alternative—and therefore his BATNA by default—is going to trial as well. In this circumstance, internal preparation and external preparation merge. For example, when Goliath's lawyer conducts legal research, he is attempting to simultaneously estimate the value of both parties' BATNAs. Of course, just because the parties have the same BATNA, they will not necessarily estimate the market value of it identically, much less arrive at identical RPs. Research suggests that an ''egocentric bias'' is likely to cause litigants to interpret material facts in a light favorable to their legal position, thus causing them to overestimate the expected value of an adjudicated outcome. Consequently, it is likely that, examining the same operative facts and legal precedent, plaintiff Goliath will place a higher value on the BATNA of trial than defendant David. This difference in perception often will be offset, however, by the fact that plaintiff Goliath is likely to set his RP, or the minimum settlement he will accept, below his perceived expected value of trial to account for the higher costs and higher risk associated with trial, while defendant David is likely to set his RP, or the maximum settlement he will agree to pay, above the expected value of trial for the same reasons. As long as the parties' preference for settlement rather than trial outweighs their egocentric biases, a bargaining zone will still exist, although it will be smaller than it would be if the parties agreed on the expected value of trial. Research also suggests that both parties are likely to be more risk averse when they are less confident in their prediction of the expected value of trial. In other words, the less confident the parties are in the value that they place on the BATNA of trial, the larger the bargaining zone between the RPs is likely to be.

2. Setting Goals

In addition to thinking through the least you can accept, or your reservation point, it is also helpful to formulate goals and set high expectations. High expectations lead to better outcomes, as discussed in this excerpt by Richard Shell.

G. Richard Shell, *BARGAINING FOR ADVANTAGE: NEGOTIATION STRATEGIES FOR REASONABLE PEOPLE*

28, Penguin (2006)

Goals: You'll Never Hit the Target if You Don't Aim

In Lewis Carroll's Alice's Adventures in Wonderland, Alice finds herself at a crossroads where a Cheshire Cat materializes. Alice asks the Cat, ''Would you tell me please, which way I ought to go from here?'' The Cat replies, ''That depends a good deal on where you want to get to.'' ''I don't much care where—'' says Alice. ''Then it doesn't matter which way you go,'' the Cat replies, cutting her off.

To become an effective negotiator, you must find out where you want to go—and why. That means committing yourself to specific, justifiable goals. It also means taking the time to transform your goals from simple targets into genuine—and appropriately high—*expectations.*…

Our goals give us direction, but our expectations are what give weight and conviction to our statements at the bargaining table. We are most animated when we are striving to achieve what we feel we justly deserve.

So it is with negotiation. Our goals give us direction, but our expectations are what give weight and conviction to our statements at the bargaining table. We are most animated when we are striving to achieve what we feel we justly deserve. The more time we spend preparing for a particular negotiation and the more information we gather that reinforces our belief that our goal is legitimate and achievable, the firmer the expectations grow…

What you aim for often determines what you get. Why? The first reason is obvious: Your goals set the upper limit of what you will ask for. You mentally concede everything beyond your goal, so you seldom do better than that benchmark.

Second, research on goals reveals that they trigger powerful psychological ‘‘striving’’ mechanisms. Sports psychologists and educators alike confirm that setting specific goals motivates people, focusing and concentrating their attention and psychological powers.

Third, we are more persuasive when we are committed to achieving some specific purpose, in contrast to the occasions when we ask for things half-heartedly or merely react to initiatives proposed by others. Our commitment is infectious. People around us feel drawn toward our goals….

Goals Versus ‘‘Bottom Lines’’

Most negotiating books and experts emphasize the importance of having a ‘‘bottom line,’’ ‘‘walkaway,’’ or ‘‘reservation price’’ for negotiation. Indeed, the bottom line is a fundamental bargaining concept on which much of modern negotiation theory is built. It is the *minimum acceptable level* you require to say ‘‘yes’’ in a negotiation. By definition, if you cannot achieve your bottom line, you would rather seek another solution to your problem or wait until another opportunity comes your way. When two parties have bottom lines that permit an agreement at some point between them, theorists speak of there being a ‘‘positive bargaining zone.’’ When the two bottom lines do not overlap, they speak of a ‘‘negative bargaining zone’’ …

A well-framed goal is quite different from a bottom line. As I use the word, ‘‘goal’’ is your *highest legitimate expectation* of what you should achieve….

Researchers have discovered that humans have a limited capacity for maintaining focus in complex, stressful situations such as negotiations. Consequently, once a negotiation is under way, we gravitate toward the single focal point that has the psychological significance for us. Once most people set a firm bottom line in a negotiation, that becomes their dominant reference point as discussions proceed. They measure success or failure with reference to their bottom line. Having a goal as your reference point, by contrast, prompts you to think you are facing a potential ‘‘loss’’ for any offer you receive below your goal. And we know that avoiding losses is a powerful

motivating force. This power is not working as strongly for you when you focus solely on your bottom line.

What is the practical effect of having your bottom line become your dominant reference point in a negotiation? Over a lifetime of negotiating, your results will tend to hover at a point just above this minimum acceptable level. For most reasonable people, the bottom line is the most natural focal point. Disappointment arises if we cannot get the other side to agree to meet our minimum requirements (usually established by our available alternatives or our needs away from the table), and satisfaction arises just above that level. Meanwhile, someone else who is more skilled at orienting himself toward ambitious goals will do much better. Not surprising, research shows that parties with higher (but still realistic) goals outperform those with more modest ones, all else being equal.

To avoid falling into the trap of letting our bottom line become our reference point, be aware of your absolute limits, but do not dwell on them. Instead, work energetically on formulating your goals,…[T]est the other side's reaction to your goal. Then, if you must, gradually re-orient toward a bottom line as that becomes necessary to close the deal. With experience, you should be able to keep both your goal and your bottom line in view at the same time without losing your goal focus. Research suggests that the best negotiators have this ability….

If setting goals is so vital to effective preparation, how should you do it? Use the following simple steps:

1. Think carefully about what you really want—and remember that money is often a means, not an end.
2. Set an optimistic—but justifiable—target.
3. Be specific….
4. Get committed. Write down your goal and, if possible, discuss the goal with someone else.
5. Carry your goal with you into the negotiation.

Set an Optimistic, Justifiable Target

When you set goals, think boldly and optimistically about what you would like to see happen. Research has repeatedly shown that people who have higher expectations in negotiations perform better and get more than people who have modest or ''I'll do my best'' goals, provided they really believe in their targets….

Once you have thought about what an optimistic, challenging goal would look like, spend a few minutes permitting realism to dampen your expectations. *Optimistic goals are effective only if they are feasible; that is, only if you believe in them and they can be justified according to some standard or norm*…. [N]egotiation positions must usually be supported by some standard, benchmark, or precedent, or they lose their credibility….

Commit to Your Goal: Write It Down and Talk About It

Your goal is only as effective as your commitment to it. There are several simple things you can do that will increase your level of psychological attachment to your goal. First, as I suggested above, you should make sure it is justified and supported by solid arguments. You must believe in your goal to be committed to it.

Second, it helps if you spend just a few moments vividly imagining the way it would look or feel to achieve your goal. Visualization helps engage our mind more fully in the achievement process and also raises our level of self-confidence and commitment…

Third, psychologists and marketing professionals report that the act of *writing a goal down* engages our sense of commitment much more effectively than does the mere act of thinking about it. The act of writing makes a thought more ‘‘real’’ and objective, obligating us to follow up on it—at least in our own eyes.

Questions

4. Can you explain the difference between BATNA and a reservation point?
5. Can you explain the difference between goals and expectations?
6. Does the advice to set high expectations work only if the other side does not follow the same advice? Will setting high expectations, particularly if done by both sides to a negotiation, likely lead to larger ‘‘negative bargaining zones,’’ as explained by Shell, and thus more frequent impasse? Is there a way for two optimistic negotiators to deal with this and reach agreement?
7. If expectations in negotiation are, in part, a function of previous success and failure, as Shell suggests, how does a new lawyer set expectations? Would a client be well advised to seek out a lawyer who has had well-known recent success in trials and negotiations on the theory that ‘‘success breeds success?’’ How might you leverage someone else’s success with a similar case to your advantage in a negotiation?

