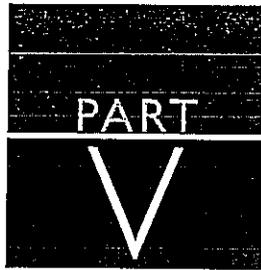


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# NEGOTIATION

Stefan H. Krieger, Richard K. Neumann, Jr., Kathleen H. McManus & Steven Jamar, *Essential Lawyering Skills: Interviewing, Counseling, Negotiation, and Persuasive Fact Analysis* (Aspen 1999)

# CHAPTER 20

## HOW NEGOTIATION WORKS

### §20.1 AIMS OF NEGOTIATION

Some scholars estimate that as much as 90% of the legal matters handled by lawyers eventually involve negotiation.<sup>1</sup> One study of tort, contract, and real property cases in urban state trial courts found that 61.5% of cases were disposed by a settlement or voluntary dismissal.<sup>2</sup> About two-thirds of criminal cases are disposed with guilty pleas.<sup>3</sup> In federal courts, over 80% of criminal cases end in guilty pleas, presumably negotiated.<sup>4</sup>

Like all other work done by lawyers, negotiations can be separated into two general categories: transactions and dispute resolution. In transactional negotiations, the parties try to enter into relationships in which they voluntarily agree to terms that will govern their future conduct. Examples include transferring or renting real estate, buying and selling goods and services, creating business partnerships and joint ventures, and merging and acquiring companies. In dispute negotiations, the parties are in conflict, and they try to resolve the conflict themselves. The alternative is to have a third party, such as a court, decide. Examples

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1. Robert M. Bastress & Joseph D. Harbaugh, *Interviewing, Counseling, and Negotiating: Skills for Effective Representation* 341 (1990).

2. Brian J. Ostrom & Neal B. Kramer, National Center for State Courts, *Examining the Work of State Courts, 1996: A National Perspective from the Court Statistics Project* 24 (1997).

3. *Id.* at 57.

4. *Judicial Business of the United States Courts, Administrative Office of the United States Courts* 224 (1997) (Table D-7).

include settlement discussions in a lawsuit, plea bargaining, and negotiations between the Federal Trade Commission and a company before the filing of an antitrust case.

Some negotiations have both dispute and transaction aspects. Labor negotiations, for example, might concern both disputes about safety or other working conditions regulated by legal rules and transactional aspects relating to the long-term relationship between labor and management. Similarly, international trade negotiations may involve disputes about the meaning of provisions in existing contracts and bargaining about future contract terms. Even in an ostensibly "pure" dispute negotiation, transactional issues may arise. In a commercial landlord/tenant case, for instance, in which the tenant alleges breach of contract because of the purported failure of the landlord to provide services required under the lease, the parties may attempt to resolve the dispute by rewriting the terms of the lease to make the requirements more explicit.

Whether transactional or dispute resolution, the goal of any negotiator is to communicate persuasively with the other side. Communication can take many forms: threats that your client will take certain actions or assert power against the other party if a deal is not reached; arguments that a certain case, statute, or rule supports your position; promises that will bind your client in return for concessions from your opponent; appeals to your adversary to display some sympathy to your client; or recognition of the views of the other party in an attempt to solve problems collaboratively. The forms of communication you choose will depend on the strategy you develop. (See §§24.1 and 24.2.) But, in essence, negotiation—like interviewing, counseling, or legal storytelling—is a communication skill.

Your aim is to get the other party to make an agreement on terms as favorable as possible to your client. It is not to vent your or your client's anger, to show your prowess in researching obscure legal issues, or to demonstrate your ability to display rhetorical flourishes. Negotiation is not a monologue with the other party's lawyer as a passive audience. Rather, it is a dialogue in which you intend to persuade the other party to reach a mutually agreeable decision on issues.

## §20.2 CONTEXT OF NEGOTIATION: INTERESTS, RIGHTS, AND POWER

To understand how negotiation works, consider each party's interests, rights, and power.<sup>5</sup> Every dispute or transaction occurs against a backdrop of these three factors. The differing interests of the parties, of course, bring them to the bargaining table. But the rights and power of the parties influence the result because the parties know that if an agreement is not reached, "a more coercive process will ensue."<sup>6</sup> In that more coercive process—litigation or economic conflict, for

5. William L. Ury, et al., *Getting Disputes Resolved: Designing Systems to Cut the Costs of Conflict* 4–8 (1988).

6. Sally E. Merry, *Disputing Without Culture*, 100 Harv. L. Rev. 2057, 2066 (1987) (reviewing Stephen B. Goldberg et al., *Dispute Resolution* (1985)).

example—each party will ask for vindication of its rights and use its power. These concepts are introduced here and explained more fully in Chapter 21.

### §20.2.1 INTERESTS OF THE PARTIES

“Interests are needs, desires, concerns, fears—the things one cares about or wants. They underlie people’s positions—the tangible items they say they want.”<sup>7</sup> Common interests are resolving the matter promptly, maximizing financial position, developing or maintaining long-term relationships, or addressing psychological needs.

Consider, for example, the *Ransom v. Dusak* case discussed in Chapter 9. There, Ransom sought damages for breach of the warranty of habitability. Underlying that legal position could be a number of interests: compensation for the partial loss of use her apartment, for her suffering, and for her medical bills; the desire to have the problems in her home repaired; development of a good relationship with the landlord; peace of mind; revenge. And behind Dusak’s defense of the case could be several other interests: protection of his reputation in the community, the desire to get a new tenant, compensation for the money he expended to defend the case, and peace of mind.

Each party might have many interests, and some of them might conflict. Although in a commercial transaction, a buyer may want quality goods, timely delivery, and a low price, she may not need to obtain all three. In a plea bargaining negotiation in a case with multiple defendants, an individual defendant might have an interest in reducing the risk of a long sentence but also might have some loyalty to codefendants and want to avoid reprisals. And in an international negotiation, a country might have concerns about secure borders but also want to develop long-term trade relations with neighboring countries.

### §20.2.2 RIGHTS OF THE PARTIES

“Rights” are independent standards that demonstrate the legitimacy or fairness of a party’s position. They can be based on formal legal rules (case law, statutes, and regulations) or contracts between the parties. Or they can be grounded on socially accepted standards of behavior, such as reciprocity, precedent, equality, and seniority.<sup>8</sup> In the *Ransom v. Dusak* case, for example, Ransom might rely on the statutory warranty of habitability, a common law claim for negligent maintenance of the premises, or the argument that, as a matter of fairness, if she pays her rent, she should be entitled to a habitable apartment. Dusak might base his defense on Ransom’s failure to prove all the elements on her claim for breach of warranty of habitability or might argue that Ransom’s refusal to allow the admittance of the exterminator absolves him of any obligation to pay damages for the vermin infestation.

In dispute-resolution negotiations, bargaining occurs in the “shadow of the

7. Ury, et al., *supra* note 5, at 5.

8. *Id.* at 7.

law<sup>9</sup>—in the context of the legal claims and defenses raised by the parties before the particular tribunal. And aside from the substantive legal positions taken by the parties, they may also have different procedural rights that frame the negotiation. Examples are rights to discovery, to joinder of additional parties, to file pretrial motions, or to file interlocutory appeals. Even a motion for an adjournment or continuance of the proceedings might be a significant right for a party in a particular case.

Unlike dispute negotiations, transactional negotiations do not technically take place in the “shadow of the law.” But the rights of the parties do provide some context for transactional bargaining. Sometimes, the parties are limited in their options by specific statutory or regulatory requirements. Usury statutes, for example, limit the amount of interest that a lender can charge a borrower, even if the two want to agree otherwise.<sup>10</sup> Beyond the law, transactional negotiators frequently rely on “common business practice” or “form provisions” in their bargaining.<sup>11</sup> And the parties often refer to socially accepted standards of behavior as a basis for their position. In a negotiation for a sale of residential property, for instance, if the buyer wants a ten-day period to withdraw from the contract after an inspection report, the seller may request that, in return, the buyer give her ten days to withdraw from the contract if she does not want to make the repairs listed in the report.

### §20.2.3 POWER OF THE PARTIES

Power is “the ability to coerce someone to do something he would not otherwise do.”<sup>12</sup> Although rights can coerce the party against whom they are enforced (see §20.2.2), power—in the sense used in this book—is coercion *without resorting to enforcement of legal rights*. A party asserts power in two common ways. One way is “aggression, such as sabotage or physical attack” (or more commonly, the pressure of bad publicity); the other way is “withholding the benefits that derive from a relationship, as when employees withhold their labor in a strike.”<sup>13</sup>

For some people and in some negotiations, relative power is the determinative factor. For example, when you want to buy a computer, the basic terms of the contract—the price, available accessories and software, and warranty—are not negotiable. When you find the computer you want to buy, you must accept the terms on which the manufacturer will let it be sold. But when General Motors wants to buy a computer, it can either dictate terms to a much smaller company or negotiate on an equal footing with a company large enough to have market power that matches GM’s.

Even in a setting where one party starts out with a substantial power disadvan-

9. This term was coined in Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: the Case of Divorce*, 88 Yale L.J. 950 (1979).

10. See, e.g., N.Y. Gen. Oblig. §5-501(1) (McKinney 1989).

11. Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 U.C.L.A. L. Rev. 754, 766 (1984). She terms this kind of negotiation bargaining in the “shadow of the form contract.”

12. Ury, et al., *supra* note 5, at 7.

13. *Id.* at 8.

tage, relative power does not necessarily determine the result. For example, car dealers have bargaining resources vastly superior to those of most car buyers. But dealers must make sales in a competitive market. Indeed, during certain times of the year, dealers need to sell cars to get them out of inventory. At those times, buyers may have significant power, at least in regard to the valuing of the trade-in, the financing package, or the availability of some options. Thus, relative power can be variable and does not always determine the negotiation's outcome.

## §20.3 APPROACHES TO NEGOTIATION

The two primary approaches to negotiation are adversarial and problem solving.<sup>14</sup> The adversarial approach focuses on the rights and power of the parties. The problem-solving approach focuses on the interests of the parties. Nearly all negotiations involve some degree of both approaches, but a description of the distinction between these two types of negotiation will help you make appropriate choices in selecting negotiation strategy and tactics.

### §20.3.1 ADVERSARIAL APPROACH TO NEGOTIATION

A negotiator taking an adversarial approach views bargaining as an issue of distribution of limited resources. This type of bargaining is also called "zero-sum" negotiation because each dollar that one side receives (or does not need to pay out) is one dollar that the other side loses. If there are three claimants to a \$3,000 pot of money, and if one claimant takes \$1,500, the other two must split the remaining \$1,500. Haggling over the price of a new car is a classic example of distributive bargaining. For every dollar that the price comes down, the buyer gains a dollar, and the seller loses a dollar.

In an adversarial negotiation, each party takes a position that she or he is entitled to something. In a personal injury case, for example, in which the plaintiff seeks \$500,000 damages for injuries incurred in an automobile accident, the parties view the negotiation in terms of a continuum between zero dollars (the amount the defendant initially says it will pay) and the \$500,000 demanded in the plaintiff's complaint. Depending on their assessment of the strength of their respective cases, the plaintiff and the defendant will each select an "opening position" on this continuum and determine a "bottom line"—the position at which the particular party will walk away from the negotiation. Negotiation then becomes a contest in which each party makes concessions, adopts fallback positions, and either eventually agrees to a compromise or leaves the bargaining table (see §22.4).

In the legal context, the adversarial approach to negotiation focuses on the rights and power of the parties. In dispute resolution cases conducted in the "shadow of the law," the negotiators typically—and sometimes wrongly—assume that the bargaining is limited to the judgment that could be entered by a court

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14. Other approaches exist, such as game theory, economic models, and bargaining theory, but they are less helpful when first learning basic negotiation skills.

or other tribunal in deciding the case: “who will get the most money and who can be compelled to do or not to do something [by the court]. Indeed, it may be because litigation negotiations are so often conducted in the shadow of [a potential] court [decision] that they are assumed to be zero-sum games.”<sup>15</sup> In a personal injury automobile accident case, for example, parties using an adversarial approach limit their discussions to the strength and weaknesses of the legal claims and defenses and each party’s predictions of a jury verdict. Similarly, in transactional negotiations, negotiators adopting the adversarial approach assume that bargaining is limited to the options available under common business practices or form contracts and agreements. Even though a court will probably not render a judgment in the transactional negotiation, prevailing practices in the trade or business can become the “rights” about which the parties negotiate. Moreover, the relative power imbalance between the parties can affect the ultimate distribution of the pot.

When is it wrong to assume that the range of possible settlements is limited to what a court could decide or what one would find in common business practices or form agreements? It is wrong whenever a problem-solving approach would get more for your client. Subsections 20.3.2 and 20.3.3 explain how and when that might occur.

### §20.3.2 PROBLEM-SOLVING APPROACH TO NEGOTIATION

While the adversarial approach to negotiation focuses on the distribution of limited resources, the problem-solving approach emphasizes the *integration* of the resources each side brings to the table so that each side ends up better off. Earlier in this book, we used the expression *problem-solving* to describe general methods of identifying a client’s problem, predicting what will happen in the future, and creating and implementing strategies to control what will happen in the future (see Chapter 4). In the negotiating chapters, we use that term to refer to a lawyer’s use of some of these same methods—especially solution-generation and solution-evaluation—to negotiate a settlement or deal that will meet the interests of all parties.

