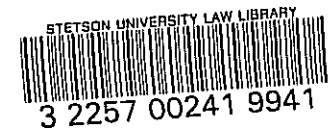


Part II

NEGOTIATING

G. Nicholas Herman, Jean M. Cary & Joseph E. Kennedy, *Legal Counseling and Negotiating: A Practical Approach* (Matthew Bender & Company 2001)

Chapter 7

Introduction and Academic Approaches to Negotiation

SYNOPSIS

§ 7.01 The Relationship Between Counseling and Negotiating

Negotiation is a process by which parties try to resolve their differences or common problems in order to reach some mutually satisfactory agreement. Of course, parties routinely negotiate in a non-dispute context when they seek to engage in a business relationship for the sale of goods or services or to consummate a transaction. When a dispute is involved, parties almost always initially seek to resolve their differences through negotiation, and it is estimated that over 90% of all lawsuits are settled.[1]

Counseling and interviewing are integral to representing a client in negotiations, whether those negotiations occur in the context of a dispute or not. That is, the skills of establishing a counseling relationship with your client, obtaining information relevant to the decision to be made by your client, analyzing the decision to be made, advising your client about the decision, and implementing the decision are all employed when representing a client in an effort to reach an agreement with another. In addition, counseling and negotiating are inexorably interrelated in that you cannot ethically and effectively represent your client in negotiations without providing appropriate counseling. Thus, in learning negotiating skills you must apply all that you have learned about counseling. Although negotiation is a separate subject from counseling in that the former is a means towards achieving your client's ends

[1] *See* Herbert M. Kritzer, *Let's Make a Deal* 3 (1991)

that have been developed through the latter, counseling your client does not stop when negotiations start. All aspects of negotiating involve your client's interests, and therefore it is necessary to continue to counsel your client throughout the entire negotiating process.

§ 7.02 Academic Approaches to Understanding Negotiation

For many years, academicians have sought to understand negotiating through game theory and from the perspectives of disciplines such as economics, anthropology, sociology, and psychology. Attempts at categorizing, quantifying, and systematizing the negotiating process have proven difficult and sometimes have led to more confusion than clarity. Part of the problem is that much of the literature has become permeated by a specialized nomenclature that must be sorted out before one can understand what is being said. Another part of the problem may be that attempts to employ quasi-empirical analyses and models to the negotiating process are inherently difficult given that negotiating is an extremely complex form of human behavior that is often characterized by irrational as well as rational considerations. Empirical or quasi-scientific methodologies and theories (as contrasted with more "anecdotal" approaches) tend to give us a greater sense of comfort and certainty that we understand a subject, and therefore it is difficult to concede that these ways of understanding why people do what they do may often be limited. Nevertheless, disciplined research about the negotiating process should not be discounted even by those who go so far as to characterize a good bit of the theoretical literature as being unnecessarily abstract, esoteric, or ethereal. Ongoing and imaginative research may well add more to our understanding of negotiating in the long run.

Provided below is a selected (not exhaustive) summary of some of the most often-cited multi-disciplinary commentary about negotiating. As indicated above, these approaches may serve as a catalyst for on-going research. In any event, providing at the outset this summary of existing theory serves as a useful introduction to the overall subject of negotiating and may also be of help in thinking more creatively about the subject.

§ 7.03 Game Theory and The Prisoner's Dilemma

Game theory[2] is an experimental tool used by a number of theorists to study negotiation.[3] Probably the most widely known game is the "Prisoner's Dilemma." While there are many variations of this game, it essentially involves two persons (*e.g.* Smith and Jones) who are taken into custody by the police and charged with a serious felony.[4] Smith and Jones are separated from one another for purposes of interrogation, and each must decide whether to confess to the felony and turn State's evidence against the other or not to confess.

[2] The seminal work on game theory is J. Von Neumann & O. Morgenstern, *Theory of Games and Economic Behavior* (1944).

[3] *See D. Pruitt, Negotiation Behavior*, 102–110 (1981); H. Raiffa, *The Art and Science of Negotiation*, 123–126 (1982); *see generally*, A. Rapoport, *Two-Person Game Theory: The Essential Ideas* (1966).

[4] *See* E. McGinnis, *Social Behavior: A Functional Analysis*, 417–418, 423–424 (1970).

Both prisoners know that if neither confesses, the State will not have enough evidence to convict them of the felony and each will receive only a 1-year sentence for a misdemeanor. If both confess (*i.e.*, plead guilty so that there is no need for one to turn State's evidence against the other), both will go to jail for the felony but will receive a reduced sentence of 7 years in return for pleading guilty. However, if one confesses and the other does not (*i.e.*, one turns State's evidence and the other does not confess and pleads not guilty), the former will be released and the latter will go to jail for 10 years. Thus, each prisoner's choice of confessing or not confessing will result in different outcomes depending not only upon his own decision, but also upon the decision made by his fellow prisoner. Because the prisoners are not permitted to communicate with one another, neither knows what the other will do.

The different outcomes or "payoffs" may be illustrated by the following matrix:

		Jones: Does not Confess	Jones: Confesses
Smith	Does not Confess	Smith gets 1 year Jones gets 1 year	Smith gets 10 years Jones is released
Smith	Confesses	Smith is released Jones gets 10 years	Smith gets 7 years Jones gets 7 years

The "dilemma" faced by Smith and Jones is that while both will be better off if neither confesses (*i.e.*, each gets 1 year) than if both confess (*i.e.*, each gets 7 years), neither wants to be the "sucker" who pleads not guilty when the other has confessed and turned State's evidence (*i.e.*, the "sucker" will get 10 years). Thus, without being able to communicate with one another, the incentives tend to pressure both into confessing such that "the pursuit of self-interest leads to a poor outcome for all"[5] (*i.e.*, each prisoner ends up with a 7-year jail term).

This result is apparent when one considers the various alternatives available to Smith if Jones confesses on the one hand, or does not confess on the other:

(1) Assume Jones confesses: Here, if Smith does not confess, Smith gets a 10-year sentence. If Smith also confesses, then Smith gets a 7-year sentence. Thus, assuming Jones confesses, Smith is better off by confessing.

(2) Assume Jones does not confess: Here, if Smith confesses, Smith is set free. If Smith also does not confess, then Smith gets a 1-year sentence. Thus, assuming Jones does not confess, Smith is better off by confessing.

[5] R. Axelrod, *The Evolution of Cooperation* 7 (1984).

If Jones applied the same analysis *vis a vis* the choices available to Smith, Jones would also conclude that his best option would be to confess.

In the context of studying negotiating, the Prisoner's Dilemma game illustrates the fact that cooperation and competition are inherent in two-party bargaining. Cooperation is necessary to achieve a voluntary agreement, but competition usually occurs over the terms of a final agreement. Analogizing Smith and Jones as opposing negotiators, if Smith *cooperates* with Jones by *not confessing*, Smith is gambling that Jones is to be trusted to reciprocate by also not confessing. However, Jones might *compete* by *confessing* (*i.e.*, "defecting" as it is called in the game-theoretic nomenclature) and thereby exploit Smith's cooperation such that Jones is released at Smith's expense. Thus, the game suggests that the best outcome for any one negotiator (prisoner) is to engage in competitive behavior (*i.e.*, to confess and serve no jail time) when the other engages in cooperative behavior (*i.e.*, does not confess and receives a 10-year sentence). The game also suggests that if both negotiators engage in cooperative behavior (*i.e.*, both do not confess), a reasonable, albeit less than ideal result occurs (*i.e.*, both get a 1-year sentence). If both engage in competitive behavior (*i.e.*, both confess), the result is largely undesirable for both (*i.e.*, both get a 7-year sentence).

There is extensive theoretical literature analyzing what happens when two players repeatedly play the game.[6] One prominent theorist held two computer tournaments in which professional and amateur game theorists submitted computer programs to compete against one another in repeated plays of the Prisoner's Dilemma where the number of rounds was not predetermined. The winner was the simplest of all strategies submitted, "Tit for Tat." Under this strategy, the player started out by cooperating and then did whatever the opposing player did on the previous move. In this way, Tit for Tat used cooperation at first instance, but switched to competitive behavior (defection) in response to competitive moves by the other side.[7]

Along with different variations on the Prisoner's Dilemma, numerous other games and game-theoretic models have been developed which, generally speaking, illustrate and analyze the tension between cooperative and competitive behavior.[8] These heuristic devices to understanding negotiating are often divorced from reality because of the strict "rules of the game." For example, most of the games involve only two parties who are the principals to the negotiation, and thus there is no accounting for the involvement of agents such as lawyers[9] or the involvement of third-party neutrals such as mediators. The

[6] *See, e.g.*, Roger B. Myerson, *Game Theory: Analysis of Conflict*, 308–310, 337–42 (1991); Jean-Francois Mertens, "Repeated Games," in *The New Palgrave: Game Theory* 205 (1989); R. Duncan Luce & H. Raiffa, *Games and Decisions: Introduction and Critical Survey*, 97-102 (1957).

[7] *See* R. Axelrod, *The Evolution of Cooperation* 27–54 (1984); D. Lax & J. Sebenius, *The Manager as Negotiator: Bargaining for Cooperation and Competitive Gain* 157–160 (1986).

[8] *See, e.g.*, O. Young, Bargaining (1975) (summarizing various game-theoretic and economic models); James P. Kahan, "Experimental Studies of Bargaining as Analogues of Civil Disputes," Rand Paper Series, Rand Corp. 1983) (bilateral monopoly game and others); H.M. Kritzer, *Let's Make a Deal* 88–98 (1991) (summarizing various models); J. Rubin & B. Brown, *The Social Psychology of Bargaining and Negotiation* 19–32 (1975) (summarizing various games).

[9] *See* R.J. Gilson & R.H. Mnookin, Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation, 94 Colum. L. Rev. 509 (1994).

games also heavily restrict other circumstances attendant to the negotiation, such as the type and number of potential outcomes or payoffs, the extent to which the players are able to communicate with one another, and the choice of strategies that may be employed (*e.g.*, cooperating or competing by "defecting"). There are usually no time constraints, and the bargainers are only concerned about the instant negotiation to the exclusion of factors such as past or future dealings between the parties, linkage to other transactions or problems faced by the parties, or the effects of establishing precedents through settlements, etc. Finally, the overall control placed over the form of game-theoretic bargaining makes any individual and interpersonal variables such as emotion, irrationality, and the personal situations of the parties essentially irrelevant to the negotiation.[10]

In short, the paradigms of game-theoretic analysis markedly limit the utility of these approaches to understanding negotiating in the real world.[11] However, this is not to say that these approaches are completely useless or unworthy of continued research. As one scholar tactfully put it:

> One criticism of [game-theoretic analysis], to put it bluntly, is that it often represents a "painful elaboration of the obvious." In fact, what appears to be obvious in retrospect is frequently less clear before the elaboration. More important, the game theoretic models serve to systematize what are often disparate bits and pieces of common wisdom (and perhaps wisdom that is not so common) and to provide a useful, albeit perhaps only heuristic, framework for thinking about bargaining. Such models also point to the basic fact that negotiations do involve a substantial component of gamesmanship.[12]

§ 7.04 Economic Approaches

Often related to game-theoretic analyses are economic theories of negotiating.[13] Economic theory essentially focuses on a "cost-benefit" approach to analyzing the outcome of negotiations inasmuch as the predominant commodity at stake in most negotiations is money. On the one hand, in negotiations involving business transactions where there is no legal dispute to be resolved, this analysis involves straightforward economic considerations that dictate the course and outcome of bargaining based upon the extent to which the parties believe that a deal would be profitable. In the context of negotiations to resolve a legal dispute, economic theory essentially posits that the likelihood of a settlement depends on the extent to which the parties calculate or otherwise perceive that the benefit to be achieved by settling the case outweighs the cost of resolving the dispute through litigation.

[10] *See* H. Scott Bierman & Luis Fernandez, *Game Theory with Economic Applications*, 68–70 (1993); H. Raiffa, *The Art and Science of Negotiation* 3–4, 54 (1982).

[11] *See* O. Young, *Bargaining* 36–37 (1975) ("[T]he models of game theory have not produced good predictions in empirical terms. That is, the outcomes predicted by these logical models do not correspond well with the actual outcomes that occur in related real-world situations even though a number of models are logically and mathematically elegant.").

[12] H. M. Kritzer, *Let's Make a Deal*, 92–93 (1991).

[13] *See* O. Young, *Bargaining* (1975) (summarizing a number of classical economic models).

The thrust of the latter analysis is that a settlement will occur if the bottom-line amounts of money that the respective parties are willing to settle for create a "zone of overlap" where the minimum amount the plaintiff will accept is less than the maximum amount the defendant will pay.[14] In the most straightforward formulation, these bottom-line amounts (often referred to as "resistance points") are arrived at by calculating an "*expected* outcome" for the case by multiplying the gross outcome that could be obtained at trial by the probability that the gross outcome will occur, and then subtracting (for plaintiffs) or adding (for defendants) the non-shiftable costs a court would not tax against the losing party which would be incurred in obtaining that outcome ("transaction costs").

For example, if the Plaintiff estimates that the gross outcome he could obtain at trial is $100,000, that he has approximately a 75% chance of obtaining such a verdict in light of the particular circumstances of the case, and that it will cost him approximately $5,000 in non-shiftable litigation expenses to obtain that verdict, his bottom-line settlement amount (resistance point) would be $70,000 (*i.e.*, $100,000 × .75 = $75,000; $75,000 − $5,000 = $70,000). On the other hand, the Defendant might estimate that Plaintiff has only a 60% chance of obtaining $100,000 at trial, and that it will cost her (the Defendant) $20,000 in non-shiftable expenses to try the case. Thus, her bottom line (resistance point) would be to pay Plaintiff no more than $80,000 to settle the case (i.e., $100,000 × .60 = $60,000; $60,000 + $20,000 = $80,000). Here, because the minimum amount the Plaintiff will accept ($70,000) is less than the maximum amount the Defendant will pay ($80,000), a settlement is theoretically most likely to occur somewhere within the $10,000 zone of overlap between $70,000 and $80,000.

A fundamental difficulty with this type of analysis is estimating "what the case is worth" when one chooses a gross amount that a jury might award and a probability that such a verdict would be realized. In addition, the amount of non-shiftable litigation costs in a given case may be quite difficult to estimate. To some extent, these uncertainties may be mathematically taken into account if each party considers a variety of possible jury verdicts (*e.g.*, from $0 to $10,000 to $20,000, etc. up to $100,000), assigns a probability to each (where the total of the percentages equals 100%), multiplies each possible jury verdict by the particular probability assigned to it to arrive at a set of "expected values," and then adds the expected values together to arrive at an overall expected outcome. The same procedure could be followed to arrive at an overall estimate of expected costs. The expected costs would then be subtracted (for the plaintiff) or added (for the defendant) to the overall expected outcome. However, the prophetic accuracy of this method of calculation is still dependent upon the relative accuracy of the various probabilities that the parties assign to different jury verdicts and cost estimates. Moreover, and perhaps most importantly, the utility of this method is limited to the extent that the parties or their lawyers are able and willing to think in these arithmetic calculations of the various probabilities.

[14] *See generally*, Richard A. Posner, An Economic Approach to Legal Procedure and Judicial Administration, 2 J. Legal Studies 399 (1973); Alan E. Friedman, An Analysis of Settlement, 22 Stanford L. Rev. 67 (1969); John P. Gould, An Economic Analysis of Legal Conflicts, 2 J. Legal Studies 279 (1973).

Apart from the difficulty of arriving at an expected value for a case, numerous other uncertainties exist that affect the reliability of economic analyses of potential settlements. For example, the extent to which the parties are psychologically willing to gamble on going to trial versus settling the case (commonly referred to as "risk aversion") usually has a profound impact on the negotiating process and its outcome. Similarly a party might have different reasons why she would prefer a trial or settlement of the case, and the particular concession behavior of a party may significantly affect the negotiating behavior of the other party. In various ways, economic theorists have struggled to incorporate these and other variables into intricate mathematical models in an on-going effort to understand different types of negotiations and their potential outcomes.[15]

The foregoing discussion of economic theory has assumed a type of bargaining that is frequently called "distributive" bargaining, having a "zero-sum" nature. That is, where there is a single issue such as money, the consequence of negotiating is that the more money or gain one side gets, the less the other side gets.[16] Another line of economic theory, however, conceptualizes "integrative" bargaining, having "positive-sum" results. Here,

> . . .[in] such bargaining, in which there are two parties and several issues to be negotiated,. . .[t]he parties are not strict competitors. It is no longer true that if one party gets more, the other necessarily has to get less; they both can get more. They can cooperate in order to enlarge the pie that they eventually will have to divide.[17]

One way of conceptualizing integrative bargaining is through the model of the so-called "efficient frontier" or "Pareto Optimal Frontier," developed by the Italian economist Vilfredo Pareto.[18] This model may be graphically represented as follows:[19]

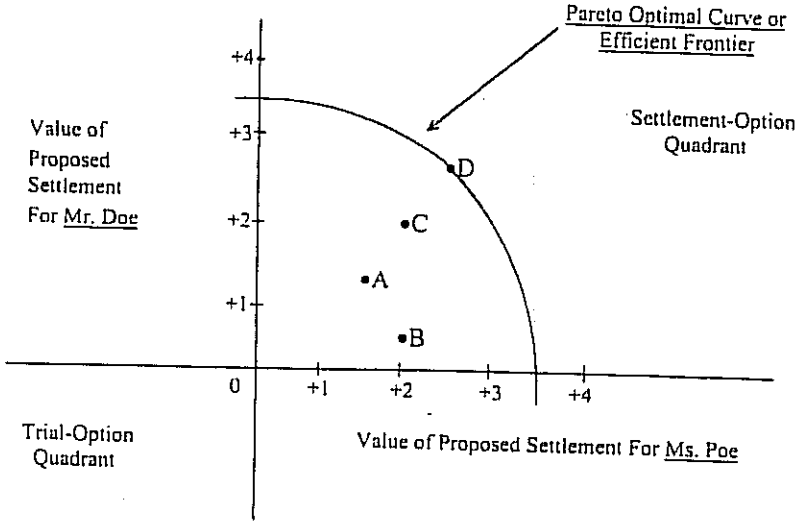
[15] For an excellent summary of many of these models, *see* Robert D. Cooter & Daniel T. Rubinfield, Economic Analysis of Legal Disputes and Their Resolution, 27 J. Econ. Literature 1067 (1989).

[16] H. Raiffa, *The Art and Science of Negotiation* 33 (1982).

[17] H. Raiffa, *The Art and Science of Negotiation* 131 (1982).

[18] *See* H. Raiffa, *The Art and Science of Negotiation*, 138–142, 148–165 (1982).

[19] This graph is adapted from the one found in Jonathan M. Hyman, Trial Advocacy and Methods of Negotiation: Can Good Trial Advocates be Wise Negotiators?, 34 UCLA L. Rev. 879 n.34 (1987).



In this graph, the point symbols designated by • with their accompanying letters represent different settlement proposals. The horizontal axis represents increases in the value of a settlement proposal for Ms. Poe in an easterly direction, and the vertical axis represents increases in the value of a settlement proposal for Mr. Doe in a northerly direction. A settlement proposal perceived by one or both of the parties to be of less value than what could be obtained at trial would not give rise to a settlement and would fall within the southwest "Trial Option Quadrant." The parties will only settle the case if a particular proposal falls within the northeast quadrant.

Within this "Settlement-Option Quadrant," there are theoretically three types of settlement proposals that could be made: (1) proposals that are of greater value to one party but simultaneously reduce value to the other party, (2) proposals that are of greater value to one party but do not reduce value to the other, or (3) proposals that are of *maximum* value to each party without reducing value to any party. The latter settlement proposals are said to be "Pareto-optimal" or most "efficient." That is, at some level, it will not be possible to fashion a settlement that will increase value for at least one party without reducing value to the other, and this level is represented by the "Pareto Optimal Curve or Efficient Frontier." Thus, no settlements exist to the north or east of the curve, but from any position within the area bounded by the curve it is theoretically possible to find a settlement along the curve line that is better for at least one party without reducing value to the other.

For example, if, after Mr. Doe has proposed a settlement of comparable value to both parties at point A, Ms. Poe proposes a settlement at point B

which is of greater value to her, the latter proposal will be rejected by Mr. Doe because it reduces the value of the settlement he would have received through proposal A. If either party thereafter proposes a settlement at point C, such a settlement would be more efficient than B because proposal C would increase value for Mr. Doe without decreasing value for Ms. Poe. In this way, proposal C is said to be "pareto superior" to proposals A or B. However, a settlement at point C is not "pareto optimal" in the face of proposal D that would be of yet further value to both parties without reducing value to any one party.

The theory of the efficient frontier is that, particularly in situations where the parties are bargaining over a number of issues rather than merely the question of how much money one party will pay and the other will get, an optimal settlement is one that is most efficient in the sense of providing the most gain to each party without diminishing the value received by any one of them through some other or earlier settlement proposal. The theory presupposes and prescribes that the parties explore and share their various interests, needs, goals, and values underlying the subject matter of the negotiation. In this way, they are more likely to arrive at an optimal settlement that is of greater net benefit to both of them than would otherwise be the case if they engaged in myopic "positional" bargaining that did not take into account their underlying interests, needs, goals, and values.

As a simple example, if Ms. Poe and Mr. Doe are in a dispute about custody, child support, and alimony, Ms. Poe's initial position might be that she will have sole "legal and physical custody" of their child, that Mr. Doe must pay her $X in child support, and that he should pay $Y in fault-based alimony each month because he committed adultery. Mr. Poe's initial position might be that he should have sole custody of the parties' child or will pay only $Z in child support if Ms. Poe has custody, and in no event will he pay any alimony notwithstanding his adultery. If the parties essentially maintain these initial positions and limit their bargaining solely to the payment amounts regarding child support and alimony, they might never reach agreement. On the other hand, if they share their underlying interests, needs, goals, and values with one another (*e.g.*, through their lawyers or a mediator), they may be successful in reaching an agreement that each perceives to have more positive-sum than zero-sum aspects. For instance, the parties might agree to have "joint legal custody" of their child with Ms. Poe having primary "physical" custody, and Mr. Doe might agree to pay more in child support than he otherwise was willing to pay (or would statutorily be obligated to pay) in exchange for Ms. Poe's agreement to forego receiving any alimony. In short, these various tradeoffs between the parties will more closely reflect the differing needs and values that the parties place upon parental status, the most appropriate care for their child, the relative importance of admitting fault in the break up of the marriage, and considerations of immediate or longer-term financial security for the child and/or the spouses.

This multi-dimensional approach of integrative bargaining as conceptualized through the search for pareto-optimal settlements has become commonly referred to as "problem-solving" negotiation in contrast to purely distributive, "adversarial" negotiation.[20] The attributes and limitations of each approach

[20] *See generally*, R. Fisher & W. Ury, *Getting to Yes* (1981); C. Menkel-Meadow, Toward Another View of Legal Negotiation: The Structure of Problem Solving, 31 UCLA L. Rev. 784 (1984).

have been vigorously debated among scholars.[21] Essentially, this debate reflects the tension between (1) the reality that most negotiations are exclusively concerned with how much money one party will receive and the other will pay, and (2) the "principled" view that parties might achieve greater mutual satisfaction if they cooperate or collaborate to either enlarge the pie they can divide or fashion an agreement that places a premium on satisfying both parties' true interests, needs, goals, and values.

§ 7.05 Anthropological & Sociological Approaches

Game theory and economic theory focus primarily, though not exclusively, on the outcome of negotiations rather than on their process. Much of the anthropological and sociological literature, on the other hand, focuses on identifying and exploring typologies of negotiating that are descriptive (and to some extent prescriptive) about the process of negotiating. These typologies tend to combine analyses of the structure of negotiations with analyses of different styles used in them to explore the interrelationship between the ends and means involved in negotiating.

For example, one prominent anthropologist has developed what is essentially a seven-phase model of the negotiating process based upon research in different cultural settings.[22] These phases may be summarized as follows:

(1) The search for an arena. The negotiators begin by choosing a forum to engage in negotiations, whether that forum is a particular place where discussions are held in person or under circumstances where negotiations take place over the telephone, Internet, or in writing.

(2) Composition of agenda and definition of issues. The negotiators decide what issues need to be addressed and the agenda for the negotiation.

(3) Establishing maximal limits to issues in dispute. The negotiators limit the key issues and stake out their positions on those issues.

(4) Narrowing the Differences. The negotiators begin to narrow their differences, and the negotiation shifts from differences and antagonism to coordination and even cooperation. When multiple issues are involved, differences are narrowed through strategies such as following a simple agenda, focusing on the most important issues, reducing issues to the attributes of a single objective, solving the less difficult issues, and/or considering matters to trade or package deals.

(5) Preliminaries to final bargaining. To the extent that the negotiators, in the process of narrowing their differences, identify sub-issues or other matters that need to be resolved to reach an agreement, information is exchanged and these issues are also addressed to bring the negotiators closer to final agreement.

(6) Final bargaining. The negotiators close the deal, disposing of the few issues or problems that remain to be resolved.

[21] *Cf.*, *e.g.*, James J. White, Review Essay: The Pros and Cons of "Getting to Yes" by Roger Fisher & William Ury, 31 J. Legal Education 115 (1981) *with* Roger Fisher, Comment on James White's Review of "Getting to Yes," 31 J. Legal Education 128 (1981).

[22] P.H. Gulliver, *Disputes and Negotiations: A Cross-Cultural Perspective* (1979).

(7) Ritual Affirmation. Upon reaching a final agreement, the negotiators engage in any customary ritual that acknowledges or memorializes it, whether a simple hand shake, elaborate ceremony, or celebration.

This anthropological model was developed from a cross-cultural perspective. In the context of negotiating legal disputes, one scholar has reduced the negotiating process to a series of four stages that roughly complement many of the phases given above. Those stages are (1) "orientation and positioning" (during which the negotiating attorneys establish a relationship and their opening positions); (2) "argumentation" (during which the attorneys present their positions in the light most favorable to their respective side, define the issues, seek to discover the "real" position of the other side, and make concessions); (3) "emergence and crisis" (during which the attorneys recognize that one or both of them must make further concessions to prevent deadlock, further concessions are made, "crisis" is reached when neither side wants to make yet further concessions, and one of the parties either accepts the other's final offer or an impasse occurs); and (4) "agreement or final breakdown" (during which a settlement is formalized if an agreement is reached, or a decision is made to go to trial if no agreement is reached).[23] Taken together, the cross-cultural and legal typologies provide an overall portrait of the major features of the process of negotiating in terms of moving from initial discussions to final agreement.

In addition, much of the sociological literature (and legal literature) has been devoted to identifying key variables or factors that permeate or differentiate negotiations. Among the more important factors that have been routinely discussed include:[24]

- The effects of the location where the negotiation takes place and the particular physical arrangements at the site of negotiations;
- The number of parties involved in the negotiation and whether any coalitions exist;
- The number and complexity of the issues involved in the negotiation;
- The nature of the stakes in the negotiation;
- The effect of time constraints or time-related costs on the parties;
- The relative bargaining power possessed by the parties;
- Whether the negotiations are public or private;
- Whether there are any persons other than the parties ("audiences") to whom the negotiators are beholden or accountable, or whether there are any constituencies that may be affected by the negotiation;
- Whether a third-party neutral assists or intervenes in the negotiation;

[23] Gerald R. Williams, *Legal Negotiation and Settlement* 70–72 (1983).

[24] *See generally*, J. Rubin & B. Brown, *The Social Psychology of Bargaining and Negotiation* (1975); D. Druckman, *Negotiations: Social Psychological Perspectives* (1977); S. Bacharach & E. Lawley, *Bargaining: Power, Tactics, and Outcomes* (1981); A. Strauss, *Negotiations: Varieties, Contexts, Processes and Social Order* 237–238 (1978); H. Raiffa, *The Art and Science of Negotiation* 11–19 (1982); G. Lawenthal, A General Theory of Negotiation Process, Strategy, and Behavior, 31 U. Kan. L. Rev. 69 (1982); C. Menkel-Meadow, Review Essay: Legal Negotiation: A Study of Strategies in Search of a Theory, 4 Am. Bar. Found. J. 927–926 (1983).

- Whether the negotiations are one-shot or multiple events, or are linked;
- The effects on the negotiation of any continuing relationships between the parties or their negotiators after the negotiation is concluded;
- The alternatives available to the parties in the absence of reaching an agreement;
- The personalities of the parties and their negotiators;
- The interests, needs, goals, and values of the parties and their negotiators;
- The extent of information sharing between the parties and their negotiators, and their ability to communicate with one another.

Another major line of research and analysis concerns the impact of the negotiator's style or strategy in negotiating upon negotiator effectiveness and the outcome of negotiations. Much of this research has attempted to compare the effectiveness of negotiators who adopt a "cooperative" approach to bargaining (*e.g.*, by "seeking common ground" and "communicating a sense of shared interests, values, and attitudes using rational logical persuasion as a means. . .to reach a fair resolution of the conflict based on an objective analysis of the facts and law.."[25] with those who employ a "competitive" approach (*e.g.*, by making high initial demands, maintaining a high level of demands during negotiations, making few and small concessions, and having a general high level of aspiration).[26] To the extent negotiator "effectiveness" involves considerations such as the cost of the negotiations, the comprehensiveness of a settlement, the satisfaction of both parties, the quality of the outcome, and observing the "rules of the game," one study concluded that cooperative negotiators are generally more effective than competitive negotiators. However, the author of this same study ultimately concluded ". . .neither pattern has an exclusive claim on effectiveness. Use of the cooperative pattern does not guarantee effectiveness, any more than does the use of the competitive pattern. An attorney can be very effective or very ineffective within the constraints of either."[27]

In terms of the effect of a cooperative or competitive style or strategy upon the "outcome" of negotiations (*i.e.*, the result achieved in relation to what was initially sought), a number of scholars have suggested that a competitive negotiator will fare better when pitted against a cooperative negotiator, particularly if the latter does not recognize his counterpart's competitive tactics.[28] This is because, given that competitive negotiators tend to take

[25] Gerald R. Williams, *Legal Negotiation and Settlement* 53 (1983).

[26] Id. *See also* D. G. Gifford, A Context-based Theory of Strategy Selection in Legal Negotiation, 46 Ohio St. L. J. 41 (1985) (distinguishing "cooperative," "competitive," and "integrative"); G.T. Lowenthal, A General Theory of Negotiation Process, Strategy and Behavior, 31 U. Kan. L. Rev. 69 (1982) (distinguishing between "competition" and "collaboration"); D. Lax & J. Sebenius, *The Manager as Negotiator: Bargaining for Cooperation and Competitive Gain* (1987) (distinguishing between negotiating to "claim value" and to "create value"); H. Raiffa, *The Art and Science of Negotiation* (distinguishing between "distributive" and "integrative" bargaining).

[27] *See* Gerald R. Williams, *Legal Negotiation and Settlement* 18–19 (1983).

[28] *See* Gerald R. Williams, *Legal Negotiation and Settlement* 54 (1983); Gary T. Lowenthal, A General Theory of Negotiation Process, Strategy, and Behavior, 31 U. Kan. L. Rev.82–83, 109–110 (1982); Donald G. Gifford, A Context-Based Theory of Strategy Selection in Legal Negotiation, 46 Ohio St. L. J. 60–62 (1985); Hazel Genn, *Hard Bargaining: Out of Court Settlement in Personal Injury Actions* 48 (1988).

tougher positions and make fewer concessions, it has been statistically shown that "[h]igh initial demands (relative to stakes) by plaintiffs and low initial offers (again, relative to stakes) by defendants are related to [more positive] success for the relevant side."[29] However, when the negotiators for both sides take the same approach, whether competitive or cooperative, there would not seem to be any theoretical reason why one style should lead to consistently better outcomes when the only issue is money. On the other hand, as mentioned previously in connection with the discussion of Pareto Optimal solutions, there is extensive debate about whether the ends of a negotiation are better served by employing a "problem-solving" model of negotiating through cooperative means, as contrasted with engaging in "adversarial" bargaining through competitive means.

§ 7.06 Psychological Approaches and Factors

The psychological theories that are most often drawn upon in the academic literature about negotiating relate to how people "communicate" with one another and how negotiators can overcome common barriers to effective communication. Another line of psychological theory (or social-psychological theory) that is useful to understanding negotiation, and which is less intuitively understood than communicative considerations, involves how people make decisions under conditions of uncertainty. Because negotiations usually require parties to make choices under circumstances of risk, provided below are some of the more important psychological factors affecting such decision-making.

[1] Risk Aversion

A critical factor in a party's decision whether to settle a case depends upon that party's willingness to gamble that the alternative to settlement (*e.g.*, taking the case to trial) will yield a better result. This is typically referred to as "risk aversion"—the degree to which a party is psychologically disinclined to take risk.

In the litigation context, a risk-averse plaintiff is one who theoretically will settle the case for something less than his calculation of the "expected outcome" for the case (*i.e.*, his estimate of the gross outcome that could be obtained at trial multiplied by the probability that the gross outcome will occur). That is, when faced with a final settlement offer, if Plaintiff estimates that there is a 75% chance of obtaining a $100,000 verdict at trial (*i.e.*, an expected outcome of $75,000), he will reduce that expected outcome further by an amount that reflects the extent to which he is intuitively averse to gambling upon getting a better result at trial. This discount would be in addition to the non-shiftable litigation costs that he would subtract from the expected outcome to arrive at his potential bottom-line settlement amount (resistance point). Similarly, a risk-averse Defendant will theoretically settle the case for something more than her calculation of the expected outcome for the case. That is, along with adding her estimated litigation costs to her

[29] H. M. Kritzer, *Let's Make a Deal* 54, 79 (1991).

calculation of the expected outcome for the case, Defendant will make a further adjustment to the bottom-line settlement amount she is willing to pay by the extent to which she is intuitively averse to gambling upon getting a better result at trial. In short, the parties' bottom-line settlement amounts (resistance points) are often adjusted downwards (for plaintiffs) and upwards (for defendants) depending upon their respective levels of risk aversion.

Of course, a party might be "risk neutral" or be a "risk preferer." If a party is risk neutral, that party will make no adjustment of the sort described above. If the Plaintiff is a risk preferer, he might adjust his bottom-line settlement demand *upwards*, not downwards; and if the Defendant is a risk preferer, she might adjust her bottom-line settlement offer *downwards*, not upwards. Most significantly, if one party is risk averse and the other is a risk preferer (or is risk neutral), the latter will have an advantage over the former in that the latter will theoretically be able to extract greater concessions from the former than would otherwise be the case.

This advantage frequently exists where one party is a "repeat player" in the type of litigation involved, and the other party is a "one-shot" player.[30] For example, in personal injury cases, an insurance company—which is, for all practical purposes, the paying defendant in such cases—is a repeat player in that it is involved in settling and litigating personal injury claims all the time. On the other hand, the injured plaintiff is a one-shot player. The important difference between the parties is that the insurance company has experience and significant financial resources available to it that may not be available to the plaintiff, particularly if she is represented by an inexperienced lawyer or one who is not willing or able to advance the costs of the litigation. As a repeat player, the insurance company is likely to be risk neutral (or even a risk preferer) because any loss resulting from a particular case will, at some level, be offset by wins in other cases. However, the injured plaintiff is more likely to be risk averse because she has only "one shot" at receiving compensation; there is no averaging out of wins and losses over a series of cases. Thus, if the insurance company has a lower aversion to risk than the plaintiff, the company is likely to hold out for a settlement on terms that are more favorable to it than to the plaintiff.

Whether a party will have a tendency to be risk averse and therefore be more inclined to settle the case than go to trial, or have a tendency to be risk preferring and thus be more inclined to gamble on a trial outcome, sometimes depends upon whether the risk is perceived as one of gaining or losing a sum of money. There is growing research to indicate that a party who perceives her situation in terms of losing money will often prefer to gamble to avoid what otherwise would be a sure loss, even if the expected loss from the gamble is larger. On the other hand, a party who perceives her situation in terms of gaining money will usually be less inclined to gamble on obtaining a greater amount, even if the expected gain from the gamble is larger. That is, parties who stand to lose money may have a tendency to be "loss averse" and risk

[30] *See* D. Wittman, Dispute Resolution, Bargaining, and the Selection of Cases for Trial: A Study of the Generation of Biased and Unbiased Data, 17 J. Legal Studies 322 (1988); M. Galanter, Why the'Haves' Come Out Ahead: Speculations on the Limits of Legal Change, 9 Law & Society Review 95 (1974).

preferring—more willing to prevent or minimize loss by taking their chances at trial; but parties who stand to gain money are generally more risk averse—less willing to gamble on getting more money at trial.[31]

As an example of this phenomenon, suppose that a person is faced with the choice of (a) a sure gain of $15,000, or (b) an 80% chance of winning $20,000 and 20% chance of getting $0. Here, even though the expected value of choice (b) is $16,000 (i.e.,.80 ×$20,000 +.20 ×$0), most people would choose the sure gain of $15,000. On the other hand, if a person is given the choice of (a) a sure loss of $15,000, or (b) an 80% chance of losing $20,000 and a 20% chance of losing nothing, studies suggest that most people will choose option (b).[32] To the extent this phenomenon is at work in a particular case, it suggests that, absent other factors that might affect the parties' risk preferences, plaintiffs will generally opt to accept a smaller gain through settlement rather than gamble on winning a larger sum at trial, whereas defendants will be more prone to risk a larger possible loss at trial in lieu of incurring a sure, albeit smaller, loss by settling a disputed case.[33]

[2] Reference Points and Framing Effects

Whether one views a matter as a gain or loss largely depends upon one's "reference point" (*i.e.*, the situation from which the gain or loss is measured) and how the matter is "framed" (*i.e.*, whether the issue, problem, or choice is presented as a "gain" or "loss").[34] This is also true in negotiating. A party will view a particular proposal as a gain or loss (which, in turn, may affect that party's level of risk aversion) based on that party's reference point—usually his resistance point—and the manner in which the proposal is framed. Thus, negotiators routinely try to induce one another to change their resistance points and risk preferences by "framing" the situation in terms of gain or loss as best suits the negotiators' respective objectives.

For example, in buyer-seller negotiations, the seller may prevail upon the buyer to purchase an item for an amount that the buyer thinks he cannot afford (a loss) by characterizing the purchase as an "investment" (a gain). Similarly, a worker may be convinced to switch jobs in the face of taking a pay cut (a loss) if she is made to see the new job as a stepping stone to greater, long-term career advancement (a gain). On the other hand, a bargainer might seek to emphasize what she stands to lose from a particular proposal in order to induce the other party to forgo a greater gain, or, more frequently,

[31] *See* P. J. van Koppen, Risk Taking in Civil Law Negotiations, 14 Law and Human Behavior 151–167 (1990); Amos Tversky & Richard Thaler, Anomalies Preference Reversals, 4 J. Econ. Perspectives 201 (1990); Amos Tversky, et. al., The Causes of Preference Reversals, 80 Am. Econ. Rev. 204 (1990); Robert H. Mnookin, Why Negotiations Fail: An Exploration of Barriers to the Resolution of Conflict, 8 Ohio St. J. Disp. Res. 243–245 (1993); M. Neal & M. Bazerman, The Effects of Framing and Negotiator Overconfidence on Bargaining Behaviors and Outcomes, 28 Acad. Mgmt. J. 34, 37–38 (1985).

[32] *See* G. Goodpaster, Rational Decision-Making in Problem-Solving Negotiation: Compromise, Interest-Valuation, and Cognitive Error, 8 Ohio St. J. Disp. Res. 346–347 (1993).

[33] *See* H. M. Kritzer, *Let's Make a Deal* 76 n. 19 (1991).

[34] *See generally*, D. Kahneman, et. al., *Judgment Under Uncertainty: Heuristics and Biases* (1982); D. Kahneman & A. Tversky, Prospect Theory: An Analysis of Decision Under Risk, 47 Econometrica 263 (1979).

emphasize what the other party stands to lose if she is unwilling to make further concessions. In either case, the overriding effort is to manipulate the other party's perspective on the situation in terms of acquiring gain or incurring loss.

Another implication of framing a proposal as an opportunity to maximize gain (which may cause a party to be risk averse) or minimize loss (which may cause a party to be loss averse) is that a party seeking to maximize gain may take a more cooperative approach to the negotiation to achieve a settlement in preference to going to trial, whereas a party seeking to minimize loss may take a more competitive approach due to a greater willingness to take the case to trial. In adversarial bargaining, where a gain to one side is viewed as a corresponding loss to the other, a party who is loss averse and thus risk-preferring and more competitive is likely to have an advantage in the negotiation if the other party is risk averse and thus more cooperative. On the other hand, the parties might take a problem-solving approach to the negotiation, in which case each would cooperate with one another by viewing the negotiation as an opportunity for both parties to maximize gain and minimize loss. In theory, the potential effects of these different factors on a settlement may be illustrated by the following matrix:

		Jones: Maximize Gain	Jones: Minimize Loss
Smith	Maximize Gain	Problem Solving Smith is risk neutral & cooperative Jones is risk neutral & cooperative (Better settlement for both)	Adversarial Bargaining Smith is risk averse & cooperative Jones is loss averse (risk preferring) & competitive (Better settlement for Jones)
Smith	Minimize Loss	Adversarial Bargaining Smith is loss averse (risk preferring) & competitive Jones is risk averse & cooperative (Better settlement for Smith)	Problem Solving Smith is risk neutral & cooperative Jones is risk neutral & cooperative (Better settlement for both)

[3] Sunk Costs

A common psychological barrier to rational decision-making under conditions of uncertainty is the tendency to allow past events which one cannot change to govern one's choices about the future. In negotiations, this barrier frequently occurs when one or both of the parties becomes entrapped by "sunk costs"— *i.e.* lost no matter what the party does but which the party vainly seeks to justify or recoup in making a choice about settlement or trial.[35]

[35] *See* Robyn M. Dawes, *Rational Choice in an Uncertain World* 22 (1988).

For example, before attempting to settle a case, the parties may have incurred substantial expenditures in pretrial litigation. If they have become psychologically entrapped by these investments, they may forgo any possibility of settling the case out of a belief that going to trial is the only way to justify or recoup that investment. In this way, the parties may only escalate the conflict, persist in spiraling litigation, and end up sustaining losses that far surpass the benefits of any favorable trial outcome. Conversely, a party may become psychologically entrapped by the time, effort, and resources expended in seeking to settle the case. Unwilling to abandon this investment, the party might irrationally agree upon a settlement that ends up costing far more than the alternative of going to trial.[36]

In short, rational decision-making generally involves an assessment of the benefits that may be realized or losses that may be minimized when looking toward the future, rather than the past. Past events or investments, to the extent they are truly "sunk" in the sense that they cannot be realistically recouped through a settlement or some reasonable alternative to a negotiated agreement, should be abandoned unless there is some other, overriding reason to honor those past events or investments.[37]

[4] Reactive Devaluation

The phenomenon of "reactive devaluation" relates to the sometimes-irrational inferences that parties draw from one another's offers or concessions made during negotiations. This phenomenon, which is commonly observed and has been empirically verified, refers to the tendency of a party to devalue a settlement proposal or compromise simply because it originated with the other side.[38] That is, a compromise or concession made unilaterally by a party is often valued less highly than one that is initially withheld and subsequently extracted through reciprocal proposals or concessions. Thus, a party might reject a seemingly gratuitous offer that is beneficial to her by misinterpreting it as a sign of weakness by the other side that warrants yet greater concessions from the other side. This misinterpretation may, in turn, result in a gross miscalculation that causes an otherwise desirable settlement to end in deadlock.

Reactive devaluation is not to be confused with a reasoned assessment about what a party's particular proposal means about his overall approach to the negotiation and concession behavior. For example, depending upon the overall context in which it is made, a unilateral concession may be a good indicator of the conceding party's resistance point. However, to *automatically* devalue a proposal or concession solely because the other side makes it is irrational. Thus, a party who is the recipient of such a proposal should act upon it to the extent it advances her objectives, rather than allow her objectives to be undermined by a gut reaction that is based on purely speculative assumptions about the other side's motives in making the proposal.

[36] *See* Charles B. Craver, *Effective Legal Negotiation and Settlement* 277–278 (3d ed. 1997).

[37] *See* G. Goodpaster, Rational Decision-Making in Problem-Solving Negotiation: Compromise, Interest-Valuation, and Cognitive Error, 8 Ohio St. J. Disp. Res. 356 (1993).

[38] *See* R. H. Mnookin, Why Negotiations Fail: An Exploration of Barriers to the Resolution of Conflict, 8 Ohio St. J. Disp. Res. 246–247 (1993).

If a party is concerned that his proposal may be erroneously devalued by the other side, he might frame it as emanating from some objective criterion such as an independent standard, custom, rule, or measure of damage under applicable law, rather than as stemming from his purely individual intentions. Alternatively, any effect of reactive devaluation is likely to be greatly diminished if the proposal is communicated through a third-party neutral such as a mediator.

§ 7.07 Translating Academic Approaches into Practice

The foregoing summary of the major academic approaches to understanding negotiation underscores the fact that the study of negotiation is essentially an interdisciplinary field. There is no single discipline or intellectual perspective that has a monopoly on useful insights into the subject, and likewise there is no single theory, model, or typology that is most descriptive and instructive about it. However, taken together, the various academic approaches provide a useful introduction to learning about negotiating because they help us to understand *why* certain negotiations are successful when others are not.

By the same token, the academic approaches are useful from a prescriptive standpoint. That is, understanding the fundamental dynamics of negotiating also tells us a lot about *how* to negotiate effectively. For example, the game-theoretic interplay between cooperation and competition in bargaining implicates the relative merits of employing cooperative or competitive means in achieving problem-solving or adversarial ends to negotiating. The cost-benefit analyses underlying economic theory are highly useful in valuing a case when choosing between the options of settlement or trial. The social-psychological literature is instructive about effective negotiating styles, tactics, and techniques that may be employed to foster rational decision-making under circumstances of risk and uncertainty. In short, in varying forms and degrees, all of these theoretical approaches may be translated into practical application.

Finally, as indicated at the outset of this Chapter, the academic research may encourage us to push the intellectual envelope to consider more expansive and imaginative approaches to negotiating. This is important because, as in the application of other practical skills, lawyers too often form the habit of adopting a largely singular negotiating approach in client representation. Although a routine approach may be comfortable and workable in many circumstances, the genius of the most effective lawyers is their ability to adopt and adapt to different approaches to negotiation as may be warranted by the particular circumstances of a case. Encouraging this ingenuity is perhaps the most practical contribution of the academic literature.

Chapter 8

Negotiating Models, Strategies and Styles

SYNOPSIS

§ 8.01 Introduction

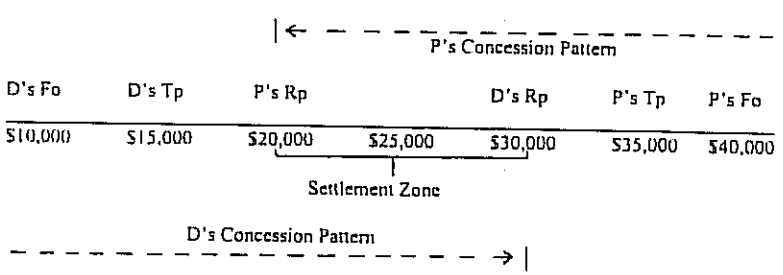
As introduced in the preceding chapter, the existing academic literature about the negotiating process has given rise to two distinct models of negotiating that are particularly helpful in understanding what negotiators do and what they ought to do. These descriptive and prescriptive models are useful frameworks for bridging the gap between theory and practice in that they provide a conceptual overview of the negotiating process that is eminently practical in deciding what overall negotiating approach to use in particular circumstances.

§ 8.02 The Adversarial Model

The adversarial model of negotiation (sometimes called "competitive," "zero-sum," "individualistic," or "distributive bargaining") is the most commonly used approach to legal negotiations. It focuses on "winning" in the sense of maximizing the likelihood the client will prevail and what the client receives upon prevailing. Each side strives to get as much of the thing bargained for (usually money), and the more one side gets, the less the other side gets. Adversarial negotiators engage in a largely competitive and manipulative process in which a series of concessions is made from initial, polarized positions to arrive at a compromise point which is perceived to be either roughly equivalent to what a court would award or more desirable than taking the risk of what might happen in court.

Adversarial negotiation usually involves five stages. First, each party prepares for the negotiation by establishing her "target" and "resistance" points, and estimating the target and resistance points of the other side. A "target point" is the best result a party realistically expects she can obtain, and her "resistance point" is the point below which she will not make any further concessions and will resort to her best alternative to negotiation such as going to trial. From these target and resistance points, the parties plan their first offers (which are set somewhere beyond their target points), and establish their concession patterns in light of the ultimate "settlement zone" created by the overlap between the parties' resistance points.

For example, if P sues D for personal injuries sustained due to the alleged negligence of D, the parties' target and resistance points, first offers, concession patterns, and settlement zone may look like the following:



P's Fo = P's first offer
D's Fo = D's first offer
P's Tp = P's target point
D's Tp = D's target point
P's Rp = P's resistance point
D's Rp = D's resistance point

In the second stage, the parties define the issues and often make their first offers or proposals. Third, the parties exchange information in the course of presenting their varying positions and arguments in support of those positions. Fourth, they bargain toward compromise by analyzing and making concessions. And fifth, the parties conclude the negotiation by executing settlement documents or releases if an agreement has been reached, or, if no agreement can be reached, by resorting to their best alternative to negotiation such as going to trial.

The adversarial model is based on four assumptions. First, the model assumes that the parties desire the same goals, items, or values (*e.g.*, money). Second, the model assumes that the parties are in conflict because they are bargaining over the same "scarce" goals, items, or values. Third, it is assumed that the matters to be bargained for are limited to those that a court would award, whether money or something that the law may compel a party to do or not to do. Finally, the model assumes that the best solution is predicated upon a division of and compromise over the goals, items, or values at issue. As summarized by one scholar:

> The adversarial paradigm is based almost exclusively on the simple negotiation over what appears to be one issue, such as price in a buy-sell transaction, or money damages in a personal injury or breach of contract suit. The common assumption in these cases is that the buyer wants the lowest price, the seller the highest; the plaintiff wants the money demanded in the complaint and the defendant wants to resist paying as much as possible. Each dollar to the plaintiff is a commensurate loss to the defendant; the same is true with the buyer and seller. Given this description of the paradigmatic negotiation, the negotiator's goal is simply to maximize gain by winning as much of the material of the negotiation as possible. Underlying this general assumption are really two assumptions: first, that there is only one issue, price; and second, that both parties desire equally and exclusively the thing by which that issue is measured, in most cases, money.[1]

Critics of the adversarial model contend that its underlying assumptions and method of negotiating often limit the quality of the solution to the parties' problem or dispute. By assuming that the parties desire the same goals, items, or values (such as money) and therefore are limited to bargaining over the same scarce resource, the parties may overlook the fact that they really value these goals or items unequally or have completely different goals in mind. When these differences are not taken into account, the parties may fail to consider alternative solutions, such as trading a smaller sum of money for the performance of an act or service by the other side. Moreover, by assuming that the matters to be bargained for are limited to those that a court would award, the parties often limit their solutions to purely "legal" ones without considering extra-judicial alternatives that may better satisfy both parties' goals, values, or needs.

For example, if a former husband and wife are in dispute about an appropriate increase in the amount of alimony the wife should receive, and the wife contends she needs $300 more per month than the husband says he is able

[1] C. Menkel-Meadow, Toward Another View of Legal Negotiation: The Structure of Problem Solving, 31 U.C.L.A. L. Rev. 784 (1984).

to afford without straining his cash-flow situation, a strict application of the adversarial model may result in the parties splitting the difference at $150 more a month or some other amount they think a court might award. However, if the wife's underlying need for the additional $300 is to allow her to make payments on a new car over a two-year period, and the former husband is the owner of a car dealership, he may be able to give her a car from his inventory in exchange for the wife's agreement to forego a $300 increase in monthly support payments. In this way, the wife receives the item that is of greater value to her (the immediate use of a dependable car), and the husband obtains the goal that is most important to him (preserving his future cash-flow situation).

Critics of the adversarial model also contend that the process by which adversarial negotiations are conducted tends to undermine the quality of potential solutions in two ways. First, the process of exchanging offers, counteroffers, and concessions may not be helpful when the parties are faced with multiple issues. Second, the competitive nature of adversarial negotiation tends to result in argumentation, manipulation, and deception that may inhibit creativity in finding solutions, leave the parties resentful even if an agreement is reached, and impair their future relationship.

§ 8.03 The Problem-Solving Model

The problem-solving model of negotiation (sometimes called "cooperative," "accommodative," "collaborative," or "integrative bargaining") focuses on identifying the parties' underlying interests or needs to develop a broad range of potential solutions from which an agreement can be fashioned that satisfies as many of the parties' mutual needs as possible. Unlike the adversarial model, which emphasizes maximizing individual gain at the expense of the other side, problem solving emphasizes maximizing the parties' joint gain. Problem-solving negotiators engage in a largely cooperative and collaborative process that strives to create a mutually satisfactory solution that is not necessarily limited to traditional judicial remedies.

The problem-solving model is based on four assumptions. First, the model assumes that the usual objective of obtaining money damages is actually a proxy for more basic interests or needs apart from merely those things that money can buy. Second, the model assumes that the parties' interests or needs are often not mutually exclusive. Third, it assumes that by identifying the parties' underlying interests or needs, the parties can come up with a greater number of possible solutions. And fourth, the model assumes that by exploring a greater number of possible solutions, the parties are more likely to find a solution that mutually satisfies their interests or needs.

The problem-solving model is usually applied in five stages of so-called "principled negotiation."[2] First, the parties plan for the negotiation by identifying each side's underlying interests or needs. These interests, which essentially constitute the underlying *reasons* for the parties' objectives or goals, are identified in light of the financial situation of the parties, their social

[2] *See* R. Fisher & W. Ury, *Getting to Yes* 4, 17-98 (1981).

and psychological needs, their moral perspectives, and the legal issues in the case.

Second, the parties make a conscientious effort to "separate the people from the problem"—a mindset that attacks the problem, not each other. Instead of focusing on stated "positions," they discuss and share information about each other's interests or needs to see where they are shared or in conflict.

Third, the parties engage in a "brainstorming" session to generate as many solutions as possible that may satisfy the interests or needs of both parties. Fourth, the parties choose the most reasoned solution that maximizes their mutual gain. Concessions might be made by trading off different interests or needs, and, where interests conflict, the parties strive to resolve their differences based on some objective standard (such as market values, expert opinions, customs, industry standards, or the law) which is independent of the naked will of either side. Finally, the parties conclude the negotiation by executing settlement documents or releases if an agreement is reached, or, if no agreement can be reached, by resorting to their "best alternative to a negotiated agreement" (BATNA) such as going to trial.

Even the strongest proponents of the problem-solving approach acknowledge its limitations. As summarized by one scholar:

> Several difficulties may confront the skeptical problem solver. First there is the problem of perceiving resources as finite. In some legal disputes, for example, a case involving a simple transfer of limited dollars or other valued items from one side to the other, it may appear impossible to expand what is available to both parties. A second barrier may be the perceived inequality of power between the negotiating parties. If one side has power in the legal, economic or psychological sense during the negotiation, the weaker party may have insufficient leverage to use problem-solving techniques where the stronger party knows it can gain a great deal by exercising power in a conventional negotiation. Third, an attempt to satisfy needs may itself thwart the problem-solving approach in a situation where, for example, one of the parties has a need for revenge or punishment. Fourth, there may be limited psychological resources. Where one of the parties is used to a competitive style of negotiation, the execution of a problem-solving method may be viewed as impossible unless the other party becomes a problem solver. Finally, a problem-solving model based on a theory of needs has its own limitations. It will not solve all negotiation dilemmas, but it still offers a potentially more systematic and effective way of thinking about negotiation.[3]

§ 8.04 Factors Affecting the Utility of the Adversarial and Problem-Solving Models[4]

Many negotiations involve neither a purely adversarial nor a purely problem-solving approach. Thus, negotiators frequently use more than one of these

[3] C. Menkel-Meadow, Toward Another View Of Legal Negotiation: The Structure of Problem Solving, 31 U.C.L.A. L. Rev. 829-30 (1984).

[4] *See* D. G. Gifford, A Context-Based Theory of Strategy Selection in Legal Negotiation, 46 Ohio State L. J. 58-93 (1985). *See generally*, D. Pruitt, *Negotiation Behavior* (1981).

approaches in a single negotiation. For example, the parties might start with an adversarial approach and then move to a problem-solving one, or they may apply different approaches to distinct issues in the case. While it sometimes may be psychologically difficult to shift between approaches, particularly when a highly competitive adversarial approach is taken at the outset and the parties then try to engage in problem solving after egos have been frayed or hurt, the willingness to be flexible in shifting one's approach often makes the difference between reaching and not reaching a satisfactory agreement.

In deciding which negotiating model may be most effective in a particular case, the following factors should be considered:

[1] The Nature of the Dispute or Problem

The nature of the parties' dispute or problem often has a significant impact on the relative effectiveness of the adversarial or problem-solving approach. For example, the adversarial model may be better suited when the parties are bargaining solely over a fixed and finite matter such as money. If the only issue is how much one party will pay the other, and the gain to one party will necessarily be at the expense of the other, this "zero-sum" controversy rarely provides an opportunity or incentive for the parties to collaborate in expanding the resources they might divide or trade to their mutual gain. Thus, if the only issue between a buyer and seller is the price of a single item, or the only issue between the plaintiff and the defendant is the amount of property damage, the adversarial model is likely to be more appropriate.

On the other hand, the problem-solving model may be more useful to the extent the nature of the dispute or problem does not have zero-sum aspects. This is particularly true if the parties are negotiating over multiple issues that they value differently. For example, if the parties are in dispute over the issues of child custody, visitation, and support, it is more likely that a problem-solving approach will produce a more mutually satisfactory solution if the parties consider options such as joint or split custody, and how various visitation arrangements may affect appropriate amounts of child support. Similarly, if the issue between a buyer and seller is not merely price, but involves considerations such as quantity, time of delivery, and manner of payment, the problem-solving approach may be more productive in reaching an agreement addressing these multiple elements. In practice, problem solving is used more frequently in domestic relations, business regulation, and government action cases.[5]

[2] The Other Side's Negotiating Approach

A party's negotiating approach will often be affected by the particular approach taken by the other side. For example, if the other side is unwilling to engage in a problem-solving approach, attempts to employ that model will be largely ineffective because the model presupposes information sharing and collaboration between the parties. This does not mean that a problem-solving negotiator should not try to encourage the other side to use a problem-solving approach. However, if the effort is unsuccessful, it is unlikely the problem solver will be able to make any headway in the negotiation unless he is willing to accommodate the other side's adversarial bargaining.

[5] *See* Herbert M. Kitzner, *Let's Make a Deal*, 42-43 (1991).

Sometimes the other side's negotiating approach conforms to some generally accepted convention or norm that is endemic to a particular geographical area or type of case. In simple personal injury cases, for example, most lawyers and insurance adjusters routinely engage in adversarial bargaining; and plaintiffs' lawyers who enter into contingency fee arrangements, whereby their fee is a percentage of the monetary amount received in settlement or at trial, may be less motivated to engage in problem solving if that approach would produce a settlement that is not exclusively resolved by the payment of money.

In addition, the parties may be reluctant to share their true needs or interests upon which expanded options for a resolution might be explored. For example, a party might be psychologically or financially distressed as a result of the dispute and not want to reveal these matters out of embarrassment or fear of demonstrating weakness. Similarly, particularly when litigation is contemplated or has already commenced, a party might not want to reveal certain information to give "free discovery" to the other side. In either of these circumstances, the parties may be more likely to resort to adversarial bargaining than problem solving.

[3] Differences in Bargaining Leverage

Negotiating leverage stems from the perception of the negative consequences that a party can inflict on his opponent if an agreement is not reached, or from the benefits that a party can bestow on the other if an agreement is reached. The extent of this leverage is largely dependent upon the alternatives available to each party in the absence of an agreement. Generally, the side that possesses the most viable alternative in the event that an agreement is not reached will have greater power over the other side.

A negotiator who possesses greater bargaining leverage over his opponent may adopt an adversarial approach on the theory that his threats will be perceived as more credible and he will thus be able to extract greater concessions from his opponent. Conversely, the negotiator with less bargaining power will often choose the problem-solving model to offset or neutralize the adversarial bargainer's emphasis on a purely concession-based settlement. In essence, the lower-power negotiator will attempt to appeal to the more powerful negotiator's sense of fairness and justice to counteract the latter's tendency to believe that his bargaining position is superior and that any concessions on his part are unwarranted.

When both negotiators have high aspiration levels and possess relatively equal bargaining leverage, rigid adherence to the adversarial model may often result in deadlock. Deadlock may motivate the parties to abandon an adversarial approach and adopt a problem-solving approach.

[4] Future Dealings Between the Parties or Negotiators

The extent to which the parties or their negotiators are likely to have an on-going relationship after the negotiation often affects the incentive for

adopting an adversarial or problem-solving approach. The adversarial model sometimes gives rise to distrust and ill will, and thus the problem-solving approach is more frequently used when the parties or their representatives expect to have future dealings with one another. On the other hand, if the parties or their negotiators are merely engaged in a one-shot transaction or encounter, there will be less incentive to avoid the adversarial model with its concomitant risk of impairing future relations.

[5] Pressures to Reach an Agreement

The pressures placed on the parties to reach an agreement may affect their choice of negotiating approach. For example, a party might want to settle quickly because she needs the settlement proceeds immediately, desires to limit legal fees or other expenses, or wants to avoid the psychological stress of protracted controversy. Similarly, court deadlines or heavy caseloads may pressure the negotiators to expedite an agreement.

Generally, the problem-solving model's emphasis on sharing information to identify the interests or needs of the parties and brainstorming to develop possible solutions is more time consuming than the offer-counteroffer and response-counter-response method of adversarial negotiation. Thus, the greater the time pressure placed on the parties, the more likely they are to resort to adversarial bargaining through the swifter device of reciprocal concessions.

§ 8.05 Negotiating Strategies and Styles

In practice, negotiating strategy is simply the conceptual model or approach chosen in conducting the negotiation—whether adversarial, problem solving, or some combination of the two. Negotiating style, on the other hand, refers to the negotiator's *interpersonal behavior* in the negotiating setting, and often will be affected by the particular strategy chosen. Generally, there are three types of negotiating styles: (1) competitive (hardball), (2) cooperative (softball), or (3) a combination of competitive and cooperative (hardball and softball).[6] Each has its advantages and disadvantages that should be assessed in choosing an appropriate style.

§ 8.06 Competitive (Hardball) Style

The competitive style is typically characterized by aggressiveness and a confrontational approach. Winning is everything, and personal feelings and interpersonal relationships are viewed as essentially irrelevant. Threats, intimidation, and Machiavellian tactics are sometimes employed.

The advantage of this style is that it tends to pressure the adversary into making concessions, particularly when he is easily intimidated or inexperienced; and extreme demands and hard-nosed positions may sometimes give rise to larger settlements. In addition, the competitive negotiator develops a reputation of strength and toughness that is attractive to many clients. On the other hand, a competitive style frequently alienates the other side and produces mistrust, misunderstanding, and more frequent deadlocks. It often polarizes positions and causes overreaction. Personal relationships may be impaired or destroyed, thus making future negotiations with the same party or negotiator more difficult.

[6] *See generally*, Gerald R. Williams, *Legal Negotiation and Settlement* 18-39 (1983); Gary T. Lowenthal, A General Theory of Negotiation Processs, Strategy, and Behavior, 31 Univ. of Kansas L. Rev. 69-114 (1982); D. Gifford, *Legal Negotiations: Theory and Applications*, 8-11 (1989).

The competitive style may be effective when dealing with an inexperienced negotiator or where the parties and their representatives are involved in a one-time adversarial relationship. On the other hand, if the parties intend to have an ongoing relationship, the competitive style is undesirable because of its propensity to cause mistrust and alienation. For example, this style is generally not well suited for business negotiations.

The negotiator who adopts a highly competitive style can minimize its negative effects by focusing on the subject matter of the negotiation rather than on personalities, and after an agreement is reached, by initiating an effort to repair any damage that has been caused to personal relationships.

§ 8.07 Cooperative (Softball) Style

The cooperative style is the antithesis of the competitive style. The cooperative negotiator places a premium on interpersonal relations, and strives for common ground, shared interests, and understanding between the parties. The style is typically sincere, accommodating, and low key. While it should not be confused with weakness, it often conveys that image.

The advantage of this style is that it tends to reduce the risk of deadlock and produces faster and more long-lasting agreements. In addition, the parties usually come away from the negotiation with their egos intact and a disposition to continue their relationship in the future. The disadvantage is that the cooperative negotiator may have a tendency to avoid confrontation and make too many concessions. Sometimes a more favorable agreement is forsaken for the mere goal of reaching an agreement.

The effectiveness of a cooperative style depends upon the willingness of both sides to forthrightly exchange information. If the cooperative negotiator is pitted against a competitive opponent, the latter may gain an unfair advantage by obtaining information from the former without reciprocating. In addition, the competitive bargainer may misinterpret the cooperative style as a sign of weakness and escalate her aggressiveness. Thus, the cooperative negotiator should also understand competitive tactics so that she can offset them in appropriate circumstances.

§ 8.08 Competitive-Cooperative (Hardball and Softball) Style

The competitive-cooperative style represents a middle ground between hardball and softball. Here, many of the advantages of the competitive and cooperative approaches are combined in a style that is professionally amicable, open-minded, but firm. Under this approach, realistic concessions are made

to satisfy the objectives of both parties that are consistent or not mutually exclusive. Conflicting objectives are resolved by compromise or by some creative solution that maximizes as many of the parties' remaining objectives as possible.

The advantage of this style is that it preserves personal relationships and facilitates long-term agreements. The disadvantage is that the approach is largely unworkable unless both sides are genuinely willing to "work together" to resolve their differences—an attitude that may be inherently difficult to adopt in the face of a heated dispute. In addition, the approach requires more time and patience.

The competitive-cooperative approach is usually a waste of time if the other side is unrelentingly competitive. However, this approach may be successful if the competitive negotiator has a weak position.

§ 8.09 Choosing a Negotiating Style and Strategy

The particular negotiating style and strategy you adopt will depend upon your own personality, the nature of the dispute, the style and strategy employed by the other side, and the client's interests and objectives which you have identified in preparing for the negotiation. In choosing an effective style and strategy, it is important to bear in mind that (1) no particular combination of style and strategy is always more effective; (2) you should consider being flexible in your choice of style and strategy throughout the negotiation process; and (3) your choice of style and strategy should always have everything to do with your client's interests in mind and nothing to do with your own ego.

Understanding the differences among negotiating styles and between negotiating strategies is highly useful in choosing a particular style and strategy. In addition, understanding how different styles and strategies tend to operate together is useful in choosing an effective combination for a particular case.

§ 8.10 Style and Strategy Combinations[7]

[1] Competitive and Adversarial

When a competitive (hardball) style is combined with an adversarial strategy, the negotiation is usually characterized by hard, intense bargaining. The positions of the parties are likely to be extreme at the outset and remain fairly rigid throughout the negotiation. Concessions are hard to come by, and bluffs, threats, and even *ad hominem* attacks may permeate the process. Deadlocks are frequent, and, even if the parties reach agreement, they sometimes leave the negotiation dissatisfied and with their personal relationship impaired or destroyed.

[7] *See* Charles B. Craver, *Effective Legal Negotiation and Settlement* 21-25 (3d ed. 1997).

[2] Cooperative (or Competitive-Cooperative) and Adversarial

When a cooperative (softball) or competitive-cooperative (hardball & softball) style is combined with an adversarial strategy, the prospects of reaching an agreement are enhanced. The negotiation is typically cordial and characterized by a reasoned debate about the various offers and counteroffers presented. Concessions made gradually are "in the spirit of compromise." Bluffs and threats may occur from time to time, but not in the sometimes-acerbic manner employed by purely hardball negotiators. If a settlement is reached, it might include the performance of obligations other than the mere payment of money, and the parties usually will conclude the negotiation with their relationship and egos intact.

[3] Competitive and Problem-Solving

A competitive (hardball) style is largely antithetical to a problem-solving strategy. While the competitive problem solver will participate in identifying the needs of the opposing party, he is likely to be less than completely candid about those needs and seek to de-emphasize them in favor of feigning or inflating the needs of his own client. In addition, the competitive bargainer is likely to advance solutions that solely benefit his side, rather than entertain broader solutions that accommodate the interests of the other side. In short, the competitive negotiator is primarily motivated to explore mutually beneficial solutions only to the extent they maximize his own client's interests.

[4] Cooperative (or Competitive-Cooperative) and Problem-Solving

A cooperative (softball) or competitive-cooperative (hardball & softball) style best complements a problem-solving strategy. The cooperative negotiator genuinely seeks to identify the legitimate interests of both parties, and is willing to explore mutually beneficial solutions in an open-minded manner. A premium is usually placed on the candid exchange of information. The hallmark of the cooperative problem-solver's style is to emphasize common ground and minimize the parties' differences. Generally, when a cooperative style is combined with a problem-solving strategy, the prospects for reaching a mutually satisfactory agreement are at their greatest.

§ 8.11 The Overall Importance of Flexibility and Credibility

Regardless of the negotiating style and strategy you choose for a particular case, you should always be flexible in switching or modifying that style or strategy in appropriate circumstances. It is not unusual for a negotiator to use more than one style or strategy in a single negotiation session or during different stages of protracted settlement discussions. In short, if it becomes clear that a particular strategy or style is counterproductive, it may be beneficial to make an adjustment.

Along with flexibility, your choice of style and strategy must be credible. Persuasion depends largely upon believability. If your style or strategy is

strained or disingenuous, it is unlikely you will be effective in successfully negotiating the case. A common mistake made by inexperienced negotiators is adopting a style or strategy that is at odds with their own personality. If credibility depends upon using a particular style or strategy that you are uncomfortable with, ask a colleague who is more skilled in using that style or strategy to join you in the negotiation.

§ 8.12 Summary of Style and Strategy Characteristics, Advantages, and Disadvantages[8]

Competitive (Hardball) Style

Characteristics:
(1) aggressive and unfriendly
(2) confrontational
(3) intimidating
(4) Machiavellian
(5) negotiates by ultimatum
(6) makes few concessions

Advantages:
(1) pressures inexperienced adversaries into making concessions
(2) hard-nosed approach may result in better settlements for one's client
(3) establishes reputation for toughness that is attractive to clients
(4) may produce one-sided agreements that are advantageous if performed

Disadvantages:
(1) causes anger, alienation, and mistrust
(2) polarizes positions and causes overreaction or irrationality
(3) impairs or destroys personal relationships
(4) damages future relations between the parties or negotiators
(5) may induce the losing party to breach the agreement
(6) frequently causes deadlocks

Cooperative (Softball) Style

Characteristics:
(1) friendly and mild mannered
(2) strives for common ground
(3) slow to anger
(4) communicates freely
(5) prone to make reasonable concessions
(6) readily considers alternative solutions

[8] See X. M. Frascogna, Jr. & H. L. Hetherington, *Negotiation Strategy for Lawyers* 41-42 (1984).

Advantages:
(1) reduces the risk of deadlock
(2) produces faster, more long-lasting, and creative agreements
(3) maintains personal relationships
(4) preserves future relations between the parties
(5) decisions are made without anger or overreaction

Disadvantages:
(1) tends to make concessions too easily
(2) may unnecessarily result in a less favorable agreement for one's side
(3) conveys a weak negotiating image

Competitive-Cooperative (Hardball and Softball) Style

Characteristics:
(1) friendly but firm
(2) open-minded and creative
(3) confrontational when necessary
(4) strives for common ground and mutually beneficial solutions
(5) makes necessary concessions
(6) communicates forthrightly
(7) analyzes alternative solutions

Advantages:
(1) usually results in mutually beneficial solutions
(2) produces more long-lasting and creative agreements
(3) maintains personal relationships
(4) preserves future relations between the parties
(5) controls the competitive negotiator
(6) encourages concessions from both sides

Disadvantages:
(1) unworkable if the adversary is unrelentingly competitive
(2) difficult to use when the parties dislike or mistrust each other
(3) largely unworkable if the parties refuse to cooperate
(4) sometimes sacrifices unilateral gains for joint solutions
(5) requires time and patience

Adversarial Strategy

Characteristics:
(1) most commonly used negotiation strategy

(2) emphasizes maximizing the party's gain (usually in terms of money)
(3) constitutes a zero-sum game
(4) fact and law rationales are manipulated to advance and defend positions
(5) based on a strict cost-benefit analysis

Advantages:
(1) effective when the only matter obtainable is a single objective like money
(2) works well when the parties dislike or mistrust each other and are not interested in a cooperative solution
(3) negotiation process is less complex and time consuming

Disadvantages:
(1) creativity is curtailed in arriving at mutually beneficial solutions
(2) the final agreement may not satisfy the parties' true needs or interests
(3) parties and negotiators sometimes remain dissatisfied and resentful after agreement

Problem-Solving Strategy

Characteristics:
(1) the people are separated from the problem
(2) both parties' needs or interests are identified and acknowledged
(3) information is freely exchanged
(4) both parties strive for mutually beneficial solutions
(5) interests and objectives of both parties are accommodated to the greatest extent possible

Advantages:
(1) usually results in greater satisfaction to both parties
(2) negotiations are markedly less intense and testy
(3) both parties' true needs or interests are often fulfilled
(4) preserves personal relationships and future relations between the parties and negotiators

Disadvantages:
(1) usually unworkable when only one objective is sought (e.g., money)

(2) unworkable if both parties are not committed to finding mutually beneficial solutions
(3) negotiations are more complex and time consuming
(4) sometimes unnecessarily sacrifices unilateral gains for joint solutions

Chapter 9

Ethical Considerations in Negotiation and Settlement

SYNOPSIS

§ 9.01 Introduction

The American Bar Association's Model Rules of Professional Conduct (Model Rules) contain a number of Rules that are particularly applicable to your responsibilities in representing a client in negotiations and settlement. These Rules relate to (1) the requisite authority that you must have from your client to make an agreement or settlement on behalf of your client, and your responsibilities in advising your client throughout the negotiating process; (2) your responsibilities when entering into an aggregate settlement on behalf of multiple clients; (3) the circumstances under which contingent fees are permissible; (4) the extent to which you are obligated to make truthful statements to others in connection with negotiations or settlement; (5) your duty to behave with civility in negotiations; and (6) whether you may threaten criminal prosecution in negotiating a civil matter. Although the Model Rules have been modified by many states in various respects, these Rules are instructive about the most important ethical considerations attendant to negotiating and settling a case.

§ 9.02 Attorney's Authority to Settle and Advising the Client

Rule 1.2(a) of the Model Rules provides, in part, that "[a] lawyer shall abide by a client's decisions concerning the objectives of representation. . .and shall consult with the client as to the means by which they are to be pursued." Although this provision has been interpreted as making a distinction between the client's objectives and the means for achieving them, whereby the lawyer is in charge of "procedural" decisions such as tactics and strategy and the

client has the final decision over matters directly affecting the ultimate resolution of the case,[1] as a lawyer you generally have no authority to enter into a final agreement or settle a case on behalf of a client merely by virtue of the attorney-client relationship or because you have been given general authority to enter into negotiations.[2] Rather, except in rare emergency situations where prompt action by you is necessary to protect your client's interests and consultation with your client is impossible,[3] most courts require that you have *express* authority from your client to enter into a binding agreement or compromise of an action. In many states, this express authority is prescribed by statute or local court rule.[4]

Generally, the special authority you need to compromise your client's claim can be obtained only when a specific settlement is proposed, or when you have been given prior authority to settle within certain limits.[5] This, of course, presupposes appropriate communication between you and your client. As Model Rule 1.4 provides:

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

The official Comment to that Rule explains, in pertinent part:

> [1] The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. For example, a lawyer negotiating on behalf of a client should provide the client with facts relevant to the matter, inform the client of communications from another party and take other reasonable steps that permit the client to make a decision regarding a serious offer from another party. A lawyer who receives from opposing counsel an offer of settlement in a civil controversy. . .should promptly inform the client of its substance unless prior discussions with the client have left it clear that the proposal will be unacceptable. See Rule 1.2(a). Even when a client delegates authority to the lawyer, the client should be kept advised of the status of the matter.
>
> [2] Adequacy of communication depends in part on the kind of advice or assistance involved. For example, in negotiations where there is time to explain a proposal, the lawyer should review all important provisions with the client before proceeding to an agreement. . . On the other hand, a lawyer ordinarily cannot be expected to describe. . .negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation.