For an in-depth scholarly discussion of the role of aspirations in settlement negotiations, see Korobkin (2002). Korobkin concludes that high aspirations may help negotiators reach better results, but at the cost of a greater risk of impasse and personal dissatisfaction in not fully achieving the expectations created by high aspirations.

3. Negotiation Preparation Checklists

There are many negotiation preparation checklists available to guide you prior to communicating with opposing counsel. A comprehensive, multipage negotiation checklist, providing an inventory of helpful questions from which you can choose, is available on the companion Web site for this book. You will want to create a personal checklist to use in preparing for negotiations in both litigation and transactional settings. Using a checklist will help to discipline your thinking, so you may eventually not need the list.

Note: Computer-Assisted Preparation

The questions to ask yourself in preparation will, in part, depend on your negotiation style and the subject of the negotiation. The purposes of your negotiation preparation are to determine your strategy, BATNA, reservation point, first offer, and management of concession. Similarly, you will use the information generated from your preparation to anticipate what your opponent perceives, values, and will do during the negotiations.

Today's technology makes it possible to obtain and capture on a computer program the information necessary to prepare, generate options, value trade-offs, and anticipate the moves of a negotiation opponent. If computers can be used to research law, play chess (calculating the probable moves of an opponent and choosing the best move from all available options), engage in sophisticated market research, anticipate terrorist attacks, and plot wars, they should be of help in preparing for negotiations.

Googling or Binging your negotiation counterparts and checking them out on social and professional networking sites is an easy way to learn about their background and experience. You can use the Web to obtain clues about how they might negotiate, the value they might place on items of potential trade, and their interests. Knowing more about an opponent can also aid in establishing trust and rapport. Please don't forget that the people with whom you negotiate will likely use their computers to learn all they can about you.

Another value of the Web is to help you calculate your BATNAs. What both sides to a negotiation previously had to guess at, and as a result probably perceived differently, can now be determined by a computer search. For example, the cost of replacing equipment or an object of art can quickly be found by a search in a truly worldwide marketplace. Thus, the creation of objective criteria to propose for resolution of an anticipated issue can be easily researched and prepared in advance. You can better research jury awards for similar injuries and court decisions on questions that might have to be decided if your negotiation fails. Diligent computer research may also reveal the outcome of similar negotiations.

Commercially available software programs can help you analyze the negotiation style that is most comfortable for you and determine the approach likely to be used by your negotiating counterpart, provided some questions can be answered about them. The programs can also assist you in designing concessions and assigning relative values to them. They collect input that is used to suggest the best opening offer and counteroffers. These programs can also formulate questions for you to ask during a negotiation and predict the actions of an opposing negotiator, along with recommended strategies for you to use. Finally, they can help you value and decide on outcomes once proposals emerge.

Although these programs are sophisticated with a type of built-in negotiation intelligence, like with any productivity software, the quality of the result ultimately depends on the input you provide. If nothing else, a good negotiation software program can provide a guide for what you should do to be well prepared to negotiate and what the alternative approaches may be. They can also catalog tactics you might not have considered and organize ideas and data helpful to you before commencing a negotiation. At the time of this writing the most comprehensive and user-friendly negotiation preparation software is Negotiator Pro, available at *www.negotiatorpro.com.* This

program assesses negotiator styles based on responses to questions about each negotiator and then offers strategies of how to negotiate with the profiled personality type. A unique feature includes an international negotiation analysis where parties can learn about cultural differences.

3. Multiparty Bargaining—Coalitions and Holdouts

Legal disputes and transactions often involve multiple parties. The negotiation dynamic and trades then become more complex and there may be sub-bargaining within the more comprehensive negotiation. In a multiparty lawsuit, a plaintiff must negotiate with the defendants and the defendants are likely to negotiate with each other. If there is also more than one plaintiff, negotiations occur on both sides of the table and across it. In multiparty transactions, there is a mix of complementary and competing interests that may require many negotiations within the larger negotiation context.

A key difference between two-party and multiparty bargaining is the formation of coalitions. A coalition forms when two or more parties discover that they have complementary interests or that they can form side deals. They can then leverage their combined bargaining strength against the others or reach a deal that leaves out another bargainer. It is the possibility of freezing someone out of participating in the deal or blocking a deal that gives a coalition leverage. The more parties, the more possible alliances or coalitions there are. The bargaining gets both more extracted and complex as each party weighs their bargaining options with each of the other parties and the possible combinations. Bargaining can become very strategic. Because there are different payoffs possible with each combination and these are not immediately known, coalitions may dissolve and change before a final agreement is reached.

An example of a classic coalition arises when an injured driver sues another driver, the dealer who sold the defendant her car, the automobile manufacturer, and the auto repair shop that last serviced the defendant's car. Although naturally allied in their defense against the injured plaintiff, because of joint and several liability each defendant has individual interests that may motivate him or her to bargain separately with the plaintiff and form a coalition against the remaining defendants. So if the auto dealership bargains with the plaintiff to pay a limited amount that caps the dealer's liability and reduces its actual payout if the plaintiff recovers full damages from the other defendants, then a coalition of interests is formed against the remaining defendants. The settling defendant may agree to stay in the case to testify favorably and also avoid creating the ''empty chair'' defense. (This is known as a ''Mary Carter'' agreement and is discussed in Chapter 8. See *Abbot Ford, Inc. v. The Superior Court of Los Angeles County; Ford Motor Co.*, 43 Cal. 3d 858 (1987).) A similar coalition situation can occur in a breach of contract case or any other type of case involving multiple defendants or plaintiffs.

Another aspect of multiparty cases and transactions that can change the bargaining process is the prospect of one or more parties holding out from a settlement or deal

knowing that the others want to close the deal and will pay proportionately more to bring in the holdout. A settlement requirement of unanimity among multiple parties in a negotiation increases the strategic motivation for one party to hold out for more and also increases the chance of a negotiation impasse. For example, one of four partners may hold out in negotiations to sell their business to a suitor unless the holdout is paid more than the other partners. One of several property owners may hold out until all other property owners have sold to a developer so he may demand more in order for the complete transaction to close. (For an analysis of the added complexities and obstacles to settlement created in multiparty situations, see Mnookin, 2003.)

Multiparty disputes and transactions, which create the prospect of coalitions and holdouts, complicate the bargaining phase and require more detailed analysis of the potential payoffs and negotiation leverage. Correctly anticipating the behaviors and moves of others in multiparty bargaining situations can be particularly valuable. Game theory combines mathematical and economic concepts to calculate and quantify what others are likely to do in response to what you do. Game theory principles can be useful to systematically assess the probable actions of opponents in multiparty negotiations. (See Baird, Gertner, and Picker, 1994; Kaplow and Shavell, 2004.)

Just as there may be a payoff for one seller in a multiple-seller situation or one plaintiff in a multiparty claim who holds out to be the last to agree, there are situations in which being the first defendant to settle is advantageous. Plaintiffs may, in effect, offer an attractive discount to the first to settle to obtain one defendant's cooperation and then leverage that agreement as pressure against the remaining defendants. The following excerpt illustrates such a situation in a class action negotiation.

John M. Poswall, *THE LAWYERS: CLASS OF '69*

248, Jullundur Press (2003)

On Monday morning, Leon and Bishop did what appeared to be poor strategy in negotiations. They went to the turf of their opponent to talk settlement—into the luxurious 28th floor conference room of the largest defense law firm in Northern California. There, overlooking the San Francisco Bay, they met with the firm's senior litigation partner, Martin Crosby, Jr., flanked by his committee of defense attorneys representing the various levels of defendants. A number of corporate senior vice presidents were also in evidence, each being given careful deference by his representative attorney. Jack Merchant was absent….