In the problem-solving model, each side is assumed to bring something of value to the deal that can create benefits to both parties, and the negotiators try to integrate these interests in a settlement or deal. A good illustration is a negotiation to create a joint business venture in which one party puts up the capital and the other provides the research and labor. Such negotiations are not viewed as zero-sum games but win-win situations. Many negotiations present integrative opportunities—even those which initially may appear to be purely distributional. In a personal injury setting, for example, the plaintiff’s interest in a quick resolution of the dispute and the defendant’s interest in delayed payment of full damages might be conducive to a structured settlement with a lengthy payout schedule. (A structured settlement is one in which the defendant makes payments stretched out over a period of years rather than in one lump sum immediately.)

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15. Menkel-Meadow, *supra* note 11, at 766.

Rather than concentrating on the rights and power of the parties, problem-solving negotiators focus on accommodating the interests of all the parties (see §4.3). As you saw in §20.3.1, the adversarial approach to negotiation results in positional bargaining: each party takes positions based on its evaluation of the strength or weakness of the parties' "rights" in the case. In their well-known book on problem-solving negotiation, *Getting to Yes*, Roger Fisher and William Ury reject this approach:

When negotiators bargain over positions, they tend to lock themselves into those positions. The more you clarify your position and defend it against attack, the more committed you become to it. The more you try to convince the other side of the impossibility of changing your opening position, the more difficult it becomes to do so. Your ego becomes identified with your position. You now have a new interest in "saving face"—in reconciling future action with past positions—making it less and less likely that any agreement will wisely reconcile the parties' original interests.<sup>16</sup>

Fisher and Ury argue that by focusing on interests and not positions, parties can generate a variety of options that will provide for mutual gain for both of them.<sup>17</sup> By identifying their own interests and recognizing the interests of the other party, both parties can collaborate to develop an agreement amenable to both.

To illustrate such an approach, they point to the Camp David treaty between Egypt and Israel negotiated in 1978. After the Six Day War of 1967, Israel occupied the Sinai Peninsula. In the 1978 negotiations, Israel took the position that it retain some part of the Sinai, and Egypt insisted that Israel return the entire Sinai. Positional bargaining about alternative boundary lines took the parties nowhere. But then the negotiators began to consider their different interests: Israel was concerned about its security interests and did not want the pre-1967 situation with a military presence on its border. Egypt, after centuries of colonial occupation, did not want any infringement on its sovereignty. This interest-based approach to negotiation led to a solution: Israel returned the Sinai to complete Egyptian sovereignty, but Egypt agreed to demilitarization of large parts of the peninsula to assure Israeli security.<sup>18</sup>

Nonetheless, problem-solving negotiators do recognize that there are instances where interests cannot be integrated satisfactorily, and negotiation will fail. While adversarial negotiators select "bottom lines" at which they will walk away from the bargaining table, problem-solving negotiators identify a BATNA—a Best Alternative To a Negotiated Agreement—as a standard against which any proposed agreement should be measured. A BATNA is more flexible than a bottom line position.

To develop a BATNA, a negotiator predicts the best thing the negotiator would be able to do if the negotiation fails and an agreement is not reached. In a transactional negotiation where a drug store chain wants to lease space in a

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16. Roger Fisher & William L. Ury, *Getting to Yes: Negotiating Agreement Without Giving In* 4–5 (2d ed. 1983).

17. *Id.* at 10–11.

18. *Id.* at 41–42.

building, for example, the building owner will wonder: "What other potential tenants might I lease the space to? Are there any alternative uses for the building? Are there any tax advantages to keeping the store vacant?" Each of these represents a potential alternative to signing an agreement with the drug store chain: finding a different tenant or using the building in a way that does not involve leasing space or leaving the space empty for a time and taking a tax loss. The most profitable of them is the building owner's BATNA—the owner's best alternative to a negotiated agreement with the drug store chain. If during the negotiation, the BATNA looks better than any possible deal with the drug store chain, the building owner can walk away. If not, the building owner will come to an agreement.

Or in a dispute resolution negotiation for settlement of a lawsuit, the plaintiff will wonder, "If this case goes to trial, will I win, how long would I have to wait to win, and how much will it cost to win?" Trial is the only BATNA. The issue is whether it is better than negotiating a settlement, and that depends on the chances of winning at trial, the delay before victory, and the cost of winning.

Good planning involves imagining the other party's BATNA as well. Unless you have a good idea of the other side's alternatives to settling with you, you really do not know how strong or weak you are in the negotiation.

### §20.3.3 USE OF THE DIFFERENT APPROACHES

Many commentators express a strong preference for problem-solving as a substitute for adversarial negotiation. The approach described in this book is more flexible. Most negotiations are not purely adversarial or problem-solving. Even a usually adversarial negotiator in a personal injury case, for example, might engage in problem-solving on an issue such as the payout schedule, taking into account the plaintiff's immediate financial needs and the defendant's preference to pay at least some of the money later rather than now. And in many problem-solving negotiations, the parties may engage in bazaar-style haggling when it comes down to "nickel and dime" issues at the conclusion of the bargaining.

These mixed approaches reflect the reality of how lawyers really do negotiate effectively. It is a complex process involving both distributive and integrative issues, all against a backdrop of the parties' interests, rights, and power. As you will see in Chapter 22, understanding the differences between the two approaches can be helpful in developing effective strategies on behalf of your client and crafting arguments or appeals to the opposing party.

If you assume that one approach is always preferable to the other, you will be less effective at negotiation than another person who can function well using either approach.

### §20.4 ROLES OF THE LAWYER IN NEGOTIATION

In negotiations, a lawyer often acts in four capacities: evaluator, advisor, negotiator, and drafter.

1. *Evaluator.* At a minimum, you can help a client by providing a third party's evaluation of the situation. Sometimes clients become fixated on a relatively small part of a dispute or transaction, and the lawyer, who has no personal stake in the matter, can provide some perspective on the problem. Some clients in personal injury cases, for example, encouraged by press reports of huge verdicts in high-profile cases, expect the same results in their cases. One of the functions of a lawyer is to give clients a reality check as to the actual experience in your particular jurisdiction.
2. *Advisor.* Lawyers counsel their clients as to their options during the negotiation process, particularly in regard to what offers to make and whether to accept an offer made by the other side. The client, however, decides whether to make an agreement (see §§3.3 and 21.6).
3. *Negotiator.* Often, the lawyer is the exclusive communicator with the other party or its lawyer, and the client does no more than authorize the lawyer to act (see §21.6). But sometimes the client is an active participant in the negotiations, and the lawyer plays the role of a co-negotiator or backseat advisor. The decision as to who should be the negotiator is a strategic one, depending in part on the communication skills of the client, the expertise of the lawyer or client on the issues raised by the transaction or dispute, the advantages or disadvantages of having a person with authority present, and the concern of the client to be intimately involved in the discussions.
4. *Drafter.* Once an agreement is reached, it usually must be reduced to writing. Even in those situations where the agreement is made orally, such as stipulations on the record in a courtroom, the lawyers need to work out the precise language of the agreement. When reducing the agreement to writing, other issues often arise, and, as the saying goes, "the devil is in the details." More negotiation is often needed when pinning down the exact language of the agreement.

## §20.5 DISCHARGING YOUR ETHICAL RESPONSIBILITIES

In any negotiation, you will make representations: in regard to particular facts in the case; as to assessments of the strengths and weaknesses of the different parties' cases; or of your opinions about proposed solutions to problems. Indeed, most arguments and threats contain representations of fact, which can raise ethical issues if you misrepresent the facts or omit certain facts.

As to misrepresentations, under Model Rule of Professional Conduct 4.1(a), a lawyer "[i]n the course of representing a client, a lawyer shall not knowingly . . . (a) make a false statement of material fact or law to a third person. . . ."<sup>19</sup> The comment to the rule provides, however, that "[u]nder 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

19. Rule 4.1(a) of the Model Rules of Professional Conduct Rule 4.1(a). In the Model Code of Professional Responsibility, similar provisions appear at DR 1-102(A)(4) and DR 7-102(A)(5).

of a transaction and a party's intentions as to an acceptable settlement of a claim are in this category. . . .<sup>20</sup>

The line between actual misrepresentation and "puffing" is not always clear. And the interpretation of the rule and comment varies from state to state and is influenced by prevailing local practices.<sup>21</sup> The weasel word "ordinarily" in the comment does not necessarily give you broad leeway in your representations in negotiation. In the *Ransom* case, for instance, consider these three statements by Dusak's lawyer, all of which he knows to be misrepresentations:

1. My client will not agree to exterminations every month.
2. My client has signed an agreement with an exterminator for service every month.
3. My client tells me he thinks it will cost over \$150 a month to have an exterminator.

In most jurisdictions, Statement 1 is probably permissible because it merely reflects an opinion of the case presented in a negotiation, and Statement 2 is probably impermissible because it states an untrue fact that materially relates to the negotiation. Statement 3, however, is on the borderline: it could just be Dusak's opinion about a negotiating position, but, by referring to an estimate of cost, it could be considered a statement of fact made to induce a concession by Ransom.

Certainly, then, before you engage in bargaining, research the applicable ethics opinions for that particular jurisdiction.<sup>22</sup> Even as to your assessments of the strengths and weaknesses of your client's case, "a careful lawyer, intent on negotiating a legally protectable bargain, would be very circumspect in making or implying false and misleading statements about intention."<sup>23</sup> A material misrepresentation not only poses an ethics problem but also permits a challenge to the entire agreement. If the other party can establish the elements for a fraud in the inducement claim, the agreement may be rescinded.

In regard to omissions of fact, Rule 4.1(b) provides that a "lawyer shall not knowingly . . . fail to disclose a material fact to a third party when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6."<sup>24</sup> With narrow exceptions, Rule 1.6 prohibits a lawyer from revealing "information relating to representation of a client unless the client consents after consultation. . . ."<sup>25</sup> Generally, under these rules, a lawyer is not obligated to disclose information which will harm that lawyer's negotiating position. Indeed, a lawyer who discloses confidential information without the client's consent commits an ethical violation.

Some threats are unethical. In states that follow the Model Code of Professional Responsibility (rather than the Model Rules), a lawyer may not "present,

20. Comment 2 to Model Rule 4.1 (emphasis added).

21. Charles W. Wolfram, *Modern Legal Ethics* §13.5.8 (1986).

22. A lawyer admitted to practice in a jurisdiction where the Model Rules apply is subject to the disciplinary authority of that jurisdiction although engaged in practice elsewhere. Model Rule 8.5.

23. Wolfram, *supra* note 21.

24. Model Rule 4.1(b).

25. Model Rule 1.6.

participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter.”<sup>26</sup> The courts have virtually read “solely” out of the rule, so any threat to bring criminal charges is risky. So is a threat to file disciplinary charges with a grievance committee. The best policy is never to threaten criminal or disciplinary consequences in Code states.

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26. DR 7-105(A) of the Model Code of Professional Responsibility.

## CHAPTER

# 21

## NEGOTIATION PREPARATION: ASSESSING THE PARTIES

### §21.1 INTERESTS, RIGHTS, AND POWER

You saw in §20.2 that all negotiations are greatly affected by the parties' interests, rights, and power. Prenegotiation preparation necessarily includes an assessment of the interests, rights, and power of both your client and the other side.

### §21.2 ASSESSING THE PARTIES' INTERESTS

This process requires identifying the interests of each party, prioritizing your client's interests, and predicting the other party's priorities.

#### §21.2.1 TYPES OF INTERESTS

Interests are the needs, desires, concerns, fears, and expectations of a particular party. Although this definition seems quite simple, the process of identifying the interests of your client and those of the other party is not so easy. Your client may be unsure or ambivalent about what she really wants. Or she may be absolutely certain about her needs at the initial interview, only to change her mind completely on the eve of the deal closing or trial.

In regard to identifying the interests of the other parties, your access to them is limited, and their communications to you might not be totally forthright. Your

task, therefore, is a reconnaissance mission to learn as much as possible about the other side's interests.<sup>1</sup>

To engage in this process, think of various types of interests to explore. Although the following categories may not be applicable to all cases and some of them overlap, they provide a framework to assure a thorough investigation of interests:

**1. Financial interests.** These include not only the short-term money effects of the transaction or dispute but also any long-term financial ramifications or tax consequences for the party.

**2. Performance interests.** Especially in transactional settings, performance concerns may be just as important as price. In an installment sales transaction, for example, the seller might be as interested in the security and nonperformance remedy provisions of the agreement as in the payment schedule. Or in the sale of a house, the seller who is relocating to another area in a short time may be willing to accept a much lower price if the buyer pays cash (so that the seller does not have to worry about whether the deal might collapse if the buyer cannot get a mortgage).

**3. Psychological needs.** In many transactions and disputes, one or more of the parties has an emotional stake: a seller has lived in her house for 25 years and is ambivalent about having to move; each spouse in a child custody dispute feels that the other is an unfit parent; a commercial buyer feels that it was overcharged in a previous transaction; a plaintiff in an action against an insurance company may have mixed feelings, wanting both vengeance and the certainty that compensation will be forthcoming; an environmental group may be up in arms because it feels that a factory deliberately and greedily ignored clean air standards. Although these feelings might not be rational, they are real and certainly affect the dynamics of bargaining. Indeed, in some dispute resolution negotiations, the primary interest of a party is not the relief requested in the complaint but an apology or public recognition of wrongdoing.

**4. Reputational interests.** Some parties might be concerned about the effect of the transaction or dispute on their reputations. They may fear, for example, that this case might set a harmful precedent in the future or that adverse publicity will embarrass them.