Thus, you have a duty to disclose to your client all good faith settlement offers,[6] and to adequately explain all ramifications of a proposed agreement or settlement so that your client can make an informed decision.[7] If you settle your client's case without authority, fail to communicate a settlement offer to your client, or fail to adequately advise your client about a potential settlement, you may be subject to discipline by the bar[8] or be liable to the client for malpractice.[9]

[1] *See* State v. Debler, 856 S.W.2d 641 (Mo. 1993); State v. Ali, 407 S.E.2d 183 (N.C. 1991); Blanton v. Womancare, Inc., 696 P.2d 645 (Cal. 1985).

[2] *See* Faris v. J.C. Penney Co., 2 F. Supp. 2d 695 (E.D. Pa. 1998); Kaiser Foundation v. Doe, 903 P.2d 375 (Or. App. 1995).

[3] *See* Sockolof v. Eden Point North Condominium Assoc., 421 So.2d 716 (Fla. App. 1982); Schumann v. Northtown Ins. Agency, Inc., 452 N.W.2d 482 (Minn. App. 1990); Midwest Federal Savings Bank v. Dickinson Econo-Storage, 450 N.W.2d 418 (N.D. 1990).

[4] *See generally*, Annotation, *Authority of Attorney to Compromise Action—Modern Cases*, 90 ALR 4th 326 (1991).

[5] *See* Lord v. Money Masters, Inc., 435 S.E.2d 247 (Ga. 1993).

§ 9.03 Aggregate Settlements

An aggregate settlement is one that is made on behalf of two or more clients who are represented by the same lawyer. Rule 1.8(g) of the Model Rules provides, in part:

> A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients. . .unless each client consents after consultation, including disclosure of the existence and nature of the claims. . .involved and of the participation of each person in the settlement.

This Rule typically applies where "counsel representing several separate plaintiffs with different claims against a single defendant. . .settle[s] all of the claims together."[10] While most of the cases discussing the Rule have involved aggregate settlements of only a small number of clients, the Rule is also acutely applicable in mass tort litigation cases where large numbers of plaintiffs are represented by a single lawyer or law firm. The Rule's prohibition against making an aggregate settlement without each client's informed consent (1) aims to prevent lawyers from favoring one client over

[6] *See* In re Cardenas, 791 P.2d 1032 (Ariz. 1990); In re Baehr, 744 P.2d 799 (Kan. 1987).

[7] *See* Hartford Accident & Indemnity Co. v. Foster, 528 So.2d 255 (Miss. 1988); Ramp v. St. Paul Fire & Marine Ins. Co. 269 So.2d 239 (La. 1972). *See generally*, Perschbacher, Regulating Lawyers Negotiations, 27 Ariz. L. Rev. 76, 115–119 (1985).

[8] *See, e.g.*, In re Nugent, 624 A.2d 291 (R.I. 1993) (settling personal injury action without client's consent was grounds for discipline); Comm. On Professional Ethics v. Behnke, 486 N.W.2d 275 (Iowa 1992) (lawyer who handled client's personal injury claim by telephone and settled case without discussion with client, violated MRPC Rule 1.4); Culpepper v. Mississippi State Bar, 588 So.2d 413 (Miss. 1991) (lawyer disciplined for misleading client about true bases of settlement reached with opposing counsel in divorce action, and for failing to advise her that agreement filed was different from her previous agreement). *See generally*, Annotation, *Conduct of Attorney in Connection with Settlement of Client's Case as Ground for Disciplinary Action*, 92 ALR3d 288 (1979).

[9] *See, e.g.*, Moores v. Greenberg, 834 F.2d 1105 (1st Cir. 1987) (attorney may be liable for malpractice for failing to inform client of a settlement offer, permitting client to recover damages in the amount of that offer).

[10] Kelly v. Johns-Manville Corp., 590 F. Supp. 1089, 1092 n. 1 (E.D. Pa. 1984).

another in settlement negotiations,[11] (2) empowers clients to prevent lawyers from putting their own economic self-interest ahead of their clients' interest (given the temptation of some lawyers to accept a relatively cheap, comprehensive settlement at an early stage of the representation rather than invest the time and resources that would be necessary to maximize their clients' recoveries),[12] and (3) reflects the mandates of Rule 1.4 that clients have a right to be fully informed about settlement offers and to control the ultimate settlement decision.[13]

When you represent multiple clients[14] against a single adversary and receive an "all or nothing" lump-sum settlement offer which conditions settlement upon acceptance of the agreement by all or a particular number of your clients, the initial question will be how the lump-sum would be allocated among your clients. If you represent a relatively small number of clients, the simplest approach is to help your clients to agree among themselves as to an appropriate division. However, if you represent a large number of clients, it is likely to be much more difficult to achieve unanimous agreement on the division of a lump-sum settlement. In that situation, some lawyers utilize the services of special masters or ask a judge to mediate the division.[15]

After determining the amount that would be received by each client, and before accepting the settlement, you should confer directly with each client (rather than communicate with one client and expect that client to confer with the others),[16] to inform each about (1) the total, lump-sum settlement amount, (2) the particular amount the client will receive, (3) every other client's share in the settlement,[17] and (4) all other information necessary to enable the client to make an informed decision whether to accept or reject the settlement. The aggregate settlement cannot be accepted unless *all* clients give informed consent, and this requirement cannot be circumvented by some other agreement, such as a retainer agreement, authorizing settlement by majority vote or by some other method.[18] A violation of Rule 1.8(g) may render the

[11] *See* In re Anonymous Member of South Carolina Bar, 377 S.E.2d 567, 568 (S.C. 1989).

[12] *See* Arce v. Burrow, 958 S.W.2d 239 (Tex. App. 1997); Silver & Baker, Mass Lawsuits and the Aggregate Settlement Rule, 32 Wake Forest L. Rev. 733, 751–52 (1997).

[13] *See* Hayes v. Eagle-Picher Industries, Inc., 513 F.2d 892 (10th Cir. 1975); Quientero v. Jim Walter Homes, Inc., 709 S.W.2d 225 (Tex. App. 1985).

[14] As a threshold matter, the multiple representation must be proper. Under Model Rule 1.7(b), a lawyer who represents multiple clients in a single matter must reasonably believe that the representation will not be adversely affected, and the clients must consent after consultation, including an explanation of the implications of the common representation and the advantages and risks involved. This explanation should include, when reasonably foreseeable, the prospect of conflicts that may arise in connection with settlement as where an aggregate settlement might be proposed.

[15] *See* Weinstein, Ethical Dilemmas in Mass Tort Litigation, 88 Nw. U. L. Rev. 469, 521 (1994).

[16] *See* Gelb, Common Ethical Problems, 79 Mass. L. Rev. 167, 174 (1994).

[17] *See* In re Anonymous Member of the South Carolina Bar, 377 S.E.2d 567, 568 (S.C. 1989) (lawyer should provide list showing the names and amounts to be received by other settling clients); *accord* Quintero v. Jim Walker Homes Inc., 709 S.W.2d 225, 229 (Tex. Ct. App. 1985).

[18] Hayes v. Eagle-Picher Industries Inc., 513 F.2d 892 (10th Cir. 1975).

settlement unenforceable against the non-consenting clients[19] and subject you to disciplinary action by the bar.[20]

§ 9.04 Contingent Fees

Many settlements occur in personal injury cases, whether arising out of common law negligence, an intentional tort, or a breach of a duty of care defined by statute. Lawyers often take these cases on a contingent fee basis, whereby the attorney's fee is a percentage of the total monetary amount or interest in property[21] recovered for the client (usually one-third), or a combination of a percentage and an hourly fee.[22] The rationale for contingent fees is that they provide a means by which clients who cannot afford to pay an hourly or fixed fee may compensate their lawyers by giving the lawyer a portion of the winning result. The fact that a lawyer might earn a larger sum of money in charging a contingent fee than would otherwise be earned from a fixed fee or at an hourly rate is balanced against the risk that the lawyer will receive no fee at all if no recovery is obtained for the client.

Model Rule 1.5 provides, in pertinent part:

> (a) A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:
>
> . . . .
>
> (8) whether the fee is fixed or contingent.
>
> . . . .
>
> (c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.
>
> (d) A lawyer shall not enter into an arrangement for, charge or collect:
>
> (1) any fee in a domestic relations matter, the payment of which is contingent upon the securing of a divorce or upon the amount

[19] *See, e.g.*, Knisley v. Jacksonville, 497 N.E.2d 883 (Ill. App. 1986); Quintero v. Jim Walker Homes, Inc., 709 S.W.2d 225 (Tex. Ct. App. 1985).

[20] *See, e.g.*, State ex rel. Oklahoma Bar Assoc. v. Watson, 897 P.2d 246 (Okla. 1994); Butler County Bar Assoc. v. Barr, 591 N.E.2d 1200 (Ohio 1992).

[21] *See, e.g.*, Beatie v. Delong, 561 NYS2d 448 (N.Y. SupCt. AppDiv. 1990) (upholding 30% of revenues generated by patents whose rights the lawyer recaptured for the client).

[22] *See, e.g.*, Boston and Maine Corp v. Sheehan, Phinney, Bass & Green P.A., 778 F.2d 890 (1st Cir. 1985) (upholding hourly fee plus reduced contingent fee).

> of alimony or support, or property settlement in lieu thereof;. . .

Like other types of fees, a contingent fee must be reasonable in terms of the percentage the lawyer will receive of the monetary amount recovered for his client; and the courts retain overall supervisory power to monitor the reasonableness of such fees.[23] Even when this percentage falls within the usual range of percentages charged in similar types of cases, a court may find the percentage unreasonable if the risk of no recovery by the client is virtually nonexistent or the lawyer can easily resolve the matter without much effort.[24] For example, the courts have repeatedly warned that contingent fees are usually inappropriate in cases involving the collection of insurance proceeds when the client's right to that money is clear and it will take little effort to collect it.[25] On the other hand, even a 50% contingent fee may be permissible, particularly if the case is very complicated, liability is highly questionable, and a favorable outcome of the case will depend upon considerable skill by the lawyer.[26] In addition, by statute or local court rule, some jurisdictions limit the percentages that may be charged in matters such as workers' compensation cases, social security cases, medical malpractice[27] or civil rights actions,[28] or in cases involving the representation of children.[29] These statutory limitations may never be exceeded in a contingent fee contract.

Rule 1.5(c) requires that the contingent fee contract be in writing. The agreement must state the percentage or percentages of the recovery to which you will be entitled if your client's case (1) is settled (making clear whether a different percentage applies if the case is settled during trial, as opposed to prior to trial); (2) goes to trial (or is retried); and (3) is appealed. If a structured settlement is possible, you should state whether the fee will be based on a percentage of the lump sum immediately received by your client plus the present value of the future payments to which your client is entitled, or on a percentage of each future payment received by your client when it

[23] Thornton, Sperry & Jensen Ltd. v. Anderson, 352 N.W.2d 467 (Minn App. 1984); West Virginia State Bar Committee on Legal Ethics v. Taterson, 352 S.E.2d 107 (W.Va. Sup.Ct.App. 1986).

[24] *See, e.g.*, In re Gerard, 548 N.E.2d 1051 (Ill. 1989) (lawyer disciplined for collecting contingent fee of 35.2% to locate and collect client's assets to which no adverse claims were made, where it took the lawyer no more than 160 hours to perform the task and contingent fee amounted to approximately $1000 per hour of work).

[25] *See* In re Hanna, 362 S.E.2d 632 (S.C. 1987); West Virginia State Bar Committee on Legal Ethics v. Tatterson, 352 S.E.2d 107 (W.Va. SupCtApp. 1986); Maryland Attorney Grievance Commission v. Kemp, 496 A.2d 672 (Md. App. 1985).

[26] *E.g.*, Sweeney v. Athens Regional Medical Center, 917 F.2d 1560 (11th Cir. 1990); Fraidin v. Weitzman, 611 A.2d 1046 (Md. Ct.Spec.App. 1992). *Cf.* West Virginia State Bar Committee on Legal Ethics v. Gallaher, 376 S.E.2d 346 (W.Va. Sup.Ct.App. 1988) (50% contingent fee excessive where lawyer achieved modest settlement of client's case in less than seventeen hours; one-third fee would have been more appropriate); Maryland Attorney Grievance Commission v. Korotki, 569 A.2d 1224 (Md. App. 1990) (even though case was complex and involved a trial and two appeals, successive contracts adding up to 75% contingent fee constituted excessive fee).

[27] *See generally*, Annotation, *Validity of Statute Establishing Contingent Fee Scale for Attorneys Representing Parties in Medical Malpractice Actions*, 12 ALR4th 23 (1982).

[28] *See* Federal Tort Claims Act, 28 USC 2678, limiting contingent fees to 25% (or 20% if the case is settled at the administrative level).

[29] *See generally*, Annotation, *Court Rules Limiting Amount of Contingent Fees or Otherwise Imposing Conditions on Contingent Fee Contracts*, 77 ALR2d 411 (1961).

is received. In addition, the agreement must state generally the "litigation and other expenses to be deducted from the recovery," and whether your percentage of the recovery will be taken from the gross amount before deduction of expenses or the net amount after deduction of expenses.[30] The agreement might also contain a clause that, in the event you are discharged from the case without good cause, you will be entitled to a fee amounting to the reasonable value of your services under *quantum meruit*, expressed as either a reduced percentage of the amount recovered by your client or a fee based on an hourly rate.[31]

Rule 1.5(d)(1) states explicitly that you cannot charge a contingent fee if the contingency is your client's obtaining a divorce, or if the amount of the fee is dependent on what your client is awarded as alimony or child support or in a "property settlement" in lieu of alimony or child support. However, in most states you are permitted to charge a contingent fee where your client's right to alimony or child support has *already* been established judicially and the aim of the representation is the collection of past-due payments of alimony or child support. Jurisdictions are divided about whether the Rule's prohibition against contingent fees in "property settlement" matters embraces equitable distribution cases, some courts holding that a contingent fee in an equitable distribution case is permissible so long as the contract does not simultaneously provide for compensation contingent on securing a divorce, or obtaining alimony or child support.[32]

Finally, Rule 1.5(c) provides that, at the conclusion of the contingent fee representation, you are obligated to provide your client with a written financial accounting of the monies to be disbursed in connection with the case. The disbursement statement must state "the outcome of the matter and, if there is a recovery, show the remittance to the client and method of its determination." A failure to abide by this requirement may result in disciplinary action.[33]

§ 9.05 Example of Contingent Fee Contract

Contingent Fee Contract

The law firm of _____(Attorneys) is retained and employed by _____(Client) to represent Client in a claim for damages against_____or any others who may be liable for injuries that Client sustained on _____[Date]_____.

1. This is a contingent fee contract and it is agreed that if Attorneys recover no compensation for Client, Client owes Attorneys no fee until a favorable

[30] *See* Louisiana State Bar Assoc. v. St. Romain, 560 So.2d 820 (La. 1990) (attorney privately reprimanded for using retainer agreement that did not specify how expenses would be deducted).

[31] *See generally*, Annotation, *Limitation to Quantum Meruit Recovery, Where Attorney Employed Under Contingent Fee Contract is Discharged Without Cause*, 92 ALR3d 690 (1979); Annotation, *Circumstances Under Which Attorney Retains Right to Compensation Notwithstanding Voluntary Withdrawal from Case*, 86 ALR3d 246 (1978).

[32] *See* Williams v. Garrison, 411 S.E.2d 633 (N.C. App. 1992).

[33] *See* Florida Bar v. Rood, 633 So2d 7 (Fla. 1994).

recovery is obtained. If a recovery is obtained on behalf of Client, Attorneys shall receive as attorneys' fees ____% of any recovery obtained, whether by settlement or trial. If an appeal is taken or proceedings are necessary to collect any judgment, the attorneys' fees shall increase to ____%. These percentages shall be calculated and paid based on the gross amount recovered for Client, and before deduction of any costs, litigation expenses, or medical charges and expenses as provided for in paragraphs 3 and 4.

2. If settlement of this case is made by a structured settlement, attorneys' fees shall be based on the present cash value of the settlement as determined by actuarial experts, and such fees shall be paid out of the initial cash lump-sum payment.

3. In addition to attorneys' fees, all court costs, expert witness fees, subpoena costs, photographs, depositions, court reporter fees, reports, witness statements, photocopying, telephone, travel and all other out-of-pocket expenses directly incurred in investigating, preparing or litigating this claim shall be paid by client irrespective of the outcome of this case, and Attorneys may deduct those amounts from the Client's share of the proceeds of any recovery.

4. All medical expenses and charges of any nature made by doctors, hospitals, clinics, or Client will pay other health-care providers in connection with the diagnosis or treatment of Client's injuries. In the event that Attorneys recover damages on Client's behalf, Client authorizes Attorneys to pay all such expenses and charges that are unpaid as of that date from Client's share of the recovery.

5. Client agrees not to make any settlement of this case without Attorneys being present and receiving all payments due them under this Contract.

6. Client agrees that Attorneys have made no promises or guarantees about the outcome of this case.

7. Client and Attorneys each have a copy of this Contract, and its terms are acceptable.

This the _____day of _____, [year].

_____ _____

[Client] [Attorneys]

§ 9.06 Truthfulness in Negotiating

The Preamble to the Model Rules states that "[a]s negotiator, a lawyer seeks a result advantageous to the client but consistent with the requirements of honest dealing with others." Rule 4.1(a) of the Model Rules provides that "[i]n the course of representing a client a lawyer shall not knowingly: make a false statement of material fact or law to a third person." The Comment to that Rule states, in pertinent part:

> [1] A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by failure to act.
>
> [2] This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are in this category. . .

These provisions reflect a tension between the aspiration that lawyers should be honest when negotiating with others and the reality that the parlance of negotiating often includes a certain amount of deception. The failure of Rule 4.1(a) and its Comment to set a bright-line standard of complete truthfulness in negotiating has led one commentator to ruefully remark that these provisions "unambiguously embrace 'New York hardball' as the official standard of practice."[34] Thus, some scholars have urged that these provisions should be revised to establish a tighter standard of truthfulness in negotiations,[35] while others recognize that, of necessity, negotiations involve at least some deceptive behavior.[36]

In practice, most experienced lawyers are essentially honest in negotiating. However, they will not mindlessly volunteer or concede weaknesses in their clients' positions and will usually make every effort to portray the facts of the situation in a light most favorable to their clients. Thus, experienced lawyers expect their adversaries will often *characterize* the facts of the case and why their clients are deserving of a more favorable outcome in ways that are less than objectively accurate. Acceptance of this reality, however, should not be interpreted as an endorsement of dishonesty. Rather, it is merely recognition of the fact that part of zealous advocacy involves the ability to tactfully put a favorable "spin" on matters. As the Comment to Model Rule 1.3 provides: "[a] lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf." Painting one's client's position in the most favorable light is an attribute of lawyer competency that is still consistent with ethical responsibility.

At the same time, most experienced lawyers also expect that their adversaries, if they are also first-rate lawyers, will not conduct themselves in negotiations by engaging in outright prevarication on material matters. This is so because, apart from the prohibition against untruthfulness in Rule 4.1(a), experienced lawyers know that effective client representation depends in large

[34] G. Lowenthal, The Bar's Failure to Require Truthful Bargaining by Lawyers, 2 Geo. J. Legal Ethics 411, 445 (1988).

[35] *See* Rubin, A Causerie on Lawyers' Ethics in Negotiation, 35 La. L. Rev. 577 (1975); Jarvis & Tellam, A Negotiation Ethics Primer for Lawyers, 31 Gonzaga L. Rev. 549 (1995/96); *see also* Steele, Deceptive Negotiating and High-Toned Morality, 39 Vand. L. Rev. 1387 (1986).

[36] *See* Craver, Negotiation Ethics: How to be Deceptive Without Being Dishonest/How to be Assertive Without Being Offensive, 38 S. Tex. L. Rev. 713 (1997); *see also* Hazard, The Lawyer's Obligation to be Trustworthy When Dealing with Opposing Parties, 33 S.C. L. Rev. 181 (1981); James T. White, Machiavelli and the Bar: Limitations on Lying in Negotiation, 1980 Am. Bar Found. Res. J. 927–928 (1980) ("To conceal one's true position, to mislead one's opponent about one's true settling point, is the essence of negotiation.").

part upon lawyer credibility. Lawyers who lie are usually found out. They are as ineffective in persuading other lawyers as they are ineffective in persuading judges or juries, and persuasion is the lawyer's principal stock in trade, whether in negotiation, litigation, or other aspects of client representation. Moreover, to the extent that actual or perceived "toughness" plays a role in effective representation, experienced lawyers know that the lawyers who have the ability to be truly tough, when necessary, are usually those who also have a strong reputation for credibility through trustworthiness and integrity.

Rule 4.1(a) and its Commentary, in large part reflect these realities. Although you generally have no duty to inform an opposing party of relevant facts such as those which would indicate weaknesses in your client's position,[37] and you are not prohibited from zealous advocacy such as by "puffing," giving mere "personal opinions" about the merits of the case, or even embellishing your client's intentions as to what would be an acceptable settlement, you may not go so far as to make any "false statements of material fact or law" to third persons in connection with negotiations on behalf of your client. False statements include those that are written as well as oral, statements by you that repeat or affirm false statements made by your client when you know of their falsity,[38] and may include statements of your intent to do something when you actually have no such current intention.[39] A false statement will also violate the Rule if made in response to a third party's question, and such a statement cannot be excused by the duty to protect client confidences because, if the matter is privileged, you have a duty to decline to answer the question altogether.[40] Moreover, if you make a statement that is literally true but is misleading because you purposefully omit material information, the intentionally deceptive nature of the omission may make it equivalent to an affirmative false statement.[41]

Rule 4.1(a) only prohibits making false statements of "material" fact or law. Although the Model Rules do not define the term "material," a "[r]epresentation relating to a matter which is so substantial and important as to influence [a] party to whom made is'material.' "[42] For example, it has been held that

[37] *See* Brown v. County of Genesee, 872 F.2d 169 (6th Cir. 1989) (defense counsel had no general ethical duty to tell counsel for plaintiff during settlement negotiations about the latter's factual error; error was not induced or contributed to by defense counsel).

[38] *See, e.g.*, Florida Bar v. Burkich-Burrell, 659 So.2d 1082 (Fla. 1995) (lawyer notarized false answers to interrogatories on behalf of husband-client, knowing that answers were untrue).

[39] *See* In re Graveley, 805 P.2d 1263 (Mont. 1990); *ABA Formal Ethics Opinion 94-383* (it is unethical to make a false threat to file disciplinary charges against another lawyer).

[40] *See* People v. Petsas, 262 Cal. Rptr. 467 (Cal. Ct. App. 1989) ("distinct difference [exists] between restricting an attorney from divulging information learned in confidence from a client, and proscribing him from knowingly making affirmative false representations regarding a claim or claims of that client."); *ABA Formal Ethics Opinion 93-370* (1993) (lawyer may decline to answer improper question by judge regarding settlement authority, but is barred by Rule 4.1 from responding with a deliberate misrepresentation or lie).

[41] *See* Florida Bar v. Joy, 679 So.2d 1165 (Fla. 1996) (lawyer violated Rule 4.1 by making statement that was literally true but intended to mislead opposing counsel); In re Goodsell, 667 So.2d 7 (La. 1996); Mississippi Bar v. Robb, 684 So.2d 615 (Miss. 1996); *ABA Formal Ethics Opinion 93-375* (1993) (attorney representing client in bank examination may not omit information when omission is tantamount to affirmative false statement).

[42] *Black's Law Dictionary*, 976 (7th ed. 1999).

information about a personal injury client's alcohol use at the time of th accident, which a lawyer deleted from the client's medical records befor submitting them to an insurer, was material.[43] A lawyer was disciplined fo stating there was only $200,000 in insurance coverage, when documents i the lawyer's possession showed $1 million in coverage.[44] Similarly, a lawye was disciplined when, during negotiations to settle a hospital's claim for personal injury client's medical expenses, the lawyer failed to disclose to th hospital the existence of a third insurance policy when the hospital mistakenl believed there were only two insurance policies that provided coverage for th accident.[45] And, it has been held that the death of one's client durin settlement negotiations is a material fact that must be disclosed to opposin counsel.[46]

Making false statements of law has typically given rise to disciplinary actio where the statements were made to non-lawyers. For example, a lawyer wa disciplined for falsely telling a debtor that his driver's license would b suspended if he failed to pay a judgment.[47] A lawyer was also held to have violated Rule 4.1(a) for providing false opinion letters to a purchaser regardin title to real property so as to enable his clients to profit from undisclosed double sales of property.[48] On the other hand, rendering a mere "persona opinion" as to the proper interpretation of a statute or case decision would fall outside the scope of the Rule,[49] and it has been said that a lawyer has no ethical duty to inform an opposing party that the statute of limitations has run, so long as the lawyer does not misrepresent the facts or his intent to file suit.[50]

Apart from the disciplinary consequences of violating Rule 4.1(a), the danger of making false statements of material fact or law is that such misrepresentations may also give rise to an action in tort for fraud. For example, it has been held that a lawyer could be sued in tort by the opposing party who alleged that the case was settled for a lower amount in reliance on the lawyer's false representation about applicable insurance policy coverage.[51] A claim for fraudulent misrepresentation was held actionable against a seller's lawyer who allegedly stated to purchasers that they were getting "a lot of property for the money" when the lawyer knew that his client could not convey title.[52] And another court refused to dismiss a complaint for fraud against lawyers who allegedly induced an asbestos manufacturer to settle claims by falsely representing that the claims were valid.[53] Thus, even if misrepresentations

[43] In re Zeiger, 692 A.2d 1351 (D.C. 1997).

[44] In re McGrath, 468 N.Y.S.2d 349 (N.Y. App. Div. 1983).

[45] State ex rel. Nebraska State Bar Assoc. v. Addison, 412 N.W.2d 855 (Neb. 1987).

[46] Kentucky Bar Assoc. v. Geisler, 938 S.W.2d 578 (Ky. 1997); Virzi v. Grand Trunk Warehouse & Cold Storage Co., 571 F. Supp. 507 (E.D. Mich. 1983); *ABA Formal Ethics Opinion 95-397* (1995).

[47] In re Eliasen, 913 P.2d 1163 (Idaho 1996).

[48] In re Duckworth, 914 P.2d 900 (Ariz. 1996).

[49] *See* J. Moliterno & J. Levy, *Ethics of the Lawyer's Work* 234 (1993).

[50] *ABA Formal Ethics Opinion 94-387* (1994).

[51] Fire Insurance Exchange v. Bell, 643 N.E.2d 310 (Ind. 1994).

[52] Jeska v. Mulhall, 693 P.2d 1335 (Or. App. 1985).

[53] Raymark Industries Inc. v. Stemple, 714 F.Supp. 460 (D. Kan. 1988). *See also* Sainsbury

of fact or law might not constitute an ethical violation, you should be aware of the risk that such misrepresentations, or even nondisclosure of information in circumstances where the law may impose a duty of disclosure,[54] may give rise to liability in tort.

§ 9.07 Civility in Negotiating

Rule 4.4 of the Model Rules provides, in part, that "[i]n representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person. . ." Most of the reported decisions finding a violation of this Rule have involved abusive interpersonal behavior or abusive tactics in the litigation context, whether directed against opposing counsel, opposing parties, witnesses, jurors, or court personnel. For example, numerous cases have found violations of the Rule where lawyers were verbally abusive to third persons, or engaged in physical threats or similar types of despicable behavior.[55] In some instances, the courts have found that a violation of Rule 4.4 also comes within the prohibitions on "engag[ing] in conduct that is prejudicial to the administration of justice" or "conduct reflect[ing] adversely on [one's] fitness to practice law" under Rule 8.4(d).[56]

Rule 4.4 recognizes that a lawyer's means in representing a client may have more than one purpose. The Rule is violated only when the means used have no other "substantial purpose" than to cause embarrassment, delay, or a burden to another person. By requiring that the other permissible purposes be "substantial," the language of the Rule suggests that the lawyer's purportedly legitimate purposes will be closely scrutinized. A good example of this occurred in *State ex rel. Scales v. West Virginia State Bar Committee on Legal Ethics*, 446 S.E.2d 729 (W.Va. Sup.Ct. App. 1994) where Scales, in representing a woman in a bitter divorce with her husband who was a member of the armed forces, contacted the husband's commanding officer to report that the husband was abusing his wife. The Court rejected the State Bar Committee's contention

v. Pennsylvania Greyhound Lines, 183 F.2d 548 (4th Cir. 1950) (setting aside release of personal injury claim that was induced by lawyer's false representation that employees in government service could recover only for pain and suffering).

[54] *See generally, Restatement (Second) of Torts*, § 551 (enumerating circumstances where party has a duty of disclosure in business transactions).

[55] *See, e.g.*, Castillo v. St. Paul Fire & Marine Insurance Co. (In re Walker), 828 F. Supp. 594 (C.D. Ill. 1992) (lawyer repeatedly obstructed deposition and engaged in "most egregious example of lawyer incivility that this Court has ever seen," including threatening opposing counsel); In re Ramunno, 625 A.2d 248 (Del. 1993) (lawyer referred to opposing counsel in vulgar terms in office conference before judge and engaged in insolent colloquy with judge); In re Bechhold, 771 P.2d 563 (Mont. 1988) (lawyer who represented client on a claim submitted to insurance company, contacted claims department employee seven or eight times a day for several days, was rude, and then attempted to serve papers on insurance company by bringing them to the claims office where lawyer engaged in continual profanity).

[56] *See, e.g.*, In re Schiff, 599 NYS2d 242 (N.Y. Sup.Ct. App.Div. 1st Dept. 1993) (lawyer's conduct of being unduly intimidating and abusive toward opposing counsel, and directing vulgar, obscene, and sexist epithets toward her in deposition reflected adversely on fitness to practice); In re Holmes, 921 P.2d 44 (Colo. 1996) ("undignified, offensive, threatening, and unprofessional" letters to opponents and court employees); In re Stanley, 507 A.2d 1168 (N.J. 1986) (rude stares at judge, laughing, remarking in undertones, shaking finger at judge).

that Scales' sole purpose in contacting the commanding officer was to harass and embarrass the husband, noting that when the wife had contacted the commanding officer to report the abuse, he had told her he could not do anything unless her lawyer contacted army officials. Thus, the Court held that because Scales' intervention had a substantial purpose other than embarrassment and harassment, there was no violation of Rule 4.4.

As in the litigation context, a violation of Rule 4.4 may occur in the context of negotiations. However, because of the overall importance of lawyer credibility as discussed in § 9.06, in practice, the vast majority of lawyers negotiate with civility. Resort to abusive interpersonal behavior or obnoxious negotiating tactics is relatively rare and, when they do occur,they are usually a product of the lawyer's personal insecurity, professional immaturity, or both.

§ 9.08 Threatening Criminal Prosecution in Negotiating

One negotiating tactic that could arguably run afoul of Rule 4.4 and has received special attention by the American Bar Association is threatening criminal prosecution in connection with negotiating a civil matter. Before the Model Rules were adopted, Disciplinary Rule 7-105(A) of the ABA Model Code provided that "[a] lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter."[57] The Code explained the rationale for this provision in Ethical Consideration 7-21 as follows:

> The civil adjudicative process is primarily designed for the settlement of disputes between parties, while the criminal process is designed for the protection of society as a whole. Threatening to use, or using, the criminal process to coerce adjustment of private civil claims or controversies is a subversion of that process; further, the person against whom the criminal process is misused may be deterred from asserting his legal rights and thus the usefulness of the civil process in settling private disputes is impaired. As in all cases of abuse of judicial process, the improper use of criminal process tends to diminish public confidence in our legal system.

The Model Rules, however, deliberately do not contain a corresponding provision to DR 7-105(A). The ABA Ethics Committee addressed the issue for the first time under the Model Rules in *ABA Ethics Opinion 92-363* (1992). That opinion states that you may use the possibility of presenting criminal charges against an opposing party in a private civil matter to gain relief for your client, provided that the criminal matter is related to the civil claim, both the civil claim and possible criminal charge are warranted by the law and the facts of the situation, and you do not attempt to exert improper influence over the criminal process. Conversely, the Committee said you may agree, as part of a settlement, to refrain from presenting criminal charges against an

[57] *Cf.* West Virginia State Bar Commission on Legal Ethics v. Printz, 416 S.E.2d 720 (W.Va. Sup.Ct. App. 1992) (decided when DR 7-105(A) was still in effect, and holding that the tactic of threatening criminal charges was not prohibited in legitimate negotiations so long as the lawyer did not seek payment beyond restitution in exchange for foregoing criminal prosecution or seek any payment in exchange for not testifying at a criminal trial).

opposing party so long as the agreement does not violate applicable law. The opinion explained that requiring the criminal charges to be related to the civil matter "discourages exploitation of extraneous matters that have nothing to do with evaluating the claim."

Thus, as a general rule, it is not unethical to threaten the initiation of criminal prosecution (*e.g.*, to seek the swearing out of a warrant), or agree to refrain from initiating such process, in connection with negotiations. However, you should not seek, as part of a settlement, any compensation that is expressly in exchange for not testifying at a criminal trial.[58] In addition, if you make a *direct* threat to initiate criminal prosecution (as opposed to merely a veiled threat) without any present intention to initiate that process if a settlement is not achieved, you may violate Model Rule 4.1(a)'s prohibition against "making a false statement of material fact" (*see* § 9.06).[59]

[58] *See* West Virginia State Bar Commission on Legal Ethics v. Printz, 416 S.E.2d 720 (W.Va. Sup.Ct. App. 1992).

[59] *See ABA Formal Ethics Opinion 94-383* (unethical to make false threat to file disciplinary charge against another lawyer).

Chapter 10

Negotiating Tactics and Techniques

SYNOPSIS

§ 10.01 Introduction

Negotiators routinely employ a variety of tactics and techniques during the negotiating process to advance their clients' interests. These range from subtle games, to overtly obnoxious behavioral ploys, to well-meaning techniques for reaching a reasoned agreement. Some are geared toward adversarial or competitive bargaining, while others are designed to encourage problem solving or cooperative bargaining. Depending upon how they are used, certain tactics or techniques may run afoul of the ethical prescriptions of truthfulness and civility in negotiating discussed in §§ 9.06 and 9.07.

A glossary of common tactics and techniques variously used in negotiations is provided below in alphabetical order.[1] Further references to them are made throughout this book. This glossary is not provided as an express endorsement of any particular tactic or technique, or, for that matter, to encourage the routine use of special tactics in negotiations generally. Rather, it is provided because understanding these tactics and techniques and how to deal with them are essential to effectively representing your client. Section 10.50 at the end of this Chapter provides a general discussion of how to deal with tactics or techniques used by the other side that are particularly disingenuous or otherwise inappropriate under the circumstances.

You may find some of the tactics or techniques useful to employ in a particular situation. However, before using a special tactic or technique, it is sometimes desirable to advise your client about any advantages or disadvantages of using it so that your client will be able to advise you about any unanticipated reason why the tactic or technique might be inappropriate under the circumstances. Of course, you should never use a tactic or technique

[1] Similar glossaries are contained in numerous works. *See, e.g.*, T.A. Donner & B. L. Crowe, *Attorney's Practice Guide to Negotiations*, Chapters 11–12 (1995); M. Schoenfield & R. Schoenfield, *Legal Negotiations: Getting Maximum Results*, Chapter 5 (1988); C. B. Craver, *Effective Legal Negotiation and Settlement*, Chapter 10 (3rd ed. 1997); Lisnek, *A Lawyer's Guide to Effective Negotiation and Mediation*, Chapter 6 (1993); G. Goodpaster, *A Guide to Negotiation and Mediation*, Chapter 4 (1997).

that you believe to be unethical, and it is highly unwise to adopt a tactic or technique that is at odds with your own personality, style, or philosophy. Properly used, tactics and techniques are aids to negotiating a successful agreement in particular circumstances, and should not be used for their own sake.

§ 10.02 Abdication

Abdication is sometimes effective in deadlock situations. It occurs when both sides are close to an agreement and each side has put forward its best arguments as to why the other ought to compromise somewhat more. Then, one negotiator abdicates by telling the other that he is at a loss as to what to do further but will agree to a final proposal if the other side can just come up with a more equitable solution. In effect, the abdicator is putting the entire problem into the hands of the other party but is hinting at the same time that he (the abdicator) will accept a fair solution.

This tactic thus puts pressure on the other side to make one more final concession. Particularly if the abdicator styles his abdication with praise for the other side's creativity and good faith in resolving the impasse, the technique will sometimes produce an additional concession by the other side that is agreeable to both parties.

§ 10.03 Adjournment or Caucus

Sometimes a negotiator may find it beneficial or necessary to take a temporary recess during the negotiation, or stop it altogether to resume discussions at a later date. Adjournment may be beneficial to regroup when momentum has been lost, to evaluate a *Surprise* that has developed, to reflect and relax when you are feeling overly pressured to make an immediate decision, or to change the tone of the negotiation if it has become particularly frustrating, exhausting, or acrimonious. In addition, negotiations might have to be temporarily suspended to consult with your client about a matter. In any event, the primary objective is to temporarily bide time to allow for a clearer assessment of the situation.

§ 10.04 Anger/Aggressiveness

A display of anger, whether real or feigned, is often effective in conveying to the other side the seriousness of one's position and may reduce the other party's expectations. On the other hand, particularly if the anger is real, the anger may be dangerous for the angry party in that he may unwittingly reveal his bottom line. For example, if you make an offer to settle for $200,000 and the opposing negotiator angrily responds by exclaiming, "this case can't possibly be worth more than $100,000!", the outburst might well reveal that the negotiator's bottom line is close to $100,000.

Some negotiators use anger as part of an overall pattern of aggressive and abrasive behavior that is designed to brow beat their adversaries into making concessions out of intimidation or simply to conclude the unpleasant interaction. When faced with such a negotiator, it is often best to let him "blow off

steam" rather than try to match the aggressiveness with quid pro quo counter attacks. In short, the best counter measure to unabated aggressiveness is to "keep your cool."

§ 10.05 Asymmetrical Time Pressure

This tactic involves asking the out-of-town opponent about her arrival and departure times, ostensibly to confirm flight schedules and other arrangements. In light of the opponent's time constraints, various social and hospitality events are held to delay the start of negotiations and thus limit the time for discussion before the opponent has to leave. The tactic is designed to induce the opponent to make greater concessions to conclude the negotiation before her departure so as not to return home empty-handed. The most obvious antidote to this tactic is to make alternative flight or other travel arrangements for departure.

§ 10.06 Blaming or Fault Finding

Another form of *Anger/Aggressiveness* may occur when a negotiator abruptly blames or alleges some fault on the part of the other side for the parties' inability to reach an agreement. Depending upon the relationship between the parties or negotiators, this tactic may result in a further concession induced solely by a sense of guilt or an overriding desire to preserve the relationship. If the accusation of fault has merit, a concession based on that fact would not be irrational. On the other hand, if the accusation is unfounded, you should guard against capitulating on an important point for the mere sake of placating the accuser.

§ 10.07 Bluffing

Bluffing involves making an assertion or taking a position that is seemingly fixed when that is not true. A negotiator might bluff about an offer or counteroffer, or in making a threat. The obvious drawback to bluffing is that the bluffer will lose credibility in the negotiation if the bluff is exposed.

A negotiator might extricate herself from a bluff by claiming that her seemingly unalterable assertion or position warrants modification or retraction based on new or unanticipated information learned during the negotiation, or in light of a misunderstanding about the facts or law. Similarly, the party who exposes a bluff might allow the bluffer to *Save Face* by acknowledging that the seemingly fixed assertion or position was based on incomplete or erroneous information.

§ 10.08 Br'er Rabbit

This tactic is drawn from the story of Br'er Rabbit who, after being caught by a fox, repeatedly begs not to be thrown into the brier patch until, in the end, the fox did just that. The tactic might be employed against an opponent who, like the fox, tends to be overly suspicious and distrustful of the other side and has a desire to always gain the upper hand. The negotiator subtly

suggests to the fox-like opponent that a particular clause or provision in an agreement might be detrimental to the negotiator's client but advantageous to the opponent's client (even though the matter would actually be of benefit to the former). The overzealous opponent then jumps to agree to this provision without recognizing its value to the other side.

§ 10.09 Coalition

Coalition is the unification of power of two or more parties to increase their leverage in negotiating with a third party. For example, coalition building is often used by consumer groups or in boycott situations. The theory of the tactic is that forming a coalition has the effect of placing more negotiating cards in the hands of its members than would be the case if each member acted independently.

Sometimes the coalition tactic may be effective when the party draws upon or forms an allegiance with a person who may be a key player in the event the negotiation fails. For example, in a domestic custody dispute, having the allegiance of a child psychologist who would testify in court that your client would be the best person to be the primary custodial parent may bring added leverage to a negotiation where custody is the main issue.

§ 10.10 Company Policy Excuse

Some negotiators attempt to justify their position by the glib assertion that "it's company policy." Usually, such a purported "policy" has nothing to do with the applicable law of remedies or other objective criteria upon which the dispute should be reasonably resolved. Thus, when confronted with a company policy excuse, you should probe the reasons underlying the policy and who has the power to change the policy, while steering the other side toward adopting a more objective standard as the basis for negotiating the dispute.

§ 10.11 Deadlines

Real or perceived deadlines often exert pressure on the negotiating process. Deadlines may be unavoidable and inflexible (such as the statute of limitations), or they may be unilaterally imposed by one of the parties. Creating a deadline within which to conclude negotiations may be particularly effective if the consequence of not agreeing by the deadline is sufficiently serious or risky. In litigation, for example, one party may create a deadline by filing a motion, giving notice of a hearing, or by refusing to consent to a request by the other party to extend the time within which to meet a deadline imposed by the court. (*See* § 15.07).

In setting the length of a deadline, it is important to consider your purpose in exerting pressure on the negotiation process. For example, if your purpose is to induce immediate action, you should set a short deadline, whether an hour, day, or week. Generally, if a deadline exceeds ten days, it will lose its effectiveness for lack of demonstrating urgency. On the other hand, if you are not yet prepared to take immediate action or it is in your best interests to

bide time to obtain additional information, you should consider a more flexible deadline of a few weeks or months.

Imposing a deadline is most effective when coupled with concrete sanctions for not meeting the deadline. As with the tactic of using a *Threat*, if you are not willing and prepared to follow through with concrete consequences for noncompliance with the deadline, the deadline tactic will be vacuous.

§ 10.12 Delay

Delaying negotiations until the most advantageous time is a common tactic. Negotiators frequently delay in order to allow a change in position to occur for a more favorable result, or to time the negotiations with an event that puts maximum pressure on the other side to negotiate. Delay is also used to gain time for obtaining more information pertinent to the negotiation, or to preserve the status quo under circumstances where it is temporarily advantageous to preserve the existing situation of the parties.

§ 10.13 Dodging the Question through Blocking Techniques

Sharing information between the parties is integral to the negotiating process, particularly when a problem-solving strategy is adopted. On the other hand, negotiators invariably need to protect certain sensitive or damaging information from the other side and thus seek to evade questions that are directed to such information.

This evasion may occur through any one of five methods, sometimes called "blocking" techniques. The first method is to simply ignore the question and change the topic. The second method is to rule the question out of bounds and provide the other side with a reasonable reason for refusing to answer the question. A third technique is to answer the question by asking another question. Fourth, you might attempt to answer the question by answering another question. This might be done by (a) re-framing the initial question so that the answer will not be damaging, (b) simply answering another question as if it had been asked, or (c) by answering another question that has recently been asked. The fifth and final method is to over-answer or under-answer the question by responding broadly to a particular question or narrowly to a general question. (*See* § 14.11).

Most of these blocking techniques are, in essence, methods of distraction. The key to avoid succumbing to this distraction is to carefully *listen* to the answer and, when necessary, re-ask the question.

§ 10.14 Draft Document or Single Negotiating Text

Sometimes a negotiator will bring a draft of a potential agreement to the negotiation to set the agenda and serve as a starting point for discussions. This technique may also be effective in multiparty negotiations, particularly where one of the negotiators or a neutral third party submits the draft in advance of formal discussions to the other parties who are asked to submit suggested changes to the draft. The negotiating text is then revised and resubmitted to the other parties for further suggestions.

The process may involve the preparation of numerous drafts before the parties actually sit down together to hammer out a final accord. By the time they do, the single negotiating text is likely to reflect the most important interests of at least most of the parties and greatly reduce the number of issues that remain to be resolved. The process often creates a powerful momentum to reach a final agreement because the parties will usually be reluctant to unravel what the text has already accomplished, and thus they will be more inclined to make reasonable concessions to close a deal.

§ 10.15 Escalating Demands

Under this tactic, the negotiator engages in a pattern of raising one of his demands for every concession made on another, or of reopening issues you thought had already been resolved. The effect is to decrease your overall concessions and to induce your side to quickly reach an agreement lest the negotiator escalate one or more of his demands again.

When faced with this tactic, it is usually best not to counter it by engaging in the same conduct. Rather, you should firmly bring the matter to the negotiator's attention and insist that the negotiation proceed in a more principled manner. If the tactic persists, you may be forced to temporarily suspend negotiations or end them altogether.

§ 10.16 Excessive Initial Demands/Offers

As mentioned in §12.03[10], it is generally desirable for a negotiator to make a greater initial demand or offer than a more modest one, so long as some reasonable basis can be provided for the more hardened, initial demand. This approach often has the effect of reducing the other party's initial expectations. However, if the initial demand or offer is extreme in the sense of having absolutely no rational basis, the negotiator is likely to quickly lose credibility with the opposing side.

When confronted with a truly excessive initial demand, the best counter tactic is to expose it by probing the purported justification for the demand. Another approach is to directly point out the disingenuousness of the tactic and indicate that you do not intend to employ the same unproductive technique. Yet another alternative is to refuse to disclose your initial offer until the other side has presented a proposal that is justified with some reasonable rationale.

§ 10.17 Face Saving

Negotiations frequently reach an impasse not because the particular proposal is unacceptable, but because one party is psychologically unable to accept the proposal for fear of being perceived as having capitulated. Face saving is a technique for inducing a party to change a previously held position in a way that fulfills his needs for self-esteem. In essence, the tactic is designed to make the other party "feel" that he is really not backing down.

For example, if the other party's change of position involves a concession on a legal or factual point, you might acknowledge that absent the complete

acts you also would have taken an initial position similar to that taken by he other side. Another approach is to ask questions about the information elied upon by the other side in support of its proposal, and then point out iow that information is incomplete. Oftentimes good-natured humor is also in effective face saving technique.

10.18 Fait Accompli

"Fait accompli" is a French phrase meaning "an accomplished fact." As a negotiating tactic, it constitutes some action or inaction by a party to change he status quo and put the other side in a weaker position.

For example, insurance adjusters sometimes create a fait accompli by imply sending a check in an amount deemed appropriate for the injury to he injured party's attorney, thus putting the attorney and her client in the position of having to accept the check or continue with litigation. Filing a awsuit or obtaining a restraining order during the pendency of negotiations creates the choice of either quickly settling the case or expending money in lefense of the legal action. Or, in a breach of contract situation, if the breaching party simply discontinues the acts constituting the alleged breach ind sells her business to another company, the injured party may be left with having to deal with a new party or with a remedy limited to damages for a past breach. In both instances, the breaching party has weakened the other side's bargaining leverage and economic justification for bringing suit.

§ 10.19 False Demands

During the exchange of information between the parties, a negotiator may discover a matter that is particularly important to the other side but of little or no value to his client. In an effort to take advantage of this knowledge, the negotiator may pretend that this matter is also highly important to his client and includes it as an integral part of his client's initial demand or offer. The negotiator then seeks to enhance his client's position by giving up that matter to the other side in exchange for extracting a more crucial concession. The best way to guard against such false demands is to carefully scrutinize the terms of your opponent's offers to determine whether they contain matters that are of only incidental benefit to your opponent.

§ 10.20 False Emphasis

Under this tactic, the negotiator temporarily emphasizes matters of lesser importance to her client and de-emphasizes matters of greater importance to her client. The goal is to mislead the other side about the client's true preferences such that the other side is induced to give up the de-emphasized matter (which is actually the more important matter to the client). For example, by creating the appearance that the most desired object is less desirable, a buyer may be successful in minimizing the cost she would have to pay for the object. Conversely, a seller may be able to increase the price that she can obtain for an item by creating the appearance that the item is much more valuable to her than it is in reality.

§ 10.21 False Multiple Concessions

During a negotiation session, one party may make multiple, relatively small concessions in rapid sequence to induce the other party to reciprocate with multiple, larger concessions to the latter's detriment. For example, in contemplating a move from an initial demand of $800,000 to a new demand of $700,000, instead of making a single, principled concession of $100,000, the party might first move to $780,000, then move to $740,000 after some discussion, and then move to $700,000. Claiming three separate, unanswered concessions, the party then seeks to have the opposing party make a larger counteroffer than would have been produced in response to a single move from $800,000 to $700,000.

When faced with such consecutive concessions, you should focus on the aggregate movement involved rather than the mere number of concessions made. If you then choose to make a single counteroffer to the other party's consecutive concessions, you should make the same counteroffer you would have made had the aggregate movement been made in one concession.

§ 10.22 False Security

Negotiators sometimes attempt to play on the psychological tendency of people to value a commodity or matter more highly if it is perceived to be scarce or the opportunity of obtaining it is perceived to be limited.[2] Thus, a negotiator might seek to extract a better price for an item by simply claiming that its availability elsewhere at the price stated is nonexistent or rare.

One form of this ploy is to convert what otherwise would be a two-party negotiation over an item into a multiparty negotiation by inviting all prospective buyers to a single negotiation rather than dealing with each potential buyer separately. This auction-like atmosphere might even be set up in the face of each buyer's expectation that he would be the sole person meeting with the seller. The competitiveness induced by the bidding atmosphere may well allow the seller to obtain a higher price than that which could have been obtained by dealing with each potential buyer on an individual basis.

§ 10.23 Floating Trial Balloons and Bracketing

This tactic is frequently employed in politics. A politician leaks a particular proposal or contemplated action and waits to see the reaction of his opponent and the public before formally adopting the proposal or implementing the action. The same technique may be used in the negotiating process. The client or a member of his negotiating team privately leaks or "floats" controversial aspects of a potential agreement to test the reaction of the opposing party.

A variant on this tactic, sometimes called "bracketing," might be employed during an actual negotiation session. For example, the negotiator might say, "I know it would be too much for you to pay $50,000, but I also know that

[2] This is sometimes referred to as "Brehm's theory of psychological reactance": "[l]abeling a resource as scarce may cause reactance. . .and produce more vigorous action to obtain the resource and more dissatisfaction with its unavailability." J. Pfeffer, *Power in Organizations* 83 (1981).

no one could get away with paying only $30,000." By presenting these high and low figures, the negotiator tests the opposing party's reaction to each figure to gauge a midpoint range for settlement. In this example, the negotiator may want to negotiate a price between $35,000 and $45,000 even though he knows that the other side desires to pay much less.

§ 10.24 Good Guy-Bad Guy Routine/Mutt and Jeff

The "good guy-bad guy" (or "Mutt and Jeff") routine is played by a team of two or more negotiators for the same side, one of whom adopts a seemingly reasonable and accommodating approach while the other takes a hard-nosed and intransigent approach. After the good guy heaps praise on the other party for his concessions and it appears that an agreement is close to being reached, the bad guy rejects the proposal as patently unacceptable, and the good guy, in turn, tries to persuade the other party that if only a few additional concessions would be made, the irrational partner may be persuaded to accept the agreement. As a variant on this routine, a single negotiator might play the good guy but insist that greater movement is necessary to satisfy his irrational client.

Law enforcement personnel frequently use the "good guy-bad guy" routine when they are interrogating a suspect. Although not usually described as a "negotiation," the "good guy" interrogator is in effect negotiating with the suspect for additional information (including the names of the other participants in the criminal behavior) in exchange for charging the suspect with a lesser criminal offense. The "bad guy" cop is holding out for more information before agreeing to a negotiated plea to a lesser criminal charge. The suspect often succumbs to the wishes of the "good guy" in order to mollify the "bad guy."

One useful test for determining whether the negotiators for the other side are playing good guy-bad guy, or whether they are genuinely in disagreement with one another, is to watch whether the reasonable negotiator ever assents to an aspect of an agreement without expressing the necessity of obtaining the approval of the unreasonable negotiator. If the reasonable negotiator always seeks the unreasonable negotiator's acquiescence, it is highly probable the game is underway.

When the tactic is employed, it is usually best to simply recognize it rather than openly expose it. If your accusation is wrong, the negotiation may be unnecessarily impaired. If you are right, the opposing negotiators may simply resort to other devious tactics. Thus, place your primary focus on obtaining the assent of the reasonable negotiator. Then, perhaps with the aid of the reasonable negotiator, direct your attention to persuading the unreasonable one.

10.25 Lack of Authority or Limited Authority

A negotiator may claim that she lacks authority or has limited authority from her client for a number of reasons. First, the tactic may serve as the negotiator's "back door" by giving her an excuse to avoid making a decision

in the face of a pushy adversary or to guard against making spontaneous or reactionary decisions. Second, the tactic provides an excuse for the negotiator to stall or temporarily suspend negotiations until there is time to consult with another negotiator or higher authority. Third, the tactic allows the negotiator to insulate the client from the heat of battle of the negotiating process so that a final decision may be made on cool-headed analysis rather than on pure emotion.

The intended effect of claiming lack of authority or limited authority, whether real or feigned, is to obtain psychological commitments from the other side when it is negotiating with complete authority, since most people tend to feel bound by tentative agreements they have reached. The negotiator without complete authority is then able to modify the tentative agreement based on new or unexpected demands from the client. When faced with this tactic, it is often useful to suggest that you also lack final authority over the matter. In this way, it is understood from the outset that any agreement is entirely tentative. If it becomes clear that claims of lack of authority or limited authority are making the negotiation unproductive, recess or suspend the negotiation until the other side obtains the requisite authority to substantively negotiate.

§ 10.26 Little Ol' Country Lawyer

Some negotiators deliberately adopt a style of seeming inexperience, disorganization, absent-mindedness, meekness, ineptness, or flattery to lure their unsuspecting adversaries into a false sense of security. They then extract valuable information and concessions from their opponents who have become unwittingly stupefied by their own sense of superiority and self-gratifying desire to accommodate the pathetic "little ol' country lawyer." The best antidote to this tactic is simply to recognize it and maintain a disciplined approach that sticks to your negotiation plan and insists upon the other side's principled participation in the negotiation process.

§ 10.27 Lock-in Positions

A tactic particularly common to labor-management negotiations is to have a principal, such as a union president or company executive, give a publicized speech or press conference that "locks in" the party's position in such a way that negotiations cannot effectively proceed until the other side at least acknowledges the party's announced position as a starting point for discussions. For example, a union president might give a speech or call a press conference to proclaim that his membership "will never accept less than a 10% pay increase" to induce management to accept that position as a bottom-line for beginning negotiations. Of course, the representative or chief negotiator for management might also call a press conference and respond with the company's own assertion of a bottom-line.

To counter this tactic, a party's purported lock-in position might simply be ignored, or characterized by the other side as a mere "expectation," "goal," or "discussion point like any other." Alternatively, the party who employed the

lock-in tactic might be told that, notwithstanding his public pronouncements, you intend to negotiate the dispute at the bargaining table, not in the press.

§ 10.28 Low-Balling

Low-balling is a tactic that takes advantage of the psychological tendency of many people to acquiesce to additional terms of an agreement once they have committed themselves to accepting the underlying transaction.[3] It is a form of *Nibbling*, designed to bait a party into deciding to purchase an item and then increasing the purchase price when it comes time to sign final papers.

As one example of this tactic, a car salesman will induce a person to decide to buy a car on what are represented to be particularly favorable terms. The prospective purchaser might even be permitted to try out the car for a few days so as to "hook" her on it. When the time comes to sign a final purchase contract, the salesman claims that there was some mistake or that the manager won't approve the original deal and asks for more money. Since the buyer has become psychologically committed to the idea of owning the car, she may agree to pay the additional money. Of course, the antidote to this tactic is simply to protest the change in terms and threaten to walk away from the deal if the salesman insists on increasing the purchase price.

§ 10.29 Misstatement

When certain information is difficult to obtain from the other side, a negotiator might make a misstatement of fact to induce the other party to correct the fact and thereby reveal the information sought. For example, if a buyer is negotiating the purchase price of an item, he might say, "We understand that you sold the same machine to X for $35,000." The seller might then correct the misstatement, revealing that the actual sale to X was for $28,000. This may give the buyer leverage to negotiate a price for the same type of machine that is closer to $28,000 than $35,000. The obvious lesson from this tactic is that you must always maintain control over yourself in what you reveal to your adversary.

§ 10.30 Nibbling

A variation on the *Lack of Authority or Limited Authority* tactic occurs when the negotiator holds herself out as having full authority from her client, but, after concluding the agreement, approaches the other side to sheepishly confess that she really didn't have "complete" authority and her dissatisfied client will only accept the agreement if just one more concession is made.

To counter this "nibbling" tactic, when confronted with a request for a post-agreement concession, you might indicate to your adversary that you are believed because your own client may be dissatisfied and want to modify a term in the agreement that you had, perhaps too prematurely, agreed upon. If your opponent's post-agreement request is in good faith, she will usually agree to discuss your proposed modification in deference to reciprocity. On the other hand, if your opponent's response is to reject further discussions and to insist upon the terms of the initial agreement, you will know that you have successfully thwarted your adversary's disingenuous attempt at nibbling.

[3] *See* Robert B. Cialdini, *Influence* 102–105 (1984).

§ 10.31 Off-the-Record Discussions

Negotiators sometimes find it useful to meet informally with one another, without their clients present, to engage in off-the-record discussions about the dispute. In this way, the negotiators are able "to lay their cards on the table" and freely explore options toward an agreement without making any firm commitments to one another. The tactic is particularly beneficial for exploratory discussions before negotiations begin, or to "separate the people from the problem" in circumstances where negotiations have broken down. This tactic is particularly useful in hotly contested and emotionally laden domestic negotiations.

§ 10.32 Personal Attacks

Some hardball negotiators deliberately engage in a variety of verbal and nonverbal behavior to insult, belittle, disparage, or otherwise make the opposing party as uncomfortable as possible. The theory is to intimidate the opponent into submission. The best counter measure to this tactic is to tactfully "name the game" and insist that the negotiations proceed on the merits of the parties' respective proposals rather than on personalities.

§ 10.33 Playing Dumb

A variation on the *Abdication* and *Little Ol' Country Lawyer* tactics occurs when the negotiator "plays dumb" by persistently picking apart the other party's proposals but never makes a proposal of his own out of a feigned inability to come up with any solution. The tactic is designed to induce the opposition to prove that it can formulate a satisfactory settlement. When the negotiator plays dumb, repeatedly ask him what he wants. If he continues to refuse to make a proposal, indicate that you may have to terminate the negotiation unless he can be more forthcoming in making proposals.

§ 10.34 Preconditions or Conditional Proposals

Some negotiators condition their willingness to negotiate upon the satisfaction of a condition precedent (*e.g.*, "We won't negotiate until you do X."). The unilaterally imposed precondition is essentially presented as a non-negotiable issue or as a threshold concession that must be made by the other side. The precondition might be "procedural" in the sense of how the negotiation will be conducted, "substantive" in the sense of demanding that the other party agree to a particular term in the agreement, or a combination of both (*e.g.*, "We are willing to discuss issue X if agreement is first reached on issue Y.").

A precondition is effective if the demanding party has superior bargaining leverage over the other side on the condition being imposed. On the other

hand, the danger of imposing a precondition is that the other side may view the tactic as coercive or tantamount to exacting an unfair concession. This may cause the other party to simply ignore the precondition, flatly reject it, or assert a counter precondition.

Closely akin to preconditions are conditional proposals. The latter are offers which are contingent upon receiving a concession on a specific point, resolving a specified issue first, or resolving all of the remaining issues in the negotiation. For example, X is offered for Y so long as the other party gives up Y, does Z, or W is resolved.

§ 10.35 Problem Solving

Negotiators who adopt a problem-solving approach seek to focus on each party's needs or interests rather than on stated "positions." The people are separated from the problem, and solutions are explored for mutual gain based on objective criteria rather than the naked will of any one party.

In furtherance of this approach, problem-solving negotiators employ the following tactics: (1) they shun any temptation to engage in personal attacks or react irrationally to the other side; (2) they seek to diffuse anger, fear, and suspicion by listening, acknowledging the other party's points, and agreeing whenever possible; (3) they deflect hard-line positions by re-framing them in the form of problem-solving questions that explore the needs and reasons underlying the other party's positions and suggest alternative solutions; (4) they adopt the role of a mediator, trying to identify and satisfy the other side's unmet interests; and (5) instead of employing threats or force, they seek to educate the other party to the costs of not reaching an agreement, and reassure him that the goal of the negotiation is mutual satisfaction, not victory.[4] (See also Sec. 14.14).

§ 10.36 Publicity

Efforts at using the media to exert pressure on the other side to negotiate or compromise are sometimes used in labor disputes, class actions, or other high-profile cases. Typical examples of these efforts include using press releases, granting newspaper or magazine interviews, and making public pronouncements over the TV or radio. (*See also, Lock-in Positions*).

The extent to which a lawyer may make statements to the media is limited by ethical constraints. Rule 3.6 of the ABA Model Rules of Professional Conduct provides, in pertinent part:

> (a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

[4] *See* W. Ury, *Getting Past No* (1991); R. Fisher & W. Ury, *Getting to Yes* (1981).

> (b) Notwithstanding paragraph (a), a lawyer may state:
>
> (1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;
>
> (2) information contained in a public record;
>
> (3) that an investigation of a matter is in progress;
>
> (4) the scheduling or result of any step in litigation;
>
> (5) a request for assistance in obtaining evidence and information necessary thereto;
>
> (6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest. . .
>
> . . . .
>
> (c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.
>
> (d) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

Lawyers wishing to achieve publicity for their clients without offending Rule 3.6 frequently include extensive details about their clients and the injuries they have suffered in the clients' complaints and answers. Because these pleadings are public records, the details are available to the press. Those lawyers who wish to avoid publicity for their clients should engage in early negotiations to stave off litigation and the creation of a "public record" available to the press.

§ 10.37 Questions to Facilitate Agreements

Skillful negotiators often use different forms of questions to facilitate an agreement. Examples of these different types of questions include the following:[5]

(1) Questions to get the negotiation started:

- What are the facts of the situation from your perspective?
- What do you consider to be the major issues?
- What are your primary interests and concerns?
- What proposals or solutions are you thinking about?

(2) Questions to obtain specific information:

- Who, what, which, when, where, why, how?

[5] *See also*, John M. Hayes, *The Fundamentals of Family Mediation* 185–186 (1994).

- What do you mean by. . .?
- Would you explain that further?

(3) Questions to invite clarification:

- How will your proposal work?
- Who will do what, when, where, and how?
- How will this solve the problem?

(4) Questions to reflect understanding:

- Do you mean that. . .?
- Do I understand you to be saying that. . .?
- Am I correct in assuming that. . .?

(5) Questions to explore or suggest alternative solutions:

- What would you think if we tried to. . .?
- Is it possible to consider. . .?
- Are there other ways to address that concern?
- What option do you think is better?

(6) Questions to focus on the key issues:

- What does all this lead to?
- Where do we go from here?
- How might we resolve the issue of. . .?
- Why do you think we are blocked on this issue?

(7) Questions to bring closure to and confirm the agreement:

- So, as I understand it, have we agreed to. . .?
- Can you think of anything we have left out in our agreement?

§ 10.38 Questioning by Socratic Method

Some skillful negotiators adopt the "Socratic method" of asking a series of logical questions that are designed to expose the weaknesses in the opposing party's proposals and lead to a particular result. This approach often allows the negotiator to obtain a series of agreements about certain concepts or principles that should underlie a resolution of the dispute. The goal is to induce the other side to participate in the negotiator's reasoning process that leads to a particular result.

This tactic should not be viewed as unfair or illegitimate. If the parties exchange thoughtful questions and answers, they are more apt to understand each other's interests and objectives and develop a solution based on reason rather than naked desire. On the other hand, excessive use of this tactic may come across as patronizing.

§ 10.39 Reversing Position

The tactic of reversing position may be as effective in breaking a deadlock as in solidifying one. Here, when faced with a stalemate, the negotiator

abruptly declares that she has made too many concessions and can no longer live with what she has already offered. She then withdraws some of her concessions. This is intended to serve as a huge blow to the other party who has worked so hard to establish headway but now finds himself "back to square one." The tactic often results in either successfully reducing the other party's aspiration level so that progress resumes, or in solidifying the stalemate unless the negotiator who reversed position reaffirms her previous concessions and offers a new proposal.

§ 10.40 Salami

The "salami" tactic stems from the metaphor that if you want to eat the salami on the other person's plate, you should proceed one slice at a time. That is, it is usually more palatable for the other side to end up paying a larger sum or conceding on a greater number of matters if the issues are defined and addressed in smaller, bite-size portions. For example, it may be easier to justify a total settlement of $600,000 if it is comprised of separately negotiated amounts for past medical expenses, future medical expenses, past lost wages, reduction in earning capacity, past pain and suffering, future pain and suffering, and the like.

§ 10.41 Snow Job/Alleged Expertise

In an attempt to gain psychological leverage, some negotiators seek to display their high level of expertise about the subject matter of the negotiation, or shower their adversaries with a highly detailed presentation of facts and figures to dominate and overwhelm the other side. If the other side is relatively unprepared, this factual "snow job" or display of expertise is effective in conveying the message that the negotiator is prepared to go to trial or take other alternative action if no agreement is reached.

When faced with this tactic, you should be careful to evaluate whether your opponent's professed expertise is real or illusory, and whether the detailed presentation is really substantive or irrelevant. Often times, slick and detailed presentations are cluttered with meaningless factual and legal minutiae in order to disguise a proposal's true weaknesses. Avoid being hurried into accepting your adversary's data and consider asking him to summarize his position without unnecessary resort to details. In this way, you will be able to keep your focus on the key components of the proposal to evaluate its overall acceptability.

§ 10.42 Splitting the Difference

Splitting the difference is probably the most common form of concluding an agreement in adversarial bargaining. For example, one party makes concessions down to $20,000, the other party concedes up to $10,000, and the parties settle on $15,000.

The appropriateness of splitting the difference depends largely on the reasonableness of the parties' respective opening offers and concession behavior. For example, if a reasonable settlement range is between $10,000 and

$20,000, and X makes an opening offer of $90,000 and Y opens with $4,000, if X thereafter makes multiple concessions down to $30,000 and Y makes a single concession up to $10,000, it would be inappropriate for X to claim that the parties should split the difference at $20,000 because she has conceded $60,000 and Y has only conceded $6,000. The point is that splitting the difference only becomes reasonable after the negotiation process has effectively negated X's extreme initial demand. In addition, once X is at $30,000 and Y is at $10,000, if Y nevertheless proposes to split the difference at $20,000, Y should not allow X to disingenuously treat the $20,000 as a separate offer to split with $30,000 and arrive at an excessive final settlement of $25,000.

§ 10.43 Surprise

Regardless of how thorough you are in preparing for the negotiation, from time to time the unexpected occurs and you are suddenly confronted with either a welcome or unwelcome surprise. For example, during the course of negotiations, you may unexpectedly discover some damaging information against the other side or find out about an event or fact that undercuts your position.

If the surprise is welcome news, it is often better to gently use it as an additional tool to reinforce and advance your overall objectives rather than to dramatically spring it upon the other side in an effort to extract an immediate, extraordinary concession. This is because a dramatic and hasty use of the surprise may backfire and eliminate its utility if the other side is unable to save face and recoils by suspending or terminating negotiations. On the other hand, if the surprise is damaging to your side, delaying the negotiations is effective in fending off any short-term advantage that may be gained by the opposition. By buying time, you can usually regroup and analyze the situation to minimize the surprise or neutralize its immediate impact.

§ 10.44 Take-it-or-Leave-it

A "take-it-or-leave-it" approach,[6] particularly if literally styled that way, often comes across as obnoxious and arrogant, and frequently results in indignant rejection. However, some negotiators who use this tactic genuinely don't intend to create that reaction, but insist upon making a single offer that they deem fair which the other side is simply free to accept or reject. This approach may be particularly effective if the offeror possesses considerable bargaining leverage over his opponent.

When faced with a take-it-or-leave-it offer, you might choose to ignore it, divert it by changing the subject, or try to counter it by pointing out what

[6] The approach is sometimes called "Boulwarism," named after Lemuel R. Boulware, a vice-president of General Electric, who used the tactic in connection with labor negotiations by bypassing GE's union representatives to make a "first, fair, firm, and final" offer directly to the company's workers. The National Labor Relations Board ultimately declared the tactic an "unfair labor practice" because it undermined the union as a representative of workers in the collective bargaining process. General Electric Co and IUE, 150 N.L.R.B. 192 (1964), aff'd NLRB v. General Electric Co., 418 F.2d 736 (1969).

the offeror stands to lose if no agreement is reached. If the offeror refuses to budge, evaluate the offer dispassionately. After all, you should not automatically assume that a better result could be obtained through ritualistic, give-and-take bargaining.

Because the take-it-or-leave-it approach often results in instinctive rejection, it is usually best not to use it even if you possess far superior bargaining power over your adversary. The more power you have in a negotiation, the more you can afford to engage in its "process." Allowing the other party to participate in protracted bargaining usually has the benefit of leaving him more satisfied after a settlement is reached and more likely to stick by and implement the settlement. Perhaps most importantly, it provides you with a hedge against having misjudged the situation. After all, a settlement reached after protracted negotiations may turn out to be more favorable to you than the offer you had planned to have the other party summarily "take or leave."

§ 10.45 Threats

A threat is vacuous unless it is credible. To be credible, (1) the threat must be understood; (2) the other side must be convinced that you definitely intend to carry out the threat and possess the capability of doing so without undue cost to your client; and (3) the other side must believe that it would be less costly to comply with your demands than to suffer the consequences that would follow if you carried out the threat. Threats tend to be most effective (a) when styled without hostility but as an unfortunate and unavoidable necessity, (b) when coupled with a deadline and some visible preparatory actions taken by your client to carry out the threat, and (c) when made without anticipation by the other side.

Threats can be countered in a variety of ways. First, you can respond with a threat of your own, but you should recognize that this tactic might cause the negotiation to degenerate into an escalating spiral of additional threats. Second, you can simply ignore the threat. Third, you can act as if the threat were unauthorized or made in the heat of passion. Fourth, you can characterize the threat as something else, such as a purely hypothetical course of action. Fifth, you can attempt to refute the other side's perception of the cost your client will incur if the threat is carried out, or try to convince the other side that it has underestimated its own costs if the threat is carried out. Finally, you can simply dare the other side to carry out the threat to demonstrate its lack of meaning to your client. Of course, the best choice among these options will depend upon the particular circumstances.

§ 10.46 Timing

Negotiators routinely attempt to conduct or conclude negotiations at times that are most advantageous to their clients. A particular event or particular time pressures placed upon the parties may trigger the most opportune timing. Negotiating when the other party is in the weakest position or your client is in the strongest position will enhance your prospects for a favorable settlement.

Jockeying for the best time to negotiate involves using tactics such as *Asymmetrical Time Pressure, Deadlines, Delay*, or taking preemptive action to create conditions through a *Fait Accompli*. Generally, if a party is operating under a particular time constraint, he should try to withhold that fact from his opponent. If this is not practical, the party may have to communicate a deadline within which negotiations must be completed in order to deprive his adversary of using this time pressure as leverage.

Finally, in a particular case, a negotiator might even consider the best day of the week or time of day to negotiate. If a negotiator is able to pick a particular day or time of day to negotiate that places a special time pressure upon the other side, he may enhance his prospects for obtaining a more favorable settlement.

§ 10.47 Two Against One

Most negotiations are conducted on a one-on-one basis with a single individual representing each side. Sometimes, however, a party may create a negotiating team of two or more representatives to "take on" a single negotiator for the other side. This might be done to permit the team to employ a *Good Guy-Bad Guy Routine* or otherwise to exert psychological pressure upon the opponent. When this occurs, the single negotiator might simply refuse to negotiate with more than one counterpart, or bring in one or more additional negotiators on behalf of her side to counterbalance the opposing party's team.

§ 10.48 Walkout

Walking out in the middle of a negotiation may appear somewhat dramatic and adolescent, but if done in a genuine and non-hostile manner it may be effective in breaking a deadlock. A walkout is often accompanied by some ultimatum about what will be required to resume negotiations. It is usually best to word such an ultimatum with sufficient ambiguity so that you have the option of walking back into the negotiation if necessary. If the other party is truly committed to on-going negotiations, he will realize that he has simply pushed matters too far and the negotiation may resume after a short recess or at a later time.

§ 10.49 Word-Smithing

Negotiators are word smiths. That is, they often couch what they say in language that is designed to subtly signal their intentions or concerns. Thus, you must be sensitive to the verbal cues given by your counterpart's expressions. The following are just a sampling of what certain expressions, depending upon the context, might really mean:

- *Our initial demand is $125,000* = We are prepared to make a lower offer.
- *Our counteroffer is $25,000. . .If you have any further information, we will of course consider it* = We need further factual justification to increase our offer.

- *I have no authority to accept less than $85,000 at this time* = I probably can get authority to accept less that $85,000.
- *My client is not inclined to. . .* = My client doesn't like the idea but might be persuaded otherwise.
- *For the sake of discussion, what would you think about a value of this case in the range of $75,000 to $85,000?* = Is your resistance point $80,000? Mine might be. Let's settle for $80,000.
- *Our final offer is to pay no more than $75,000* = Your resistance point [in the preceding example] is really $75,000, so that's going to be my bottom line.
- *Well, our final counteroffer is that we will accept no less than $77,500* = You might have been correct that our resistance point was $75,000, but you will settle the case for $2,500 more rather than go to the expense of a trial.

§ 10.50 Dealing with Disingenuous or Inappropriate Tactics or Techniques

A tactic or technique may be inappropriate to a negotiation either because it is disingenuous (and perhaps even unethical), or because you believe it otherwise would be counterproductive in the particular circumstances. Generally, there are four ways you can deal with such tactics or techniques. However, no one method is invariably better than the other, and thus you should simply choose the method (or combination of methods) you think best in the particular situation.

[a] Rule the tactic or technique out of bounds before negotiations start or when it arises during the negotiation

Ruling the tactic or technique out of bounds before negotiations start may be appropriate if your counterpart has already employed the tactic or technique before formal negotiations begin or you are certain the tactic or technique will be employed when negotiations begin. On the other hand, this method may come across as condescending or patronizing if used when your counterpart never had any intention in the first place of employing the tactic or technique you want to foreclose. Thus, if you are unsure whether the tactic or technique will be used, it is better to rule it out of bounds at the time it first arises during actual negotiations rather than before they start.

Either way, it is important to be *tactful* in ruling a tactic or technique out of bounds. The goal is to foreclose the tactic or technique without unnecessarily foreclosing negotiations by disparaging or insulting your counterpart. For example,

compare (untactful negotiator):

—Listen, John, we're not interested in any "Getting to Yes by Getting Past No" problem-solving type of stuff here. . . This case is about bucks, only bucks, and nothing but bucks. . .So, the only thing I'm interested in knowing is where your bucks stop.

—George, let me tell you at the outset that if you guys truly want to negotiate this contract, I'm not going to tolerate any "lock-in" tactics in the press. . . If you guys want to do that, you and I might just as well get in front of the cameras now and lock horns. . .

with (tactful negotiator):

—John, I may be wrong, but I really don't think we can "problem solve" this case. . . For better or worse, my client's only interest is the amount of money she might receive.[7]

—George, let me share with you one concern I have before next week's meeting. In these types of cases, I'm always concerned that the press might undermine a deal before we even have a chance to sit down and talk. I can prevent that on my end. Can you give me any help on that from your end?