''We're all realists here,'' Crosby went on. ''All professionals. Litigation is costly, even when we win. I'll be candid with you. I think class actions are legal blackmail and should be resisted forcefully. But my clients, our clients,'' he corrected himself, gesturing with his hands to the assembled group, ''are willing to resolve the matter now to save the costs of litigation. Of course, if the matter proceeds, this offer will be withdrawn, and I can give you my personal assurance, Mr. Goldman, that we are prepared to spend whatever it takes to win.'' …

‘‘We’re prepared to pay your class of clients $1 million’’ —Crosby said $1 million very slowly to let it sink in— ‘‘for any real or imagined slight they have endured and,’’ he looked at Leon closely, ‘‘$1 million in fees and costs to your firm for its efforts in this matter.’’ …

‘‘Marty’’ —he knew no one called Martin Crosby, Jr., anything but Mr. Crosby— ‘‘you invite me over here, threaten me, and then insult me and my clients, and conclude with offering me what amounts to a bribe to sell out my clients. I think I should report you to the State Bar.’’ …

Leon smiled…. He stood up, leaned on the table with both hands, and spent a few seconds on each corporate vice president, after passing his eyes over their attorneys.

‘‘Here’s how it’s going to be, gentlemen. We will settle with each group separately. The first group will pay the least; the next a bit more; and so on. The last to settle will pay the most.’’ …

‘‘You should know that I met with Jack Merchant [a defense attorney not in the room] on Saturday and Sunday, and we have arrived at a settlement, signed last night, that includes all of the provisions I just outlined. The lenders group of defendants have agreed to pay $40 million in settlement with our guarantee that each remaining group will pay more.’’

He shifted his eyes around the room again. He sensed the shock bordering on panic.

‘‘So gentlemen, I suggest each of you call me when you are ready.’’

He turned and walked to the door….

G. Moving Toward Closure

1. The Role of Power and Commitment

Negotiation is often discussed in terms of power and how each side to a negotiation can use its power to move the negotiation in the direction it desires and get what it wants from the other side. Power comes from the mind of your negotiating opponents. If they believe that you can provide them what they want or deny it to them, then relative to them, you have power. Again, perception becomes reality for purposes of negotiation. What someone wants may be material or emotional. It may be a desire to gain something new or not to lose what they have. So, you have power if you control what your opponent wants, including peace of mind, looking good, or not being harmed—provided they think you will exercise your control.

Power is linked to commitment. If it is perceived that you are committed to do what another wants, or not do it, only if they give you what you want, then you have power to obtain what you want. For example, a hostage taker may have added power if one of several hostages is shot.

Power may be a factor from the beginning to the end of negotiation. However, the perception of power often changes as the process goes forward. Because power is in the mind of the perceiver, what is communicated verbally and nonverbally during the course of a negotiation determines how power is perceived at the time decisions must be made. Both parties will attempt to display or exercise the power they have over the other to move the negotiation to a successful closure. Each may communicate their power, or attempt to create a perception of power, by threats, displays of absolute commitment, or disclosure of better alternatives for themselves and worse alternatives for the opponent.

Getting to Yes did not place emphasis on negotiation power and was criticized for not addressing the topic more. In the article that follows, Roger Fisher, the lead author of *Getting to Yes,* takes up the subject of negotiating power and ties it to commitment. He defines power and expands the traditional concepts of power in a way that makes using power consistent with being a principled negotiator.

Roger Fisher, *NEGOTIATING POWER: GETTING AND USING INFLUENCE*

in Negotiation Theory and Practice 127, Program on Negotiation Books (J. Z. Rubin and W. Breslin eds., 1991)

Getting to YES (Fisher and Ury, 1981) has been justly criticized as devoting insufficient attention to the issue of power. It is all very well, it is said, to tell people how they might jointly produce wise outcomes efficiently and amicably, but in the real world people don't behave that way; results are determined by power—by who is holding the cards, by who has more clout.

At the international level, negotiating power is typically equated with military power. The United States is urged to develop and deploy more nuclear missiles so that it can negotiate from a position of strength. Threats and warnings also play an important role in the popular concept of power, as do resolve and commitment. In the game of chicken, victory goes to the side that more successfully demonstrates that it will not yield.

There is obviously some merit in the notion that physical force, and an apparent willingness to use it, can affect the outcome of a negotiation. How does that square with the suggestion that negotiators ought to focus on the interests of the parties, on the generating of alternatives, and on objective standards to which both sides might defer?…

How Should We Define Negotiating Power?

If I have negotiating power, I have the ability to affect favorably someone else's decision. This being so, one can argue that my power depends upon someone else's perception of my strength, so it is what they *think* that matters, not what I actually have. The other side may be as much influenced by a row of cardboard tanks as by a battalion of real tanks. One can then say that negotiating power is all a matter of perception.

A general who commands a real tank battalion, however, is in a far stronger position than one in charge of a row of cardboard tanks. A false impression of power is extremely vulnerable, capable of being destroyed by a word. In order to avoid focusing our attention

on how to deceive other people, it seems best at the outset to identify what constitutes ‘‘real’’ negotiating power—an ability to influence the decisions of others assuming they know the truth. We can then go on to recognize that, in addition, it will be possible at times to influence others through deception, through creating an illusion of power. Even for that purpose, we will need to know what illusion we wish to create. If we are bluffing, what are we bluffing about?…

Categories of Power

My ability to exert influence depends upon the combined total of a number of different factors. As a first approximation, the following six kinds of power appear to provide useful categories for generating prescriptive advice:

1. The power of skill and knowledge
2. The power of a good relationship
3. The power of a good alternative to negotiating
4. The power of an elegant solution
5. The power of legitimacy
6. The power of commitment….

1. The Power of Skill and Knowledge

All things being equal, a skilled negotiator is better able to influence the decision of others than is an unskilled negotiator. Strong evidence suggests that negotiating skills can be both learned and taught. One way to become a more powerful negotiator is to become a more skillful one. Some of these skills are those of dealing with people: the ability to listen, to become aware of the emotions and psychological concerns of others, to empathize, to be sensitive to their feelings and one’s own, to speak different languages, to communicate clearly and effectively, to become integrated so that one’s words and nonverbal behavior are congruent and reinforce each other, and so forth….

The more skill one acquires, the more power one will have as a negotiator. These skills can be acquired at any time, often far in advance of any particular negotiation.

Knowledge also is power. Some knowledge is general and of use in many negotiations, such as familiarity with a wide range of procedural options and awareness of national or negotiating styles and cultural differences. A repertoire of examples, precedents, and illustrations can also add to one’s persuasive abilities.

Knowledge relevant to a particular negotiation in which one is about to engage is even more powerful. The more information one can gather about the parties and issues in an upcoming negotiation, the stronger one’s entering posture….

2. The Power of a Good Relationship

The better a working relationship I establish in advance with those with whom I will be negotiating, the more powerful I am. A good working relationship does not necessarily imply approval of each other’s conduct, though mutual respect and even mutual

affection—when it exists—may help, the two most critical elements of a working relationship are, first, trust, and second, the ability to communicate easily and effectively.

Trust. Although I am likely to focus my attention in a given negotiation on the question of whether or not I can trust those on the other side, my power depends upon whether they can trust me. If over time I have been able to establish a well-deserved reputation for candor, honesty, integrity, and commitment to any promise I make, my capacity to exert influence is significantly enhanced.

Communication. The negotiation process is one of communication. If I am trying to persuade some people to change their minds, I want to know where their minds are; otherwise, I am shooting in the dark. If my messages are going to have their intended impact, they need to be understood as I would have them understood….

3. The Power of a Good Alternative to Negotiation

To a significant extent, my power in a negotiation depends upon how well I can do for myself if I walk away. In *Getting to YES*, we urge a negotiator to develop and improve his ‘‘BATNA’’ —his Best Alternative To a Negotiated Agreement. One kind of preparation for negotiation that enhances one’s negotiating power is to consider the alternatives to reaching agreement with this particular negotiating partner, to select the most promising, and to improve it to the extent possible. This alternative sets a floor. If I follow this practice, every negotiation will lead to a successful outcome in the sense that any result I accept is bound to be better than anything else I could do…. The better an alternative one can develop outside the negotiation, the greater one’s power to affect favorably a negotiated outcome.

4. The Power of an Elegant Solution

In any negotiation, there is a mélange of shared and conflicting interests. The parties face a problem. One way to influence the other side in a negotiation is to invent a good solution to that problem. The more complex the problem, the more influential an elegant answer. Too often, negotiators battle like litigators in court. Each side advances arguments for a result that would take care of its interests but would do nothing for the other side. The power of a mediator often comes from working out an ingenious solution that reconciles reasonably well the legitimate interests of both sides. Either negotiator has similar power to effect an agreement that takes care of some or most of the interests on the other side.