**5. Relationship interests.** Many transactional and some dispute-resolution negotiations involve repeat players: buyers frequently purchase from particular sellers; unions regularly bargain with management for collective bargaining agreements; parents in a custody dispute may continue to be in close contact with each other; or public interest groups may consistently litigate against the same governmental regulatory bodies. In those situations, although the relationship

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1. For an extended discussion of this process, see Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 U.C.L.A. L. Rev. 754, 801-03 (1984).

between the parties on some level will be adversarial, on another level it will require cooperation. After a collective bargaining agreement is reached, for example, the employees will be working for management, and, even after the public interest group has settled or litigated its case, it will probably be dealing on a regular basis with matters before the regulatory body. In many cases, therefore, parties may have a stake in maintaining a working relationship.

6. *Liberty interests.* These may include not only freedom from incarceration in a criminal case but also freedom to travel, to engage in a particular occupation, or to spend time with one's family. Criminal defendants nearly always want to avoid imprisonment. But other dispositions can also have a significant impact on the defendant's liberty: community service obligations may interfere with the defendant's job obligations; a record of a conviction might preclude employment in a particular occupation; or participation in a drug program might interfere with family life.

7. *Basic human needs.* This catch-all category is a useful tool in double-checking your investigation of the parties' interests. It includes security, economic well-being, a sense of belonging and of being appreciated, and control over one's life. These needs are not exclusive to individuals. Groups, corporations, government agencies, and nations, to some extent, all have these interests, and they should not be overlooked.

### §21.2.2 IDENTIFICATION OF PARTIES' INTERESTS

When interviewing and counseling your client to learn the client's interests, begin with open-ended, rather than closed or leading questions (see §6.3.2). Ask your client what end results she desires, and then why this outcome is so important. Do not rush into accepting the initial response, but try to obtain a complete listing of all the client's concerns. If the client defines her needs and interests only vaguely, you will want to narrow your questions, perhaps by exploring whether the client has any interests in the categories described in §21.2.1. If you do not succeed with this approach, ask about the kinds of concerns that other clients have had in these situations. It is often helpful to write down your client's responses on a pad or whiteboard which the client can read while you write; seeing the answers charted out, the client may be encouraged to articulate other concerns.

During this process, your client may be reluctant to express some concerns, especially those of a psychological nature. In a child custody dispute, for example, a parent may not want to litigate aggressively an issue because she feels that she lacks the stamina to do it. Sensitive, active listening helps in such situations (see §6.1.2). To obtain a thorough account of all your client's interests, be nonjudgmental so that your client feels that she can openly confide in you.

You also need to identify the interests of the opposing party or parties to understand fully the context for the negotiation. Sometimes the other party articulates its needs and interests clearly and forthrightly. Other times, however, your opponent will leave you bewildered either because of its own negotiation strategy or because it has not thought out its concerns thoroughly. In those situations, you may want to adopt an approach similar to the one you use with your client

and ask the other party's lawyer why the other party has adopted a particular position and why the other party rejects your client's position (see §25.1.1).<sup>2</sup> If this does not work, you might want to explore possible interests with your opponent by asking questions such as "it seems to me that you are interested in . . ." to evoke an affirmative or corrective response. A similar technique is to make a proposal, tell the other side that you think the proposal helps to satisfy an interest that you assume they have, and then listen carefully to their reaction. Sometimes phrasing a proposal as a hypothetical results in helpful discussion because the other side may not feel as threatened by it as by an actual offer ("If we were to offer X, what effect would that have on your client's situation?").

The other party and its lawyer, however, are not the only sources for identifying its interests. Your client may know the other side's interests and concerns from personal experience. This is certainly true in domestic relations or labor management disputes. And many commercial and corporate transactions involve repeat players who have intimate knowledge of each other's interests. Additional information can be obtained from other lawyers or third parties who have previously dealt with your opponent. And in a dispute or transaction with an organization, news articles might reveal its financial, reputational, and policy priorities.

### §21.2.3 PRIORITIZING INTERESTS

The final step in assessing the interests of the parties is to prioritize the interests of your client and the other party. Obviously, the lists you compile in regard to your client's interests and your guesses as to the other party's interests will in many cases be lengthy. (See Chart 21A for the list's basic structure.) And some

**CHART 21A ASSESSMENT OF PARTIES' INTERESTS**

Types of Interest	Client's Interests	Other Party's Interests
1. Financial		
2. Performance		
3. Liberty		
4. Psychological		
5. Reputational		
6. Relationship		
7. Basic Human Needs		
<b>HIGHEST PRIORITIES</b>		

2. Roger Fisher & William L. Ury, *Getting to Yes: Negotiating Agreement Without Giving In* 44-45 (2d ed. 1983).

interests on a list might be inconsistent with others on the same list. In negotiating a business partnership, for example, your client may articulate interests both in retaining control over the direction of the business and in limiting the time he wants to spend on it.

To get an adequate assessment of the interests of both parties, work with your client to determine her two or three most important interests in this transaction or dispute and try to speculate on the priorities of concerns for the other party. Remember that each of the parties' interests may change as the bargaining progresses. As that happens, you may want to revisit your assessment of interests and priorities. By identifying these priorities you lay the groundwork for determining whether or not a problem-solving approach will settle the issues (see §22.3).

### §21.3 ASSESSING THE PARTIES' RIGHTS

Novice lawyers tend to think of negotiations as driven primarily by legal concerns. You saw in §21.2, however, that nonlegal interests—financial, psychological, relationship, reputational needs—can be the driving force behind the parties' behavior. Still, legal negotiations do take place in the "shadow of the law," and it would be a mistake to ignore totally the legal rights of the parties in preparing for negotiation. Although many negotiations do not include lengthy legal arguments, the parties' evaluation of their respective rights can have a significant impact on the outcome. Robert Condlin writes that although explicit legal argumentation is

common among novice negotiators, [it] is less prominent in negotiations between experienced lawyers who bargain with one another regularly (e.g., personal injury plaintiffs' lawyers and insurance company counsel, prosecutors and criminal defense lawyers). Perhaps this is because personal familiarity and common experiences give lawyers shared views about what law is settled and what evidence counts as persuasive, and enable them to play out arguments privately in their heads so that they need discuss only novel or controversial points openly.<sup>3</sup>

In dispute resolution negotiations, assessment of the parties' rights requires predicting the possible outcome if the case were to be tried in court. This includes evaluating the strengths and weaknesses of the parties' legal and factual theories (see Chart 21B). The lawyer for the party going forward (the plaintiff, the prosecutor, or the movant) should identify all possible claims for relief (or, in a criminal case, the range of charges) and the legal elements for each. The lawyer should then determine whether the evidence will establish a *prima facie* case (see Chapter 9). Finally, the lawyer should identify the possible legal remedies that would be available if the case is proved. (Sometimes, a plaintiff in a civil case will have a strong case establishing liability, but only be entitled to limited relief.)

The resisting lawyer (representing the defendant, for example) should consider

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3. Robert J. Condlin, "Cases on Both Sides": *Patterns of Argument in Legal Dispute-Negotiation*, 44 Md. L. Rev. 65, 69 n.14 (1985).

**CHART 21B ASSESSMENT OF PARTIES' RIGHTS—DISPUTE**

Analysis of Claims	Plaintiff/Prosecutor	Defendant
Legal Theory(ies)/ Defense(s)  Strengths  Weaknesses  Factual Theory(ies)  Strengths  Weaknesses		
<b>WHAT ADDITIONAL INFORMATION IS NEEDED TO REACH A DEAL?</b>  <b>WHO IS LIKELY TO PREVAIL?</b>  <b>HOW CAN THE RIGHTS RELATIONSHIP BE CHANGED?</b>		

whether any of the claims is based on an accurate understanding of the law. Then, the resisting lawyer should marshal the available evidence to determine whether the party asserting the claim can establish a prima facie case. Finally, the resisting lawyer should consider whether any affirmative defenses can defeat any of the claims and whether the evidence will establish the minimum facts to prove those defenses.

When considering legal theories in preparation for negotiation, be especially careful about burdens of production and persuasion. In litigation, the winner is the party who either carries all of her burdens or prevents an adversary from carrying all of his. The question is not whether a defendant is liable or guilty, but whether the evidence proves that according to the applicable standard. And negotiation "in the shadow of the law" inevitably takes this into account. In a criminal case, for example, the prosecution's need to prove its case beyond a reasonable doubt has a substantial effect on the plea bargaining process. (Remember to evaluate not only the strength and weakness of each party's legal theory in the abstract, but also try to predict the probable rulings on these legal issues by the tribunal that will actually decide the case. See §17.3.1.)

In regard to factual theory, consider the persuasiveness of the parties' facts. Using the approach discussed in §§13.2–13.4, evaluate the credibility of each

parties' sources of facts, contextual facts, and circumstantial evidence and assess the structural integrity of their stories. Then try to forecast, given the nature of your audience (the particular judge, hearing examiner, arbitrator, or jury), the ultimate judgment. (See §17.3.1 on how to predict damages.)

Rights assessment is also necessary in preparation for a transactional negotiation (see Chart 21C). Here, the inquiry is not about the possible outcome of the case at trial, but about legal requirements governing the transaction or the common business practices that create context for the deal. Many legal form books provide not only sample forms for similar deals but also relevant case law and statutory authority on these transactions. Although you should avoid using form books as the sole basis for your proposal, they can help to identify key legal issues. If you have not handled such a deal before, get copies of similar agreements from experienced lawyers. With the help of your client, investigate also the common business practices for such transactions, such as pricing, performance, and quality control standards. Certainly, you should not feel bound by the sample agreement in the form book or common business practices, but you need to understand that the other parties may be entering the negotiation presuming that these customs constitute their informal "rights."

Often, novice lawyers—out of fear that the negotiations will fail—will prematurely reach a deal with an opponent without learning crucial facts. Identify the information that is indispensable to your appraisal of the situation so that you can adequately prepare a negotiation strategy. In a transactional setting, obtain

**CHART 21C ASSESSMENT OF PARTIES' RIGHTS—TRANSACTION**

Rights	Client's Rights	Other Party's Rights
Statutory/Regulatory Requirements  Common Business Practices for Transaction		
<b>WHAT ADDITIONAL INFORMATION IS NEEDED TO REACH A DEAL?</b>  <b>WHAT EFFECT DO THESE RIGHTS HAVE ON THE TRANSACTION?</b>  <b>HOW CAN THE LEGAL RELATIONSHIP BE CHANGED?</b>		

facts about industry customs, information about past dealings between the parties, and technical information about the products or services involved. In a dispute negotiation, examine your Chronology (see Chart 10B on page 131), and identify the missing witnesses, documents, and facts that are essential to a basic understanding of the events. (See Charts 21B and 21C.)

The rights context of most negotiations is not stagnant but can change drastically depending upon the legal maneuvering of the parties. You often have the ability to change the legal relationship of the parties before or during negotiation. In the dispute resolution context, for instance, you can add leverage by suing, making strategically sound motions, conducting extensive discovery, filing a counterclaim, or seeking sanctions for unreasonable conduct. Similar things can happen in transactional negotiations. For example, in a commercial real estate sale where the price is deflated because of zoning restrictions on the property, the situation will be changed radically if the owner succeeds in getting a zoning variance. In preparing for your negotiation, you should identify those possible changes. (See Charts 21B and 21C.)

## §21.4 ASSESSING THE PARTIES' POWER

Power is the ability to coerce someone to do something that person would not otherwise do (see §20.2.3). Assessing the parties' rights means examining how legal or other objective standards affect the parties' strengths and weaknesses. But assessing the power context explores how *nonlegal*, coercive factors do the same thing. Although, as we shall see, power differentials do not necessarily determine negotiation outcomes, they can have a significant impact on the bargaining process. In your preparation for a negotiation, therefore, you need to assess the potential effects of power imbalances.

### §21.4.1 TYPES OF POWER

The primary sources of power in legal negotiations are economic, social, psychological, and political power, and expertise. (See Chart 21D.)

*1. Economic power.* Obviously, the ability of a party to bring its resources to bear on a transaction or dispute can impact the negotiation. When a large corporation negotiates to acquire a smaller, family-run business, for example, the acquiring company will probably have at its disposal a much greater staff of lawyers, accountants, and tax experts. Similarly, in a criminal case, the state can overwhelm many defendants with its cadre of assistant district attorneys, investigators, and expert witnesses. And in the labor-management context, the company, as owner of its facilities, has the right, within legal limits, to set the conditions of work for its employees. In many cases, the dynamic of the negotiation is driven by these types of power imbalance.

Nevertheless, parties with large resources may suffer from limitations on their power, and parties with ostensibly fewer resources may have access to other means of economic power. The large corporation seeking to acquire the smaller company may be involved in numerous other transactions and litigation and may be able

CHART 21D ASSESSMENT OF PARTIES' POWER

Types of Power	Client's Power	Other Party's Power
1. Economic 2. Social 3. Psychological 4. Political 5. Expertise		
<b>WHAT EFFECT DO THESE POWER RELATIONSHIPS HAVE ON THE TRANSACTION/ DISPUTE?</b>		
<b>HOW CAN THE POWER RELATIONSHIP BE CHANGED?</b>		

to devote only limited staff to this deal. And the privately-owned company may have retained a small, boutique law firm that specializes in representing “underdogs” in such negotiations. Likewise, while the heavy caseload of many urban prosecutors may severely inhibit their ability to press all cases to the fullest extent possible, some white collar defendants may have the ability to retain legal “dream teams.” And in labor-management negotiations, the employees may have an advantage if they are few in number, have highly specialized skills, and operate expensive and complicated machinery. The company has invested heavily in equipment, and it may be cheaper to raise pay than to let that equipment lie idle while hard-to-replace workers are on strike.