[b] Deflect the tactic or technique by ignoring it

Deflecting a tactic or technique by ignoring it does not mean that you act as if you are naively unaware of it. For example, you might show your awareness of the tactic through subtle body language expressing your irritation, or by making some casual remark indicating that you know the tactic or technique is being employed (see also *[c]* below). Deflecting a tactic or technique by ignoring it simply means that you proceed with the negotiation as if the tactic or technique were not being used. This approach essentially shows the other side that you are not interested in playing his or her game, and that you intend to proceed with your own principled approach to the negotiation.

[7] A tactful problem solver might respond, "I understand. I would just like to explore for a minute the possibility that each side could benefit by. . ."

[c] Expressly expose the tactic or technique

Expressly exposing the tactic or technique involves directly mentioning it to your counterpart when it arises during the negotiation, hoping this will be enough to cause him to abandon the tactic. This approach differs from *[a]* above only in that when you expose the tactic you might not say anything about your unwillingness to proceed with the negotiation if the tactic continues to be used. Again, when expressly exposing the tactic or technique, try to be tactful so that your counterpart will not be unnecessarily embarrassed or lose face. For example, if your counterpart persists in *Dodging the Question* through one or more "blocking techniques," it may be more effective to explain why a candid answer to your question is important to the negotiation rather than to confront your counterpart with, "Why do you always answer my question with a question or with some answer to a question I never asked?"

[d] Respond to the tactic or technique in kind

If you counter a disingenuous tactic or technique by employing the same or similar tactic or technique, the negotiation may rapidly result in deadlock. On the other hand, retaliating in this way may be enough to cause your counterpart to abandon the unproductive behavior. For example, when faced with a *Good Guy-Bad Guy Routine* or a *Two Against One* tactic, you might indicate to your adversaries that you may need to temporarily suspend the negotiation until another colleague can join you in continuing discussions. Similarly, as mentioned previously, a sudden claim of *Lack of Authority or Limited Authority* by your counterpart might be countered with a suggestion that you too may need to confer further with your client before a final agreement can be reached.

Chapter 11

Valuing Cases for Negotiation and Settlement

SYNOPSIS

§ 11.01 Introduction

The vast majority of cases in the litigation context involves a dispute over money and therefore is usually negotiated through adversarial bargaining. In these negotiations, because the ultimate decision to settle rests with your client, you will often be asked to advise whether it would be in your client's best interests to settle the case or take it to trial. This requires valuing the case in terms of its likely outcome at trial as compared with the outcome of accepting the opposing party's final settlement offer. It also involves taking into account how willing your client is to gamble on the outcome of a trial versus accepting a settlement and your client's other motivations affecting the choice between trial and settlement. This Chapter discusses a variety of analyses that you might draw upon in valuing a case for negotiation and settlement. In addition, these analyses may be drawn upon to help formulate the offers and concessions that your client might make during adversarial negotiations, which is discussed more fully in Chapter 12.

§ 11.02 Target and Resistance Points

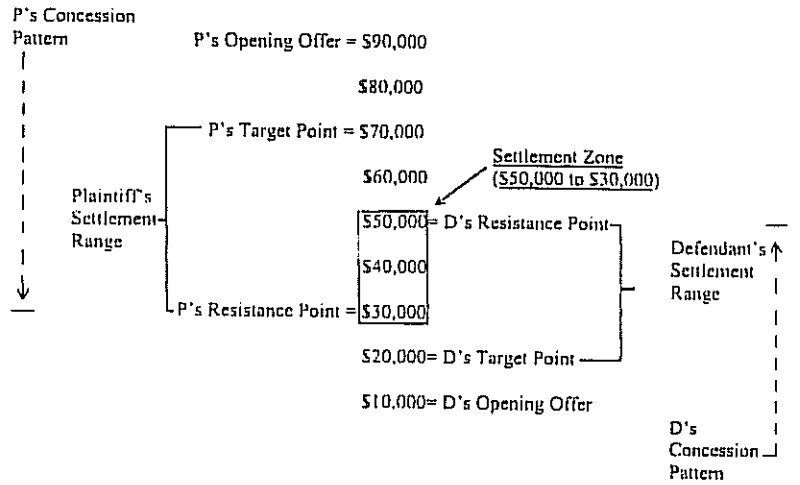
As introduced in § 8.02, in adversarial bargaining, the parties prepare for negotiation by establishing "target" and "resistance" points. From the Plaintiff's perspective, his "target point" will be the highest amount of money he realistically believes he could obtain if everything in the case went his way. From the Defendant's perspective, her "target point" will be the lowest amount of money she realistically believes she would have to pay if everything in the case went her way. The Plaintiff's "resistance point" will be the lowest amount of money he will accept in settlement; and if he does not receive at least that

sum, he will take his chances at trial. On the other hand, the Defendant's "resistance point" will be the highest amount of money she is willing to pay to settle the case; and if the Plaintiff insists on a settlement that is greater than that amount, she will take her chances at trial.

Target points should not be confused with opening offers made in negotiations. The Plaintiff will usually make an opening offer to settle the case for an amount that is greater than his target point, and the Defendant will make an opening offer for an amount that is lower than her target point. Each party will thereafter make concessions (downwards for the Plaintiff and upwards for the Defendant) to propose settlement amounts that approach their respective target points. Usually, further concessions will be made such that the Plaintiff will end up offering to settle for an amount below his target point and the Defendant will end up offering to settle for an amount above her target point. However, in no event will the Plaintiff settle for an amount that is less than his resistance point, nor will the Defendant settle for an amount that is greater than her resistance point. The significance of the parties' resistance points is that a settlement will occur only if they overlap, where the minimum amount that the Plaintiff will accept is less than or equal to the maximum amount that the Defendant will pay.

For example, assume that the Plaintiff sets his target point at $70,000, resistance point at $30,000, and plans to make an opening offer of $90,000. The Defendant sets her target point at $20,000, resistance point at $50,000, and plans to make an opening offer of $10,000. As shown in the chart below, Plaintiff's "settlement range" thus falls between $70,000 and $30,000, and Defendant's "settlement range" falls between $20,000 and $50,000. Plaintiff will gradually make concessions downward from his opening offer of $90,000, but never below his resistance point of $30,000; and Defendant will gradually make concessions upward from her opening offer of $10,000, but never above her resistance point of $50,000. The amount overlapping the parties' resistance points ($50,000 to $30,000), constitutes the anticipated "settlement zone"—the range within which the parties are most likely to reach final agreement. If there is no overlap between the parties' resistance points, no settlement can be achieved unless one or both of the parties revise their resistance points to expand the settlement zone.

The foregoing example may be illustrated as follows:



In light of the foregoing, in advising your client about settlement and in preparing for adversarial bargaining, you must be in a position to recommend a "settlement range" represented by a resistance point and target point. Ideally, and from a purely *economic* standpoint, when the only alternative to settling the case is going to trial, an accurate resistance point for the Plaintiff would be an amount that is less than what a jury would award; and an accurate resistance point for the Defendant would be an amount that is greater than what a jury would award. Thus, you must have some analytical method to determine an appropriate resistance point that your client might adopt in connection with negotiations in the litigation context. Once this "bottom line" is established, the goal of bargaining will be to settle the case in an amount that is better than one's resistance point and as close as possible to one's target point.

§ 11.03 Intuitive "Case Worth" Analysis

To advise a client about an appropriate resistance point, many lawyers engage in an essentially intuitive analysis of "what the case is worth" in terms of the net recovery to the client if the case were tried. This analysis is "intuitive" in the sense that it is largely based on the lawyer's experience and best judgment. It essentially involves predicting what a likely jury verdict would be in light of all the circumstances of the case, and then adjusting that verdict expectancy downward (for plaintiffs) or upwards (for defendants) by the amount that it is likely to cost the client to litigate the case. The resulting

figure may serve as the client's resistance point. In making this analysis, lawyers typically consider (1) the cause of action that would be brought and the elements of proof and damages that the substantive law provides for that cause of action; (2) the relative strength of the evidence in support of and in opposition to the client's contentions about liability and damages; (3) the amount of money that could be reasonably argued to a jury in light of the foregoing factors and jury verdicts in similar cases; and (4) the cost of gathering and presenting the evidence in a persuasive manner to a jury.[1]

The particular cause of action and elements of proof and damages involved in the case will affect the accuracy of determining what the case is worth in a variety of ways. For example, in a contract dispute where damages are measured by the financial loss to the plaintiff as a result of the breach, or in a property damage suit where the damages are usually the difference between the fair market value of the property immediately before and after the event causing the damage, the value of the case from a jury-verdict standpoint may be relatively easy to forecast assuming that the essential facts and liability are not in dispute. However, even if there is no question about liability, if the cause of action is for personal injury in an automobile accident case, or for defamation involving damages for injury to reputation and punitive damages, the elements of damage are much more amorphous and cannot be calculated with any real degree of certainty. In addition, regardless of whether the case involves damages that are objectively or only subjectively calculable, determining what the case is worth becomes increasingly difficult if liability is questionable or the facts relating to damages are in dispute. Moreover, forecasting the most likely result at trial may be even more difficult if the burden of proof involves "clear, cogent, and convincing evidence" rather than the usual "preponderance of the evidence" standard, the case involves multiple issues with shifting burdens of persuasion and production, or existing law is unclear about whether liability may be imposed under the particular facts of the case.

Similarly, trying to determine what a case is worth is complicated by the quantum and quality of the evidence available in the case. For example, factors such as the availability of corroborating witnesses and the extent of their credibility, whether one or both parties have "jury appeal," and whether the particular facts of the case would cause a jury to be more sympathetic to one side or the other all have a bearing on the value of the case but are not capable of any precise calculation. Similarly, the cost of finding and preparing expert witnesses in a difficult case is hard to calculate.

Nevertheless, under an intuitive "case worth" analysis, a lawyer will take into account all of these factors, notwithstanding their uncertainties, to arrive at a "best judgment" about what a jury would do if the case were tried. In this connection, particularly if the damages are amorphous, some lawyers consult sources on prior verdicts in similar cases such as the *Personal Injury Valuation Handbooks* (Jury Verdict Research, Inc., Cleveland Ohio), *The National Jury Verdict Review and Analysis* (Jury Verdict Review Publications, Inc. Newark, New Jersey), the *JVR Case Evaluation Software for the Evaluation of Personal Injury Cases* (Jury Verdict Research, Inc., Solon, Ohio), the *ATLA Law Reporter* (Association of Trial Lawyers of America, Washington, D.C.), or local bar publications that report jury verdicts in the particular jurisdiction to estimate the value of the case at hand. In addition, lawyers frequently confer with other experienced trial lawyers to solicit their views about what a jury might award in the particular circumstances, even though, when consulted about the same facts, highly experienced lawyers specializing in litigating the same type of case will often have wide differences of opinion about what a jury would do.[2]

[1] Some lawyers also consider the relative experience and trial skills of opposing counsel as a factor that may affect the value of the case. However, unless opposing counsel is particularly inexperienced, this factor is usually less important than some lawyers might prefer to think. In any event, when negotiations are conducted prior to the filing of a lawsuit, and the negotiator for the other side is not the person who will represent the opposing party in the event suit is brought, the factor is irrelevant because the opposing litigator is unknown.

After the value of the case is estimated from the standpoint of a most likely jury verdict, the lawyer will estimate the costs to the client of achieving that verdict (*i.e.*, litigation expenses, and lawyer's fees if based on an hourly rate) that the law in the particular jurisdiction will not shift to the opposing party as taxable court costs in the event of a favorable judgment. These expenses will then be subtracted (for plaintiffs) from the estimated jury verdict, or added (for defendants) to the estimated jury verdict. After consultation with the client, the resulting figure may become the client's resistance point, and the target point is then set at a higher figure (for plaintiffs) or a lower figure (for defendants) based on an estimate of the *best possible* verdict that might be obtained if everything in the case went the client's way.

§ 11.04 Rule-of-Thumb Valuation

In personal injury cases, some lawyers and insurance adjusters consider certain crude "rules of thumb" as a starting point in valuing a case. The most common of these is to estimate the settlement value of the case by multiplying the "special damages" (*i.e.*, the gross amount[3] of the medical bills and other expenses incurred as a result of the accident) by a factor of three. For example, if the Plaintiff's gross doctors' bills are $4,500 and drug expenses are $500, $5,000 × 3 yields a potential settlement figure of $15,000. Although lost wages are part of special damages, insurance adjusters normally do not triple the lost wages, but instead add them after the multiplier is applied to the medical bills and other expenses. Thus, if the Plaintiff also has lost wages in the gross amount (*i.e.*, before taxes and other deductions and regardless of the use of sick leave or vacation time) of $3,000, the final settlement estimate would be $18,000 ($15,000 + $3,000).

[2] *See, e.g.*, Gerald R. Williams, *Legal Negotiation and Settlement* 5—6 (1983) (widely divergent settlement results were reached by 20 pairs of lawyers, all of whom practiced in the same community and were given information about the same case); D. Rosenthal, *Lawyer and Client: Who's in Charge?* 202—207 (1974) (widely divergent results reached by a panel of two plaintiffs' lawyers, two insurance adjusters, and one attorney who handled both plaintiffs' and defendants' cases, when each was asked to independently evaluate cases presented in the study); R. Haydock, *Negotiation Practice*, § 2.3 (1984) (30 experienced personal injury lawyers who were asked to evaluate a simulated personal injury case came up with widely divergent valuations).

[3] This is the total of the medical and other expenses, regardless of whether the plaintiff has been or will be reimbursed for them from his private health insurance carrier or from some other independent source.

This crude calculus is most frequently considered when liability is undisputed and the Plaintiff has not suffered any extraordinary pain or significant permanent injury. If the pain and suffering is relatively severe or permanent injury exists, the multiplier applied to the special damages might be increased to five, ten, or more. Generally, however, this multiplier, "rule-of-thumb" approach is only considered in minor personal injury cases.

§ 11.05 The Sindell Formula

In search of a better sense of what a personal injury case is worth from a jury-verdict standpoint, some lawyers analyze the case through a "point allocation" method, such as the so-called "Sindell formula."[4] Under this method, the likelihood and probable amount of a verdict are estimated by allocating a certain number of points (out of a maximum number of potential points) to six categories: (1) liability; (2) type of injuries; (3) age of plaintiff; (4) type of plaintiff; (5) type of defendant; and (6) out-of-pocket expenses or special damages. The maximum number of potential points per category is as follows:

50 — Liability

10 — Injuries

10 — Age of Plaintiff

10 — Type of Plaintiff

10 — Type of Defendant

10 — Special Damages (1 point per $100 of expenses, with a maximum 10 points)

(Total possible points = 100)

Points are allocated for each category based on an assessment of the extent to which the facts of the case are suited to an ideal recovery. For example, if you represent a 27-year-old plaintiff who sustained multiple fractures to his right arm when he was hit by a utility company truck, and medical expenses and lost wages total $8,000, points might be allocated as follows:

Number of Points per Category	Reason for Allocation
40 for Liability:	The utility company truck driver will testify that plaintiff stepped into the road off of the curb, but other eyewitnesses will testify that plaintiff was not contributorily negligent. (If liability were absolutely clear, 50 points would have been allocated.)

[4] *See* Sindell & Sindell, Formulae to Evaluate Injury Cases, in *Settlement and Plea Bargaining* 65—75 (M. Edwards ed. 1981); 4 *Am. Jur. Trials*, § 26 at 320—323 (1966).

Number of Points per Category	Reason for Allocation
5 for Injury:	Although the arm fractures were severe, Plaintiff eventually recovered from his injuries with no appreciable permanent impairment. (Minor contusions would have been worth 1 point; amputation would have been worth 10 points.)
7 for Age of Plaintiff:	Points are assigned as follows: 0—7 years, 10 pts.; 8—15 years, 9 pts.; 16—23 years, 8 points; 24—31 years, 7 pts.; 32—39 years, 6 pts.; 40—47 years, 5 pts.; 48—55 years, 4 pts.; 56—60 years, 3 pts.; 61—65 years, 2 pts.; 66 years or over, 1 pt.
8 for Type of Plaintiff:	Plaintiff is attractive and has no criminal record. (If plaintiff were independently wealthy or had a criminal record, the points allocated would be much lower.)
9 for Type of Defendant:	The utility company is a perfect "target" defendant, but only 9 points of the maximum 10 points are allocated because the jury may have some sympathy for the truck driver.
10 for Special Damages:	10 points are allocated because the special damages exceed $1,000. The damages in excess of $1,000 (*i.e.*, $7,000) will be added in later.
79 Total Points:	79 points of 100 potential total points.

The 79 total points allocated for the case are then expressed as a percentage (*i.e.*, 79%) that is multiplied by the average jury verdict expectancy for a similar case in the applicable jurisdiction. To this is then added the excess out-of-pocket expenses over $1,000.

Thus, if the average jury verdict or verdict expectancy for a similar case is $40,000, the estimated settlement value of your client's case is $31,600 (*i.e.*, .79 × $40,000) + $7,000 (the amount of special damages over $1000) for a total settlement value of $38,600. The $38,600 may then be used in establishing a resistance point after deducting from it (for plaintiffs) or adding to it (for defendants) the client's non-shiftable litigation expenses and any hourly lawyer's fees.

§ 11.06 Traditional Economic Analysis

The traditional economic analysis of valuing cases for settlement involves computing an "expected outcome" by multiplying the gross outcome by the probability that it will occur, and then adjusting for "transaction costs" that would be incurred in obtaining that outcome. Assuming you represent the Plaintiff, this analysis consists of four calculations:

(1) First, an average verdict expectancy is estimated assuming that the Plaintiff client will prevail on liability. For example, if a reasonable verdict range for the particular kind of case is $35,000 to $45,000, the average verdict expectancy would be $40,000.

(2) Second, the $40,000 average verdict expectancy is adjusted by the probability (expressed as a percentage) that the Plaintiff will be successful in actually obtaining that amount. This results in an "*expected* outcome" for your client. For example, if you estimate that there is a 50% chance on the law and the facts that your client will win $40,000, the "expected outcome" becomes $20,000. This outcome, under probability theory, is "expected" in the sense that if the case were tried 100 times, approximately 50 trials would result in a verdict for your client and 50 would result in a verdict for the defendant; and the average recovery would be 50 Plaintiff's victories multiplied by $40,000 per victory or $2,000,000, plus 50 losses multiplied by $0 per loss, divided by 100 cases for an average recovery of $20,000. (When the analysis is conducted for the Defendant, in *theory*[5] she might use the same average verdict expectancy of $40,000 but will adjust it by her own estimate of the probability that the Plaintiff will be successful in obtaining that amount).

(3) Third, an estimate is made of all non-shiftable litigation expenses and hourly lawyer's fees that your client will incur if the case goes to trial, and these costs and hourly fees are also deducted from the average verdict expectancy. Thus, if your client is expected to incur a total of $4,000 in litigation expenses and hourly lawyer fees combined, the bottom-line settlement value of the case becomes $16,000. (When the analysis is conducted for the Defendant, the expenses and fees are added.)

(4) Fourth, the time value of money is sometimes considered because an amount received now is worth more than the same amount received much later. If your client is not expected to obtain a verdict for a number of years, and the investment yield on a prudent investment is currently X% per year, the amount of money received in a year is worth about X% less than if received now. Thus, for the Plaintiff, this time value of money would also be applied to adjust the $16,000 depending upon how much time is likely to transpire from the point an offer of settlement is made until a judgment would be obtained at a trial. The resulting figure may serve as your client's resistance point.

Setting aside a calculation for the time value of money, the basic formula for establishing the Plaintiff's and Defendant's resistance points may be expressed as follows:

[5] Needless to say, the Defendant's estimate of the average verdict expectancy for the case may be quite different than the Plaintiff's estimate, and disputes about this matter exist in the vast majority of cases.

Theoretically, a settlement will occur only if Plaintiff's Resistance Point ≤ Defendant's Resistance Point.[6]

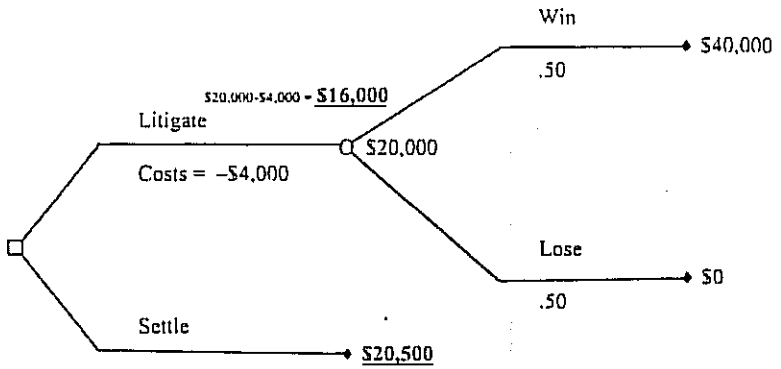
Taking the example above, Plaintiff's resistance point of $16,000 was calculated based on $40,000 (the Average Verdict Expectancy) × .50 (P's % Estimate of P's Probability of Winning at Trial) = $20,000 (P's expected outcome) ($4,000 (P's Cost of Going to Trial). Assume that the Defendant calculates her resistance point as follows: $40,000 (the Average Verdict Expectancy) × .40 (D's % Estimate of P's Probability of Winning at Trial) = $16,000 (D's expected outcome) + $5,000 (D's Cost of Going to Trial) = resistance point of $21,000. Since Plaintiff's resistance point of $16,000 is less than Defendant's resistance point of $21,000, a settlement would theoretically occur within the $5,000 zone of overlap.[7]

In the parlance of management science, the resistance-point calculation for the Plaintiff or Defendant may be expressed in the form of a "decision-tree" analysis commonly used in business and public-policy decision-making.[8] To illustrate, assume that in the example above the Defendant ultimately makes a settlement offer of $20,500. In deciding whether to accept this offer, Plaintiff's decision tree might look like the following:

[6] Expressed another way, a settlement will occur only if the Average Verdict Expectancy × P's % Estimate of P's Probability of Winning at Trial (P's expected outcome) (the Average Verdict Expectancy × D's % Estimate of P's Probability of Winning at Trial (D's expected outcome) ≥ P's Cost of Going to Trial + D's Cost of Going to Trial.

[7] Under the formula given in the preceding note, a settlement will theoretically occur because Plaintiff's expected outcome of $20,000 ($40,000 × .50) minus Defendant's expected outcome of $16,000 ($40,000 × .40) amounts to $4,000, which is less than the sum of the costs of going to trial for the two sides of $9,000 ($4,000 for Plaintiff + $5,000 for Defendant).

[8] *See* David P. Hoffer, Decision Analysis as a Mediator's Tool, 1 Harv. Negotiation L. Rev. 113 (1996). *See generally*, H. Raiffa, *Decision Analysis: Introductory Lectures on Choices Under Uncertainty* (1968).



This tree is organized chronologically from left to right. The □ symbol is the "decision node," denoting the point at which the decision-maker must choose between two or more options. The O symbol is the "chance node," denoting the point where the decision maker is faced with an event over which he has no control and to which a probability is assigned that reflects the most likely result of the event. The ♦ symbol is the "terminal node," which denotes the result of an option or particular event.

Here, Plaintiff has two choices—litigate or settle—as shown by the branches stemming from the decision node,□. If Plaintiff accepts Defendant's settlement offer, Plaintiff will receive $20,500 as shown next to the terminal node, ♦, at the end of the branch representing the settlement option. If Plaintiff chooses the litigation option, he is expected to incur $4,000 in non-shiftable trial costs as shown under the branch denominated "Litigate."

The expected outcome of a trial, represented by the "Win" and "Lose" branches stemming from the chance node, O, is calculated with reference to the probabilities of achieving that outcome. That is, Plaintiff estimates he has a 50% (.50) chance of winning an average jury verdict expectancy for the type of case of $40,000, and therefore a 50% (.50) chance of getting $0.[9] The expected outcome of $20,000 shown to the right of the chance node, O, is calculated by: (1) multiplying the 50% probability of winning by the average jury verdict expectancy of $40,000; (2) multiplying the 50% probability of losing by the $0 payoff of defeat; and (3) adding the two together. Thus,.50 × $40,000 +.50 × $0 = $20,000 as the expected outcome.

Finally Plaintiff's resistance point of $16,000 (as shown above the "Litigate" option) is calculated by subtracting from the expected outcome of $20,000 the $4,000 in trial costs. Since the option of accepting Defendant's settlement offer

[9] To make the arithmetic work, the sum of the probabilities assigned to the branches stemming from any chance node *must* equal 100%.

of $20,500 yields a greater recovery than the option of going to trial which yields only $16,000, Plaintiff would be best off to accept the settlement offer.

If you were to construct a decision tree for the Defendant using the hypothetical given above, the expected non-shiftable trial costs would be $5,000; the Defendant's estimate of the probability of Plaintiff winning $40,000 at trial would be 40% (.40); and the Defendant's estimate of the probability of Plaintiff getting $0 at trial would be 60% (.60). Thus, .40 × $40,000 +.60 × $0 = $16,000 as the expected outcome at trial. To this number, the Defendant would then *add* her expected trial costs of $5,000 to arrive at a resistance point of $21,000. If Plaintiff were to make a final settlement offer that is equal to or less than $21,000, Defendant should settle the case.

In short, this decision-tree analysis is substantively the same as Traditional Economic Analysis. However, because the "form" of the analysis is a management tool routinely taught in business schools and continuing education courses in management, it may serve as a more familiar method of presenting the settlement value of a case to a business executive who is making a decision on behalf of a corporate party.

§ 11.07 Fair Settlement Range Formula

The Fair Settlement Range Formula[10] for valuing cases is essentially a refinement on traditional economic analysis. Under this formula, an over-all fair settlement range for the case is established, after which the Plaintiff might set his initial resistance point at the low end of the range and the Defendant might set her initial resistance point at the high end of the range. The components of the formula are as follows:

AVE = The Average Verdict Expectancy assuming the plaintiff will prevail on liability

PPW = The Probability the Plaintiff Will Win the Average Verdict Expectancy, considering the law and facts of the particular case.

UPV = The Uncollectible Portion of the Verdict (*e.g.*, where some defendant is uninsured, underinsured, or is partially or completely judgment proof).

PC = The Plaintiff's Cost of going to trial.

DC = The Defendant's Cost of going to trial which the defendant would be willing to contribute to settlement.

SIF = Special Intangible Factors (expressed as a $ amount) that may increase or decrease the verdict (*e.g.*, the particular "jury appeal" of the case for one party or the other).

FSV = The Fair Settlement Value of the case.

FSR = The Fair Settlement Range of the case.

[10] *See* John W. Cooley, *Mediation Advocacy*, § 3.12 (NITA 1996).

The formula may be expressed as follows:

(AVE × PPW) (UPV (PC + DC ± SIF = FSV

Then, FSV + (10% of FSV) = FSR (upper end of range)

FSV ((10% of FSV) = FSR (lower end of range)

For example, drawing upon the hypothetical estimates given for the Plaintiff in § 11.06, the figures that would be computed in the formula would be:

- AVE = $40,000.
- PPW = 50% (.50).
- UPV = $0 (*i.e.*, assuming the Defendant is not uninsured or underinsured).
- PC = $4,000.
- DC = $3,000 (assuming the Defendant's total cost of going to trial would be $5,000 and it is estimated she would be willing to contribute $3,000 of the costs towards settlement, thereby saving $2,000 in costs).
- SIF = $5,000 in favor of Plaintiff (*e.g.*, assuming he has much greater jury appeal than does the Defendant).

Applying the foregoing to the formula yields the following:

(AVE × PPW) − UPV − PC + DC ± SIF = FSV

- ($40,000 × .50) − $ 0 − $4,000 + $3,000 + $5,000 = $24,000

Then, to establish a Fair Settlement Range, 10% of the Fair Settlement Value is added to and subtracted from that Value to arrive at a range:

FSV + (.10 × FSV) = FSR (upper end of range)

- $24,000 + (.10 × $24,000) = $26,400 (upper end of range), and

FSV − (.10 × FSV) = FSR (lower end of range)

- $24,000 − (.10 × $24,000) = $21,600 (lower end of range).

Based on the foregoing, the Plaintiff might set his initial resistance point at $21,600. He might then set his target point at $27,000 and opening offer at $75,000. In the usual case, the Defendant's calculation of the formula is likely to be quite different from the Plaintiff's calculation. However, assuming the Defendant arrives at the same Fair Settlement Range arrived at by the Plaintiff, the Defendant might set her initial resistance point at $26,400, her target point at $20,000, and opening offer at $7,000.

§ 11.08 Analysis of the Client's Aversion to Risk and Motivations

The foregoing methods of valuation largely assume that the client's decision to settle or go to trial will be made solely on the basis of which course of action will yield the best result from a rote economic standpoint. However, choosing between settlement and trial is not purely an economic process. Whether a client will accept a final settlement offer or take his chances at trial largely depends on that client's psychological propensity or aversion to risk—that is, how willing the client is to gamble on losing at trial versus the certainty of receiving the amount offered in final settlement. (*See also* § 7.06[1]).

This risk averseness varies from individual to individual and will often vary for each individual at different points in time. For example, most people are less willing to "roll the dice" with an "all or nothing" outcome at trial where liability is questionable if the amount at stake is a million dollars versus $10,000. Similarly, a wealthy client is more likely to gamble on his chances at trial when the amount at stake is $10,000, whereas an indigent client faced with the same amount at stake may be content to settle for the certainty of receiving $5,000.

In addition, risk aversion largely explains why many settlements occur on the eve of trial and some occur literally on the courthouse steps. When a trial is a year or more away, the consequences of an adverse verdict appear more abstract.[11] On the other hand, those consequences often take on a different reality during the weekend before trial, with the result that many clients will at that time prefer the certainty of an agreed-upon settlement to the risk of an undesirable verdict.

Clients also have various motivations that will affect their decision to settle the case or take it to trial. For example, settlement may be preferred to avoid the emotional strain and time demands of a trial, to preserve the personal or business relationship between the parties, to avoid unwanted publicity, to avoid an adverse legal or factual precedent, or to obtain an immediate source of funds if the client is in financial distress. On the other hand, a client might prefer a trial over settlement out of a desire to inflict punishment on the opposing party, to publicly vindicate a principle by having one side declared the winner and the other the loser, to establish a legal precedent or policy (*e.g.*, to discourage nuisance suits), or to simply delay payment of a claim for lack of sufficient funds to pay it.

Thus, you must always analyze the extent of your client's aversion to risk and other motivations that may affect the desirability of settling the case or trying it. These factors may be analyzed by (1) identifying the various risks and personal motivations bearing upon the choice between settlement and trial, (2) reducing these to a set of consequences of settling the case on the one hand, and trying it on the other, and (3) asking your client to place a monetary value on the overall consequences in light of his preferences and values to determine how much he is willing to accept or forgo for those consequences.[12] This amount might then be applied to increase or decrease the client's resistance point that was otherwise established based on a purely economic type of analysis.

As a simple example, assume that resistance points of $30,000 for the Plaintiff and $50,000 for the Defendant are arrived at by Intuitive "Case Worth" Analysis, the Sindell Formula, Traditional Economic Analysis, or the Fair Settlement Range Formula. If the Plaintiff does not want to go through the emotional trauma of a bitter trial, he might lower his resistance point by an additional $10,000 to $20,000. On the other hand, if the Defendant is more

[11] *See* D. Waterman & M. Peterson, Evaluating Civil Claims: *An Expert System Approach* 8 (1985) (one study found that the value of a personal injury case just before trial may be as much as 20% greater than the value of the case two years before trial).

[12] *See* P.T. Hoffman, Valuation of Cases for Settlement: Theory and Practice, 1 J. Disp. Res. 38-40 (1991).

willing to take the case to trial because she has received adverse publicity from the suit and wants to vindicate herself from any wrongdoing, she might adjust her resistance point such that she will pay no more than $30,000. In this scenario, what otherwise would have likely resulted in a settlement of approximately $40,000 (*i.e.*, the midpoint of a $30,000 to $50,000 settlement zone) is now likely to result in a settlement of approximately $25,000 (*i.e.*, the midpoint of a $20,000 to $30,000 settlement zone).

§ 11.09 Adopting a Holistic Analysis and Advising the Client

Most lawyers do not employ a standard mathematical formula in valuing cases for negotiation and settlement. Although a strict empirical approach may be tempting and comforting from the standpoint of providing some "objective" analysis, certainty in valuing cases for settlement is almost always illusory. The typical case presents too many factors and unknowns to reconcile through some rote computation. Indeed, if one applies, for example, the Sindell Formula, Traditional Economic Analysis, or the Fair Settlement Range Formula to the same case, the resulting computations will likely be very different. Moreover, if there were some fool-proof formula to valuing cases, there would be no need for negotiation at all because cases would then simply be settled by applying that formula to the particular facts and arriving at a result.

Thus, most lawyers adopt a "holistic" analysis to valuing cases for settlement that essentially draws upon the various factors considered in Intuitive "Case Worth" Analysis, a point allocation method like the Sindell Formula, Traditional Economic Analysis, the Fair Settlement Range Formula, and an analysis of the Client's Aversion to Risk and Motivations. Depending on the particular type of case and the values and preferences of the client, holistic analysis considers the factors variously emphasized in the other approaches, giving those factors more or less weight as the circumstances warrant. In the process of considering and weighing these factors, however, holistic analysis does not attempt to plug them into some standard mathematical formula, but attempts to arrive at a multi-faceted, reasoned judgment about a reasonable "settlement zone" for the case (*i.e.*, the distance between the parties' resistance points) and a reasonable "settlement range" for each side (*i.e.*, the distance between each party's resistance point and target point).

In this process, it is explicitly recognized that the predictions made are uncertain, may well change over time, and may well be revised during actual negotiations. These limitations on the prophetic accuracy of valuing a case are accepted as a reality and reconciled under the assumption that if the lawyer and client engage in an on-going assessment of the advantages and disadvantages of settling the case versus trying it, the final decision—which should always be made by the client—will turn out to be the best decision in the end.

It follows that in advising the client about a reasonable settlement zone and settlement range, most lawyers express their opinions about these matters as a *tentative* prediction or estimate. The reason for this is not, as some might cynically believe, to somehow exonerate the lawyer from making a bad

prediction relied upon by the client. Rather, the tentativeness of the prediction or estimate is, as mentioned above, a candid concession to the inherent complexity and difficulty of valuing cases for settlement. It is consistent with the ethical prescription that a lawyer has a duty to advise his client according to the lawyer's best overall judgment and to place the ultimate decision whether to settle the case with the client. Indeed, a lawyer should explain this to the client in just these terms.

In light of the foregoing, in employing a holistic analysis to case valuation and advising your client about that analysis, you might follow the following 6 steps:

(1) Estimate the "Average Jury Verdict Expectancy" for the type of case, by evaluating:

- The cause of action
- The burdens of proof for the cause of action
- The legal elements and measure of damages for the cause of action
- Jury verdicts in the same type of case, drawn from one's own experience, the experience of other lawyers, or from publications reporting jury verdicts

(2) Adjust the Average Jury Verdict Expectancy (upwards or downwards) to arrive at an "Estimated Jury Verdict for the Case" that reflects the particular legal and factual circumstances of the case, by evaluating:

- Any uncertainties in the law about whether the case is actionable or damages are recoverable
- The relative strength of the evidence in support of and in opposition to establishing liability
- The relative strength of the evidence in support of and in opposition to establishing damages
- What damages may be calculated as a sum certain (*e.g.*, special damages)
- What damages are amorphous (*e.g.*, pain and suffering, permanent injury, punitive damages)
- The extent to which the case has any special "jury appeal" for one side or the other

(3) Adjust the Estimated Jury Verdict for the Case (downwards for the Plaintiff and upwards for the Defendant) by the amount of the client's non-shiftable costs of obtaining that verdict to arrive at a "Potential Resistance Point," by evaluating:

- All out-of-pocket expenses the client will likely incur and which the court will not tax against the party who loses at trial (*e.g.*, hourly attorney's fees, and costs associated with case investigation and preparation)
- The time value of money if a trial would not take place for a number of years

(4) Adjust the "Potential Resistance Point" (upwards or downwards) based on the Client's aversion to risk and personal motivations, by evaluating:

- The client's financial, social, psychological, and other personal circumstances
- The various risks and personal motivations of the client bearing on the choice between settlement and trial
- The important consequences to the client of settling the case or trying it
- Any monetary value that the client would place on settling the case in preference to trial or vice versa

(5) Adjust the "Potential Resistance Point" further, if appropriate, based on an evaluation of the factors under steps (3) and (4) above from the other party's perspective

(6) Based on the Potential Resistance Point as adjusted, advise the client about a tentative resistance point and tentative target point, leaving the final decision on these matters to the client

These steps in holistic analysis are similar to the Fair Settlement Range Formula, but place a greater premium on the effects that intangible factors play in evaluating whether it is in the client's best interest to settle the case or take it to trial. The analysis also embodies a more fluid reasoning process that is more in keeping with how most clients and lawyers think about case valuation—*i.e.*, through a process of weighing multiple factors, probabilities, and preferences together, rather than through some rote, algebraic calculation of seemingly independent variables.

This does not mean that the mathematical calculations employed in the Fair Settlement Range Formula (or Traditional Economic Analysis) are inappropriate to consider when conducting holistic analysis. For example, many lawyers find it useful to arrive at an "Estimated Jury Verdict for the Case" in Step 2 above by multiplying the "Average Jury Verdict Expectancy" by the probability, expressed as a percentage, that it will occur (*i.e.*, AVE × PPW in the Fair Settlement Range Formula). Similarly, after arriving at the "Potential Resistance Point" in Step 5 of holistic analysis, it may be useful to consider a fair settlement range by establishing a bracket whose endpoints are 10% on either side of the Potential Resistance Point—*i.e.*, the Potential Resistance Point + (10% of the Potential Resistance Point) = Upper end of Range; and the Potential Resistance Point − (10% of the Potential Resistance Point) = Lower end of Range. In sum, in an appropriate case, holistic analysis might draw upon or be combined with certain aspects of the Fair Settlement Range Formula or some other valuation method in arriving at a potential resistance point and target point.

§ 11.10 Example of Holistic Analysis

Assume that a Town has decided to build a water supply reservoir to meet the demands of the Town's growing population. The site chosen for the reservoir is located approximately ten miles outside the Town limits. This is a predominantly rural area consisting mostly of farm land, but some residential subdivision development has occurred in the general area in recent years.

To acquire the land for the reservoir, the Town has given statutory notice to affected landowners that it intends to use its power of eminent domain to condemn eight separate properties, each of which consists of approximately 100 acres of vacant, unsubdivided, and undeveloped land, and is owned by different landowners. However, before filing condemnation actions to officially "take" each of the eight properties, the Town has decided to negotiate with the affected landowners to purchase their properties at current fair market value. This has been somewhat successful to date in that three of the landowners have already sold their properties to the Town for $7,000 per acre, which is the current fair market value estimated by an independent appraisal firm hired by the Town. The other five landowners remain opposed to the reservoir project, but negotiations with them are still under way.

Ms. Jessica Dalton, a relatively poor, elderly widow, is one of the five landowners who has not yet settled with the Town. Her property also consists of 100 acres of vacant, undeveloped land. However, unlike all the other properties being acquired for the reservoir, Dalton had planned to subdivide her property into 10 contiguous lots (10 acres a piece) for eventual sale to third-party purchasers who would build their homes on the lots. In connection with these plans, last year she spent $50,000 (constituting almost all of the proceeds of her late husband's modest life insurance policy) on surveying and various engineering costs to finalize a plat for the subdivision. She ended up not recording the plat with the County Register of Deeds office once she was given formal notice that the Town planned to acquire her property as part of the reservoir project. Had she simply recorded the plat, while this would not have affected the Town's right to condemn her property, her subdivision would have been complete because there were no other local-governmental requirements for approval of this type of subdivision.

The Town is still waiting for a response to the offers it has made to the four other landowners who were extended purchase offers based on $7,000 per acre. Because of Dalton's frustrated subdivision plans and expenditure of $50,000, the Town Council thinks her situation might be unique and has asked its attorney to estimate the value of Dalton's property for settlement purposes before the Town makes her a purchase offer.

Tracking the 6 steps set out in § 11.09, the Town attorney's holistic analysis of the settlement value of Dalton's property might be as follows:

(1) An estimate of the "Average Jury Verdict Expectancy" for the condemnation case:

Although the Town would be the named plaintiff in a condemnation action, for all other litigation purposes it would actually occupy the position of a defendant. The burden of proof is on the landowner to establish (by a preponderance of the evidence) the fair market value of the condemned property as of the date of the "taking," which is the date the Complaint is filed. When a lawsuit is filed, the Town must simultaneously deposit with the

clerk of court the amount of money the Town estimates to be the current fair market value of the property (which amount is not admissible as evidence at a trial), and the landowner may immediately receive that money from the clerk notwithstanding the pendency of the lawsuit.

At trial, the jury decides the issue of "just compensation" (*i.e.*, the fair market value of the property on the date of taking), and the judge decides all other issues. If the verdict exceeds the amount that the Town deposited with the clerk, the Town must pay the landowner the amount awarded in excess of the deposit. If the verdict is for less than the amount deposited, the landowner must pay back to the Town the difference between the amount deposited and the verdict. So long as the verdict is greater than the amount of the deposit, the law requires the Town to pay all litigation expenses of the landowner (*e.g.*, costs of appraisals, appraisers' expert-witness fees, court-reporter costs for depositions, etc.), but not attorney's fees. Landowners are usually represented on a contingent fee basis, whereby the lawyer's fee is a percentage of the amount obtained for the landowner that exceeds the amount the Town deposited with the clerk.

"Fair market value" as the measure of damages is the amount that a willing buyer and willing seller would most likely agree upon for the property, where the buyer is not compelled to buy and the seller is not compelled to sell. Fair market value is also determined based on the "highest and best use" of the property, which means the most economically viable use to which the property may be put, even if that is not how the property was being used at the time of the taking. However, the jury is not permitted to award compensation to the landowner based on a purely speculative use, or for sums such as lost profits from some intended future use. In addition, no compensation may be awarded for specific amounts paid by the landowner to improve her property (such as the $50,000 that Dalton spent), or for general damages such as those stemming from any inconvenience to the landowner, or emotional distress, or the like occasioned by the taking. In sum, the sole measure of compensation is the fair market value of the property on the date of taking, considering its "highest and best use."

Jury verdicts in condemnation cases typically favor the landowner and result in awards that are higher than the fair market value contentions of the condemnor such as a Town. This is usually the case even if the jury essentially rejects the testimony of the landowner's appraisers. Notwithstanding that the burden of proof is on the landowner, juries tend to give the landowner the benefit of the doubt in any valuation, and they are frequently prone to reject the appraisals of both parties altogether, and independently arrive at a determination of fair market value based on the differing "comparable sales" data submitted to them at trial. Apart from this general experience with jury verdicts, there are no reliable statistics that can be drawn upon to predict the average percentage by which verdicts exceed the fair market value contentions of the condemnor.

In the case at hand, because no condemnation suits have yet been filed by the Town, there are no verdicts to draw upon to estimate an "Average Jury Verdict Expectancy" for the per-acre value of the properties being acquired for the reservoir. The best information currently available is that all of the

properties being acquired for the reservoir have a fair market value of approximately $7,000 per acre as determined by the appraisal firm hired by the Town. This figure does not appear to be an unreasonable benchmark because three landowners have already accepted this valuation. Thus, an Average Jury Verdict Expectancy for Dalton's 100 acres would be at least $700,000.

(2) Adjustment of the Average Jury Verdict Expectancy to arrive at an "Estimated Jury Verdict for the Case" that reflects the particular legal and factual circumstances of the case:

Estimating what a jury would most likely find to be the fair market value of Dalton's property is complicated by a legal question about the proper appraisal method that may be used in valuing that property. On the one hand, the Town's appraiser is likely to employ the "comparable sales" method of valuation to appraise the fair market value of the property based on actual sales of other approximately 100-acre tracts of undeveloped, unsubdivided land in the general vicinity of the reservoir area. There is no question that an appraisal based on this method would be admissible into evidence. The result would be a value of approximately $7,000 per acre for a total of $700,000.

However, Dalton's appraiser is likely to appraise her property on the assumption that it consisted of a subdivision of 10 lots, and therefore the fair market value should be determined based on the aggregate of the prices that could have been obtained for the 10 lots, less the costs of developing the subdivision and other costs that would have been incurred until all the lots had been sold. The case law in the jurisdiction is arguably conflicting about whether an appraisal based on this "development approach" to valuation would be admissible under the circumstances of the instant case. On the one hand, the law is clear that a landowner may not value unsubdivided, undeveloped land as if it were subdivided or developed. On the other hand, the law is equally clear that if a final plat has been recorded to subdivide the property, it may be valued as a subdivision. In Dalton's situation, the only reason her plat was not recorded was due to the futility of this act in light of the Town's plans to acquire the property for the reservoir project, and the law would not now permit her to record the plat because she has received formal notice of the Town's condemnation plans.

Notwithstanding Dalton's situation, it is unlikely that the appellate courts of the instant jurisdiction would hold that a "development approach" to valuation would be admissible in valuing her property. However, because the resolution of this issue remains uncertain in the jurisdiction, there is a 50% chance that a trial judge would permit an appraisal based on that approach to be admitted into evidence in the case. If that were to occur, the jury would be presented with evidence that the fair market value of the property is approximately twice as much as that estimated by the Town's appraiser—*i.e.*, as high as $14,0000 per acre for a total of $1.4 million dollars.[13] Even if

[13] In appraisal "theory," at least, an application of the "development approach" and "comparable sales" method should yield the same result, assuming the "highest and best use" is residential

Dalton's appraisal based on the "development approach" were not admitted into evidence, she would still be able to introduce the fact that there was one sale of a large tract in the general vicinity of the reservoir area that sold for $8,000 per acre.

Even assuming that Dalton's appraisal of $1.4 million were admitted into evidence, it is highly unlikely that a jury would accept this amount as the fair market value because there is nothing to differentiate Dalton's property from the comparable sales in the $7,000-$8,000 per-acre range, except for the fact that Dalton had prepared a plat to subdivide her property into 10 lots. That is, the mere preparation of the plat (or the recording of it, had that occurred) did not result in any specific physical improvements to the property. Nevertheless, the jury is likely to be highly sympathetic to the fact that Dalton has now essentially lost the $50,000 she expended in surveying and engineering costs to prepare the plat. Although it is unlikely a jury would specifically include this amount in its verdict (given a trial judge's explicit instruction that this element of damage is not compensable), most jurors would have this loss in the back of their minds during deliberations.

From a "jury appeal" standpoint, everything about the case favors Dalton. She is an elderly widow of modest means who is being forced to give up her land. There will be no evidence that she will benefit in any way from the reservoir. Thus, consistent with the typical condemnation case, the jury is likely to give her the benefit of the doubt in any reasonable calculation of fair market value.

In light of the foregoing, even though it is unlikely a jury would give Dalton a "bonus" of $50,000 over and above what it otherwise determines to be the fair market value of her property, it is reasonable to predict that a jury would calculate the fair market value at approximately $7,500 per acre. This would be justified given that $8,000 per acre is the upper end of the available comparable sales data. The "Estimated Jury Verdict for the Case" is thus $750,000.

(3) Adjustment of the Estimated Jury Verdict for the Case by the amount of the Town's non-shiftable costs of obtaining that verdict to arrive at a "Potential Resistance Point":

It is expected to cost the Town approximately $35,000 in lawyer's fees, expert-witness fees, and other litigation expenses combined. In addition, it is estimated that the Town will have to pay Dalton approximately $10,000 of Dalton's litigation expenses. This totals $45,000 which, when added to the Estimated Jury Verdict for the Case of $750,000, results in a "Potential Resistance Point" of $795,000.

(4) Adjustment of the "Potential Resistance Point" based on the Town's aversion to risk and motivations:

The Town Council is primarily concerned about the *de facto* precedent that might be established if Dalton were paid much more than $7,000 per acre.

development. In reality, however, this is almost never the case in light of the numerous variables considered in a "development approach" which may be manipulated to produce much higher values.

This is so not only because three of the landowners have already accepted purchase offers from the Town at $7,000 per acre and might publicly accuse the Council of treating them disparately if Dalton were paid more than $7,000 per acre, but because there remain (apart from Dalton) four other landowners who might not agree to accept less than the per-acre value that is given to Dalton. This problem could not be resolved by including a confidentiality clause as part of a settlement with Dalton because the Town is a governmental entity that has a duty to disclose how public funds are expended.

On the other hand, even though Dalton's property has no special characteristics that, from a fair market value standpoint, distinguish it from the tracts of land owned by the other seven landowners, unlike them, she has now lost the $50,000 she spent in preparing the subdivision plat. Out of fairness, the Council is not philosophically opposed to paying her this amount in addition to the reasonable fair market value of her property, even though she would not be legally entitled to recover the $50,000 at trial. Whether in a contract to purchase her property or in a settlement agreement, the Town could denominate the additional $50,000 as an equitable reimbursement for her special loss, thereby distinguishing it from the amount paid to her strictly for the fair market value of her property.

The Town's overriding interest is to settle all cases as close to the $7,000 per acre benchmark as possible because this is the figure that can be justified to the public based on the Town's appraisal. Moreover, the budget is extremely tight. Thus, the Council is not afraid to spend the $45,000 it would cost to try the case in an effort to establish a possible verdict precedent of approximately $7,000 per acre. If a jury awarded Dalton $7,500 per acre, she would receive $50,000 more than she otherwise would receive at $7,000 per acre, and this additional amount could be publicly explained as an equitable result in light of Dalton's loss of the $50,000 she incurred in preparing the subdivision plat. Paying her as much as $750,000 in settlement would be equivalent to the "Estimated Jury Verdict in the Case" and save the Town $45,000 in litigation expenses.

Thus, taking into account the Town Council's motivations, the "Potential Resistance Point" of $795,000 (*i.e.*, $45,000 in non-shiftable costs + a $750,000 "Estimated Jury Verdict for the Case") might be adjusted downward to $750,000. This amount would (a) be consistent with the Council's goal of settling all cases at $7,000 per acre, (b) equitably reimburse Dalton for her special $50,000 loss which she otherwise would not be entitled to recoup at trial, and (c) save the Town $45,000 in litigation expenses that would be incurred in obtaining the "Estimated Jury Verdict for the Case" of $750,000.

(5) Adjustment of the "Potential Resistance Point" further, if appropriate, based on an evaluation of the factors under Steps (3) and (4) above from Dalton's perspective:

Not all of Dalton's litigation expenses are shiftable to the Town in the event of a trial. The trial judge will only award her "reasonable" litigation expenses. For example, if an appraiser charges her a particularly large amount of money to conduct an appraisal or testify at trial, the judge may tax only a portion

of that charge against the Town. Moreover, she may incur some litigation-related costs that are not taxable against the Town at all (*e.g.*, the costs of preparing certain illustrative exhibits or preparing a professional video-tape of the property). However, it is unlikely that her non-shiftable costs will be great enough to warrant any adjustment to the Town's "Potential Resistance Point."

Dalton's aversion to risk and personal motivations are not known. However, it is reasonable to assume that given her age she might prefer to settle the case rather than wait out the trial process and an additional number of years if the case is appealed. In addition, it is reasonable to assume that she is aware of the settlements that the Town has reached with three of her neighbors. Regardless of what feelings she might have about their willingness to accept $7,000 per acre, it is also reasonable to assume that she wants to be compensated for her special loss of $50,000 in addition to receiving the fair market value of her property. None of these assumptions, however, warrant any adjustment to the Town's "Potential Resistance Point."

(6) Based on the Potential Resistance Point as adjusted, advise the Town Council about a tentative resistance point and tentative target point, leaving the final decision on these matters to the Council:

Based on the evaluations in Steps (1) through (5) above, a tentative resistance point for the Town would be not to pay Dalton more than $750,000. A tentative target point would be to pay her $700,000 based on $7,000 per acre. Because the Town has extended purchase offers to all of the other landowners based on $7,000 per acre, an initial offer to Dalton should not be less than this amount.

Chapter 12

Preparing for Negotiation

SYNOPSIS

§ 12.01 Introduction

Thorough preparation is indispensable for effective negotiation. Before commencing negotiations, you must (1) obtain all information relevant to understanding what may reasonably be obtained for your client through negotiation, and (2) transpose that information into a working outline from which an overall negotiating approach can be developed and employed.

§ 12.02 Information to Obtain

Generally, you should obtain all information that may be pertinent to the entire negotiation process. This information should serve as the raw material from which you can identify: (1) what further information you need to find out; (2) what information to reveal during the course of negotiating; (3) what information to protect from disclosure; (4) the underlying interests of each party; (5) the primary, secondary, and incidental objectives of each party; (6) possible solutions that may satisfy each party's interests and objectives; (7) each party's best alternatives to a negotiated agreement (BATNA); (8) each party's strongest and weakest factual and legal leverage points; (9) the "target" and "resistance" points for each party; (10) each party's negotiating strategy and style; (11) the specific offers or proposals that may be presented by each party; and (12) the particular tactics each party may employ during the negotiation process. In obtaining this information, consider the following categories.

[1] Information from the Client

Obviously, your client is a critical source of information. You need to know all the facts and circumstances surrounding your client's problem. Carefully probe your client's objectives: what would she want in a final agreement if she could obtain everything she hoped to achieve in the negotiation? And, if everything went against her in the negotiation, what would be the very least she would accept to conclude an agreement? What are her long-term and short-term goals?

Apart from objectives or goals, encourage your client to share her underlying "interests." That is, what are her real needs, desires, concerns, fears, and feelings? Many clients are hesitant to disclose these more deeply rooted matters for fear that revealing them will display some personal weakness or insecurity. However, a candid exploration of these matters may well give rise to alternative and more creative solutions for satisfying your client's objectives.

[2] Information About the Other Party

Just as you need to know all the facts and circumstances surrounding your client's problem from her perspective, it is also essential to understand all the facts and circumstances from the other party's perspective. The latter information will provide a basis for anticipating the other party's objectives and underlying interests. In short, you must be willing to put yourself in the shoes of the opposing party.

In obtaining information about the other party, be sure to obtain information about his personal and financial situation, and emotional or psychological needs and dispositions. In addition, particularly when the opposing party is a corporation or governmental entity, identify the principal decision-makers who will play the most important roles in fashioning and deciding upon an agreement, and identify the particular pressures and interests that may affect their input into the negotiating process.

When obtaining information about an individual, don't overlook sources such as the Internet, criminal records, records of prior judgments, biographies, *Who's Who* books, clubs, professional societies, trade associations, or other attorneys or parties who have had prior dealings, disputes, or litigation with the individual. In the case of a corporation, useful information might be obtained from sources such as the Internet, the Consumer Protection division or Better Business Bureau of a state, annual and quarterly reports, reports of stockholders meetings, *Dun and Bradstreet, Moody's, Standard & Poors*, speeches of executives, company press releases, newspapers, or information supplied to governmental entities or public stock exchanges.

[3] Information About the Opposing Negotiator

Obtaining information about the negotiator for the opposing side is particularly important in choosing an appropriate negotiating style and strategy. Find out about the opposing negotiator's personality, style, level of competence, experience as a negotiator, reputation as a trial lawyer, and overall approach to negotiating.

If the opposing negotiator is a lawyer, it is also often useful to consider his likely fee arrangement with his client. For example, if the opposing party is being represented on a contingency fee basis, his lawyer may be primarily interested in a settlement that includes an up-front cash payment rather than a purely structured settlement with payments made over time. On the other hand, if the fee is based on an hourly rate, you will be able to estimate the pressure that mounting legal costs may impose on the opposing party throughout the negotiation process.

In addition, knowing about opposing counsel's general workload and trial schedule may be useful. For example, if opposing counsel is overworked, consumed by a pressing trial schedule, or is facing crucial deadlines in the case at hand or in other cases, these factors may markedly affect his disposition toward settlement at different times during the negotiation process.

[4] Information About the Law

Thoroughly researching the law applicable to your client's problem is essential. To be effective in negotiating you must not only know the factual strengths and weaknesses of the case, but the legal strengths and weaknesses

as well. In addition, when appropriate, you should research any legal issues that may arise from the particular terms of a potential or final agreement.

[5] Other Information

Apart from the foregoing, you should obtain any other information that may be pertinent to the particular negotiation. In this era of information explosion and ever-expanding resources such as the Internet, your ability to obtain information is almost as limitless as your imagination.

§ 12.03 Preparing a Negotiation Preparation Outline

Once you have obtained as much of the foregoing information as possible, you should evaluate and transpose that information into a working outline (a Negotiation Preparation Outline like that shown in § 12.04) from which an overall negotiating approach can be developed and employed. In preparing this outline, use the twelve steps presented below:

[1] Step 1: From the Perspective of Each Party, Make a List of Information To Obtain, Information To Reveal, and Information To Protect

Information To Obtain

An integral aspect of the negotiating process is finding out information from the other side that you have been unable to obtain independently. Having as complete information as possible about the other party's interests, objectives, possible solutions, best alternatives to a negotiated settlement, factual and legal leverage points, target and resistance points, offers or proposals, and particular tactics is essential in shaping your particular approach to the negotiation. Thus, based on the information you already possess, make a list of information you need to find out from the other party.

Next, make a list of information you expect the other party will want to find out from you that is not readily obtainable from independent sources. This may or may not include information that you will be willing to reveal to the other side.

Information To Reveal

Make a list of information you want to reveal to the other party (whether or not the other side knows about it already), and a separate list of types of information you expect the other side will gratuitously reveal to you. Information to reveal may consist of each side's strong factual or legal leverage points that will be itemized in Step 6 below, or other important information that each party wants the other to know in order to understand one another's particular interests, objectives, possible solutions, and offers or proposals.

Information To Protect

Finally, make a list of information you want to protect from disclosure to the other side, and a separate list of types of information you expect the other party will not want to reveal to you. Information to protect may include damaging factual or legal points (see also Step 6 below), or sensitive information such as trade secrets, work product, or the like.

[2] Step 2: Make a List of Each Party's Interests

Conceptually, a party's "interests" are to be distinguished from her "objectives," even though the two often overlap or end up being the same. A party's objectives are the specific *matters* she wants to obtain from the negotiation, whereas interests are the underlying *reasons* for the party's objectives. There may be multiple interests underlying any one objective, or multiple objectives that are related to a single interest.

To identify the interests of your client or the other party, ask "why" she desires a particular objective. Focus on her underlying *needs, desires, concerns, fears, philosophies*, and *feelings*. What are the personal, psychological, ideological, and emotional motivations behind her goals? Does she have any special needs for power, prestige, acceptance, security, economic well-being, belonging, or control over her life? When listing the interests of your client and the other party, rank those interests from most important to least important, and note which interests may be shared between the parties, as well as those which conflict.

For example, consider the plaintiff in a defamation or wrongful death case. While in both cases the single "legal" objective would be money, the primary interest of the plaintiff in the defamation case might be to restore her reputation, and the primary interest of the plaintiff in the wrongful death case might be to ensure that the accident that killed the decedent would never happen again. These interests may give rise to alternative objectives and solutions apart from the mere payment of money. In the defamation case, the plaintiff's interest in restoring her reputation may give rise to the objective of obtaining a public retraction and apology. This might not be at odds with the defendant's interests if the retraction and apology are styled in terms of the defendant having made a mistake in making the defamatory statement, and if a payment of a smaller sum is made to the plaintiff in exchange for making the recantation public. Similarly, in the wrongful death case, the interests of the plaintiff and defendant in preventing a future accident will undoubtedly be shared, and this may lead to a possible solution in which the defendant promises to undertake specific steps to correct the product's defect in exchange for paying a smaller sum to the plaintiff.

[3] Step 3: Make a List of Each Party's Primary Objectives, Secondary Objectives, and Incidental Objectives (to Exchange)

As mentioned above, a party's objectives are what she specifically wants out of an agreement, whereas her interests constitute the reasons underlying

her objectives. In other words, objectives are the outgrowth of interests. While objectives and interests are conceptually distinct, objectives are quite often nothing more than interests formulated into statements of specific goals.

Based on the interests of both parties identified in Step 2 above, list each party's primary, secondary, and incidental objectives (or objectives to exchange). A "primary" objective is a specific matter that must be obtained if an agreement is to be reached at all. A "secondary" objective is an important but not necessarily vital matter that a party may choose to forgo if the primary objective is resolved in a satisfactory manner. An "incidental" objective is a lower-priority goal that a party would be pleased to obtain, but which will not have a substantial effect on the overall success or failure of the final agreement. In addition, an incidental objective may serve as a matter to trade with the other party for something of greater value. After listing each party's objectives, compare them to note those which are shared, which conflict, and which do not conflict.

[4] Step 4: Make a List of Possible Solutions for Each Party (from most preferred to least preferred)

In light of the interests and objectives of each party, make a list of possible solutions for each side. In formulating possible solutions, it may be useful to first consider the primary, secondary, and incidental objectives of each party that are shared or do not conflict, and then consider those which do conflict.

Particularly when thinking about solutions to the parties' conflicting objectives, try to develop solutions based on objective criteria that are fair and independent of each party's mere desires. For example, in a property damage dispute, a reasonable solution is more likely to be found if the parties focus on objective criteria such as appraisals or "book values" to establish fair market value, rather than on a sum that one party merely wants to receive or the other is merely willing to pay. Similarly, in a construction contract dispute, a solution might be based on industry-wide standards, rather than on the mere preferences or practices of the particular parties. Depending upon the case, other sources of objective criteria might include what a court might decide, professional standards, moral standards, expert opinions, precedent, costs, efficiency, tradition, and the like.

At this stage, it is particularly important to "brainstorm" and list all possible solutions. These will later be refined into more concrete offers or proposals in Step 10 below.

[5] Step 5: Make a List of Each Party's Best Alternatives to a Negotiated Agreement (BATNA)

The purpose of negotiation is not only to reach an agreement that satisfies your client's objectives and interests, but also to protect your client from an agreement that would be harmful or counterproductive to his interests and objectives. In understanding the dividing line between an acceptable and unacceptable agreement, you must understand your client's Best Alternative to a Negotiated Agreement (BATNA), and whether that "walk-away" option would be better than anything that could be achieved from an agreement.

Knowing your client's BATNA and forecasting the other party's BATNA is essential to understanding the relative negotiating strength of each party. If you know in advance what your client's alternatives are if an agreement is not reached, you will not be negotiating in the dark. Instead, you will have the strength and confidence to walk away from the bargaining table if the best alternative is more attractive than the final agreement. Similarly, the relative negotiating power of the other party will primarily depend on his BATNA.

Understanding the BATNA of both parties also makes it easier to realistically estimate what you can expect from the negotiation. If your BATNA is greater than the other side's BATNA, you will have greater leverage over the terms of any negotiated agreement. Conversely, if the other side's BATNA is greater than yours, you may have to reduce your expectations and modify your objectives accordingly.

[6] Step 6: Make a List of Each Party's Factual and Legal Leverage Points (Strong and Weak)

Factual and legal leverage points are the strong and weak aspects of the case that shape the parties' target and resistance points (see Step 7 below), and the rationales for each party's offers or proposals (see Step 10 below). As such, these factual and legal leverage points are used by the parties in arguing for or against various terms of an agreement.

Each party's strong and weak factual and legal leverage points often correspond, respectively, to the information "to reveal" and information "to protect" listed in Step 1 above. In listing these factual and legal leverage points, it is important to maintain an objective perspective. Because you are intimately familiar with your client's situation and may know much less about the other side's situation, it is sometimes tempting to unduly focus on the weaknesses of your own case without recognizing that those weaknesses may not be actually apparent to the other party. Thus, remember that your assessment of the strong and weak points for each party is necessarily limited by the extent of the information possessed by you.

[7] Step 7: Identify Each Party's Potential Target and Resistance Points

As discussed in § 11.02, a party's "target point" is the best result she realistically hopes to achieve from the negotiation. It is not to be confused with a party's opening offer (see Step 10 below), which is the point at which a party begins negotiations and thereafter moves, through a series of concessions, toward the target point but not below her "resistance" point. A party's "resistance" point is her "bottom line"—the point below which she would cut off negotiations and resort to her Best Alternative to a Negotiated Agreement (BATNA). In other words, it is the point below which the party is unwilling to make any further concessions or compromises.

Estimating target and resistance points depends upon an overall evaluation of the case in light of all the factors considered in Steps 1 through 6 above.

Drawing upon those factors and the valuation methods discussed in Chapter 11, you should establish not only the target and resistance points of your client, but consider and list alternative target and resistance points that may be adopted by the other side so that you can estimate different ranges of potential settlement zones.

[8] Step 8: Identify Each Party's Negotiating Strategy: Adversarial or Problem-Solving

As discussed in Chapter 8, there are generally two types of negotiating strategies: "adversarial" or "problem-solving." Each has its advantages and disadvantages that should be considered in light of the particular case. Taking into account these considerations and the matters developed in Steps 1 through 7 above, identify the particular strategy you intend to adopt in the negotiation and the one you expect will be employed by the other party.

[9] Step 9: Identify Each Party's Negotiating Style: Competitive (Hardball), Cooperative (Softball), or Competitive-Cooperative (Hardball and Softball)

Also as detailed in Chapter 8, there are generally three types of negotiating styles: (1) "competitive" (hardball), (2) "cooperative" (softball), or (3) a combination of "competitive and cooperative" (hardball and softball). Like the different negotiating strategies, the different negotiating styles have their distinct advantages and disadvantages. In addition, there are particular advantages and disadvantages to different style and strategy combinations such as "competitive and adversarial," "cooperative (or competitive-cooperative) and adversarial," "competitive and problem-solving," or "cooperative (or competitive-cooperative) and problem-solving." In light of these considerations and the anticipated negotiating strategy of each side listed in Step 8 above, identify the particular negotiating style you plan to use in the negotiation, and the one you expect will be used by the opposing party.

[10] Step 10: Make a List of Each Party's Offers or Proposals in the Order They May be Presented

The specific offers or proposals of each party should be formulated in light of all the matters developed in Steps 1 through 9 above. In deciding your opening offer and fall-back offers in descending order to your final offer, the target and resistance points and potential concession patterns developed in Step 7 above are particularly important. In addition, for every offer or proposal you make, you should draw upon the factual and legal leverage points listed in Step 6 above to back up each offer or concession with well-reasoned rationales.

In choosing an opening offer, it is important to note that a number of studies have shown that negotiators frequently obtain more satisfactory outcomes when they start with more extreme rather than more moderate demands (*i.e.*, higher initial demands by plaintiffs or lower initial offers by defendants). In this regard, experience has shown that in choosing an initial offer, many

successful negotiators first forecast the best result they reasonably expect to achieve in the negotiation, and then deliberately *increase this goal* or target point in setting an opening offer.[1]

On the other hand, if your initial offer or proposal is too extreme and cannot be backed up with sensible reasons, you are likely to quickly lose credibility with the opposing party. In that event, the negotiation may collapse at the outset, or, if it nevertheless proceeds, it will be more difficult for you to justify the meaningfulness of your concessions to the other side. In short, your opening offer and each subsequent offer should be supported by non-frivolous rationales.

In developing your fall-back offers and concession pattern, consider (1) the extent of the information possessed by each side and the extent to which the factual and legal aspects of the case have been developed; (2) how protracted the negotiation is likely to be in light of the relative complexity of the case and (3) the particular negotiating strategy and style (see Steps 8 and 9 above) of the opposing party. Generally, the more thoroughly developed the case is in terms of the overall information possessed by each side, the less room you need to leave to maneuver between your opening offer and final offer. Similarly, if the negotiation is not expected to be long or complex, and the opposing party does not take a highly competitive (hardball) approach to the negotiation, it is less important to preserve substantial maneuvering room between your initial proposal and bottom line. On the other hand, if the negotiations start out when the parties possess limited information about each other's interests and objectives, or if the opposing party adopts a highly adversarial strategy and competitive style, you should prepare a concession pattern that leaves ample room within which to maneuver from your opening offer to your final one.

Finally, it is essential to forecast the potential offers and concession pattern of the opposing party. This perspective will help you to anticipate and formulate balanced counter-offers and alternatives to the other side's proposals.

[11] Step 11: Consider Each Party's Particular Tactics

Negotiators invariably employ a variety of particular tactics throughout the negotiating process to advance their clients' objectives. The most common tactics are discussed in Chapter 10. Thus, in preparing for negotiation, you should consider any particular tactics you might employ, and anticipate any tactics that might be used by the other party so that you will be prepared to meet and counter those tactics.

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[1] *See* C. Karrass, *The Negotiating Game* 17–18 (1970); J. Rubin & B. Brown, *The Social Psychology of Bargaining and Negotiation* 267 (1975); M. Bazerman & M. Neale, *Negotiating Rationally* 28 (1992); Charles B. Craver, *Effective Legal Negotiation and Settlement* 63–66 (3d ed. 1997); Herbert M. Kritzer, *The Justice Broker: Lawyers and Ordinary Litigation*, 143–15 159–161 (1990).

[12] Step 12: Revise All of the Foregoing Matters Throughout the Negotiating Process

The foregoing Steps are designed to systematically develop an overall approach to the particular negotiation. You can then prepare a Negotiation Preparation Outline for use in all stages of the negotiating process. While the outline may serve as a blueprint or road map for the negotiation, you should always be prepared to revise any aspect of it, in whole or in part, as circumstances warrant.

§ 12.04 Format for Negotiation Preparation Outline

There are many ways to format a Negotiation Preparation Outline. One format is as follows:

	YOUR CLIENT	OTHER PARTY
1. INFORMATION		
To Obtain:	1. 2. 3. 4.	1. 2. 3. 4.
To Reveal:	1. 2. 3.	1. 2. 3.
To Protect:	1. 2. 3.	1. 2. 3.
2. INTERESTS (from most important to least important)	1. 2. 3. 4.	1. 2. 3. 4.
3. OBJECTIVES		
Primary:	1. 2.	1. 2.
Secondary:	1. 2.	1. 2.
Incidental: (to exchange)	1. 2.	1. 2.

4. POSSIBLE SOLUTIONS (most preferred to least preferred)	1. 2. 3.	1. 2. 3.
5. BEST ALTERNATIVES TO A NEGOTIATED AGREEMENT (BATNA)	1. 2.	1. 2.
6. FACTUAL AND LEGAL LEVERAGE POINTS		
Strong points:	1. 2. 3. 4.	1. 2. 3. 4.
Weak points:	1. 2. 3. 4.	1. 2. 3. 4.
7. POTENTIAL TARGET AND RESISTANCE POINTS		
Target Points:	1. 2.	1. 2.
Resistance Points:	1. 2.	1. 2.
8. OFFERS OR PROPOSALS	1st: 2nd: 3rd: 4th:	1st: 2nd: 3rd: 4th:
9. PARTICULAR TACTICS	1. 2. 3.	1. 2. 3.

§ 12.05 Illustration of Negotiation Preparation Outline (Adversarial Approach)

Assume you represent Polly Pierce, a very attractive nineteen-year-old woman, who lives in Hopeville, a small town in rural North Carolina. Polly's father is a tobacco farmer who has recently been diagnosed with cancer, and her mother is a homemaker.

Polly has just finished her first semester at a small four-year college, the Gordon College of Dance & The Arts in Bakersfield, North Carolina, which is nationally known for training some of the best performing dancers in the country. Although Polly is considered by her instructors to have a promising career and is one of the best dancers the college has seen in the past decade, she is only on a partial scholarship and her parents are struggling to pay the balance of her tuition and other expenses which total approximately $20,000 per year.

On the evening of December 12, Polly went to a party with some of her classmates to celebrate the end of the first semester. At the party, she had four beers during a two-hour period. As she was about to leave and drive back to the college, one of her classmates, Missa Sulick, asked Polly if she was able to drive. Missa was concerned that Polly had too much to drink. Polly said that she was fine and proceeded to drive back to the college which was approximately 15 miles away. Other classmates at the party would testify that, while they could tell that Polly had been drinking, she was not too intoxicated to drive.

While driving back to the College, Polly was hit head-on by Donald Doan, who lost control of his car while speeding and crossed the centerline into Polly's lane of travel. Polly was not speeding. The accident happened on a lightly traveled road in Bakersville County. There were no independent witnesses to the accident.

Polly was taken by ambulance to Bakersville Memorial Hospital where she was diagnosed with multiple fractures to her right leg and ankle. Her blood alcohol level taken approximately one hour after the accident was 0.07, just below the legal limit. She spent 10 days in the Hospital during which she had surgery and the doctors put a pin in her leg to secure one of the fractures. Her medical and physical therapy bills totaled $30,000. Because Polly had no insurance, the Hospital has asserted a statutory lien in that amount on any personal injury funds she recovers. That is, the $30,000 will have to be paid back to the Hospital out of any personal injury compensation that Polly receives.

Polly was able to attend the spring semester on crutches, and her fractures were healed by the end of April. She has a 25% permanent partial disability rating of her right leg and ankle. She is able to walk without a cane, but has a permanent limp and a slightly visible four-inch scar on her right leg from the surgery. Her doctors expect that she is at high risk for developing potentially debilitating arthritis later in life, but they have no estimate of what this might mean in terms of future medical costs. Her prospects for any dancing career are now over. She had no medical problems before the accident, except that when she was 18 she was diagnosed with early degenerative disc

disease in her back which may or may not have hampered her future dancing career. According to standard mortality tables, she has an average life expectancy of an additional 53 years.

The top dancing graduates from Gordon usually earn between $30,000 and $40,000 per year for the first two to three years, and for the next five to ten years they may earn up to $100,000 or more per year depending upon their success. Polly has now decided to switch her major from dance to art history, and either teach art history in high school or at the college level upon graduating from Gordon.

Doan was miraculously not injured in the accident. He admitted to the police that he had "been going a bit over the speed limit." He was charged with speeding and driving while left of center of the roadway, and pled guilty to these traffic violations. Doan is a member of the Bakersville County Board of Commissioners, and it is rumored that he might run for Chairman of the Board in the next election that is six months away. To date, there has been no media coverage of the accident. It is also rumored that Doan recently inherited a sizeable sum of money that is believed to be in excess of $500,000.

You have undertaken to represent Polly on her personal injury claim on a contingency fee basis, which is 1/3 of the gross recovery regardless of any medical liens. You have already given notice of your representation to Doan's insurance carrier. The adjuster handling the claim, Arnold Aaron, is based at the carrier's headquarters in Dallas, Texas. Aaron is a senior claims adjuster who is rumored to be an extremely hard-nosed negotiator. Polly's property damage claim for her car has already been resolved.

No lawsuit has yet been filed in the case. If a lawsuit is filed, it will be filed in Bakersville where jury verdicts are significantly lower than in larger cities such as Dallas, Texas. You have found out that at least one recent jury verdict in Dallas on similar facts totaled $600,000.

Polly is still quite angry about the accident and how it has foreclosed her promising career in dance. She plans to finish her college education at Gordon, but she does not want her tuition and expenses for the remaining three years (approximately $60,000) to be a burden on her family, particularly in light of her father's declining health. She is also very concerned about her long-term physical condition in light of the prognosis of early arthritis and because any health insurance she might now obtain would most likely exclude her leg and ankle injury as a pre-existing condition. She is also concerned about how she will pay the $30,000 hospital lien. While Polly is not afraid of a jury trial, she would very much prefer to settle the case and get it over with before beginning her second year at Gordon, which starts in four months. She does not care whether the terms of any settlement are kept confidential, and she also doesn't care if the settlement is "structured" (whereby she would receive payment over a number of years) so long as she receives an initial lump sum that will cover her remaining college education and the hospital lien after attorney's fees are paid.

North Carolina law requires that all motorists carry liability insurance of at least $50,000, but you do not know the specific limits on Doan's policy that may be considerably more than $50,000. In addition, North Carolina is a pure

contributory negligence jurisdiction, which precludes a claimant from recovering *any* amount on a personal injury claim if she is in any way contributorily negligent.

You estimate that the best monetary result you can realistically obtain for Polly is $479,000 calculated as follows: $30,000 for the medical bills + $25,000 for pain and suffering from December through April + $424,000 for permanent disability, future pain and suffering, and loss of the dancing career (53 years x $8,000 per year). Your rough guess is that Aaron will not settle for an amount over $300,000, particularly in light of the potential contributory negligence problem.