5. The Power of Legitimacy

Each of us is subject to being persuaded by becoming convinced that a particular result ought to be accepted because it is fair; because the law requires it; because it is consistent with precedent, industry practice, or sound policy considerations; or because it is legitimate as measured by some other objective standard. I can substantially enhance my negotiating power by searching for and developing various objective criteria and potential standards of legitimacy, and by shaping proposed solutions so that they are legitimate in the eyes of the other side….

To retain his power, a wise negotiator avoids advancing a proposition that is so extreme that it damages his credibility. He also avoids locking himself into the first principle he advances that he will lose face in disentangling himself from that principle and moving on to one that has a greater chance of persuading the other side. In advance of this process, a negotiator will want to have researched precedents, expert opinion, and other objective criteria, and to have worked on various theories of what ought to be done, so as to harness the power of legitimacy—a power to which each of us is vulnerable.

6. The Power of Commitment

There are two quite different kinds of commitments—affirmative and negative:

(a) Affirmative commitments

(1) An offer of what I am willing to agree to.

(2) An offer of what, failing agreement, I am willing to do under certain conditions.

(b) Negative commitments

(1) A commitment that I am unwilling to make certain agreements (even though they would be better for me than no agreement).

(2) A commitment or threat that, failing agreement, I will engage in certain negative conduct (even though to do so would be worse for me than a simple absence of agreement).

Every commitment involves a decision. Let's first look at affirmative commitments. An affirmative commitment is a decision about what one is willing to do. It is an offer. Every offer ties the negotiator's hands to some extent. It says, ''This, I am willing to do.'' The offer may expire or later be withdrawn, but while open it carries some persuasive power. It is no longer just an idea or a possibility that the parties are discussing. Like a proposal of marriage or a job offer, it is operational. It says, ''I am willing to do this. If you agree, we have a deal.'' …

A negative commitment is the most controversial and troublesome element of negotiating power. No doubt, by tying my own hands I may be able to influence you to accept something more favorable to me than you otherwise would. The theory is simple. For almost every potential agreement there is a range within which each of us is better off having an agreement than walking away. Suppose that you would be willing to pay $75,000 for my house if you had to; but for a price above that figure you would rather buy a different house. The best offer I have received from someone else is $62,000, and I will accept that offer unless you give me a better one. At any price between $62,000 and $75,000 we are both better off than if no agreement is reached. If you offer me $62,100, and so tie your hands by a negative commitment that you cannot raise your offer, presumably, I will accept it since it is better than $62,000. On the other hand, if I can commit myself not to drop the price below $75,000, you presumably will buy the house

at that price. This logic may lead us to engage in a battle of negative commitments. Logic suggests that ‘‘victory’’ goes to the one who first and most convincingly ties his own hands at an appropriate figure. Other things being equal, an early and rigid negative commitment at the right point should prove persuasive.

Other things, however, are not likely to be equal.

The earlier I make a negative commitment—the earlier I announce a take-it-or-leave-it position—the less likely I am to have maximized the cumulative total of the various elements of my negotiating power.

The Power of Knowledge

I probably acted before knowing as much as I could have learned. The longer I postpone making a negative commitment, the more likely I am to know the best proposition to which to commit myself.

The Power of a Good Relationship

Being quick to advance a take-it-or-leave-it position is likely to prejudice a good working relationship and to damage the trust you might otherwise place in what I say. The more quickly I confront you with a rigid position on my part, the more likely I am to make you so angry that you will refuse an agreement you might otherwise accept.

The Power of a Good Alternative

There is a subtle but significant difference between communicating a warning of the course of action that I believe it will be in my interest to take should we fail to reach agreement (my BATNA), and locking myself in to precise terms that you must accept in order to avoid my taking that course of action. Extending a warning is not the same as making a negative commitment….

The Power of an Elegant Solution

The early use of a negative commitment reduces the likelihood that the choice being considered by the other side is one that best meets its interests consistent with any given degree of meeting our interests. If we announce early in the negotiation process that we will accept no agreement other than Plan X, Plan X probably takes care of most of our interests. But it is quite likely that Plan X could be improved. With further study and time, it may be possible to modify Plan X so that it serves our interests even better at little or no cost to the interests of the other side.

Second, it may be possible to modify Plan X in ways that make it more attractive to the other side without in any way making it less attractive to us. To do so would not serve merely the other side but would serve us also by making it more likely that the other side will accept a plan that so well serves our interests.

The Power of Legitimacy

The most serious damage to negotiating power that results from an early negative commitment is likely to result from its damage to the influence that comes from legitimacy. Legitimacy depends upon both process and substance. As with an arbitrator, the legitimacy of a negotiator's decision depends upon having accorded the other side ''due process.'' The persuasive power of my decision depends in part on my having fully heard your views, your suggestions, and your notions of what is fair before committing myself. And my decision will have increased persuasiveness for you to the extent that I am able to justify it by reference to objective standards of fairness that you have indicated you consider appropriate. That factor, again, urges me to withhold making any negative commitment until I fully understand your views on fairness….

The Power of an Affirmative Commitment

Negative commitments are often made when no affirmative commitment is on the table…. To make a negative commitment either as to what we will not do or to impose harsh consequences unless the other side reaches agreement with us, without having previously made a firm and clear offer, substantially lessens our ability to exert influence. An offer may not be enough, but a threat is almost certainly not enough unless there is a ''yesable'' proposition on the table—a clear statement of the action desired and a commitment as to the favorable consequences which would follow.

Conclusion

This analysis of negotiating power suggests that in most cases it is a mistake to attempt to influence the other side by making a negative commitment of any kind…at the outset of the negotiations, and that it is a mistake to do so until one has first made the most of every other element of negotiating power.

This analysis also suggests that when as a last resort threats of other negative commitments are used, they should be so formulated as to complement and reinforce other elements of negotiating power, not undercut them. In particular, any statement to the effect that we have finally reached a take-it-or-leave-it position should be made in a way that is consistent with maintaining a good working relationship, and consistent with the concepts of legitimacy with which we are trying to persuade the other side….

Note and Questions

Getting to Yes is one of the world's best-selling books and has been translated into every major language. Since its first publication in 1981, it has become the reference point for writing on negotiation. Other writers either agree and expand on its concepts or take issue with Fisher and Ury, as we have read in excerpts by James White and Roger Dawson. Roger Fisher has responded to some of the criticisms of cooperative/principled negotiation by either conceding that *Getting to Yes* presents abbreviated concepts that need to be further expanded and specifically applied, or by elaborating on their principled theories and countering the criticisms.

14. Does the above essay by Professor Fisher on negotiating power depart from the principles of *Getting to Yes*? How is it consistent or inconsistent?

15. Does an affirmative commitment always create more power than a negative commitment or threat? Are threats ever appropriate in negotiation? If so, when and under what circumstances?
16. Have you experienced or heard reports of threats that seemed irrational, but succeeded in getting the threatening party what it wanted?

Note: Irrational Threats, Absolute Commitments, and Perception of Power

The selections you have read are all premised on rational behavior to get what your client wants through negotiation. Expressed and implied threats can also be conveyed very powerfully when viewed as irrational. Nikita Khrushchev gained immense power when, as premier of Russia, one of only two countries with a nuclear arsenal in the 1950s, he pounded his shoe on the table at the United Nations in an apparent fit of anger. An irrational, impulsive leader with his finger on the nuclear button had more power to get his way than a rational, restrained person, at least in the short run.

A threat does not become powerful unless the recipient believes the person making the threat has the capacity to carry it out. Khrushchev's behavior at the United Nations was powerful because it was known that the Soviet Union had nuclear capacity. Power can also come from creating the illusion that you have capacity to harm others. Iraq's Saddam Hussein was attributed with more power than he actually had because of our impression that he had weapons of mass destruction. This illustrates the statement that your power comes from the mind of your negotiating opponents.