**2. Social power.** Some transactions and disputes occur within a context where the parties can wield significant power within a given geographic, fraternal, religious, or similar community. For instance, suppose a young retailer has recently opened a business in a small town and negotiates a contract with a well-established and prominent wholesaler. Both parties certainly know the pressures that the wholesaler can exert on the retailer’s business relationships in the town, on his position in the community, and on his family and personal life. Or, within some traditional religious communities, parties can apply pressure from religious authorities to attempt to influence negotiations on child custody and property distribution issues.<sup>4</sup> Even within the more cosmopolitan world of regulatory

4. See, for example, *Fred Kaplan, Orthodox Jews Struggle with Divorce*, Boston Globe, May 3, 1998, at A-1, available in LEXIS, News Library, Globe File (describing problems created in civil divorce proceedings when Orthodox Jewish men refuse to give their wives religiously required divorces)

transactions and litigation, social power can play a role. Studies have shown, for instance, that because of the ongoing, day-to-day personal relationship between public utilities and their regulators' staffs, close and informal ties develop between them, often resulting in the companies having an undue influence over the process of regulatory negotiations.<sup>5</sup>

And differences in social status between the parties can create power imbalances in the bargaining process. A visit to a high-volume urban eviction or misdemeanor court will starkly reflect this problem. Court personnel and judges often treat the assistant district attorney assigned to a particular courtroom or a "regular" landlords' lawyer who consistently appears in a court with a deference that is not shown to low-income litigants or defendants of color. Indeed, in some of these courtrooms, African-American and Latino lawyers are often frequently mistaken by the regular lawyers or court personnel for one of the defendants. A defendant who does not speak English is at an even greater disadvantage in attempting to maneuver through the court process. In such an environment, social factors obviously influence negotiations.

3. *Psychological power.* All parties to a negotiation have certain psychological needs: desires, fears, anger, and other emotions (§21.2). And sometimes one or more of the parties try to exploit those needs in negotiations by wielding psychological power. In a child custody dispute, for example, one parent might threaten to poison the children's minds against the other unless the latter agrees to more liberal visitation terms. Likewise, in some landlord-tenant negotiations, the landlord might threaten to lock the tenant out of his apartment or disconnect the utility service, even though the landlord has no legal right to take such action. Threats like these can have profound effects on low-income tenants who do not know their rights—or on anybody who wants to live in his home in peace. Even in corporate bargaining, negotiators often attempt to play psychological games with their adversaries to obtain an advantage.

4. *Political power* is the ability to influence public officials, decision-makers, or opinion-makers. In high-profile civil rights, antitrust, or products liability cases, parties often attempt to enlist the support of government agencies or key media figures to influence the negotiations.

But even in less dramatic cases, parties can try to exert political power. Consider the *Ransom v. Dusak* case for example. On the one hand, the landlord might attempt to influence the political context by contacting friendly officials in the Department of Health to discourage the filing of any formal charges against him for the conditions at Ransom's apartment. On the other hand, Ransom might work with a community organization to organize the tenants to pressure Dusak to repair the property and to demand prompt action by the Health Department.

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and the religious authorities side with the husbands).

5. David M. Welborn & Anthony E. Brown, *Regulatory Policy and Processes: The Public Service Commissions in Tennessee, Kentucky & Georgia* 66 (1980). See Stefan H. Krieger, *Problems for Captive Ratepayers in Nonunanimous Settlements of Public Utility Rate Cases*, 12 Yale J. on Reg. 257, 306-308 (1995).

She might also try to interest a local newspaper in her story. In either case, these political actions or threats of political action by the parties would certainly affect any negotiation of the dispute.

5. *Expertise.* In some negotiations one party has greater expertise on certain issues involved in the transaction or dispute, and that knowledge can result in a power imbalance. Imagine, for instance, a company official with no computer background who is negotiating for the purchase of a software program for all his firm's accounts and records. Even if he educates himself on the basics of computer software, the salesperson will probably be at an advantage because of her superior knowledge about the product.

This situation frequently arises with novice lawyers. Suppose you are negotiating with an experienced lawyer in a routine matter, such as a real estate closing or settlement of a divorce case, and your adversary says, "This is the way attorneys in this area always handle escrow accounts for real estate taxes that will become due," or "They may have taught you this in law school, but let me tell you, Judge Lavagetto won't even countenance a request for joint custody."

You may have carefully researched the law on the subject and spoken to other experienced practitioners about the issue and come to the conclusion that your adversary is dead wrong—but you might still have the nagging feeling that he knows what he is talking about. Your adversary may have nothing more than psychological power over you because your inexperience makes you insecure. But unless you are willing to stand up to your adversary, that psychological power can be intimidating.

#### §21.4.2 SHIFTING THE POWER RELATIONSHIP

The power relationship between the parties is not static. You or the other party can take steps either before or during the negotiation to change the power balance. And those changes can significantly impact the course of the negotiations. In preparing for your negotiation, you should also identify those possible changes. (See Chart 21D.)

1. *Using the party's own power to affect the power balance.* Obviously, if one party in a negotiation has substantially more power in a particular area, the other party can either try to increase its power in the same area or develop power in some other area. For instance, a small company with limited resources locked in an antitrust dispute with a large manufacturer that has huge resources can increase its economic power by forging alliances with other small firms that are experiencing similar problems. Or a community organization challenging a powerful corporation's siting of a hazardous waste dump in a low-income neighborhood might attempt to reduce the power imbalance by using media pressure to influence government officials.

2. *Asserting rights to affect the power balance.* Often when a power imbalance exists between the parties to a dispute, the less powerful party can attempt to

if you're  
not sure  
about  
something  
ask for a  
small  
extension  
so you can  
✓ it out.

equalize the playing field by seeking rights-based relief. Litigation, for example, can be used by less powerful parties to protect their interests against more powerful opponents.

The prime example of the use of adjudication for this purpose is a federal civil rights action against a school system alleging racial discrimination, in which the plaintiffs rely on the protections of the civil rights laws and the procedural protections of the federal courts to rectify the power imbalance between themselves and local government officials.

**3. Reducing the perception of powerlessness.** Some power imbalances are more perceived than real. Although the threats of a spouse in a child custody dispute or of a landlord against a low-income tenant may be empty, they may still cause your client to feel inordinate fear. Likewise, even though your experienced opponent may be completely wrong in his interpretation of the law or his understanding of how a particular judge handles a matter, you, as an inexperienced lawyer, may feel intimidated by his pressure.

A partial remedy is to change the perception of powerlessness. To address your client's fear, counsel her about the actual risks involved in the situation. Certainly, you do not want to downplay actual dangers. But, in many instances, your client will not have been involved previously with a similar transaction or dispute, and the client's fears will be unfounded. In a calm setting, describe to the client your experiences or those of your colleagues in comparable cases, lay out the advantages and disadvantages of different options, and then let the client decide (see §§18.2–18.3).

Psychological power plays—aimed at you, your client, or both of you—often occur in hallway negotiations just before trial or at the last minute before a deal closes. To alleviate the impact of this conduct, prepare your client for the contingency that it will happen, and, if it does occur, counsel your client in a private setting where you and the client can coolly reflect on the odds that the opponent will in fact exercise his power. And be prepared in advance for situations where more experienced lawyers might try to manipulate you because you are still a novice lawyer. If you come prepared with cases and statutes in support of your position or have consulted with other lawyers about the habits of a particular judge, you will be in a better position to resist.

## ■ §21.5 OBTAINING YOUR CLIENT'S AUTHORITY

Now that you have assessed the interests, rights, and power of the different parties, you can start to develop a strategy for the negotiation. When engaging in this process, remember that your client has the ultimate authority to accept or reject a settlement or plea bargaining offer. Under the ABA Model Rules of Professional Conduct, “[a] lawyer shall abide by a client’s decision whether to accept an offer of settlement of a matter. In a criminal case, the lawyer shall abide by the client’s decision, after consultation with the lawyer, as to a plea to be

entered.”<sup>6</sup> Thus, you are always obligated to inform your client of a settlement offer, even if you suspect that the client will reject it.<sup>7</sup>

Because the client has the ultimate authority in the negotiation process, you should consult with the client from the beginning of your preparation for the negotiation. Have the client identify the core of what she wants in this transaction or dispute and what would be “icing on the cake.” As you will see in Chapter 22, this process requires a determination of the client’s Best Alternative To a Negotiated Agreement. Before the negotiation, ask the client to decide how much authority to settle she will give you. This, of course, is not a one-time process. As the negotiation proceeds, as you learn new information, as you receive offers from the other party, and as your client reevaluates her feelings about the transaction or dispute, your counseling will continue, and your client will determine whether to modify the authority she has given you.

Although your client has the ultimate authority to decide on any agreement, the type of authority your client gives you before and during the negotiation can vary greatly. Sometimes lawyers negotiate “without authority.” You can say to the other party’s lawyer, “I don’t have authority to negotiate those particular type of terms,” or “At this time, I don’t have authority on anything,” and then try to work out the most favorable deal to present to the client for approval. Often your clients will want you to take such an approach, telling you to see what you can get and asking you to report back to them. On the other hand, a desperate client might give you unlimited authority, saying to you, in effect, “Get me the best deal you can” and pre-authorizing you to accept it. In most instances, however, clients will give you limited authority, and you will continually consult with them for increased authority as the negotiation progresses.<sup>8</sup>

Two problems can arise from unlimited authority. One is that the client loses a lot of control over her own lawyer’s conduct during the negotiation because the lawyer has not been asked to report back for approval at various stages during the negotiation. The other problem is that a lawyer negotiating with unlimited authority can more easily be swept up in the heat of negotiation. Reporting back to the client before the deal is closed provides an opportunity for reflection before making a commitment.

On the other hand, if you have no authority to settle, you might be able to brainstorm more openly and flexibly with the other side, unconfined by limits set in advance by your client. But when you have no authority to settle, your client may delay making a realistic assessment of her case and expect more from the negotiations than is possible. You might solve that problem before negotiating by explaining to the client the possible deals that might result, given the practicalities of the situation.

We suspect that most lawyers generally feel comfortable negotiating with limited authority, which encourages the client to assess the case seriously before negotiation and allows the client to keep control over the process. But there are

*make sure your client is available by phone*

*It might also irritate the other side who did come w/ full authority.*

6. Model Rules of Professional Conduct Rule 1.2. A similar provision appears in EC 7-7 of the Model Code of Professional Responsibility.

7. ABA Comm. on Professional Ethics, Formal Op. 326 (1970).

8. Donald G. Gifford, *Legal Negotiation: Theory and Applications* 70 (1989).

disadvantages to limited authority, too. For example, social science studies show that lawyers with only limited authority are more likely to be more vigorous and tough in their use of competitive tactics than lawyers who have unlimited authority.<sup>9</sup>

The decision of how much authority you will be given is a strategic one and should fit the situation. What works well in one negotiation for one client might work badly in the next negotiation for another client.

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9. *Id.*

# CHAPTER 22

## DEVELOPING A NEGOTIATION STRATEGY

### §22.1 DETERMINING YOUR CLIENT'S BATNA

The first step in developing a negotiation strategy is to identify your client's BATNA or Best Alternative To a Negotiated Agreement (see §20.3.2).

Your BATNA is your walkaway alternative. It's your best course of action for satisfying your interests without the other's agreement. If you're negotiating with your boss over a raise, your BATNA might be to find a job with another firm. If you're negotiating with a salesperson, your BATNA might be to talk to the store manager or, if that fails, you might go to another store. If one nation is negotiating with another over unfair trade practices, its BATNA might be to appeal to the appropriate international tribunal [or impose a tariff].<sup>1</sup>

Determining the client's BATNA is valuable whichever approach you eventually use in the negotiation—adversarial, problem-solving, or a combination of both.

Although the alternative method—the fixing of a “bottom line”—helps your client to resist the pressures of negotiation by setting rigid bargaining limits, it has a number of disadvantages, at least at the beginning of your preparation. First, bottom lines reduce the potential for problem-solving negotiation. By focusing on a fixed preconception of what outcome is acceptable, it ignores the possibility of

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1. William Ury, *Getting Past No: Negotiating Your Way from Confrontation to Cooperation* 21–22 (1993).

unforeseen solutions that might develop during the negotiation.<sup>2</sup> After your review of the alternatives to negotiation, your client might decide that the negotiated solution must exceed or at least equal something she determines in advance. But if that decision is made too early, it might preclude a fair amount of problem-solving brainstorming during the negotiation.

Second, bottom lines are sometimes set too high. At the beginning of the negotiation process, your client's expectations may be unrealistic. But once they are crystallized into a bottom line, those expectations become a position that is hard to abandon even when it turns out later to be unrealistic. The converse can also be true. In some circumstances the bottom line may be too low, but because it is a position, the client might abandon it only reluctantly.

To determine your client's BATNA, you and your client should review your assessments of the parties' interests, rights, and power (Charts 21A, 21B, 21C, and 21D). From these assessments, generate options by identifying the possible alternatives to a negotiated settlement. From your interests assessment, consider the alternatives that your client can undertake herself to pursue her interests outside of any relationship with the other party. Then, from the rights assessments, identify what rights the client can assert before a court, agency, or arbitrator to address her interests. Finally, from the powers assessment, consider alternative ways that your client can wield power to coerce the other side into meeting her interests.