It is now early May, five months after the accident. You have told Aaron that in the near future you will provide him with an initial offer along with pertinent documentation about Polly's claim. Aaron already has a copy of the accident report by the police, and a copy of Polly's medical records and bills since December 12 from Bakersville Memorial. You expect that if the case is to be settled in the next three to four months, all of the negotiation is likely to be conducted with Aaron in writing and over the telephone.

Based on the foregoing, your Negotiation Preparation Outline might include the following:

	YOUR CLIENT	OTHER PARTY
1. INFORMATION		
To Obtain:	1. D's insurance policy limit. 2. Whether D will run for re-election. 3. D's financial situation.	1. P's past medical history. 2. Facts about P's drinking at the party. 3. P's jury appeal.
To Reveal:	1. P's jury appeal. 2. P's promising dance career. 3. P's disability rating. 4. P is uninsured. 5. $600,000 Dallas verdict.	1. P's.07 alcohol level. 2. P has recovered from her injuries.
To Protect:	1. P prefers to settle. 2. P's prior medical history.	1. D's financial situation.

2. INTERESTS (from most important to least important)		
	1. Not to burden family with college expenses. 2. Concerned about future physical problems. 3. Pay off hospital lien. 4. Settle the case.	1. Aaron will want to minimize any pay out. 2. D doesn't want publicity. 3. D doesn't want a judgment in excess of policy limits. 4. D probably wants to settle.
3. OBJECTIVES		
Primary:	1. $ to pay remaining college expenses and lien. 2. Future medical insurance.	1. Aaron wants to pay as little $ as possible. 2. D doesn't want a judgment in excess of policy limits.
Secondary:	1. $ to compensate for future pain and suffering.	1. Settle the case. 2. Include confidentiality clause in settlement.
Incidental: (to exchange)	1. No confidentiality clause in settlement.	1.
4. POSSIBLE SOLUTIONS (most preferred to to least preferred)		
	1. Lump-sum settlement.	1. Structured settlement.

	2. Part lump-sum and part structured settlement. 3. Carrier to provide P with future insurance.	2. Part lump-sum and part structured settlement.

5. BEST ALTERNATIVES TO A NEGOTIATED AGREEMENT (BATNA)

	1. Binding arbitration or mediation. 2. Jury trial.	1. Jury trial. 2. Binding arbitration or mediation.

6. FACTUAL AND LEGAL LEVERAGE POINTS

Strong points:	1. P's jury appeal. 2. Permanent disability. 3. $30,000 in special damages. 4. Promising career is destroyed. 5. Dallas jury verdict of $600,000.	1. P's potential contributory negligence. 2. P is fully recovered. 3. Speculative future medicals. 4. Lower verdict expectancy In Bakersville.
Weak points:	1. P's potential contributory negligence. 2. Dancing career speculative. 3. Future medicals speculative.	1. P's jury appeal. 2. P's permanent disability. 3. Promising career destroyed.

	4. Lower verdict expectancy in Bakersville.	

7. POTENTIAL TARGET AND RESISTANCE POINTS

Target Points:	1. $479,000	1. $100,000
Resistance Points:	1. $150,000 (Settlement Zone = $150,000 to $300,000)	1. $300,000

8. OFFERS OR PROPOSALS

1st: $600,000 2nd: $500,000 3rd: ? 4th: $350,000 (not lower than $150,000)	1st: $90,000 2nd: ? 3rd: ? 4th: $300,000

—Consider structured settlement for any amount over $150,000
—Trade confidentiality clause for more $
—Trade less $ for carrier insuring P for leg and ankle (P to pay premiums)

9. PARTICULAR TACTICS

1. Threaten lawsuit in 30 days if case not settled. 2. Send a videotape of P to Aaron. 3. Send Aaron affidavits from students who say P was able to drive.	1. Aaron may delay until he gets discovery relevant to contributory negligence.

§ 12.06 Illustration of Negotiation Preparation Outline (Problem-Solving Approach)

Assume you represent Coble Inc., a small midwestern fertilizer manufacturer. Coble has one plant in the Midwest and has recently developed an improved fertilizer for commercial farming. Coble wants to expand its market for the new fertilizer by establishing new plants throughout the country. While Coble's first plant has been profitable, the company does not have the capital to build new plants of its own and has decided against seeking traditional financing for fear that incurring additional debt in the foreseeable future would strain the company's resources. Moreover, Coble still does not have a well-developed management team with the capability of managing multiple plants in different areas of the country.

Consequently, over the past year Coble has entered into licensing agreements with two other companies, one in the southeast and one in the northeast. Under these agreements, Coble has granted each company an exclusive right to manufacture and sell the new fertilizer (and any improvement to the product that is made or acquired by Coble) within a 250-mile radius of the licensee's plant. Each company paid Coble an initial fee in the form of a nonrefundable advance against royalties, which provided Coble with immediate cash to expand its own plant and engage in continuing research and development. To prevent the licensees from developing a substitute to Coble's fertilizer and thus avoid payment of additional royalties in the future, the licensees were required to assign all of their improvements in fertilizer substitutes to Coble so that it could remain in control of the business and receive royalties on any improvements to the product that were manufactured and sold by any licensee.

Through these licensing arrangements, Coble's on-going plan is to obtain additional plants throughout the country that are run by management supplied by licensees. The licensees would have the benefit of exclusively manufacturing and selling a top-quality product, and generate earnings based on the success of their sales and plant operations.

Although Coble has done well by its Midwestern plant and licensees in the southeast and northeast, it has not yet been able to expand its market into the farm belts of the central states such as Nebraska and Kansas. However, Coble has recently been contacted by Baxter, Inc., a manufacturer and seller of pesticides. Baxter owns and operates two plants, one in the southeast and the other in Nebraska, and is interested in entering into a licensing agreement with Coble to manufacture and sell the new fertilizer from both of Baxter's plants.

Representatives of Coble and Baxter have already held preliminary discussions about a potential licensing arrangement. Coble has learned that while Baxter has never been in the fertilizer business, the company has an interest in developing its own line of fertilizers sometime in the near future and would not want to assign those products to Coble and pay royalties on them. Coble has also learned that Baxter has a large share of the pesticide market in the southeast and central states (including Nebraska, Kansas, Oklahoma, and the Dakotas), and virtually all of its customers would be potential buyers of the

new fertilizer. Finally, Baxter has made clear that in order to enter into licensing agreement, Baxter must be permitted to manufacture and sel Coble's new fertilizer from both of Baxter's plants.

Coble is concerned that if Baxter develops new fertilizers in the future and pays no royalties on them, Coble will be in the ironic position of having pu Baxter into the fertilizer business, only to lose the ability to earn money from a business initially created by Coble's creative efforts. In addition, while granting Baxter a license in the southeast would not violate Coble's specific territorial agreement with its southeastern licensee, Coble is concerned that competition between two licensees in that region might reduce overall profits. Notwithstanding the latter concern, Coble has also had some exploratory discussions with Fulton, Inc. of Atlanta, Georgia, which is interested in a licensing agreement on the same terms as those that Coble negotiated with its current southeastern licensee. However, Coble is more interested in making a deal with Baxter because of its broad customer base not only in the southeast but throughout the central states.

Coble's strong preference is to negotiate a licensing agreement with Baxter along the same terms as Coble has negotiated with its other licensees. While Coble intends to be flexible, in no event will it enter into an agreement that does not provide some protection against Baxter's domination of the commercial fertilizer business through the development of its own line of fertilizers. Because Coble's cash flow situation is now much better than it was a year ago, Coble is prepared to be flexible about requiring Baxter to pay a nonrefundable initial fee.

The lead negotiator for Baxter is its in-house attorney, Malcolm Sears. Sears has a reputation for being smart, forthright, and easy going. A meeting has been scheduled between you and Sears in ten days to see if the basic elements of a licensing agreement can be worked out.

Based on the foregoing, your Negotiation Preparation Outline might include the following:

	YOUR CLIENT	OTHER PARTY
1. INFORMATION		
To Obtain:	1. Number of B's potential customers for fertilizer. 2. B's ability to convert plants for fertilizer mfg.	1. History of gross sales of fertilizer. 2. Other licensees and the terms of their agreements.
To Reveal:	1. C's strong sales. 2. Discussions with Fulton.	1. B's broad customer base. 2. B's ability to manufacture and sell fertilizer.
To Protect:	--	--

2. INTERESTS (from most important to least important)	1. Expand market into central states. 2. Protect control over product and future royalties. 3. Maintain cash flow for on-going R and D.	1. Expand into fertilizer mfg. and sales at both plants. 2. Retain all rights to B's own line of fertilizers. 3. Pay lowest royalties and initial fee as possible.
3. OBJECTIVES		
Primary:	1. Enter into licensing agreement with B, particularly to expand market into central states. 2. Protect control over product and future royalties.	1. Enter into licensing agreement with C for both of B's plants. 2. Pay no royalties on any fertilizers developed by B.
Secondary:	1. Require B to pay the same royalties as are being paid by other licensees.	1. Pay lowest royalties and initial fee as possible.
Incidental: (to exchange)	1. Amount of initial fee.	1. –
4. POSSIBLE SOLUTIONS (most preferred to to least preferred)	1. Licensing agreement on the same terms as those negotiated with C's other licensees.	1. Licensing agreement without assignment to C of any fertilizers developed by B alone.

	2. Licensing agreement without assignment to C of fertilizers developed by B alone, but B must share any of its improvements/ substitutes with C and permit C and its other licensees to use them without cost. 3. Licensing agreement without assignment to C, but B only gets to manufacture and sell improvements to product made by C alone and not acquired by C from its other licensees. 4. Reduction in initial fee.	2. Licensing agreement without assignment to C, but B still gets to manufacture and sell any improvements to C's product that are made or acquired by C or its other licensees. 3. Reduction in initial fee.
5. BEST ALTERNATIVES TO A NEGOTIATED AGREEMENT (BATNA)	1. Grant a license to Fulton. 2. Find other licensees in the central states.	1. Develop a fertilizer product on B's own. 2. Find another licensor.
6. FACTUAL AND LEGAL LEVERAGE POINTS		
Strong points:	1. C's strong sales. 2. Fulton is a potential licensee. 3. C already has a licensee in the southeast.	1. B's broad market and customers. 2. B has 2 plants. 3. B has ability to manufacture and sell C's product.

	4. B has never been in the fertilizer business.	
Weak points:	1. C has no market in the central states. 2. B has many customers.	1. C already has a licensee in the southeast. 2. B has never been in the fertilizer business. 3. Fulton is a potential licensee.

7. POTENTIAL TARGET AND RESISTANCE POINTS		
Target Points:	1. Licensing agreement on the same terms as those negotiated with C's other licensees.	1. Licensing agreement for both plants.
Resistance Points:	1. Licensing agreement with some protection against B dominating the fertilizer market.	1. Licensing agreement without assignment to C of any fertilizers developed by B.

8. OFFERS OR PROPOSALS		
	1st: Licensing agreement on the same terms as those negotiated with C's other licensees. 2nd: Licensing agreement without assignment to C of fertilizers developed by B alone, but B must share all of its improvements/ substitutes with C and permit C and its other licensees to use them without cost.	1st: Licensing agreement without assignment to C of any fertilizers developed by B alone. 2nd: Same as C's 2nd offer, but B still gets to manufacture and sell any improvements to C's product that are made or acquired by C or its other licensees.

	3rd: Same as B's second offer, but B only gets to manufacture and sell improvements to product made by C alone and not acquired by C from its other licensees.	3rd: Same as C's 3rd offer, but C must reduce its initial fee.
	4th: Same as B's 3rd offer, and initial fee to be 75% of that charged to C's other licensees.	4th: Same as B's 4th offer, but initial fee to be 66% of that charged to C's other licensees.

9. PARTICULAR TACTICS		
	1. Induce B to make the first offer.	1. --

§ 12.07 The Role of the Client and Advising the Client

The client's role in the negotiation is integral to preparation and the overall approach taken to the negotiation. Some studies have indicated that the dollar outcomes of certain settlements are consistently higher when the client is not only regularly informed about the progress of the negotiation, but actively participates in the overall process (even if he is not actually present during the negotiations). Similarly, attorney-client misunderstandings have been found to be the single largest factor resulting in unsuccessful settlements.[2]

Of course, the ultimate decision whether to accept or reject a settlement negotiated by a lawyer rests with the client, and a lawyer generally has a duty to inform his client of all settlement offers. Within this restriction, however, the client may give you broad authority not only over the process of the negotiation, but over what offers or counteroffers to make and what proposals to accept or reject. Thus, it is imperative that there be a clear understanding between you and your client about the extent of your authority throughout the negotiation process. (*See* § 9.02).

Generally, in informing and advising the client about the negotiation, you should cover: (1) the procedural and substantive process of the negotiation, including its different phases, the goals of the particular negotiation, and expected time frames; (2) how, when, and to what extent your client may be involved at different stages of the process or during the actual negotiation; (3) when and how your client will receive status reports about the progress of the negotiation; (4) all alternatives to the negotiation process and the

[2] *See* G. Williams, *Legal Negotiation and Settlement* 58–60 (1983).

relative advantages and disadvantages of those alternatives; and (5) all expenses and attorney fees that are likely to be incurred in negotiating the case or resolving it by other means such as trial. Because negotiation is a dynamic and changing process, it is essential that you regularly advise your client of any reassessments about the foregoing matters as the situation warrants.

In addition, it is imperative that you establish a strong relationship of trust with your client. Never inflate your client's expectations about what may be accomplished through the negotiation, and always inform him that your representation is aimed at achieving the best result consistent with his objectives and interests. A relationship grounded in honesty and trust in your skill and judgment is essential to effective representation.

Chapter 13

Negotiating in Writing and Over the Telephone

SYNOPSIS

§ 13.01 Introduction

Many negotiations are conducted exclusively in writing, over the telephone, or through a combination of both. This is particularly true for small business deals or disputes, domestic disputes, and non-catastrophic personal injury cases. Typically, one party initiates the negotiation by mailing, faxing, or e-mailing a proposal or demand letter, and the other party responds in writing

or negotiations proceed over the phone. Particularly in personal injury cases, lawyers usually start negotiations by sending the insurance adjuster a "settlement brochure" that details the client's contentions about liability and damages, and provides an initial settlement "demand." There are certain advantages and disadvantages to negotiating in writing and over the telephone. In addition, there are a variety of techniques that can enhance the effectiveness of these methods of negotiation.

§ 13.02 Negotiating in Writing—Advantages and Disadvantages

The principal advantage of negotiating in writing is that it creates a paper record that leaves less room for misunderstanding, and allows the other party to carefully review what is being said and share it with other persons involved in the negotiation. Also, correspondence is often more articulate. Strong points can be emphasized, and weak points carefully downplayed or refuted. Matters that might be difficult to say face to face can be controlled through delicate wording and phrasing. Moreover, writing is an efficient and unmistakable way of conveying instructions, sanctions, time frames, and deadlines.

The principal disadvantage of negotiating in writing is that it is impersonal and does not lend itself to interpersonal or emotional appeals. Moreover, a sloppily worded or ambiguous letter can create false impressions, confusion, or misunderstandings that may be more difficult to erase later. Writing also takes time, not only from the standpoint of preparing the correspondence or other documentation, but by slowing down the pace of the negotiation.

§ 13.03 Techniques for Effective Correspondence

Whether writing an initial business proposal, pre-litigation demand letter, or response to either, you should consider the following:

[1] Send the Letter By Registered or Certified Mail

Consider sending the letter by registered or certified mail, return receipt requested. This will inevitably grab the attention of the recipient and foreclose any contention that the letter was not received. If you choose this form of mailing, be sure to designate on the first page of the letter that it was sent by certified mail, return receipt requested. If you fax the letter, be sure to keep the printout showing that the fax went through to the recipient.

[2] Copy the Letter to Other Persons

Particularly if the letter is being sent to a business or governmental entity, consider copying the letter to any individual who is likely to be directly or indirectly involved in the negotiation. This is likely to exert pressure on the recipient and increase the chances of getting a corporation or governmental entity to act promptly. However, this tactic should not be employed if it will unnecessarily alienate the addressee or other persons to whom a copy of the

letter is sent. Do not send a copy to the opposing party if counsel represents him, because of course you cannot correspond with a represented party.

[3] Identify Your Authority to Represent

In the first paragraph of your letter, clearly identify the subject matter of your representation and authority to represent. This is an essential formality that will require the other side to respond directly to you.

[4] Adopt an Appropriate Style and Tone

Adjust the style and tone of your letter to the particular recipient and anyone else who might read the letter. For example, if you are writing directly to an unrepresented party, you should avoid unnecessary legalese. If the letter is sent to the other side's lawyer, always assume that the letter will be read by his client.

Avoid using language from which any personal attack or insult might be inferred. Although, in an appropriate case, your letter should be firm, your overall style and tone should be identical to that which you would consider professional if you were the recipient of the letter. In this regard, particularly if you are writing to a person you do not know, consider concluding the letter with, "I look forward to hearing from you and working with you on this matter." Similarly, in responding to a letter, you should regulate the tone as well, regardless of the tone used by the other side. For example, you might begin your response with, "This will acknowledge and thank you for your letter of. . ."

[5] Highlight the Pertinent Facts and Law

Be sure to educate the other side to the relevant facts. It is best to state them in an objective tone rather than by editorializing or being argumentative. Because your understanding of the facts is often limited to what your client has told you, leave yourself maneuvering room in the event that your client's version is not totally accurate. This can be accomplished by prefacing your factual recitation with, "According to our client,. . ." In addition, if you need an immediate response from the other side to verify your understanding of the facts (as where you are contemplating injunctive relief), you might write: "To prevent any misunderstanding about the facts surrounding this matter, please advise us immediately if our understanding is incorrect" [or] "If I do not hear from you on or before. . ., I will assume that the facts related by my client are accurate."

Educate the other side to your legal position. This might be stated by quoting the particular language of a contract or court order at issue, or by summarizing or citing to specific statutory or case law supporting your legal contention. Also, consider attaching to your letter a copy of any pertinent documentation, legal authority, or even a draft complaint or motion.

Of course, you should highlight the facts and law most favorable to your client. While you should never deliberately misrepresent the facts or law, you have no obligation to disclose weak facts or adverse legal authority in the

negotiation context. If your letter cannot summarily deal with weak points, it is often best to deal with them at a later stage of the negotiation. The structure of your letter, word selection, and choice of points to emphasize or omit can help you put the best light on your client's situation.

[6] Convey a Specific Proposal or Course of Action

A business proposal or pre-litigation demand letter is essentially meaningless if it does not specifically convey what you propose or what you are asking the other side to do or not to do. In addition, the terms of your proposal or demand should not be vague or ambiguous unless you have a deliberate reason for leaving matters open ended or imprecise. Thus, in stating a particular proposal or demand, make sure that it appropriately answers who, what, which, when, where, why, and how.

[7] State a Time Frame for Action and Consequences for Inaction

Consider including in your letter a time frame or deadline within which you expect the other side to act. Imposing a time constraint on the other party will exert pressure on the negotiating process. In choosing a time frame or length of a deadline, you must bear in mind whether your purpose is to induce immediate action or to bide time (*see Deadlines* in Chapter 10).

In addition, setting a time frame for action is most effective when coupled with an indication or specific statement of the consequences that could occur or sanctions that could be imposed if the other side is unresponsive. Thus, it is often desirable to educate the other side to these consequences or what you will be forced to do in the event that no timely agreement is reached (*see Threats* in Chapter 10). For example, a pre-litigation demand letter might say: "If we do not hear from you by. . .p.m. on. . ., we will have no alternative but to immediately institute appropriate legal proceedings. If that should become necessary, in addition to the principal amount of $_____, we will request that the court award reasonable attorneys' fees, interest, and all court costs pursuant to [cite statute]."

§ 13.04 Illustration of a Demand Letter

June 7, [year]

Mr. Franklin Sinclair,
Esq. Suite 300,
Bartlett Building 210
N. Jones Street
Raleigh, North
Carolina 27602

CERTIFIED
MAIL
RETURN
RECEIPT
REQUESTED[1]

RE: Unauthorized Sale of Marital Home of Ida L. Doe and Austin T. Doe

Dear Mr. Sinclair:

Our law firm represents Ms. Ida. L. Doe in connection with her recent separation from her husband, Austin T. Doe, who I understand you represent. Ms. Doe has authorized me to contact you regarding your client's apparent plans to sell the parties' marital home and potentially defeat Ms. Doe's interest in it as distributable marital property under G.S. 50-20 *et. seq.*[2]

As you may know, the parties separated on May 17, [year], and since then Mr. Doe has been in possession of the marital home at 3629 Briarwood Court in Raleigh, and Ms. Doe has been living with her mother in Charlotte. The marital home was purchased for $106,000 on March 6, [year] during the marriage of the parties, but for some unexplained reason title was placed solely in Mr. Doe's name. (*See* Attachment 1). There is currently no mortgage or other indebtedness on the home, and, according to Ms. Doe, each of the parties paid one-half of the $15,000 down payment from their separate, premarital funds. Accordingly, the home constitutes distributable marital property under G.S. 50-20, notwithstanding that title is in Mr. Doe's name alone. *See Smith v. Smith*, 314 N.C. 80, 331 S.E.2d 682 (1985) (equal division of marital property is generally mandatory even though title to marital assets may be listed in the name of only one spouse during the course of the marriage).[3]

Ms. Doe has informed me that on June 6, [year] at approximately 7:30 p.m., Mr. Doe telephoned my client from Canada where he is currently on a two-week business trip. During the conversation, the parties apparently had an argument, and Mr. Doe said he intends to put the marital home up for sale immediately upon his return to Raleigh on June 22. Ms. Doe reports that Mr. Doe also said he wants to sell the home by no later than August 1, [year] does not care if the home is sold at a depressed price, and that he will "fix it" so that Ms. Doe will not get any of the proceeds from the sale. According to Ms. Doe, your client indicated further that he intends to list the house for only $180,000 even though the latest tax value alone is $200,000. (*See* Attachment 2).[4]

This letter serves as formal notice of Ms. Doe's objection to any listing or sale of the marital home at 3629 Briarwood Court without her consent. Any

[1] *See* § 13.03 at [1]. A letter such as this might also be faxed.

[2] *See* Id. at [3].

[3] *See* Id. at [5].

[4] *See* Id.

unauthorized sale of the home by Mr. Doe (or anyone on his behalf) will be considered unlawful conversion and waste of a marital asset in which Ms. Doe has at least a one-half interest. Ms. Doe is requesting that the parties immediately execute a written agreement that prohibits the listing or sale of the marital home without the consent of both parties and which acknowledges Ms. Doe's interest in the home as distributable marital property under G.S. 50-20. (*See* draft of proposed Agreement at Attachment 3).[5]

If I do not hear from you by 4:00 p.m. on or before June 19, [year], I will assume that the facts set forth in this letter are accurate and that Mr. Doe has no intention of entering into an agreement like that proposed above. If a satisfactory agreement cannot be reached on or before that date and time, we will be forced to seek immediate injunctive and other relief under G.S. 50-20 (i); G.S. 1A-1, Rule 65; G.S. 1-485; and G.S. 1-116 *et. seq.*[6]

Notwithstanding the circumstances giving rise to the parties' separation, Ms. Doe wishes to resolve all matters respecting the parties' rights as cooperatively and amicably as possible. I look forward to hearing from you and working with you on this case.[7]

Sincerely,_____

§ 13.05 Settlement Brochures

A settlement brochure is a document that sets out the legal and factual basis for a claimant's claim and details her damages. The brochure may be in the form of a letter or a more formal, bound document that contains extensive exhibits. Brochures are often used by plaintiffs' lawyers in personal injury cases to establish the basis for initial settlement demands and to define the issues for ensuing negotiations.

The brochure is often sent to the adjuster for the defendant's liability insurance carrier before any lawsuit is filed. The adjuster then responds to the claimant's initial offer in writing or over the telephone. After an exchange of one or more counteroffers, the case is often settled without the parties or their representatives having engaged in any face-to-face negotiations. If in-person negotiations do occur, the plaintiff's lawyer often uses the brochure in an effort to structure the negotiation agenda.

Effective brochures usually contain extensive documentary and illustrative exhibits to back up the claimant's assertions about the facts, liability, and damages. Broad disclosure is justified on the theory that the materials contained in the brochure would otherwise be revealed through discovery, and meaningful settlement discussions cannot occur without substantiating the claim. If these exhibits are voluminous, the brochure might contain an index of them. Such documentation lends credibility to the brochure and shows the opposing side that the claimant is prepared to litigate the case if necessary. Supporting documentation also serves to "paper" the defense representative's file to justify the amount of a final settlement.

[5] *See* Id. at [6].

[6] *See* Id. at [5] and [7].

[7] *See* Id. at [4].

While much of the documentation in a brochure will consist of materials that would be admissible at trial, you should not limit yourself to revealing strictly admissible evidence. So long as the information is pertinent to the claim, it should be included regardless of technical rules of evidence. Although, in the event of litigation, formal discovery will require you to reveal certain information that may be damaging to your client's case, weak aspects of your client's claim may usually be omitted from the brochure unless the opposing side already knows about these weak points and they can be effectively countered in the brochure. On the other hand, you should never make a false statement of material fact in the brochure (*see* § 9.06).

The format and content of a brochure are limited only by your imagination. Most brochures take the form of a written summary or narrative that makes reference to the documents or exhibits collected at the end of the brochure. However, some brochures are organized in a sequence of documents, photographs, and other materials that are arranged under captions and interspersed with commentary to provide a dramatic, pictorial presentation of the client's case. In addition, some attorneys will include a videotape that reenacts the accident or displays the client's injuries and physical limitations. Occasionally, video footage from television news stations or from the highway patrol might be included. Regardless of the particular format chosen for the brochure, you should usually include within it the following elements:

[1] Introduction to Brochure/Cover Letter

Your brochure should contain an introduction or be accompanied by a prefatory letter that provides a general introduction to the case and specifies any restrictions or limitations on the use of the brochure. These might include: (1) a statement that the brochure is being provided for settlement purposes only (*see* Fed. R. Evid. 408 and § 17.11); (2) a statement that the brochure is the property of your client, may not be copied without permission, and must be returned upon demand; (3) a date specified for a reply, after which the settlement offer will expire or be withdrawn; (4) an expression of willingness to settle the case reasonably; and (5) an offer to discuss the case further or to meet for future negotiations.

[2] Statement of Facts and Liability

The brochure should detail the facts giving rise to your client's claim and the basis for the defendant's liability. This statement of facts and liability should be written as a narrative, and refer, whenever possible, to exhibits such as police or accident reports, private investigative reports, witness statements (whether by affidavit or recorded interview), diagrams or photos of the accident scene or instrumentality causing the injury, or newspaper articles, etc. In addition, it is important to humanize your client and provide appropriate information about his background, such as age, marital status, family, education, military service, avocational interests, awards, commendations, financial status, work history, and the like.

When liability is clear, it is unnecessary to discuss the applicable law. Even when liability is disputed, many attorneys avoid any specific discussion of the

law because the representative for the defendant is usually aware of the applicable legal principles and might be offended or feel patronized by counsel's citation to legal authority. On the other hand, if the recipient of the brochure is unlikely to be familiar with the applicable law, or if a discussion of the law otherwise seems appropriate, the legal grounds for liability should be set out and supported by accurate citations to case law and statutory authority. In this regard, some attorneys also include a copy of the plaintiff's proposed complaint.

[3] Summary of Medical Treatment

The brochure should contain a chronological summary of your client's pertinent medical treatment. This might be written in narrative form or by quoting verbatim the most important portions of the medical records. A copy of all relevant medical records (including test results and x-rays) should be included as an exhibit and indexed if the records are voluminous. Any letters from physicians that are not part of the formal medical records and that discuss the extent and nature of your client's future medical treatment, future medical costs, prognosis, and extent of disability should also be summarized and included as an exhibit. If the medical records contain references to a medical condition or course of treatment that is wholly unrelated to the accident, the summary should omit those matters.

[4] Summary of Lost Earnings

If your client has incurred lost wages due to her injury, or will incur future lost wages or a reduction in earning capacity, these elements of damage should be described with particularity. In the case of past lost wages, the brochure should include a statement from your client's employer showing your client's gross wage rate, time out of work due to the accident, and total lost wages. In the event of future lost earnings or a reduction in earning capacity, the brochure might include a report prepared by an economist that calculates the future lost wages and fringe benefits, reduced to present value.

[5] Summary of Pain and Suffering and Permanent Injury

Your client's general damages for past, present, and future pain and suffering and permanent injury, as applicable, should be vividly described in narrative form. The description should cover all pertinent aspects of your client's life, including physical, psychological, social, and economic effects. Whenever possible, this description should be accompanied by photographs of your client before and after the accident and during different stages of recovery. Particularly in catastrophic injury cases, a day-in-the-life video of your client may be highly effective. If permanent injury is involved, your client's life expectancy should be stated based on standard mortuary tables.

[6] Damages Summary and Initial Demand

The conclusion of the brochure should provide an itemized summary of your client's damages along with an initial demand or first offer. Each item of damage, whether special or general, should be separately enumerated and supported by available statements, bills, receipts, or other documentation. Special damages might include: (1) medical expenses, (2) future medical expenses, (3) lost wages, (4) future lost earnings and benefits, and (5) miscellaneous expenses (past and future).

Items of general damage should also be separately enumerated when appropriate. These might include: (1) past pain and suffering (including humiliation and emotional distress), (2) future pain and suffering, and (3) loss of life's pleasures or other damage resulting from permanent disfigurement or disability. In an appropriate case, some attorneys also set out the amount that would be sought at trial for punitive damages.

At the conclusion of the brochure, the special and general damages should be combined to produce a single figure representing an initial settlement demand or first offer.

§ 13.06 Illustration of Settlement Brochure (Personal Injury Case)

SETTLEMENT BROCHURE
Prepared on behalf of
JANE R. POOLE
June 14, [year]
By:
John W. Doe, Jr.
DOE & DOE
Suite 344, 30 Columbia Avenue
Charlotte, North Carolina 28212
Telephone: (704) 333-2868
Fax: (704) 221-8685
E-Mail: jwdoe@lightspeed.com

June 14, [year]

Mr. Donald Delaney
Senior Claims Adjuster
All-Care Insurance Company
629 Bellview Road
West Newton, Massachusetts 02165

RE: My Client: Ms. Jane R. Poole Our File No.: JWD-2392 #1 Your Insured: Winslow S. Hall Date of Collision: January 4, [year]

Dear Mr. Delaney:

As I mentioned to you in my letter of January 10, [year], I represent Ms. Jane R. Poole in her personal injury claim arising out of an automobile

collision on January 4, [year] in Charlotte, North Carolina caused by your insured, Mr. Winslow S. Hall. This settlement brochure summarizes Ms. Poole's personal injury claim, and all information provided herein is intended for settlement purposes only. You are free to copy the brochure if you wish, but it is the property of Ms. Poole and DOE & DOE law firm and is returnable to us on demand.[8]

FACTS AND LIABILITY

There is no question about liability in this case. On Monday, January 4, [year], at approximately 8:30 a.m., Ms. Poole was on her way to work, traveling east on Harnette Avenue in Charlotte, North Carolina. She stopped at a stoplight at the intersection of Harnette Avenue and St. Mary's Street. Mr. Hall, who was also traveling east on Harnette Avenue, lost control of his vehicle and crashed into the rear of Ms. Poole's car at an estimated speed of 45 miles per hour in a 35 mile per hour zone. (*See* Charlotte Police Accident Report at Exhibit 1).

Mr. Milton Reeves, who was traveling in a car behind Mr. Hall, witnessed the accident and will testify that Mr. Hall was "speeding," driving "erratically," and "weaving" in the road just before the impact. (*See* statement of Milton Reeves at Exhibit 2). Officer T. L. Fennell, who responded to the accident scene and prepared the police report, charged Mr. Hall with "Failure to Reduce Speed to Avoid an Accident" to which Mr. Hall entered a plea of guilty on March 6, [year]. (*See* Citation at Exhibit 3). Although the accident report also notes that the rear brake lights on Ms. Poole's car were not working at the time of the accident, under the circumstances of this case no jury would find that this fact was a contributing or proximate cause of the accident.[9]

Upon impact, even though Ms. Poole was wearing her seatbelt, she was thrown violently forward and backward in her seat, and her left knee slammed into the dashboard. The force of the impact broke the driver's seat. Her car was nearly totaled. (*See* photographs at Exhibit 4).[10]

MEDICAL TREATMENT

Ms. Poole was taken by ambulance to the emergency room at Hopeview Memorial Hospital in Charlotte. The following are the most pertinent, verbatim portions of her medical records during her five-month course of treatment (*See* medical records at Exhibit 5):[11]

[8] Here, there is no reason to prohibit copying of the brochure because all of the materials contained in it would be discoverable in the event of litigation and there is no reason to suppose that the adjuster will inappropriately disseminate the contents of the brochure. Thus, the requirement that the brochure be returned to the claimant's lawyer upon demand is, in this case, a purely *pro forma* safeguard.

[9] If there was any real doubt about this proposition, the attorney might cite an appropriate appellate decision.

[10] For purposes of effect, the attorney might put the photographs immediately following this paragraph rather than including them in an attached exhibit.

[11] This approach would not be practical if the medical records were particularly voluminous. In that event, the attorney might summarize the course of treatment in a narrative and make specific reference to key medical records such as surgical procedures or discharge summaries.

1/4/yr: Emergency Room, Hopeview Memorial Hospital.
Chief complaints: low back pain and stiffness; numbness; soreness in neck; left knee pain from impact with dashboard.
Thorough examination.
Small contusion, bruising to medial left knee.
DIAGNOSIS: Musculoskeletal pain.
DISCHARGE INSTRUCTIONS:
1. Expect to be sore.
2. Advil for pain.
3. Heating pad for pain.
4. No strenuous activity for next 2–3 days, then advance as tolerated.
5. Return immediately if problems develop or symptoms worsen.

1/8/yr: Dr. Bruce Cooper, MD, Charlotte Family Medicine Center, P.A.
New patient.
Chief complaints: development of increased lower back pain and left upper back pain; persistent pain in right lower rib cage; difficulty in sleeping.
EXAM: Neck reveals some mild left trapezial tightness; tenderness; mild to moderate paralumbosacral tenderness over both iliac crests; point moderate to severe tenderness over mid-thorzic right rib cage and around T7-8.
ASSESSMENT: Neck and back strain; probable fractured rib.
PLAN: Will obtain rib x-rays. Sent to Spellman Radiology for x-rays. Recommend local ice packs to rib cage; gentle flexible exercises, avoiding any activities that exacerbate any of her pain; avoid high impact activities.
Prescribed: Advil for pain; Ambien 10 mg for sleep. Follow-up recheck in one week.

1/9/yr: Spellman Radiology, Dereck S. Spellman, MD.
X-rays taken of right ribs: reveal nondisplaced fracture of right 10th rib.

1/14/yr: Dr. Bruce Cooper, MD, Charlotte Family Medicine Center, P.A.
Follow-up examination. Slight "clicking" left hip; some occasional discomfort on that side with walking. Slight pressure lower back—

Examination of lower back reveals some mild paralumbosacral tenderness over left superior anterior iliac crest. Mild-moderate tenderness over right lateral rib cage.
ASSESSMENT: Mild left hip, low back strain; rib fracture.
PLAN: Encourage patient to get back into normal exercise program at 50% level and slowly increase. Recommend hot packs and stretching. Recheck in 3 weeks. Consider physical therapy. Advise patient to expect several weeks to heal but she should have complete resolution of symptoms.

2/16/yr: Dr. Bruce Cooper, MD, Charlotte Family Medicine Center, P.A.
Follow-up examination.
No longer has pain in rib cage; now has most of pain in neck: right side greater than left. Neck gets tired upon flexion or leaning forward. Occasional blurring of vision, but no apparent visual field defects. Examination of neck reveals some mild-moderate tenderness on right paracervical ridge.
Noted that patient saw her gynecologist for pregnancy test: positive a week ago, but negative serum test four days ago. Apparently since accident she has also had galactorrhea which is being monitored by her GYN.
ASSESSMENT: Neck strain secondary to motor vehicle accident.
PLAN: Get baseline cervical spine x-rays; send to physical therapy with follow-up in one month.
ASSESSMENT: Galactorrhea; possible spontaneous abortion.
PLAN: Follow-up with GYN. Galactorrhea could be due to emotional trauma of motor vehicle accident causing patient's hormone imbalance.

2/20/yr: Spellman Radiology, Dereck S. Spellman, MD
Cervical Spine x-rays: minor straightening of cervical spine which could represent muscle spasm.

3/16/yr: Dr. Bruce Cooper, MD, Charlotte Family Medicine, P.A.

Follow-up. Gets occasional sharp pain in head and neck; some stiffness in lower back. Will be starting on regular exercise aerobic program soon and will be seeing Ian Tersky, Physical Therapist for strengthening and flexibility exercises. Galactorrhea apparently resolved. No new symptoms.
Low back reveals some slight limitation in forward flexion.
ASSESSMENT: Resolving neck and back strain.
PLAN: Physical therapy to get patient back on road to recovery and help get back to normal full-time activity and exercise. Cervical spine x-rays unremarkable except for slight straightening consistent with spasm. Advised to follow-up when ready to come to closure on this.

3/28/yr: Ian Tersky, P.T., Charlotte Comprehensive Physical Therapy Center.
Initial evaluation.
Chief complaints: neck/back pain; headaches.
Symptoms aching in nature and intermittent.
Discomfort caused by symptoms severe in intensity, affecting her most in afternoon and evening.
ASSESSMENT:
Diagnosis: Cervicolumbar strain.
Problem list: Limited cervical range of motion; limited lumbar range of motion; increased density right levator and lumbar myofasia.
GOALS:
Short term: Decrease inflexibility and inflammation; increase cervical range of motion to full.
Long term: Increase lumbar ROM to full; decrease headache frequency and intensity.
PLAN:
Treatment: Ice; facet stretching; massage; and flexibility exercises. Treatment to be followed 2 times per week for approx. 3 weeks.

4/2/yr: Charlotte Comprehensive Physical Therapy Center.
Physical therapy.

4/5/yr: Charlotte Comprehensive Physical Therapy Center.

Physical therapy.

4/10/yr: Charlotte Comprehensive Physical Therapy Center.
Physical therapy.

4/13/yr: Charlotte Comprehensive Physical Therapy Center.
Physical therapy.

4/17/yr: Charlotte Comprehensive Physical Therapy Center.
Physical therapy.

5/10/yr: Dr. Bruce Cooper, MD, Charlotte Family Medicine, P.A.
Patient here to achieve some closure on her motor vehicle accident. Gets occasional mild tightness in lower back with rotation. Finds physical therapy helpful.
Examined.
ASSESSMENT: Resolved back and neck strain.
PLAN: Patient to continue as she has been doing. No need for further physical therapy at this point. Continue with home exercise program.[12]

MEDICAL EXPENSES

Listed below are Ms. Poole's medical and miscellaneous, pharmaceutical expenses to date (*See* Exhibit 6):

MECKLENBURG COUNTY AMBULANCE SERVICE	$ 250.00
HOPEVIEW MEMORIAL HOSPITAL	$ 200.00
CHARLOTTE FAMILY MEDICINE CENTER, P.A.	$ 350.00
SPELLMAN RADIOLOGY	$ 250.00
CHARLOTTE COMPREHENSIVE PHYSICAL THERAPY CENTER	$ 500.00
MISCELLANEOUS PHARMACEUTICAL EXPENSES	$ 80.00
	$ 1,630.00

LOST WAGES[13]

Ms. Poole is employed as an Account Technician I at the University of North Carolina at Charlotte. Due to the accident, she missed 52 hours of work at a gross wage of $35.00 per hour. (*See* Letter from UNC Personnel and Benefits Office at Exhibit 7).

[12] If the claimant sustained an injury that required future medical treatment, the next section of the brochure would summarize that on-going treatment under a heading styled, "FUTURE MEDICAL TREATMENT."

[13] If the client will sustain future lost wages or a reduction in earning capacity, these matters would also be detailed here.

TOTAL LOST WAGES $ 1,820.00

PAIN AND SUFFERING[14]

Prior to the collision, Ms. Poole was a healthy 43-year-old woman. She had no prior history of medical problems like those sustained in this collision. Given the tremendous force of the collision (*see* photos at Exhibit 4), Ms. Poole was fortunate that she was not more seriously injured and that she was able to recover in five months.

As the medical records show, Ms. Poole sustained at least 116 days of continuous pain of varying intensity from January 4, [year] through the end of April [year]. As the physical therapy record of March 28 [year] states, her "discomfort [is] caused by symptoms severe in intensity, affecting her most in [the] afternoon and evening." Accordingly, the jury would be permitted to compensate approximately 80% of Ms. Poole's pain and suffering through a *per diem* calculation.

The medical records objectively show that the elements of her pain and suffering include (1) "a fracture of her right 10th rib," (2) "bruising to medial left knee," (3) "lower back pain,"(4) "upper back pain," (5) "difficulty in sleeping," (6) "avoiding any activities that exacerbate any of her pain," (7) "left hip pain," (8) "neck strain and pain," (9) "blurring of vision," (10) "muscle spasms," (11) "sharp pain in head," (12) "limitation in forward flexion," (13) "headaches," (14) "limited cervical range of motion," and (15) "galactorrhea due to emotional trauma of motor vehicle accident."

Ms. Poole's injuries markedly affected her daily activities. Her sleeplessness, headaches, and blurred vision left her lethargic and at times disoriented. Her rib fracture and cervical and paralumbosacral pain limited her movement. Routine household chores, grocery shopping, and even driving were difficult. Prolonged sitting at work exacerbated her pain in the afternoons and into the evenings. She was forced to markedly limit her social activities. She canceled her aerobics classes, and was forced to restrict other recreational activities. She was under Advil for pain, Ambien for sleeplessness, and variously used heating pads, ice packs, and hot packs to relieve her condition. The prolonged emotional trauma of the collision even manifested itself in a physical hormone imbalance.

DAMAGES SUMMARY

MEDICAL EXPENSES	$ 1,630.00
LOST WAGES	$ 1,820.00
PAIN AND SUFFERING	$ _____
TOTAL DEMAND	$ _____

Based on the foregoing, we propose that $_____ would be a reasonable sum to settle this case. After you have had an opportunity to review this

[14] If the claimant has permanent injury or will sustain future pain and suffering, these matters would also be detailed here under a heading such as "PAIN AND SUFFERING AND PERMANENT INJURY."

brochure, I look forward to hearing from you and working with you on this case.

Sincerely,

John W. Doe, Jr.

§ 13.07 Negotiating Over the Telephone—Advantages and Disadvantages

When negotiations are conducted over the telephone (as contrasted with written communication), communication is enhanced and misunderstandings or misperceptions are reduced. Questions can be asked to clarify ambiguous proposals, and the interests and reasons underlying a party's proposals can be fully explored. The negotiators are able to share each other's views firsthand and focus on the particular matters they consider important. Moreover, even though the negotiators are not meeting face to face, they can usually get a sense of each other's true intentions by discerning changes in tone and voice inflection.

Telephone negotiations also give the parties a greater sense of freedom and security than they otherwise might feel when negotiating face to face. The negotiator is free to choose the time when he is willing to talk, and the pressure to make an on-the-spot response can be simply eliminated with a promise to phone the other party back after his proposal has been reviewed. Moreover, it is easier to say no to the other party over the phone, and discussions can be more gracefully terminated than would be the case if they were being conducted face to face.

On the other hand, because telephone negotiations are less personal than face-to-face interactions, they are almost always more abbreviated than personal meetings. Consequently, it is usually more difficult to create a concerted, psychological commitment to resolve the case over the phone. For the same reason that it is easier to say no over the phone, it is also easier for a party to engage in overtly competitive and deceptive tactics. In addition, notwithstanding that it is easier to come up with a graceful excuse for cutting short a phone conversation, some individuals feel psychologically pressured to negotiate once they are on the phone even though they may be distracted or unprepared. This may lead to hasty concessions and uninformed decisions.

§ 13.08 Techniques for Effective Telephone Negotiations

Many of the bargaining techniques that are effective in face-to-face negotiations (*See* Chapter 14) apply to telephone negotiations as well. In addition, you should keep the following in mind:

[1] Do Not Commit Yourself Unless You Are Prepared

The negotiator who makes the telephone call often has an advantage over the recipient because the former will be prepared and the latter may be caught unawares. This may allow the phoning party to be more persuasive and exact

greater concessions than would be possible if the negotiation had been formally scheduled. Thus, the recipient of the phone call should never hesitate to postpone making a response or decision until she is fully prepared to do so. In addition, the recipient should use the call as an opportunity to listen, ask questions, and obtain as much information from the other side as possible. After this information has been fully evaluated, the recipient can always call the other side back to give a response.

[2] Do Not Be Afraid to Be "Unavailable"

Of course, the recipient of a call may simply use the excuse that she is "unavailable" to take the call at the particular time. This is the best choice to make if you are so hurried or distracted that you cannot even use the call for the limited purpose of obtaining information from the other side. Moreover, if your objective is to delay negotiations, you can always have your secretary or assistant tell the other side that you will return the call at a later time.

[3] Use a Preparation Negotiation Outline

To negotiate effectively over the phone, you should prepare for it as you would for a face-to-face meeting. Thus, it may be useful to use a Preparation Negotiation Outline like that shown at § 12.04. It is also useful to prepare a checklist of items to be discussed to ensure that you present your points in a logical order and important matters are not overlooked.

In addition, take careful notes of the conversation so that you have a record of what was said. Concessions, promises, or other important points can often be forgotten during a protracted discussion. Throughout the conversation, confirm in your own words your understanding of the proposals or points being made by the other side. If an agreement is reached, promptly confirm its terms by fax, E-mail, or a follow-up letter to avoid any misunderstanding.

[4] Adjust the Pace and Tone of Your Voice

Unless you are negotiating on a televised conference call, telephone conversations do not, of course, allow the negotiators to observe one another. Thus, to enhance comprehension, you should consciously try to talk more slowly during a telephone negotiation. In addition, try to "put a face" in your voice. Even though the listener cannot see your expressions, if you talk as if he were sitting across the table from you, your tone of voice will convey greater feeling behind your words and enhance the persuasiveness of your presentation.

[5] Do Not Be Afraid to Call Back

After a telephone conversation is over, never hesitate to promptly call back if you discover an error or suspect a possible misunderstanding. The more abbreviated nature of telephone negotiations may sometimes cause the parties to overlook important matters or fail to clear up ambiguities in a final settlement offer. Thus, if you have any doubt about a proposal or agreement made over the phone, it is best to immediately call back and clarify the issue in lieu

of having to reopen negotiations after a written agreement has been prepared for the parties to execute.

Chapter 14

Negotiating Face to Face

SYNOPSIS

§ 14.01 Introduction

Negotiating face to face is a highly complex form of human behavior. Indeed, to negotiate effectively in person is much more of an art than a science. This effectiveness can be enhanced by understanding (1) how to set the stage for a face-to-face negotiation (*i.e.*, with whom, when, and where to negotiate, and who should attend the negotiation); (2) how to set the tone and agenda for the negotiation (*i.e.*, the negotiating atmosphere and the issues to be discussed); (3) the importance of reading body language during the negotiation; (4) how information is exchanged during the negotiation (*i.e.*, techniques for obtaining, protecting, and revealing information); (5) the process and techniques associated with traditional, adversarial bargaining (*i.e.*, the making

of offers, counteroffers, and concessions, and using different forms of persuasion); (6) the process and techniques associated with problem-solving bargaining (*i.e.*, identifying the parties' interests or needs, and brainstorming for mutually beneficial solutions); (7) how to combine adversarial and problem-solving bargaining when appropriate; and (8) how to conclude the negotiation.

§ 14.02 With Whom to Negotiate

In the vast majority of circumstances, you will have no control over choosing the person with whom you will negotiate. Once the opposing negotiator has been identified, you should conduct appropriate research about his likely style and strategy toward the negotiation (*see* §§ 8.04[2] and 12.02[3]). Sometimes it is desirable to arrange a pre-negotiation get-together to become acquainted with your counterpart and establish rapport. This initial meeting may also be useful to find out preliminary information about others who may be involved in the negotiation, and the general attitude of the other side toward the negotiation.

In the early stage of negotiations, it sometimes may become apparent that the negotiator for the other side actually has little authority to bind his principal. This is an undesirable situation because the success of a negotiation depends far more upon negotiating with a person who can make binding decisions than on negotiating with someone with whom you might feel more comfortable. If it is clear that the other side's agent has little authority, consider suggesting that the negotiation might be expedited by involving the principal or other decision-maker directly in the negotiation. This must be done tactfully so as not to offend the agent, and preferably should be arranged with the cooperation of the agent. If the agent is not agreeable to your suggestion, at the very least try to arrange a meeting or conference call with the agent and his principal.

Either at the outset of negotiations or as they progress, it may become apparent that you and your counterpart simply cannot get along with one another. In this situation, you might also suggest that the principals be directly included in the negotiation. Alternatively, you might suggest that additional negotiators participate in the discussions, or even that it would be in the best interests of both sides that each call upon some other representatives to continue the negotiation.

When the negotiation involves more than two parties, it is necessary to decide with which party you should start negotiations. While there may be myriad factors to consider in making this selection, generally it is desirable to start negotiations with the party who (1) is most likely to accept your position, (2) is most likely to establish a precedent during the negotiations, or (3) possesses the weakest bargaining power.

§ 14.03 When to Negotiate

Although it is rare to have any choice about the person with whom you will negotiate, you will often have greater control over the timing of negotiations. Generally, you should initiate negotiations when the other party is in the weakest position or your client is in the strongest position. The optimal time for negotiating may be influenced by tactics such as *Asymmetrical Time Pressure*, setting *Deadlines*, *Delaying*, taking some action to create a *Fait Accompli*, or the development of a *Surprise* (*see* Chapter 10). In addition, you should consider the most optimal day of the week or time of day to negotiate, which should usually be a time when the parties are most apt to be alert or when the opposing side is under a pressing time constraint.

§ 14.04 Where to Negotiate

Whenever possible, you should seize the opportunity to choose the site of the negotiation—usually your own office. The negotiator who negotiates on her "home court" is apt to be more relaxed, confident, and assertive. In contrast, the visiting negotiator occupies the subordinate status of a guest, and is more likely to feel constrained and distracted in unfamiliar surroundings. Because familiar surroundings tend to reduce tension and anxiety, arranging the negotiation on your home turf may be particularly important if your client will attend the negotiation. One circumstance in which you might deliberately choose to hold the negotiation at the opposing party's office is if you believe that you may have to use a *Walkout* tactic in the event the negotiation deadlocks.

If you are unable to arrange the negotiation at your office and have a strong reason for not negotiating at your opponent's office, propose that the meeting take place at a neutral location. If you make all of the arrangements for the neutral site and pay the expenses for its use and refreshments, you will effectively make it an extension of your own office. In addition, gratuitously making these arrangements shows respect for the other side and the importance you attach to the negotiation.

When you are able to control where the negotiation will take place, it is also important to give attention to the overall environment and available seating arrangements. Generally, the negotiating room should be conducive to a relaxed, noncompetitive environment. There should be a conference table if documents are to be reviewed, and if there will be groups of participants, it is desirable to have adjacent rooms available for private caucuses. Refreshments should be made available, and the room should be quiet and free from outside distractions and interruptions, particularly the telephone.

Seating arrangements can also affect the initial tone of the negotiation. For example, a more adversarial atmosphere may be created when participants are seated opposite one another at a rectangular or round table, whereas a more cooperative atmosphere may exist when the participants sit together in an L-shaped configuration at a rectangular table, or together in a semicircle at a round table.[1]

§ 14.05 Who Should Attend the Negotiation

If a negotiator intends to employ a *Good Guy-Bad Guy Routine/Mutt and Jeff* approach or a *Two Against One* strategy (*see* Chapter 10), it is necessary

[1] *See* M. Korda, *Power: How to Get It, How to Use It* (1975).

to have a colleague join him in the negotiation. A negotiator might otherwise choose to have a colleague or assistant join him at the negotiation merely to serve as a passive, objective observer, or to assist in note taking or locating and presenting documentation or other materials during the discussion. An assistant may also provide psychological support and give the lead negotiator the benefit of a detached perspective as the negotiation progresses.

Having your client attend the negotiation presents certain drawbacks. When your client is present: (1) it may be more difficult for you to control the negotiation and prevent inappropriate argumentation between your client and the other side; (2) the emotional aspects of the dispute may be more likely to pervade the negotiation; (3) candor may be inhibited; (4) the other side may not be able to engage in emotional venting as a prerequisite to serious discussions; (5) you may create the impression that your client does not have complete confidence in you; (6) you will be deprived of the convenient excuse of having to *Adjourn or Caucus* with your client; (7) a *Good Guy-Bad Guy Routine / Mutt and Jeff* or *Lack of Authority or Limited Authority* tactic cannot be employed; and (8) it may be difficult to engage in any *Off-the-Record Discussions* with the opposing negotiator (*see* Chapter 10).

On the other hand, having your client and the other side's client present during the negotiation may be useful (1) if the parties expect to have a continuing relationship; (2) if substantive or emotional misunderstandings can be smoothed over in a face-to-face meeting; (3) if the client's presence is necessary to provide technical expertise, clarification of the facts, or input about an unforeseen issue; (4) if it would be beneficial to demonstrate the client's sincerity or jury appeal; or (5) if having the client present will muzzle an obstreperous or irrational negotiator. If your client will attend the negotiation, he must be fully advised about what to expect in terms of his role and your role, the agenda of the negotiation, potential tactics, and the importance of carefully monitoring nonverbal behavior.

If you represent an institution, labor union, or large corporate client, it may be necessary to have client officials present during the negotiation for "political" reasons or to authorize a settlement. In these circumstances, it also is sometimes psychologically desirable to have your audience outnumber the other side's audience. In the absence of an actual audience at the negotiation, the effect of an audience might otherwise exist when a party establishes a *Coalition*, publicly pronounces a *Lock-in Position*, or engages in other *Publicity* by utilizing press releases or news leaks (*see* Chapter 10).

If it is decided that your client will attend the negotiation, generally you will "take the lead" in the negotiation. Your client's role should be carefully restricted to the reasons why he is attending. For example, if his attendance is designed to demonstrate his jury appeal or to smooth over a misunderstanding, at some point during the negotiation you might have your client describe the events surrounding the controversy or permit the other side to ask him appropriate questions about those events. Apart from your client's preplanned role, it is generally unwise for him to speak during the negotiation, and you might decide to continue the negotiation with the opposing side without your client present. Finally, in lieu of having your client present at the negotiation, you might choose to have him on telephone standby in the event you need to confer with him while the negotiation is underway.

§ 14.06 Setting the Tone

Once the stage has been set for the negotiation, the initial phase of the actual face-to-face meeting is a crucial opportunity to set the tone for the ensuing negotiation. This tone or atmosphere should be established from the time that the opposing side literally walks in the door. For example, a host negotiator who greets the other side with a smile, a handshake, and on a first name basis exudes warmth and trust. Greeting the visiting negotiator promptly and personally escorting her to the office or conference room show equality and respect. As mentioned in § 14.04, if the negotiators choose seats next to or adjacent to one another, as opposed to separating themselves by a wide distance or across from one another with a table in between, they will create a more cooperative atmosphere. On the other hand, a more adversarial atmosphere may be created when the negotiators are slow in starting the negotiation, shake hands as a glib formality, address one another as "Mr. _____ or Ms. _____," or deliberately seat themselves so as to create spatial separation, distance, or dominance.

After the initial greeting, the tone of the negotiation may be influenced by the extent to which the negotiators make an effort to engage in appropriate, casual conversation to establish rapport before "getting down to business." This preliminary conversation is useful to humanize the setting, to relax the participants, and to allow them to get to know one another if they have never met before. In this regard, it cannot be overemphasized that in an appropriate situation, making at the outset a genuine apology about the circumstances of the case or dispute may have a dramatic effect on the entire tone and ultimate success of the negotiation. This is so because direct displays of humility, contrition, or apology are rarely expressed in the face of the formalistic, ritualistic, and often nonsensical practice of never admitting fault or liability regardless of the facts. In addition, in an appropriate case, a negotiator should not hesitate to convey at the outset her desire to engage in a cooperative or problem-solving approach to the negotiation. This direct expression of a non-adversarial attitude toward the negotiation is uniquely powerful precisely because of the instinctive, competitive style and adversarial strategy that otherwise permeate most legal negotiations.

§ 14.07 Setting the Agenda

The issues to be resolved in the negotiation and the order in which they will be addressed constitute the agenda for the negotiation. The agenda might be tacit, *ad hoc*, expressly agreed upon before the negotiation begins, or established through discussion or debate at the negotiation session. Whether the agenda is prearranged or established during the negotiation, you should have a specific agenda in mind before the face-to-face meeting.

This agenda should be prepared from your "Negotiation Preparation Outline." If you are able to control the issues to be resolved and the order in which they will be addressed in the negotiation, you will sometimes have an advantage over your opponent, particularly in complex adversarial bargaining. This is because the negotiator who controls how the issues are defined and when they will be discussed is in a better position to dictate the focus

of the negotiation by framing the issues in the light most favorable to his client, emphasizing those topics or points of most importance to his client, and de-emphasizing the matters of most importance to the other side.

Most negotiations involve two types of issues: (1) those which center around the parties' "primary objectives" (*i.e.*, those matters which must be obtained to reach an agreement), and (2) those which constitute the parties' "incidental objectives" (*i.e.*, those matters which are of lesser importance and might be traded in order to obtain a primary objective) (*see* § 12.03[3]). The particular outcome of a negotiation may largely depend upon the order in which these different types of issues are presented and discussed.

There are distinct advantages and disadvantages to starting the negotiation with the "primary" issues on the one hand, or "incidental" issues on the other. Adversarial negotiators who put their primary objectives at the forefront of the agenda do so on the theory that it may be easier to resolve these difficult matters at the outset when the negotiators may have a more conciliatory attitude. Putting off the tough issues until the end may make them more difficult to resolve in the face of fatigue and if the parties have already used up most, if not all, of their "bargaining chips" constituting their incidental objectives. Moreover, dealing with the hard issues first creates a challenge that tests the parties' initial willingness to be flexible, and places pressure on them to determine more quickly whether a settlement can be reached or deadlock is inevitable. When problem-solving negotiators take this approach, they are sending the message that it is essential to first address the parties' most important needs or interests in order to reach an accord that accommodates as many of those needs or interests as possible.

The obvious disadvantage of starting with the primary issues is that the negotiation may result in premature deadlock. The haste associated with "cutting to the chase" may cause the negotiators to become discouraged and abandon the negotiation before giving it a chance to work its course. In addition, if the primary issues are resolved first, the bargainers may not have a chance to use their "bargaining chips" to optimal advantage by trading them for a more favorable resolution of a primary issue.

Adversarial negotiators who put the incidental issues at the top of the agenda theorize that resolving these easier matters at the outset builds an atmosphere of trust, cooperation, and conciliation between the parties, and establishes a positive momentum for subsequently tackling the tougher, primary issues. Similarly, problem-solving negotiators may start with the less difficult issues to demonstrate to the other side how a mutual effort to accommodate the parties' varying needs or interests may be effectively employed in resolving the remaining harder issues.

The principal disadvantage to this approach is that it may create the false impression that the party initiating the resolution of the easier issues at first instance is being flexible, accommodating, and anxious to reach agreement because of weakness. This misperception may cause the opposing side to take a more hardened, demanding, and unrealistic approach to the primary issues and cause the negotiation to unnecessarily deadlock. Moreover, if both parties have exhausted their "bargaining chips" at the outset, neither side may be left with any matters to trade once the bargaining turns to the toughest issues.

In light of the relative advantages and disadvantages of starting the negotiation with either the primary or incidental issues, many negotiators strive to balance the discussion of these different matters throughout the negotiation. In this way, the risks associated with the "all or nothing" approach of starting with the primary issues, or the "easy does it" approach of beginning with the incidental issues are minimized. The adversarial negotiator's technique of controlling the agenda is thus tempered with a willingness to be flexible in discussing the various issues in whatever order promotes ultimate progress in the negotiation.

From the problem solver's standpoint, so long as the parties are focusing on their real needs or interests, it matters less whether those interests involve primary or incidental issues at any particular stage in the negotiation. Indeed, many problem-solving negotiators use the tactic of allowing the other side to dictate the agenda as a means of finding out what interests are most important to the opposing party and may be compatible with one's own interests. It is only when the opposing party deviates from focusing on the joint needs or interests of the parties and becomes entrenched in positional bargaining that the problem solver becomes more concerned about controlling the agenda. In that event, the problem solver will strive to refocus the parties' attention back to their respective needs or interests, by trying to "separate the people from the problem," and using "brainstorming" to arrive at mutually beneficial solutions based on objective criteria (*see* § 14.14[2]).

Setting the agenda at the negotiation usually takes the form of one party suggesting that the discussion begin with a particular issue. Alternatively, a party might simply begin discussing some issue without expressly stating the issue as a starting point. The advantage of the subtlety of the latter approach is that it disguises the party's attempt at agenda control and obviates a mini-negotiation over what will be negotiated and how. Sometimes, particularly in complex business or labor negotiations involving numerous participants, the agenda will have been pre-negotiated and reduced to writing such as through a *Draft Document or Single Negotiating Text* (*see* Chapter 10).

§ 14.08 Reading Body Language

To be a skilled negotiator you must not only be sensitive to understanding what is being said at a negotiation and "reading between the lines" of what is being said and not being said, but you must be sensitive to the other party's nonverbal thoughts and feelings expressed through body language. Some negotiators become so consumed with the ritualistic aspects of making and meeting offers and concessions that they unwittingly ignore what they can learn intuitively from the nonverbal reactions of the other side. It is essential to keep in mind that what the other party "feels" during the negotiation is often integral to the bottom-line outcome.

Reading body language is much more instinctive than scientific. It is essentially grounded in experienced intuition. That experience cautions that many people react differently under different circumstances, and the mannerisms displayed by one person may mean something quite different when

displayed by another. Thus, reading body language accurately must be done contextually and holistically.[2]

§ 14.09 Exchanging Information

After the "small talk" has set the tone for the negotiation and the agenda has been explicitly or implicitly established, the substantive portion of the negotiation usually begins with the parties exchanging information that is relevant to their ensuing bargaining. This "information stage" (sometimes called the "assessment stage") is, from a conceptual standpoint, often viewed as a distinct component of the negotiation process that is followed by the so-called "persuasion" and "exchange" stages during which the parties make their offers, counteroffers, and concessions toward a final agreement.[3] While these stages provide a useful analytical framework for understanding the negotiation process, it is important to emphasize that they are invariably intertwined and permeate the entire negotiation process.

In general, the parties exchange information during the negotiation in order to (1) predict what each one will do, (2) understand what each is proposing, (3) determine the accuracy or truthfulness of what is being said, and (4) evaluate what matters are of greater or lesser importance to each party. In addition, information is used to persuade in that it forms the basis for the reasons underlying the parties' offers, counteroffers, concessions, needs or interests, and proposed solutions. Where competitive, adversarial bargaining is involved, the ability to control critical information about the strengths and weaknesses of the parties' respective positions is integral to the successful outcome of the negotiation. For cooperative problem solvers, exchanging information is essential to identifying the parties' varying needs or interests and in fashioning mutually beneficial solutions.

§ 14.10 Obtaining Information

As detailed in Chapter 12, prior to commencing the negotiation, you should obtain as much information as possible from your client, the other party, and the opposing negotiator that is pertinent to (1) the underlying needs or interests of each party; (2) the primary, secondary, and incidental objectives of each party; (3) the possible solutions that may satisfy each party's interests and objectives; (4) each party's best alternatives to a negotiated agreement (BATNA); (5) each party's strongest and weakest factual and legal leverage points; (6) the target and resistance points of each party; (7) each party's negotiating strategy and style; (8) the specific offers or proposals that may be presented by each party; and (9) the particular tactics each party may employ during the negotiation. This information may be contained in a Negotiation Preparation Outline for use during the face-to-face negotiation. The Outline will also contain an "Information" category that lists information "to

[2] *See generally*, D. Morris, *Bodytalk* (1994); D. Druckman, et. al., *Nonverbal Communication: Survey, Theory and Research* (1982); A. Mechrabian, *Nonverbal Communication* (1972).

[3] *See* R. Condlin, Cases on Both Sides: Patterns of Argument in Legal Dispute-Negotiation, 44 U. Md. L. Rev. 65 (1985).

obtain" from the other side, information "to reveal" to the other side, and information "to protect" from the other side (*see* § 12.04).

During the face-to-face negotiation, you will need to confirm and obtain information from the other side about one or more of the nine categories listed above. Thus, these categories serve as a useful checklist of information that is relevant to both adversarial and problem-solving bargaining.

In obtaining information from the other side during the negotiation, in addition to the technique of using *Questions to Facilitate Agreements* in Chapter 10, it is useful to keep the following matters in mind:

[1] Ask Broad, Open-ended Questions When Seeking Maximum Information

The best technique for obtaining maximum information is to ask broad, open-ended questions (*e.g.*, "Tell me how the contract came about. . ."), as opposed to directed or leading questions that call for a "yes" or "no" answer (*e.g.*, "Did you propose the purchase price?" or "You proposed $20,000, didn't you?"). Open-ended questions invite the other negotiator to talk, and the more she talks, the more information you are likely to obtain.

[2] Use Silence, Encouragement, and Questions that Call for Elaboration

Using silence and not interrupting the speaker are also effective in obtaining maximum information. In addition, you can indirectly encourage the speaker to elaborate by using utterances that indicate attention, such as "I see," "hmmm," "uh huh," or by asking open-ended follow-up questions that call for elaboration, such as "Could you explain that?" or "What happened next?" You may also find that reflecting feelings encourages the speaker to continue talking. Phrases such as, "That must have upset you," or "I understand," convey your focus on the listener and facilitate the continued exchange of information.

[3] Listen Intently and Patiently

Part of the art of information gathering (and effective questioning) is listening. While this point is obvious, many negotiators are habitually prone to talk more than to listen. Effective listening requires patience and a willingness not to hurry through the negotiation. So long as the other side is talking, even if what is being said is repetitive or rambling, patience may yield additional relevant information. Moreover, it is difficult to listen effectively if you are distracted by excessive note taking or overly preoccupied with thinking about your response to what is being said.

[4] Ask Specific Questions to Clarify, Pin Down, and Confirm Information

Specific or leading questions are most useful to clarify information, pin down ambiguous responses, or to confirm the accuracy of information you already

possess. When taking a deposition, for example, many lawyers use a so-called "funnel" technique whereby the examiner begins with open-ended questions that elicit a plethora of information metaphorically represented by the wide mouth of the funnel, and then asks a series of more specific questions to clarify and pin down the details of what is being said which is represented by the bottom tip of the funnel.[4] Information can also be clarified or confirmed by recapitulating what has been said (*e.g.*, by responsively saying, "So, if I understand your point, it is. . .").

[5] Insist upon the Necessity of Receiving Crucial Information

If the other side is being evasive or refuses to reveal information that is essential to the negotiation, do not hesitate to point out why the requested information is important and why the failure to supply it will make further negotiation unproductive or impossible. An appeal to fairness and reciprocity is often successful. Alternatively, if the other negotiator is being unreasonably secretive, you might explain to him that his evasiveness has forced you to assume the facts in the light least favorable to his client. Notwithstanding the risks associated with this confrontational approach, it may be enough to cause the other side to be forthcoming.

§ 14.11 Protecting Information

Although sharing information is integral to the negotiating process, negotiators must protect privileged information; and they invariably avoid revealing other sensitive or damaging information whenever possible. This occurs even in the most cooperative, problem-solving negotiations.

When protecting privileged information or avoiding the disclosure of damaging information, a negotiator should never engage in outright misrepresentation. As discussed previously (*see* § 9.06), it is unethical to make false statements of material fact, and if a misrepresentation is exposed, the negotiator's credibility will be severely if not irreparably impaired. To avoid revealing information without misrepresentation, negotiators sometimes employ one or more of the so-called *Blocking Techniques* introduced in Chapter 10. The most common blocking techniques are as follows:

[1] Ignore the Question and Change the Topic

Because many listeners become so caught up in what they are being told, they often forget the question they asked. Thus, if you are faced with a question that asks for information you do not want to reveal, it is often effective to simply ignore the question and continue the conversation on a different topic. The effectiveness of this technique is enhanced if your response relates to a matter of importance to the other side, notwithstanding its unresponsiveness to the particular question asked.

[4] See David M. Malone & Peter T. Hoffman, *The Effective Deposition*, 70–78 (1993).

[2] Answer the Question by Asking Another Question

Sometimes asking a question in response can deflect a question. For example, suppose your opponent asks, "What tax returns do you have to support your client's claim for lost wages?" If you want to avoid revealing your client's tax returns (or non-existence of them), you might respond: "Don't you think that my client's W-2 statement accurately shows his earnings before the accident?"

[3] Answer the Question by Answering Another Question

If you are asked a compound question (*e.g.*, "How has the boycott affected local sales and your last year's contract with Corporation X?") you can choose which part of the question to answer and ignore the other part. Alternatively, you might attempt to answer the question by answering another question. This may be done by re-framing the question in a way that the answer will not be damaging, by answering another question that has recently been asked, or by simply answering another question as if it had been asked (*e.g.*, "If you're asking about the nationwide effect on our business, I can tell you it has been devastating. . .over a dozen suppliers have canceled their contracts with us.").

[4] Over-Answer or Under-Answer the Question

Giving broad, general responses can often deflect specific questions. Similarly, giving narrow responses can often deflect general questions. This technique of over-answering a specific question or under-answering a general question is a variation of the technique in [3] above.

[5] Rule the Question Out of Bounds

If a question is asked that calls for revealing privileged information, such as confidential attorney-client communications or work-product material, do not hesitate to explain that you are not at liberty to reveal such information. However, be careful to be consistent about the types of information you claim to be privileged. Revealing certain portions of information claimed to be privileged but declining to reveal other information on the same subject will be construed as disingenuous.

§ 14.12 Revealing Information

Exchanging relevant information is, of course, essential to the negotiating process. Generally, there are five categories of information you will want to reveal: (1) your client's interests or needs; (2) your client's objectives; (3) possible solutions to the dispute or problem at hand; (4) your strongest factual and legal leverage points; and (5) your specific offers or proposals. All of this information should be contained in your "Negotiation Preparation Outline." In short, these types of information are necessary to educate and persuade the other side to the result you hope to obtain through the negotiation.

Revealing information is a dynamic process that occurs throughout the negotiation. Information is most effectively revealed through a dialogue rather

than a monologue. While some negotiators prefer to start the substantive phase of a face-to-face negotiation with an "opening statement" that essentially "lays all of the cards on the table," this is usually undesirable. Notwithstanding the directness of this approach, opponents are often suspicious of wholesale voluntary disclosures, and sometimes view them as patronizing, disingenuous, self-serving, and even manipulative. (*See also, Reactive Devaluation* at § 7.06[4]).

Thus, it is usually best to err on the side of divulging important information gradually. Allow the other side to extract information through her questions. In this way, the other side is more likely to listen to your information. When appropriate, you can always emphasize or reveal additional information in responding to particular questions.

The effective exchange of information occurs in a fluid, mutual, and cooperative process. It is conversational and sharing in nature, not a structured presentation of alternating opening speeches or a staid question-and-answer session. In sum, it is most effective when conducted in an open, free-flowing discussion.

§ 14.13 Adversarial Bargaining

In adversarial bargaining, after the parties have set the tone and agenda and exchanged pertinent information, the negotiation proceeds into the so-called "persuasion" and "exchange" stages whereby the parties make offers, counteroffers, and concessions in an effort to reach a final agreement. The process and techniques associated with these aspects of the negotiation are discussed below.

[1] Making Offers

[a] Who Should Make the First Offer

While negotiators frequently try to induce their adversaries to make the first offer, there is no empirical evidence that making the first offer results in a less favorable outcome to the negotiation. Quite often, one party will simply decide to "get the ball rolling" by making a first offer, or, out of custom, the party who initiated the claim or the negotiation will make the first offer.

Negotiators who prefer to induce the other side to make the first offer adopt this approach for four reasons. First, making the first offer may give the appearance that one is overly eager to reach an agreement and has a weak position. This reason for not making the first offer is largely overstated. After all, no negotiation can proceed unless someone makes the first offer.

Second, it is asserted that if the party making the first offer has miscalculated the value of the case, he will find himself at a distinct disadvantage if his initial offer falls close to the other party's bottom line or resistance point. For example, if the plaintiff in a personal injury case makes a first offer of $75,000 and the defendant (having a bottom line of $70,000) would have started with $30,000 had he made the first offer, in hindsight the plaintiff will realize he woefully underestimated the value of the case and his first offer should have been far in excess of $75,000.

Third, the negotiator who can induce the other side to make the first offer can adjust his initial counteroffer to make it appear that his goal is the midpoint between the two opening offers. For example, if one's goal is to obtain $50,000 and the other side makes a first offer of $10,000, an initial counteroffer of $90,000 will keep the target point of $50,000 in the middle.

Fourth, inducing the other party to make the first offer will frequently induce that party to make the first concession after the responding party makes his initial counteroffer. There is some statistical evidence to suggest that the party who makes the first concession does less well in the negotiation,[5] perhaps because an initial concession provides the first forecast of the conceding party's concession strategy and potential target and resistance points.

In the final analysis, with the exception of the situation where you are unsure about the value of the case, it makes little difference which party makes the first offer. Indeed, the party making the first offer will have the advantage of observing the other party's initial reaction to the proposal and thus may learn something about his potential settlement range.

Nevertheless, if you have a good reason to induce the other party to make the first offer, you should try to do so. If your opponent steadfastly declines to make the first offer, you can always protect yourself against a miscalculation by (1) making an opening offer that is more extreme than the one you originally planned to make, or (2) expressing your first offer in the form of a dollar range (*e.g.*, "I would estimate that this case is worth anywhere from $100,000 to $200,000."). Moreover, in the unfortunate event that you discover that your first offer was a gross miscalculation, don't be afraid to substitute it with a revised offer and an explanation for your original miscalculation. Despite the embarrassment and loss of credibility that this retraction may cause, it may be the only way to avoid a bad agreement for your client.

[b] When to Make the First Offer

Before making a first offer, you should be sure that during the face-to-face negotiation you have obtained as much information as possible from the other party about (1) his underlying needs or interests; (2) his primary, secondary, and incidental objectives; (3) possible solutions that may satisfy his interests and objectives; (4) his best alternatives to a negotiated agreement (BATNA); (5) his strongest and weakest factual and legal leverage points; (6) his potential target and resistance points; and (7) his potential offers or proposals (*see* § 12.03). While, prior to the face-to-face meeting, you will have forecasted these matters in your Negotiation Preparation Outline, you must appropriately revise the information in your Outline based on what you have learned first-hand at the meeting. Once you have taken into account any revisions to your Outline, you will be in a position to make your first offer.

[5] R. M. Bastress & J. D. Harbaugh, *Interviewing, Counseling, and Negotiating* 493 (1990).

[c] The Amount of the First Offer

Setting the amount of your first offer (or responsive counteroffer) depends upon the estimate you have made in your Negotiation Preparation Outline of both parties' target and resistance points. As mentioned previously, studies have shown that a negotiator might obtain a better outcome if her first offer represents a goal that is greater than her estimated target point (*see* § 12.03[10]). Thus, in a damages case, if the plaintiff's target point is $70,000 and her resistance point is $30,000, and the defendant's target is to pay only $20,000 and his resistance point is $50,000, the plaintiff might make a first offer of $90,000, and the defendant might make an initial counteroffer of $10,000 (*see* diagram at § 11.02). Generally, for the purpose of making first offers, it would be disadvantageous for either party to make an opening offer that falls within the parties' "settlement zone" of $50,000 to $30,000 (*i.e.*, the range between the parties' respective resistance points).

However, it is also unwise for a party to make an opening offer that is extreme in the sense of being wholly devoid of any rational basis. An outrageous opening offer may result in premature deadlock and loss of credibility. If you are confronted with an outrageous opening offer, it is usually best to summarily reject it and resume preliminary discussions or the exchange of further information. After your opponent is given some time to save face, you can either induce him to make another first offer or make your own first offer.