A commercial negotiator can exert persuasive power by threatening to end a negotiation so that both sides will lose what they want, even if the result is irrational. The threat of going to trial over a small monetary dispute, for example, may seem irrational. However, if the commitment appears real and the means exist for the threat to proceed, the power of irrationality may prevail. The apparent irrationality may be explained by an absolute commitment to prevail, but it is no less effective. If in a game of ''chicken'' an opposing driver, headed toward you on a narrow road, removed her steering wheel and threw it out the window, would you get off the road? Would you be more persuaded to concede if you thought the oncoming driver was carrying a load of dynamite and you were on a road wide enough for only one vehicle?

The road-chicken example of the power of commitment and many others are discussed in an essay by Thomas Schelling, who shared the 2005 Nobel Prize in Economics for his writing on noncooperative bargaining and game theory. Schelling also provides this example of the power of irrational threats: ''[I]f a man knocks at your door and says that he will stab himself on the porch unless given $10, he is more likely to get the $10 if his eyes are bloodshot.'' Schelling equates bargaining power with the firmness of one's commitment as communicated to an opponent. A sophisticated, rational negotiator has difficulty appearing obstinate and may have trouble bluffing. Threats and commitment to an outcome may be more believable from a madman or from someone irrevocably locked into a position by outside influences. Schelling cites examples of leverage derived from being locked into a position, including the added international bargaining power of a U.S. President negotiating under a congressional mandate on tariffs and a labor leader's

leverage in negotiating with management following a union vote to strike if a set wage limit is not met.

Schelling notes that his examples have instructive characteristics in common:

> First, they clearly depend not only on incurring a commitment but on communicating it persuasively to the other party. Second, it is by no means easy to establish the commitment, nor is it entirely clear to either of the parties concerned just how strong the commitment is. Third, similar activity may be available to the parties on both sides. Fourth, the possibility of commitment, though perhaps available to both sides, is by no means equally available; the ability of a democratic government to get itself tied by public opinion may be different from the ability of a totalitarian government to incur such a commitment. Fifth, they all run the risk of establishing an immovable position that goes beyond the ability of the other to concede, and thereby provoke the likelihood of stalemate or breakdown. (1960, 22-28)

Power need not be based on the capacity to harm others. It can come from the positive ability to help others meet their needs. If they believe that you can provide them with what they want or deny it to them, then relative to them, you have power.

We know that perceptions can be manipulated to project power that otherwise would not exist. Perception becomes reality for purposes of negotiation. A classic example of perceived power resulting from illusion is portrayed in L. Frank Baum's popular tale the *Wizard of Oz*, which was made into the classic 1939 film featuring Judy Garland as Dorothy. The Wizard was created by the special effects of a meek, old man to be an image of power. The Wizard was able to create power and meet the needs of Dorothy and her rag-tag friends by manipulating their perceptions, and thus he also fulfilled his interest in banishing the Wicked Witch of the West. If only success in life and negotiation could be as easy as following the yellow brick road.

2. Deadlines and Final Offers

The well-known maxim that work expands to fill the time available applies to negotiation. Negotiations often continue until time runs out. As available time to conclude an agreement decreases, slow-moving or stalled negotiations seem to move toward closure. Concessions are offered and compromises are sometimes reached near the forced end of negotiations even though they would not be considered at the earlier stages. As Dawson noted in *Secrets of Power Negotiating*, quoted in Chapter 4, ‘‘the rule in negotiating is that 80 percent of the concessions occur in the last 20 percent of time available.’’ More competitive negotiators will attempt to take advantage of any perceived need of the other side to conclude a deal, while hiding their own need for quick closure. However, creative solutions also materialize for more cooperative negotiators as available time comes to an end. Experienced cooperative negotiators will discuss their time constraints and agree on a time frame for the negotiation.

The passage of time may be associated with costs or lost opportunities. Time is money in many situations. More often than not, both sides want to conclude an agreement as soon as practical. However, time and delay may be more costly for one side in a negotiation. An injured plaintiff may not have the financial resources to hold out during a protracted negotiation for payment of a claim, whereas the insurance company on the other side may benefit from delay if its claim reserves are earning interest. It is this type of asymmetrical time pressure that gives an advantage to one side and is subject to manipulation.

When it is to one party's favor to move to closure, particularly if it believes that it is advantageous to prevent the other side from exploring other alternatives or opportunities, that party will impose an accelerated deadline. The deadline may be linked to a concession or a desired sweetener in exchange for accelerating closure. (''Order now and receive a free set of 'Ginza' knives.'') The deadline may be imposed to accept the entire last offer or end the negotiation. (''Accept this settlement amount by 5 p.m. or we go to trial.'') A take-it-or-leave-it deadline proposal is referred to as an ''exploding offer.''

Deadlines can also be used to test if the other side is serious about settlement. Of course, any test can fail and the side imposing the deadline must be willing to live with the consequences. Consider the use of the bold and strategic deadline imposed by the plaintiff's attorney in a class-action civil rights lawsuit brought by African-American customers against the Denny's restaurant chain.

Guy T. Saperstein, *CIVIL WARRIOR: MEMOIRS OF A CIVIL RIGHTS ATTORNEY*

384, Berkeley Hills Books (2003)

Tom Pfister showed up with the President of Denny's and began to present Denny's offer, as we sat and listened in our conference room. He explained what corrective action Denny's was willing to undertake, and, in some cases, had already undertaken. Much of that already was required under the agreement with the United States Department of Justice and we had no quarrel with the requirements of that agreement, except that it didn't go far enough. Then Tom addressed the damage issues, explaining that Denny's would donate $3 million to various civil rights groups…. I interrupted Tom before he finished, demanding, ''Is that it? Is that all the money you're offering?'' Tom said it was. So I said, ''OK, I've heard enough'' …

''You indicated Denny's is willing to donate $3 million to various civil rights groups. That is fine, but as far as I'm concerned, that is your client's charity. It has nothing to do with our lawsuit. We are not seeking charity, we are seeking damages for Denny's reprehensible behavior. You can give $3 million away to any group or groups you want, but you will get no credit from us for that. Frankly, I was astonished and angered at your money offer, as it bore no relation to the seriousness of our lawsuit. Your offer left me with the feeling that time spent in settlement negotiations with Denny's is time wasted. Therefore, I am going to tell you what Denny's has to do to maintain credibility with me. By 10 a.m. tomorrow morning, Denny's has to offer a *minimum* of $20 million to settle damage claims of the class. That $20 million offer which Denny's is going to make tomorrow morning will NOT settle this case. It is only Denny's down payment—a

tangible expression of good faith that will allow Denny's to continue these discussions. In the end, Denny's will have to pay far more than $20 million to settle this case.''

Tom and his cohort left the room. We went back to my office. The mood was heavy with gloom. No one said a word in support of what I had done; several attorneys quietly voiced negative opinions: ''We overplayed our hand'' ; ''They won't be back'' ; ''It'll be a long time before we have settlement discussions again in this case.'' I responded, ''We broke them today. Just watch.''

I walked into the office the next morning around 9 a.m. Tom Pfister was sitting in our reception area, waiting for me. Tom, a former USC basketball player, and still trim and athletic, rose to his full height of about 6' 3'', shook my hand, and said, ''You've got your $20 million.''

Negotiations in the above case continued until a settlement was reached that included the payment by Denny's of $54.4 million, then the largest settlement in a public accommodations case in American history. This example also illustrates the power of commitment, the power of legitimacy, and the power of a good alternative, all explained by Roger Fisher in the previous selection. Guy Saperstein's power to successfully make this bold demand was enhanced by Denny's lawyers' awareness that Saperstein had tried and won a total of $250 million in a class action gender discrimination case against State Farm Insurance companies.

Note: The Effect of Scarcity and Deadlines

Moving to closure by imposing deadlines or making an ''exploding offer,'' which becomes unavailable if not accepted by a deadline imposed by the offerer, is a tactic in negotiation to take advantage of what is known as the ''scarcity effect.'' The scarcity effect enhances the value of a desired item by making it appear less available or fleeting. We tend to pay more for something now if we believe it will not be available later. If something we want seems readily available, we tend to value it less and are less motivated to act decisively to obtain it. As examples, a New Yorker might never visit the Statue of Liberty until she discovers she must move to the Midwest, or the price of existing Volkswagen convertibles was bid up when it was announced that no more would be made.