Assume, for example, that you represent an electric utility that is negotiating for an easement to install a high-voltage transmission line over some farmland. In reviewing its interests, your client might develop a number of possible alternatives to negotiation that it can pursue without any relationship with the property owner: obtaining an easement on other, nearby property; purchasing other property in the area for the installation of the line; enlarging an existing line; or abandoning plans altogether for the new installation. In reviewing its rights, your client might identify still another option: an eminent domain proceeding to obtain a condemnation order allowing an easement on the property. And in reviewing its power, your client might consider the possibility of raising its electric rates to the property owner (because of the extra cost of service) to force the granting of the easement.

Or consider a negotiation in the *Ransom v. Dusak* case. Assume you are counseling Ransom. After reviewing her interests, you might identify several alternatives to negotiation: repairing the conditions herself, moving out of the apartment, or just giving up. Turning to her rights, you might determine that Ransom has other options: withholding her rent and raising the inadequate conditions as a defense in an eviction action, filing an affirmative case against Dusak for breach of the warranty of habitability, or bringing a class action against him on behalf of all the tenants in the building. And, finally, considering her power, you might develop even more options, such as persuading the Health Department to prosecute Dusak for his failure to maintain the premises or organizing the tenants to pressure him to sell the building.

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2. Roger Fisher & William L. Ury, *Getting to Yes: Negotiating Agreement Without Giving In* 98-99 (2d ed. 1983).

After identifying possible alternatives to negotiation, you and your client should evaluate each of them to determine one or two BATNA's. You and the client should try to imagine the potential consequences of each option and consider its advantages and disadvantages. Although there is no simple formula for this evaluation, the client should consider: (1) whether a particular option meets those interests the client considers to be top priorities, (2) the strengths and weaknesses of the different parties' legal and factual theories, and (3) any power imbalance in the relationship with the other side.

In the utility easement hypothetical, for instance, where your client's primary interest is minimizing costs, the utility will need to consider the potential expense of obtaining an easement from other property owners in the area, the costs of enlarging existing lines, the financial necessity for an easement on this particular property, the costs (and risks) of eminent domain litigation, and the dangers of trying to impose increased rates on the property owner. And, in *Ransom v. Dusak*, if Ransom's principal interest is peace of mind and the safety of her children, she will need to weigh seriously the psychological pressures and time delays inherent in rights-based or power-based alternatives to negotiation.

Identification of a BATNA serves several functions. First, it helps your client decide whether to negotiate. If, for example, your rights-based BATNA is very strong and the client has little interest in any compromise, trial may be better than negotiating.

Second, a BATNA sets a standard by which to measure settlement proposals. If the client's BATNA is a very strong legal case which she is willing and financially able to pursue, she will probably reject an offer that does not address most of her interests adequately. If, on the other hand, the BATNA is a difficult defense of a lawsuit, the adjudication of which will strain the client's limited finances, she will be more likely to accept that very same offer.

Finally, as you will see in §22.3, the process of identifying a BATNA helps you select the most effective overall approach to the negotiation.

## ■ §22.2 DETERMINING THE OTHER PARTY'S BATNA

After identifying your client's BATNA, go further and try to predict the other side's BATNA. Reviewing the assessment of the other party's interests, rights, and power, you and your client should imagine the other side's alternatives to negotiation. Then, weighing these options in light of their imagined priority interests, try to identify the one or two that would best accomplish the other side's goals. By comparing your client's BATNA with the other side's BATNA, you get a good sense of the settlement range and the probability of achieving a negotiated agreement.

## ■ §22.3 SELECTING AN APPROACH TO THE NEGOTIATION

As you know by now, a lawyer using an adversarial approach to negotiation views what is happening as a conflict over distribution of limited resources and

tries to persuade the other side to concede that the adversarial lawyer's client is entitled to the maximum gain. A lawyer using a problem-solving approach tries to integrate the resources of each side to reach a settlement or deal and works with the other party to develop mutual agreements. Often a lawyer will use both types of approaches in the same negotiation (see §20.3.3). In preparation for a negotiation, determine the most effective approach or approaches for the situation in which you find yourself. Most of what you do and say while negotiating will depend on the approach you have selected.

The approach you take will depend, in large part, on the kind of authority the client has given you and the BATNA she has identified. Many proponents of problem-solving negotiation assert that almost all transactions and disputes are not zero-sum games, and they argue for the use of such an approach in most negotiations. "While there may be some paradigmatic zero-sum games in legal negotiations," one scholar asserts, "most are not zero-sum. For example, in a random search of 240 cases taken from 15 federal and state reporters most cases, in terms presented to the court, were not zero-sum disputes. . . . Child custody can become joint custody, zoning cases permit variances, and bankruptcy can become financial reorganization."<sup>3</sup>

Although this might be admirable theory, it ignores the fact that the client has the ultimate authority to accept or reject a proposal. Thus, even if the most efficient and reasonable solution to a child custody dispute might be a joint custody agreement, if your client insists on sole custody, a problem-solving approach to negotiation will probably not be useful in addressing her interests. You, of course, can counsel your client as to the benefits of a joint custody arrangement and warn her of the disadvantages of relying on a court proceeding as her BATNA, but the client does have the final say—and, in the end, might be right for her needs, even if we would rather she chose otherwise.

In determining the approach to take, consider the following factors:

1. *Integrative versus distributive aspects of the transaction or dispute.* While a problem-solving approach works better when there is good potential for joint gain, an adversarial approach works better when distributive issues predominate. To choose between them, consider the "Highest Priorities" section of your interests assessments chart (Chart 21A) and determine whether any viable solutions are suggested by these priorities that would be mutually acceptable to both parties. In a negotiation for the commercial sale of goods, for example, if the parties care about price more than anything else, an adversarial approach probably will protect each party's interests better because distributive issues predominate. But in a negotiation to create a joint venture, many common interests may exist that allow for a problem-solving approach; the joint venture will fail if the parties do not develop a sound relationship.
2. *Relationship interests versus one-shot deal.* If your interests assessment reflects important relationship interests between the parties, a problem-solving ap-

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3. Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 U.C.L.A. L. Rev. 754, 785 (1984).

proach may be strongly warranted because positional bargaining can be highly disruptive to relationships. In situations where an ongoing relationship exists between the parties—for example, labor and management, tenant and landlord, spouses, merchants who engage in frequent transactions—an adversarial approach has the potential for adversely affecting that relationship. “Even if you win the battle, you may lose the war. In the process you may destroy your relationship with the other side. And they will often find a way to renege or retaliate the next time they are in a position of power.”<sup>4</sup> In contrast, if the dispute or transaction is a “one-shot” deal with a party with whom your client has little or no relationship—and anticipates none in the future—the interest of maintaining the relationship does not predominate and the problem-solving approach is not so strongly indicated. You might, of course, still want to use a problem-solving approach for other reasons—for example, if your client wants to minimize the costs of litigating a dispute.

*3. Impact of psychological and reputational interests.* In some negotiations, if your client’s psychological or reputational interests matter most, they will dictate the approach you take in bargaining. If, for example, your client is deathly afraid of going to trial under any circumstances, you may opt for a problem-solving approach even if you believe you can achieve the maximum gain for your client using adversarial methods. Or, if in an action alleging a Clean Air Act violation, in which you represent a defendant company that believes the plaintiffs are unfairly attacking its environmental record and that wants to vindicate its reputation, you may choose an adversarial approach even if your evaluation of the different interests suggests possible integrative solutions.

*4. Strength or weaknesses of the rights-based or power-based BATNA’s.* Your approach to negotiation may be significantly affected by the strength or weakness of your rights-based or power-based BATNA’s. On one hand, if your client has a strong legal claim or power resources that could coerce the other side into submission, an adversarial approach may be warranted. Unless your client can realize maximum gain from the negotiation, she probably should resort to her BATNA. On the other hand, if her legal claims are more tenuous and you are litigating before a hostile judge or agency or the power balance tips in your opponent’s favor, a problem-solving approach may be advisable.

*5. Importance of a definitive ruling.* In some disputes one or both of the parties might need a definitive ruling on a particular legal issue. In certain constitutional, civil rights, environmental, or other “public interest” litigation, the plaintiff may have a strong interest in attaining a clear vindication of its rights either through a ruling from the court or agency or through a consent decree or other agreement under which the defendant acknowledges some liability. In such cases, even though a problem-solving approach might efficiently resolve the dispute, the plaintiff’s

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4. Ury, *supra* note 1, at 132 (“[as] the great Chinese strategist Sun Tzu wrote, “To win one hundred victories in one hundred battles is not the acme of skill. To subdue the enemy without fighting is the acme of skill”).

lawyer may want to adopt an adversarial approach to achieve the maximum gain in the negotiation: an admission of wrongdoing by the defendant.

Consider three cautions about these factors. First, they are merely guidelines to suggest ways of selecting your approach to negotiation; they are not mechanical rules. In some cases, for example, where your client wants a definitive ruling, you may select a problem-solving approach because other overriding client interests, such as maintaining a good relationship with the other side, suggest that an adversarial approach is not warranted. Second, in some if not most cases, different issues in the negotiation will be more amenable to one approach than to another. Third, you may find that your initial approach simply does not work with the other side. Be prepared to adapt your strategy to the negotiation behavior of the other party.

## §22.4 CRAFTING A PLAN: ADVERSARIAL APPROACH

In a negotiation in which you have chosen to take an adversarial approach, or for those issues in a particular negotiation for which you have selected that approach, your goal is to maximize your client's gain and minimize your client's loss. To accomplish this goal, you engage in an exchange of offers and counter-offers with the other side until you either reach an impasse or agreement. Along the way, you attempt to persuade the other party to make concessions based on different arguments, threats, warnings, or appeals. On a very basic level, this is not very different from the everyday dickering on a New York street corner between a vendor and a tourist:

**Vendor:** It sure looks like it's going to rain. These umbrellas are a great buy for \$15.00!

**Tourist:** I saw them on sale at my local Walmart in Tulsa for \$5.00 a piece. Fifteen dollars is a rip-off. I'll only pay \$7.50.

**Vendor:** Come on, you know as well as I that a Walmart umbrella would fall to pieces in one wind gust. These umbrellas are high-quality. They have a special patented lining to protect against wind gusts. But, I like you; I once had a good friend from Tulsa. For you today, I'll give you one for \$12.50.

**Tourist:** You have to be kidding! There's no difference between one umbrella and another. I bet you think I'm some sort of hick. In fact, I can go into Macy's basement right now, and I'm sure I can get one for much less than \$12.50. [*walking away*] Bottom line, I'll give you \$9.00.

**Vendor:** Wait a second! Do you want to stand in line at Macy's for an hour and then end up paying \$20.00. Listen. I need to make a living too; I have a family to support. Did you hear that thunder? OK, for you today, I'll give it to you for \$11.00.

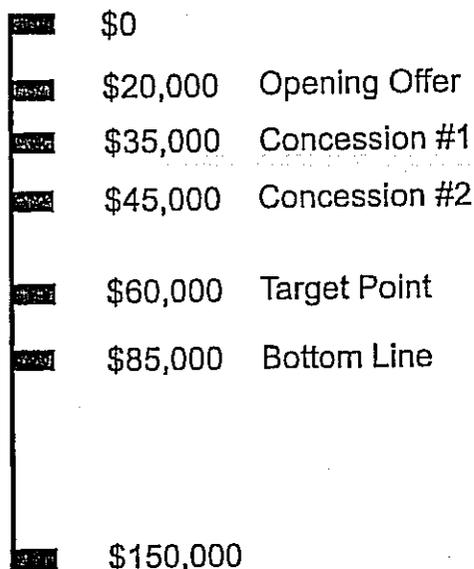
**Tourist:** [with raindrops falling on his head] \$10.00 and that's it.

**Vendor:** [grumbling] I'm making nothing on this sale, but I'll give it to you for \$10.00.

The street vendor and tourist probably did very little, if any, planning for their bargaining. You, on the other hand, will be negotiating for much more than an umbrella. Adversarial exchanges in important matters require serious preparation, including the creation by you and your client of a game plan for the exchange. This plan should identify several key positions in the exchange: (1) the opening offer; (2) the bottom line; (3) the target point (the position on the continuum of offers and counteroffers where you imagine the parties will agree); and (4) concession points (the moves you might make between the opening offer and your bottom line.<sup>5</sup> Section 22.1 warned against premature identification of a bottom line and advised that you initially look for a BATNA instead. Once you decide to take an adversarial approach, however, the identification of a bottom line is essential to effective planning. But counsel your client that circumstances might change, and that she should not become entrenched with that position.

To understand such a plan, consider a simple automobile accident personal injury case in which the plaintiff seeks a judgment of \$150,000, and the insurer denies any liability. After meeting with its lawyer and considering the circumstances of the case, the insurer prepares the game plan graphed in Chart 22A.<sup>6</sup>

**CHART 22A YOUR OWN BARGAINING RANGE**



5. Robert M. Bastress & Joseph D. Harbaugh, *Interviewing, Counseling, and Negotiating: Skills for Effective Representation* 475 (1990).