[d] Communicating Offers

The cardinal rules about making any offer are to make it (1) succinct, (2) specific, and (3) justifiable.[6] Brevity is important in order to avoid unnecessary elaboration or a slip of the tongue that might reveal your resistance point or concession strategy. Too often a negotiator will make the mistake of excessively elaborating upon the reasons for her offer such that she unwittingly reveals more information underlying the offer than she intended. This sometimes has the ironic effect of exposing fallacies in the basis of the offer itself.

Second, the offer should be specific rather than vague. As applicable, all essential terms about timing and performance should be spelled out. Specificity avoids misunderstandings and demonstrates the negotiator's commitment to the offer.

Third, every offer must be justifiable. This means that you must be prepared to provide precise and persuasive reasons for your offer based on your strongest factual and legal leverage points contained in your Negotiation Preparation Outline. When communicating your offer, it is usually desirable to provide the other side with specific reasons for your proposal (*e.g.*, "Our $11,668 offer is based on $5,000 in lost wages, $2,668 in medical expenses, and $4,000 for four months of pain and suffering during which Mr. Smith was undergoing regular treatment."). Avoid giving a lecture about your reasons.

[6] *See* R. M. Bastress & Joseph D. Harbaugh, *Interviewing, Counseling, and Negotiating* 507 (1990).

You can always amplify upon your reasons in response to questions from the other side. (*See also* § 14.13[4][a]).

[2] Making Counteroffers

Like opening offers, all counteroffers should be made with brevity, specificity, and justifiable reasons. However, before making a counteroffer, you should carefully evaluate the other side's offer in terms of understanding (1) exactly what is being offered, and (2) the other party's reasoning behind his offer. Do not hesitate to ask follow-up questions about any specifics of the offer and why the other party considers his proposal reasonable.

When probing the rationale for an offer, you will often recognize fallacies or weaknesses in the other party's position or analysis. This will provide you with an opportunity to expose and discuss those weaknesses to (1) lower your opponent's aspiration level, and (2) formulate and justify your counteroffer. It is important to re-emphasize that although you will have prepared one or more counteroffers in your Negotiation Preparation Outline, you should appropriately revise any counteroffers in light of the additional information you have learned about your opponent's offers and emerging concession strategy.

[3] Making Concessions

[a] When to Make Concessions

Concessions are an integral part of negotiation. They may be triggered by any number of the tactics or techniques discussed in Chapter 10 such as *Abdication, Asymmetrical Time Pressure, Br'er Rabbit*, the formation of a *Coalition, Deadlines* or other time pressures, *Escalating Demands*, a *Fait Accompli, False Demands, False Emphasis, False Multiple Concessions, Lock-in Positions, Low-Balling, Nibbling, Preconditions or Conditional Proposals, Reversing Position, Splitting the Difference, Surprise*, a *Take-it-or-Leave-it* approach, *Threats*, or a *Walkout*. In addition, a party's mere desire to put an end to the dispute, preserve good will, or accede to the advice of a third party such as a judge or mediator often results in concession behavior.

Generally, concessions are appropriate when your use of argument, persuasion, threats, promises, or other tactics have been unsuccessful, and you still have some distance between your latest offer or counteroffer and your resistance point. In any event, in the absence of a concession by one party or the other, there will be no further movement toward an agreement. Thus, you should be willing to make concessions so long as you believe that the outcome of the negotiation will be better than your best alternative to a negotiated agreement.

Whether to make the first concession or wait for the other party to do so is a controversial issue. As mentioned in § 14.13[1][a], there is some statistical evidence suggesting that the party who makes the first concession does less well in the negotiation. However, if you make one or more minor concessions at the outset without losing bargaining leverage, you may have greater success

later on in extracting more important concessions from the other party who has been psychologically induced to reciprocate out of a sense of fairness. That is, it often pays to give the appearance of generosity and cooperativeness by initiating one or more small concessions that do not equal a major concession. In this way, the purported generosity doesn't cost much.

[b] Concession Strategy

Effective negotiators tentatively plan out their concession strategy in advance of the face-to-face negotiation. This strategy should be reflected in the 1st, 2nd, 3rd, and 4th "Offers or Proposals" contained in your Negotiation Preparation Outline. Each successive offer will reflect one or more additional concessions. Your planned concession pattern will also be based on the successive offers or proposals that you anticipate will be made by the other party.

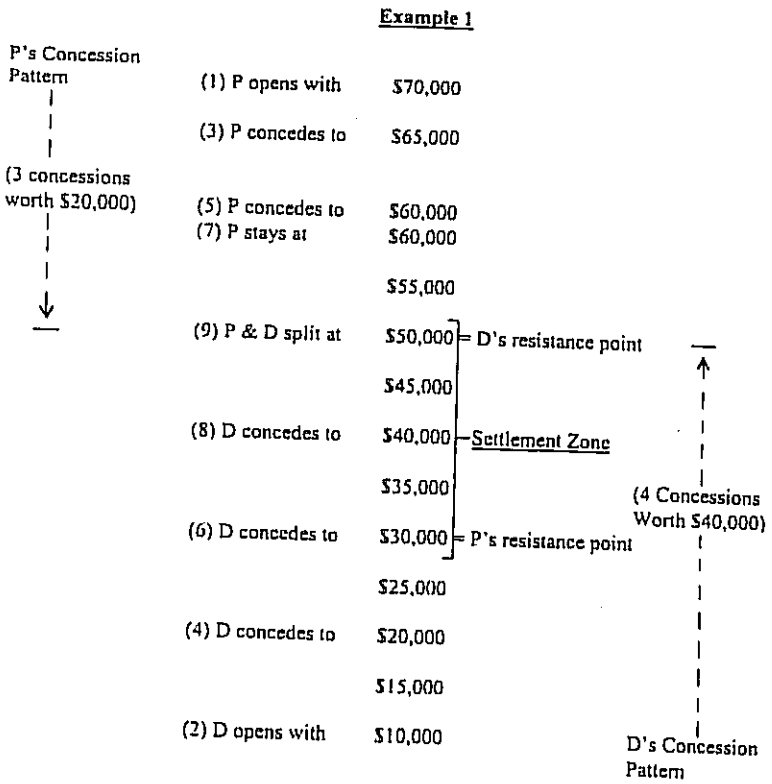
Some research suggests that when one party's concessions are few and small, the opposing party is more likely to reduce her aspirations and make both greater and more frequent concessions. Thus, as a general rule, negotiators tend to be more successful if they make both fewer and smaller concessions than their adversaries.[7] As summarized by one authority:

> The research data suggest you can construct an effective concession pattern as an adversarial negotiator by doing the following: Be sure your rate of concession is not too rapid, nor the size of the concessions too great, nor the number too many. Consistent with the research, taking a strong stand on a moderately high or low opening offer with one or, at most, a few concessions to your resistance level will produce the most effective results. Finally you should attempt to accurately identify the minimum your opponent will accept to settle the matter [*i.e.*, his resistance point] and then position yourself just outside that point, resisting a further concession for as long as possible.[8]

Consider the following example:

[7] *See* C. Karrass, *The Negotiating Game* 18–19 (1970).

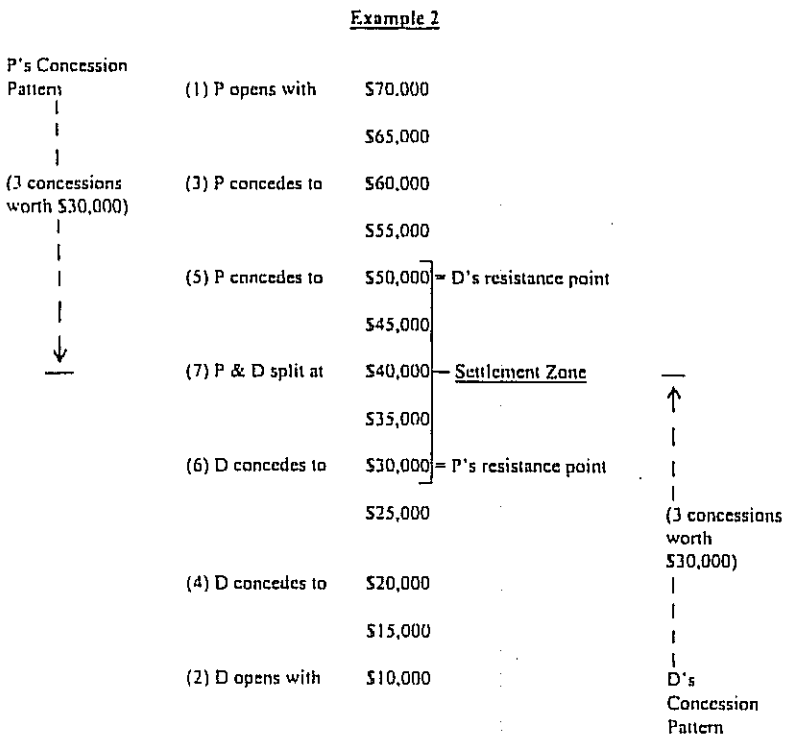
[8] R. M. Bastress & J. D. Harbaugh, *Interviewing, Counseling, and Negotiating* 520 (1990). *See also*, M. Saks & R. Hastie, *Social Psychology in Court* 124 (1978) (advocating "extreme initial offers, well above (or below) one's resistance point, making concessions few, small, reciprocal, and each one rationalized, explained, justified on some basis other than mere pursuit of agreement.").



In this example, the settlement zone is $30,000 to $50,000, with P's resistance point at $30,000 and D's resistance point at $50,000. The following exchange steps occur: (1) P makes an opening offer of $70,000; (2) D makes an opening offer of $10,000; (3) P makes a first concession to $65,000; (4) D makes a first concession to $20,000; (5) P makes a second concession to $60,000; (6) D makes a second concession to $30,000; (7) P refuses to move from his latest offer of $60,000; (8) D grudgingly makes a third concession to $40,000; and (9) P proposes to split the difference by conceding to $50,000 and D agrees by conceding to $50,000. The net result is that P has made slower, smaller, and fewer concessions than D. That is, P has made a total of 3 concessions worth $20,000 (while holding out at $60,000 for a time), and D has made 4 concessions worth $40,000 (while never resisting a concession).

Although the mid-point of the settlement zone is $40,000, P managed to achieve a settlement of $50,000 that constituted D's resistance point, as compared with P's resistance point of $30,000.

Consider, however, another example:



In this example, the settlement zone is still $30,000 to $50,000, with P's resistance point at $30,000 and D's resistance point at $50,000. The following exchange steps occur: (1) P makes an opening offer of $70,000; (2) D makes an opening offer of $10,000; (3) P makes a first concession to $60,000; (4) D makes a first concession to $20,000; (5) P makes a second concession to $50,000; (6) D makes a second concession to $30,000; and (7) P and D split the difference by each conceding an additional $10,000 to settle at $40,000. The net result is that neither party has made slower, smaller, or fewer concessions than the other. That is, each party has made 3 concessions worth

$30,000 and settled at the mid-point of the settlement zone ($40,000), which is the mid-point of their respective resistance points.

The foregoing examples teach that you can generally prevent the other side from having an undue advantage by (1) keeping careful track of the number and value of the other side's concessions, (2) seeking to extract reciprocal concessions in number and value, and (3) modifying your planned concession strategy in light of the particular concessions made by the other side. Monitoring the other side's concession behavior will also gradually reveal how close that side is coming to its resistance level and the relative impact that one's efforts at persuasion and use of various tactics are having upon the other side's concession pattern.

Patience in making concessions is important because it is estimated that as much as 80% of position changes tend to occur during the last 20% of the negotiation.[9] Being too hasty in making concessions may thus cause you to make a greater, aggregate compromise at the end of the negotiation than you would have made had your earlier concessions been fewer in number and value. In addition, impatience with the negotiating process may cause you to become frustrated and angry with your more cautious and grudging adversary, and become psychologically entrapped by the negotiation "game" such that you feel compelled to reach an agreement regardless of the cost.[10] This entrapment can be avoided by always keeping your resistance point and best alternative to a negotiated agreement (BATNA) in mind, regardless of the time, effort, and energy expended in attempting to reach an accord. There is nothing wrong with failing to reach an agreement, but it is poor advocacy to acquiesce to an agreement on behalf of your client simply for the sake of reaching an agreement.

This does not mean that in an appropriate situation you should not adjust your initial resistance point. If the negotiation process reveals that you have misjudged your pre-planned bargaining limits or that the consequences of non-settlement are more onerous than a negotiated result, you should be flexible in reassessing your resistance point. On the other hand, if it remains apparent that a negotiated agreement would be more costly than your best alternative to negotiation, and you are unable to convince the other party that a settlement on your terms would be better than his best alternative to a negotiated agreement, do not hesitate to tell the other side that you cannot make any further concessions. If negotiations deadlock at that point and thereafter do not resume, you can resort to your best alternative option.

[c] Communicating Concessions

Inasmuch as concessions are almost always embodied in counteroffers, your concessions should be communicated with brevity, specificity, and justifiable reasons (*see* § 14.13[1][d]). Providing one or more reasons for your concessions demonstrates to the other party that you are not simply engaging in a ritualistic offer, counteroffer, response, counter-response march along the

[9] *See* R. Dawson, *Roger Dawson's Secrets of Power Negotiating* 144 (1995).

[10] *See generally*, J. Brockner & J. Rubin, *Entrapment in Escalating Conflicts: A Social Psychological Analysis* (1985).

bargaining scale toward your ultimate resistance point. Rather, you want to demonstrate that your concessions are based on a rational assessment of the dispute or problem at hand and form a modified proposal to which you are committed.

Your reason for making a concession might stem from a persuasive point made by the other side, an effort to accommodate a particular need or interest of the other side, additional information you were not previously aware of, or a mere willingness to engage "in the spirit of compromise." Be succinct in giving your reasons and avoid being defensive.

Sometimes, particularly when there are multiple issues in the negotiation, it may be useful to forecast your willingness to make a possible concession in exchange for a specific concession from the other side (*e.g.*, "We might agree to make a larger lump sum payment if you are willing to accept our non-compete clause."). Using flexible language in communicating a concession makes it easier to retract your position and resurrect the concession at a later time. However, the excessive use of ambiguity in suggesting concessions may lead to misunderstandings and undermine your credibility for lack of committing yourself to making firm concessions.

[4] Forms of Persuasion

[a] Argument[11]

Argument as a form of persuasion permeates the making of offers, counteroffers, and concessions. Effective arguments contain six elements.

First, the argument should be based on some normative standard or objective criterion that is independent of the naked will of either side. Thus, the argument might be based on applicable law, the facts of the dispute or problem at hand, economic considerations, custom, ethical norms, expertise, analogy, or rule. These should be included as part of the "Factual & Legal Leverage Points" in your Negotiation Preparation Outline (*see* § 12.03[6]). The most effective arguments are based on as many of these normative standards or objective criteria as possible.

Second, the argument must show how the normative standard or objective criterion chosen applies to the parties' situation. That is, the legal, factual, or other reason asserted must be rationally related to the case at hand.

Third, the normative standard or objective criterion chosen must be credible or authoritative in the sense of being supported by appropriate evidence or other proof. Such evidence or proof might be based on indisputable or verifiable facts, logical presumptions, or so-called "customary proofs" such as generally accepted assumptions, beliefs, or values.

Fourth, the argument must be "balanced" in the sense of taking into account the other party's legitimate contentions. If you fail to be evenhanded or distort

[11] *See* R. Condlin, "Cases on Both Sides": Patterns of Argument in Legal Dispute-Resolution, 1 Md. L. Rev. 65 (1985); C. Perelman & L. Obrechts-Tyteca, *The New Rhetoric: A Treatise on Argumentation* (1971).

the merits of the other side's arguments, your own arguments will be unpersuasive. When possible, you must be prepared to distinguish away the strongest points advanced by the other party, or persuasively show how his standards or criteria are inappropriate, inapplicable to the situation at hand, or based on inadequate evidence or proof.

Fifth, when appropriate, your argument should be emphasized by highlighting and amplifying upon key points, without muddling the force of your argument with minutiae or ancillary matters. In addition, arguments should be emphasized by repeating them in different forms, and they should be expressed with tact and controlled emotion that takes into account the legitimate feelings of the parties.

Sixth, although it is usually best to be relatively brief when communicating an offer, your justification for it will have more persuasive force if you give multiple reasons for your proposal. That is, if you can show that no matter which way one looks at the problem the best solution always seems to be the same, your proposal will be much more convincing. This also means that you should be prepared to provide detailed factual information that supports the multi-dimensional reasoning behind your proposal.[12]

[b] Exhibits

Exhibits, such as models, diagrams, charts, photos, slides, or videos may be highly effective in presenting arguments or proposals. Of course, proper attention to considerations such as format, placement, layout, size, and style is essential. Similarly, careful attention should be given to the use of color schemes in exhibits to make them easy to read and understand.[13]

[c] Emotional Appeals

In contrast to rational argumentation, emotional appeals are directed to the other party's psychological needs and motivations. People need and are often motivated by (1) sensory rewards such as feeling good or free from anger, fear, tension, and anxiety; (2) social rewards such as prestige, acceptance, and love; and (3) ego-supporting rewards such as self-esteem and meaning in life. Cooperative negotiators frequently appeal to these psychological rewards through positive behaviors such as altruism, good will, friendship, humor, flattery, and the like. Conversely, some highly competitive negotiators employ a variety of negative behaviors or tactics, such as *Anger/Aggressiveness, Blaming or Fault-Finding, Escalating Demands, Reversing Position,* or *Threats* (*see* Chapter 10), that are designed to create frustration, guilt, embarrassment, discomfort, indebtedness, or other unpleasant pressures upon their adversaries. Whether emotional appeals are made through deliberately positive or negative behavior, the ultimate goal is the same—to induce the other party to enter into an agreement more favorable to one's own terms, either under circumstances where the other party will feel good about himself

[12] *See* Thomas F. Guernsey, *A Practical Guide to Negotiation* 101–102 (1996).

[13] For a discussion about using color in negotiations, *see* Cheskin, *Color Guide for Marketing Media* (1955); Cheskin, *Color for Profit* (1957).

n reaching an agreement, or under circumstances where he would prefer to :onclude an agreement in lieu of having to further endure the unpleasant :ncounter.

d] Threats and Promises

Threats and promises, whether express or implied, are commonly used orms of persuasion. A threat is intended to induce the other party to believe hat the cost of disagreement outweighs the cost of reaching a particular igreement. Threats are negative in the sense that they forecast preplanned iegative consequences if carried out. As such, threats tend to elicit greater eelings of hostility and competitiveness.

An affirmative promise, on the other hand, is a proposal to act in a beneficial ray toward another if she takes certain action (*e.g.*, "We would be willing to .o X if you would be willing to accommodate us on Y."). Promises imply eciprocal cooperation. Accordingly, in contrast to threats, positive promises end to elicit greater feelings of conciliation and cooperativeness. Thus, it is ot surprising that the prospects for reaching a mutually satisfactory agree- ient are greater when affirmative promises are employed in lieu of negative hreats.[14]

The elements of a credible threat and techniques for responding to threats re set out in § 10.45. In addition, whenever possible, negotiators should onsider using a "warning" in lieu of an express threat. A warning might take ie form of a strong word of caution, argument, or an appeal to the other side bout the consequences that might result in the event an agreement is not eached. In contrast to a formal threat, such a warning does not presage ecific, adverse action on the part of the declarant, but forecasts undesirable nsequences that will independently occur in the absence of an accord.

14.14 Problem-Solving Bargaining[15]

The substantive stages of problem-solving bargaining involve the identifica- on and sharing of the interests or needs of both parties, and brainstorming develop as many solutions as possible that may satisfy those needs and aximize the parties' mutual gain. The making of offers, counteroffers, and ncessions is deliberately tied to this objective. The process and techniques this problem-solving approach are given below.

[1] Identifying and Sharing Interests or Needs

Since the aim of problem solving is to reach an agreement that is mutually tisfactory to both parties, this approach to negotiation is predicated upon cooperative effort between the parties to identify and share each other's derlying interests or needs. A party's "interests" are akin to his "objectives" that the former constitute the *reasons* underlying his specific negotiation als. Identifying interests involves asking "why" one desires a particular

[4] *See* J. Rubin & B. Brown, *The Social Psychology of Bargaining and Negotiation* 286 (1975).

[5] *See generally*, R. Fisher & W. Ury, *Getting to Yes* (1981); W. Ury, *Getting Past No* (1991).

objective. The focus is on the *needs*, *desires*, *concerns*, *fears*, *philosophies*, and *feelings* that shape a party's personal, psychological, ideological, or emotional motivations underlying his negotiation goals. For example, consider the following potential interests:[16]

- Ego or psychological interests: recognition, status, personal satisfaction, career satisfaction, sense of power or authority, self-esteem and self-respect, freedom from anxiety or stress
- Moral or ideological interests: reputation, good will, integrity, fairness, religious or political beliefs
- Economic or efficiency interests: financial security, short-term or long-term profits, reducing costs or inefficiency, developing new business opportunities, establishing or avoiding certain precedents
- Relationship interests: fostering better interpersonal relationships, working with others, ending detrimental relationships, developing new relationships or contacts

The interests (and objectives) of both parties should be listed in your Negotiation Preparation Outline, ranked from most important to least important, and evaluated to determine which are shared between the parties, which are independent of each other but do not conflict, and which conflict. When the parties exchange information during problem-solving negotiation, they (1) consciously strive to "separate the people from the problem" through a mindset that attacks the problem, not each other; and (2) focus on each other's interests, as against the mere "wants" reflected in each side's stated "positions."

If one side is resistant to these efforts, the other party will (1) shun any temptation to participate in personal attacks or react irrationally to the other side; (2) seek to diffuse anger, fear, and suspicion by listening and acknowledging the other side's points and concerns; (3) deflect hard-line positions by reframing them in the form of problem-solving "why" and "what if" questions that explore the interests and reasons underlying the other side's positions; (4) adopt the role of a mediator, trying to identify and satisfy the other side's unmet interests; and (5) instead of employing threats or force, seek to educate the other side to the costs of not reaching an agreement and emphasize that the overriding goal of the negotiation is mutual satisfaction, not victory.

[2] Brainstorming for Solutions

After the parties identify and share their interests or needs, they jointly brainstorm for as many solutions as possible that may satisfy their mutual needs. These potential solutions should be drawn and developed from the "Possible Solutions" listed in your Negotiation Preparation Outline.

In brainstorming for possible solutions, it has been suggested that the parties employ the following techniques:[17]

(1)They should initially spend time thinking of all possible solutions by promoting broad discussion and agreeing to outlaw negative criticism of any kind. (These potential solutions might be outlined on a chart for all to see).

[16] *See* G. Goodpaster, *A Guide to Negotiation and Mediation* 95–96 (1977).

[17] *See* R. Fisher & W. Ury, *Getting to Yes* (1981); W. Ury, *Getting Past No* (1991).

(2)They should clarify at the outset that each party's mere listing of solutions is not an expression of an official position. The point is to generate as expansive a list as possible, which can later be refined for detailed discussion.

(3) They should strive to broaden the potential options that might be considered, rather than look for a single answer.

(4) Multiple options might be generated by identifying (i) the overall problem at hand, (ii) potential causes of or barriers to solving the problem, (iii) theoretical solutions, (iv) solutions that might be proposed by experts or persons from the perspective of different professions or disciplines, and (v) specific steps that might be taken to deal with the problem.

(5) The parties should consider which options might be more desirable or workable than others, distinguishing among those that are substantive versus procedural, comprehensive versus partial, and unconditional versus contingent.

(6) Options for mutual gain should be explored based on shared interests and the possibility that the parties' divergent interests can be mutually satisfied without undue cost to any particular party.

(7) Each party should consciously consider potential options from the other side's point of view.

(8) The parties should be particularly advertent to possible solutions that are based on normative standards or objective criteria, such as the facts at hand, applicable law, economic considerations, custom, industry standards, ethical norms, expertise, analogy, or rule, rather than the naked will of any one party.

[3] Making Problem-Solving Offers, Counteroffers, and Concessions

After developing a broad list of potential solutions, the parties will, of course, have to decide which solution or combination of solutions to formally propose or adopt. In contrast to negotiators engaged in strictly adversarial bargaining, problem solvers are much less hesitant to initiate first offers, and they are less inclined to view subsequent offers as incremental steps in a preestablished concession strategy toward a defined resistance point. This is because the problem solver often uses the making of offers to encourage joint problem solving by analyzing what the other party's responses to those offers mean about the other party's underlying interests or needs. Therefore, it is not unusual for problem solvers to make multiple offers at the same time. By gauging the other party's reaction to these offers and engaging in a discussion about them, more specific proposals can be fashioned that maximize mutual gain.

Consistent with this approach, unlike adversarial bargainers, problem solvers tend to make offers, counteroffers, and concessions that are more general and expansive. Specificity is replaced with generality (at least at the outset), and brevity is replaced with a willingness to expansively share explanations and rationales for what is being proposed. Once again, in this way the problem solver is able to reveal and reinforce the needs of her own client and simultaneously demonstrate a willingness to recognize the legitimate interests

or needs of the other side. Purely singular solutions are shunned, and fervent commitment to any particular proposal is avoided in order to invite open, honest, and legitimate criticism. The goal is that, through joint sharing, exploring, and discussion, a concrete proposal will emerge that best satisfies as many of the interests or needs of both parties as possible.

In freely making offers, counteroffers, and appropriate concessions, however, the problem solver, like the adversarial bargainer, buttresses them with justifiable reasons. Thus, arguments are based on normative standards or objective criteria that are rationally related to the case at hand, are credible or authoritative in the sense of being supported by appropriate evidence or other proof, are "balanced" in light of the legitimate points made by each side, and are appropriately emphasized and highlighted whenever possible (*see* § 14.13[4][a]). In addition, notwithstanding the problem solver's disposition to seek solutions that maximize the mutual gain of the parties, she still guards against becoming entrapped by the negotiation process and keeps in mind her best alternatives to a negotiated agreement (BATNA).

§ 14.15 Combining Adversarial and Problem-Solving Bargaining

Few negotiations are either purely adversarial or purely problem solving. Many negotiators combine the two approaches to different aspects of a single negotiation, where the salient features of each strategy best complement the dispute or problem at hand or otherwise enhance the prospects for a favorable agreement. In addition, some negotiators might start with a wholly adversarial approach and, when it becomes plain that the negotiation is stalling or near deadlock, pursue a largely problem-solving approach. The mere fact that the adversarial and problem-solving models are analytically and conceptually distinct is not a reason to employ only one to the exclusion of the other. Negotiation is a complex and dynamic form of human interaction which often requires flexibility to achieve a successful outcome.

As a practical matter, in most negotiations there is an on-going tension between "win-win" cooperative efforts to create solutions for an agreement, and "win-lose" competitive efforts to claim the best solutions for one's own side.[18] In this sense, problem solving "giveth" and adversarial bargaining "taketh." The tension can be counterproductive and subject to abuse in that win-lose tactics often impede the creation of desirable solutions, and win-win tactics—while tending to promote creative solutions—may be exploited by a disingenuous problem solver who changes his approach in midstream and adopts an adversarial posture to reap the fruits of cooperatively created solutions for his unilateral benefit. From the perspective of purely "zealous advocacy," this type of giving with the right hand and taking with the left is clever (and arguably creative) negotiating—*i.e.*, problem solve to create and then compete to take.

To effectively deal with this tension and create cooperative solutions without being vulnerable to exploitation, a so-called TIT-FOR-TAT or "conditionally

[18] *See* D. Lax & J. Sebenius, *The Manager as Negotiator* 29–41, 158–166–91–105 (1981).

open" approach has been suggested.[19] Under this approach, problem-solving and adversarial bargaining are combined in that the negotiator (1) warily seeks mutual cooperation at first instance; (2) engages in competitive tactics when the other party does so; (3) resorts back to cooperative behavior when the other side appears so inclined; and (4) attempts to induce an overall problem-solving approach by developing a reputation for being a consistently "principled" negotiator who nevertheless is not a push-over but is willing and able to meet highly competitive tactics in kind when necessary. This "conditionally open" approach is a form of "tough love," whereby the negotiator genuinely exemplifies cooperativeness and fairness along with appropriate firmness and subsequent forgiveness if the other party transgresses into overly disingenuous and exploitive conduct.

Alternatively, the parties might find it mutually productive to adopt a problem-solving approach towards certain issues in the case or during certain phases of the negotiation, and an adversarial approach towards other issues or during other phases. For example, problem solving might be used for those issues where the parties are capable of exchanging or trading a variety of items or matters, whereas adversarial bargaining might be employed where the issue is merely how much money one party receives and the other pays. Alternatively, the parties might choose to deliberately engage in problem-solving to understand each other's underlying interests or needs and the issues at hand, and thereafter engage in adversarial bargaining when it comes time to constructing a specific agreement. There is nothing wrong with or undesirable about bifurcating and then combining adversarial and problem-solving bargaining in these ways, so long as each party is expressly or implicitly aware which playing field is being used for any particular issue or at any particular time during the negotiation.

§ 14.16 Concluding the Negotiation

In every negotiation there comes a time when it becomes apparent to the parties either that an agreement is likely to be reached or that the negotiation will conclude in an impasse or final deadlock. If an impasse occurs, or even if a deadlock seems inevitable, it is usually best to indicate that you are willing to "keep the door open" for future negotiations. In addition, you should close the stalled or deadlocked negotiation with civility.

If it appears that the parties are close to reaching an agreement, it is essential to avoid being caught up in the anticipation of the moment. As mentioned previously, the most significant concessions tend to be made toward the end of the negotiation (*see* § 14.13[3][b]), and thus it is not uncommon for a negotiator to become overly anxious to conclude an agreement by forfeiting at the last moment much of what she had gained by patience throughout the balance of the negotiation session. Accordingly, effective negotiators tend to be particularly patient, cautious, and persistent when making final offers, counteroffers, or concessions toward the end of the bargaining session. This means always keeping in mind one's resistance point and best alternative to a negotiated agreement.

[19] *See* Id., R. Axelford, *The Evolution of Cooperation* 109–124 (1984).

In light of the psychological tendency of many negotiators to accelerate and increase their concessions toward the end of the negotiation, you might be able to capitalize on this tendency by (1) applauding the other party for the movement or position changes he has made thus far, (2) encouraging him to continue his conciliatory behavior for the sake of reaching a final agreement, or (3) providing him with appropriate face-saving reasons for making one or more additional concessions. Even in problem-solving bargaining, the most successful negotiators tend to be more competitive than cooperative during the closing phase of the negotiation.

Sometimes, negotiators seek to accelerate the closing phase of a negotiation through tactics discussed in Chapter 10 such as *Abdication*, *Asymmetrical Time Pressure*, creating *Deadlines*, using other *Timing* pressures, *Escalating Demands*, creating a *Fait Accompli*, *Reversing Position*, offering to *Split the Difference*, announcing a *Take-it-or-Leave-it* position, or engaging in a *Walk-out*. In general, to protect yourself against such tactics you should (1) not allow the other side to press for a closing until you are ready to close, (2) not press for a closing yourself until you are ready to close, and (3) not press for a closing when the other side is likely to view your pressure with mistrust or suspicion.

After you have reached an agreement, and before you leave the face-to-face meeting, it is desirable to repeat the major terms of the transaction or reduce them to a memorandum of understanding to obviate any misunderstandings. If any exist, they should be dealt with on the spot so as not to lose the momentum toward closure. In addition, you should be careful to clarify any details attendant to the execution of the agreement. These matters might include (1) time frames for performing the agreement; (2) any follow-up action to be taken by the parties; (3) what information or documents are needed to effectuate the agreement; (4) whether any third parties need to be notified of the agreement; (5) details regarding the preparation and submission of appropriate releases, pleadings, or other documents; (6) contingency plans in the event either client rejects the agreement (assuming final client approval is necessary); and (7) who will bear any applicable expenses such as court costs, legal fees, and expenses.

If the agreement is to be formalized in writing, and particularly if its terms are complex, you should volunteer to draft the final documentation. This reduces the risk that the other party will insert new terms or provisions into the agreement that were not discussed or agreed upon during the negotiation. In addition, if you are the draftsman, the other party is more likely to be at a psychological disadvantage if she requests any significant changes, additions, or deletions to your draft. That is, if such changes are demanded, you might be in a better position to exact some additional concessions from the other party in exchange for modifying the draft.

On the other hand, if you do not prepare the final documentation, you must carefully review it to ensure that it accurately and completely reflects the agreement reached at the face-to-face meeting. If it does not, firmly insist upon appropriate changes to the draft, and, if the other side repeatedly resists your modifications, volunteer to take over the final drafting process yourself.

Finally, conclude the face-to-face meeting with appropriate parting salutations and professionalism. If you have achieved a particularly advantageous

agreement for your client, do not gloat; and if the final agreement was less desirable than you hoped for, do not pout. In either case, by graciously commending your counterpart for her efforts in handling the negotiation, you will bolster your reputation for integrity and professionalism in any future dealings.

Chapter 15

Negotiating During Civil Litigation

SYNOPSIS

§ 15.01 Introduction

Approximately 90% of all lawsuits are settled,[1] and it is likely that thi percentage will increase with the growth of court-annexed mediation an other forms of alternative dispute resolution. Litigation is expensive, risky and time consuming, and the economic and emotional drain on the partie is usually considerable. Because settlement is so prevalent during litigation lawyers should not hesitate to initiate settlement discussions as a rule rathe than as an exception.

Much of the discussion in the preceding chapters is relevant to negotiatin during litigation. However, given below are some additional considerations that you should bear in mind in connection with settling before trial an settling during or after trial.

§ 15.02 General Considerations about Preparation

As in any negotiation context, to effectively prepare for a lawsuit settlement you should develop a Negotiation Preparation Outline like that discussed in Chapter 12. In addition, in developing an overall approach to settlement, it is particularly important to obtain information about the opposing lawyer, not only as a negotiator, but also as a trial advocate. After all, in the litigation context, the parties' best alternative to a negotiated agreement usually will

[1] *See also* H.M. Kritzer, *Let's Make a Deal* 1 (1991) ("If one were to include the cases that never get through the door of the court *house*–cases that are settled between the parties before a formal court action is even started—the settlement figure approaches 99 percent!").

usually be trial, and the outcome of a trial may have much to do with the relative trial skills of the parties' lawyers.

Particularly when settlement discussions are initiated before the filing of a lawsuit, it is also important to obtain information about the settlement attitudes and practices of any insurance carrier or other entity that will be involved in the negotiation. For example, if you represent the plaintiff and the particular carrier or entity has a reputation for routinely taking a hard-line position to initial settlement overtures, it may be preferable to file a lawsuit before initiating any discussion of settlement. On the other hand, if you represent the defendant under circumstances where liability seems clear, and the plaintiff's lawyer has a reputation of being reluctant to try cases and a disposition to settle quickly, you might choose to be more active in initiating or responding to settlement proposals. In either case, the simplest way to find out about the general settlement attitudes of the other side is to ask lawyers or other persons who have had prior dealings with your counterpart.

§ 15.03 General Considerations about Pretrial Strategy and Style

As mentioned previously, lawsuit negotiations are usually adversarial and competitive. This is because, in many instances, once lawyers have become involved and litigation is contemplated or underway, the parties' relationship has become badly strained or even destroyed. In addition, both sides are aware that, regardless of who prevails in the lawsuit, each is still a potential loser. A victory for the plaintiff may be offset by the costs of time and money in pursuing his claim, and a victory for the defendant in preserving the status quo may be offset by substantial legal fees and other costs. Perhaps most importantly, both sides have already begun to sustain the emotional costs of stress, pressure, anxiety, and animosity. Thus, once the parties have come to recognize that their dispute might only be resolved through litigation, they are often, as a purely "human" rather than rational matter, less inclined to adopt a problem-solving and cooperative approach to settlement.

The litigation process itself aggravates this adversarial and competitive atmosphere. After initial settlement discussions have broken down, the plaintiff and defendant often engage in the following series of actions and counteractions: (1) the plaintiff files his complaint; (2) the defendant takes as long as permissible to answer, and interposes a counterclaim if possible; (3) the plaintiff initiates discovery (*i.e.*, by taking depositions, submitting interrogatories and requests to produce documents, etc.); (4) the defendant responds in kind and often initiates even more discovery; (5) the plaintiff files dispositive motions; (6) the defendant responds or counters with her own dispositive motions; (7) one side or the other calendars the case for trial; (8) the other side sometimes seeks to delay the trial; and (9) after trial, the losing party appeals and, if she loses on the initial appeal, an appeal is taken to the jurisdiction's highest court. In sum, each party seeks to wear down the other through pressure, counter-pressure, action, counter-action, delay, and spiraling expense.

Against this background, settlement discussions tend to occur when one or both parties begin to realize (1) that it may be more advantageous to substitute the certainty of a settlement for the uncertainty of a trial outcome, or (2) that the time and expense associated with the litigation process is becoming unbearable. Of course, there is no standard point in the litigation process when either of these realizations will be triggered. However, in general, the strategy often employed by the plaintiff is to exert maximum pressure on the defendant through the litigation process until the latter realizes that the plaintiff is prepared to go the distance. Conversely, an often used strategy for the defendant is to erect as many barriers as possible to the plaintiff's pursuit of his claims with the hope that he will significantly reduce his expectations and settle the case cheaply, or even abandon his case altogether due to the financial costs of continuing to pursue the case. In the end, the party who possesses the greatest persistence, patience, and economic and emotional wherewithal is most likely to effectuate the most advantageous settlement.

This description of the effects of the litigation process on settlement should not be interpreted as an endorsement of engaging in such a highly competitive and adversarial approach as a matter of course. A more cooperative approach is often instrumental in blunting the adversarial instincts inherent in the litigation setting, and a problem-solving strategy is neither conceptually nor practically inappropriate after a lawsuit has been filed. Particularly when the parties' dispute involves multiple issues, may be resolved through a variety of solutions other than the mere payment of money, or requires ongoing dealings between the parties, a problem-solving approach is often the best means for settling litigation.

§ 15.04 Filing the Complaint and Answer

As discussed in Chapter 13, many lawyers initially try to resolve disputes through a demand letter, settlement brochure, or negotiations over the telephone. A lawsuit is typically not filed until negotiations break down or unless initiating them would be fruitless at the outset. On the other hand, a number of experienced litigators advocate filing a lawsuit at first instance, or, at the least, sending the other side a draft of the complaint when initiating settlement discussions. The rationale for this approach is that it demonstrates the plaintiff's preparedness and seriousness about his claims.

Once the decision has been made to file a lawsuit, there are a number of considerations to take into account for settlement purposes. First, when possible, the plaintiff's lawyer should bring the suit in the most convenient place for his client and most inconvenient place for the defendant. For example, if the defendant lives in Wyoming but the transaction took place in New York where your client lives, the forum of choice would be New York. The inconvenience and expense to the defendant of having to litigate the case away from home may exert significant settlement pressure.

Second, despite the bare requirements of "notice pleading," for settlement purposes it is sometimes desirable to draft a complaint that sets forth one's factual allegations and calculation of damages in extra detail. This has the benefit of beginning to educate defense counsel to the merits of your case at the outset, rather than gradually revealing them later on through a drawn-out

discovery process. Additional specificity in your complaint also shows the other side that you are not bluffing about the bases for your causes of action, which are often otherwise expressed in rather conclusory terms. However, you should always bear in mind that filing a complaint for an improper purpose or with frivolous factual or legal allegations is unethical and otherwise may expose you or your client to potential sanctions by the court.[2]

Third, when possible, causes of action that are ancillary to the main claim should be included in the complaint. For example, if the defendant's negligence was accompanied by extreme and outrageous conduct resulting in severe emotional distress, additional causes of action for negligent and/or intentional infliction of emotional distress should be included. Similarly, if such outrageous behavior involved willful, wanton, reckless, or malicious conduct, a claim for punitive damages should be added even if the applicable insurance would not cover exemplary damages. In short, the greater the number of causes of action and claims for damages, the greater the defendant's potential exposure becomes.

Fourth, in an appropriate case, seeking a temporary restraining order or preliminary injunction might increase bargaining leverage. Even if an *ex parte* TRO is not granted, the climate for settlement might be enhanced pending a hearing on the motion for a preliminary injunction. If injunctive relief is granted, the plaintiff will have scored a *Fait Accompli* (*see* Chapter 10) by changing the status quo to require the defendant to refrain from certain action or take certain action to protect the plaintiff.

Fifth, including a demand for a jury trial in the complaint may increase bargaining leverage because jury verdicts and awards are much less predictable than decisions and awards rendered by judges. From the plaintiff's standpoint, a jury trial is particularly important when the defendant is a so-called "target defendant," such as a large corporation or governmental entity for whom the jury may have little sympathy.

Sixth, even the choice of how to effect service of the complaint upon the defendant may exert psychological pressure toward settlement. For example, serving a defendant by sheriff at the defendant's home or office will generate greater stress and anxiety than serving her by registered or certified mail, return receipt requested.

In answering the complaint, the defendant should, when permissible, first consider moving for an extension of time within which to answer. This is important not only to gain time to conduct an adequate investigation into the plaintiff's allegations, but may be desirable as part of an overall strategy to preserve the status quo as long as possible.

Second, when applicable, the defendant's answer should detail all available counterclaims against the plaintiff. Apart from compulsory counterclaims which must be raised to avoid waiver,[3] it is often desirable for settlement purposes to plead all permissive counterclaims[4] in order to reduce the

[2] *See* Fed. R. Civ. P. 11(b) and (c).

[3] *See* Fed. R. Civ. P. 13(a).

[4] *See* Fed. R. Civ. P. 13(b).

plaintiff's expectation of recovery. In addition, any appropriate cross-claims or third-party impleader or interpleader should be raised.[5]

Third, just as the plaintiff should consider including in his complaint all potential causes of action, the defendant should consider raising all affirmative defenses and allege factual bases for those defenses in extra detail. In this regard, instead of making mere general denials of the plaintiff's allegations, the defendant should consider, when permissible, expanding upon her denials by stating the relevant facts that contradict the plaintiff's averments.

Fourth, the defendant should raise in the answer (or by motion, when appropriate) any pertinent defenses such as lack of jurisdiction, improper venue, insufficiency of process or service of process, failure to state a claim on which relief can be granted, or failure to join a party.[6] In addition, if the plaintiff's complaint contains any redundant, immaterial, impertinent, or scandalous matter, a motion to strike should be made;[7] and if the allegations are vague or ambiguous, a motion for a more definite statement should be filed.[8]

Filing the complaint and answer usually puts a temporary hold on settlement discussions. Thereafter, the attorneys usually allow the discovery process to proceed at least for a while before negotiations resume. Once the parties have a clearer understanding of the factual and legal issues in the case and begin to feel the effects of time pressures and expense, there is a heightened incentive to discuss settlement possibilities.

§ 15.05 Using Discovery

Discovery may be effectively used formally or informally to induce settlement. Informal discovery essentially occurs when the plaintiff details his claims, along with supporting documentation, in a demand letter or settlement brochure. Sometimes, as in negotiations with an insurance adjuster, the plaintiff's lawyer might allow his client to be interviewed by the other side to demonstrate the plaintiff's jury appeal. Alternatively, both sides might agree to freely exchange information and documentation that would otherwise be discoverable in order to evaluate the prospects for settlement. Given the breadth of information that is otherwise discoverable under the formal discovery rules, exchanging information informally is usually a desirable method for educating the parties about settlement possibilities.

Promptly taking depositions is another effective method for moving a case toward settlement. The deposition is the most useful discovery device for obtaining information, testing legal theories, evaluating a witness's demeanor, gathering impeachment material, setting up the case for possible summary judgment, and asking about facts which are not directly related to the lawsuit but which may lead to the discovery of admissible evidence. A videotape deposition may be particularly effective for revealing the extent of a party's injuries or the jury appeal of a party or crucial witness.

[5] *See* Fed. R. Civ. P. 13(g), 14, and 22.

[6] *See* Fed. R. Civ. P. 12(b).

[7] *See* Fed. R. Civ. P. 12(f).

[8] *See* Fed. R. Civ. P. 12(e).

The usual goal of a deposition is to obtain information for use at trial and not to provide the witness with a rehearsal of what it will be like at trial. However, for settlement purposes, it is sometimes useful to depose the opposing party with the specific intention of giving her a taste of what it will be like when she is cross-examined or called as an adverse witness before the jury. A particularly destructive cross-examination of a party opponent during a deposition may cause her to seriously rethink the desirability of settling the case in lieu of the embarrassment and discomfort she will incur when taking the witness stand. A similar approach might be used when deposing a key witness for the other side.

Submitting interrogatories, requests for admissions, or requests for production of documents not only demonstrates a commitment to prepare for trial, but may reveal information that will induce the parties to settle. For example, obtaining information about applicable insurance policy limits or requesting extensive financial records from a party against whom punitive damages are sought may dramatically change the prospects for settlement.

Litigants often engage in extensive "paper" discovery and various obstructionist tactics to thwart discovery requests in an effort to wear down the opposition. Motions to compel and motions for protective orders are still commonplace. However, this is changing in many jurisdictions in light of revisions to discovery rules and the growing intolerance of judges to discovery abuses. For example, the requirements under the federal rules to provide "initial disclosures" and "pretrial disclosures," along with limitations on the number of interrogatories that may be submitted and depositions that may be taken,[9] have tended to curtail abuses and hence the use of the discovery process to overwhelm less wealthy litigants.

§ 15.06 Making Offers of Judgment

Rule 68 of the Federal Rules of Civil Procedure provides:

> At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against the defending party for the money or property or to the effect specified in the offer, with costs then accrued. If within 10 days after service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the order and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than 10 days prior to the commencement of the hearings to determine the amount or extent of liability.

[9] *See* Fed. R. Civ. P. 26, 30, and 33.

A number of states have similar rules, and some states even permit plaintiffs to make offers of judgment.[10] However, under Fed. R. Civ. P. 68, only a defendant or a plaintiff defending against a counterclaim[11] may make an offer of judgment. The offer must be in writing and served upon the adverse party (usually the plaintiff), and the rule is not satisfied by a mere oral offer made in settlement negotiations or an offer made before suit is filed.[12]

The defendant's offer of judgment may be for non-monetary relief such as to allow a judgment for entry of an injunction or the granting of other equitable relief.[13] The offer may also disclaim liability[14] or be conditioned upon acceptance by all plaintiffs where multiple plaintiffs are involved.[15] The essential effect of rejecting an offer of judgment is that, if the ultimate judgment for the plaintiff is identical to[16] or less favorable than the offer, the plaintiff is obligated to pay all of the defendant's post-offer statutory "costs" (*e.g.*, filing fees, witness fees, and court reporter costs).[17] In determining whether the plaintiff's judgment exceeds the offer, the total monetary recovery (*i.e.*, compensatory and punitive damages) is included, along with plaintiff's pre-offer costs.[18] However, the rule is inapplicable if the defendant wins altogether because, in that situation, there has been no "judgment finally obtained by the [plaintiff] offeree," at all.[19] The defendant's costs in that situation may be recouped in the discretion of the court under Fed. R. Civ. P. 54(d).

When making an offer of judgment, the offer must specify a definite sum that will be paid on the underlying action (or other relief for which a judgment may be entered) and include a provision for "costs then accrued," although the defendant may leave the amount of the costs for later determination by the court. That is, an offer may take one of three forms—a lump-sum offer including substantive relief and costs, a sum for substantive relief while leaving the amount of costs for the court's determination, or separate specified sums for substantive relief and costs.[20]

[10] *See* Solimine & Pacheco, State Court Regulation of Offers of Judgment and Its Lessons for Federal Practice, 13 Ohio St. J. Disp. Res. 51, 63–69 (1997).

[11] Simon v. Intercontinental Transport (ICT) B.V., 882 F.2d 1435 (9th Cir. 1989).

[12] Clark v. Sims, 28 F.3d 420 (4th Cir. 1994); Cox v. Brookshire Grocery Co., 919 F.2d 354 (5th Cir. 1990).

[13] *See* Liberty Mut. Ins. Co. v. EEOC, 691 F.2d 438 (9th Cir. 1982) (injunction); Mallory v. Eyrich, 922 F.2d 1273 (offer of judgment for finding a violation of Voting Rights Act); Spencer v. General Electric Co., 894 F.2d 651 (4th Cir. 1990) (offer of judgment to reinstate plaintiff in sexual harassment case).

[14] Staples v. Wickesberg, 122 F.R.D. 541 (D. Wis. 1988).

[15] Lang v. Gates, 36 F.3d 73 (9th Cir. 1994).

[16] *See* Id., Hutchison v. Wells, 719 F. Supp. 1435 (D. Ind. 1989).

[17] *See* 28 U.S.C. § 1920; Fed. R. Civ. P. 54(d).

[18] *See* Grosvenor v. Brienen, 801 F.2d 944 (7th Cir. 1986).

[19] Delta Air Lines, Inc. v. August, 450 U.S. 346, 101 S.Ct. 1146, 67 L.Ed2d 287 (1981).

[20] *See* Simon, The New Meaning of Rule 68: Marek v. Chesney and Beyond, 14 N.Y.U. Rev. of Law and Social Change 475, 508–509 (1987); Marek v. Chesney, 473 U.S. 1, 105 S.Ct. 3012, 87 L.Ed2d 1 (1985).

Ordinarily, attorney's fees are not part of "costs." However, under certain federal statutes, such as those governing civil rights actions or employment discrimination cases, attorney's fees are expressly included as part of costs.[21] In such cases, if the offer of judgment expressly and unambiguously[22] states that it includes attorney's fees up to the date of the offer as part of costs, a plaintiff who accepts the offer or rejects it and obtains a judgment that is less than the total offer cannot apply to the court for otherwise recoverable fees incurred after the date of the offer.[23] If the offer of judgment does not expressly include attorney's fees where they are statutorily included as part of costs, then the plaintiff who accepts the offer[24] or rejects it and obtains a judgment in excess of the offer may recover post-offer attorney's fees. If the applicable statute provides for attorney's fees separately from costs, an offer of judgment that is rejected by the plaintiff who fails to obtain a judgment in excess of the offer does not automatically cut off the prevailing plaintiff's right to seek post-offer attorney's fees, but such fees are likely to be significantly reduced by the court in light of the fact that the plaintiff's post-offer legal work produced a net loss.[25]

Finally, in federal civil rights and employment discrimination cases, even if the defendant may shift its post-offer "costs" to the plaintiff under Rule 68, the defendant's attorney's fees cannot be shifted to the plaintiff. This is so because, in such suits, the defendant may only receive attorney's fees if the action was "frivolous, unreasonable, or without foundation."[26]

Although there is no current empirical evidence that Rule 68 has, as it was designed to do,[27] increased the rate of settlements,[28] if you represent the defendant, making an offer of judgment may cause the plaintiff "to 'think very hard' about whether continued litigation is worthwhile"[29] in certain types of cases. For example, an offer of judgment may exert significant pressure on a plaintiff to settle if liability is clear, the costs of the litigation will be high, the plaintiff's damages will be difficult to prove or are very uncertain, or the plaintiff is in need of immediate funds or is otherwise not disposed to bear the time and stress of lengthy litigation.The defendant may make an offer of judgment at any time after suit is filed and need not wait until the plaintiff has completed discovery,[30] and there is no limit on the number of offers that

[21] *See* 42 U.S.C. §§ 1983, 1988, & 2000 *et. seq. See also* the listing of such federal statutes in Marek v. Chesney, 473 U.S. 1, 105 S.Ct. at 3035–36, 87 L.Ed2d 1 (1985).

[22] *See* Bevard v. Farmers Ins. Exchange, 127 F.3d 1147 (9th Cir. 1997).

[23] Herrington v. County of Sonoma, 12 F.3d 901 (9th Cir. 1993); Guerrero v. Cummings, 70 F.3d 1111 (9th Cir. 1995).

[24] Fulps v. City of Springfield, 715 F.2d 1088 (6th Cir. 1983); Chambers v. Manning, 169 F.R.D. 5 (D. Conn. 1996).

[25] *See* Haworth v. State of Nevada, 56 F.3d 1048, 1052 (9th Cir. 1995); Sheppard v. Riverview Nursing Center, Inc., 88 F.3d 1332 (4th Cir. 1996).

[26] Grossman v. Marcoccio, 800 F.2d 329 (1st Cir. 1986); EEOC v. Bailey Ford Inc., 26 F.3d 570 (5th Cir. 1994); *See* Hughes v. Rowe, 449 U.S. 5, 101 S.Ct. 173, 66 L.Ed2d 163 (1980).

[27] *See* Delta Air Lines, Inc. v. August, 450 U.S. 346, 101 S.Ct. 1146, 67 L.Ed2d 287 (1981).

[28] *See* Rowe & Anderson, One-Way Fee Shifting Statutes and Offer of Judgment Rules: An Empirical Experiment, 36 Jurimetrics J. 225 (1996).

[29] Marek v. Chesny, 473 U.S. 1, 11, 105 S.Ct. 3012, 3017, 87 L.Ed2d 1 (1985).

[30] *See* Grossman v. Marcoccio, 800 F.2d 329 (1st Cir. 1986) (offer made 21 days after suit filed).

the defendant may make. Finally, particularly where the plaintiff's cause of action permits him to recover attorney's fees as part of costs, an early offer of judgment that expressly includes fees up to the date of the offer should cause him to seriously consider the offer in the face of the prospect that no post-offer fees will be recoverable if he fails to obtain a judgment in excess of the offer.

§ 15.07 Using Timing and Deadlines

The most opportune times for engaging in pretrial negotiations are influenced by numerous factors and circumstances. Among them are the following:

(1) If the parties are attempting to avoid litigation and the statute of limitations on the plaintiff's claim is drawing near, negotiation efforts may be accelerated.

(2) Sometimes negotiations will be triggered merely by the filing of the complaint, or when the defendant aggressively asserts a counterclaim, cross-claim, or seeks to add additional parties to the lawsuit.

(3) Settlement discussions are influenced by the extent to which the discovery process reveals particular strengths or weaknesses in a party's case, and whether engaging in discovery is becoming cost prohibitive for one or both of the parties.

(4) If the trial judge denies the defendant's motion for summary judgment but otherwise indicates that the plaintiff's case is tenuous, the prospect for settlement is likely to increase.

(5) The extent to which the trial judge encourages the parties to settle or pushes the case to trial will often influence the parties' disposition toward settlement.

(6) If the plaintiff is in need of money, he is more likely to settle for a smaller sum now than gamble on recovering a larger sum later at trial.

(7) If a party is receiving adverse publicity about the case or her litigation position, she may be induced to negotiate a settlement.

(8) The outcome of another lawsuit or appellate decision on issues similar to those being litigated between the parties may induce settlement.

(9) Corporate parties may be more receptive to settlement toward the end of the calendar or fiscal year either for tax purposes or because the resolution of the case can be announced in the corporation's annual report.

(10) The arrival of the holiday season toward the end of the year may cause the parties to be more inclined to discuss settlement, and an indigent plaintiff might accept a lesser sum than he might otherwise accept in order to buy Christmas or Chanukah presents.

(11) The unexpected postponement of a trial after the parties have strenuously prepared for trial may cause them to consider settlement possibilities.

(12) Settlement prospects may be affected by factors such as the illness of a party or her attorney, the extent to which a party is really prepared to go to trial, whether the party is being represented on an hourly or contingent fee

basis, or whether a party's witnesses have become unavailable or difficult to secure for trial.

(13) Establishing deadlines can also exert pressure on the parties toward settlement. For example, a party might notify the other side that numerous depositions will have to be noticed by a certain date if no settlement is reached by that date, obtain a court order for a deadline within which discovery must be completed, make a calendar request to schedule the case for trial, obtain a court order that peremptorily sets the case for trial, or file a motion for a pretrial conference with the judge.

§ 15.08 Using Pretrial Settlement Conferences

A pretrial settlement conference with the trial judge or magistrate is frequently an appropriate time to advance the settlement of a case. Many jurisdictions require pretrial settlement conferences or make them available upon motion of a party.[31] Sometimes clients are required to attend along with the lawyers. In cases where a conference is not required, requesting one is particularly useful when the other party is being recalcitrant. After all, a judge is not likely to look with favor upon a party who refuses to discuss settlement.

Judges vary in their approaches to pretrial settlement conferences. Many are constrained to merely encourage the parties to seriously consider settlement possibilities. Others take a more active role by asking the parties to explain their most recent offers, probing the factual and legal contentions of each side, and even giving a gratuitous assessment of the case or suggesting a possible compromise.

The local rules of some jurisdictions require the parties to submit written settlement conference statements to the court in aid of the conference. These rules vary in terms of what should be included in the statements, whether they are to be filed with the court or only "lodged" with it (*i.e.*, submitted solely to the judge without becoming part of the official record of the case), and whether they are to be served on opposing counsel. Experienced judges advise that, in general, these written statements should (1) be brief and to the point (*i.e.*, not exceed ten pages and not include voluminous exhibits), (2) reflect candor by appropriately acknowledging the weaknesses in your case, (3) clearly state the *reasons* for your settlement contentions, (4) avoid emotionalism, and (5) avoid taking a "nickel and dime" approach in making offers or counteroffers.[32] Except as the applicable local rule might otherwise prescribe, your written statement should include:

(1) A brief summary of the facts giving rise to the lawsuit (including an itemization of damages) and the anticipated trial evidence in support of those facts;

(2) A summary of your legal contentions about liability and damages in light of the facts and anticipated evidence;

(3) A summary of the procedural status of the litigation (i.e., the extent of discovery conducted in the case and the pendency of any pretrial motions);

[31] *See* Fed. R. Civ. P. 16.

[32] See E.F. Lynch, et. al., *Negotiation and Settlement* 391–398 (1992).

(4) A summary of any settlement offers or counteroffers that have already been made in the case; and

(5) A summary of your client's current settlement position in terms of a specific settlement amount or settlement range, and your specific reasons justifying that amount or range.

How to best conduct yourself at the pretrial settlement conference will, of course, largely depend upon the style of the presiding judge. In general, however, with or without a written settlement conference statement, you should be prepared to (1) summarize the past and current offers of the parties; (2) explain your strongest factual and legal points, while appropriately acknowledging your weaker ones; (3) show the judge any admissible documentation or key exhibits that substantiate your claims or defenses; (4) provide rational reasons for your offer or propose a modification of your latest offer; (5) downplay any emotionalism or acrimonious history of the litigation; and (6) avoid using any deceptive tactics.

If you demonstrate some willingness to compromise, it is likely that the judge will look to the other side to reciprocate. However, as in the closing phase of a face-to-face negotiation, it is best to be patient and cautious in making final concessions. If you appear overly eager to compromise, the judge may end up exerting more pressure on your side to effectuate a final settlement.

Finally, unless you know in advance that the judge would flatly decline to do so, you should not hesitate to ask her for her general assessment of the case for settlement purposes. While most judges are reluctant to give a direct opinion on this subject, some will at least indicate their instincts about the general settlement value of the controversy, or use your question as a springboard to actively encourage settlement. Of course, this does not mean that you should feel bound by any assessment the judge might make, but the opinion of a trial judge who has seen hundreds of verdicts and awards is worth careful consideration.[33]

§ 15.09 Settling at the Last Minute

Last minute settlements—whether at the courthouse steps, during trial, or while an appeal is being contemplated or pending—are not unusual. No matter how thoroughly prepared you are for trial, unexpected events invariably occur. A party might be induced to settle (1) the night before or minutes before the trial starts, (2) after the judge has ruled on a critical pretrial motion such as a motion *in limine*, (3) after an unfavorable jury has been empanelled, (4) after one or more key witnesses fails to show up for trial, (5) after a particularly destructive cross-examination, (6) after a witness gives unexpected or surprise testimony, (7) after the plaintiff has rested his case and before the defendant makes a motion for a directed verdict, (8) during or after the defendant's evidence, (9) after the judge has made his rulings at the jury instruction conference, or (10) after the closing arguments and before the jury

[33] For an interesting survey about the attitudes of judges and lawyers toward various techniques that might be used in a pretrial settlement conference, *see* Rude & Wall, Judicial Involvement in Settlement: How Judges and Lawyers View It, 72 Judicature 175 (1988).

returns from the jury room to announce its verdict and award. In short, nearly every trial has its own pressure points that may cause the parties to settle.

If the trial has not gone well either party and both sides have been unable to reach agreement on a settlement amount, you still might be able to force a last-minute agreement. For example, as the jury is returning from the jury room to render a verdict, you might inform the judge of your final settlement offer. The judge is likely to give the other side a few minutes to accept the settlement or hear the verdict. The pressure of this "last ditch" effort, coupled with the certainty of a reasonable settlement, may induce the other party to accept.

Alternatively, after the closing arguments and while the jury is deliberating, the parties might consult with the judge about a last-minute settlement. Obtaining the judge's perception about the presentation of the evidence and the risks to each party in gambling on the jury's verdict may facilitate a final agreement.

Even after the jury verdict, a settlement might be reached while the losing party contemplates filing an appeal or while an appeal is pending. The appellate process is likely to take years, and the parties may choose to forgo the time, expense, and uncertainty of the outcome on appeal. This is so even for the party who prevailed at trial. If an objective assessment of the outcome on appeal indicates that a reversal and remand for a new trial is likely, serious consideration should be given to renewing settlement discussions.

§ 15.10 High-Low Agreements

In connection with last-minute settlements, the parties will sometimes enter into a so-called "high-low" agreement that provides for a floor and a ceiling on a settlement amount that is tied to the jury's verdict or award. For example, if the plaintiff believes that his case is worth $250,000, and the defendant thinks that she might prevail at trial but is concerned about being faced with a large verdict by a run-away jury, the parties might agree that if the jury finds liability, the plaintiff will receive $150,000; and if no liability is found, the plaintiff will receive $50,000. Alternatively, it might be agreed that if the jury returns an award of $100,000 or more, the plaintiff will get $150,000, but if the jury renders any verdict below $100,000, the plaintiff will receive $50,000. This type of agreement guarantees the plaintiff a reasonable award but protects the defendant from an excessive verdict.

Chapter 16

Negotiating During Mediation

SYNOPSIS

§ 16.01 Introduction

Mediation is an informal, non-adversarial alternative dispute resolution process, whereby a neutral third party, who is either selected by the parties or is appointed from an approved list of mediators eligible to mediate the type of case at hand, encourages and facilitates the parties to voluntarily resolve their dispute. The mediator does not decide what the outcome should be. The process is different from arbitration, in which a neutral third party hears evidence and arguments from the parties and makes a binding or non-binding decision about how the parties' dispute should be resolved. In mediation, the parties themselves make the decision; and if they do not voluntarily resolve their dispute, they may resolve it through some other alternative dispute resolution process or, if the case is actionable, litigate it.

Virtually all jurisdictions—by statute, agency rule, or court rule—mandate mediation or otherwise formally make it available in certain types of cases. Illustrative are family-law disputes, collective bargaining and other labor-law disputes, personal injury cases, medical malpractice actions, products liability cases, civil rights actions, contract cases, wrongful discharge cases and other employment-related disputes, landlord-tenant cases, small claims actions, toxic tort cases, consumer complaints, environmental disputes, professional conduct and licensing cases, neighborhood or community disputes, farm mortgage disputes, housing disputes, agricultural producer-distributor bargaining, geothermal energy development disputes, criminal misdemeanor cases (*see* § 19.12), and rule-making disputes.[1] Many jurisdictions mandate mediation in a broad range of civil cases as a prerequisite to taking the case to trial. These "court-annexed" mediation programs have burgeoned as a means of easing the backlog of cases and reducing the time and expense of litigation. In short, the "mediation explosion" has permeated our society in the both the public and private sector.

[1] *See* Nancy H. Rogers & Craig A. McEwen, *Mediation: Law, Policy & Practice* (2d ed. 1994) (setting forth in Appendices state-by-state legislation governing mediation in different types of cases).

Studies have shown that mediation has a number of advantages over traditional inter-party or lawyer-to-lawyer negotiations.[2] First, mediation provides a structured opportunity to bring the parties together, not just to exchange demands and positions, but to discuss and explain their interests, needs, and emotions in a setting where the parties can feel that another person (the mediator) has heard their side of the story and given them a "fair shake." Second, mediation structures the negotiating process in ways that increase more reliable information sharing and better understanding between the parties so that they can better decide how to resolve their dispute. Third, skilled mediators can help facilitate an agreement by breaking down cognitive and emotional barriers between the parties through a variety of tactics and techniques that help to diffuse suspicion and irrationality, and help to promote reality testing and face saving. Fourth, mediation gives the parties a greater sense of participation and control over their case through a process in which they can address the issues they themselves feel are most important. In sum, the advantages of mediation are consistent with the well-established fact that clients are often at least as much concerned with how they are treated in dispute resolution as they are with its results. That is, the very *process* of how the parties go about resolving their dispute is often of integral importance to them.

Often mediation will occur after traditional negotiations have failed to produce an agreement. Sometimes, however, the parties will choose mediation as a means of first resort in trying to resolve their dispute. This chapter focuses on how you can negotiate effectively during mediation, whether you are engaging in the process as part of a mandatory program or as a matter of choice.[3]

§ 16.02 The Mediation Process, in General[4]

Mediation typically occurs in a conference room at a neutral location or at a lawyer's office agreed upon by the parties and the mediator. Present are the mediator (or perhaps co-mediators in a multi-party or highly complex case), the individual parties (or a designated representative of a party if it is a corporation or governmental entity), and their lawyers. If there is insurance coverage in the case, an insurance adjuster will usually also attend. In many court-annexed mediations, all of the foregoing persons are required to attend. Sometimes, by agreement between the parties, other support persons (*e.g.*, a spouse of a party, or a person who has some special expertise or is otherwise integrally involved in the case) might attend all or part of the mediation or be on telephone standby for consultation. Because the process

[2] *See* Robert A. Baruch Bush, "What Do We Need a Mediator For?": Mediator's "Value-Added" For Negotiators, 12:1 Ohio St. J. on Dispute Res. 13–26 (1996); Nancy H. Rogers & Craig A. McEwen, *Mediation: Law, Policy & Practice* § 4:04 (2d. ed. 1994).

[3] The focus is not on how to be an effective mediator, a subject typically relegated to a "mediation" or "alternative dispute resolution" course. Among the numerous instructive works for mediators, *see* Christopher W. Moore, *The Mediation Process—Practical Strategies for Resolving Conflict* (2d ed. 1996); John W. Cooley, *The Mediator's Handbook* (NITA 2000).

[4] *See also* "General Suggestions to Mediators For How to Mediate a Case" in Appendix B of this book.

is private, no stenographers, court personnel, news reporters, or other observers attend the mediation.

The mediator begins the mediation in a joint session in the presence of all participants. After the mediator introduces herself, and all participants have introduced themselves to one another, she will make some brief introductory remarks that explain her role and the over-all mediation process. Typically, these remarks will explain that:

(1) Mediation is an informal process where the rules of evidence and other formal rules of procedure do not apply;

(2) The mediator is neutral and impartial in the case and has no conflict of interest;

(3) The mediator has reviewed any pre-mediation submissions that the parties may have sent to her in advance of the mediation;

(4) The mediator's role is to assist the parties in reaching a possible agreement, and not to serve as a judge or jury in the case;

(5) Generally, most things said or done during the mediation are confidential in the sense that they cannot later be used by one side against the other in litigation (*see* § 17.11);

(6) If a party privately shares anything with the mediator that the party expressly states he wants kept confidential, the mediator is prohibited from disclosing that information to the other side or to anyone else unless required by law;

(7) The mediator is prohibited from giving any legal advice during the mediation;

(8) Each side will be given an opportunity at the outset to make an opening statement about the case;

(9) Each side might then wish to ask some clarifying questions of the other to bring as much non-confidential information to the table as early as possible in the mediation process;

(10) After the case is discussed in joint session, the mediator typically will hold multiple private caucuses, separately with each party, to clarify information, and to discuss underlying interests, feelings, objectives, possible solutions to the dispute, and particular proposals offered by the parties that might resolve the case;

(11) If a settlement is reached, the mediator will have all participants reconvene in a joint session at which she will summarize the terms of the agreement and make sure the parties understand what steps will be taken to prepare and execute any settlement documents;

(12) If no agreement is reached, it is the mediator's duty to declare an impasse; and

(13) The fees for the mediation will be borne equally between the parties unless they have otherwise agreed about how those fees will be paid.

After the mediator has made her introductory remarks and answered any questions about her role or the overall mediation process, each side will make

an opening statement, usually beginning with the claimant. The lawyers typically give these opening statements, which generally set forth the parties' factual and legal contentions. Sometimes, however, the clients will participate in the opening statements by explaining certain parts of "the story" (*see* §§ 16.08[4] and 16.11). After the opening statements, the mediator might ask some clarifying questions, might allow the parties to share further information between one another, or might let the parties engage in a free-flowing discussion of the dispute. If there are multiple issues in the case, the mediator might devote part of the joint session to establishing an appropriate agenda.

When it becomes apparent that discussions in a joint session are no longer productive, the mediator will begin private caucusing through separate, *ex parte* meetings with each side. Usually, she will hold the first private meeting with the claimant and his attorney or the side that is in the position to respond to the latest offer or proposal, and then caucus with the opposing side. In most cases, private caucusing will begin shortly after the parties have given their opening statements, and the mediator will hold numerous private meetings with each side. Indeed, in the mediation of legal disputes, it is common for the balance of the time spent during mediation to consist of these alternating private caucuses through which the mediator acts as a sort of "shuttle diplomat" between the opposing sides. On the other hand, after holding a number of private caucuses with each side, the mediator might decide to bring the parties back together in a joint session if, for example, they express a desire to do so, or if exchanging certain information or discussing a particular proposal would be more efficient in a joint meeting.

During the private caucuses, the mediator will engage in five overlapping functions or stages:

(1) Obtaining information about the facts, the law, the issues, the parties' underlying feelings, interests or needs (*e.g.*, emotional, psychological, economic, physical, or social), the parties' primary, secondary, and incidental objectives, potential solutions or proposals, and the reasons supporting particular proposals, offers, and counteroffers;

(2) Generating and discussing potential solutions or proposals in light of the parties' interests and objectives;

(3) Assessing, selecting, and communicating specific proposals, offers, and counteroffers of the parties;

(4) Creating movement in the negotiations by encouraging the parties to compromise and consider the risks, costs, and alternatives to not reaching an agreement; and

(5) Forging and finalizing the terms of an agreement.

Throughout these stages, the mediator will engage in a variety of tactics and techniques to encourage the parties to be cooperative and realistic in the bargaining process.

Most mediation sessions last between one and five hours, but it is not uncommon for a mediation to last for a day or more in multi-party or particularly complex cases. In addition, the mediator and the parties might

agree to hold more than one mediation session to allow the parties to use the time in between to formulate or consider new settlement proposals or obtain additional information.

§ 16.03 Facilitative v. Evaluative Mediation

As a matter of mediation philosophy, mediators often distinguish between so-called "facilitative" and "evaluative" mediation, and some jurisdictions permit only "facilitative" mediation in court-annexed mediation programs. Strictly speaking, in "facilitative mediation," the mediator assists the parties to arrive at their own decision about a reasonable settlement or solution under circumstances where the mediator neither offers an opinion about the settlement value of the case nor recommends how the case should be resolved. In contrast, in "evaluative mediation," the mediator is permitted to give a non-binding opinion or recommendation about the settlement value of the case or how the case should be resolved. In a combined facilitative-evaluative mediation, the mediator will usually first try to achieve a resolution through pure facilitation, and if that is unsuccessful, will then offer an opinion or recommendation about how the case should settle. In selecting a mediator, the parties are usually free to choose which type of mediation they prefer for their case.

It is important to emphasize that even in strictly "facilitative" mediations, the mediator still engages in important evaluative functions throughout the mediation. For example, mediators constantly evaluate the body language of the parties, the relative importance of their feelings, needs, interests and objectives, the reasons behind their offers and counteroffers, the costs and risks associated with not reaching an agreement, and the extent to which the parties' negotiating positions are realistic. This is because an on-going evaluation of these matters is critical to the mediator in deciding what styles, strategies, and tactics and techniques to employ in helping the parties reach an agreement. Thus, although the strictly "facilitative" mediator will never *directly* render an opinion about the settlement value of the case or how the case should be resolved, she will inevitably indicate her views or sense about these matters by *indirection*—through the questions she asks the parties, the information she shares between one side and the other, and the various matters she emphasizes with each side in an effort to encourage the parties to compromise and forge a satisfactory agreement.

§ 16.04 Mediator Styles and Strategies

Mediators may engage in styles of interpersonal behavior that range from being fairly passive to being quite aggressive. In mediation training programs, mediators are typically taught to act in a mild-mannered and low-key way, to keep their emotions under control, and to place a premium on being sensitive to the feelings and concerns of the parties through focused questioning, "active listening," and empathetic understanding.

In connection with the overall goal of trying to bring the parties together to reach an agreement, mediators employ different strategies or methodologies that, in turn, may affect their interpersonal style. In general, these different

strategies or conceptual approaches to mediating have been usefully described as "trashing," "bashing," or "hashing it out."[5]

Under the "trashing" approach, the mediator uses the private caucuses to "tear apart" each side's case by asking pointed questions about its strengths and weaknesses. In this way, the parties are forced to take a hard look at the merits of the case from a more objective factual and legal standpoint. Despite the bombastic-sounding term "trashing," this strategy of facilitating honest case assessment may be employed by mild-mannered as well as more aggressive mediators. After each side's case has been "torn down," the mediator proceeds to press both sides to put more "realistic" proposals or settlement figures on the table. The mediator then continues to shuttle back and forth between the parties in private caucuses to help forge an agreement out of their more reasonable proposals or positions.

Many lawyers appreciate this sometimes blunt, "no-nonsense" approach to mediating, particularly in adversarial cases where money is the sole or primary issue and the lawyers' or parties' egos have prevented them from making realistic assessments of the value of the case or coming up with viable settlement options. The effectiveness of the strategy, however, largely depends upon the litigation experience of the mediator and her ability to accurately point out the strengths and weaknesses of the case from a trial standpoint. Although the approach may also be used in problem-solving situations, it is likely to be less effective when the parties are not particularly concerned with analyzing settlement prospects from a cost-benefit perspective, but rather are driven by matters such as establishing precedent or obtaining vindication.

Under the "bashing" strategy, the mediator (who might, for example, be a retired judge) spends much less time discussing the relative strengths and weaknesses of the parties' cases, and instead "bashes away" at the initial settlement offers of the parties to try to get the parties to settle somewhere in between. The basher draws upon her trial experience to emphasize the risks and costs of litigation, and then aggressively exhorts the parties to compromise. The ensuing mediation becomes a sort of "mad dash for the middle." As explained by one basher:

> The plaintiff wanted $75,000. The defendant told me he would pay $40,000. I went to the plaintiff and said to him, "They're not going to pay $75,000. What will you take?" He said, "I'll take $60,000." I told him I wasn't sure I could get $60,000 and asked if he would take $50,000 if I could get it. He agreed. I then went back to the defendant and told him I [sic] couldn't settle for $40,000, but "you might get the plaintiff to take $50,000" and asked if he would pay it. The answer was yes. Neither of them were bidding against themselves. I was the guy who was doing it, and that's the role of the mediator.[6]

Some lawyers welcome this highly aggressive approach, which tends to expeditiously "hammer sense" into the parties. The drawbacks of the strategy are that it is not conducive to problem solving, is largely inappropriate for

[5] James J. Alfini, Trashing, Bashing, and Hashing it Out: Is this the End of "Good Mediation"? 19 Fla. St. Univ. L. Rev. 47 (1991).

[6] Id. at 70.

complex or multiparty cases, and sometimes fails to encourage the parties to carefully evaluate their cases beforehand to make reasonable initial settlement offers from which concessions are made based on reasoning rather than out of raw submission.

Under the "hashing it out" approach, the mediator places greater reliance on direct communication between the parties and takes a less directive role in pressing them toward an agreement. The preference is for the parties to communicate freely and hash out an agreement by themselves. If the parties have difficulty communicating with one another, they communicate through the mediator. The mediator variously plays the roles of "facilitator, orchestrator, referee, sounding board, [and] scapegoat."[7] Unlike the trashers and bashers, hashers tend to be more flexible in their approach to the mediation process by varying their styles and use of caucusing as best fits the particular circumstances of the case and the parties. If the parties are not making headway toward an agreement and wish to terminate the mediation, the hasher will usually accede to the voluntariness of the process and not press the parties to reach an agreement.