Scarcity is enhanced if we discover that others want what we want, particularly if the item is limited in quantity or unique. A common ploy to close a negotiation is to suggest, directly or indirectly, that there is someone else interested in the deal if you do not accept it or that another offer is pending. (Lying about the existence of a competing offer is an ethical issue, as we will see in Chapter 7.)

Introducing deadlines into a negotiation is a way to create a vanishing opportunity or scarcity. Deadlines may be imposed by one side in the form of a threat, or created by external factors, like the end of a tax year. Time limits or deadlines can also be agreed to between the negotiating parties. Mutually imposed deadlines help structure negotiations and ensure a finite conclusion. So deadlines can be used cooperatively in negotiations, as

well as in a unilateral, threatening way. Of course,agreed-upon deadlines can be extended by agreement and unilateral deadlines may also be subject to negotiation.

H. Impasse or Agreement

Although a negotiation may appear to be moving toward closure, some gaps or differences can still exist. Both sides must assess if what is on the table is or is not better than no agreement. Adversarial negotiators may see this as the time to add new demands or conditions, and competitive bargainers may test an opponent's resolve by threatening to end the negotiation. More cooperative negotiators will see the need for joint problem solving and explore the possibility of improving the outcome for both sides. Several endgame moves or collaborative strategies are available to bring closure. Some of these focus on closing remaining economic gaps in the settlement or transaction, and some look for agreement by attending to matters beyond money. We now look at some approaches to breaking impasse.

1. Apologies

Some negotiations reach an impasse even though economic considerations do not seem to present an obstacle. Progress on substantive matters may stall because something gets in the way of a final agreement, but it is not always clear what that ''something'' is. As you now know, negotiated settlements depend on satisfaction of three sets of needs—economic, emotional, and environmental—that form the three sides of the settlement triangle, presented in Chapter 2. It may be difficult to quantify the emotional and environmental factors, but there are ways to satisfy emotional and social needs in a manner that creates value. Offering something other than money that fills a felt need can be worth more to the recipient than is given up by the offering party. An apology and its acceptance illustrate this point.

The most readily identified words indicating an apology are ''I'm sorry.'' This usually marks the beginning of an apology, but the most effective apologies contain several elements:

1. Expressing regret for the wrong suffered (I'm sorry)
2. Manifesting sympathy for the injury or hurt
3. Admitting responsibility or blame
4. Promising forbearance—not to do it again
5. Offering repair or compensation

Saying you are sorry and showing sympathy without admitting fault is a partial apology that might help, but it can also make matters worse if perceived as insincere or a brush-off. A ''full apology'' would include at least the first three elements on the list. The third element, admitting fault, in many situations is the key component of an apology. However, admitting fault can be legally dangerous because the admission may be admissible evidence at trial to establish liability. The two elements of providing assurances that the wrong will not happen again and offering compensation create the perfect apology package.

The hoped-for counterpart or trade-off for an apology is forgiveness. Forgiveness may create value by filling needs for both the recipient and the forgiving party. An apology, even if not full or perfect, and expressions of forgiveness can unlock a stalled negotiation and facilitate closure. Although we have placed this material on apology at a late stage of the ‘‘negotiation dance’’ when impasse occurs, an apology that precedes negotiation or is offered in the earliest stages may be most effective. In resolving some disputes, the amount of compensation or other substantive considerations may be secondary to an apology and resulting forgiveness. In other cases, an apology might not matter or could be seen as manipulative.

The role of apologies in settling cases has become a subject of increased interest as states consider legislation providing evidentiary protection or ‘‘safe harbor’’ for apologies made by people who have done harm to those on the receiving end of a tort or wrong. We will revisit the role of apologies in the next section on mediation. Several significant law review articles have examined the appropriateness and effect of apologies on settlement, most drawing on psychological literature and anecdotal experience (see, e.g., O’Hara and Yarn, 2002; Taft, 2000; Cohen, 1999; Robbennolt, 2003).

Notes and Questions

22. In what type of cases would an apology be most effective to bring closure? What needs might an apology fill? Are there types of cases in which an apology would be counterproductive or inappropriate?
23. A highly publicized apology from basketball star Kobe Bryant in 2004 played a role in the dropping of criminal rape charges by the recipient of the apology and the settlement of a related civil suit. Do you think the following apology by Mr. Bryant was a spontaneous, benevolent gesture, or the result of careful drafting and negotiation by attorneys? What policy issues are raised by this apology, the subsequent dropping of criminal charges, and the negotiated settlement in 2005 that resolved the civil suit? What considerations and motivations, from both sides, prompted the inclusion of the specific wording that was used? What purpose did this apology serve?

> First, I want to apologize directly to the young woman involved in this incident. I want to apologize to her for my behavior that night and for the consequences she has suffered in the past year. Although this year has been incredibly difficult for me personally, I can only imagine the pain she has had to endure. I also want to apologize to her parents and family members, and to my family and friends and supporters, and to the citizens of Eagle, Colorado.
>
> I also want to make it clear that I do not question the motives of this young woman. No money has been paid to this woman. She has agreed that this statement will not be used against me in the civil case. Although I truly believe this encounter between us was consensual, I recognize now that she did not and does not view this incident the same way I did. After months of reviewing discovery, listening to her attorney, and even her

testimony in person, I now understand how she feels that she did not consent to this encounter.

I issue this statement today fully aware that while one part of this case ends today, another remains. I understand that the civil case against me will go forward. That part of this case will be decided by and between the parties directly involved in the incident and will no longer be a financial or emotional drain on the citizens of the state of Colorado.

2. *Splitting the Difference and Dealing with Impasse*

A deceptively simple concluding technique often used in both competitive and cooperative negotiations is ‘‘splitting the difference.’’ The rationale for splitting the difference and a couple of caveats about agreeing to it are discussed in a popular book by Richard Shell. Professor Shell also offers advice on what to do when the remaining gap causes the negotiation to reach impasse.

G. Richard Shell, *BARGAINING FOR ADVANTAGE: NEGOTIATION STRATEGIES FOR REASONABLE PEOPLE*

185, Penguin (2006)

Perhaps the most frequently used closing technique is splitting the difference. Bargaining research tells us that the most likely settlement point in any given transaction is the midpoint between the two opening offers. People who instinctively prefer a compromise style like to cut through the whole bargaining process by getting the two opening numbers on the table and then splitting them right down the middle.

Even in cases in which the parties have gone through several rounds of bargaining, there often comes a time when one side or the other suggests that the parties meet halfway between their last position. In situations in which the relationship between the parties is important, this is a perfectly appropriate, smooth way to close.

Why is splitting the difference so popular? First, it appeals to our sense of fairness and reciprocity, thus, setting a good precedent for future dealings between the parties…. Each side makes an equal concession simultaneously. What could be fairer than that?

Second, it is simple and easy to understand. It requires no elaborate justification or explanation. The other side sees exactly what you are doing.

Third, it is quick. For people who do not like to negotiate or are in a hurry, splitting the difference offers a way out of the potentially messy interpersonal conflict that looms whenever a negotiation occurs.

Splitting the difference is such a common closing tactic that it often seems rude and unreasonable to refuse, regardless of the situation. This is taking a good thing too far, however. There are at least two important situations in which I would hesitate to split the difference.

First, you should be careful that the midpoint being suggested is genuinely fair to your side. If you have opened at a reasonable price and the other party opened at an aggressive one, the midpoint is likely to favor the other party by a big margin. So don't split the difference at the end if there was a lack of balance at the beginning. Second, when a lot of money or an important principle is on the line and relationships matter, quickly resorting to a splitting may leave opportunities for additional, creative options on the table….

When the gap between offers is too wide to split, another friendly way to close is to obtain a neutral valuation or appraisal. If the parties cannot agree on a single appraiser, they can each pick one and agree to split the difference between the two numbers given by the experts.

What Happens if Negotiations Break Down?

The concession-making stage of bargaining sometimes ends with no deal rather than an agreement. The parties reach an impasse. In fact, a no deal result is sometimes the right answer. No deal is better than a bad deal….

In addition to escalation problems, the parties may start too far apart to close the gap. Many times there are miscommunications, misunderstanding, and simple bad chemistry that the parties fail to overcome. Now what?