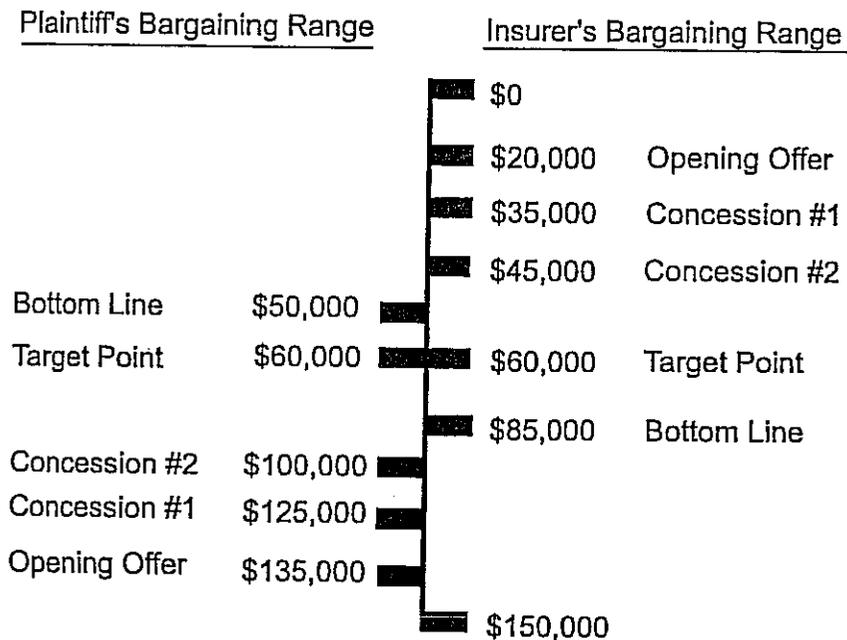
6. Similar graphs appear in *id.* at 476-77 and Thomas F. Guernsey, *A Practical Guide to Negotiation* 2 (1996).

Although we graphed this game plan in terms of dollar amounts, the same format can be used when the controversy is not about money. In a plea bargaining situation, for example, the parties might graph a continuum of different sentences, or, if the defendant has been charged with many crimes, the parties might chart the range of offenses from the major one to all the lesser included ones. Or, in the *Ransom v. Dusak* case, they might graph both monetary and nonmonetary positions, including not only compensation for Ransom, but also different repairs and the time when they will be completed.

After drawing up your own range of positions, graph your prediction of positions the other side will take. The insurer's lawyer, for example, might develop the diagram in Chart 22B. From this diagram, the insurer's lawyer can estimate a settlement range of \$50,000 (the plaintiff's bottom line) to \$85,000 (his client's bottom line). His goal in the negotiation will be to convince the plaintiff to concede all the way to her bottom line and to fend off the attempts of the plaintiff's lawyer to force the insurance company to its bottom line. Most of the time, your predictions of the other party's positions will not be completely accurate. This process helps, however, to give you and your client a rough estimate of the relationship between the other side's bargaining range and yours.

Although these ranges, by their very nature, are merely estimates, do not pull them out of a hat. You and your client should return to your assessment charts (Charts 21A, 21B, 21C, and 21D) and evaluate your client's and the other party's positions in light of each parties' interests, rights, and power. In the personal injury hypothetical, the insurer's lawyer will certainly consider the strengths and weaknesses of each party's case in terms of both legal and factual theory. But he

**CHART 22B BOTH PARTIES' BARGAINING RANGE**



will also want to examine the interests and power of the plaintiff and its effect on her bargaining range. If the plaintiff is strapped for funds, for example, or at the deposition appeared very reluctant to proceed with the case, these facts will certainly affect the estimate the insurer's lawyer makes of the plaintiff's bottom line. Additionally, he might want to consider his own client's economic and financial interests in developing its bottom line and concession points.

Evaluating interests, rights, and power in terms of the parties' respective bargaining ranges will also help you develop arguments, threats, warnings, and appeals to convince the other side to make concessions. In order to elicit concessions from the other side, you must demonstrate that your offer is better than its BATNA. The process of estimating these ranges helps you to develop ways of causing the other side to make concessions and to know when you should make concessions (see §24.1.4).

## §22.5 CRAFTING A PLAN: PROBLEM-SOLVING APPROACH

### §22.5.1 THE BRAINSTORMING PROCESS

When you decide to take a problem-solving approach, your goal is to find solutions that will integrate the resources of both sides or to increase the resources available so that a mutually agreeable solution is more likely. You and your client should consider the priorities of each party's interests (Chart 21A) and explore any possible solutions suggested by these priorities. Unlike the adversarial approach, where you concentrate on maximizing the interests of your client and consider the most obvious distributive options, here you try to broaden the number of options for settlement beyond obvious issues of dividing a fixed pie.

In a personal injury case, for instance, the plaintiff may need money for medical and rehabilitation expenses in the future, and the uninsured defendant may need to limit his short-term expenditures. With an adversarial approach, the parties simply try to reach an agreement as to the amount of the plaintiff's recovery. Under a problem-solving approach, the parties might agree on a structured settlement, paid over time, that might meet the needs of both parties. Or in a commercial leasing transaction where the property needs a major renovation, the landlord is strapped for cash, and the potential tenant is worried about whether a profit can be made within the first year, a potential solution might be a reduced rent for the first year, in exchange for which the tenant will repair the property.

To plan for a problem-solving negotiation, think of ways to expand the range of options. Encourage your client to break out of the tendency to view the issues as a simple distributive problem. Ask the client to help you brainstorm other solutions. For example, in representing the buyer in a negotiation for the sale of a house, ask her, "If the seller won't decrease the price, is there anything else he can do that would make you willing to pay that amount?" Another way of increasing the range of options is to enlist the assistance of an expert. Accountants and other financial consultants, for example, can be helpful in devising methods for organizing a settlement or transaction to meet the interests of both parties.

In developing different solutions, look beyond the resources of the parties and ask yourself whether there are ways of creating resources elsewhere. One commentator tells the story, for example, of a large antitrust case against drug manufacturers in which a subgroup of plaintiff drug wholesalers and retailers rejected as inadequate the \$3 million allocated to them of the \$100 million total settlement. Because of time and other logistic constraints, the settlement terms could not be modified, and it appeared that the deal was a failure. The parties developed a solution, however, under which the drug manufacturers placed a large portion of the total settlement in a bank account for one year in trust for the plaintiffs. After that year, the trust account accrued interest, and the protesting drug wholesalers and retailers were able to take a larger award. The bank provided the mechanism for augmenting the resources available to the parties.<sup>7</sup> By considering expansion of resources, the negotiation becomes less of a zero-sum game.

### §22.5.2 A CASE STUDY OF THE BRAINSTORMING PROCESS

Consider a concrete example of how to plan an actual case:

Ms. Cassini, a registered nurse, established a group home for people with AIDS in a predominantly African-American neighborhood in the City of Wincliffe. She became interested in this patient population through her nursing practice at a large metropolitan hospital. She rented the house from a local landlord and received funding from the state Department of Social Services for each of the residents at the facility. Cassini chose this neighborhood because of the low rent and because several of the residents originally grew up in the area. Six to eight people lived in the home at any one time, and a nurse or other health attendant was always on duty. The residents shared housekeeping responsibilities, ate their meals together, and spent their spare time in common social activities.

Neighbors around the home became very distressed by its existence. They felt that the city had dumped group homes in their neighborhood. (Just around the block from Cassini's facility was a group home for people with muscular dystrophy.) In fact, they felt that the city discriminated against them because they were African-American, and that it had neglected their area in a number of ways: the schools were some of the worst in the city, services were substandard, and complaints about these conditions were largely ignored. The neighbors feared that their children would come into contact with residents at Cassini's facility, that visitors to the home would congest the streets, and that, because of the number of people living in and visiting the home, the noise level at night would be intolerable.

The neighbors complained to local politicians, who talked to city officials. The city investigated the matter and discovered that its own sanitation workers were also concerned about possible contamination from handling refuse from the home. In response to these complaints and under pressure from the local politicians, the city brought two misdemeanor charges against Cassini for violation of the city's zoning ordinance, which allowed only single-family homes in the area

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7. Menkel-Meadow, *supra* note 3, at 810.

where she operated her facility. If convicted, Cassini was subject to six-months imprisonment and a \$1,000 fine for each of the charges.

Ms. Cassini came to a law school clinic, which agreed to represent her. Clinic students investigated the facts and law and decided to file a complaint with the United States Department of Housing and Urban Development (HUD) against the city, arguing that the city's actions constituted discrimination against the handicapped residents of the home in violation of the federal Fair Housing Act.<sup>8</sup>

At this point, the students began to prepare for negotiations with the City Attorney. They met with Cassini and asked her about her interests in the case. She said that she wanted to keep running the home for people with AIDS; that she wanted an apology from the city and the neighbors for the way they treated her; that she was worried about a possible jail sentence and criminal record; and that she wanted the confidentiality for the residents of the facility protected. Although she initially expressed a strong conviction about pressing the case to trial, she eventually broke down crying and said that she just wanted the case to go away.

After the arraignment, the City Attorney told the Clinic students that the city felt obligated to enforce the zoning ordinance and wanted to protect its citizens and sanitation workers from contamination. The City Attorney confided "off the record" that he was under pressure from local politicians to push this case to trial as soon as possible. While he acknowledged that the city was concerned about the HUD investigation and that case precedents were against the city, the students got the sense that the city was equally concerned about complaints from the neighbors that the city was discriminating against African-Americans.

After identifying the interests of the parties, the students, jointly with Cassini, prioritized these interests. For Cassini, they decided that her primary concerns were (1) avoiding a conviction, (2) continuing to maintain a group home for people with AIDS, and (3) restoring her peace of mind. For the city, they guessed that its principal interests were (1) safety of its citizens and workers and (2) risk avoidance (avoiding negative responses from both the neighbors and HUD). Finally, the students decided to identify the interests of the neighbors, even though they were not parties to the case, both because of the pressure they had brought against the city and because of the relationship they had with Cassini. The students speculated that the neighbors' interests included safety and noise conditions in their area and better treatment of their neighborhood by city officials.

Based on their assessment of these priorities, the students decided to take a problem-solving approach in the plea bargaining. Cassini wanted peace of mind, and to build a good relationship with the neighbors, and the city was risk averse. Perhaps there were ways of integrating the interests of the parties into a solution.

The students found that the listing of interests suggested a number of possible options besides the obvious ones, which were conviction of Cassini or dismissal of the charges. One possible option was the city's cooperation in helping Cassini find a new location for her facility in an area with fewer group homes. That would allow Cassini to continue her work, and would give her some peace of mind by ending the criminal case and her contact with the neighbors. The city

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8. See 42 U.S.C. §3604.

would be relieved of the political pressures, although new problems might be created with the people who lived near the new home, and the fears of the sanitation workers would not be alleviated.

A second possibility was a program to educate the neighbors and sanitation workers about the negligible dangers of contamination with AIDS and to develop a cooperative relationship between the home and the neighbors to avoid safety and noise problems. This option would permit Cassini to keep the home at its present location. It addressed, to some extent, the concerns of the neighbors, and, if it were to satisfy the neighbors, it would also satisfy one of the city's primary interests.

A final option was an expansion of city services (garbage collection, road repair, police surveillance) in the neighborhood. If the neighbors felt that there actually could be benefits from the existence of the group home, they might be less concerned about the existence of such facilities in the area.

Obviously, there were drawbacks with each of these options. The city, for example, might reject any relocation option or the cost of any additional neighborhood services. The neighbors, even with an educational program, might have irrational fears about people with AIDS. The purpose of this planning process, however, is not to develop absolutely acceptable solutions. It is to open the door to the other side so that the two sides can continue brainstorming to find mutually agreeable solutions (see §24.2.2). Just as the adversarial planning method attempts to guess at the responses of the other party and to lay a foundation for a future exchange of offers, this process tries to speculate about the interests of the other parties to establish a basis for future brainstorming.

## §22.6 INFORMATION GATHERING, DISCLOSING, AND CONCEALING

Whether you are planning an adversarial approach, a problem-solving approach, or a combination of the two, you need to prepare for "information bargaining." A negotiation involves not only an exchange of offers and counteroffers or brainstorming of possible solutions, but also attempts by each party to learn more information from the other. With this information, each party can readjust its concession strategy in adversarial bargaining or its brainstorming approach in problem-solving negotiation. To prepare, identify: (1) information you want to obtain from the other party so you can understand their bargaining stance; (2) information you want to disclose voluntarily to the other party to facilitate your overall plan; and (3) information you want to conceal that might weaken your negotiation posture. The next few pages explain how to identify information in each of these categories. Chapter 23 describes techniques to use during the negotiation to elicit or conceal this information (also see §25.1).

**1. Gathering information.** Remember that the negotiation process itself is by no means the only vehicle for gathering information about the other side's position or interests in the dispute or transaction. Significant information can be obtained through your client, third parties, library research, public records, and, in the dispute context, formal discovery. In a negotiation for a sale of a business, for

example, if the seller had previously engaged in failed negotiations with another potential buyer, that party might be an important source of information for the new buyer about the seller's "bottom line." Likewise, in a medical malpractice suit, the defendant's lawyer may be able to discover much more about the plaintiff's interests in the case at a deposition than might be learned during settlement talks. In other words, before relying on the bargaining process as a means to gather information, try to develop other sources of proof.

In adversarial negotiations, the most important information you need is the other party's bottom line. For that very reason, most opponents will not disclose that information. Your goal, then, is to gather as much circumstantial evidence as possible about the other party's assessment of the transaction or dispute so that you can better estimate its bottom line. Start with your interests assessment of the case and identify what particular interests of the other party might affect its determination of a bargaining range. You might want to explore, for example, the other side's psychological or reputational interests in a lawsuit or its concerns about the transaction costs of the case.