Hashers thus tend to take a somewhat more passive role in the mediation process. The strategy is well suited for problem-solving and works particularly well when the parties are willing to engage in non-adversarial and cooperative bargaining. On the other hand, because of the hasher's penchant not to vigorously "push" the parties toward an agreement, the parties may end up abandoning the mediation process prematurely.

These different mediator strategies are not necessarily mutually exclusive. That is, in a particular mediation, a mediator might first hash, then trash, and finally bash. Similarly, a mediator might adopt a more passive style at the outset of the mediation and then employ a more aggressive style later if the parties appear able to reach an agreement but are having difficulty achieving closure. In short, different strategies and styles have their own advantages and disadvantages depending on the particular case, the parties involved, and where the parties are in the mediation.

§ 16.05 What Cases to Mediate and When to Mediate

If your client has filed a lawsuit and the jurisdiction requires that the case be mediated as a predicate to maintaining the suit, your client will have no choice but to engage in mediation unless the applicable statute, agency rule, or court rule otherwise allows the parties to waive mediation by mutual agreement or for good cause. Even if mediation is not required, it is important to decide whether to nevertheless voluntarily engage in mediation either after negotiations have failed or in lieu of traditional negotiations. If you decide to pursue mediation, it is also necessary to consider at what stage of the case mediation would be most productive.

The option of mediating a case is typically not considered until after traditional negotiations have broken down. However, in circumstances where (1) the parties or their lawyers have a particularly strained relationship, (2)

[7] Id. at 71.

multiple parties are involved, or (3) there are numerous or complex issues in dispute, it may be beneficial to mediate the case at the outset in lieu of engaging in traditional negotiations. Assuming you are considering mediation, either in lieu of traditional negotiations or after they have failed, provided below are "Favorable Situations for Mediation" and "Unfavorable Situations for Mediation" to aid in deciding whether to mediate and at what stage of the case mediation might be most productive.

[1] Favorable Situations for Mediation

- The parties or their lawyers are finding it difficult to engage in negotiations, or negotiations are deadlocked.
- The parties want to settle the case confidentially.
- The parties want to avoid establishing judicial precedent.
- Communication between the parties is poor, or their emotional involvement in the case is preventing settlement.
- The parties want to minimize litigation costs.
- The interests or needs of the parties are interdependent, and they would benefit from each other's cooperation in satisfying those interests or needs.
- The parties want or will have to maintain a relationship after the dispute is resolved.
- The parties have different perceptions about the facts of the case, or disagree about what data or other information is needed to resolve it.
- The parties are divided over different values or interests.
- There are multiple parties in the case, or there are a number of other persons whose input is necessary or would be desirable in resolving the dispute.
- There are multiple issues in the case and the parties disagree about the order in which the issues should be addressed.
- The parties are considering a non-monetary remedy or some other remedy that a court cannot provide.
- The parties are unable to agree on an acceptable forum or structure for negotiations.
- Stereotyping, prejudices, misunderstandings, or other misperceptions are preventing the parties from resolving their dispute.
- The parties are having difficulty evaluating the factual or legal merits of the case or its value, or have unrealistic views about those matters.
- The parties desire to resolve at least some, if not all, issues in the case.
- The parties wish to engage in informal discovery, or want to evaluate each other's credibility or jury appeal.

[2] Unfavorable Situations for Mediation

- The parties have a need for formal discovery that has not yet been completed, and they are unable to provide necessary information to one another through the mediation process.

- The parties want a judicial resolution of the dispute because they want to establish a precedent, want a court to resolve ambiguous or conflicting law, or want vindication.
- The sole issues dividing the parties are ones of "principle."
- Punitive damages are an indispensable issue in the case.
- The events giving rise to the parties' dispute were so traumatic that the parties are not yet psychologically able to discuss a possible resolution of their dispute (*e.g.*, in the family law area, where domestic violence has been involved in the dispute).
- Negotiations have been so acrimonious or unproductive that the parties have essentially decided to take the case to trial.
- The parties stand to gain from a strategy of delay.
- There are numerous parties involved in the dispute and one or more of them is unwilling to mediate.
- The parties' dispute affects the public interest and the government is not represented.

§ 16.06 Choosing a Mediator

In jurisdictions that mandate mediation in certain types of cases, the parties are usually free to select their mediator by mutual agreement. If they cannot agree, a mediator will usually be appointed from a list of mediators eligible to mediate the particular type of case. Typically, these eligible mediators have been "certified" to mediate cases after completing a mandatory mediation-training course.

One scholar has summarized the qualities and abilities of a good mediator as a person who is "capable of appreciating the dynamics of the environment in which the dispute is occurring, intelligent, effective listener, articulate, patient, non-judgmental, flexible, forceful and persuasive, imaginative, resourceful, a person of professional standing or reputation, reliable, capable of gaining access to necessary resources, non-defensive, person of integrity, humble, objective, and neutral with regard to the outcome."[8] When choosing a mediator, in addition to these qualities and abilities, you should consider whether the prospects for settling the case would be enhanced by a "facilitative" or "evaluative" mediator, and whether the particular mediator has a style and strategy that would complement the case.

Along with the foregoing considerations, it may be useful to know that, for many lawyers, the most sought-after mediators are those who are "willing and able to 'push' the parties, not in an antagonistic or hostile sense, but in the positive sense of inviting, supporting, encouraging, motivating, and urging the parties to work [toward an agreement]."[9] This overall attribute of "pushing" the parties involves pushing them (1) to obtain, disclose, and consider all

[8] Joseph B. Stulberg, The Theory and Practice of Mediation: A Reply to Professor Susskind, 6 Vt. L. Rev. 94 (1981).

[9] Robert A. Baruch Bush, Efficiency and Protection, or Empowerment and Recognition? The Mediator's Role and Ethical Standards in Mediation, 41 Fla. L. Rev. 277 (1989).

information relevant to resolving the dispute; (2) to carefully assess the importance of any missing pieces of information in deciding whether and how to proceed in the absence of complete information; (3) to identify and consider all possible options for resolving the issues before focusing on specific options and making actual decisions; (4) to consider and fully understand the consequences of reaching an agreement or not reaching an agreement; (5) to articulate clearly their positions and the reasons behind them; and (6) to hear and understand each other's positions and the reasons underlying them.[10] In sum, many lawyers appreciate mediators who are willing to be persistent in the mediation process by engaging in a diligent effort to push *for* the parties to reach an agreement and push *with* them toward that end. This role of the effective mediator may be accomplished through any number of different mediator styles or strategies.

Finally, in unusually complex cases or where there are numerous parties and issues, it may be desirable to have co-mediators conduct the mediation. In selecting co-mediators, you might consider whether gender, racial, or ethnic balance would enhance the mediation. In addition, you might select one mediator for her rote skills as an effective mediator, and the other for his special expertise in the subject matter of the case to be mediated.

§ 16.07 Mediator Tactics and Techniques

[1] Tactics and Techniques Drawn from Traditional Negotiating

It is often said that good mediators are good negotiators. Accordingly, mediators routinely employ a variety of tactics and techniques that are similar to those employed in inter-party negotiations. Thus, mediators may use a number of the "Negotiating Tactics and Techniques" discussed in Chapter 10. However, good mediators will not use those tactics and techniques which are designed to mislead or exert undue pressure upon a party, or which are otherwise disingenuous or unethical.

Based on the list of Negotiating Tactics and Techniques given in Chapter 10, the following chart separates the particular tactics and techniques that mediators will not use in mediation from those they might use in mediation:

Negotiating Tactics and Techniques Mediators Will Not Use:	Negotiating Tactics and Techniques Mediators Might Use:
• Anger/Aggressiveness	• Abdication
• Blaming or Fault Finding	• Adjournment or Caucus
• Bluffing	• Deadlines
• Br'er Rabbit	• Delay (in a constructive application)
• Coalition	• Draft Document or Single Negotiating Text
• Company Policy Excuse	• Face Saving
• Dodging the Question	• Floating Trial Balloons and Bracketing

[10] Id. at 276–281.

Negotiating Tactics and Techniques Mediators Will Not Use:

- Escalating Demands
- Excessive Initial Demands/Offers
- Fait Accompli
- False Demands
- False Multiple Concessions
- False Scarcity
- Good Guy-Bad Guy Routine/Mutt and Jeff
- Lack of Authority or Limited Authority
- Little Ol' Country Lawyer
- Lock-in Positions
- Low-Balling
- Misstatement
- Nibbling
- Personal Attacks
- Playing Dumb
- Publicity
- Reversing Position
- Snow Job/Alleged Expertise
- Take-it-or-Leave-it
- Threats
- Two Against One
- Walkout

Negotiating Tactics and Techniques Mediators Might Use:

- Off-the-Record Discussions
- Preconditions or Conditional Proposals
- Problem-Solving
- Questioning by Socratic Method
- Questions to Facilitate Agreements
- Salami
- Splitting the Difference
- Surprise
- Timing
- Word-Smithing

In addition to the foregoing negotiating tactics and techniques that mediators sometimes employ, there are a number of other tactics and techniques that mediators commonly use which are important to understand when you prepare for mediation and negotiate during mediation. These mediator tactics and techniques are summarized below under the five overlapping functions or stages that mediators engage in during mediation: (1) Obtaining Information; (2) Generating and Discussing Potential Solutions; (3) Assessing, Selecting, and Communicating Specific Proposals; (4) Creating Movement in the Negotiations; and (5) Forging and Finalizing the Terms of an Agreement.

[2] Tactics and Techniques for Obtaining Information

Mediators consider it essential to obtain complete information from both parties about the facts; the law; the issues; the parties' underlying feelings, interests or needs (*e.g.*, emotional, psychological, economic, physical, and social); the parties' primary, secondary, and incidental objectives; potential solutions or proposals; and the reasons supporting particular proposals, offers and counteroffers. This information serves as the raw material from which the mediator can understand the issues in the case, and then proceed to explore potential solutions, discuss specific proposals, create movement in the negotiations, and hopefully forge and finalize an agreement.

Sometimes these types of information are discussed openly in a joint session, but more often than not, the mediator will seek to obtain this information during private caucusing. In doing so, the mediator might:

- Ask direct questions about the facts, law, issues, and the parties' interests, objectives, and possible solutions (*see also* §10.37);
- Ask "why" the parties have the particular interests and objectives that they do;
- Ask the parties to rank, from most important to least important, their interests, objectives, the issues in the case, and general elements of a potential agreement;
- Explore the extent to which the interests and objectives of the parties are mutually exclusive, competing, compatible, or identical;
- Allow the parties to vent their emotions;
- Ask for counsels' analysis of the merits of the case and what might resolve it.

In this information-gathering stage, the mediator is primarily concerned with building rapport with the parties, understanding all factors underlying the dispute, and identifying the key issues in the case. If the parties are unable to agree on an appropriate agenda for dealing with the issues, the mediator might call upon the parties to (a) alternate in choosing the issues to be discussed, (b) pick one or two issues that both parties consider of greatest importance and place them at the top of the agenda, (c) identify the "easier" issues and place them at the top of the agenda, (d) negotiate first those issues that are a necessary or logical predicate to resolving other issues, or (e) negotiate a number of issues simultaneously through packaged proposals containing multiple-issue solutions.

[3] Tactics and Techniques for Generating and Discussing Potential Solutions

Mediators often encourage the parties to problem-solve by generating as many potential solutions to the dispute as possible before making a specific proposal or offer. (*See also* § 14.14[2]). The overall objective is to encourage the parties to consider solutions that may satisfy their mutual interests or needs, and to discourage the parties from engaging solely in positional bargaining. Consistent with this objective, mediators frequently request that the parties not reveal their bottom lines (*i.e.*, resistance points) to the mediator until late in the mediation process. This is to prevent the parties from becoming psychologically committed to bottom-line outcomes that may result in deadlock when their settlement ranges do not overlap, and to prevent them from being reluctant to modify their bottom lines in light of the information they learn during the mediation process that may change their assessment of the case.

In helping the parties generate and discuss a broad range of potential solutions, the mediator might:

- Encourage the parties to explore non-monetary as well as monetary solutions to the case;

• Engage in "brainstorming for solutions" (*see* §14.14[2]) either in a joint session or during the private caucuses;

• Ask each party to consider the opposing party's interests and views about the dispute;

• Pose hypothetical solutions to the parties to test their reaction to alternative ways of resolving the dispute;

• Ask the parties what elements of an agreement they might be willing to trade in exchange for obtaining certain other commitments in an agreement;

• Ask the parties (if they have an ongoing or past relationship) to identify those aspects of their relationship that have worked well, and whether any of those aspects might be incorporated into an agreement;

• Encourage the parties to consider objective standards such as custom, industry standards, ethical norms, or expertise in generating possible solutions;

• Suggest that the parties consider incorporating into an agreement the elements of any "model agreements" that other persons have used to resolve similar disputes.

[4] Tactics and Techniques for Assessing, Selecting, and Communicating Specific Proposals

After the parties have generated and discussed potential solutions, they will begin the bargaining phase of the mediation by making specific proposals, offers, and counteroffers, which the mediator will communicate to the parties usually by shuttling back and forth between them in private caucuses. Sometimes this will occur in a joint session when, for example, a party's proposal contains multi-faceted elements that require detailed explanation or discussion.

In assisting the parties to assess and select specific proposals, the mediator might:

• Help the parties value the case through any of the valuation methods discussed in Chapter 11;

• Ask the parties to articulate specific reasons for their particular proposals or offers;

• Encourage the parties to make reasonable first offers and counteroffers;

• Suggest that the parties work from a *Draft Document or Single Negotiating Text* (*see* § 10.14);

• Suggest that the parties consider incorporating into a proposal, as might be appropriate:

— a payment in kind (*e.g.*, a transfer of goods or property, or a performance of services) instead of in money;

— a structured settlement (*see* § 17.09) or payment in installments;

— payment of a portion of the settlement to a mutually acceptable charity or other public-interest organization;

— a future business arrangement or relationship (*e.g.*, in a contract dispute);

— a change in an employee's title or work status in lieu of, or in exchange for, a smaller pay increase (*e.g.*, in an employment dispute);

— an undertaking to provide a warning label on a product in a products liability case, or a promise to take certain corrective action to prevent the recurrence of the type of accident that occurred in the instant case;

— a substitution of goods (*e.g.*, in a dispute involving a purchase or lease of goods);

— an apology for what happened;

— a confidentiality clause in the agreement;

— a provision to abide by the recommendation of a suitable third party who has special expertise in the matter in dispute (*e.g.*, the recommendation of a child psychologist in a child custody or visitation dispute).

In communicating specific proposals being made by one party to the other, the mediator might:

• Present the proposal as if it were the mediator's own idea so as to keep the party to whom the proposal is made from rejecting it out of hand due to "reactive devaluation" (*see* § 7.06[4]);

• Make a proposal conditional without communicating a commitment on the part of the offering party (*e.g.*, "If I can get the other side to do X, will you do Y?");

• Time the communication of a particular proposal to coincide with that point in the process when presentation of the proposal will have the greatest impact;

• Explain the parties' reasons for their particular offers, or their reasons for rejecting or modifying particular proposals.

[5] Tactics and Techniques for Creating Movement in the Negotiations

Creating movement in the negotiations in the sense of encouraging the parties to make reasonable concessions toward an agreement is, of course, the mediator's most difficult task. To this end, as discussed in § 16.04, a mediator might employ a "trashing," "bashing," or "hashing it out" strategy, or a combination of these strategies. As specific tactics and techniques for bringing the parties closer together and reducing their commitment to unreasonable or unrealistic positions, the mediator might:

• Directly or indirectly indicate the mediator's views about the merit or lack of merit of a particular proposal or position;

• Engage in *Questioning by Socratic Method* (*see* § 10.38) by asking a series of logical questions that are designed to expose the weaknesses in a party's proposals or positions;

• Suggest that counsel for the parties phone another lawyer or a law professor they respect to render an opinion about the relative merits of a novel or controversial legal theory advanced in the case;

• Ask what evidence would be introduced at trial in support of a particular factual or legal theory in the case;

• Inquire about the extent of the parties' "aversion to risk" and willingness to actually take the case to trial (*see* § 7.06[1]);

• Point out the economic and emotional costs of taking the case to trial or of pursuing the parties' other BATNAs;

• Point out the irrationality of failing to reach an agreement due to a preoccupation with "sunk costs"—*i.e.*, past expenditures of money or emotional capital which are lost no matter what the parties do but which they vainly seek to justify or recoup in making a choice about settlement or trial (*see* § 7.06[3]);

• Point out that a party's interests or positions may not be as important as originally believed, or that the other party's interests or positions may be more important than originally believed;

• Engage in an off-the-record, private discussion solely with the parties' lawyers to discuss the barriers that are preventing settlement (*see also* § 16.12[10]);

• Suggest that the mediation be temporarily adjourned so that the parties might reconsider their positions or try to come up with new proposals;

• Ask a variety of questions designed to moderate the parties' positions, such as:

—If you were in the other party's situation, would you accept the proposals that you are making now, or would you expect that more should be offered in exchange for an agreement?

—Is your offer fair? Will those whom you respect, the community or the public, perceive it as such?

—Is your offer in line with community, legal, or other norms?

—Is the demand that you are making in line with other negotiated settlements or court decisions on similar issues under similar conditions?

—Do you have the power to force the issue?

—What are the benefits to you of pursuing your present course? Are there any risks?

—How certain are you that you can win in court? Ninety percent? Seventy-five percent? Fifty percent?

—What if you lose in court? What will your life be like then?

—What impact do you think your victory in court will have on your on-going relationship with the other party? Will you ever be able to work together again? Who else might be affected?[11]

[11] Christopher W. Moore, *The Mediation Process—Practical Strategies for Resolving Conflict*, 276, 331 (2d ed. 1996).

[6] Tactics and Techniques for Forging and Finalizing the Terms of an Agreement

When the parties are on the verge of reaching an agreement, mediators often become somewhat more aggressive in helping to forge the terms of a final settlement. For example, the mediator might press harder in applying the tactics and techniques set forth in subsection [5] above. In addition, the mediator might:

• *Abdicate* by pressing one or more of the parties to come up with a final concession (*see also* § 10.02);

• Provide one or more of the parties with a rationale for changing position that allows the party to save face in making a final concession;

• Ask one or more of the parties to make a specific concession proposed by the mediator who serves as the scapegoat for the concession, such that the party making it can say that he did so solely at the request of the mediator and not because the party initiated the concession or was forced into it by the other side;

• Suggest that the parties split the difference.

As mentioned previously, if the parties reach an agreement, the mediator will usually reconvene in a joint session to summarize the terms of the agreement and seek clarification about any "loose ends" and appropriate arrangements for preparing and executing final settlement documents. In many court-annexed mediation programs, the mediator is required to have the parties sign a memorandum of understanding about the terms of the settlement before leaving the mediation session.

§ 16.08 Preparing for Mediation

Preparing for mediation is much like preparing for negotiation. You need to (1) prepare a Mediation Preparation Outline from which an overall negotiating approach can be developed and employed during the mediation; (2) decide whether to hold a pre-mediation conference with the mediator or opposing counsel; (3) decide who should attend the mediation for your side and what roles those participants will play; and (4) prepare the client for the mediation session.

[1] Preparing a Mediation Preparation Outline

In preparing a Mediation Preparation Outline, you should follow the same twelve steps and format used for preparing a Negotiation Preparation Outline as set forth in §§ 12.03 and 12.04. These steps, with a few additional considerations pertinent to the mediation process, are as follows:

Step 1: *From the Perspective of Each Party, Make a List of Information to Obtain, Information to Reveal, and Information to Protect.* Any special information you decide "to reveal" to the other side would presumably be information you would want to reveal to the mediator as well. Under "information to protect," list any information that you do not want to disclose to the

mediator, even in confidence, and any information that can be disclosed to the mediator but not to the other side.

Step 2: *Make a List of Each Party's interests.*

Step 3: *Make a List of Each Party's Primary Objectives, Secondary Objectives, and Incidental Objectives (to Exchange).*

Step 4: *Make a List of Possible Solutions for Each Party (from most preferred to least preferred).*

Step 5: *Make a List of Each Party's Best Alternatives to a Negotiated Agreement (BATNA).*

Step 6: *Make a List of Each Party's Factual and Legal Leverage Points (Strong and Weak).*

Step 7: *Identify Each Party's Potential Target and Resistance Points.*

Step 8: *Identify Each Party's Negotiating Strategy: Adversarial or Problem Solving.*

Step 9: *Identify Each Party's Negotiating Style: Competitive (Hardball), Cooperative (Softball), or Competitive-Cooperative (Hardball and Softball).* Also identify the mediator's most likely style and strategy during the mediation—*e.g.*, passive or aggressive, and "trasher," "basher," or "hasher" (*see* § 16.04).

Step 10: *Make a List of Each Party's Offers or Proposals in the Order They May Be Presented.*

Step 11: *Consider Each Party's Particular Tactics.* Also consider any special tactics and techniques that might be effectively used by the mediator during the mediation (*see* § 16.07).

Step 12 *Revise All of the Foregoing Matters Throughout the Mediation Process.*

Because mediation often occurs after the parties have already engaged in negotiations and filed a lawsuit, it is particularly important to review the case file when preparing your Mediation Preparation Outline. This means reviewing all pleadings, formal admissions, responses to interrogatories and requests for production of documents, transcripts of depositions, correspondence setting forth the history of prior settlement discussions and any instructions from your client about your settlement authority, and any other important documents in the case (*e.g.*, medical reports, medical bills, statements showing lost earnings, reports of expert witnesses or investigators, documents that might be introduced at trial, etc.). If your review of the case file shows that certain documentation is incomplete or that you need additional information to support your client's case, this information should be obtained in advance of the mediation.

[2] Holding a Pre-mediation Conference With the Mediator or Between Counsel

It is sometimes desirable to hold a pre-mediation conference, by telephone or in a meeting, with the mediator or opposing counsel. Such a conference may be useful:

- To work out the agenda, format, or logistics of the mediation;

- To brief the mediator about the issues in the case, prior settlement discussions, the status of the litigation, and the basic positions of the parties;
- To determine whether there is any essential information that the parties need to obtain or submit to the mediator in advance of the mediation;
- To forewarn the mediator about any delicate aspects of the controversy that may impede a resolution of the case;
- To provide the mediator with insights about any special ways in which the mediation session might be structured or conducted to best facilitate a resolution of the dispute;
- To discuss the need for having any third persons attend the mediation or be on telephone standby for consultation on questions of settlement authority or to provide certain expertise during the mediation;
- To apprise the mediator of any technical, legal, or sensitive information so as to save time or awkwardness in discussing these matters at the mediation session;
- To suggest that the mediator meet in advance with one or more persons who have information relevant to the dispute but who will not be able to attend the mediation;
- To suggest that, where numerous parties are involved or the parties are particularly emotional about the dispute, the mediator meet privately with each party in advance of the mediation to understand the issues and, as appropriate, calm the parties; or
- To discuss any other matters that may enhance the overall efficiency of the mediation session and the prospects for resolving the case.

The foregoing types of matters are typically discussed between counsel before deciding whether it would be useful or necessary to raise any of them with the mediator in advance of the mediation. Moreover, counsel's pre-mediation discussions about these matters help them to prepare for the mediation and to ensure that both sides have all necessary information to meaningfully evaluate the case. In most situations, you will find that an informal pre-mediation discussion with opposing counsel will be sufficient to pave the way for an effective mediation session, and that it is unnecessary to hold a formal pre-mediation conference with the mediator. As a matter of practice, a lawyer for a party generally should not have any *ex parte* pre-mediation meetings or conversations with the mediator about substantive issues or positions in the case without opposing counsel's knowledge.

[3] Who Should Attend the Mediation

As mentioned previously, many court-annexed mediation programs require the following persons to attend the mediation: the individual parties (or designated representative of a party if it is a corporate or government entity), an insurance company representative if there is insurance coverage in the case, the parties' lawyers, and the mediator (or co-mediators). The goal is to ensure that all persons who are necessary to reaching a workable and binding settlement be present.

However, even in jurisdictions that prescribe the persons who must attend the mediation, the parties are usually permitted, by mutual agreement and the consent of the mediator, to excuse the attendance of a person who otherwise is required to attend. For example, in automobile personal injury cases where liability is not in issue, the parties will often agree that the defendant who caused the accident need not be present, given that the defendant's insurance carrier paying the claim will be represented at the mediation by a claims adjuster and by defense counsel hired by the carrier.

When your client's attendance at the mediation is not mandatory, it is unwise for him not to attend unless there are compelling reasons for his nonattendance. In most cases, active client participation in the mediation (particularly during the private caucuses) is instrumental to reaching a settlement. Given that for many clients the very *process* of resolving a dispute is important, there can be no exposure to that "process" if your client does not attend the mediation. Moreover, your client's attendance at the mediation helps give effect to the ethical prescription that he alone must make the final decision about whether to settle the case. Finally, his attendance makes it easier for you to fulfill your ethical responsibility of ensuring that he is reasonably informed about all essential matters relevant to making that decision (*see* § 9.02).

In addition to these reasons for having your client attend the mediation, his attendance may be particularly useful as an opportunity to display his credibility and likeability to the opposing side. This is important because many mediations occur before the lawyers have deposed any of the parties. Even if your client does not have a personality that readily radiates these qualities, his mere presence at the mediation will tend to humanize the case. In short, a client's demonstration of "jury appeal" can go a long way towards achieving a favorable settlement when the only alternative to settlement is taking the case to trial.

On the other hand, if your client does not want to attend the mediation and seems incapable of controlling negative behaviors that would impede the mediation process, you should seriously consider obtaining his consent not to attend the mediation. That is, if he is simply unable to control his distinct lack of jury appeal (even in a relatively short joint session before private caucusing), you might discuss with him the option of not attending the mediation and making himself available for private consultation with you by telephone during the mediation. Of course, discussing this option with your client is a difficult matter if he nevertheless wants to be present at the mediation. In that event, the best approach is to be straightforward but tactful about the matter, pointing out that some clients—through no fault of their own—are so emotionally affected by a dispute that their overall interests might be better served if they are not physically present at the mediation. This same explanation would be given to the other side and the mediator to obtain their consent to your client's nonattendance. However, if your client still insists on attending the mediation, you must honor that choice.

Sometimes a client will want a family member or close friend to be physically present during the mediation session as a support person. This may be permitted with the consent of the opposing party and the mediator, but

rarely occurs in practice. More often, the support person will be permitted to come to the office where the mediation is being held to confer privately with the client when breaks are taken or when the mediator is holding private caucuses with the other side.

Parties sometimes also find it useful to have certain experts attend the mediation or, more commonly, be on telephone standby for consultation during the mediation. Examples of such experts include structured settlement experts, accountants or tax lawyers, medical experts, psychologists (*e.g.*, in a child custody or visitation dispute), or economists (*e.g.*, to explain lost future earnings). If one side has an expert attending the mediation, mediators usually prefer that the other side also have an expert present or available for consultation by telephone. That is, mediators are particularly sensitive to maintaining a "level playing field" for both parties.

Finally, some jurisdictions provide that third parties who have a lien or other claim on the proceeds of a settlement (*see* § 17.10) have the right to attend the mediation or be on telephone standby for consultation. As a practical matter, lienholders or similar claimants rarely send a representative to attend the mediation; and mediators otherwise usually prefer that such third parties not attend, given that the assertion of their economic interests during the mediation may greatly complicate the process and undermine the prospects for a settlement. On the other hand, the participation of a lienholder at the mediation may be important where, for example, the defendant is unwilling to pay the plaintiff more than the amount of the lien and the lienholder, hearing this, thus decides to reduce its lien to ensure at least some recovery for itself and for the plaintiff.

[4] Preparing the Client for Mediation

In preparing your client for mediation (or any other person who will attend the mediation for your side), you should explain the overall mediation process (*see* §16.02); whether the mediation will be "facilitative" or "evaluative" (*see* § 16.03); and the general style and strategy of the particular mediator (*see* § 16.04), including her background and qualifications. In particular, emphasize that:

- The process is not a trial and will be conducted in an informal atmosphere that is designed to make all parties feel comfortable;
- The offers and counteroffers or proposals discussed at the mediation are not admissible as evidence at a trial;
- The mediator (even in "evaluative" mediation) does not serve as a judge or jury to decide the case, but is trained to assist both sides to consider each other's perspectives about the controversy to make an informed and voluntary decision about whether to settle the case, and if so, how to settle it;
- The ultimate decision whether to settle the case is your client's, but that you will be providing advice to your client throughout the mediation to help him make that decision;
- In the private caucuses with each side, the mediator is likely to "play the devil's advocate"—not to criticize your client's interests or positions, but to

encourage a realistic assessment of the case and discussion of all possible solutions;

- Particularly in the private caucuses, the mediation process is designed to encourage free-flowing discussion and open information sharing;
- Many mediations last for the better part of the day (or even longer), and experience has shown that patience and open-mindedness in the process often leads to a satisfactory settlement of the case; and
- During the mediation session there will be ample opportunity for you and your client to confer privately.

Irrational or inflated client expectations about the value or outcome of the case are common problems that lawyers face when representing a client in mediation. If you have these problems with your client, stress the knowledge and experience of the mediator, and that the mediation process provides a unique opportunity to listen to the mediator and draw upon her special skills and experience as you and your client assess the case and the prospects for a reasonable settlement. In short, point out that consistent with the ultimate task of deciding whether it is in your client's best interests to settle the case or take it to trial, the input of an impartial and neutral mediator is worth careful consideration when one is trying to make a decision that will not later be regretted.

After explaining the overall mediation process and the role of the mediator, you should review and discuss your Mediation Preparation Outline with your client. As appropriate, make any changes or additions to it. Be sure to emphasize to your client that the Outline is only a general "game plan" for the mediation, and not an inflexible blueprint of unalterable interests, objectives, positions, and bottom lines. Explain that it is typical to discover new information or perspectives about the case during the mediation process that may cause both parties to significantly depart from their pre-planned approach to the mediation and reconsider their earlier assessment about what would be a reasonable settlement of the dispute. In sum, emphasize that the *sine qua non* of effective advocacy in the mediation setting is to resist becoming entrapped by entrenched positions, and to keep an open mind and willingness to be flexible in considering different solutions to the case and engaging in appropriate compromise.

Next, discuss with your client the specific roles he will play during the mediation. In the joint session, this role may range from saying nothing to making pre-planned remarks as part of the opening statement or answering questions of the other side. For example, if your client is articulate, credible, likeable, and persuasive, you might have him participate in the opening statement by explaining certain facts or events in connection with the case, explaining how he has been affected by those events, or sharing his general perspectives or feelings about the dispute. Conversely, if your client's personality or emotional involvement in the case would make it inappropriate or uncomfortable for him to participate in the presentation of the opening statement or respond to questions of the other side, he should be advised to let you do all of the talking in the joint session.

Similar considerations apply in determining the extent to which your client should speak during the private caucuses. In this setting, however, your client's active participation is much "safer" in that what he says, and how he says it, is known only to the mediator and can be shielded from the other side. Therefore, it is generally a good idea to encourage your client to speak freely during the private caucuses, particularly in responding to questions asked directly to him by the mediator. This will enhance the mediator's understanding of your client's feelings and views about the case, and any "venting" or other emotional displays by your client are more likely to be viewed by the mediator as being the product of a candid attempt to respond to her questions, rather than as manifestations of an irrational or unstable personality. In any event, you can always take a recess from a private caucus if you think that your client is engaging in counterproductive or other inappropriate behavior.

Notwithstanding the usual desirability of encouraging your client to speak freely during the private caucuses, you should specifically advise your client:

- Not to reveal any information that both of you have agreed to keep confidential from the mediator;
- Not to reveal any attorney-client privileged information, such as your negotiating strategy;
- Not to get into an argument with the mediator or anyone else at the mediation session;
- Not to engage in exaggeration, hyperbole, speculation, or misrepresentation;
- Not to interrupt when another person is speaking; and
- Not to display any verbal or non-verbal reactions to any settlement proposals or offers in a way that may reveal or otherwise undermine your negotiating strategy.

These cautionary instructions also apply, of course, to any joint session during the mediation.

As for your role during the mediation, explain that your overall responsibility is to "take the lead" for your client's side. Make clear that your role as an advocate during mediation is quite different from your advocacy role at a trial or in an arbitration. That is, during mediation, you will not be engaging in the formal presentation of evidence, cross-examining any witnesses, or delivering a closing argument. Rather you will be engaging in a respectful dialogue with the other side and the mediator, where you will be doing at least as much listening as talking. Moreover, explain that consistent with your goal to advance the best interests of your client and negotiate a favorable settlement on his behalf, you will be utilizing the mediation process as part of an on-going assessment of your client's case to give him your best judgment and advice from which he can make an informed decision about settlement.

§ 16.09 Effective Advocacy During Mediation, in General[12]

To be an effective advocate during the mediation process, it is important to understand (1) how to prepare a pre-mediation submission to the mediator; (2) how to present your opening statement; and (3) what to do during the private caucuses. In addition to these matters, it is essential to bear in mind

[12] *See also*, John W. Cooley, *Mediation Advocacy* (1996).

that to be an effective advocate during mediation you must use the mediation process to *actively negotiate* with the other side, and not rely upon the mediator to do this work for you. As mentioned previously, while a good mediator is one who is also a good negotiator, her role is not to resolve the parties' dispute. Rather, her negotiating skills are used to facilitate *your* negotiations with the other side and vice versa. Therefore, it is essential that you draw upon and apply all of the concepts, skills, and techniques of effective negotiating discussed in the preceding chapters of this book when representing your client during mediation.

§ 16.10 Preparing a Pre-mediation Submission

The primary purposes of a pre-mediation submission are to educate the mediator about the general nature of the dispute, to identify the issues to be addressed, and to set out the basic contentions of the parties. It is essentially an introductory purview of the case that gives the mediator a general idea of what the dispute is about before the mediation takes place. The submission is often useful in helping the mediator to move more quickly in assisting the parties to reach a resolution during the mediation.

Some mediators invite or even require that the parties submit a pre-mediation submission. Other mediators expressly prohibit or prefer not to receive any pre-mediation materials out of a fear that such submissions might taint their impartiality in the case. Still others have no standard practice about the matter and will review any pre-mediation materials sent to them. Therefore, as a threshold matter, it is important to find out your mediator's preferences about pre-mediation submissions and whether the applicable jurisdiction has any special rules governing them.

If you are not prohibited from making a pre-mediation submission, it is often a good idea to send one to the mediator (with a copy to opposing counsel), bearing in mind the limited purposes of a submission mentioned above. Consistent with those purposes, in the vast majority of cases, the submission should be very brief—*i.e.*, no more than a two or three page synopsis of the case. In a letter, succinctly set out in a non-argumentative style:

(1) The basic facts of the case or events giving rise to the dispute, including the amount of any special damages;

(2) If a lawsuit has been filed, the basic legal claims and defenses involved;

(3) If no lawsuit has been filed, the basic contentions of your client;

(4) The nature of the issues to be addressed if they are not otherwise apparent from the foregoing;

(5) The status of any prior negotiations and the latest settlement offers of the parties if mentioning those offers would be instructive to the mediator in understanding the dispute;

(6) A reference to any documents attached to the letter (*e.g.*, a copy of the contract involved, accident report, governing statute if the law is not generally known, or copy of the pleadings if reading them is essential to understanding the case, etc.); and

(7) A concluding sentence that confirms the time and place of the upcoming mediation, along with an expression of your hope that the mediation might be successful in resolving the case.

It cannot be overemphasized that, in the routine case, brevity is the hallmark of an appropriate submission. Mediators do not want to read (and rarely will read) prolix or voluminous pre-mediation materials. Accordingly, do not send the mediator packages or boxes of medical records, medical bills, or documentary trial exhibits, etc. If, before the mediation, it is absolutely necessary for the mediator to understand certain matters contained in voluminous records, summarize that information in a short attachment to your letter submission. Remember that at the mediation you will have your complete file in the case, from which you can show the mediator any pertinent document or set of documents that may become the focal point of discussion.

In extremely complex cases or multi-party cases, however, your pre-mediation submission may have to be more detailed. In these situations, your pre-mediation submission might include, for example, an indexed notebook containing important documentary evidence, portions of discovery, court orders, legal memoranda, or even copies of appellate decisions. If the case being mediated is on appeal, it may be necessary for the mediator to read such matters as the final judgment and any Memorandum Opinion, the jury instructions, any special verdicts, rulings on any post-trial motion, portions of the trial transcript, and the appellate briefs and record on appeal if they have been filed.

Unless otherwise agreed between the parties, you should send a copy of your pre-mediation submission to opposing counsel. Because this means that the opposing counsel's client will read your submission, it is important to be as objective as possible in your summary of the facts and contentions, and to draft your submission in a way that does not unnecessarily escalate the dispute or otherwise impair the prospects for constructive negotiations during the mediation. Even if it is agreed that your submission will be sent to the mediator *ex parte*, your submission should not be written in an excessively argumentative or acerbic tone that will undermine your credibility with the mediator.

Finally, when reviewing the case file and preparing your pre-mediation submission, if you discover any new documents or additional information that are pertinent to the dispute and have not yet been furnished to the other side (*e.g.*, updated medical records, year's-end financial statements, etc.), send a copy of this information to opposing counsel as appropriate. In addition, before sending a copy of your pre-mediation submission to opposing counsel, it is often desirable to phone him to find out whether there is any further information he needs from you to evaluate settlement prospects in the case. In the same conversation, you can ask for any additional information you still need from him that is necessary for your complete evaluation of the case. Like a pre-mediation conference (*see* § 16.08[2]), this pre-mediation contact between counsel can help ensure that the parties have exchanged as much pertinent information as possible before the mediation takes place.

§ 16.11 Making the Opening Statement

Mediation is, of course, not a trial. In mediation, there is no judge or jury, no burden of proof, no restrictions on the admissibility of evidence, and no verdict. At trial, the opening statement is a forecast of what will be proven, and the closing argument is a summary of what has been proven. Both speeches are designed to convince the fact finder that one side must win and the other must lose. In mediation, however, there is no fact finder to decide the case. Thus, in mediation there is no such thing as a case that may be won or lost.

Although these distinctions are obvious, they are critical to bear in mind because many lawyers who are inexperienced in mediation unwittingly equate mediation with a trial. For instance, many lawyers will deliver an opening statement at mediation that sounds much like a trial opening statement and closing argument wrapped into one: the facts are meticulously set out; the key points of law are explained; the facts are applied to the law; the other side's proof is attacked; and the presentation is concluded with a pronouncement to the effect that there can be no other logical conclusion but that the lawyer's client is the winner, and the other party is the loser. The advocate then turns and looks at the mediator, as if looking at a jury to say, "Please render a verdict in our favor."

The inappropriateness of this approach is that it is designed to ask the mediator to do the very thing she cannot do—decide the case and declare a winner and a loser. Such an opening statement is entirely at odds with the mediator's role as an impartial facilitator of an agreement, as against a fact finder who renders a verdict. Unlike a trial, where the objective is an all-or-nothing decision on the merits, in mediation the only all-or-nothing matter is whether there will be an agreement or no agreement. If no agreement is reached, neither side leaves the mediation with a verdict that pronounces victory or defeat.

Therefore, lawyers who are experienced in mediation know that the primary objectives of an effective opening statement are not to convince the mediator about which side should win or lose, but rather are: (1) to convince the opposing party to enter into a satisfactory agreement, and (2) to motivate the opposing party to do so. These are the only tangible things that can be obtained through mediation.

This means that an opening statement in mediation should not be delivered as if to "prove a case," where the facts, the law, and imaginative themes are woven together in a presentation that supports a forecast of what will be proven and attacks the other side's forecast of proof. Rather, the opening statement should present the facts, law, and themes of the controversy in a way that points to a possible resolution of the dispute and encourages the other party to seek the same. This means that the content and tone of an effective opening statement must (a) treat the other party with respect; (b) avoid personal attacks; (c) convey a willingness to fairly consider the other side's points of view so that it will fairly consider yours; (d) avoid threats or ultimatums; and (e) allow the other party to consider the case from the perspective of your client's real needs and interests—*i.e.*, "why" he has taken a particular position, and "why" a particular resolution is important to him.

These elements of an effective opening statement should be incorporated throughout a presentation that otherwise appropriately addresses the facts of the case, pertinent legal considerations, the facts and legal aspects of the case that are strongest for your side, potential ways for settling the case, potential outcomes if the case went to trial, and the risks and costs of not reaching an agreement. However, in addressing these matters, the target audience is the *opposing side* because only it, not the mediator, can agree to settle the case. In short, if the opening statement is presented in a way that is aimed at disparaging the opposing side (as is implicitly intended in an opening statement at trial), you may end up "losing" in the mediation process by making it impossible to obtain the only thing mediation can give you—a final settlement offer from the other party that is better than anything you could obtain at trial or through some other means.

Assuming that counsel for the parties have adequately prepared for the mediation and have a fairly good understanding of the case, each opening statement will usually last between fifteen and thirty minutes. However, for cases that are unusually complex, an opening statement may take an hour or more. In a routine case, such as a non-catastrophic personal injury case, the opening statement for plaintiff's counsel will usually consist of the following:

(1) A brief summary of how the accident occurred;

(2) An explanation of the plaintiff's theory of liability (if liability is in issue);

(3) A brief summary of the plaintiff's course of medical treatment;

(4) A summary of the diagnosis and prognosis for the plaintiff's injuries, including the extent of any permanent injury;

(5) A summary of how the plaintiff's injuries have affected his life;

(6) An itemization of the plaintiff's special damages (*e.g.*, medical expenses, lost wages, etc.); and

(7) An expression of willingness to fairly consider all aspects of the case from the perspectives of both sides to the end that the case might be settled through the mediation process.

If counsel and the plaintiff have decided that the plaintiff will participate in the opening statement, counsel might call upon his client (either in the middle of counsel's opening statement or after it is over) to explain, for example, how the accident occurred or how the plaintiff's injuries have affected his life.

Defense counsel's opening statement will then usually consist of the following:

(1) An explanation of any additional facts about how the accident occurred;

(2) An explanation of the defendant's theory of liability (if liability is in issue);

(3) A summary of any time gaps in the course of the plaintiff's medical treatment, or any medical treatment that appears to have been unnecessary under the circumstances of the case;

(4) Any references in the medical reports to a pre-existing medical condition, or any ambiguities in the reports about diagnoses, the plaintiff's prognosis, or extent of permanent injury;

(5) An itemization of any special damages that seem unwarranted in the case;

(6) An expression of apology to the plaintiff or similar expression of regret about how the accident has affected the plaintiff; and

(7) An expression, like that of plaintiff's counsel, of a willingness to fairly consider all circumstances of the case with the hope that it might be resolved by agreement.

When delivering the opening statement, most advocates use a low-key, non-argumentative style. In addition, most advocates will primarily make eye contact with the mediator, even though they are consciously addressing their remarks to the opposing side. There are two reasons for this. First, part of the function of an opening statement is to educate the mediator about the case. Second, and most importantly, advocates often correctly intuit that if the opening statement is delivered by making too much direct eye contact with opposing counsel's client, the opening statement may come across as a lecture to the opposing party who may then "reactively devalue" (*see* § 7.06[4]) what is being said. In short, many clients do not like lawyers, particularly the opposing party's lawyer. Thus, from a body-language standpoint, the opening statement is directed at the mediator precisely so that the opposing party might be more receptive to what is being said.

The particular type of case involved, the gravity or delicacy of the dispute, and the dynamics of the parties must all, of course, be taken into account in deciding what would be most appropriate to say in the opening statement and how to present it. For example, in an appropriate case, consider the following:

- Using audiovisual aids such as models, charts, diagrams, photos, a video, a chalkboard, a power point slide presentation, a tape recording, a computerized simulation, etc.;
- Showing potential trial exhibits, such as a day-in-the-life video of the injured plaintiff or the metal rod that the surgeons removed from his leg;
- Providing all participants with a notebook containing pertinent documents to refer to during the opening statement;
- Suggesting an appropriate agenda, or outlining the parameters of a potential settlement or other proposal that may resolve the dispute;
- Acknowledging at the outset certain strengths in the case for the opposing party, but pointing out that there are two sides to the story and that the risks and costs of litigation for both sides warrant a reasoned effort to try to resolve the case by agreement;
- Making an initial offer or concrete proposal and explaining the reasons behind the offer or proposal;
- Declining to make an initial offer or proposal at the outset until after there has been an opportunity for private caucusing;
- Suggesting that at the conclusion of the opening statements, both sides engage in a free-flowing, uninhibited discussion about the dispute and possible ways to resolve it;
- Extending a sincere (not canned) apology for the events giving rise to the dispute;

- Establishing a deadline for completing the mediation session by mentioning that counsel will have to leave the mediation by a certain time to meet a another commitment.

§ 16.12 Using the Private Caucuses

In the vast majority of cases (except in family-law disputes), the private caucuses are the most important part of the mediation process. As discussed previously (*see* § 16.07), it is here that the mediator works her craft in obtaining information; generating and discussing potential solutions; assessing, selecting, and communicating specific proposals; trying to create movement in the negotiations; and helping to forge and finalize the terms of an agreement. Effective advocacy during the private caucuses requires (1) that you actively participate in all of these functions of private caucusing as you negotiate with the opposing party, and (2) that you try to *assist* the mediator, rather than try to manipulate her, when negotiating through the private caucuses.

Trying to manipulate the mediator through misrepresentation or the use of disingenuous tactics such as *bluffing, escalating demands, false demands, false emphasis, false scarcity, reversing position*, or the like (*see* Chapter 10) is a bad idea for three reasons. First, attempts at such manipulation are likely to be unavailing because most mediators are trained to recognize them, and experienced mediators can otherwise spot them immediately.

Second, although the mediator cannot decide the case in your favor or compel the other party to settle the case on your terms, you do want the mediator "on your side" in the sense of having respect for you as a credible advocate who has a realistic assessment of the case and is making reasonable offers or proposals toward a potential settlement. As mentioned in § 16.03, even mediators who hold a most stringent "facilitative" philosophy about mediation, engage in a constant process of evaluating the extent to which a party's interests, objectives, analysis of the case, and proposals are realistic. Thus, your credibility for realism and reasonableness will invariably have an effect on how fervently the mediator will "push" the other side to seriously consider your offers or proposals. Although even a "basher" cannot and will not "force" the other side to see matters your way, even a "basher" may be induced to engage in some "bashing" with your opponent if she is convinced of the genuineness and rationality of your negotiating efforts.

Third, attempts at manipulating the mediator will only undermine her ability to create movement in the negotiations by impairing her ability to assist the other party to understand and be more willing to accommodate the interests and objectives of your client. The standard tactics and techniques used by mediators to facilitate productive negotiations can only be effectively employed with the other side if you assist the mediator in providing her with the benefit of all your information, reasoning, and analysis which serve as the raw material for utilizing those tactics and techniques. Needless to say, trying to manipulate the mediator is antithetical to assisting her in this effort.

For the foregoing reasons, it is also futile to call upon the mediator to threaten or otherwise play hardball with the other side. Mediators will simply

not do that, and they are heavily schooled in cooperative and principled problem-solving negotiation. On the other hand, this does not mean that you should be weak or irresolute in your analysis of the case and representation of your client. Mediators appreciate firmness in well-considered and well-grounded positions and proposals. As in negotiation, in mediation you should always remember that a settlement should never be entered into simply for its own sake. Although an agreement is often the most desirable way of resolving a dispute, it is not the only legitimate way. If the offers you make during the mediation process do not give rise to an agreement that is acceptable to your client, you should not hesitate to take the case to trial or resort to your client's other best alternative to dealing with the dispute.

In using the private caucuses to negotiate with the other side and assist the mediator in those negotiations, consider the approaches and techniques provided below.

[1] Assist the Mediator in Obtaining Information

As mentioned in § 16.08[4], particularly if your client is articulate, credible, likeable, and persuasive, it is generally a good idea to allow him to freely respond to the mediator's questions and otherwise actively participate in the private caucuses. Even if your client is angry about the events giving rise to the dispute, the mediator will better understand your client's feelings and views about the case if you permit him to appropriately "vent" his feelings. Your client's "humanity" and likeability will often have a favorable psychological effect on the mediator; and if your client is otherwise credible and persuasive, these qualities are likely to be mentioned by the mediator when she privately caucuses with the other side.

If your client is reticent or uncomfortable in actively participating in the private caucuses, you should intercede in responding to the mediator's requests for information. Moreover, because private caucusing is essentially a discussion rather than a question-and-answer session, you should not hesitate to volunteer all pertinent information that may help the mediator understand the dispute. In this regard, remember that the mediator will often want to know "why" your client has taken a particular position or thinks that a particular objective is important. These "why" questions are usually designed to assess the possibility of non-monetary solutions to the dispute, and they may even be relevant in a case that appears to be solely about money given that a monetary settlement might still include some non-monetary commitments.

In addition, you should not hesitate to point out to the mediator important information that you need from the other side. Explain to the mediator why this information is essential, and encourage her to ask the other side about it. In most situations, the mediator will follow up on your suggestion and will ask for the information without specifically mentioning to the other side that the request came from you. In sum, use the private caucuses not only to give information but to obtain information as well.

[2] Discuss the Strengths and Weaknesses of the Case

Private caucusing is a safe opportunity to recognize reality. Each case has its strengths and weaknesses, and understanding both is critical to making a sound decision about settling the case or taking it to trial. Therefore, it is only sensible to acknowledge the weaknesses in your case as well as its strengths. It is useful to discuss weaknesses for three reasons.

First, the mediator is likely to play the devil's advocate at some point during the private caucuses, and acknowledging weaknesses enhances your credibility with the mediator. Second, the relevance of a weakness depends not only upon the extent to which it *in fact* hurts your case, but upon the extent to which the other side *perceives* that the matter hurts your case. A candid, private discussion about weaknesses may reveal that you either underestimated or overestimated the particular weakness and may require that you adjust your negotiating strategy accordingly. Third, even when there are significant weaknesses in your case, they might well be offset by equally significant strengths. Therefore, in the course of acknowledging certain weaknesses, you also have the opportunity to put a positive spin on them by pointing out to the mediator how they pale in contrast to the strengths of your case, and why the other side's perception of those weaknesses is overblown. These points, if well taken, are likely to be emphasized by the mediator to the other side.

When weaknesses in your case are not readily apparent to the other side, it is usually best not to volunteer weaknesses in your case at first instance. Wait until the subject is prompted by the mediator's questions to you or her comments about the other side's views of the case. In this way, you can hedge against unnecessarily revealing weaknesses that are unknown to the other side, and you can keep them in the back of your mind when you consider whether it is worthwhile to make a particular concession at a crucial point during the negotiations.

[3] Specify Confidential Information

When the mediator caucuses with the other side, you should assume that it is fair game for her to share with them anything you or your client have said to her during the private caucuses that you have not specified as strictly confidential. This does not mean that she will invariably share everything you have told her with the other side. Rather, mediators tend to be quite selective about what information they share between one side and the other, depending on the extent to which the mediator believes that sharing the particular information will advance the prospects of reaching an agreement.

However, because of the mediator's general license to share with one side what she has learned from the other, it is essential that you make very clear to her what information you want her to keep confidential from the other side. Accordingly, before the mediator leaves a caucusing session with you to caucus with the other side, remind her of what information you wish to keep in strict confidence.

[4] Listen to the Mediator's Cues and Clues

Mediators are wordsmiths. They try to *tell* you things, usually indirectly through their questions and sometimes even through their body language. That is, mediators often give you cues and clues about their views about the case and, most importantly, what might be acceptable to the other side in resolving it. These usually subtle (and sometimes not so subtle) hints are routinely given by mediators, and even by those who profess to engage in strictly "facilitative" mediation.

For example, consider a mediator who asks: (1) "Are you aware of any six-figure jury verdicts for this type of case?" (2) "Do you think the other side would perceive your offer as being fair?" Or (3) "What would you say if the other side offered to do X?" On the one hand, these questions might be asked strictly for the purpose of obtaining information, without intending to suggest anything about the mediator's views or what she knows from the other side. On the other hand, depending upon the context of the discussion in which the questions are asked, they may actually mean: (1) "The value you have placed on the case is way out of line"; (2) "Your offer is unreasonable and unrealistic"; and (3) "The other side has told me that they are willing to do X, but you must give them something in return."

Thus, it is essential to carefully consider the context in which the mediator asks her questions and otherwise makes comments during the private caucuses. Asking rhetorical questions is the primary device that mediators use to indicate their assessment of the case, the viability of your settlement proposals, and what is going on in the mind of the other side. Needless to say, an ability to accurately read between the lines of what the mediator is asking or saying may be of significant strategic assistance in negotiating with the other side.

[5] Invite the Mediator's Perspectives About the Case

Except in "evaluative" mediation, mediators will not *directly* express their views about the value of the case or how it should be resolved. This is true in "facilitative" mediation even if you specifically ask the mediator how she would value the case or settle it. However, as mentioned in subsection [4] above, most mediators will at least *indicate* their views about these matters through the context in which their questions are asked or otherwise through subtle comments or body language. This disciplined refusal to give a direct response to a party's question about the value of the case or how to settle it is consistent with the role of the mediator as a neutral and impartial facilitator of an agreement that should be fashioned and owned by the parties, not the mediator.

This does not mean, however, that a mediator will be unresponsive to your requests for assistance in resolving the case. It is entirely legitimate for you to invite the mediator's *general* perspectives about the case in terms of your analysis and the other party's analysis of its strengths and weaknesses, value, and possible solutions. After all, the whole mediation process involves the interplay between these differing analyses of the dispute. In connection with these analyses, the mediator's perspective—precisely because she is neutral and impartial—is often integral to helping the parties reach an agreement.

The mediator's willingness to reveal her general perspectives about these matters will largely depend on whether she perceives that you are asking for her assistance in understanding the viewpoints of the other side to assess the overall case, or are asking for her *personal opinion* about the merits of your positions or how to resolve the case. For example, if you ask her, "What do you think a jury would do in this case?" or "How do you think we can settle this case?," she is most likely to respond, "What do you think?" On the other hand, if you ask her to help you "think through" an evaluation of the case by engaging in a Fair Settlement Range Formula calculation (*see* § 11.07) or constructing a Decision Tree (*see* § 11.06), or by asking questions such as, "How can we best think through this aspect of the dispute?" "What might we do to accommodate the other side about X?" or "I wonder if there is anything more we should be thinking about to resolve this matter?" she is likely to be more directive in her responses. Even if she persists with a glib, "Well, what do you think?" response, generating a *discussion* about these matters is likely to encourage her to be more forthcoming in sharing her perspectives about the case.

If the mediator is a "trasher" or "basher," or otherwise is not hesitant to help "push" the parties toward an agreement, you might be able to be more direct in soliciting her perspectives. For example, you might ask, "What is your sense of how a jury might react to X fact, Y theory, or Z theme?" "What can we do to encourage the other side to make more movement in the case?" or "How can we encourage the other side to consider X?" Alternatively, you might invite her responsiveness by musing: "I'm having difficulty seeing how a jury would react to the fact that. . ." or "I'm having trouble coming up with something else to offer. . .I wonder what more we can do?"

When inviting the mediator's perspectives about the case, bear in mind that your requests for assistance must be carefully couched so that the mediator does not feel that her responses would be tantamount to being perceived as "taking sides" in the case. The aim is to encourage her to see that you are earnestly willing to be educated about the relative strengths and weaknesses of the overall case and possible ways to resolve it.

[6] Do Not Disclose Your Bottom Line Up Front

If you represent the plaintiff, it is unwise in the initial caucuses to tell the mediator the minimum amount you would accept to settle the case; and if you represent the defendant, it is unwise to reveal up front the maximum amount you would be willing to pay. There are four reasons for this.

First, the opposing party might have evaluated the case much differently from what you had thought, and therefore might be willing to settle the case on terms that are much more favorable to your client than you had anticipated. Second, during the caucusing process, you might learn critical information that will cause you to change your bottom line. Third, by providing the mediator with your bottom line, you will lose significant control over the negotiating process by effectively causing the mediator to "play" within your

bottom-line constraint. And fourth, you may place the mediator in the awkward position (if not troubling ethical dilemma) of how to candidly respond to a question about whether the other party has "any further flexibility" if the party asking the question is about to make a final offer that is less (for plaintiffs) or more (for defendants) than what would be acceptable to the other side. That is, if the plaintiff is contemplating making a final offer of $30,000 when the mediator knows that the defendant will pay as much as $60,000, or the defendant is contemplating making a final offer of $60,000 when the mediator know that the plaintiff is willing to settle for $30,000, the mediator's dilemma is whether to disclose to the plaintiff that more money is available from the defendant, or whether to disclose to the defendant that the plaintiff is willing to accept less than the defendant's bottom line.

Along with not disclosing your bottom line up front, it is unwise to reveal to the mediator that your client will not, in any event, take the case to trial. For example, in many relatively minor automobile personal injury cases, the plaintiff will decide at the outset that he does not want to go through the delay, expense, and inconvenience of litigation, but simply wants to use the mediation process to obtain as much money from the defendant's insurance carrier as it might be willing to pay on the claim. If the mediator knows that this is the plaintiff's sole goal, the mediator is much less likely to "push" the defendant to consider making higher settlement offers.

[7] Make Reasonable Settlement Offers Supported by Sound Reasons

A major function of the mediator is that she serves as a conduit for your negotiations with the other side. As in traditional inter-party negotiations, making an initial offer that is extreme and beyond reason is likely to insult the other side, impair your credibility, and may cause the mediation to unnecessarily end in deadlock.

Whenever you make a settlement offer or a concession through a counteroffer, provide the mediator with specific reasons for your proposal so that these may be conveyed to the other side. (*see also* § 14.13). If you can, try to incorporate into your proposals something that the other side wants, or provide reasons for why your proposal would have some benefit to the other side. In these ways, you will assist the mediator in explaining to the other side that your proposals are principled and rationally based, and that your counteroffers are similarly principled and not simply made in the course of an auction-like bargaining process.

[8] Hold Back Some Strong Leverage Points Until the Final Caucuses

One of the mediator's most difficult tasks is helping to forge the final terms of a settlement when the parties are close to an agreement but are unwilling to make any further concessions. In helping the mediator bring closure to an agreement, it is sometimes useful to have held back one or two important items of information (*e.g.*, an important document, the fact that one of the opposing party's key witnesses has a criminal record, etc.) until late in the

caucusing process. These leverage points might then be raised with the mediator toward the end of the negotiations to provide her with exactly what she needs to encourage the opposing side to make an additional deal-clinching concession.

As a practical matter, this technique is unlikely to be available in most cases. That is, if counsel for both sides have carefully prepared for the mediation, they are likely to know in advance about critical favorable or unfavorable matters affecting the case. Moreover, even if you have certain critical leverage points that are unknown to the other side in advance of the mediation, it will often be best to raise those matters earlier rather than later in the mediation process, so as to create a psychological commitment of movement and momentum toward an agreement. That is, holding back a particularly strong leverage point until near the end of the mediation presupposes that meaningful compromise will not occur during the process unless you "drop a bombshell" at the last minute.

[9] Suggest Mediator Tactics and Techniques that May Help Forge an Agreement

As discussed in § 16.07, the mediator will invariably employ a variety of tactics and techniques in an effort to help the parties reach a satisfactory agreement. Quite often, the mediator will use these tactics and techniques *sua sponte*, without any express prompting from the parties. However, if you perceive that one or more of these tactics or techniques may be particularly helpful in forging a satisfactory agreement, suggest them to the mediator. For example, in an appropriate case, you might suggest:

- A payment in kind instead of in money;
- A structured settlement or payment in installments;
- Payment of a portion of the settlement to a mutually acceptable charity or other public-interest organization;
- A future business arrangement or relationship;
- A change in an employee's title or work status in lieu of, or in exchange for, a smaller pay increase;
- An undertaking to provide a warning label on a product, or to take certain corrective action to prevent the recurrence of the type of accident that occurred in the instant case;
- A substitution of goods;
- An apology for what happened;
- A confidentiality clause in the agreement;
- A provision to abide by the recommendation of a suitable third party who has special expertise in the matter in dispute;
- That the mediator present a proposal to the other side as if it were her own idea;
- That the mediator make a proposal conditional without communicating a commitment on your part (*e.g.*, "If I can get the other side to do X, will you do Y?");

- That the mediator present a particular proposal at a certain time during the mediation process when the proposal will have the greatest impact;
- That counsel for the parties phone another lawyer or a law professor they respect to render an opinion about the relative merits of a novel or controversial legal theory;
- That the mediator hold a private discussion solely with the parties lawyers to discuss the barriers that are preventing settlement (*see also* subsection [10] below);
- That the mediation be temporarily adjourned so that the parties might reconsider their positions or try to come up with new proposals;
- That the mediator provide the other side with a particular rationale for changing position that allows that party to save face;
- That the parties split the difference;
- That the parties reconvene in joint session to discuss the case.

[10] Confer Alone With the Mediator and Opposing Counsel, If Necessary

It is not unusual for you and opposing counsel to be faced with equally irrational or emotionally distraught clients who are making it tremendously difficult for the mediator to engage in constructive private caucuses with each side. In these circumstances, it is sometimes useful for you and opposing counsel to meet with the mediator, without the clients present, to discuss the sources of their irrationality or psychological inability to meaningfully participate in the medation process.

It is best to make this suggestion to the mediator outside the presence of your client, for example, during a break in the session. If it is decided that you and opposing counsel will meet privately with the mediator, explain to your client (or preferably have the mediator explain) that the mediator has asked for the private meeting as an additional way to discuss how to get the settlement discussions back on track. Assure your client that nothing will be decided about settling the case without his full knowledge and consent, and that he will be briefed about the meeting after it is over. When the meeting is over, either you or the mediator can summarize for your client what was discussed and any suggestions that arose about how to resume more constructive negotiations.

[11] Do Not Make the Mediator's Fee an Element of the Settlement

Typically, the mediator's fee is split evenly between the parties. Sometimes, in an effort to exact yet one additional concession from the other side, a party will propose that the other side pay the mediator's entire fee. This is usually not a good idea. Such a proposal is embarrassing to the mediator and puts her in the uncomfortable position of appearing to have a monetary stake in the final agreement. Moreover, such a proposal may inhibit the mediator from devoting the amount of time she believes is appropriate to the mediation out

of a fear that the other side might construe her on going caucusing as a way of unnecessarily prolonging the session to obtain a greater fee. Nevertheless, on occasion, a party might agree to bear the entire cost of the mediator's fee in an effort to seal a final settlement.

[12] Be Patient With the Mediation Process and Take Time to Confer Privately With Your Client

As mentioned in § 16.01, the principal advantage of mediation over traditional inter-lawyer negotiations is that it provides a "process" through which the clients have an opportunity to be directly involved in resolving their dispute; and for many clients, the very *process* of how they go about resolving their differences is often very important to them. Working through this process takes time, and therefore you must be patient with it even though hours may pass before the mediation begins to "get to the point" of substantive negotiations over specific terms of a potential agreement. In short, if you hurry the process, you may defeat its fundamental purpose.

In addition, after each private caucus with the mediator, take the time to confer privately with your client. As appropriate, discuss the matters raised during the caucus and consider your "next move." If during a caucusing session you or your client wants to talk privately (*e.g.*, to decide what counteroffer you want the mediator to present to the other side), do not hesitate to temporarily recess the session to confer. Above all, remember that even though you and your client have established a game plan for the mediation through your Mediation Preparation Outline, you should use all that you learn during the mediation to modify that plan as the circumstances warrant. Indeed, this modification may be as significant as entirely changing what you earlier thought was an appropriate bottom line.

§ 16.13 Concluding the Mediation

As mentioned previously, if an agreement is reached during the mediation, the mediator will typically bring the parties back together in a joint session to summarize the terms of the settlement and discuss arrangements for the preparation of final settlement documents. At the joint session, be sure that the mediator's summary of the terms of the agreement is accurate, and clarify any ambiguities or loose ends with opposing counsel. For considerations about preparing final settlement documents, *see* §§ 17.12 through 17.14.

If no agreement is reached, leave the mediation with civility toward the other side. In an appropriate case, indicate to opposing counsel your willingness to resume the mediation or further lawyer-to-lawyer negotiations at some later time. Always bear in mind that in many cases where mediation has failed to produce an agreement, the parties still end up settling the case in lieu of taking it to trial or resorting to what they thought was their other best alternative to a negotiated agreement.

Chapter 17

Legal Considerations in Settlement

SYNOPSIS

§ 17.01 Introduction

This chapter discusses some of the more important legal considerations that must be taken into account when negotiating a settlement on behalf of a client. These legal considerations include: (1) the professional duty of care you owe to your client in negotiating a settlement, (2) your responsibilities in settlement negotiations if you are hired by an insurer to represent an insured tortfeasor, (3) the implications of particular types of settlement agreements where joint tortfeasors are involved, (4) what kinds of settlements require judicial approval, (5) what portion of settlement funds are taxable, (6) differences between lump-sum and structured settlements, (7) your responsibilities to health-care providers or other entities which have asserted statutory liens on settlement funds for medical services or benefits provided to an injured party, (8) the extent to which settlement agreements and settlement discussions may be kept confidential, and (9) how to finalize and enforce a settlement agreement.

§ 17.02 Duties of Attorneys in Settlement

As discussed in § 9.02, it is unethical for an attorney to (1) settle a case on behalf of a client without requisite authority from the client, (2) fail to disclose to the client all good-faith settlement offers, or (3) fail to adequately explain all ramifications of a proposed settlement so that the client can make an informed decision about whether to settle. In addition, it is unethical for an attorney who represents multiple clients to enter into an aggregate settlement on their behalf unless each client consents after full consultation (*see* § 9.03). Along with these ethical duties, you have a legal duty to exercise a reasonable degree of care and skill when settling a case on behalf of your client, and a breach of this duty (as well as any one of the foregoing ethical duties) may give rise to liability for malpractice.

It is often broadly stated that because the relationship between an attorney and client is fiduciary in nature, an attorney owes his client a high degree of fidelity and good faith.[1] More precisely, the attorney's duty to his client is to exercise the knowledge, skill, and ability ordinarily possessed and exercised by members of the legal profession similarly situated.[2] This duty does not require an attorney to act with extraordinary diligence,[3] and he will not be liable for a mere error in judgment so long as he acts with due care and in good faith, and honestly believes that his acts and advice are well founded and in the best interests of his client.[4] That is, an attorney is not an insurer or guarantor of a successful result for his client, and he will not be liable for acting upon or giving mistaken advice about a legal matter that has not been clearly decided by a court of last resort or about which other informed lawyers may have different opinions.[5]

However, an attorney who breaches this standard of exercising "reasonable care"[6] in representing his client may be liable for any actual losses incurred by the client as a result of the breach.[7] The elements of a legal malpractice action, whether grounded in tort or breach of contract, are typically defined as follows:

> In an action against an attorney for negligence or breach of contract, the client has the burden of proving the existence of the relationship of attorney and client; the acts constituting the alleged negligence or breach of contract; that it was the proximate cause of the damage; and that but for such negligence or breach of contract the client would have been successful in the prosecution or defense of the action.[8]

[1] *See, e.g.*, Coleman v. Moody, 372 S.W.2d 06 (Tenn. App. 1963).

[2] Zalta v. Billips, 81 Cal. App.3d 183, 144 Cal. Rptr. 888 (1978); Frank H. Taylor & Son Inc. v. Shepard, 344 A.2d 344 (N.J. Super. 1975); Hughes v. Klein, 427 A.2d 353 (Vt. 1981).

[3] *See* Glenn v. Haynes, 66 S.E.2d 509 (Va. 1951).

[4] *See* Woodruft v. Tomlin, 616 F.2d 924 (6th Cir. 1980); Cook v. Irion, 409 S.W.2d 467 (Tex. Civ. App. 1966).

[5] *See* Hodges v. Carter, 80 S.E.2d 144 (1954); Babbitt v. Bumpus, 41 N.W. 417 (Mich. 1889).

[6] Lysick v. Walcom, 258 Cal. App.2d 136, 65 Cal. Rptr. 406 (1968); Nause v. Goldman, 321 So.2d 304 (Miss. 1975).

[7] *See* Pete v. Henderson, 269 P.2d 78 (Cal. App. 1954); Freeman v. Rubin, 318 So.2d 540 (Fla. App. 1975).

[8] Glenna v. Sullivan, 245 N.W.2d 869, 871 (Minn. 1976).

The proximate cause element will be satisfied so long as the attorney's negligence was a "substantial factor" in the client's loss, and it need not be the sole cause of the loss.[9] However, in proving loss, the client must show that she sustained an actual, ascertainable loss[10] that would have been obtainable and collectible in the case but for her attorney's negligence.[11] Thus, for example, if the client alleges that as a result of her attorney's negligence she agreed to an undesirable settlement of the case, she must make a non-speculative showing that any reasonable jury would have given her a better result at trial and that this amount (in the case of a plaintiff) would have been collectible from the defendant.[12]

In representing a client in settlement negotiations, the legal duty of care you owe to your client (coupled with ethical prescriptions) dictates the following:

(1) You should never settle a case without having requisite authority from your client.[13]

(2) You should always communicate to your client all settlement offers extended by the other side.[14]

(3) You should fully advise your client of her right to trial and all ramifications of a proposed settlement.[15]

(4) You should conduct an adequate investigation of the case and initiate, as well as respond to, settlement offers on behalf of your client when appropriate.[16]

(5) You should adequately advise your client about whether to accept or reject a settlement offer, but emphasize to your client that the ultimate decision whether to settle and in what amount rests with her.[17]

(6) When effectuating a comprehensive settlement on behalf of your client, you should exercise reasonable care that all issues in the case are resolved by the settlement.[18]

[9] *See* Lysick v. Walcom, 258 Cal. App.2d 136, 65 Cal. Rptr. 406 (1968).

[10] *See* Glenna v. Sullivan, 245 N.W.2d 969 (Minn. 1976); Murphy v. Edwards & Warren, 245 S.E.2d 212 (N.C. App. 1977); Freeman v. Rubin, 318 So.2d 540 (Fla. App. 1975).

[11] *See, e.g.*, Hoppe v. Ranzini, 385 A.2d 913 (N.J. Super. 1978).

[12] *See* Glenna v. Sullivan, 245 N.W.2d 869 (Minn. 1976); Nause v. Goldman, 321 So.2d 304 (Miss. 1975); Becker v. Julien, Blitz & Schlesinger P.C., 406 NYS2d 41 (Sup. Ct. 1977), *aff'd* 411 NYS2d 17 (1978).

[13] *See generally*, Annotation, *Authority of Attorney to Compromise Action-Modern Cases*, 90 ALR4th 326 (1991).

[14] *See* Moores v. Greenberg, 834 F.2d 1105 (1st Cir. 1987); Rogers v. Robson, Masters, Ryan, Brumund and Belom, 407 N.E.2d 47 (Ill. 1980).

[15] *See* Ramp v. St. Paul Fire and Marine Ins. Co., 269 So.2d 239 (La. 1972); Ishmael v. Millington, 241 Cal. App. 2d 520, 50 Cal. Rptr. 592 (1966).

[16] *See* Lysick v. Walcom, 258 Cal. App. 2d 136, 65 Cal. Rptr. 406 (1968); Smiley v. Manchester Ins. & Indem. Co. of St. Louis, 375 N.E.2d 118 (Ill. 1978).

[17] *See* Nioso v. Aiello, 69 A.2d 57 (D.C. 1949).

[18] *See* Zalta v. Billips, 81 Cal. App. 3d 183, 144 Cal. Rptr. 888 (1978).

§ 17.03 Duties of Insurers to Defend and Settle

Under a standard liability insurance policy, an insurer is required to defend any action against the insured or another person who is covered by the policy on the claim asserted.[19] Even in the absence of a policy provision that expressly requires the insurer to defend, a duty to defend may be implied if the policy gives the insurer the right to control the defense.[20] Generally, this duty to defend exists as long as the plaintiff's claims arguably or potentially fall within the coverage of the policy[21] and even if the action is fraudulent or groundless.[22] Thus, the duty to defend exists unless it is absolutely clear from the plaintiff's complaint that her claims fall outside the coverage of the policy or, during the course of the litigation, it becomes clear that despite the allegations in the complaint, none of the plaintiff's claims are within the policy's coverage.[23]

If an insurance carrier wrongfully refuses to defend, the insured is relieved of any obligation to comply with the provisions of the insurance contract and may independently hire an attorney to defend the case and attempt to settle it.[24] If the case is tried, the insurer will be liable to the insured for legal fees incurred in defending the action and the amount of any judgment rendered against the insured that is within the policy limits.[25] Similarly, if the insured settles the case in a reasonable manner, the insurer will be required to pay the insured's legal fees as well as the amount of the settlement itself.[26] In some jurisdictions, the insurer may even be liable to the insured for other consequential or punitive damages for wrongfully failing or refusing to defend.[27]

Related to the duty to defend, an insurer also has a duty to engage in "good faith" in settling a case on behalf of an insured or any other person entitled

[19] *See, e.g.*, Maryland Casualty Co. v. Armco, 822 F.2d 1348 (4th Cir. 1987); Missionaries of Co. of Mary, Inc. v. Aetna Cas. & Sur. Co., 230 A.2d 21 (Conn. 1967).

[20] *See* Id. *But see* American Casualty Co of Reading v. Federal Deposit Ins. Corp., 677 F. Supp. 600 (N.D. Iowa 1987).

[21] *See, e.g.*, Ellis v. Transcontinental Ins. Co., 619 So.2d 1130 (La. App. 1993); Aetna Casualty & Sur. Co. v. Centennial Ins. Co., 838 F.2d 346 (9th Cir. 1988); Brown v. State Auto. & Cas. Underwriters, 293 N.W.2d 822 (Minn. 1980); Brooklyn & Queens Allied Oil Burner Ser. Co. v. Security Mut. Ins. Co., 27 Misc.2d 401, 208 NYS2d 259 (1960).

[22] *See, e.g.*, Cole's Restaurant, Inc. v. North River Ins. Co., 105 Misc2d 754, 432 NYS2d 844 (1980); Novak v. Insurance Administration Unlimited Inc., 414 N.E.2d 258 (Ill. App. 1980).

[23] *See e.g.*, Lee v. Aetna Cas. & Sur. Co., 178 F.2d 750 (2d Cir. 1949); Touchette Corp. v. Merchants Mut. Ins. Co., 76 A.D.2d 7, 429 NYS2d 952 (4th Dept. 1980); First American v. Nat. Union Fire Ins., 695 So. 2d 475 (Fla. App. 1997).

[24] *See, e.g.*, Krutsinger v. Illinois Cas. Co., 141 N.E.2d 16 (Ill. 1957); Milbank Mut. Ins. Co. v. Wentz, 352 F.2d 592 (8th Cir. 1965).

[25] *See, e.g.*, United States Fid. & Guar. Co. v. Capfer, 406 NYS2d 201 (1978) *aff'd* 424 NYS2d 356, 400 N.E.2d 298 (1979); Landie v. Century Indem. Co., 390 S.W.2d 558 (Mo. App. 1965); Nat'l Steel Constr. Co. v. Nat'l. Union Fire Ins. Co., 543 P.2d 642 (Wash. App. 1975); Executive Aviation Inc. v. National Ins. Underwriters, 94 Cal. Rptr. 347 (Cal. App. 1971).

[26] *See, e.g.*, Servidone Const. Corp v. Security Ins. Co., 64 N.Y.2d 419, 477 N.E.2d 441 (1985); Zander v. Casualty Ins. Co. 259 Cal. App. 2d 793, 66 Cal. Rptr. 561 (1968).

[27] Annotation, *Insurer's Tort Liability for Consequential or Punitive Damages for Wrongful Failure or Refusal to Defend Insured*, 20 A.L.R.4th 23 (1983).

to the benefits of the liability policy.[28] That is, an insurer who wrongfully fails or refuses to settle a lawsuit brought against a person covered by the policy may be liable to the insured or his assignee for the full amount of an ultimate judgment, including any portion of the judgment in excess of the policy limits.[29] The courts have variously based this liability on breach of a fiduciary duty between the insurer and its insured,[30] breach of an implied covenant of good faith and fair dealing,[31] or, more commonly, on a finding that the insurer's failure or refusal to settle was in "bad faith," was negligent, or both.[32] Moreover, many states have passed specific statutes that variously set forth the standard for liability and types of damages that may be recovered if the insurer breaches its duty to settle.