Jump-Starting the Negotiation Process

Perhaps the easiest way to overcome impasse is to leave yourself a back door through which to return to the table when you get up to leave it. ''In light of the position you have taken,'' you might say as you pack your bags, ''we are unable to continue negotiations at this time.'' An attentive opponent will pick up on your use of the words ''at this time'' and tactfully ask you later if the time has come to reinitiate talks. This back door also allows you to contact the other side at a later date without losing face.

If the other negotiator leaves in a genuine fit of anger, he may not be very careful about leaving a back door open. If so, you should consider how you can let him back in without unnecessary loss of face. You must, in one expert's phrase, build him a ''golden bridge'' across which to return to the table. Such bridges include ''forgetting'' that he made his ultimatum in the first place or recalling his last statement in a way that gives him an excuse for returning.

When miscommunication is the problem, a simple apology may be enough to get the parties back on track. If the relationship has deteriorated beyond apologies, changing negotiators or getting rid of intermediaries altogether may be necessary.

In America, the sport of professional baseball lost nearly two full seasons in the 1990s because of an impasse in negotiations between the players' union and the club owners. The team owners from the big cities wanted to limit the size of team payrolls. The team owners from smaller cities wanted the team owners from big cities to subsidize their franchises. The players wanted more money. It was a three-ring circus. The breakthrough came when the owners hired a new negotiator—a lawyer named Randy Levine—to

represent them at the table. Levine acted in the role of mediator as much as advocate and brought a high degree of both credibility and creativity to the process that, according to one participant, ‘‘broke the dam of mistrust’’ that had built up between the parties. Another move that helped move the talks beyond impasse was getting all parties to agree to stop talking to the press and taking public positions that made it hard for them to compromise at the table…. [P]ublic commitments can help you stick to your goals, but there comes a time when it is in everyone’s interest to get unstuck from their positions. In a high stakes negotiation such as a labor strike, this often means getting the parties out of the spotlight so they can work in private.

The worst impasses are the products of emotional escalation that builds on itself: My anger makes you angry, and your response makes me even angrier…. The solution to this sort of collision, in business deals as well as wars, is what I call the ‘‘one small step’’ procedure. One side needs to make a very small, visible move in the other side’s direction, then wait for reciprocation. If the other party responds, the two can repeat the cycle again, and so on. Commentator Charles Osgood, writing about the Cold War in the early 1960s, created an acronym for this process: GRIT (Graduated and Reciprocated Initiatives in Tension Reduction).

Egypt’s late prime minister, Anwar Sadat, used the ‘‘one small step’’ technique to deescalate the Arab-Israeli conflict when he flew to Jerusalem on November 19, 1977 and later met with Prime Minister Menachem Begin. By simply getting off a plane in Israel—a very small step indeed—Sadat demonstrated his willingness to recognize Israel’s existence. This move eventually led to the Camp David peace accords and Israel’s return of the Sinai Peninsula to Egypt.

An executive once told me a bargaining story that nicely sums up how the ‘‘one small step’’ process can work in everyday life. Two parties were in a complex business negotiation. Both were convinced that they had leverage, and both thought that the best arguments favored their own view of the deal. After a few rounds, neither side would make a move.

Finally one of the women at the table reached in her purse and pulled out a bag of M&M’s. She opened the bag and poured the M&M’s into a pile in the middle of the table.

‘‘What are those for?’’ asked her counterparts.

‘‘They are to keep score,’’ she said.

Then she announced a small concession on the deal—and pulled an M&M out of the pile and put it on her side of the table.

‘‘Now it’s your turn,’’ she said to the men sitting opposite.

Not to be outdone, her opponents put their heads together, came up with a concession of their own—and pulled out two M&M’s. ‘‘Our concession was bigger than yours,’’ they said.

The instigator of the process wisely let the other side win this little argument and then made another concession of her own, taking another M&M for herself.

It wasn't long before the parties were working closely together to close the final terms of the deal. Call this the M&M version of the GRIT process. Any similar mechanism that restarts the norm of reciprocity within the bargaining relationship will have a similar, helpful effect.

Overall, when parties reach an impasse, it is usually because each sees the other's demands as leaving it below its legitimate expectations. Eventually, if the parties are to make any progress, they must change their frame of reference and begin seeing that they will be worse off with no deal than they would be accepting a deal that falls below their original expectations.

Sometimes this transition takes time. The impasse must be allowed to last long enough that one or both parties actually alter their expectations. A final agreement must be seen as a gain compared with available alternatives.

Questions

24. Have you ever ''split the difference'' to conclude a negotiation or sale? Looking back, was that the best way to close the deal? Are you now sure you were not manipulated into an outcome or price that was more favorable to the other side? Have you used this closing tactic to your advantage?
25. Do you agree with Shell that impasse can often be helpful? If so, when? Why would anyone plan an impasse as part of their negotiating strategy?

3. Logrolling and Packaging

You should now be familiar with the concept that value is created through negotiation when what is received in trade is worth more to the recipient than to the provider. Logrolling involves conceding on low-priority interests to satisfy high-priority interests. Legislators logroll when they trade their vote on a matter of little concern in their district for another legislator's vote on an important issue in their own district. For example, a congressman from Montana might agree to vote for a federal rapid transit subsidy bill in return for a New York City congressman's vote for federal animal grazing subsidies. Logrolling creates value, because both legislators are better off if both bills pass than if neither passes. The New York congressman strongly favors the rapid transit bill, while only moderately opposing the grazing bill, and the Montana legislator strongly favors the animal grazing bill and only moderately opposes the rapid transit bill.

You should also understand that the difference between overlapping reservation points, or ''bottom lines,'' of negotiators creates a bargaining zone within which agreement is likely. Differences in the value that negotiators place on multiple items or promises allow for integrated solutions that expand the bargaining zone. Packaging multiple items, adding items to the mix, and taking advantage of an expanded zone of possible agreement can help close a deal. Packaging requires flexibility and creativity because the negotiators may have initially perceived the negotiation to be fixed on a single item or a more limited

set of trade-offs. Selling a car by including a longer warranty or a reduced-price luxury package is a sales example of packaging. When negotiating for office space, the landlord may not budge on the rent but will include in the package the use of his building crew to make office improvements or the use of free conference rooms.

Packaging is also used in negotiating the settlement of lawsuits. An agreement may not be possible based on the claim in litigation, but a universal settlement that resolves other pending or potential claims between the same parties or those aligned in interest may expand the bargaining range, and allow more high-priority/low-priority trade-offs that allow an agreement to be reached. It was this type of packaging that led to the ''universal'' settlement of the Microsoft v. Stac litigation described in Chapter 4. Each side agreed to drop its claims in the lawsuit in exchange for cross-licensing all of their existing patents as well as future ones over five years and Microsoft agreed to pay Stac license royalties totaling $43 million over 43 months, while also investing $39.9 million for a 15 percent equity stake in Stac. Although most often associated with problem-solving negotiation, packaging and logrolling are frequently utilized by competitive negotiators at the end of the day. Effective negotiators, regardless of their general approach, will do what it takes to reach a settlement or complete a deal if they end up getting more than they have to give up.

4. Agree to Disagree: Contingent Agreements

If impasse is reached because of different predictions of future events or disagreement over risks, an agreement might be structured based on these differences. In short, you can agree to disagree and write contingent outcomes into the deal.

Recognition of different views and probability assessments of uncertain events can help conclude a negotiation and result in an agreement that builds on differences by rewarding the side that most accurately predicts an unknown future event or outcome. An impasse over the amount of rent for a new restaurant can be resolved by the landlord agreeing to a lower base rent for the skeptical or risk-averse renter, with an additional amount to be determined by the restaurant's revenue. A personal injury settlement negotiation that is stalled because of different predictions about the ongoing need for medical treatment can be resolved by a lump sum amount, with a contingent amount based on the speed of recovery.

Agreeing to disagree and leaving economic questions open to uncertain results through the use of contingent agreements has a down side. The uncertainty and the temptation to manipulate the contingencies on which future rewards are based can create moral dilemmas and future disputes. The nature, potential, and dilemmas of contingent agreements are discussed in the next reading.