Then, examining your rights assessment of the case, identify both the issues about which your position is strong and the ones in which your position is weak. By obtaining information about the other side's views on these issues, you will learn whether or not its assessment coincides with yours and how it evaluates the merits of its position.

Finally, in regard to your power assessment of the case, consider the types of potential power the other side might wield and how the likelihood of the exercise of that power would affect that party's bottom line. In most cases, you obviously do not want to ask the other side directly if it will exercise a particular form of power if bargaining fails. But if the other side threatens the exercise of that power, you probably will want to gather information to determine whether it is bluffing or is serious.

In problem-solving bargaining, the types of information you want to obtain flow from your interests assessment of the case. Consider the priority interests you have predicted for the other side that lead to the integrative solutions you have brainstormed. In the negotiations, you will want to gather information to confirm whether or not those forecasts are correct. In the group home case, for instance, the students predicted that one of the city's interests would be to avert the risks of a Fair Housing Act enforcement proceeding and brainstormed a possible solution to meet that interest (that the city help Cassini find a new location for her facilities). In the negotiation process, the students would want to explore whether the city in fact was so worried that it would help Cassini relocate.

**2. Disclosing information.** The process of identifying information that you should disclose during the negotiation requires an analysis converse to the one you used in regard to the information you want to gather from the other side. Thus, in an adversarial negotiation, you want to disclose information that will apprise the other side of facts showing a strong bottom line for your client: that your client's interests support few concessions in bargaining, that your legal and factual theories are convincing, and that you will use power alternatives if negotiations fail. And, in problem-solving negotiations, you will want to reveal

information about your client's interests that will facilitate a solution that will integrate both parties' concerns. In either case, however, your disclosure must be limited by tactical considerations (it must be credible or it will not persuade) and ethical constraints (it must be permitted by the rules of professional responsibility; see §20.5).

**3. Concealing information.** Although many lawyers consider the concealment of damaging information an absolute rule of negotiation, it is better to think of the issue as a tactical one. Initially, consider whether the other side has—or will have—access to the information. If the other side will learn it from other sources anyway, it might be useless to hide it. Second, examine whether candid acknowledgment of damaging facts may have the potential to increase the strength of your negotiating positions. In a negotiation for the sale of a house, for example, consider the impact on the buyer if the seller's lawyer admits, "I know that the ceiling in the upstairs bedroom had some water damage a few years ago, but it was fixed, and there hasn't been a problem since then." Finally, analyze whether the disclosure will facilitate the negotiation. Especially in problem-solving bargaining, your openness as to the interests of your client—even if you disclose some weakness of your client—might encourage a similar response from the other side. If, however, the damaging information is not easily accessible and its disclosure serves no tactical purpose, consider ethically acceptable means of concealing it (see §20.5).

## §22.7 PLANNING THE AGENDA

You need to decide the best sequence in which to address issues as well as where and when to negotiate.

### §22.7.1 ISSUES AGENDA

After you have decided on an approach to the negotiations and considered information issues, plan your issues agenda. Most negotiations concern multiple issues. In the settlement of a police brutality case, for example, the parties might negotiate over the proportionate liability of the different officers, the amount of actual damages, any entitlement to punitive damages, admissions of liability, and the plaintiff's right to attorney's fees. A number of issues can arise even in a routine negotiation for a home sale in those states where lawyers represent the parties to such a transaction. Examples might include responsibility for performing and paying for certain repairs, deadlines for required inspections and obtaining financing, date for closing, and liability for real estate taxes. As part of your strategy development, consider the sequence in which you want to address these issues.

Although there are no hard and fast rules for designing your issues agenda, the primary consideration is whether your sequencing facilitates the overall plan you have developed for the negotiation. Initial consideration of minor issues can be effective if you want to establish a cooperative relationship with the other party that facilitates the negotiation of more difficult issues.<sup>9</sup> This approach can

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9. Donald G. Gifford, *Legal Negotiation: Theory and Applications* 76 (1989).

help if you are using problem-solving methods in the negotiation and are concerned about the other party's willingness to engage in such bargaining. But it might delay the inevitable negotiation over the major issues. For that reason, you may want to begin with bargaining over one or two major issues to evaluate the possibility of any settlement or deal. In an adversarial context in which your client has a very strong rights- or power-based BATNA, consideration of a major issue first can give you control over the negotiation. Finally, you might want to negotiate multiple issues simultaneously. In adversarial bargaining, this approach can lead to "logrolling" or trading off of concessions. In problem-solving negotiation, it can assist in mutual brainstorming of solutions.

Development of your own agenda, of course, does not assure that the other party's lawyer will agree with your sequencing of issues. Therefore, be prepared to explain the advantages of your approach and how it will lead to a quick resolution of the issues. In a negotiation where you want to take a problem-solving approach, this explanation might help you persuade the other side to take such an approach. You might also want to present an initial draft agreement to the other party and propose that you both work off of it. This approach helps you to take control of the negotiation. If, however, you want to develop a cooperative relationship with the other side, the surprise presentation of the document at a negotiation session can be viewed as too controlling and can alienate the other attorney.

### §22.7.2 VENUE AGENDA

Where will you negotiate: on the phone, at one of the lawyers' offices, at one of the parties' homes or businesses, or at a "neutral" location such as the hallway outside the courtroom? In some disputes, you may have the option of holding negotiation sessions at a pretrial conference in court. And in many cases, the bargaining will entail multiple negotiation sessions with the possibility of using different venues.

Although some lawyers believe that they are always at an advantage if the negotiation takes place at their office, the issue of turf, as with all the other issues of negotiation strategy, is not so clear-cut. Again, consider the overall plan you have developed for the negotiation and the impact, if any, of the venue on this plan. The use of the telephone as the medium for bargaining, for example, can be effective for "short and sweet" exchanges in an adversarial negotiation. Where your client has limited resources, it is also less expensive than a face-to-face meeting. If you want to use a problem-solving approach, however, and the other side is reluctant to engage in mutual brainstorming, the phone can be very limiting. Whichever location you choose for the negotiation, in-person negotiation is more conducive to the parties' rolling up their sleeves and considering solutions than a telephonic dialogue. On the phone, each party can easily control the agenda simply by hanging up.

In regard to the location of face-to-face negotiations, an advantage to hosting the negotiation is that you can have the resources you need under your command—your files, research materials, and support staff. You feel more in control of the situation. But there are also advantages to negotiating on the other party's turf. You can demonstrate your intent to cooperate by consenting to meet at the other

lawyer's office. And when you are away from your own office, you can honestly excuse yourself if you do not have the necessary materials on hand.

Consider also the person you are and where you will perform best. One of the authors of this book believes that the sales operations of new car dealerships are designed to confuse buyers like him into making mistakes. This author never conducts a serious negotiation at a car dealership. He sends faxes to several dealers, mentioning the wholesale price of the car he wants to buy and asking each dealer to open the negotiation by stating the smallest amount of markup the dealer would be willing to accept from the sale. He completes the negotiation over the telephone and signs the sales contract by fax. Another author of this book believes that he is at his best in face-to-face negotiations and does all his negotiating at the dealership. Neither author gets better deals than the other. But each gets better deals than he would if he were to negotiate in a way that did not fit his personality.

### **§22.7.3 TIMING AGENDA**

Most bargaining does not occur in a vacuum where the parties have infinite time to resolve the transaction or dispute. Negotiators regularly face deadlines imposed either by the circumstances of the case (the date when the seller wants to leave her home, the time when the manufacturer needs the goods for production, or the expiration of the collective bargaining agreement); by third-party requirements (a scheduled trial date); or by limitations set by one or both of the parties themselves (an offer that expires next Tuesday). As part of your strategic planning, you should consider how to handle these deadlines.

As to external deadlines—those imposed by circumstances outside of the negotiation—examine the pros and cons of different timing agendas. The most propitious time to negotiate may not be the earliest. You may, for example, need additional information to assess adequately the strengths and weaknesses of your legal case; you may feel that the case is not “ripe” for serious bargaining because the other side has not seriously considered the merits of the case; or you may want to wait until the trial court has decided a pivotal motion. Indeed, especially if you are using the adversarial approach, you may want to wait until the eve of trial or other deadline to pressure a less powerful opponent into a deal.

On the other hand, delay has its disadvantages. The more resources the other party has devoted to preparing for trial, the greater may be the possibility that it will take its risks going to trial. If your client wants to conserve resources or panics at the thought of going to trial, or if you fear that the opposing lawyer will try to take advantage of your client in the court hallway on the eve of trial, you also may want to forgo waiting until the last minute. Moreover, if you are using a problem-solving approach, you need to allow enough time to work out a mutually agreeable solution. The time pressures of deadlines are not always conducive to such a process.

When the other side sets a deadline on an offer, you can try to persuade the other lawyer that deadlines like that are counterproductive. But if that fails, your client will need to decide, based on her BATNA, whether to accept or reject the offer as made.

If you want to make an offer with a deadline, remember that while that might be effective in adversarial bargaining, it can harm a problem-solving negotiation. It not only hinders the development of a cooperative atmosphere but can also harm any long-term relationship your client might want to maintain with the other side. And unless you are serious about such self-imposed deadlines, your credibility will be significantly damaged if the other side calls your bluff and you have to renege on your threat (see §25.2.2).

## ■ §22.8 ADAPTING YOUR STRATEGY

The strategy that you initially develop should not be set in stone. As bargaining proceeds, the interests, rights, and power context of the negotiation may change; your client may modify her BATNA; speculation about the responses of the other party may simply be wrong; the information you gather during the negotiation may significantly affect your client's and your own perception of the situation; and the overall approach you have selected for the negotiation (adversarial or problem-solving) may turn out to be ineffective. Despite your valiant efforts to use a problem-solving approach to negotiation, for example, the other side might simply ignore your entreaties and bulldoze ahead with an adversarial approach. On the other hand, you may find that adversarial bargaining by both sides has worn both parties down to such a small bargaining range that a problem-solving approach helps to obtain a final agreement. "Competitive tactics early in the negotiation, perhaps ironically, sometimes increase the prospects for successful use of . . . problem solving tactics later in the negotiation."<sup>10</sup>

Accordingly, throughout the negotiation process, reevaluate your initial strategy and be open to adapting it to any changed circumstances. The analysis will be the same as the one you used in your initial planning: go back to your assessment of the parties' interests, rights, and power (Charts 21A, 21B, 21C, and 21D), have your client fine tune her BATNA, consider what additional information might be helpful, and reexamine the approach you have selected for addressing the different issues.

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10. *Id.* at 35.

# CHAPTER 23

## STYLES AND RITUALS

### §23.1 CREATING NEGOTIATING STYLES

In conducting any negotiation, you should select for yourself a negotiating style that will work well in the circumstances. You should also recognize any issues raised by cultural differences between you and the other side.

#### §23.1.1 SELECTING A STYLE FOR A PARTICULAR NEGOTIATION

As you have learned, negotiating, like most other lawyering skills, requires the ability to communicate. You may have developed the most creative and clever strategy possible, but you will fail unless you can communicate effectively with the other side. Your style is an important aspect of this ability to communicate. Style is the manner in which you personally relate to the other side—for example, your word choice, tone of voice, body language, and eye contact.

Strategy is the overall approach you have chosen to achieve your client's goals—adversarial, problem-solving, or both. Style is the personal manner in which you execute this strategy: how you present your proposals, listen to the other side's proposals, and respond. Obviously, this distinction is a bit artificial (often your tone will reflect your strategy). But the distinction helps in understanding the conduct of a negotiation. Strategy is the content of your presentation to the other side (*what* you say). Style is the way you package this presentation (*how* you say it). Just as you select a strategy for a particular negotiation, you also select a style (or styles).

We do not suggest that you try to become someone who you are not. How you negotiate—as well as how you examine a witness, counsel a client, or argue to a judge—will grow out of who you are. You can change your negotiation style or modify it to meet the needs of a particular situation, but to some degree the ways you negotiate or try a case will be determined by your personality. If you are naturally abrasive and aggressive, for example, it will be difficult, if not impossible, for you to come across as a Milquetoast.

But you cannot ignore the fact that the style you use in your communications with your adversary may have an important effect on its outcome. Part of becoming an effective lawyer is learning how to act. As you become more experienced, try to develop a repertoire of negotiating masks that grow out of your personality but also communicate effectively in the particular situation. Indeed, this approach is applicable to all aspects of the lawyering process. Consider, for example, the cross-examination of witnesses in an assault case. The defense lawyer might very well wear a very different mask in her questioning of the eighty-year-old grandmother who allegedly witnessed the incident and the detective who obtained the confession from her client.

Two categories of negotiating style are *combative* and *cordial*. While a combative style is tough, dominating, forceful, aggressive, and attacking, a cordial style is personable, friendly, and tactful.<sup>1</sup> Obviously, there is a broad continuum between these two styles. And in any given negotiation, a lawyer might switch from one to another style depending upon the impact the lawyer wants to make on the other side. Moreover, since style depends in large part on the perception of the listener, the precise attributes of a particular style will depend significantly on the culture in which the negotiation is taking place. That perception might vary from one region of the country to another, and it might vary from one type of law practice to another. What is combative in a complex federal antitrust negotiation might be considered very tepid in high-volume urban eviction bargaining.

In choosing your negotiation style, consider a number of factors. Sometimes your selection will be based on the strategy you choose. If you are using an adversarial approach, if your client has a strong rights or power-based BATNA, and if she is willing to make few concessions, you may select a combative style to demonstrate to the other side your client's confidence in her position. On the other hand, if you are using a problem-solving strategy, if your client has a strong interest in maintaining good relations with the other side, and if she is open to a wide variety of solutions to the issues, you might choose a cordial approach to encourage mutual brainstorming.