Under the "bad faith" doctrine, an insurer may be liable for its refusal to accept a reasonable settlement offer if the insurer fails to consider, in good faith, the insured's interests as well as its own when making a decision about settlement.[33] Bad faith, as the absence of good faith, essentially means any frivolous or unfounded refusal to pay a reasonable settlement demand and, in the view of most bad-faith courts, does not require a showing that the insurer engaged in fraud, misrepresentation, or deceit.[34] Of course, bad faith will be found if the insurer's refusal to accept a reasonable settlement offer resulted from a dishonest purpose, moral obliquity, or conscious wrongdoing such as fraud or malice,[35] but most courts will uphold a jury finding of bad faith under circumstances where there was (1) no lawful basis for the refusal to settle coupled with actual knowledge of that fact, or (2) an intentional failure by the insurer to determine whether there was any lawful basis for the refusal.[36]

However, courts that adopt the bad-faith test will not impose liability against an insurer for a failure to settle that results from *mere* negligence

[28] *See generally*, Annotation, *Liability Insurer's Negligence or Bad Faith In Conducting Defense as Ground of Liability to Insured*, 34 ALR3d 533 (1970); Kent D. Syverd, The Duty to Settle, 76 Va. L. Rev. 1113 (1990)

[29] *See, e.g.*, Torrey v. State Farm Mut. Auto. Ins. Co., 705 F.2d 1192 (10th Cir. 1982); Hall v. Brown, 526 A.2d 413 (Pa. Super. 1987); Bollinger v. Nuss, 449 P.2d 502 (Kan. 1969).

[30] *See, e.g.*, Hazelrigg v. American Fid. & Cas. Co., 241 F.2d 871 (10th Cir. 1957); Evans v. Florida Farm Bur. Cas. Ins. Co., 384 So. 2d 959 (Fla. App. 1980)..

[31] *See, e.g.*, Automobile Ins. Co. of Hartford Conn. v. Davilla, 805 S.W.2d 897 (Tex. Ct. App. 1991); Critz v. Farmers Ins. Group, 230 Cal App.2d 788, 41 Cal. Rptr. 401 (1964), 12 ALR2d 1142 (1967); Smith v. American Family Mut. Ins. Co., 294 N.W.2d 751 (N.D. 1980).

[32] *See, e.g.*, Tacket v. State Farm Fire & Casualty, 558 A.2d 1098 (Del. 1988) (bad faith); Gelinas v. Metropolitan Prop. & Liab. Ins. Co., 551 A.2d 962 (N.H. 1988) (negligence); Spencer v. Aetna Life & Cas. Ins. Co., 611 P.2d 149 (1980) (duty of good faith and duty to exercise reasonable care).

[33] Cappano v. Phoenix Assur. Co., 28 A.D2d 639, 280 NYS2d 695 (4th Dep't. 1967).

[34] State Farm Mut. Auto. Ins. Co. v. White, 236 A.2d 269 (Md. 1967); United Services Auto. Ass'n. v. Carroll, 486 S.E.2d 613 (Ga. App. 1997); United States Fid. & Guar. Co. v. Lembke, 328 F.2d 569 (10th Cir. 1964).

[35] *See, e.g.*, World Ins. Co. v. Wright, 308 So.2d 612 (Fla. App. 1975); Slater v. Motorists Mut. Ins. Co., 187 N.E.2d 45 (Ohio 1962).

[36] *See* Motorists Mut. Ins. Co. v. Said, 590 N.E.2d 1228 (Ohio 1992); James v. Aetna Life & Casualty Co., 326 N.W.2d 114 (Wis. 1982); Miglico v. HCM Claim Corp., 672 A.2d 266 (N.J. Super 1995).

or bad judgment.[37] Nevertheless, evidence of the insurer's negligence in handling the claim is frequently permitted as circumstantial evidence of bad faith.[38] The overall thrust of the duty of good faith is that an insurer has an obligation to fairly evaluate and act upon a reasonable settlement offer in the case. As summarized by two decisions:

> [Good faith] requires that the defense of [the action] be evaluated in terms of the reasonable expectations that that defense will prevail and the amount of the verdict if it does not. The settlement offers must then be viewed in light of those expectations, with equal consideration being given to the financial exposure of both the insured and the insurer.[39]
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> * * *
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> If the insurance company, then, was guilty of an intentional disregard of [the insured's] interests, in hoping to escape full liability under the policy, it was guilty of bad faith; if it did not exercise an honest judgment as to the merits of the case, and whether it should be settled, it was guilty of bad faith; if the circumstances suggested to the jury that the insurance company was indifferent to the trust imposed by the policy to guard [the insured's] rights equally with its own, the jury might find bad faith; if the insurance company abandoned [the insured's] interests merely because it faced the prospect of a full loss under the policy, it was guilty of bad faith; if the insurance company was guilty of arbitrary and capricious denial of settlement within the policy limits, its action might have been found to amount to bad faith.[40]

Most jurisdictions, as an alternative to the bad-faith test, employ a negligence test (or incorporate a negligence standard into the bad-faith test)[41] to require insurers to exercise reasonable care in evaluating and acting upon settlement offers extended in the case, and liability may be imposed upon an insurer for a breach of this duty of care.[42] Examples of the numerous factors that a jury might consider in this regard include whether the insurer adequately investigated the case, whether the insurer reasonably evaluated the merits of the case in terms of liability and damages, whether the insurer engaged in serious settlement negotiations, whether the insurer kept its

[37] *See, e.g.*, Steedly v. London & Lancashire Ins. Co. Ltd, 416 F.2d 259 (6th Cir. 1969); Aetna Cas. & Sur. Co. v. Price, 146 S.E.2d 220 (1966); Delaune v. Liberty Mut. Ins. Co., 314 So. 2d 601 (Fla. App. 1975).

[38] *See, e.g.*, Liberty Mut. Ins. Co. v. Davis, 412 F.2d 475 (5th Cir. 1969); Kohlstedt v. Farm Bur. Mut. Ins. Co., 139 N.W.2d 184 (Iowa 1965); Kunkel v. United Sec. Ins. Co., 168 N.W.2d 723 (S.D. 1963); Holt v. Continental Ins. Co., 440 F.2d 652 (6th Cir. 1971).

[39] Heges v. Western Cas. & Sur. Co, 408 F.2d 1157 (8th Cir. 1969).

[40] Tennessee Farmers Mut. Ins. Co. v. Wood, 277 F.2d 21 (6th Cir. 1960).

[41] *See, e.g.*, State Farm Mut. Auto. Ins. Co. v. Jackson, 346 F.2d 484 (8th Cir. 1965); United States Fid. & Guar. Co. v. Evans, 156 S.E.2d 809 (Ga. App. 1967); Gernocky v. Indemnity Ins. Co. of North America, 216 N.E.2d 198 (Ill. App. 1968); Anderson v. St. Paul Mercury Indem. Co., 340 F.2d 406 (7th Cir. 1965); Kabatoff v. Safeco Ins. Co., 627 F.2d 209 (9th Cir. 1980); Kinkel v. United Sec. Ins. Co., 168 N.W.2d 723 (S.D. 1969).

[42] *See generally*, Allan D. Windt, *Insurance Claims and Disputes*, § 5.13 at 259 (2d ed. 1988).

insured reasonably informed about settlement offers in the case, and whether the insurer followed the recommendations of its attorney in rejecting a settlement offer.[43]

Regardless of how the duty to settle is defined—whether in terms of exercising good faith, reasonable care, or both—the courts essentially require that an insurer put itself in the shoes of the insured and act as if the insurer faces potential, unlimited liability from an adverse claim.[44] If the insurer refuses a settlement demand within the policy limits and a judgment results in excess of that demand, the insurer will not be liable for the excess judgment merely because it miscalculated the situation, but liability will exist if the insured (or, more commonly, the third-party claimant who has accepted an assignment of the insured's rights in satisfaction of the judgment)[45] proves by a preponderance of the evidence that the insurer's refusal to settle was outside the realm of any reasoned judgment. In addition, apart from liability for the amount by which the judgment exceeds the policy limits, a number of jurisdictions treat the wrongful failure or refusal to settle as a tort rather than a mere breach of contract, and thus permit the insured to recover other economic losses, emotional distress, and even punitive damages in an appropriate case.[46]

The foregoing is only a general summary of a highly complex area of the law that varies significantly among the jurisdictions. Nevertheless, if you represent an insurer or are hired by an insurer to defend an insured on a claim covered by a liability policy, the existing decisional law about an insurer's obligations regarding settlement is instructive in the following respects:

(1) An insurer has an obligation to adequately investigate the case in terms of liability and damages and to determine whether a judgment in excess of the policy limits is likely.[47]

[43] *See, e.g.*, Hodges v. State Farm Mut. Auto. Ins. Co., 488 F. Supp. 1057 (D. S.C. 1980); Board of Educ. of Bor. of Chatham v. Lumbermen's Mut. Cas. Co., 293 F. Supp. 541 (D. N.J. 1968); Daniels v. Horace Mann Mut. Ins. Co., 422 F.2d 87 (4th Cir. 1970). *See generally*, Annotation, *Liability Insurer's Negligence or Bad Faith in Conducting Defense as Ground of Liability to Insured*, 34 ALR3d 533 (1970).

[44] *See, e.g.*, Voccio v. Reliance Ins. Co., 703 F.2d 1 (1st Cir. 1983); Herges v. Western Cas. & Sur. Co., 408 F.2d 1157 (8th Cir. 1969); Davis v. Cincinnati Ins. Co., 288 S.E.2d 233 (Ga. App. 1982).

[45] *See generally*, Annotation, *Right of Injured Person Recovering Excess Judgment Against Insured to Maintain Action Against Liability Insurer for Wrongful Failure to Settle Claim*, 63 ALR3d 677 (1975).

[46] *See, e.g.*, Crisci v. Security Ins Co. of New Haven, 426 P.2d 173 (Cal. 1967); Kunkel v. United Security Ins. Co., 168 N.W.2d 723 (S.D. 1969); Farmers Group, Inc. v. Trimble, 658 P.2d 1370 (1982), *aff'd* 691 P.2d 1138 (Colo. 1984); Gibson v. Western Fire Ins. Co. 682 P.2d 725 (Mont. 1984). *See generally*, Annotation, *Recoverability of Punitive Damages in Action By Insured Against Liability Insurer for Failure to Settle Claim Against Insured*, 85 ALR3d 1211 (1978).

[47] *See* State Farm Mut. Auto Ins. Co v. Zubiate, 808 S.W.2d 590 (Tex. App. 1991); Tennessee Farmers Mut. Ins. Co. v. Wood, 277 F.2d 21 (6th Cir. 1960); Boston Old Colony Ins. Co. v. Gutierrez, 386 So.2d 783 (Fla. 1980); Baker v. Northwestern Nat'l. Cas. Co., 132 N.W.2d 493 (Wis. 1965).

(2) An insurer should promptly inform the insured of all settlement offers by the plaintiff, particularly when damages in excess of the policy limits are being sought.[48]

(3) If the insurer is aware that damages may exceed the policy limits, it should notify the insured to allow her to retain counsel to protect her interests by contributing towards any settlement.[49]

(4) An insurer should attempt to negotiate a settlement in an appropriate case even if the plaintiff has not made any offer to settle.[50]

(5) Even after an excess judgment has been entered against the insured, the insurer has a continuing duty to attempt to reasonably settle the case within the policy limits if possible.[51]

(6) If liability is clear and damages exceed the policy limits, an insurer generally should accept a settlement offer within the policy limits unless the insurer reasonably believes that the jury would not award damages in excess of those limits.[52]

(7) When multiple claimants have brought claims against the insured arising out of a single event, the insurer should consider whether it is in the best interests of the insured to negotiate a comprehensive settlement with all claimants rather than a settlement with only some of the claimants that exhausts the policy limits.[53]

(8) An insurer should not disregard the settlement recommendations of its attorney or claims adjuster without compelling reasons to do so.[54]

(9) An insurer's failure to disclose its policy limits may be evidence of bad faith.[55]

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[48] *See* Keith v. Conco Ins. Co, 574 So.2d 1270 (La. Ct. App. 1991); National Farmers Union Property & Cas. Co. v. O'Daniel, 329 F.2d 60 (9th Cir. 1964); Baker v. Northwestern Nat'l. Cas. Co., 132 N.W.2d 493 (Wis. 1965); State Farm Mut. Auto Ins. Co. v. White, 236 A.2d 269 (Md. 1967).

[49] *See* Martin v. Hartford Accident & Indem. Co, 228 Cal. App. 2d 178, 39 Cal. Rptr. 342 (1964); Kaudern v. Allstate Ins. Co., 277 F. Supp. 83 (D. N.J. 1967); Young v. American Cas. Co., 416 F.2d 906 (2d Cir. 1979).

[50] *See* Steward v. State Farm Mut. Ins. Co., 392 F.2d 723 (5th Cir. 1968); Kohlstedt v. Farm Bur. Mut. Ins. Co, 139 N.W.2d 184 (Iowa 1965); Abernathy v. Utica Mut. Ins. Co., 373 F.2d 565 (4th Cir. 1967).

[51] *See* State Farm Mut. Auto Ins. v. Smoot, 381 F.2d 331 (5th Cir. 1967); Foundation Reserve Ins. Co. v. Kelly 388 F.2d 528 (10th Cir. 1968); State Farm Mut. Auto Ins. Co. v. Brewer, 406 F.2d 610 (9th Cir. 1968).

[52] *See* Comunale v. Traders & Gen. Ins. Co., 328 P.2d 198 (Cal. 1958), 68 ALR2d 833 (1959); Boerger v. American Gen. Ins. Co., 100 N.W.2d 133 (Minn. 1959).

[53] *See* Liberty Mut. Ins. Co. v. Davis, 412 F.2d 475 (5th Cir. 1969).

[54] *See generally*, Annotation, *Reliance on, or Rejection of, Advice of Counsel as Factor Affecting Liability in Action Against Liability Insurer for Wrongful Refusal to Settle Claim*, 63 ALR3d 725 (1975). *See also* General Star Nat'l. Ins. v. Liberty Mut. Ins., 960 F.2d 377 (3d Cir. 1992); Commerical Union Ins. Co. v. Liberty Mut. Ins. Co., 393 N.W.2d 161 (Mich. 1986).

[55] Cernocky v. Indemnity Ins. Co. of North America, 216 N.E.2d 198 (Ill. App. 1966); Coppage v. Firemen's Fund Ins. Co., 379 F.2d 621 (6th Cir. 1967).

§ 17.04 Settlements With and Contribution Among Joint Tortfeasors

Multiple defendants may be jointly and severally liable to a plaintiff if her injuries were caused by concerted action of the defendants or their failure to perform a common duty, or if separate but concurring acts of the defendants caused a single and indivisible harm to the plaintiff.[56] Generally, under the doctrine of joint and severable liability, each tortfeasor who contributed to the plaintiff's injuries is liable to her for her entire damages, irrespective of proportionate responsibility; and the plaintiff may thus obtain full satisfaction from one or more of the joint tortfeasors.[57] As a practical matter, this doctrine allows the plaintiff to proceed against the "deep pocket" defendant for full satisfaction of a claim even though that particular defendant's culpability may have been less than that of other defendants who are less able to pay the claim.

A plaintiff's settlement prior to trial with some but not all joint tortfeasors raises three major issues. First if the plaintiff enters into a partial settlement with one joint tortfeasor, under what circumstances and to what extent may she thereafter also proceed against one or more other non-settling joint tortfeasors? Second, if one joint tortfeasor has settled with the plaintiff, under what circumstances and to what extent may that tortfeasor seek contribution from a non-settling joint tortfeasor? And third, if one joint tortfeasor has settled with the plaintiff, under what circumstances and to what extent may the non-settling joint tortfeasors seek contribution from the settling joint tortfeasor?

Under the common law, the answer to the first issue—under what circumstances and to what extent a plaintiff may proceed against a non-settling joint tortfeasor after settling with one joint tortfeasor—depends upon whether the plaintiff's settlement agreement with the settling tortfeasor is a "covenant not to sue" or a "release." A "covenant not to sue" is an agreement by which the injured plaintiff promises not to bring or enforce an existing cause of action against the covenanting tortfeasor; and although the agreement operates as a promise not to sue between the parties to it, it preserves the injured plaintiff's claim against other joint tortfeasors who are not joined in the agreement.[58] However, if the injured plaintiff thereafter sues a joint tortfeasor who was not joined in the agreement, the liability of that tortfeasor will usually be reduced by the amount that had been paid to the plaintiff by the covenanting tortfeasor.[59]

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[56] *See* In re One Meridian Plaza Fire Litig., 820 F. Supp 1492 (E.D. Pa. 1993); Employers Mut. Cas. Co. v. Petroleum Equip. Inc., 475 N.W.2d 418 (Mich. App. 1991); General Accident Ins. Co. of America v. Schoendorf & Sorgi, 549 N.W.2d 429 (Wis. 1996).

[57] A few courts have distinguished "joint tortfeasors" (*i.e.*, those who jointly commit a wrong resulting in a single injury) from "concurrent tortfeasors" (*i.e.*, those who commit separate and distinct acts which concur to cause a single injury), to hold that the single-satisfaction rule is inapplicable where liability is concurrent. *See, e.g.*, Phillips v. Cincinnati Traction Co. v. Griffith, 120 N.E. 207 (Ohio 1918). However, most jurisdictions apply the doctrine of joint and several liability to both classifications where the wrongs result in a single injury. *See, e.g.*, Pillo v. Reading Co., 232 F. Supp. 761 (E.D. Pa. 1964); McLeod v. American Motors Corp., 723 F.2d 830, *reh'g denied*, 729 F.2d 1468 (11th Cir. 1984).

[58] Raye Korte Chevrolet v. Simmons, 571 P.2d 699 (1977); Menzel v. Morse, 362 N.W.2d 465 (Iowa 1985); Hood v. Williamson, 499 P.2d 68 (Wash. App. 1972).

[59] Wirth v. Miller, 580 A.2d 1154 (Pa. Super. 1990); Asbridge v. General Motors Corp., 797 S.W.2d 775 (Mo. Ct. App. 1990).

On the other hand, a "release" at common law is an agreement by which the injured plaintiff relinquishes a cause of action against a tortfeasor but the release, unlike a covenant not to sue, has the effect of entirely extinguishing the cause of action by discharging *all* tortfeasors from liability.[60] Thus, a true release may be pleaded by any joint tortfeasor as a defense to any claim brought on the cause of action[61] under the rule that an unqualified release of one tortfeasor generally operates to discharge all parties liable for the same harm.[62]

However, most jurisdictions have abolished this distinction between a release and a covenant not to sue and abrogated or modified the common-law rule that a general release given to one tortfeasor discharges all others. For example, under the latest version of the Uniform Contribution Among Tortfeasors Act (UCATA) adopted by a number of states, a release or covenant not to sue one joint tortfeasor does not operate to discharge the other tortfeasors from liability unless it so provides, "but it reduces the claim against the others to the extent of the greater of either (a) any amount stipulated by the release or the covenant, or (b) the amount of consideration paid for it."[63] Similarly, some other states have adopted the Uniform Joint Obligations Act under which a release of one joint tortfeasor will not discharge other joint tortfeasors if the release expressly reserves the injured party's rights against the other tortfeasors.[64] Only a small minority of states still speak of the traditional common-law rule that a general release executed in favor of one charged with a wrong extinguishes the right of action against all those jointly liable for the same wrong.[65]

Most jurisdictions also take the view that the release of one tortfeasor does not release others unless (1) this is the actual intention of the parties as evidenced in their written agreement, or (2) the plaintiff has, in fact, received full compensation for her entire claim in exchange for the release.[66] For example, the release of one tortfeasor will not release all if the court finds that the agreement is, in essence, a covenant not to sue,[67] or if the release is construed to reserve a cause of action under a finding that the plaintiff did not intend to accept full satisfaction for her entire injury when receiving payment under the release.[68] Usually, whether the consideration for a release was received

[60] Taggart v. United States, 880 F.2d 867 (6th Cir. 1989); Sanderson v. Hughes, 526 S.W.2d 308 (Ky. Ct. App. 1975); Aljian v. Ben Schlossberg, Inc., 73 A.2d 290 (N.J. Super. 1950).

[61] Gronquist v. Olson, 64 N.W.2d 159 (Minn. 1954); Collins v. Fairways Condominiums Ass'n, 592 A.2d 147 (R.I. 1991).

[62] Hayman v. Patio Products, Inc., 311 S.E.2d 752 (Va. 1984); Beck v. Cianchetti, 439 N.E.2d 417 (Ohio 1982).

[63] UCATA § 4(a), 12 U.L.A. 57 (1975). *See also* Annotation: *Uniform Contribution Among Tortfeasors Act*, 34 A.L.R.2d 1107 (1954).

[64] *See, e.g., Melo National Fuse and Powder Co.*, 267 F. Supp. 611 (D.C. Colo. 1967) (applying Utah law); State Farm Mut. Auto. Ins. Co. v. Continental Casualty Co. 59 N.W.2d 425 (Wis. 1953).

[65] *See, e.g.*, Young v. Hoke, 493 N.E.2d 1279 (Ind. Ct. App. 1986); Grundy County Nat'l. Bank v. Olsen, 534 N.E.2d 196 (Ill. App. 1989).

[66] *See, e.g.*, Richardson v. Eastland Inc., 660 S.W.2d 7 (Ky. 1983); Mickle v. Blackman, 166 S.E.2d 173 (S.C. 1969); Weldon v. Lehmann, 84 So.2d 796 (Miss. 1956).

[67] *See, e.g.*, Western Spring Co v. Andrew, 229 F.2d 413 (10th Cir. 1956); Florkiewicz v. Gonzales, 347 N.E.2d 401 (Ill. App. 1976); Gronquist v. Olson, 64 N.W.2d 159 (Minn. 1954).

[68] *See, e.g.*, Johnson v. Harnisch, 147 N.W.2d 11 (Iowa 1966); Mallet v. Credo Oil & Gas, 534 So.2d 126 (La. Ct. App. 1988); Freeman v. Myers, 774 S.W.2d 892 (Mo. Ct. App. 1989).

or intended as full compensation for the plaintiff's claim is a question of fact for the jury.[69]

Thus, where a plaintiff chooses to settle with one joint tortfeasor in partial settlement of a larger claim, the safest practice is to include language in the agreement that expressly reserves her rights against the non-settling tortfeasors if she intends to proceed against them to recover additional compensation towards full satisfaction of her claim. If the agreement reserves these rights, the amount the plaintiff will be permitted to recover from a non-settling tortfeasor at trial will nevertheless be reduced in one of several ways. In jurisdictions that have adopted the UCATA, the plaintiff's claim against the non-settling tortfeasor will be reduced by deducting the greater of the amount stipulated by the release given to the settling tortfeasor or the amount actually paid under the release (*pro tanto* method).[70] Other jurisdictions deduct an amount equal to the settlor's proportionate share of liability or culpability for the injury (comparative fault method),[71] or deduct an amount equal to the settler's share of the verdict (*pro rata* method).[72]

For example, if plaintiff sues joint tortfeasors A, B, and C and settles with A for $200,000, and if the jury finds plaintiff's total damages to be $300,000 in a trial against B and C, under a strict *pro tanto* method plaintiff would recover $100,000 ($300,000 ($200,000) from B and C collectively, whereas under a strict *pro rata* method she would recover $200,000 ($300,000 ($100,000) with B and C each paying their $100,000 share. Thus, the particular method used in the applicable jurisdiction must be carefully considered by the plaintiff in deciding whether to enter into a partial settlement and, if so, with which tortfeasor to settle and which tortfeasor to take to trial.

If the plaintiff settles with one joint tortfeasor, the second major issue is under what circumstances and to what extent that tortfeasor may seek contribution from a non-settling joint tortfeasor. Generally, the doctrine of contribution gives a joint tortfeasor the right to recover from another joint tortfeasor that amount for the liability that the other ought to pay.[73] Although at common law there was a very limited right to contribution between joint tortfeasors (under the theory that no person should be allowed to profit from his own wrong),[74] most states now permit contribution actions by joint tortfeasors in broader circumstances and so long as the tortfeasor seeking contribution did not engage in intentional or willful or wanton conduct in

[69] *See* Murphy v. Indiana Harbor Belt R.R., 289 N.E.2d 167 (Ind. App. 1972); Hargreaves v. American Flyers Airline Corp, 494 P.2d 229 (Wash. App. 1972).

[70] *See, e.g.*, Martinez v. Lopez, 476 A.2d 197 (Md. 1984); Lafayette v. County of Los Angeles, 162 Cal. App. 3d 547, 208 Cal. Rptr. 668 (1984); Salim v. LaGuire, 361 N.W.2d 9 (Mich. App. 1984).

[71] *See, e.g.*, Cooper Mountain, Inc. v. Poma of America Ins., 890 P.2d 100 (Colo. 1995); Cartel Capital Corp v. Fireco of N.J., 410 A.2d 674 (1980); Bartels v. City of Williston, 276 N.W.2d 113 (N.D. 1979). *See also* Uniform Comparative Fault Act, Sec. 6, 12 U.L.A at 54.

[72] *See, e.g.*, Wall v. Am. Employers Inc. Co, 386 So.2d 79 (La. 1980); Palestine Contractors, Inc. v. Perkins, 386 S.W.2d 764 (Tex. 1964).

[73] *See* Partin v. First Nat'l Bank & Trust Co., 283 N.W. 408 (Minn. 1939); Barth v. Keffer, 464 S.E.2d 570 (1995).

[74] *See* Merryweather v. Nixan, 8 Term Rep. 186, 101 Eng. Rep. 1337 (K.B. 1799).

contributing to the plaintiff's injury.[75] Where the right of contribution exists, generally the jurisdictions establish the amount of contribution based on (1) a *pro rata* or equal sharing among the tortfeasors having common liability,[76] or (2) the comparative fault of the joint tortfeasors where damages are apportioned in proportion to the tortfeasors' respective degrees of fault in causing the plaintiff's injuries.[77]

In the specific context of a settling tortfeasor's attempt to seek contribution from a non-settling joint tortfeasor, some states—for example, New York[78] and Texas[79] —do not recognize a right of contribution where a tortfeasor has obtained a release from liability. On the other hand, states that have adopted the most recent version of the UCATA will allow a settling tortfeasor to recover contribution from a another joint tortfeasor (1) if the settling tortfeasor settled with the plaintiff in "good faith" (*i.e.*, entered into a reasonable settlement without collusion or fraud)[80] and paid more than his *pro rata* share of the common liability; (2) if the settlement agreement clearly extinguished not only the liability of the settling tortfeasor but that of the other tortfeasors from whom contribution was sought (*e.g.*, as some courts have said, where the release specifically named the joint tortfeasors whose liability was extinguished);[81] (3) if the settling tortfeasor did not intentionally cause or contribute to the plaintiff's injury; and (4) only for that amount which the settling tortfeasor paid in excess of his *pro rata* share.[82] The settling tortfeasor has the burden of proving all of the foregoing.[83]

If there is no judgment against the settling tortfeasor seeking contribution, the UCATA provides that the tortfeasor's right of contribution is barred unless he has either "discharged by payment the common liability within the statute of limitations period applicable to claimant's right of action against him and has commenced his action for contribution within one year after the payment" or, prior to judgment in an action against him, he has agreed to discharge the common liability and has actually paid the liability and commenced a contribution action within one year of so agreeing.[84]

[75] *See, e.g.*, UCATA, § 1(c) (1955 Revised Act), 12 U.L.A. (1975); Ziarko v. Soo Line R.R., 641 N.E.2d 402 (Ill. 1994); Savage v. Booth, 468 S.E.2d 318 (W.Va. 1996); Blackburn Inc. v. Harnischfeger Corp., 773 F. Supp. 296 (D. Kan. 1991) (punitive damages are not recoverable in an action for contribution).

[76] *See, e.g.*, Economy Eng'g Co. v. Commonwealth, 604 N.E.2d 694 (Mass. 1992); Sanchez v. City of Espanola, 615 P.2d 993 (N.M. App. 1980).

[77] *See, e.g.*, Dunn v. Praiss, 656 A.2d 413 (N.J. 1995); Bervoets v. Harde Ralls Pontiac-Old, Inc., 891 S.W.2d 905 (Tenn. 1994).

[78] N.Y. Gen Oblig. Law, Sec. 15-108(c). *See* Gonzles v. Armac Indus. Ltd, 611 N.E.2d 261 (1993); Rosado v. Proctor & Schwartz, Inc. 484 N.E.2d 1354 (1985).

[79] *See* Sherwin-Williams Co. v. Trinity Contractors, Inc., 852 S.W.2d 37 (Tex. Ct. App. 1993); Beech Aircraft Corp. v. Jinkins, 739 S.W.2d 19 (Tex. 1987).

[80] *See* Reynolds v. Southern R.R., 320 F. Supp. 1141 (N.D. Ga. 1969); Cooper Mountain Ins. v. Poma of America Inc., 890 P.2d 100 (Colo. 1995).

[81] *See, e.g.*, Albright Bros. Contractors, Inc. v. Hull-Dobbs Co., 209 F.2d 103 (6th Cir. 1953); United States v. Reilly, 385 F.2d 225 (10th Cir. 1967) (applying New Mexico law).

[82] *See, e.g.*, O'Keefe v. Baltimore Transit Co., 94 A.2d 26 (Md. 1953).

[83] *See* Reynolds v. So. R.R., 320 F. Supp. 1141 (N.D. Ga. 1969); Young v. Steinberg, 250 A.2d 13 (N.J. 1969).

[84] UCATA § 3(d), 12 U.L.A. 63 (1975).

With respect to a liability insurer who settles with the plaintiff on behalf of an insured-tortfeasor, the UCATA provides that if the insurer has discharged in full or in part the liability of the insured and thereby has discharged in full its obligation as insurer, it is subrogated to the insured's right of contribution to the extent the insurer has paid in excess of the insured's *pro rata* share of the common liability.[85]

In addition, the UCATA provides that the Act does not apply to or impair any right of indemnity under existing law, and the indemnity obligor is not entitled to contribution from the obligee for any portion of the indemnity obligation.[86] This is because indemnity, unlike contribution, does not seek an equitable sharing of joint and several liability, but arises by an express agreement or by operation of law (*e.g.*, as through vicarious or derivative liability under the doctrine of *respondeat superior*)[87] such that the entire loss borne by one party who has been forced to pay is shifted to one who should bear it instead, either by virtue of a contract or some special relationship between the parties.[88]

In those jurisdictions that have not adopted the UCATA, the settling tortfeasor may have to meet other requirements to obtain contribution from a non-settling joint tortfeasor. For example, under Michigan law, a settling tortfeasor is not entitled to recover contribution unless he makes a reasonable effort to notify the person from whom he seeks contribution about the pendency of settlement negotiations with the plaintiff, and gives the potential contributor a reasonable opportunity to participate in the settlement negotiations.[89]

Finally, the third major issue presented by a joint tortfeasor's pretrial settlement with the plaintiff is whether the settling tortfeasor may have to contribute to the amounts the other tortfeasors have to pay. This issue is addressed by the UCATA, which provides that when a release or covenant not to sue is given in "good faith" to a joint tortfeasor, "[i]t discharges the tortfeasor to whom it is given from all liability for contribution to any other tort-feasor."[90] This rule that a settling tortfeasor is protected from liability for contribution fosters the public policy of encouraging settlements,[91] and thus has even been applied by states that have not adopted the UCATA.[92]

Much of the litigation in this area has concerned whether, under the UCATA, the joint tortfeasor entered into the particular release in "good faith"

[85] UCATA § 1(e), 12 U.L.A. 63 (1975).

[86] *See, e.g.*, Owens v. Truckstops of America, 915 S.W.2d 420 (Tenn. 1996).

[87] *See* In re Consolidated Vista Hills Retaining Wall Litig, 893 P.2d 438 (N.M. 1995).

[88] *See* Hermeling v. Minnesota Fire & Cas. Co., 548 N.W.2d 270 (Minn. 1996); Keil v. United States, 705 F. Supp. 346 (E.D. Mich. 1988); Fucher v. First Vt. Bank & Trust Co., 821 F. Supp. 916 (D. Vt. 1993).

[89] *See, e.g.*, Klawiter v. Reurink, 492 N.W.2d 801 (Mich. App. 1992).

[90] UCATA § 4, 12 U.L.A. 98. *See also* Uniform Comparative Fault Act, § 6, 12 U.L.A. at 57. *See, e.g.*, Schreier v. Parker, 415 So.2d 794 (Fla. Dist. Ct. App. 1982); Bartles v. City of Williston, 276 N.W.2d 113 (N.D. 1979); Baker v. Clouse, 591 N.E.2d 722 (Ohio App. 1990).

[91] *See* Cooper Mountain Inc. v. Poma of America, Inc., 890 P.2d 100 (Colo. 1995).

[92] *See, e.g.*, Hardy v. Gulf Oil Corp., 949 F.2d 826 (5th Cir. 1992) (applying Texas law and general maritime law); Cook v. Iowa, 476 N.W.2d 617 (Iowa 1991); Cook v. Stansell, 411 S.E.2d 844 (W. Va. 1991).

so as to preclude contribution. In most jurisdictions, good faith essentially means the absence of fraud, collusion, or dishonesty by the plaintiff and the settling tortfeasor. A tortfeasor seeking contribution from a settling tortfeasor bears the burden of proving lack of good faith in the earlier settlement. The courts typically examine the "totality of the circumstances" in determining the question.[93] Some courts also predicate a finding of good faith on at least some showing that the amount paid in settlement fell within a "ballpark" or reasonable range estimate of the settling tortfeasor's liability in the case.[94]

Some states that have not adopted the UCATA have enacted statutes providing that a release by the plaintiff of one joint tortfeasor will not preclude contribution to another joint tortfeasor unless the release (1) is given before the right of the other tortfeasor to secure a money judgment for contribution has accrued, and (2) provides for a reduction, to the extent of the *pro rata* share of the released tortfeasor, of the plaintiff's damages recoverable against all other tortfeasors.[95]

The legal effects of a settlement involving fewer than all joint tortfeasors is quite complex, particularly because of the wide variations in the law among different jurisdictions. The foregoing highlights only the major issues and principles. This means, of course, that whenever you represent a party in connection with a partial settlement involving joint tortfeasors, it is imperative to have a complete understanding of the applicable law in the relevant jurisdiction.

If you represent a plaintiff who has been injured by multiple defendants in a jurisdiction that follows the latest version of the UCATA, the following are some of the major considerations to keep in mind when negotiating a settlement of the case:

(1) When possible, it is of course desirable for a plaintiff to enter into a comprehensive settlement that resolves her entire claim against multiple tortfeasors. In that event, all parties "buy their peace" without the uncertainty of a trial and potential issues of contribution.

(2) Assuming a comprehensive settlement cannot be obtained, a partial settlement that resolves the liability of one tortfeasor benefits the plaintiff in that she is thereby assured of at least some compensation for her injuries, and the compensation she receives might otherwise provide her with a fund to finance her litigation against the non-settling torfeasors.

(3) However, if the plaintiff settles with one joint tortfeasor, she will thereafter have no further recourse against that defendant and will be relegated to pursuing other, perhaps less solvent defendants at trial to obtain complete compensation for her damages. This underscores the importance to the plaintiff of negotiating a particularly satisfactory settlement if the only tortfeasor willing to settle is the "deep pocket" in the case.

(4) If the plaintiff enters into a settlement agreement releasing one tortfeasor and intends to take the others to trial, it is imperative that she include language in the agreement that expressly reserves her rights against the non-settling tortfeasors. In this regard, the safest practice is to include in the settlement agreement the specific names of those tortfeasors against whom the plaintiff reserves her rights (*see* example at § 17.05).

[93] *See, e.g.*, Smith v. Monongahela Power Co., 429 S.E.2d 643 (1993).

[94] *See, e.g.*, Tech-Bilt, Inc. v. Woodward-Clyde & Assoc., 698 P.2d 159 (Cal. 1985); City of Tucson v. Superior Court, 778 P.2d 1337 (Ariz. 1989).

[95] *See, e.g.*, McBride v. Chevron U.S.A., 673 So.2d 372 (Miss. 1996).

On the other hand, if you represent a defendant joint tortfeasor who is negotiating a potential settlement with the plaintiff, the following are some major considerations to bear in mind:

(1) A settlement with the plaintiff is desirable because, assuming the UCATA applies, a full release from the plaintiff will insulate the defendant from having to make contribution to any other joint tortfeasor.

(2) However, when settling with the plaintiff, the defendant must avoid any terms in an agreement that may be construed as evidencing collusion with the plaintiff to pay her a cheap sum in exchange for cooperating with her to maximize her recovery against the other joint tortfeasors. This means, among other things, that the amount of the settlement should be reasonably related to a good-faith assessment of the defendant's share of potential liability, taking into account jury verdicts in similar cases.

(3) If the defendant undertakes to settle with the plaintiff by paying her more than the defendant's *pro rata* share of the common liability and intends thereafter to seek contribution from the non-settling tortfeasors, it is imperative that the settlement agreement include language that makes it absolutely clear that the plaintiff is releasing all other joint tortfeasors from liability. In this regard, it is desirable for the agreement to specifically name all known potential joint tortfeasors who are being released from liability by the plaintiff (*see* example at § 17.05).

(4) If the settling defendant intends to seek contribution from the other joint tortfeasors, the requirement that the settlement agreement release all joint tortfeasors from liability to the plaintiff will be in direct conflict with the plaintiff's interests if she wishes to preserve her rights in the agreement to proceed against the non-settling tortfeasors herself. The resolution of this conflict will undoubtedly be reflected in the amount of the settlement and influenced by the relative bargaining power of the parties. If the plaintiff refuses to release all joint tortfeasors in the settlement agreement, one option for the defendant is to insist on an indemnification provision in the agreement by which the plaintiff undertakes to hold the defendant harmless from any contribution claim brought against him by a non-settling joint tortfeasor. However, as a practical matter, the value of such an indemnity provision to the defendant will only be as good as the solvency of the plaintiff to be bound to it.

§ 17.05 Example of Settlement Agreement and Release [With Reservation of Rights]

Settlement Agreement And Release [With reservation of Rights][96]

In consideration of the payment to the undersigned, ..., of $_____, the receipt of which is acknowledged, the undersigned, being legally competent and of lawful age, releases and forever discharges, for myself, heirs, executors, administrators, and assigns, the following persons:. . . . . ., and, except as otherwise provided herein, all other persons, firms, or corporations from any causes of action, claims, demands, damages, costs, loss of services, expenses and compensation on account of, or in any way growing out of, any known and unknown personal injuries and property damage resulting or to result from the accident that occurred on the . . . . . day of . . . . . .at or near. . . . . in. . . . . .

[This Settlement Agreement and Release reserves to the undersigned all rights of action, claims and damages against the following:. . . . . .]

[This Settlement Agreement and Release does not include the subrogation interest of the . . . . . .Insurance Company.]

The undersigned understands that the injuries sustained may be permanent and progressive, that any recovery from them is uncertain and indefinite, and that any recovery at law for those injuries or other damages is uncertain and indefinite. The undersigned understands and agrees that, in making this Settlement Agreement and Release, I rely wholly on my judgment, belief, and knowledge, and that I have not been improperly influenced in any way by anyone in making this Settlement Agreement and Release.

The undersigned understands that this settlement is the compromise of a doubtful and disputed claim, and that the payment is not to be construed as an admission of liability on the part of the persons, firms, and corporations hereby released, by whom liability is expressly denied.

[The undersigned further agrees to forthwith file a dismissal with prejudice in favor of the defendant,. . . . . ., in the lawsuit filed as. . . . . v. . . . . in the court of . . . . . .]

[The undersigned further agrees that any liens outstanding in favor of any medical or health-care provider or governmental agency which would prevent the direct payment to the undersigned of the settlement proceeds received under this Settlement Agreement and Release will be satisfied out of the proceeds of this settlement, and the undersigned agrees to indemnify and hold harmless . . . . . .for any claim by any lienholder against these settlement funds.][97]

[96] *See also* Beaver v. Harris' Estate, 409 P.2d 143 (Wash. 1965); Morris v. Millers Mut. Fire Ins. Co. of Texas, 343 S.W.2d 269 (Tex. Civ. App. 1961); Miles v. Inter Island Tel. Co., 416 P.2d 115 (Wash. 1966).

[97] *See* § 17.10.

This Settlement Agreement and Release contains the entire agreement between the parties, and the terms of this Settlement Agreement and Release are contractual and not a mere recital.

The undersigned states that I have signed this Settlement Agreement and Release as my own free act, and before doing so I have fully informed myself of its contents by reading it or having it read to me.

This Settlement Agreement and Release shall be construed under the laws of the State of . . . .

Signed this the . . . . . .day of . . . . . .

Caution: Read Before Signing.

§ 17.06 Mary Carter and Loan-Receipt Agreements

Assume that P, after being injured in an automobile accident, sues A, B, and C, all of whom were driving separate trucks. Assume also that, at the time of the accident, B and C were working for the same company employer. Prior to trial, P enters into a written agreement with A which specifies that the agreement is not to be revealed to anyone unless ordered by the court. The agreement provides that A's maximum liability to P will be $12,500, and that A will remain a party-defendant in the suit. It is understood (though not expressly "agreed") that A will testify that the fault for the accident lies with B and C. The agreement further provides that if the jury awards P more than $37,500 from the joint tortfeasors (*i.e.*, $12,500 multiplied by the three defendants), P will seek satisfaction of the judgment only from B and C's employer (who is also a named defendant in the suit and would be liable under the doctrine of *respondeat superior*), and A will owe nothing to P. If the jury awards P less than $37,500 from B and/or C only, A will owe P an amount, not exceeding $12,500, to make up the difference between the verdict and $37,500. If P loses the case entirely, A will pay $12,500 to P. These facts are roughly what occurred in Booth v. Mary Carter Paint Co., 202 So.2d 8 (Dist. Ct. App. Fla. 1967). After the jury awarded $15,000 to P, the Florida District Court of Appeal upheld the agreement by which A was obligated to pay $12,500 to P.

This type of agreement is commonly called a "Mary Carter" agreement.[98] While it may have many variations, it typically has three features. First, the contracting defendant remains a party throughout the litigation and provides testimony at trial that is favorable to the plaintiff in her effort (and the contracting defendant's effort) to pin all liability and large damages upon the non-agreeing defendants. Second, the contracting defendant promises to pay the plaintiff a predetermined, maximum amount of money (*e.g.*, the $12,500 in the *Mary Carter* case) if the plaintiff's recovery at trial is less than that

[98] *See generally*, Annotation: *Validity and Effect of "Mary Carter" or Similar Agreement Settling Maximum Liability of One Cotortfeasor and Providing for Reduction or Extinguishment Thereof Relative to Recovery Against Nonagreeing Cotortfeasor*, 22 A.L.R.5th 483 (1994). Some courts variously describe such agreements as guarantee agreements, sliding-scale agreements, or "Gallagher Covenants." *See, e.g.*, City of Tucson v. Gallagher, 383 P.2d 798 (Ariz. App. 1971), *vacated* 493 P.2d 1197 (Ariz. 1972).

predetermined amount or if the plaintiff fails to win a judgment altogether; and if the judgment equals or exceeds the predetermined maximum amount of money guaranteed by the contracting defendant and all co-tortfeasors are found liable, the plaintiff promises to enforce the judgment only against the non-agreeing defendants. In addition, or alternatively, the plaintiff and the contracting defendant may agree that the contracting defendant's ultimate payment to the plaintiff will be calculated on a "sliding scale" in proportion to the size of the recovery that the plaintiff obtains against the non-agreeing defendants (*e.g.*, in the *Mary Carter* case, the difference between $37,500 and the amount of the verdict, not exceeding $12,500). Either way, the amount the contracting defendant ultimately pays the plaintiff is determined by the success of the plaintiff's action against the non-agreeing tortfeasors. And third, the agreement between the contracting defendant and the plaintiff is kept secret in that it is not voluntarily revealed to any non-agreeing defendant.

Stated in a more shorthand way, the prototypical Mary Carter agreement is a confidential agreement that places a limit on the maximum liability of the contracting defendant, which will be reduced or extinguished depending upon the amount the plaintiff recovers at trial from the non-agreeing defendants. In addition, the plaintiff agrees not to execute on any judgment found by a jury against the contracting defendant but to seek recourse against only the non-agreeing defendants; and the contracting defendant agrees to continue as a party-defendant in the trial of the action.

Thus formulated, a Mary Carter agreement is neither a "release" nor a "covenant not to sue," nor even a true "settlement." (*See generally*, § 17.04). That is, the agreement does not release any party from liability with the common-law effect of extinguishing the plaintiff's entire cause of action against all joint tortfeasors. The agreement is also not a covenant not to sue because the contracting defendant in a Mary Carter agreement remains an active party-participant in the suit with a strong financial interest in its outcome, whereas a covenant not to sue discharges the settling tortfeasor as a party-defendant who then has no tangible stake in the outcome of the case. At most, a Mary Carter agreement is only a "partial" settlement in the sense that the contracting defendant guarantees the plaintiff a minimum sum of money, yet the litigation continues as if no settlement had been reached at all.

A Mary Carter agreement presents distinct advantages for the plaintiff. She is guaranteed at least a minimum recovery from the contracting defendant even if she entirely loses the case at trial. Particularly if she receives her guaranteed funds up front, she will have greater resources to fund the litigation and can marshal them with those of the contracting defendant in engaging in discovery and other pretrial preparation. Most importantly, the contracting defendant will be her ally at trial and will be cooperative in presenting testimony and other evidence that points the finger for liability and damages upon the non-agreeing defendants. The overall scheme is that the plaintiff and contracting defendant will team up against the non-agreeing defendants with a united litigation front.

For the contracting defendant, the greatest advantage of a Mary Carter agreement is the assurance that his liability will be limited to a predetermined

amount, and thus he will not run the risk of becoming victim to an adverse, run-away verdict. In addition, if the agreement not only places a predetermined cap on the contracting defendant's liability but provides that his *ultimate* liability will be reduced as the size of the judgment increases, such a "sliding-scale" provision may have the effect of significantly reducing, or entirely erasing, what he ultimately has to pay the plaintiff depending on the extent to which the judgment against the non-agreeing defendants exceeds the predetermined cap. Finally, if the contracting defendant's maximum liability is limited to an amount that falls within his insurance coverage, he will not be faced with an uninsured loss, and his insurer will favor the arrangement because it will tend to negate the possibility of eventual liability for an amount in excess of the policy limits on the basis of a bad-faith failure to settle.[99] (*See generally* § 17.03).

For any non-agreeing defendant, the effects of a Mary Carter agreement present a litigation nightmare. He faces not only the plaintiff as an adversary, but the deceptive contracting defendant who he ordinarily would assume to be his ally but who now has pooled his resources with the plaintiff to pin all liability in the case upon the non-agreeing defendant alone. The effects are particularly invidious if he is unaware of the secret agreement. At every stage of the litigation, whether pretrial or during trial, the plaintiff and contracting defendant are—"behind the non-agreeing defendant's back," so to speak—cooperating in discovery and pretrial motions, and cooperating during jury selection and in the presentation of evidence and overall courtroom strategy.[100] This not only significantly increases the chances that the jury will render a verdict against the non-agreeing defendant (and perhaps a larger verdict than otherwise would be awarded against him), but the plaintiff will look to him alone to pay the entire judgment if the damage award is above the minimum amount that the contracting defendant has agreed to pay to the plaintiff.

Because Mary Carter agreements give the contracting defendant a financial interest in the outcome of the trial and a motive to advance the plaintiff's cause, they can promote unethical collusion, skew the trial process, mislead the jury, and create the likelihood that a less culpable non-agreeing defendant will be burdened with the full payment. Thus, by statute or judicial fiat, some jurisdictions (including now Florida) have banned these types of agreements altogether as being in violation of public policy,[101] or have invalidated them as being champertous (*i.e.*, containing a promise for a payment of compensation for the subject matter of the suit),[102] or as failing to satisfy the "good faith" requirement necessary under the Uniform Contribution Among Tortfeasors Act to discharge the contracting defendant from any obligation of

[99] *See* Tucson v. Gallagher, 493 P.2d 1197 (Ariz. 1972).

[100] *See* Note, "It's a Mistake to Tolerate the Mary Carter Agreement," 87 Colum. L. Rev. 368 (1987).

[101] *See, e.g.*, Dosdourian v. Garsten, 624 So.2d 241 (Fla. 1993); Elbaor v. Smith, 845 S.W.2d 240 (Tex. 1992); Cox v. Kelsey-Hayes Co., 594 P.2d 354 (Okla. 1978); American Nat'l. Bank & Trust Co. v. Bic Corp., 880 P.2d 420 (Okla. App. 1994 (dictum).

[102] *See, e.g.*, Lum v. Stinnett, 488 P.2d 347 (Nev. 1971).

contribution.[103] Other jurisdictions, however, have not found these types of agreements invalid *per se*.[104]

Most jurisdictions that have permitted Mary Carter agreements, have established prophylactic procedural rules to protect the non-agreeing defendants and the integrity of the trial process. For example, a number of jurisdictions either make such agreements and their terms subject to discovery[105] or require their disclosure to the court and the non-agreeing defendants.[106] A significant number of jurisdictions allow the fact of the existence of the agreement (albeit usually not its specific monetary terms) to be disclosed to the jury so that the jurors can evaluate the credibility or bias of the parties to the agreement.[107] Finally, some courts have suggested that to preserve the non-agreeing defendant's right to a fair trial, he should be allowed to have the trial of the case against him severed from the trial against the contracting defendant.[108]

Another type of agreement similar to a Mary Carter Agreement is a "loan-receipt" agreement.[109] Here, the contracting defendant gives a non-interest bearing loan to the plaintiff who is obligated to repay all or a portion of the loan if the plaintiff either recovers from a non-agreeing defendant or the recovery from the non-agreeing defendant exceeds the amount of the loan. For

[103] *See, e.g.*, Brandner by Brandner v. Allstate Ins. Co., 512 N.W.2d 753 (Wis. 1994); *Re Waverly Acci. of February 22-24, 1978*, 502 F. Supp. 1 (M.D. Tenn. 1979) (applying Tennessee law); Reager v. Anderson, 371 S.E.2d 619 (W. Va. 1988).

[104] *See, e.g.*, Howard v. ICRR, 709 So.2d 1044 (La. App. 1998); Abbott Ford Inc. v. Superior Court, 741 P.2d 124 (Cal. 1987) (sliding-scale agreements specifically addressed by statute); General Motors Corp. v. Lahocki, 410 A.2d 1039 (Md. 1980); Pacific Indem. Co. v. Thompson-Yaeger, Inc., 260 N.W.2d 548 (Minn. 1977); Carter v. Tom's Truck Repair, Inc., 857 S.W.2d 172 (Mo. 1993); Vermont Union School Dist. v. H.P. Cummings Constr. Co., 469 A.2d 742 (Vt. 1983); Shell Oil Co. v. Christie, 607 P.2d 21 (Ariz. App. 1979).

[105] *See* Firestone Tire & Rubber Co. v. Little, 639 S.W.2d 726, *appeal after remand*, 662 S.W.2d 473 (Ark. 1982). Corn Exchange Bank v. TriState Livestock Auction Co., 368 N.W.2d 596 (S.D. 1985).

[106] *See, e.g.*, Gum v. Dudley, 505 S.E.2d 391 (W. Va. 1997); Ratterree v. Bartlett, 707 P.2d 1063 (Kan. 1985); Johnson v. Moberg, 334 N.W.2d 411 (Minn. 1983); Cox v. Kelsey-Hayes Co., 594 P.2d 354 (Okla. 1978).

[107] *See, e.g.*, Thibodeaux v. Ferrellgas Inc., 717 So.2d 668 (La. Ct. App. 3d Cir. 1998); Franklin v. Morrison, 711 A.2d 177 (Md. 1998); Stam v. Mack, 984 S.W.2d 747 (Tex. App. 1999); Ratterree v. Bartlett, 707 P.2d 1063 (Kan. 1985); L.J. Vontz Constr. Co. v. Alliance Industries Inc., 338 N.W.2d 60 (Neb. 1983); Cox v. Kelsey-Hayes Co., 594 P.2d 354 (Okla. 1978); Hatfield v. Continental Imports, Inc., 610 A.2d 446 (Pa. 1992); Riggle v. Allied Chemical Corp., 378 S.E.2d 282 (W. Va. 1989); Corn Exchange Bank v. TriState Livestock Auction Co., 368 N.W.2d 596 (S.D. 1985); Poston v. Barnes, 363 S.E.2d 888 (S.C. 1987); Carter v. Tom's Trucking Repair, Inc. 857 S.W.2d 172 (Mo. 1993); Fullenkamp v. Newcomer 508 N.E.2d 37 (Ind. App. 1987); Gatto v. Walgreen Drug Co., 337 N.E.2d 23 (Ill. 1975); Firestone Tire & Rubber Co v. Little 639 S.W.2d 726 (Ark. 1982); Sequoia Mfg. Co. v. Halee Const. Co., 570 P.2d 782 (Ariz. 1977); Bohna v. Hughes, Thorsness, Gantz, Powell & Brundin, 828 P.2d 745 (Alaska 1992). Where the agreement contains self-serving language that would be prejudicial to the non-agreeing defendant, that language would be excised from disclosure to the jury. *See, e.g.*, General Motors Corp. v. Lahocki, 410 A.2d 1039 (Md. 1980); Carter Tom's Truck Repair, Inc., 857 S.W.2d 172 (Mo. 1993).

[108] *See* Burkett v. Crulo Trucking Co., 355 N.E.2d 253 (Ind. App. 1976).

[109] *See generally*, Annotation: *Validity and Effect of "Loan Receipt" Agreement Between Injured Party and One Tortfeasor, for Loan Refundable to Extent of Injured Party's Recovery from a Cotortfeasor*, 62 A.L.R.3d 1111 (1975).

example, P might settle with and release defendant A from liability in exchange for a loan from A to P of $25,000, none of which is to be repaid to A if P loses her case against B at trial, but which is repayable to A to the extent of the amount P recovers from B. Thus, if P gets a $15,000 verdict against B, P repays that amount to A but keeps the original $25,000. Alternatively, P might settle with A for a loan of $25,000, repayable to A only to the extent P gets a verdict against B that exceeds the amount of the loan. Thus, if P gets a verdict against B for $15,000, P owes A nothing and nets $40,000; if the verdict is $35,000, P nets $50,000 with A being repaid $10,000; if the verdict is $100,000, P nets $75,000 after repaying to A all of the $25,000 loan.

To the extent such an agreement otherwise contains the common features of a Mary Carter agreement (*e.g.*, the obligatory participation of the contracting defendant as a continuing party in the suit), a loan-receipt agreement might be prohibited on public policy grounds.[110] However, under the usual loan-receipt agreement, the contracting defendant enters into a true settlement with the plaintiff in the sense of being discharged from the case as a party-defendant, although he might be called to testify as a witness in the plaintiff's action against one or more non-agreeing defendant-tortfeasors. Largely because of this difference between a loan-receipt agreement and Mary Carter agreement, the courts have refused to invalidate the former on public policy grounds, particularly if the loan must be disclosed to the court and opposing counsel and if the fact of the existence of the loan agreement may be admitted into evidence in the plaintiff's trial against the non-agreeing defendant.[111] The courts have also rejected contentions that loan-receipt agreements should be declared invalid on grounds of unlawful maintenance or champerty (*i.e.*, the common-law rule that one having no interest in a suit may not fund the plaintiff's action or do so in return for receiving a portion of the plaintiff's recovery),[112] or as an illegal sale of a tort claim.[113]

Many jurisdictions hold that a loan-receipt agreement is nothing more than an enforceable loan, and therefore it has neither the effect of discharging a non-agreeing joint tortfeasors from liability nor the effect of allowing them to receive a *pro tanto* reduction in liability corresponding to the amount of the loan if they are sued by the plaintiff.[114] On the other hand, some jurisdictions have construed loan-receipt agreements as covenants not to sue thereby requiring that any verdict the plaintiff recovers against a non-agreeing defendant must be reduced by the amount advanced under the loan-receipt agreement between the plaintiff and the contracting defendant.[115]

[110] *See* 22 A.L.R.5th 483 at 498 n. 8 (1994).

[111] *See, e.g.*, Reese v. Chicago, B & Q. R. Co., 303 N.E.2d 382 (Ill. 1973); State v. Ingram, 3 N.E.2d 808 (Ind. App. 1980).

[112] *See, e.g.*, Cullen v. Atchison, T. & S.F.R. Co., 507 P.2d 353 (Kan. 1973).

[113] *See, e.g.*, Biven v. Charlie's Hobby Shop, 500 S.W.2d 597 (Ky. 1973).

[114] *See, e.g.*, Reese v. Chicago B. & Q. R. Co., 303 N.E.2d 382 (Ill. 1973); American Transpo Co. v. Central I.R. Co, 264 N.E.2d 64 (Ind. 1970); Crocker v. New England Power Co., 202 N.E. 793 (Mass. 1964); Biven v. Charlie's Hobby Shop, 500 S.W.2d 597 (Ky. 1973).

[115] *See, e.g.*, Bolton v. Ziegler, 111 F. Supp. 516 (Iowa 1953); Cullen v. Atchison T. & S.F. Co., 507 P.2d 353 (Kan. 1973); Jensen v. Beaird, 696 P.2d 612 (Wash. App. 1985). *See also* Boh v. Hughes, et. al., 828 P.2d 745 (Alaska 1992).

It should be apparent from the foregoing that Mary Carter agreements are much more controversial than loan-receipt agreements. Even if you are permitted to enter into a Mary Carter agreement on behalf of your client, you will usually be required to disclose the terms of the agreement to counsel for the non-agreeing defendant and to the court, and the plaintiff and the contracting defendant can be rigorously cross-examined at trial about the existence of the agreement to undermine their credibility. This may significantly, though not entirely, undercut the benefits of such an agreement to the contracting parties.

On the other hand, loan-receipt agreements are far less controversial. For the plaintiff and contracting defendant, such an agreement has many of the same advantages as a Mary Carter agreement, so long as the particular jurisdiction does not treat the loan-receipt agreement as a covenant not to sue so as to reduce the non-agreeing defendant's liability to the plaintiff by the amount advanced under the loan. Even though some jurisdictions also permit the non-agreeing defendant to cross-examine the plaintiff and contracting defendant about the existence of their agreement, this impeachment is likely to be somewhat less destructive than in the Mary Carter situation because the contracting defendant in a loan-receipt agreement will not be a "party" at trial and might not even be called as a witness at trial.

If you represent the non-agreeing defendant in a case where a Mary Carter or loan-receipt agreement might be afoot between the plaintiff and another tortfeasor, you should engage in appropriate discovery to determine whether either of these agreements is at play. If so, in jurisdictions which require that the terms of the agreement be disclosed to you, you may be able to learn much about the plaintiff's target and resistance points which may give you added leverage in negotiating a potential settlement with the plaintiff. In addition, the fact that you will usually be permitted to cross-examine the plaintiff and contracting defendant about the existence of the agreement at trial may induce the plaintiff to ultimately accept a reasonable settlement with your client.

§ 17.07 Settlements Requiring Judicial Approval

A settlement made on behalf of a minor or incompetent, whether made before or after a lawsuit is filed, is subject to court approval. Although the procedures for judicial approval vary among jurisdictions, most require a hearing before the judge who decides (1) whether the proposed settlement is reasonable in light of the minor's or incompetent's damages; (2) the amount of attorney's fees that should be paid out of the settlement funds for the minor's or incompetent's lawyer; (3) the amount of any settlement funds that should be applied to satisfy unpaid medical expenses and the interests of any lienholder (*see* § 17.10), or be paid to a parent, guardian, or conservator for reimbursement for medical or other expenses incurred on behalf of the minor or incompetent; and (4) how the net settlement proceeds will be held for the benefit of, or distributed to, the minor or incompetent.

If the proposed settlement is agreed upon before a lawsuit has been instituted, usually a *pro forma* complaint and answer is filed, along with a motion or petition requesting judicial approval of the settlement. If the proposed settlement is reached after litigation has commenced, the motion or petition is simply filed in the cause. In either case, a guardian *ad litem* (if there is no guardian of the estate) must be appointed to represent the minor's interests, and that guardian will usually be a parent of the child. The guardian ad litem and the lawyers typically attend the hearing on the motion to approve the settlement for the minor and defendant, and some jurisdictions require that the minor or incompetent also attend.

If the court fails to approve the settlement and no satisfactory alternative settlement is approved, the case must be tried. If the court approves the settlement on behalf of a minor, the net settlement proceeds are usually placed in a "blocked account" (*e.g.*, an account in a federally insured bank, savings and loan, credit union, or trust company) in the name of the guardian *ad litem* as trustee for the minor. The funds may not be removed from the account without court approval prior to the minor's reaching the age of majority. In some jurisdictions, if the settlement proceeds to the minor do not exceed a certain amount (*e.g.* $5,000), the court may allow the funds to be paid directly to the guardian *ad litem*, without bond, to be held in trust for the minor until the minor reaches majority age. In the case of an incompetent who is not a minor, the funds may be delivered in trust to the guardian *ad litem* or some other trustee to be held and used for the benefit of the incompetent.

Finally, settlements in class actions also require judicial approval. The principal plaintiff in a class-action suit has a fiduciary obligation to the other class members and may not compromise the group's interests for personal gain. Thus, the federal courts[116] and most state jurisdictions require that notice of the proposed settlement be provided to all members of the class who are then afforded a hearing on any objections they may have to the settlement before the court decides whether to approve or reject it.[117] In determining whether the proposed settlement is fair, adequate, and reasonable, the court will consider such factors as (1) the views of the class members, (2) the views of class counsel, (3) the extent of and any reasons for opposition to the settlement, (4) the existence of any improper collusion behind the settlement, (5) the current stage of the litigation, (6) the likelihood of success at trial, (7) the complexity, expense, and likely duration of the lawsuit, and (8) the range of potential recovery.[118]

§ 17.08 Taxation of Settlement Funds

Under federal law, § 104(a)(2) of the Internal Revenue Code excludes from gross income damages received on account of "personal physical injuries or physical sickness."[119] The exclusion applies regardless of whether the funds are received from a judgment or by settlement, or are received in a lump sum or as periodic payments (*e.g.*, through a structured settlement).[120] The

[116] *See* Fed. R. Civ. P. 23(e).

[117] *See generally*, Boyd v. Bechtel Corp., 485 F. Supp. 610 (N.D. Cal. 1979).

[118] Austin v. Hopper, 15 F. Supp. 2d 1210 (M.D. Ala. 1998).

[119] 26 U.S.C. § 104(a)(2) (1996).

[120] Id.

exclusion applies except in the case of amounts attributable to and not in excess of deductions for medical expenses permitted under § 213 of the Code. Thus, generally, compensatory damages received from the settlement of a physical personal injury case are not taxable.

However, under § 104(a)(2) of the I.R.C., punitive damages are generally not excludable from gross income and are thus taxable. Also, "emotional distress" (including physical symptoms thereof such as insomnia, headaches, stomach disorders, etc.) does not fall within the definition of "personal physical injuries or physical sickness." Thus, for example, if damages for emotional distress are not attributable to a physical injury or sickness but are merely awarded in connection with a claim for employment discrimination or injury to reputation, the emotional distress damages are generally taxable. However, if the damages for emotional distress paid by the tortfeasor constitute reimbursement to the plaintiff for medical expenses incurred for treatment of the emotional distress, such damages are excludable from income provided they have not otherwise been deducted from income by the plaintiff.[121] On the other hand, if damages for emotional distress are attributable to a physical injury or sickness proximately caused by a tortfeasor, the emotional distress damages are generally excludable from gross income.

In addition, any income derived from the investment of the payment received from a lump-sum settlement or from the investment of periodic payments received under a structured settlement is generally taxable. For example, if the plaintiff receives a $100,000 lump-sum settlement for physical personal injuries and places that sum in an investment account that yields 10% annually, the $100,000 is not taxable but the $10,000 earned in the first year and all interest earned in subsequent years is taxable. By contrast, if the plaintiff has negotiated a structured settlement providing for total compensation of $1 million to be paid in periodic payments over a number of years, so long as the plaintiff is only entitled to receive each periodic payment as it becomes due and has no control over the funding source or ability to change the amount or timing of the payments,[122] neither the $1 million nor the amount of any periodic payment is taxable, although any income the plaintiff derives from investing any periodic payment is taxable. (*see also* § 17.09).

Where a settlement is in part a satisfaction of a claim for personal physical injury and in part for a non-physical injury claim, the written settlement agreement should specifically distinguish between the non-taxable amount of the settlement being paid for the physical injury and the taxable amount being paid for the non-physical injury. Generally, a tax court will accept such an allocation so long as it results from arm's length negotiations.[123] In the absence of an express allocation in the settlement documentation, the I.R.S. will generally allocate the taxable versus non-taxable portions of the settlement in proportion to the amounts prayed for in the complaint.[124] For

[121] *See* Id., § 104(a) last sentence.

[122] *See* H.G. Miller, *Art of Advocacy-Settlement*, § 10:32[4] (1999).

[123] *See* Seay v. Commissioner, 58 T.C. 32 (1972).

[124] Rev. Rul. 85-98, 1985-2 C.B. 55.

example, if a complaint contains a first cause of action in tort for $100,000 in (non-taxable) compensatory damages on account of physical injury or physical sickness and a second cause of action for breach of contract for $900,000 in (taxable) lost profits, any settlement—in the absence of explicit settlement documentation to the contrary—will generally be allocated one-tenth to non-taxable damages and nine-tenths to taxable damages. Such a result would seriously undermine the value of the settlement to the plaintiff if the parties did not intend this allocation.

Tax law is, of course, a highly complex, changing, and specialized field. Thus, unless you possess independent expertise in the subject, you should always consult a tax lawyer if tax implications may be important in negotiating a settlement. Similarly, after a settlement has been finalized, if you are uncertain about whether or to what extent your client's settlement funds may be taxable, you should advise him to consult a tax specialist. Providing erroneous tax advice in connection with settlement may constitute malpractice.

§ 17.09 Lump-sum and Structured Settlements

The most common type of monetary settlement in the litigation context is the payment of a single lump-sum in exchange for the dismissal of the legal claim. The advantages of this type of settlement are simplicity and finality. After both parties execute the agreement, there is no need for them to monitor any future performance under it.

On the other hand, particularly in personal injury cases where extensive damages are involved, the parties will sometimes enter into a "structured settlement" by which, after an initial lump-sum (or "front money") is paid, the plaintiff will receive future periodic payments on a monthly, quarterly, semi-annual, or annual basis that are paid for a specified number of years or over the plaintiff's lifetime. The amounts of these future payments are predetermined, but they may be set to increase or decrease over time. A structured settlement thus requires on-going performance by the payor and mechanisms by which the plaintiff will be reasonably assured that the payor will not default on its future obligations.

The most common type of structured settlement is the "single-premium immediate annuity." An annuity is a contract between the defendant or the defendant's insurance carrier and an annuity issuer (usually a life insurance company), whereby, in exchange for the defense's payment of a single premium to the annuity issuer, the issuer promises to make specified payments to the plaintiff on specified dates. The defendant or its insurance carrier owns the annuity, and the plaintiff is the sole beneficiary unless the settlement documents designate some other beneficiary upon the plaintiff's death. The annuity is "immediate" in the sense that all of its terms regarding the amount and timing of payments are immediately known at inception.

Ordinarily, if the annuity issuer defaults on making the payments to the plaintiff, the defendant or its insurer will remain ultimately liable for the payments. Quite often, however, and subject to the express approval of the plaintiff, the defendant or its insurer will absolve itself from any liability for

a default by assigning that liability to a "Qualified Assignee" as permitted by § 130 of the Internal Revenue Code. To do this, the defendant or its insurer pays the qualified assignee (usually a bank or some corporate affiliate of the life insurance company issuing the annuity) the premium to purchase the annuity and an assignment fee. The assignment corporation then pays the premium to an annuity issuer who, in turn, issues an annuity contract and makes the periodic annuity payments directly to the plaintiff on behalf of the assignment corporation. Under this arrangement, the assignment corporation becomes the ultimate obligor for the future payments in the event of a default by the annuity issuer, and all liability of the defendant or its insurer is extinguished.

Apart from the single-premium immediate annuity, there are a number of other, albeit less common, methods for managing and funding a structured settlement. For example, the defendant or its liability carrier might establish a trust administered by an independent trustee who assumes liability for and makes the future payments to the plaintiff with monies funded by United States Treasury bonds, and the plaintiff is given a security interest in the bonds held by the trust. In lieu of this arrangement, the defendant or its carrier might establish and fund a "reversionary trust" which obligates the defense to pay additional amounts into the trust to meet unforeseen care costs for the plaintiff, but all funds in the trust revert back to the defense in the event of the plaintiff's death. Yet another alternative is a "settlement fund management trust" by which the defendant-carrier's policy limits are paid over to an independent trustee who invests the funds and makes periodic payments to or for the benefit of the plaintiff in a way that roughly emulates the payment stream that would be paid by an annuity issuer.

For the defendant or its liability carrier, the principal advantage of a structured settlement through a single-premium immediate annuity is that a large annuity to be paid over a number of years can be purchased for less than what it would cost the defense to pay a single lump-sum settlement to the plaintiff. The advantages to the plaintiff are that the periodic payments are tax free (which is not the case with respect to any income the plaintiff earns from investing a single lump-sum); the periodic payments may be flexibly designed to meet the plaintiff's anticipated needs (albeit this flexibility ceases once the structure is established); and there is little risk that the plaintiff will mismanage or squander the entire settlement—an outcome that would be particularly disastrous if lifelong medical or custodial care is necessary. On the other hand, a structured settlement might not be desirable for a plaintiff who is elderly, who otherwise wants or has a special need to receive a large sum immediately, or who is capable of wisely investing a lump-sum. In addition, because a structured settlement involves fixed payments that are not changeable once agreed upon at the outset, the purchasing power of those payments will be undercut in the event of future inflation, and the value of the overall settlement to the plaintiff will be reduced if interest rates rise substantially in the future.

In formulating or evaluating a proposal for a structured settlement, many plaintiffs' lawyers employ the services of a structured-settlement consultant, and defendants' lawyers often rely on the expertise of an annuity broker who

sells annuity products. Even the most experienced personal-injury lawyers often utilize such an expert in evaluating the case, designing an appropriate structure, and advising or assisting in negotiations. Apart from the desirability of drawing upon a specialist in the field, some of the conventional wisdom about considerations that should be taken into account in connection with structured settlements includes the following:[125]

(1) For the plaintiff, a structured settlement is often desirable when the injuries call for long-term or life-long care; the plaintiff is a minor or incompetent; or the plaintiff is either inexperienced in managing a large sum of money or has spendthrift propensities.

(2) A structured settlement may be inappropriate for a plaintiff who is experienced in managing a large sum of money or who is willing to have a third person such as a trustee manage the investment of a lump-sum. If most of the payments from a structured settlement will be spent on tax-deductible medical care, the tax advantage of structured payments may be illusory because the investment interest earned from a lump-sum settlement can be offset by the large tax deduction of the medical expenses.

(3) For the defense, a structured settlement is often desirable as a means of settling the case in a way that meets the plaintiff's special needs, and the defense should be expected to save at least 5% to 10% of the fair settlement value of the case on the structured portion of the settlement.

(4) It is imperative that plaintiff's counsel research the financial stability of the *ultimate obligor* of the periodic payments—*i.e.*, the defendant or its carrier in the event it will be the owner of the annuity, or the qualified assignee in the event the defendant or its carrier will assign (with the plaintiff's permission) the ultimate liability for the payments to an assignment corporation. That is, the plaintiff should not agree to any qualified assignment to an entity that does not have a high financial rating; and if the defendant carrier remains as the ultimate obligor and has a low financial rating, the plaintiff should insist that the carrier assign its liability to a highly-rated assignment corporation.

(5) If the defendant or its insurer remains the ultimate obligor for the structured payments, it should purchase the annuity only from a highly rated annuity issuer. In most situations, the defendant or its carrier will want to extinguish its ultimate liability and close the file by entering into a qualified assignment with an assignment corporation.

(6) When plaintiff's counsel negotiates the amount of initial "front money" paid apart from and in advance of the periodic payments, counsel should be sure that this amount is sufficient to cover any liens of health-care providers or other entities (*see* § 17.10), unpaid medical and litigation expenses, attorney's fees on the structured portion of the settlement calculated on the cost or present value of the annuity whichever is lower,[126] and the immediate needs of the plaintiff.

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[125] *See* H. Miller, *Art of Advocacy-Settlement*, Chapter 10 (1999); Schoenfield & Schoenfield, *Legal Negotiations*, § 7.03 (1988).

[126] *See* Wyatt v. United States, 783 F.2d 45 (6th Cir. 1986); Danninger & Palfin, How to Evaluate Proposals; Avoid Fee Disputes, 24 Trial 38 (Dec. 1988) (citing the position of the Board of Governors of the Association of Trial Lawyers of America).

(7) To ensure that the periodic payments received by the plaintiff are not taxable, the structured settlement should not give the plaintiff any right to (a) control the funding source or the investment of the funding medium, (b) own the annuity or change the beneficiary of the annuity, or (c) accelerate, increase, or decrease the periodic payments.[127] However, where a qualified assignment is involved, the plaintiff may perfect a "security interest" in the annuity contract under applicable state law so long as the plaintiff has no ownership rights in the contract and cannot assign or otherwise use it as any form of collateral.[128]

(8) To guard against the adverse effects of inflation, the structured settlement might include an escalator provision that increases the amount of the periodic payments each year (*e.g.*, an escalator of 3%–5% per annum), or include a so-called "step rate" or "plateau plan" by which the amount of the periodic payments are increased every certain number of years (*e.g.*, $4,000 per month for the first five years; $4,100 per month for the next five years; $4,200 per month for the next five years, etc.).

(9) Plaintiff's counsel should insist upon disclosure of the actual cost of the premium that will be paid to purchase the annuity contract,[129] and be sure that the annuity being purchased represents fair market value.

(10) The structured settlement agreement should be in writing and carefully drafted to preserve the tax-exempt status of periodic payments.

§ 17.10 Liens of Health-care Providers and Other Entities on Settlement Funds

The vast majority of jurisdictions, usually by statute or sometimes through the common law, recognize the right of a hospital,[130] physician or other health-care provider[131] to assert a lien upon the settlement funds received by an injured person from a tortfeasor to the extent of the reasonable value of medical services that the health-care provider rendered to the injured person on account of the tortfeasor's negligence and for which the health-care provider has not been paid. Statutes vary significantly in terms of when and how such a lien may be asserted, the permissible extent or amount of the lien, for what type of injuries the lien may be asserted, and the means by which and the persons against whom the lien may be enforced. In addition, if the injured person has received benefits from a public health-care provider or program, it also may have subrogation or associated lien rights on settlement

[127] The importance of these limitations is to prevent the plaintiff from being deemed in "constructive receipt" of the principal of the structured settlement payments in which event they would be taxable under § 451(a) of the Internal Revenue Code. *See* Treas. Reg. § 1.451-2(a); Rev. Rul. 77-230, 1977-2 C.B. 214; Rev. Rul. 79-220, 1979-2 C.B. 74; Rev. Rul. 79-313, 1979-2 C.B. 75.

[128] *See* I.R.C. § 130; I.R.S. Priv. Ltr. Rul. 92-53745 (October 6, 1992).

[129] Obtaining this information in no way impairs the tax-exempt status of the periodic payments received by the plaintiff. *See* I.R.S. Priv. Ltr. Rul. 83-33035 (May 16, 1983).

[130] *See generally*, Annotation: *Construction, Operation, and Effect of Statute Giving Hospital Lien Against Recovery from Tortfeasor Causing Patient's Injuries*, 16 A.L.R.5th 262 (1993).