Michael Moffitt, *CONTINGENT AGREEMENTS: AGREEING TO DISAGREE ABOUT THE FUTURE*

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''That won't happen.'' ''Yes, it will.'' ''No, it won't.'' ''Will too.'' ''Will not.''

Negotiators generally find no shortage of things about which to disagree. For example, negotiators seeking to resolve a dispute often have sharply differing perceptions of the past. What happened? Whose decisions and actions caused the effects in question? How does their conduct compare with expectations or duties? In some circumstances, settlement is impossible without resolution of these backward-looking questions. A significant component of classical dispute resolution theory suggests that one might overcome impasse by shifting the focus of conversations toward the future. Sometimes, however, the shift to a forward-looking exploration merely provides fertile, new grounds for disagreement. Rather than arguing about what happened, the negotiators argue about what will happen. A wholesaler asserts that demand for the product will skyrocket in the future, and the retailer suspects otherwise. A defendant points to the relatively minor and temporary injuries caused in a car crash, but the victim fears that currently undetected injuries may manifest themselves down the road. Instinct may suggest that one negotiator will need to persuade the other about the likelihood of future uncertain events. Instead, genuinely held disagreements about the future present an important opportunity for negotiators to discover an attractive trade. The vehicle for capturing this potential is the contingent agreement.

Structurally, a contingent agreement is one in which the parties identify the universe of possible future conditions and agree to take on different obligations in each of those conditions. The simplest contingent deals are those in which the future has only two possible relevant conditions. X will happen, or it will not. If X happens, the terms of our deal are ABC; otherwise, we will do DEF. If I think X is unlikely to happen, I will be happy to give you terms you prefer for ABC, in exchange for terms I favor for DEF. Believing that she will get the work finished on time, an author signs a lucrative book contract with a very harsh penalty for late completion. Buyer loves Seller's house, but really wants a property with off-street parking. Seller firmly expects that the city council will approve a variance required for construction of a new garage, but Buyer is less confident about the likelihood of getting approval. Buyer agrees to purchase the property from Seller at a reduced price, with a substantial additional payment to Seller if the City Council grants a variance within the next twelve months. Negotiators can craft attractive trades by establishing obligations that are contingent on a future uncertain event that affects each side's valuation of the agreement.

Contingent agreements can also include variable terms, pegged to some benchmark to be measured in the future. I think interest rates will increase over the next few months, and you think they will go down. If I am loaning you money today, we will each be happy to agree to a deal with a floating interest rate. A school board is nervous about the future level of state funding to the districts, while the teachers' union is optimistic. The teachers' union agrees to a wage and benefit increase tied to a particular line in next year's state budget. The plaintiff believes that he may suffer long-term health effects of exposure to the defendant's product, while the defendant believes no significant health risks exist. The defendant agrees to pay specified medical monitoring expenses for the plaintiff and to assume any future medical costs associated with exposure. Parties to a joint venture agree to final, binding resolution of their intellectual property dispute by an appointed arbitrator. Without the possibility of contingent agreements, uncertainty regarding future conditions can make distributive decisions (for example, who gets how much money) difficult. By linking the allocation of resources to an externally measurable

variable, negotiators can sometimes overcome otherwise paralyzing disagreements about the future.

Contingent agreements also present an opportunity to create favorable incentives. Some negotiated deals involve no future relationship between the negotiators and are self-executing. Buying a trinket in a marketplace involves a simple exchange of money for goods. In more complex circumstances, however, ongoing relationships exist and implementation of the agreement takes place over time. When the negotiated deal involves more than a simple, one-time exchange, parties' behavior after the agreement is relevant. Contingent agreements can help to create incentives for parties to behave well after the terms of the deal are fixed. A company may agree to tie a sales executive's compensation to sales performance, thus promoting sales-maximizing behavior out of the executive after the deal is signed. The health ministry of a developing country approaches a prospective donor, seeking support for particular health sector programs. Both the prospective donor and the developing country want to see multiple sources of funding. They agree to a matching program under which the donor will contribute an amount equal to the funds the ministry secures from other sources, giving the ministry officials added incentive to garner resources. In some contingent deals, one party can affect the likelihood of the contingent trigger—the salesman can make more sales calls, the ministry officials can approach more donors. Contingent agreements can affect parties' behavior after the agreement.

Precisely because contingent agreements can affect parties' behaviors, some contingent agreements risk creating conditions of moral hazard. Moral hazard is a condition in which one party, under the terms of an agreement, may undetectably or uncontrollably behave in a way that is adverse to the other party. How quickly do you take the speed bumps when you are driving a rental car? Moral hazard suggests that many drivers will drive more cautiously over the bumps if they are driving their own cars because they consider the long-term effects of their driving behavior. Athletes' contracts often contain contingent incentive clauses. If the athlete scores a certain number of points, for example, he or she receives additional money. Moral hazard arises when, toward the end of the season, a team notices that the athlete is only a few points away from the triggering contingent event. Will the team structure its play to enable the athlete to achieve the statistical goal? If an agent's contract provides for a thirty percent commission on sales this year, but only a ten percent commission in future years, the agent will have an incentive to push deals into the current year—even if the deal he or she could have struck next year would have been on terms more favorable to the company. Negotiators crafting a contingent agreement should foresee the possibility of moral hazard and, where appropriate, structure incentives and disclosures to minimize the incentive for subsequent adverse behavior….

Contingent agreements may affect negotiators' perceptions of ''winning'' and ''losing.'' Classical negotiation advice counsels negotiators to conceive of negotiations in terms other than win-lose, pointing to the risk that competitive behavior may cloud opportunities for joint gains. In one respect, contingent agreements may present an opportunity for negotiators to avoid the necessity of identifying a winner. Rather than forcing one side to concede on its forecast, contingent agreements permit (in fact, require) both sides to maintain their conflicting predictions about the future. At the time

of the agreement, therefore, each side can declare ‘‘victory,’’ to the extent such a declaration is important. On the other hand, contingent agreements have the nature of a wager or a bet. Unless one counts the sheer joy of gambling as a victory, both sides cannot win a wager. The contingent event either happens or it does not. Either way, one side may be disappointed. In some organizational cultures, failure is punished more harshly than success is rewarded. A negotiator fearful of identifiable failure (for example, a wager that visibly did not pay off) may forgo an elegant contingent agreement in favor of a less efficient non-contingent deal. Elegantly structured contingent deals may help to reduce the risk of visibly ‘‘losing.’’ For example, if the plaintiff fears that a jury may award him nothing, and a defendant fears a runaway jury award of millions, the two could agree to a small guaranteed recovery in exchange for a cap on the maximum recovery. The losing party at trial will then be grateful to have made the contingent agreement, and the winner’s regret will be dampened by having won a favorable verdict….

A final, often overlooked, factor dissuading parties from crafting contingent deals is that parties place some value on certainty and finality. Particularly for negotiators embroiled in a dispute, achieving resolution may have an inherent value independent of the terms of the deal. Many disputants find it emotionally costly to carry around uncertainty. A contingent agreement does not represent complete finality, as at least some of the terms are yet to be determined. Uncertainty also can be costly for economic reasons. A company with an uncertain liability or benefit on its books faces considerable challenges in planning appropriate reserves of money, for example. If a company has a large collection of similar contingent agreements, it may be able to spread the risks and allocate money accurately in the aggregate. Similarly, some circumstances may permit parties to manage risks through the use of hedging instruments such as futures or options. Such allocations are not generally available to all individual negotiators, potentially making contingent agreements less attractive. For a contingent agreement to be appropriate in a given context, therefore, the perceived benefit it captures for each negotiator must exceed the transaction costs of discovering and implementing the agreement.

Negotiators arguing about the past sometimes ‘‘agree to disagree,’’ preferring instead to focus on what they will do moving forward. Negotiators with differing perceptions of the future should similarly agree to disagree—using contingent agreements to capture the potential benefits of their differences.

Problem 2

Assume you are negotiating with a small law firm interested in hiring you as an associate. The firm is offering you a lower salary than other firms are paying new associates. You do not want to accept a lower salary, but your employment options are limited and you believe the firm has up-side potential. What terms of agreement might you suggest that could benefit you and be attractive to the firm?