[131] *See generally*, Annotation: *Physicians' and Surgeons' Liens*, 39 A.L.R.5th 787 (1996).

funds, and it even may have a right to participate in settlement negotiations or approve settlements between the injured plaintiff and the tortfeasor.[132]

Significantly, many statutes provide that any person who has proper notice of the lien and thereafter disburses settlement funds to the injured person without first satisfying the lien may be liable to the health-care provider for its unpaid charges. For example, such liability may be imposed upon the tortfeasor or his insurer,[133] or upon the attorney representing the injured party.[134] In any event, a health-care provider may also sue the injured party for payment of the unpaid charges.

Workers' Compensation statutes also provide for liens upon settlement funds paid by third-party tortfeasors in certain circumstances. Typically, workers' compensation statutes provide medical benefits and partial wages to employees who are out of work as a result of being injured on the job, irrespective of the fault of the employer or employee in causing the injury. If an employee while working in the course and scope of her employment is injured as a result of the negligence of a third-party tortfeasor, she may independently seek damages against the tortfeasor and also avail herself of any workers' compensation benefits that she is otherwise entitled to receive from her employer. In this situation, workers' compensation statutes variously provide that the employer (or its workers' compensation insurance carrier) has a right to be reimbursed for the benefits it has paid which are attributable to the fault of the third-party tortfeasor, and a right to a credit against paying future benefits to the extent of the net settlement recovered by the employee in the third-party action. A similar right of reimbursement exists in favor of the United States under the Federal Employees' Compensation Act.[135] In some state jurisdictions, the amount of the lien or credit is adjusted in proportion to any fault attributed to the employee or employer in causing the injury.[136]

Thus, if you represent the injured party, it is imperative that you have a complete understanding of any statutory obligations you may have to first reimburse a lienholder for medical charges or benefits before distributing the proceeds of any settlement to your client. Similarly, you must thoroughly understand these obligations if you represent the tortfeasor or his insurer. As a matter of practice in many jurisdictions, insurers will insist that in exchange for making a settlement payment to the injured party, the injured party must sign a Settlement Agreement and Release that includes a

[132] *See, e.g.*, The Federal Medical Recovery Act, 42 U.S.C. 2651 *et. seq.*, 7 A.L.R. Fed. 289

[133] *See, e.g.*, Charlotte-Mecklenberg Hosp. Auth. v. First of Ga. Ins. Co., 455 S.E.2d 655 (N.C. 1995); National Ins. Ass'n. v. Parkview Memorial Hosp., 590 N.E.2d 1141 (Ind. App. 1992); St. Luke's Hosp. v. Consolidated Mut. Ins. Co., 32 Misc.2d 657, 217 NYS2d 843 (1961); Republic Ins. Co. v. Shotwell, 407 S.W.2d 864 (Tex. Civ. App. 1966).

[134] *See, e.g.*, Charity Hosp. Of Louisiana v. Band, 593 So.2d 1392 (La. App. 1992); Elizabeth General Hosp. & Dispensary v. Longobardi, 116 A. 471 (N.J. 1933).

[135] *See generally*, Annotation, *Construction and Application of Provisions of Federal Employees' Compensation Act (5 U.S.C. § 8132) Requiring Compensation Beneficiary Who Recovers from Third Person or Receives Money in Settlement of Claim, to Refund to United States Amount of Compensation Paid, After Deducting Cost of Suit and Reasonable Attorney's Fee*, 17 A.L.R. Fed. 494 (1973).

[136] *See generally*, A Larson, *Workmen's Compensation Law* § 71 (1990).

indemnity clause by which she agrees to hold the insurer and insured-tortfeasor harmless from the claims that any private or public lienholder may have upon the settlement funds. (*See* example of such a clause in § 17.05).

§ 17.11 Confidentiality of Settlements and Settlement Discussions

Approximately three-fourths of the states have adopted rules of evidence that are substantially similar to the Federal Rules of Evidence. Rule 408 of the Federal Rules provides:

> Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

Consistent with the public policy of encouraging settlement of disputed claims,[137] under this rule, evidence of an offer to settle,[138] acceptance of that offer, or the settlement itself[139] of a disputed claim[140] is not admissible at trial to prove liability, or invalidity of the claim or its amount.[141] Evidence of conduct or statements made in settlement negotiations is also inadmissible.[142] The rule applies to settlements and settlement negotiations regardless of whether they were between the parties in the instant suit or involved a third party,[143] and extends to conduct or statements of parties, their agents, and their lawyers.[144]

[137] *See* Cheyenne River Sioux Tribe v. United States, 806 F.2d 1046, 1050 (Fed. Cir. 1986); Morley-Murphy Co. v. Zenith Electronics Corp., 910 F. Supp. 450, 456 (W.D. Wis. 1996). *See also* 4 Wigmore, *Evidence*, § 1061 at 36 (Chadbourn rev. 1972) (true reason for excluding offers of compromise is that they are essentially irrelevant as manifesting "merely a desire for peace, not a concession of wrong done.").

[138] Pierce v. F.R. Tripler & Co. 955 F.2d 820, 827 (2d Cir. 1992); Winchester Packaging, Inc. v. Mobile Chemical Co., 14 F.3d 316, 319 (7th Cir. 1994) (a demand for payment is not an offer to settle).

[139] Dolese v. United States, 605 F.2d 1146 (10th Cir. 1979); Burns v. City of Des Peres, 534 F.2d 103, 112 n. 9 (8th Cir. 1976); Hudspeth v. C.I.R., 914 F.2d 1207, 1213 (9th Cir. 1990).

[140] McCormick, *Evidence*, § 266 at 194 (4th ed. 1992); Affiliated Manufacturers, Inc. v. Aluminum Co. of America, 56 F.3d 521, 527–28 (3d Cir. 1995).

[141] Deere & Co. v. International Harvester Co., 710 F.2d 1551, 1557 (Fed. Cir. 1983).

[142] *See* Russell v. PPG Indus. Inc, 953 F.2d 326, 333–34 (7th Cir. 1992) (information from mock trial used to motivate parties to settle was inadmissible); Ramada Dev. Co. v. Rauch, 644 F.2d 1097, 1106 (5th Cir. 1981) (exclusion of architect's report used for settlement negotiations)

[143] Kennon v. Slipstreamer, Inc., 794 F.2d 1067, 1069 (5th Cir. 1986); McInnis v. A.M.F. Inc., 765 F.2d 240, 247–251 (1st Cir. 1985); Missouri Pacific Ry. Co. v. Arkansas Sheriff Boy's Ranch, 655 S.W.2d 389, 394–395 (Ark. 1983).

[144] *See* Pierce v. F.R. Tripler & Co., 955 F.2d 820, 827 (2d Cir. 1992).

The rule's exclusion is limited, however, only to "disputed" claims (*i.e.*, in situations where there is "an apparent difference of opinion between the parties as to the validity of a claim").[145] For example, the rule does not apply to an offer to settle a claim that has not been asserted,[146] to a mere "demand" for payment, to mere payment in the face of a demand,[147] or to mere "business discussions" about a matter that has not ripened into a dispute.[148] In addition, the rule does not exclude evidence of facts or documents merely because they were presented or revealed in the course of settlement negotiations if such evidence is otherwise discoverable through the discovery process[149] or obtainable from independent sources. Thus, a party cannot render evidence inadmissible under the rule simply by presenting it during settlement.[150] However, statements made during negotiations or documents prepared as a result of them are barred.[151]

Evidence in connection with a settlement may be admissible for a relevant purpose *other* than to prove liability or invalidity of the claim or its amount, such as to prove bias or prejudice,[152] to impeach one who has entered into a Mary Carter or loan-receipt agreement (*see* § 17.06), to negate a contention of undue delay (*e.g.*, evidence that good faith settlement discussions were underway to rebut a contention that a party purposefully delayed certain action to the detriment of another),[153] or to prove an effort to obstruct a criminal investigation or prosecution (*e.g.*, evidence of trying to "buy off" the prosecution or a prosecution witness).[154] The rule's list of admissible purposes is not exclusive.[155] Thus, for example, proof of a settlement and its terms are admissible in a contract action to enforce a settlement agreement as long as the suit does not embrace an issue about the validity of the underlying claim.[156]

[145] Alpex Computer Corp. v. Nintendo Co., 770 F. Supp. 161, 163 (S.D. N.Y. 1991).

[146] *See* Cassino v. Reichhold Chemicals, Inc. 817 F.2d 1338 (9th Cir. 1987).

[147] *See* United States v. Hooper, 569 F.2d 219 (7th Cir. 1979); In re B.D. International Discount Corp., 701 F.2d 1071, 1074 (2d Cir. 1983); Winchester Packaging Inc. v. Mobile Chemical Co., 14 F.3d 316, 319 (7th Cir. 1994).

[148] Big O Tire Dealers Inc. v. Goodyear Tire & Rubber Co., 561 F.2d 1365, 1372–73 (10th Cir. 1977).

[149] *See, e.g.*, Ramada Dev. Co. v. Rauch, 644 F.2d 1097, 1107 (5th Cir. 1981).

[150] *See* Center for Auto Safety v. Dept. of Justice, 576 F. Supp. 739, 749 & n. 23 (D.D.C.1983).

[151] Ramada Dev. Co. v. Rauch, 644 F.2d 1097, 1107 (5th Cir. 1981).

[152] Hudspeth v. Commissioner of IRS, 914 F.2d 1207, 1213–14 (9th Cir. 1990).

[153] California & Hawaiian Sugar Co. v. Kansas City Terminal Warehouse Co., 602 F. Supp. 183, 188 (W.D. Mo. 1985).

[154] *See* United States v. Gonzales, 748 F.2d 74, 78 (2d Cir. 1984); Advisory Committee Note to Rule 408.

[155] *See, e.g.*, United States v. Havert, 40 F.3d 197, 200 (7th Cir. 1994) (prior audit settlement admissible to show knowledge of duty); Johnson v. Hufo's Skateway, 949 F.2d 1338 (4th Cir. 1991) (consent decree admissible to show intent or motive to racially discriminate); Belton v. Fibreboard Corp., 724 F.2d 500 (5th Cir. 1984) (evidence of prior settlements admissible to show plaintiffs had been exposed to products of other defendants); Urico v. Parnell Oil Co., 708 F.2d 852 (1st Cir. 1983) (testimony about prior settlement negotiations admissible to show defendant prevented plaintiffs from mitigating their damages).

[156] Cates v. Morgan Portable Bldg. Corp., 780 F.2d 683, 691 (7th Cir. 1985); Catullo v. Metzner, 834 F.2d 1075, 1079 (1st Cir. 1987).

Because Rule 408 applies only to evidence at trial between the actual litigants before the court and is limited to proof regarding "liability for or invalidity of the claim or its amount," the rule provides only narrow protection against the disclosure of settlements and matters occurring during settlement discussions. The rule does not prohibit disclosure of such matters outside of the courtroom, provides no blanket protection against formal discovery of such matters in the litigation process,[157] and generally does not provide a litigant with protection against the disclosure of other information he might want to protect such as trade secrets or other proprietary data.[158] In addition, as mentioned above, the rule is entirely inapplicable to parties who are negotiating over a matter that does not involve a disputed claim.

In light of these limitations under Rule 408, parties negotiating either a disputed claim or non-litigation matter will sometimes enter into a confidentiality agreement regarding their negotiations or settlement. For example, they might agree not to disclose the fact that negotiations are occurring, the participants in the negotiations, certain information furnished by either side during negotiations, or the terms of a settlement if one is reached. To deter a breach of such an agreement, the parties might include a clause that permits enforcement by injunctive relief and provides for liquidated damages in the event of a breach. As between the signatories to such an agreement, the courts will generally enforce it[159] as well as any liquidated damages provision so long as those damages approximate actual damages.[160]

However, a confidentiality agreement may have limited force if a nonparty discloses the information that the contracting parties wished to protect, or a nonparty seeks disclosure of the confidential information for her own use in unrelated litigation or for some other purpose like "the public's right to know." A nonparty will generally not be bound by the agreement, and some courts have held that the contracting parties to a confidentiality agreement may not "foreclose others obtaining, in the course of litigation, materials that are relevant to their efforts to vindicate a legal position."[161] Moreover, a third party may be able to compel disclosure of information otherwise protected by a confidentiality agreement if nondisclosure would violate public policy as where, for example, a public-records disclosure statute is applicable.[162]

With the burgeoning increase in court-annexed mediation and other dispute resolution programs, many jurisdictions have now enacted statutes or court rules that protect the confidentiality of settlement discussions through

[157] *See, e.g.*, Uinta Oil Refining Co. v. Continental Oil Co., 226 F. Supp. 495 (D. Utah 1964).

[158] *See, e.g.*, Cipollone v. Liggett Group, Inc. 785 F.2d 1108, 1121 (3rd Cir. 1986). *See* Wigmore, *Evidence* § 2212 (McNaughten rev. 1991). On the other hand, a protective order might be sought under Rule 26(c) of the Federal Rules of Civil Procedure to prevent disclosure of such information.

[159] *See, e.g.*, Doe v. Roe, 93 Misc2d 201, 400 NYS2d 668 (1977).

[160] *See* Uniform Commercial Code, § 2-718; Farnesworth, *Contracts* § 12.18 (1982).

[161] Grumman Aerospace Corp. v. Titanium Metals Corp., 91 FRD 84, 87–88, 32 FR Serv2d 1520 (E.D. N.Y. 1981). *Cf.*, Hinshaw, et al. v. Superior Court, 51 Cal. App. 4th 233, 58 Cal. Rptr. 2d 791 (6th Dist. 1966) (prohibiting nonsignatories from obtaining income information about physicians contained in confidentiality agreement).

[162] *See, e.g.*, Anchorage School Dist. v. Anchorage Daily News, 779 P.2d 1191 (Alaska 1989), later proceeding 803 P.2d 402 (1989).

mediation privilege laws. The protection of confidentiality through a "privilege" may be much broader than the protection afforded by an evidentiary rule like Rule 408 because privileges usually bar persons subject to them from disclosing information not only in the course of adjudicative hearings but also in other contexts. Thus, a privilege may prevent not only the admissibility of certain evidence at trial, but may block the disclosure of information in discovery and in other proceedings or settings not governed by the rules of evidence. The growth of mediation privilege laws and rules stems from the public-policy view that extended confidentiality will encourage the use of mediation or other dispute resolution processes as a means for resolving disputes where traditional, two-party negotiations have failed.

State mediation privilege statutes and rules vary significantly in terms of what processes and persons are covered, the scope and sources of information protected, whether the privilege is qualified or absolute, who may invoke the privilege, in what settings the privilege may be asserted, and in what circumstances the privilege is inapplicable.[163] In most jurisdictions, for example, the mediation privilege applies only in certain publicly administered programs, such as child custody and visitation mediation or state labor department mediation. Other jurisdictions have a more generic privilege that extends to court-annexed mediation of civil or even criminal disputes, or to mediation programs having certain certification requirements for mediators.

Usually, the information that is privileged consists of all matters—whether oral, written, or expressed through conduct—that arise during the mediation. Other statutes more broadly protect the names of the participants to the mediation, communications with nonparties during the mediation, all information in control of the mediator or mediation agency, and sometimes the mediated agreement itself.[164] When the privilege applies, it usually prevents disclosure or use of the protected information in any proceeding in the jurisdiction—whether in discovery, in pretrial proceedings, at trial, or in administrative proceedings—and may be asserted by the mediator or any of the parties or other participants.[165]

A number of statutes expressly provide for exceptions to the privilege, as where a governmental subdivision or agency is a party to the mediation and is subject to a "sunshine" or "open-meetings" law requiring that the affairs of the governmental entity be open to public scrutiny, where information obtained during the mediation gives rise to evidence of a felony or perjury or where disclosure is necessary in a suit between a party and a mediator for damages arising from the mediation.[166] Other limitations on the extent of the privilege may exist where the courts interpret it as being "qualified" rather than absolute, as where disclosure is necessary to protect a crimina

[163] For a comprehensive compilation of state mediation privilege statutes and rules, *see* Nancy H. Rogers & Craig A. McEwen, *Mediation: Law, Policy and Practice*, Appendices (2d ed. 1994)

[164] *See* Nancy H. Rogers & Craig A. McEwen, *Mediation: Law, Policy & Practice*, § 9:12 (2d ed. 1994).

[165] *But see* Fenton v. Howard, 575 P.2d 318 (Ariz. 1978) (only mediator holds the privilege) In re Marriage of Rosson, 178 Cal. App.3d 1094, 224 Cal. Rptr. 250 (1986) (same).

[166] *See* Nancy H. Rogers & Craig A. McEwen, *Mediation: Law, Policy & Practice*, § 9:12 (2d ed. 1994).

defendant's constitutional confrontation rights,[167] to otherwise prevent "manifest injustice" in a case or public harm,[168] or to preserve the public's First Amendment right of access to information about adjudicative proceedings.[169] Moreover, many jurisdictions have statutes that require certain professionals to report information about possible child abuse, child neglect, or certain felonies, and these statutes may override or operate independently from any mediation privilege.[170]

In sum, the current state of the law regarding the confidentiality of settlement agreements and settlement discussions outside of the trial setting remains to be more fully developed as states, the federal government, and the judiciary continue to promote various alternative dispute resolution programs and processes. On the one hand, there is wide recognition that confidentiality is a critical component to successful extra-judicial dispute resolution, but the public policy of promoting settlement must be balanced against competing public policies about the costs of confidentiality to the due process rights of litigants, the public's interest in preventing and punishing crime, and the public's interest in access to information to preserve the integrity of adjudicative proceedings. Thus, you must be alert to the fact that this is a rapidly developing and changing area of the law as legislatures and the courts continue to struggle to resolve the tension among competing public policies implicated by confidentiality in settlements and settlement discussions.

§ 17.12 Finalizing Settlements and Disbursing Settlement Funds

In the vast majority of cases, the terms of a settlement are, at first instance, orally agreed to between counsel for the plaintiff and counsel for the defendant or, as in most personal injury cases, between plaintiff's counsel and the insurance adjuster for the defendant's insurer. Ordinarily, oral agreements are binding unless they fall within the statute of frauds,[171] the parties contemplate that the oral agreement will be reduced to writing,[172] or there is a court rule requiring that the oral settlement be in writing to be effective.[173] Notwithstanding the enforceability of many oral settlements, the

[167] *See, e.g.*, Davis v. Alaska, 415 U.S. 308, 39 L.Ed2d 347, 94 S.Ct. 1105 (1975) (holding that the confidentiality of juvenile records must yield to the criminal defendant's right to confront and cross-examine prosecution witnesses); Pennsylvania v. Ritchie, 480 U.S. 39, 94 L.Ed2d 40, 107 S.Ct. 989 (1987) (disclosure of privileged information may be necessary to protect a criminal defendant's due process right to exculpatory information).

[168] *See, e.g.*, Federal Administrative Alternative Dispute Resolution Act, 5 U.S.C. 584 (1990). *See also*, Project: Government Information and the Rights of Citizens, 73 Mich. L. Rev. 971 (1975)

[169] *See, e.g.*, FTC v. Standard Financial Management Corp., 830 F.2d 404 (1st Cir. 1987); SEC v. Van Waeyenberghe, 990 F.2d 845 (5th Cir. 1993); Janus Films Inc. v. Miller, 801 F.2d 578 (2d Cir. 1986).

[170] *See generally*, Gibson, Confidentiality in Mediation: A Moral Reassessment, 1992 J. Disp. Res. 25 (1992).

[171] *See* B-Mall Co. v. Williamson, 977 S.W.2d 74 (Mo. Ct. App. W.D. 1998); Sims v. Purcell, 257 P.2d 242 (Idaho 1953).

[172] *See* Kreling v. Walsh, 176 P.2d 965 (Cal. App. 1947).

[173] *See* Moore v. Gunning, 328 So.2d 462 (Fla. App. 1976).

parties will typically memorialize their agreement through one or more settlement documents.

Usually there is no need for you to confirm in writing the terms of an oral settlement agreed to between you and opposing counsel in advance of having closing settlement documents prepared and executed. However, if you have any doubt that the terms agreed to in an oral settlement discussion might be misunderstood or abrogated prior to the execution of final settlement documents, you should promptly confirm your understanding of the terms of the settlement in a letter or by E-mail to the other side. If an oral agreement is reached during trial, the best practice is to state the complete terms of the agreement on the record before the trial judge.

Following an oral agreement as to the terms of the settlement, defense counsel will usually send plaintiff's counsel (1) a Settlement Agreement and Release like that shown in § 17.05 or some other pertinent settlement agreement or documents (*e.g.* a structured-settlement agreement, contract, or deed, etc.), (2) a settlement check made payable to the plaintiff and plaintiff's counsel if the consideration for the settlement involves the payment of money, and (3) a dismissal to be signed and filed with the court if a lawsuit was previously filed. After these documents are received, the responsibilities of plaintiff's counsel are typically as follows:

(1) Counsel should carefully review the settlement documents to ensure that they comport with all terms of the settlement. If any changes to the documents are necessary, whether in form or substance, the incorporation of those changes should be coordinated with defense counsel.

(2) Counsel should carefully review the final settlement documents with the plaintiff so that the plaintiff has a complete understanding of them.

(3) Counsel should have the plaintiff endorse the settlement check,[174] which must then be deposited in counsel's trust account maintained for the safekeeping of client funds.

(4) Once the check "clears" the trust account, and before any funds are paid out of that account, counsel should prepare a Settlement Statement that provides to the plaintiff an accounting for the disbursement of all settlement funds to be paid from the account. This statement will usually set forth (a) the gross settlement amount, (b) the amount disbursed as attorney's fees, (c) the amounts disbursed for costs and other litigation expenses, (d) the amounts paid to lienholders or other third parties, and (e) the net settlement proceeds disbursed to the plaintiff. For example, if there is a Contingent Fee Contract like that shown in § 9.05, the foregoing maters might be set forth as follows:

[174] *See* In re Deragon, 495 N.E.2d 831 (Mass. 1986) (lawyer publicly censured for endorsing check made out to his client).

Settlement Statement

Client:_____

File No.:_____

(a) Gross settlement amount	$90,000
(b) Less Attorneys' fee (33 1/3% of gross recovery)	($30,000)
(c) Less costs and litigation expenses advanced by Attorneys (see attached itemization)	($1,000)
(d) Less payments to lienholders or other third parties (see attached itemization)	($2,000)
(e) Net recovery & balance paid to client	$57,000

Approved and signed, this the _____ day of _____.

Client: _____.

Attorney: _____.

(5) Counsel should review the Settlement Statement and all other settlement documents with the plaintiff. If the plaintiff approves them, the plaintiff should then sign the Settlement Statement, the Separation Agreement and Release (or other settlement papers), and any dismissal of the lawsuit if the plaintiff's signature on the dismissal is necessary.

(6) Counsel must then write and deliver the appropriate checks out of the trust account in accordance with the disbursements set out in the Settlement Statement. In the Settlement Statement example above, this would mean paying the $57,000 to the plaintiff, the $2,000 to the various lienholders, and the attorney's fees and reimbursement for costs and litigation expenses advanced totaling $31,000 to counsel's separate, attorney account.

(7) Counsel must send an original of all executed settlement documents (except the plaintiff's Settlement Statement and the checks) to defense counsel. As a matter of common practice, defense counsel will usually arrange for the actual filing of any dismissal of the action.

Of course, defense counsel should also review all pertinent settlement documents with the defendant. In addition, depending upon the terms of the settlement, defense counsel may have to prepare a Settlement Statement for the defendant and follow the foregoing trust-account procedures for safeguarding and disbursing the defendant's funds.

The proper safekeeping and disbursement of settlement funds is ethically mandated. For example, under the ABA Model Rules of Professional Conduct, Rule 1.15, entitled "Safekeeping of Property," provides:

> (a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of [five years] after termination of the representation.
>
> (b) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.
>
> (c) When in the course of representation a lawyer is in possession of property in which both the lawyer and another person claim interests, the property shall be kept separate by the lawyer until there is an accounting and severance of their interests. If a dispute arises concerning their respective interests, the portion in dispute shall be kept separate by the lawyer until the dispute is resolved.

The official Comment to that Rule provides, in pertinent part:

> [2] Lawyers often receive funds from third parties from which the lawyer's fee will be paid. If there is a risk that the client may divert the funds without paying the fee, the lawyer is not required to remit the portion from which the fee is to be paid. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds should be kept in trust and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds shall be promptly distributed.
>
> [3] Third parties, such as client's creditors, may have just claims against funds or other property in a lawyer's custody. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client, and accordingly may refuse to surrender the property to the client. However, a lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party.

In sum, the foregoing prescribes that when you receive settlement funds that belong to your client or with respect to which a third party such as a health-care provider has a lien, you essentially have six fiduciary duties regarding the funds: (1) segregation, (2) safeguarding, (3) notification, (4) record-keeping, (5) delivery to your client or a third person when he is entitled to delivery, and (6) rendering an accounting when asked to by the client or third person. A violation of any one of these duties may result in malpractice or disciplinary action by the bar.[175]

[175] *See, e.g.*, In re James, 452 A.2d 163 (D.C. Ct. App. 1982) (lawyer's failure to pay funds on behalf of client in settlement of litigation); In re Feder, 442 N.E.2d 912 (Ill. 1982) (lawyer's failure to pay medical expenses as agreed from funds received on client's behalf); In re Hedrick, 725 P.2d 343 (Or. 1986) (lawyer disciplined for keeping money when client disputed that lawyer was

Rule 1.15 and its Comment are somewhat ambiguous about your duties when you are in possession of settlement funds owed to your client and a dispute develops between your client and a third person (*e.g.*, a lienholder or creditor) as to who is entitled to those funds. Subparagraph (b) of the Rule provides that you must deliver to your client the funds which belong to him, but that you must also deliver to a third person those funds that the third person "is entitled to receive." Paragraph [3] of the Comment notes that third persons may have "just claims" against client funds, in which event you may have a duty "under applicable law" (*e.g.* a statute providing for a health-care provider lien or some other subrogation right) to protect those claims against wrongful interference" by your client by refusing to surrender the funds to your client.

Assuming there is a dispute between your client and a third party as to who is entitled to particular funds, the question is under what circumstances you should deliver the funds to one or the other. Many courts and state ethics opinions hold that if you have actual knowledge that a third party has a properly perfected statutory lien or has some other clearly valid legal interest in a portion of the settlement funds (*e.g.*, by virtue of a court order or a valid contract), you must deliver that portion to the third party even if your client objects,[176] and the failure to do so may constitute fraudulent conduct.[177] Similarly, if you have properly entered into an express agreement with a third party about the disposition of funds in which the third party has an interest, you must honor that agreement.[178] If you ignore your duty to the third party in either of these circumstances, you may be liable to the third party for the funds owed to it.[179]

On the other hand, if the third-party's interest was not properly perfected pursuant to statute[180] or some other legal requirement,[181] or constitutes the

entitled to that money as a fee); In re Strnad, 505 N.W.2d 134 (Wis. 1993) (lawyer may not withdraw funds from trust account as partial payment of disputed fee); In re Waldron, 790 S.W.2d 456 (Mo. 1990) (lawyer disciplined for collecting medical payment and holding it "hostage" for alleged fee); State ex rel. Oklahoma Bar Assoc. v. Watson, 897 P.2d 246 (Okla. 1994) (lawyer failed to provide proper accounting to clients in connection with distribution of settlement funds); In re Arrieh, 496 N.W.2d 601 (Wis. 1993) (failure of lawyer to deposit client funds in trust account and maintain adequate records).

[176] *See, e.g.*, Aetna Casualty & Surety Co. v. Gilreath, 625 S.W.2d 269 (Tenn. 1981) (lawyer has duty to honor statutory workers' compensation lien); California Formal Ethics Opinion 1988-101 (where client agreed to pay recovery proceeds to health-care provider, attorney may not disburse all monies to client); Ohio Ethics Opinion 95-12 (1995) (similar); Maryland Ethics Opinion 94-19 (1994) (similar); South Carolina Ethics Opinion 94-20 (1994) (lawyer must deliver funds owed to third party who has valid doctor's lien); Rhode Island Ethics Opinion 95-29 (1995) (lawyer must honor valid Medicare lien).

[177] *See, e.g.*, Cleveland Ethics Opinion 87-3 (1988); Rhode Island Ethics Opinion 90-31 (1990); South Carolina Ethics Opinion 81-14 (1981).

[178] *See, e.g.*, Florida Bar v. Neely, 587 So.2d 465 (Fla. 1991); In re Edwards, 448 S.E.2d 547 S.C. 1994) (lawyer disciplined for failing to deliver funds to medical providers as agreed); South Carolina Ethics Opinion 93-14 (1993); Iowa Ethics Opinion 89-32 (1989); Washington Ethics Opinion 185.

[179] *See, e.g.*, Kaiser Foundation Health Plan Inc. v. Aguiluz, 54 Cal. Rptr. 2d 665 (Cal. App. 1996); Herzog v. Irace, 594 A.2d 1106 (Me. 1991); Berkowitz v. Haigood, 606 A.2d 1157 (N.J. 1992); Leon v. Martinez, 638 N.E.2d 511 (N.Y. 1994). *But see* American State Bank v. Enabit, 471 N.W.2d 329 (Iowa 1991); Twin Valley Motors Inc. v. Morale, 385 A.2d 678 (Vt. 1978).

[180] *See, e.g.*, Arizona Ethics Opinion 88-6 (1988) (unperfected third-party lien or assignment);

mere assertion of a claim in the absence of clear evidence as to its validity,[182] you generally have no duty to investigate that interest and should deliver the funds to your client.[183] In this situation, however, you should always advise your client about the liability he may face in the event that the third-party's claim turns out to be legally enforceable.[184]

However, if there is a non-frivolous dispute between your client and a third person regarding entitlement to the funds, and particularly if your client makes a non-frivolous objection to any payment of the funds to a third party,[185] you "should not unilaterally assume to arbitrate [the] dispute between [your] client and [the] third party"[186] but should advise your client (preferably in writing) that you will keep the disputed funds in your trust account until the dispute is resolved by agreement or by the court.[187] The essential practical point is that, if you have any doubt about who is entitled to the disputed funds, the safest practice is to retain them in trust. Furthermore, in uncertain situations, you may be best able to protect yourself and your client from liability by conferring with ethics counsel for the State Bar in your jurisdiction before making a decision about whether to disburse the funds to your client or the third party or retain the funds in your trust account.

§ 17.13 Enforcing Settlements and Drafting Settlement Agreements

A settlement agreement is a contract that is (1) entered into between parties with the requisite authority and capacity, (2) neither illegal nor entered into by fraud, duress, or undue influence, (3) a product of a "meeting of the minds" through a definitive offer and acceptance, and (4) supported by adequate consideration—*i.e.*, the compromise of a bona fide dispute, whether or not in

Colorado Ethics Opinion 94 (1993) (lawyer should distribute funds to client in absence of statutory lien, contract, or court order); Maryland Ethics Opinion 97-20 (1997) (lawyer may deliver funds to client where medical lien not properly perfected).

[181] *See, e.g.*, South Carolina Ethics Opinion 89-13 (1989) (lawyer not required to deliver funds to client's ex-wife under divorce decree where lawyer not served with process as required by decree); Janson v. Cozen & O'Connor, 676 A.2d 242 (Pa. Super. Ct. 1996) (lawyer owes no fiduciary duty to third person who has no agreement with client).

[182] *See, e.g.*, Connecticut Informal Ethics Opinion 95-20 (1995) (lawyer has no duty to act on mere assertions of third-party interests); Maryland Ethics Opinion 97-9 (1997) (lawyer may deliver funds to client even though two other lawyers asserted claims to proceeds for services in unrelated matter).

[183] *See, e.g.*, South Carolina Ethics Opinion 93-31 (1993).

[184] *See, e.g.*, Cleveland Ethics Opinion 87-3 (1988); South Carolina Ethics Opinion 93-31 (1993).

[185] *See* Connecticut Informal Ethics Opinion 95-20 (1995) (lawyer cannot pay money to third person over client's objection); Pennsylvania Ethics Opinion 92-89 (1992) (lawyer whose client was ordered to pay arrearage in child support cannot release escrow proceeds without client's consent).

[186] Comment to ABA Model Rule 1.15 at paragraph [3].

[187] *See, e.g.*, Alaska Ethics Opinion 92-3 (1992); Arizona Ethics Opinion 88-6 (1988); California Formal Ethics Opinion 1988-101; Maryland Ethics Opinion 96-16 (1996); Michigan Informal Ethics Opinion 61 (1990); Ohio Ethics Opinion 95-12 (1995); Oregon Ethics Opinion 1991-52 (1991); Philadelphia Ethics Opinion 90-16 (1990); Tennessee Formal Ethics Opinion 87-F-110 (1987).

litigation.[188] Thus, a settlement agreement may be rescinded or avoided in the same manner and on the same grounds as other contracts, and the construction and operation of the agreement will be governed by the legal principles applicable to contracts generally.[189] As mentioned in § 17.12, although the vast majority of settlement agreements are memorialized through settlement documents, oral settlement agreements may be enforced unless they are subject to the statute of frauds, the parties contemplated a writing, or there is a court rule requiring documentation.[190]

Generally, when a settlement agreement is breached under circumstances where no lawsuit was filed on the underlying dispute, the agreement may be enforced through an action for breach of contract, usually by specific performance. If a party breaches a settlement agreement that terminates pending litigation, generally the agreement may be enforced not only through a separate breach of contract action but also through a motion in the original lawsuit to have the court enter a judgment in accordance with the terms of the settlement.[191] The appropriate enforcement procedure will be dictated by the law in the applicable jurisdiction and will depend upon precisely when and how the settlement agreement was reached and breached.

The hallmarks of an enforceable settlement agreement are that it (1) be comprehensive in the sense of covering all pertinent aspects of the parties' obligations under it, and (2) be unambiguous in setting forth those obligations. These basic elements of completeness and clarity should be your primary goals when drafting an agreement. Of course, the agreement must otherwise contain all pertinent technical provisions to effectuate its particular purposes under applicable law, such as to effectuate certain tax consequences or to preserve certain other rights of the parties. Thus, there is no boilerplate "form" that may be used in all circumstances, and each agreement must be carefully tailored to the particular facts and law governing the situation at hand.

With this caveat in mind, when drafting a settlement agreement, it is nevertheless useful to consider the following matters that are frequently contained in many settlement agreements:[192]

(1) The date of the agreement and the identity of the parties. Along with the date of the agreement and names of the parties, a signatory who is acting in a representative or fiduciary capacity should be designated as such.

(2) The identity of counsel. If counsel represents the parties, the names of counsel should be included.

[188] *See* Marks-Foreman v. Reporter Pub. Co, 12 F. Supp. 2d 1089 (S.D. Cal. 1998); Harding v. Will, 500 P.2d 91 (Wash. 1972); Walker-Neer Machine Co v. Acmeline Mfg. Co., 279 S.W.2d 156 (Tex. Civ. App. 1955); Berger v. Lane, 213 P. 45 (Cal. 1923).

[189] *See* Penn Dixie Lines, Inc. v. Grannick, 78 S.E.2d 410 (N.C. 1953); Smith, Hinchman & Grylls Associates, Inc. v. Board of County Road Comrs., 229 N.W.2d 338 (Mich. App. 1975).

[190] *See* B-Mall Co. v. Williamson, 977 S.W.2d 74 (Mo. App. 1998); Sims v. Purcell, 257 P.2d 242 (Idaho 1953); Kreling v. Walsh, 176 P.2d 965 (Cal. App. 1947); Moore v. Gunning, 328 So.2d 462 (Fla. App. 1976).

[191] *See, e.g.*, TNT Marketing Inc. v. Agresti, 796 F.2d 276 (9th Cir. 1986); Harrop v. Western Airlines, Inc., 550 F.2d 1143 (9th Cir. 1997); Ozyagcilar v. Davis, 701 F.2d 306 (4th Cir. 1983).

[192] *See* E.F. Lynch, et. al., *Negotiation and Settlement* § 11:28 (1992).

(3) A description of the nature of the dispute. If a lawsuit has been filed, specific reference should be made to the case caption and court file number, along with a brief description of the nature of the case. If no lawsuit has been filed, there should be a brief description of the events of the dispute sufficient to identify the matters that are being settled.

(4) Definitions of technical words or phrases. If the agreement uses terms of art or other words or phrases that are intended to have a special or broader meaning, it is useful to define them at the outset in a single section.

(5) Language reciting consideration for the agreement. Because the consideration for the agreement is usually nothing more than the mutual agreement of the parties to compromise and settle a bona fide dispute, "The obligations of each party" in (6) below are often prefaced by a comprehensive phrase such as: "In consideration of the mutual promises and undertakings of the parties and other consideration made by each party to the other, the receipt and sufficiency of which is acknowledged, the parties agree as follows:. . ." However, if the applicable law requires some special or additional consideration, it should be specifically stated.

(6) The obligations of each party. The time, manner, and place of payment or other performance of each party should be explicit. If the payment under the agreement is made in part for a claim for "personal injury or sickness" (which is not taxable to the recipient) and in part for a non-personal injury claim (which is taxable to the recipient), the agreement should specifically designate the amount being allocated for each claim (*see* § 17.08). If the agreement is subject to the terms of another document (*e.g.*, an annuity contract or qualified assignment where a structured-settlement agreement is involved), the agreement should specifically incorporate that document by reference. This also should be done if the agreement utilizes exhibits defining the obligations of the parties.

(7) How the litigation will be concluded. If a lawsuit has been filed, the agreement typically will prescribe that the plaintiff (and the defendant, if he interposed a counterclaim) will file a dismissal of all claims. Sometimes the parties might prescribe that only certain causes of action will be dismissed, or that a partial judgment will be entered against one party. In addition, because a statutory right to recover costs and attorney's fees in an action may be waived by a settlement agreement,[193] the parties will often include in their agreement a provision that each party will bear its own costs, expenses, and attorney's fees, or that one party will be responsible for certain costs, expenses, or fees of the other.

(8) A confidentiality provision. The parties might include a provision that the agreement and its terms will remain confidential except to the extent disclosure is required by law or limited disclosure is necessary for conducting the personal or business affairs of the parties such as filing tax returns. (*See also* § 17.11).

(9) The identification and extent of claims being released. The claims being released under the agreement and any claims being reserved under it should

[193] *See, e.g.*, Wray v. Clarke, 151 F.3d 807 (8th Cir. 1998) (waiver of attorney's fees under 42 U.S.C. § 1988 in civil rights action).

be clearly specified. (*See, e.g.*, the "Settlement Agreement and Release [With Reservation of Rights]" in § 17.05).

(10) Remedies for breach of the agreement. The parties will often specify that in the event of a breach of the agreement, the non-breaching party will be entitled to certain remedies or to reactivate the lawsuit settled by the agreement. Such a provision typically provides that the prevailing party in an enforcement action will be entitled to recover reasonable costs, expenses, and attorney's fees from the non-prevailing party.

(11) A disclaimer of liability. A clause disclaiming any liability of one party to the other is typical because a settlement agreement is usually a resolution of a doubtful or disputed claim, and non-admission of liability is sometimes important to defendants to avoid potential *res judicata* issues or adverse decisions by insurance carriers regarding renewal of insurance for defendant-insureds.

(12) An integration clause. An integration clause makes it clear that the parties intend that the written agreement constitutes their entire agreement, thus precluding a party from later contending that the written agreement was modified or supplemented by some oral agreement.

(13) A choice-of-law provision. Such a provision specifies the jurisdiction whose laws will govern in the event of a breach of the agreement or if a court is called upon to interpret the agreement.

(14) A severability clause. A severability clause provides that, in the event a particular provision of the agreement is found to be invalid, all other valid provisions will remain enforceable.

(15) An anti-waiver clause. When the agreement calls for multiple or periodic performance, as where one party is obligated to make payments over time, a party may sometimes waive strict compliance by, for example, accepting a late payment from the payor. An anti-waiver clause makes clear that a party's decision to waive strict compliance on one or more occasions in lieu of declaring a breach of the agreement does not constitute a waiver of any subsequent breach of the agreement.

(16) A stipulation that the agreement was entered into freely and voluntarily. Such a stipulation is designed to preclude a party from later claiming that the agreement was procured by fraud, duress, or undue influence.

(17) A recital of joint preparation. A recital that the agreement was jointly drafted by the parties is designed to prevent a court from applying the rule of construction that an ambiguity in the agreement should be construed against the party who drafted it.

(18) A stipulation about the facts on which the agreement is based. A stipulation that the parties accept the facts of the situation as they appeared at the time of the execution of the agreement is designed to foreclose a party from later contending that it entered into the agreement based on some mistake of fact or incomplete understanding of the facts.

(19) A warranty of legal capacity and non-assignment of claims. This provision warrants that each party has the legal capacity to execute the agreement and that neither party has assigned to any third party any claims or right surrendered under the agreement.

(20) A provision to cooperate in executing the terms of the agreement. Such a provision calls upon the parties to cooperate in executing all documents and taking other steps necessary to give effect to the agreement.

(21) The effective date of the agreement and a provision for counterpart execution. The agreement should always specify when it becomes effective, and it might provide that the agreement will be effective even if both parties do not sign the same copy of the agreement.

§ 17.14 Example of Common Settlement Agreement Provisions

The types of provisions enumerated in paragraphs (1) through (21) in §17.13 above are illustrated in paragraphs (1) through (21) of the following Settlement Agreement:

Settlement Agreement

(1) This Settlement Agreement ("Agreement") is entered into as of _____ [date], between John J. Jones of Raleigh, North Carolina and Sandra S. Smith of Roanoke, Virginia.

(2) In connection with this Agreement, Jones is represented by Don D. Doe, Esq. of Raleigh, North Carolina, and Smith is represented by Rhonda R. Rowe, Esq. of Roanoke, Virginia.

(3) There is pending in the Civil Superior Court division in Wake County, North Carolina an action entitled "John J. Jones v. Sandra S. Smith," Court File No: 2000 CVS 1210 ("Action"). In this Action, Jones alleged a First Claim for Relief against Smith for breach of contract, praying for compensatory damages for lost profits, and a Second Claim for Relief against Smith for personal physical injury. Smith timely filed an Answer to Jones' Complaint, denying all of its material allegations.

(4) As used in this Agreement:

(a) "Jones" means John J. Jones, and his employees, representatives, and agents of any kind, and his heirs, assigns, and successors in interest of any kind.

(b) "Smith" means Sandra S. Smith, and her employees, representatives, and agents of any kind, and her heirs, assigns, and successors in interest of any kind.

(c) "Claim(s)" mean all claims, demands, obligations, damages, actions, and causes of action of any kind, for any relief, on any basis, whether known or not, asserted or not, fixed or contingent.

(d) "Party(ies)" means Jones and Smith.

(5) In consideration of the mutual promises and undertaking of the parties to this Agreement and other consideration made by each party to the other, the sufficiency of which is acknowledged, the parties agree as follows:

(6) Within ten business days of the execution of this Agreement, Smith shall (1) pay to Jones $45,000 by delivering a cashier's check in that amount made payable to "John J. Jones and Don D. Doe, attorney" to the office of Don D.

Doe at 6256 Springfield Ave., Raleigh, N.C. 27602; and (2) transfer title to the RX-Z Sailboat owned by Smith and having a fair market value of $55,000 by executing the title documents attached as Exhibit A to this Agreement in favor of "John J. Jones" and delivering the executed title documents to the office of Don D. Doe. The parties agree that, of the total $100,000 in cash and property, the $45,000 in cash is allocated as a settlement of the lost profits alleged in the First Claim for Relief in the Action (45% of total), and the $55,000 representing the fair market value of the Sailboat is allocated as a settlement of the personal physical injuries alleged in the Second Claim for Relief in the Action (55% of total).

(7) Within 20 days of the execution of this Agreement, and if Smith has fully performed her obligations under Paragraph 6, Jones shall file with the Wake County Civil Superior Court a Voluntary Dismissal With Prejudice of all claims in *John J. Jones v. Sandra S. Smith, 2000 CVS 1210*. Each party shall bear its own costs, expenses, and attorney's fees in the Action.

(8) The parties agree that all provisions of this Agreement shall remain confidential between the parties, and its provisions shall not be disclosed to anyone except to the extent that either party is legally obligated to disclose them, disclosure is reasonably necessary for the conduct of the personal or business affairs of the parties (such as disclosure to attorneys, accountants, or tax authorities), or disclosure is necessary in any proceeding to enforce this Agreement.

(9) In consideration of the obligations and undertakings of the parties in paragraphs (6) through (8), each party releases the other from all Claims arising from or connected in any way with the events alleged in the Action and all claims that could have been raised by either party in the Action.

(10) Any breach of this Agreement will entitle the non-breaching party to all legal and equitable remedies for the breach; and if either party brings an action on account of an alleged breach of this Agreement, the prevailing party shall be entitled to recover all of its reasonable costs and expenses of any kind, and reasonable attorney's fees.

(11) This Agreement is the result of a good-faith compromise of disputed claims and shall never or for any purpose be considered an admission of the correctness of the allegations or claims asserted in the Action by either party, each of whom denies all allegations and claims made by the other party.

(12) This Agreement supersedes all previous agreements between the parties, contains the entire Agreement between the parties, and may not be modified except in writing.

(13) This Agreement was negotiated in Raleigh, North Carolina, is to be performed in North Carolina, and the laws of North Carolina shall govern its interpretation and enforcement.

(14) If any part of this Agreement is held to be invalid, unenforceable, or nonbinding, all remaining portions shall remain in effect.

(15) The waiver by any party of a breach of a particular provision in this Agreement shall not constitute a waiver of any subsequent breach of the same provision or any other provision.

(16) Both parties stipulate that they have had the advice of counsel throughout the proceedings and negotiations leading to the preparation and execution of this Agreement, that they have read this Agreement and understand its terms, and that they enter into this Agreement freely and voluntarily without any fraud, duress, or undue influence.

(17) The text of this Agreement is the product of negotiations between the parties and their counsel and is not to be construed as having been prepared by one party or the other.

(18) Both parties stipulate that if the facts with respect to which this Agreement is executed should be later found to be different than now believed, this Agreement will nevertheless remain effective; and it is stipulated that neither party has relied on any representations not explicitly set forth in this Agreement.

(19) Each party warrants that as of the date of execution of this Agreement, each has the legal capacity and sole right and authority to execute it, and has not sold, assigned, or otherwise transferred any Claim relating to any right surrendered by this Agreement.

(20) The parties agree to execute all documents and take any further actions reasonably necessary to accomplish the provisions of this Agreement.

(21) This Agreement becomes effective when executed by both parties, and the Agreement may be executed in counterparts and be as valid and binding as if both parties signed the same copy.

_____

[Signatures and dates]

[Witness or notary, if required]

Chapter 18

Cross-Cultural Negotiations and Negotiating Between Genders

SYNOPSIS

§ 18.01 Introduction

A natural byproduct of our global economy has been the growth of multinational business enterprises and a dramatic increase in cross-cultural business negotiations. This increase in transnational bargaining has required American business executives to learn how to recognize and accommodate wide-ranging cultural differences when negotiating with their counterparts in other countries.

The subject of how cultural differences affect bargaining interactions is complex.[1] Much of the difficulty is that an instructive treatment of the subject depends upon the particular culture or society one is talking about, whether in a country from Eastern or Western Europe, Asia, Latin America, or Africa. In the first part of this chapter, rather than trying to summarize the specific negotiating styles endemic to particular countries or cultures,[2] provided below is an overall analytical framework for considering how differences in cultures

[1] *See generally*, G. Faure & J. Rubin, *Culture and Negotiation* (1993); R. Cohen, *Negotiating Across Cultures* (1991); J. Salacuse, *Making Global Deals* (1991); I.W. Zartman, *International Multilateral Negotiation* (1994).

[2] For summaries of such styles, *see, e.g.*, H. Binnendijk, *National Negotiating Styles* (Foreign Service Institute, U.S. Dept. of State 1987); V. Kremenyuk, (Ed.), *International Negotiation* (1991).

may affect cross-cultural negotiations. The factors set out in this framework are useful to consider before undertaking negotiations in any international setting.

The second part of this Chapter discusses considerations about negotiations between men and women. This too is a complex subject that is fraught with difficulties of over-generalization and potential misunderstanding. Nevertheless, a discussion of some of the more important factors that affect negotiations between genders may be useful in guarding against erroneous stereotyping that sometimes impedes negotiations between persons of the opposite sex.

§ 18.02 Cross-Cultural Negotiations

It is axiomatic that meaningful negotiations require communication and understanding. For negotiators to truly "understand" one another, however, they must be able to recognize critical differences in the cultural norms, customs, rules, and verbal and nonverbal behavior that underlie each other's ways of communicating. In the absence of appreciating these differences, communication is impaired, and misunderstandings may make negotiations extremely difficult if not impossible.

This problem can be particularly acute in cross-cultural negotiations. As a simple example, consider the situation where a person raised in white Anglo-Saxon American culture is negotiating with a person brought up in the Native American culture. The Anglo-Saxon American may have learned as a child, "Never trust someone who can't look you in the eye and give you a firm handshake," whereas the Native American may have been taught that direct eye contact was rude and insulting. Here, in the absence of understanding each other's cultural differences, the two negotiators are likely to mistrust one another before the first offer is even made.

Writing about cross-cultural differences is difficult because of the dangers of stereotyping and oversimplification. However, persons who engage in cross-cultural negotiations need an analytical framework to identify potential barriers or impediments to negotiating in the international setting. Professor David A. Victor, a noted scholar on the subject of cross-cultural communications, has developed one such framework. He uses the acronym, "LESCANT," to describe the most common factors that account for cultural differences in communicating and negotiating. The acronym stands for differences in "Language," "Environment and Technology," "Social Organization," "Contexting," "Authority Conception," "Nonverbal Behavior," and "Temporal Conception."[3] These factors are summarized below.

[1] Language Barriers

Most United States citizens speak only one language, while citizens of other countries are often versed in several languages. Because language creates an "in group" of those who understand and an "outcast group" of those who do not, language barriers often create an "us" versus "them" division. When a

[3] David A. Victor, "Cross-Cultural Awareness," *The ABA Guide to International Business Negotiations: A Comparison of Cross-Cultural Issues and Successful Approaches*, 15 (1994).

U.S. negotiator speaks only English but his opponent is conversant in several languages, the U.S. negotiator may find himself isolated and dependent upon a translator, while his counterpart freely shares information and bonhomie. Anyone who has sat through the tedious translation of a joke in another language will readily understand this social ostracization.

Not being conversant in multiple languages may lead U.S. negotiators, however, to overestimate the importance of language as a cultural barrier.[4] Although the language barrier may be an obstacle, it usually may be overcome through the use of a translator. In addition, even when the negotiator from another culture is able to communicate in English, it may be helpful to the U.S negotiator to hire a translator to assist in negotiations.

Although U.S. negotiators may initially overcome the language barrier through the use of competent translators, even the best translators cannot translate the complete context and nuance of what is being said in the foreign language. For example, one scholar has described this problem by contrasting the different interpretations of the word "corruption" in English and Korean. Although the word has negative connotations in both languages, subtle variations in its meaning evoke different associations in the two countries. For those in the United States, corruption implies immoral and even criminal behavior. For Koreans, however, while corruption may have unfortunate social consequences, it is not considered morally wrong. The distinction turns on differing views about the duties of a civil servant. In the U.S., a civil servant is expected to be impartial and loyal to the entire community and thus, for instance, is not permitted to take bribes. In Korea, on the other hand, it is an accepted practice to give gifts to officials because they have obligations to family and friends that take precedence over any abstract duty to society.[5] In this example, one can imagine the difficulties in translating the different meanings of the word "corruption" when it is being used in a negotiation between a U.S. and a Korean negotiator.

Any cross-cultural negotiation between people who do not speak the same language may also include inaccuracies and even unintended insults as the translator interprets one language into the other. The problem arises most often when the translator, though proficient with word-for-word translation, is unfamiliar with colloquial idioms in one of the languages.

For example, consider the story of a young man from a Kentucky farm who returned from a semester abroad in France to recount his cultural faux-paux at a formal French dinner in his host's home. After being offered a second helping of a roast lamb, he respectfully declined, announcing in his halting French that he could not eat another bite because, "Je suis plein"—a term which he had carefully translated from his phrase book as meaning, "I am full." At first the guests were dumbfounded and then began to titter. Finally, someone explained to him that the phrase he had used was an idiom meaning, "I am pregnant." Although the young man's self-effacing laughter eased the

[4] *Id.* at 15–16.

[5] *See* Lorand B. Szalay, "Intercultural Communication: A Process Model," 5 *International Journal of Intercultural Relations* 133–146 (1981); Raymond Cohen, *Negotiating Across Cultures: International Communication in an Interdependent World* 28 (1991).

situation, one can easily imagine how different the situation would have been had this student been an unmarried young woman traveling abroad.

An additional problem with translation arises when a phrase conveys a meaning in one language that has no comparable translation in another language. For instance, a U.S. negotiator might say to an opponent, "I think we just hit a home run when we raised that point." The baseball analogy is, of course, meaningless to someone from a country where baseball is not played. An even more difficult problem arises when the use of language results in an unintended but painful insult to one of the parties. For instance, the colloquial U.S. expression, "I think we just dropped a bomb when we gave them that fact" would have an insulting meaning to a Japanese negotiator who has sensitivities to the memories of Nagasaki and Hiroshima.

In addition to issues related to the particular meaning of a word or phrase being translated, cultural differences arise when language is used not just as a means to communicate but also as a social lubricant. For example, those who are accustomed to using language solely as a means of conveying information can be frustrated with lengthy exchanges of pleasantries, which, in some cultures, may be customarily appropriate or necessary before any concrete information can be discussed. Impatience with the time spent on "useless visiting" can prevent the listener from investing the time necessary to build trust with the speaker.

In a culture such as the U.S. that values directness, explicitness is sought and indirectness is avoided. However, in a culture in which language is a social lubricant, indirectness is valued, nonverbal messages are read and showcased, and language is used as a means to preserve and promote social interests. For example, a negotiator from the U.S. may totally misunderstand his Japanese counterpart's message if he does not know that a common characteristic of the negotiation process in Japan is an emphasis on consensus building and an avoidance of confrontation. A Japanese negotiator might never use the word "No" in his communication, but those experienced with the Japanese know that the presentation of a counterproposal or a failure to act or respond to a proposal may in fact be a polite, but definite "no" from a Japanese negotiator.[6]

[2] Environmental and Technological Differences

Negotiators must determine "where" true negotiation takes place in a culture. In some instances, negotiations are customarily conducted behind closed doors around a boardroom table. In other cases, negotiations may occur on the golf course or at meals. For example, U.S. State Department officials have described negotiations with Mexican officials as occurring over long lunches rather than at formal negotiating sessions.[7] Thus, when negotiating in cross-cultural settings one must be prepared for variations in the negotiation environment and be attuned to accepting the luncheon invitation as well as the request to play golf.

[6] Robert C. Circicillo, Adam Femantle, & Jeanne M. Hamburg, "International Negotiations: A Cultural Perspective", *ABA Guide to International Business Negotiations*, 10 (1994).

[7] Raymond Cohen, *Negotiating Across Cultures*, 140 (1997).

Similar sensitivities must be shown when negotiations occur in cultures where access to modern office equipment is unavailable. If fax machines and e-mail capabilities are not yet routinely used in a particular country, it is important that the more technologically sophisticated negotiator not impose such equipment on the negotiation process. In some cultures, even telephones may be expensive luxuries. Therefore, for example, a negotiator must not rush to assume that a deal has not been reached when a timely response has not been communicated. It may well be that all communication had been interrupted while a telephone wire was being repaired or electricity was being reestablished in a remote area of a third-world country. In these situations, negotiators must be alert to the impracticality of requiring "a faxed acceptance" to a contract proposal by a certain date, or automatically canceling an offer when a timely response is not made.

[3] Differences in Social Organization

"Social organization" refers to the common institutions and collective activities shared by members of a culture.[8] Before one can be an effective negotiator in a foreign culture, one must study the relevant social organization for that particular culture. Professor Victor has identified six organizational variables most likely to affect legal transactions and negotiations across cultures: (1) kinship and family ties; (2) friendship ties; (3) education; (4) class and social stratification; (5) perception of work and the law; and (6) gender differences.[9]

In some societies, kinship and family ties determine who may be trusted. In such societies, the negotiator may be at a disadvantage unless she can find kinship relationships to utilize in the negotiating process. In other societies, friendship determines who may be trusted. Although negotiators obviously cannot make themselves into "kin" or "longstanding friends," they may be able to find appropriate persons who have the requisite kinship or friendship that can act as intermediaries in such situations.

In other societies, educational or class ties may determine potential business connections. For instance, in Great Britain, attendance at the same "public" school (which would be called a private university in the United States) will often serve as a resource for networking. Similarly, those of the same social class who attend the same social functions frequently form business relationships based on those contacts.

Perceptions about work and work settings also vary among cultures. For instance, in the United States, most people identify themselves by their profession, not the particular organization in which they practice their profession. When a person in the U.S. is asked about her employment, the response is more likely to be, "I'm a lawyer," or "I'm a teacher," but not, "I work for the attorney general's office" or "I work at Smithwick elementary school." In the U.S., members of a profession often feel their closest ties to others who are practicing in the same profession as opposed to a special

[8] David A. Victor, "Cross-Cultural Awareness," *The ABA Guide to International Business Negotiations: A Comparison of Cross-Cultural Issues and Successful Approaches*, 17 (1994).

[9] Id.

closeness to other employees within the same organization. This type of identification contrasts sharply with the Japanese who are more likely to identify themselves by the company they work for, or Mexicans who are more likely to identify themselves primarily by the family to whom they belong.[10]

Gender issues also may affect negotiations (*see also* § 18.03). Each society has developed its own views of the proper roles for each gender, and there is no society in which women and men are acculturated to behave identically.[11] Although various cultures make distinctions between gender roles, there is considerable similarity among the stereotypes ascribed to men and women regardless of the particular culture. In a study of twenty-nine different countries, for example, it was found that people in each country attached the same sex stereotypes to the same gender. Men were seen to be adventurous, dominant, forceful, independent, and strong-willed. On the other hand, women were classified as emotional, sentimental, submissive, and superstitious.[12] Although these stereotypes may have no connection with the attitudes or temperament of an individual negotiator, those who are planning negotiations should be aware of the particular culture's view of gender differences and the consequent conclusions that might be drawn regarding the importance of the negotiation depending on the gender of the person who has been assigned to conduct it.

[4] Differences in Contexting and Face-Saving

"Contexting" is a term coined by Edward T. Hall to describe the extent to which people look beyond what is being literally said and consider what is being said in the context of surrounding circumstances.[13] Put more plainly, it refers to "reading between the lines" of what someone is saying. In some cultures, such as in the United States, negotiators are more likely to focus on the actual words communicated rather than on the context in which the words are spoken. Accordingly, the U.S. has been referred to as a "low-context" society.

On the other hand, other cultures rely heavily on *how* something is said or written and the circumstances surrounding the communication in order to derive the meaning of the exchange. These cultures are referred to as "high-context" societies. In a high-context culture, negotiations may be based more on what is tacitly understood than what is expressly said. The Chinese, Japanese, and Egyptians are typical examples of high-context cultures.

In contrast, a low-context culture, like the United States or France, negotiators, regardless of legal training, view themselves as conscientiously and objectively representing the interests of their clients. They aspire to make logical arguments that they hope will persuade their counterparts to accept a particular position. The model that many U.S. negotiators emulate is that of a courtroom in which an unbiased jury will ultimately make a reasoned decision based on the evidence and persuasive arguments of counsel. Although

[10] Id. at 18.

[11] Id.

[12] J.E. Williams and D. Best, *Measuring Sex Stereotypes: A Thirty Nation Study* (1982).

[13] Edward T. Hall, *The Silent Language*, (1959).

impassioned arguments may be made, it is assumed that most of the emotion expressed is done for histrionic purposes to enhance the logical presentation.[14] The entire focus of this type of negotiation may be the drawing up of a detailed contract that sets out the precise terms that the negotiators have hammered out in a methodical manner. The exact wording of the contract is of the utmost importance.

On the other hand, those from a high-context culture are generally not focused on details such as the drafting of a precisely worded contract, but are more concerned with the relationship between the negotiators. In other words, they are concerned with communal harmony. For instance, the Japanese view debate as an unwelcome threat to communal harmony[15] and are not comfortable with the adversarial, auction-like approach to bargaining used by many Americans. Instead, the Japanese often expect the parties to a dispute to "do the right thing" as defined by obligations implicit in the parties' relationship.[16]

Integral to many high-context societies is the concept of "saving face." When one is negotiating against an opponent in a "high-context face-saving" culture, one must be alert to the appearance as well as the actual result of any deal. In other words, in a face-saving culture, the outcome must often appear favorable to those not directly involved in the negotiation, and the high-context negotiator must be able to leave the table with dignity and respect even though the actual result of the negotiation may not be totally favorable for him. For the high-context negotiator, this may require that changes in position be skillfully explained away or ignored so that there is no appearance of a concession. It may also require that the high-context negotiator be given permission to leave the table before the details of an agreement are decided in order to have the opportunity to consult with those of more senior status.

[5] Differences in Authority Conception

The management style of an organization varies from culture to culture and sometimes from organization to organization within a given culture. For instance, in the United States, the management style of law firms varies immensely. In some firms an authoritarian managing partner makes all promotion and salary decisions, while other firms favor a more participatory management committee or even the inclusion of all personnel in management decisions. The same can be said of corporations. In short, different organizations in different cultures employ varying styles of authority.

Negotiators, therefore, need to be particularly aware of the status of the person with whom they are negotiating. In strictly hierarchical societies, the negotiation should usually occur between those of similar rank. In authoritarian societies, the person who is negotiating may have little, if any, power and must cloak any particular agreement with the understanding that someone of a higher rank must approve every position. The constant need to stop the

[14] Raymond Cohen, *Negotiating Across Cultures*, 135–136 (1991).

[15] Id. at 137.

[16] Roger W. Benjamin, "Images of Conflict Resolution and Social Congrol: American and Japanese Attitudes toward the Adversary System," Journal of Conflict Resolution 19 (1975).

negotiation for approval from those having more senior status can grow tedious, but it may be a necessary part of the process to reach an agreement.

[6] Nonverbal Behavior

Each society also has its own way of communicating in a nonverbal manner.[17] All of us are familiar with the stereotypes of the "expansive gestures" of the Italians, the "stoic calm" of the Japanese, and the "stiff upper lip" of the British. Yet, despite these stereotypical descriptions, most of us are unaccustomed to observing, understanding, and explaining the nonverbal behavior of another culture. Professor Victor has classified cultural variations in nonverbal communication in six distinct areas: kinesics (body movement and facial gestures); proxemics (distance); oculesics (eye movements and eye contact); haptics (touching behavior); paralanguage (tone of voice and non-language sounds); and appearance (dressing and grooming).[18]

The negotiator who wishes to be effective in international negotiations must observe how the target culture varies from his or her particular culture in these six areas. For instance, most Americans who have grown up in an individualistic society, where personal space is valued and direct speech is encouraged, will have a difficult time negotiating with someone from a culture where people routinely stand near each other and speak in lowered voices. Those who have grown up in a society where people routinely touch each other during a conversation are in danger of offending someone from a culture where touching is avoided except in the most intimate relationships.

The difficulty in understanding the meaning of nonverbal behavior is further magnified by the reluctance of most people to ask for an explanation of the specific behavior. Perhaps because of the mistaken assumption that the meaning of nonverbal behavior is obvious and therefore an inquiry would be rude, or because nonverbal behavior by its very nature is rarely accompanied by a verbal explanation, nonverbal behavior is rarely explicated. The result for the cross-cultural negotiator is often mystification about another's actions. An effective cross-cultural negotiator must therefore strive to understand and be attuned to his counterpart's nonverbal behavior.

[7] Differences in Conception of Time

Of all the roadblocks that can occur in cross-cultural negotiations, time may be the least understood, but the most important in its ramifications for the participants. There are two major ways that cultures conceive of time.[19] "Monochronic" cultures view time as an inflexible period that can be subdivided into hours, minutes and seconds. Members of monochronic cultures typically carry calendars and live their lives according to appointments and schedules. "Polychronic" cultures, however, view time in the cycle of seasons and the patterns of rural life.[20] In a polychronic society, time is measured

[17] David A. Victor, "Cross-Cultural Awareness," *The ABA Guide to International Business Negotiations: A Comparison of Cross-Cultural Issues and Successful Approaches*, 21 (1994).

[18] Id.

[19] Id. at 22.

[20] Raymond Cohen, *Negotiating Across Cultures*, 34 (1991).

in days and months, not hours and minutes; and a dividing point in the past is not the number of a year, but whether the event was before or after a natural disaster.

In a monochronic culture like the United States, the focus is often on "getting things done" and life is a "treadmill of achievement."[21] Time is valued by what is accomplished during an hour or a day, not by relationships formed or history recounted. On the other hand, countries with a polychronic concept of time value history and a sense of the past. Members of these cultures are more often focused on the long-term relationship than on the immediate solution.[22]

It is easy to see how conflicts can arise when members of these two cultures attempt to negotiate. Those from a monochronic culture are constantly pressing for scheduled meetings and timely accomplishments aimed towards a final deadline. Those from a polychronic culture, on the other hand, come to the table with a sense of history and a focus on developing a long-lasting and fruitful relationship. Immediate deadlines are of no concern to those from a polychronic culture, whereas the immediate deadline is of all-consuming importance to the person from a monchronic culture.

[8] The Utility of the LESCANT Factors

The utility of the LESCANT factors is that they provide a comprehensive set of considerations to be considered and researched by any negotiator who intends to engage in a cross-cultural negotiation. The relative importance of any single factor or combination of factors will, of course, depend upon the particular country and culture where the opposing negotiator resides. As a practical matter, although much can be learned about the particular cultural background and practices of foreign negotiators through reading and study, any U.S. negotiator who is about to engage in a cross-cultural negotiation for the first time would be well advised to consult persons who have had prior personal experience negotiating with others in the particular culture involved.

§ 18.03 Negotiating Between Genders

Professor Charles Craver has said that some male law students in his Legal Negotiating classes have indicated "they are particularly uncomfortable when female opponents obtain extremely beneficial results from them" in a simulated negotiation. Some of these students have even said they would prefer the consequences associated with nonsettlements to the possible embarrassment of "losing" to female opponents.[23] A study of students participating in simulated negotiations in the Lawyering Program at New York University School of Law concluded that "[s]tudents more easily trusted someone of the same gender."[24] Discussions about gender-based comparisons or distinctions

[21] Id. at 34–35.

[22] Id. at 35.

[23] Charles B. Craver & David W. Barnes, Gender, Risk Taking, and Negotiation Performance, 5 Mich. J. Gender & L. 299, 315.

[24] Sandra R. Farber & Moica Rickenberg, Under-Confident Women and Over-Confident Men: Gender and Competence in a Simulated Negotiation, 11 Yale J. L. & Feminism 271, 303.

in negotiating effectiveness are delicate because they can unintentionally invite the often misleading stereotyping that such discussions are otherwise intended to disabuse. Nevertheless, some discussion of this subject may be useful because, as the foregoing observations indicate, a number of lawyers have great difficulty when interacting with attorneys of the opposite sex.

[1] Studies about Negotiating Between Genders

There have been a number of empirical studies about different behavioral characteristics between men and women that may be relevant to negotiating. Most of the existing empirical research indicates that men and women tend to demonstrate the following different characteristics:

Men	Women
• More competitive	• Less competitive[25]
• More dominant	• More passive and submissive[26]
• More rational, objective, & task oriented	• Less rational, objective, & task oriented[27]
• Less sensitive to nonverbal signals	• More sensitive to nonverbal signals[28]
• Less trusting and trustworthy	• More trusting and trustworthy[29]
• More willing to forgive violations of trust	• Less willing to forgive violations of trust[30]
• Less concerned with relationships	• More concerned with relationships[31]
• Viewed as more competent if physically attractive	• Viewed as more competent if less physically attractive[32]
• Employ more "highly intensive" language	• Employ less "intensive language"[33]
• Believe in "equitable" bargaining outcomes	• Believe in "equal" bargaining outcomes[34]

[25] *See* C. Gilligan, *In a Different Voice*, 14–15 (1982).

[26] *See* E. Maccoby & C. Jacklin, *The Psychology of Sex Differences*, 228, 234 (1974).

[27] *See* C. Gilligan, *In a Different Voice* (1982); R. Lewicki, et. al., *Negotiation*, 340–342 (1994).

[28] *See* J. Hall, *Nonverbal Sex Differences*, 15–17 (1984); N. Henley, *Body Politics: Power, Sex, and Nonverbal Communication*, 13–15 (1977).

[29] *See* J. Rubin & B. Brown, *The Social Psychology of Bargaining and Negotiation*, 171–173 (1975).

[30] *See* Id.

[31] *See* R. Lewicki, et. al., *Negotiation*, 340–342 (1994).

[32] *See* Cash & Janda, "The Eye of the Beholder," *Psychology Today* 46–52 (December 1984).

[33] *See* Burgoon, Dillard & Doran, "Friendly or Unfriendly Persuasion: The Effects of Violations of Expectations by Males and Females," 10 *Human Communication Research* 284, 292 (1983); Smeltzer & Watson, "Gender Differences in Verbal Communication During Negotiations," 3 *Communication Research Reports* 78 (1986).

[34] *See* R. Lewicki, et. al., *Negotiation* 330 (1994).

In connection with existing empirical research, one scholar has succinctly observed:

> [D]espite the persistence of stereotypes, the studies of social behavior suggest that there are relatively few characteristics in which men and women consistently differ. Men and women both seem to be capable of being aggressive, helpful, and alternatively cooperative and competitive. In other words, there is little evidence that the nature of women and men is so inherently different that we are justified in making stereotyped generalizations.[35]

This view is consistent with one study that specifically analyzed the impact of gender on clinical negotiating achievement.[36] The view is also consistent with the experiences of the authors of this book in teaching negotiation.

Regardless of the accuracy of different gender-based characteristics in a given situation, there is certainly a difference in the *perception* of abilities that men and women bring to the negotiating table. Carol Gilligan, a noted psychologist, posits a male model of reasoning that she describes as "the logic of the ladder" because of its vertical hierarchy of values. This male model of reasoning is based on abstract universal principles that, in application, create an "ethic of justice." She contrasts this "ethic of justice" with the female "ethic of care" which she describes as similar in structure to a "web." She uses the "web" as a symbol of the interconnected, relational, and contextual form of reasoning that focuses on people as well as the substance of a problem.[37]

Although some commentators have criticized Gilligan's models, in part because of a fear of emphasizing differences in gender to the detriment of women who are often portrayed as weaker,[38] Professor Carrie Menkel-Meadow suggests that women bring to the negotiating table dispositions that are more amenable to problem solving. For her, the problem-solving model of negotiation utilizes the perceived "feminine" attributes of being "less competitive" and more "concerned with relationships" to creatively resolve disputes between the parties as contrasted with the "zero-sum" or adversarial model which focuses on arriving at a solution beneficial to only one party. The adversarial or zero-sum approach is often viewed as more "masculine" because the negotiators are more "competitive" and "less concerned with relationships" than with a result that is beneficial to both parties and places a premium on preserving their future relationship.[39]

[35] K. Deaux, *The Behavior of Women and Men* 144 (1976).

[36] C. Craver, The Impact of Gender on Clinical Negotiating Achievement, 6 Ohio St. J. Disp. Res. 1, 12–16 (1990).

[37] Carol Gilligan, *In a Different Voice: Psychology Theory and Women's Development* 62–63 (1982). *See also* Carrie Menkel-Meadow, Portia Redux: Another Look at Gender, Feminism, and Legal Ethics, 2 Va. J.Soc. Pol'y & L. 75, 76.

[38] *See, e.g.*, Anne M. Coughlin, Excusing Women, 82 Ca. L. Rev. 1, 90–91 (1994); Joan Williams, Deconstructing Gender, 87 Mich. L. Rev. 797, 799–802 (1989).

[39] *See*, Carrie Menkel-Meadow, Toward Another View of Legal Negotiation, The Structure of Problem-Solving, 31 U.C.L.A. L. Rev. 754 (1984).

Despite the perceived differences based on gender that negotiators bring to the table, empirical studies involving negotiations do not consistently substantiate differences in negotiation outcomes.[40] Psychologists who have utilized the "Prisoner's Dilemma" game (*see* § 7.03) to analyze male-female differences in negotiation have discerned few or no gender differences in outcome.[41] Similarly, a study of male-female performances of students participating in simulated negotiations in the Lawyering Program at New York University School of Law concluded, "We have shown that women and men achieved comparable actual outcomes in this negotiation exercise, and that there were no gender differences in students' perceptions of their outcomes and of their overall performance. Results indicate that women performed as well as men in this exercise, and did not perceive themselves to be less successful in the negotiation than did men."[42]

Although the authors of the study at New York University School of Law concluded there was no difference in the outcomes of simulated negotiations based on gender, they did find that there was a difference in the participants' perceptions about *how* they had negotiated. "When we explored further, however, a more complex picture emerged. Women and men obtained equivalent results, but women left the exercise feeling less confident than did their male peers."[43] This conclusion also correlates with Charles Craver's observations about the performances of students in his Legal Negotiating course at George Washington University: "[w]hile male students almost never apologize for their successes, a number of female class members indicate discomfort with their achievements and apologize to opponents whom they have outperformed."[44]

[2] The Importance of Awareness about Perceived Gender Differences

When a woman approaches the bargaining table as a negotiator, she faces her own perceptions, the perceptions of her client, the perceptions of the opposing lawyer, and the perceptions of the opposing client. Because of societal stereotypes that women will be less comfortable and less effective in highly competitive circumstances, each of these individuals (including even the woman herself) may suspect that she will be a less successful negotiator. Each of these individuals may make faulty assumptions based on these outdated stereotypes.

For instance, a male attorney who is about to negotiate with a female attorney from a well-respected litigation firm, needs to be alert to a tendency

[40] Charles B. Craver and David W. Barnes, Gender, Risk Taking and Negotiation Performance, 5 Mich. J. Gender & L. 299, 317–318.

[41] Id. (citing Eleanor Emmons Maccoby & Carol Ngy Jacklin, *The Psychology of Sex Differences* 228, 234 (1974) and Jeffrey Z. Rubin & Bert R. Brown, *The Social Psychology of Bargaining and Negotiation* 172–73 (1975)).

[42] Sandra R. Farber and Monica Rickenberg, Under-Confident Women and Over-Confident Men: Gender and Sense of Competence in a Simulated Negotiation, 11 Yale J.L. & Feminism 271, 302.

[43] Id.

[44] Charles B. Craver and David W. Barnes, Gender, Risk Taking and Negotiation Performance, 5 Mich. J. Gender & L. at 301.

on his part (based on societal stereotypes) to assume that the opposing client and law firm do not place a high value on the case or they would not have assigned the case to a woman. He should prepare for the negotiation aware of this potential misperception because he may discover a highly skilled opponent. Indeed, he may even discover that the opposing firm, client, and attorney intended him to be thrown off guard and initially deceived by the gender of his formidable female opponent.

Negotiators also need to be cognizant of the perceived advantages and disadvantages opponents and clients may attribute to gender. For instance, a female negotiator may find it to her advantage that her male opponent assumes she will not be competitive in her demands. A male negotiator who is operating on the basis of unexamined perceptions instead of the abilities of his opponent may find himself outflanked and outmaneuvered if he enters a negotiation assuming his female opponent will not be competitive in her strategy toward the negotiation. Similarly, a female negotiator who enters into negotiations with the mistaken assumption that her male opponent is adversarial may find herself thrown off balance by the problem-solving techniques he employs.

One scholar has concluded that it is much less important whether women are more cooperative in their negotiation styles than that "people *think* women are likely to be cooperative types."[45] Successful negotiators must therefore take into account perceived traits and stereotypical assumptions regarding gender when they approach the negotiation table, and analyze whether any of these traits or assumptions are at all relevant in a particular case. The fundamental importance of being aware of perceived gender differences in negotiating is that, as repeated experience has shown, the perception that gender has anything to do with successful negotiation outcomes is belied by the fact that men and women are coequals in negotiating effectively.

[45] Carol M. Rose, Bargaining and Gender, 18 Harv. J.L & Pub. Pol. 547 (1995)