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1. See Gerald R. Williams, *Legal Negotiation and Settlement* 21, 23 (1983). Williams's definition of competitive and cooperative conflates both strategic and stylistic aspects of the negotiator. We focus solely on the stylistic considerations. We use "combative" and "cordial" because they clearly connote the tone, rather than the substance of the communication. The terms "competitive" and "cooperative," although used by other authors, are ambiguous because they could refer either to substance or tone. See Robert M. Bastress & Joseph D. Harbaugh, *Interviewing, Counseling, and Negotiating: Skills for Effective Representation* 390 (1990); Donald G. Gifford, *Legal Negotiation: Theory and Applications* 18 (1989). Actually, all negotiations are competitive in the sense that each side tries to satisfy its own interests. Problem-solving and adversarial approaches and combative and cordial tones are just different ways of accomplishing that.

Other times, however, your selection of style will depend not so much on the strategic approach you have selected as on your attempt to respond to a position of your adversary. Consider, for example, this exchange between the City Attorney and Cassini's lawyer during a negotiation in the group home case:

*City Attorney:* I'm sorry, Sara. May I call you Sara? But my bosses have told me that this case has to go to some type of disposition. I agree with you about the need for facilities for people with AIDS; one of my sister's friends is dying of AIDS. But there's a lot of political pressure on the city, and we can't ignore it. Now, if your client would be willing to close the home and pay a token fine, I'm sure we can work this out. I can tell you, both my bosses and I want your client to stay out of jail.

*Cassini's Attorney:* Come on now, Mr. Jackson, we all know that the case law supports our position, and that eventually your case will be thrown out. If you want, I can spend the whole day talking to you about the Supreme Court precedents in our favor. But I *don't* want to talk about the law. That's simply a waste of time . . .

*City Attorney:* Sara, I'm sorry, but . . .

*Cassini's Attorney:* *Just listen to me!* Think of the time you'll be wasting responding to all my papers! I think it's in both of our clients' interests—and in the interest of the neighbors of the home—to work out a mutually acceptable agreement. I know your client doesn't want this case going on forever, but my client will stand by her guns to maintain facilities for people with AIDS. Why don't we just try to find another location in the city . . .

*City Attorney:* I'm sorry, Sara, there's no way; I really wish we could do it . . .

*Cassini's Attorney:* [*standing up*] Please don't interrupt me. Just listen. Is it *really* in your interest to litigate this case?

*City Attorney:* Regrettably, I have to.

In this interchange, the City Attorney clearly has chosen an adversarial approach but has decided to be perceived as cordial. (In fact, he may feel contempt for both Cassini and her lawyer, but he has selected this style to set a tone for the bargaining.) He knows that Cassini and her lawyer view this case as very significant, but uses a cordiality mask to try to open the door for a swift resolution of the case; the city gets rid of the house, and Cassini gets off with a light fine. Cassini's lawyer, on the other hand, wants to use a problem-solving approach, but feels frustrated in her inability to engage the City Attorney in this process. In response to the City Attorney's refusal to brainstorm, she becomes combative to try to get him to listen. She says, in essence, to the City Attorney, "If you want

to focus solely on the criminal charges, we can litigate them to the hilt. But since we do have some mutual interests, let's work things out."

Still other times, your choice of style should be based on credibility factors. The effectiveness of your communication in a negotiation depends in large part on your own credibility. And style can have a significant effect on the way the other side and its lawyer perceive you. In a negotiation for the purchase of a \$200,000 home, for example, where an issue arises about a \$200 paint job, a combative approach most likely will be considered disproportionate to the circumstances and may damage the lawyer's credibility when more significant issues arise later in the negotiation. It might even lead to such mistrust that the deal will fall through.

One factor that should not affect your style is your client's or your own emotions about the other side or the other side's lawyer. As Fisher and Ury advise, you need to "separate the people from the problem."<sup>2</sup> While novice lawyers often select a combative approach against an experienced lawyer to show that "they know what they are doing," their bravado may not communicate effectively with the opposing lawyer, who will probably see through the mask and might even break off the negotiation. Other inexperienced lawyers, intimidated by their first negotiations, will mistakenly use a cordial approach because the other lawyer seems so "nice."

Communicate as effectively as possible. Your goal is not to score points or make friends.

### §23.1.2 RECOGNIZING CROSS-CULTURAL DIFFERENCES

Although most legal negotiations occur between lawyers within the same local community, in recent years lawyers have become more involved in transactions and disputes with their counterparts from other cultures. Traditionally, such cross-cultural bargaining arose in the context of international diplomacy. Nowadays, however, they occur regularly in negotiations between private lawyers and official representatives of other nations, and in commercial transactions between companies in different countries.

Since styles of communication may vary significantly from culture to culture, consider the nature of the culture of the other side and its lawyer in selecting your negotiation style for effective cross-cultural bargaining. Even when negotiating with an attorney or party from another region of the country, you may want to think about the effect of cultural differences on negotiation style. Consider, for example, the characters of the soft-spoken Southern judge and abrasive New Yorker in the movie *My Cousin Vinnie*. Likewise, the gender of the participants may affect the style of the negotiation. Studies are inconclusive, however, on whether female and male lawyers behave significantly differently in negotiations.<sup>3</sup>

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2. Roger Fisher & William L. Ury, *Getting to Yes: Negotiating Agreement Without Giving In* 11 (2d ed. 1983).

3. See Lloyd Burton, et al., *Feminist Theory, Professional Ethics, and Gender-Related Distinctions in Attorney Negotiating Styles*, 1991 J. Disp. Resol. 199; Thomas F. Guernsey, *A Practical Guide to Negotiation* 26-27 (1996).

While it is beyond the scope of this text to discuss in depth methods for selecting a style in cross-cultural negotiation, it is helpful to identify some of the factors which should be considered.<sup>4</sup>

1. *Language.* What you might consider standard norms of discourse in America may be viewed as abrasive and rude in another culture. In some negotiations, you will be communicating through an interpreter. You need to understand the limitations of translation and the effects of language structure on communication.

2. *Environment.* While in the United States, for example, the conference room or formal boardroom is the principal setting for bargaining, in other cultures, the real negotiations occur elsewhere: in hotel lobbies, dining rooms, or private homes.

3. *Social organization and hierarchy.* In crafting a style for a negotiation with someone from another culture, consider aspects of that culture's social hierarchy. In societies with strict vertical hierarchies, it is considered inappropriate to bargain with someone of a different status. This can cause problems for an American lawyer in countries where lawyers have a lower social rank than they do here.

4. *Contexting.* Social scientists distinguish between high context cultures in which the participants rely most heavily on how a statement is said rather than what is said and low context cultures in which the participants rely primarily on what is said.<sup>5</sup> In a high context culture, such as Japan or the Arab countries, the parties rely a great deal on nonverbal communication and pay less attention to detail. In lower context cultures, such as Germany and the United States, the focus is on the words and literal meaning of the communication.<sup>6</sup> Accordingly, while a direct, combative style may be effective in many American negotiations, it may not work, and in fact may be counterproductive, in dealings with negotiators from high context cultures.

5. *Conceptions of time.* Some cultures, such as the United States, understand time in a monochronic manner: time is inflexible, and schedules should be adhered to as closely as possible. In other cultures, time is understood polychronically: it is flexible, and schedules are not closely adhered to. When an American negotiates with someone from a culture with a polychronic conception of time, the American may become impatient with the delays inherent in such a context and may respond combatively. The American may need to adjust style to that of the other side's culture.

Given these variables in cross-cultural communication, you should consider the sensibilities of the other participants before you embark on negotiations that cross profound cultural divides. Lawyers who have participated in similar negotiations can provide helpful assistance. And you may want to consult the

4. See David A. Victor, *Cross-Cultural Awareness*, in *The ABA Guide to International Business Negotiations* 15 (James R. Silkenat & Jeffrey M. Aresty, eds. 1994); see also Raymond Cohen, *Negotiating Across Cultures* 19-32 (1991).

5. Cohen, *supra* note 4, at 25. ("A high-context culture communicates allusively rather than directly").

6. Victor, *supra* note 4, at 20.

significant body of literature that is being developed on bargaining with negotiators from particular regions or countries.<sup>7</sup>

## ■ §23.2 NEGOTIATION RITUALS

Negotiations often follow set patterns. In some fields these rituals have become so well established that they are entrenched social expectations. Some labor negotiations between unions and management, for example, always entail months of useless bargaining between low-level representatives until the principals sit down at the table on the eve of a strike deadline to work out a contract. And experienced plaintiff personal injury lawyers and insurance claims agents who know each other well engage in almost ritualistic exchanges of information and offers and counteroffers before agreeing on a deal. In some urban eviction practices, lawyers for both parties know that the real bargaining will only take place in the hallways between the first and second calls of the cases.

Some rituals can serve useful psychological functions such as building trust, maintaining comfort levels, and setting a tone. You should investigate any customs or conventions that local practitioners usually follow for the kind of bargaining you will conduct. Your client or more experienced lawyers who have engaged in similar negotiations may have this information.

On the other hand, some rituals serve no useful purpose for your client and can actually be harmful. Novice lawyers conducting dispute negotiations often engage in a ritual that goes something like this: Each lawyer brags about the quality of the lawyer's evidence ("we have three witnesses who say your client ran the red light") and the likelihood of prevailing at trial ("the jury will be upset about my client's injuries"), while insulting the other lawyer's evidence ("nobody's going to believe your pathologist") and the other party's chance at trial ("I think you're going to lose"). This goes on like a barroom argument, each lawyer trying to top the other and each getting angry at the other, until finally both realize that time is running out and their clients need a deal. Then, without much thought about why, the lawyers quickly come to an agreement that is about halfway between the positions they started with. This is not really negotiation at all. It is a prolonged threat display, followed by a quick splitting of the difference. Neither side has really influenced the other, and neither has thought about interests, rights, or power enough to plan a careful negotiation.

In your conduct of a negotiation weigh the advantages and disadvantages of following established bargaining patterns. Examine the effect of these rituals on your overall negotiation strategy. If you decide to break with established local tradition, consider ways to handle the situation without jeopardizing the negotiation. In an environment where swift adversarial bargaining is the norm, for instance, and you want to engage in a problem-solving approach, you may want

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7. For example, see Rona R. Mears, *Contracting in Mexico: A Legal and Practical Guide to Negotiating and Drafting*, 24 St. Mary's L.J. 737 (1993); Robert J. Walters, "Now That I Ate the Sushi, Do We Have A Deal?"—*The Lawyer As Negotiator in Japanese-U.S. Business Transactions*, 12 Int'l Bus. 335 (1991).

to begin the negotiations by acknowledging explicitly that you know the usual custom in the area is to have quick exchanges of offers, but that you think it is in the interest of both parties to spend at least a short while brainstorming mutually agreeable solutions.

Besides learning your area's negotiation customs, learn the local bargaining semantics. These coded signals send messages—either intentionally or unintentionally—about a particular side's position or attitude in the negotiation. They differ by geographic region, cultural environment, and practice area. For example, in some places the phrase "I think we can work this out" is just an opening pleasantry to the bargaining, while elsewhere it is a message that the parties are on the brink of a deal. Likewise, the outburst, "This is hopeless! We're going to trial!" in one locale can literally mean that there is deadlock while in another merely that the other party is frustrated and will quickly be back to the table. Sensitivity to these different signals can help you maneuver your way through the bargaining.

The best way to become familiar with these signals is to play the role of an anthropologist during your initial negotiations in a particular locale. Be sensitive to the signals used by various negotiators and the way others respond to them. Think about this not only during negotiation, but also afterward when you have an opportunity to reflect on the bargaining dynamics.

## CHAPTER

# 24

## FOLLOWING THROUGH ON YOUR PLAN

### §24.1 ADVERSARIAL APPROACH

Remember that your goal in adversarial bargaining is to maximize your client's gain and minimize your loss (see §22.4). You need to communicate your offers and concessions in a way that persuades the other party to agree on terms most favorable to your client.

#### §24.1.1 MAKING INITIAL OFFERS

As part of your planning, you have decided what you will offer initially, and you have estimated what the other side will initially offer (see Chart 22B).

Should you make your initial offer before the other side makes theirs? Or should you wait to hear their initial offer before you make yours? Many lawyers feel that it is always a sign of weakness to be the first party to make an offer. Lawyers often engage in a ritual dance at the beginning of a negotiation, each lawyer trying to delay making an initial offer until the other side has done so first.

Empirical research, however, shows that there is *no* correlation between who makes the first offer and the eventual outcome of the negotiation.<sup>1</sup> Sometimes, you can help your client by making the first offer, and sometimes you can hurt

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1. Robert M. Bastress & Joseph D. Harbaugh, *Interviewing, Counseling, and Negotiating: Skills for Effective Representation* 493 (1990).

your client by doing so. An advantage to making the first offer is that you can evaluate the other party's reaction and adjust your concession strategy accordingly. The main disadvantage occurs when you really do not know what the object of the negotiation is worth. If the other side makes the first offer, you can learn something about how much they think it is worth. If you make the first offer, it might be too pessimistic and lead to a smaller return for your client.

### §24.1.2 DECIDING HOW MUCH TO OFFER

To determine your initial offer, return to your assessment of interests, rights, and power (Charts 21A, 21B, 21C, and 21D). Then, try to predict the possible outcomes of the case—including your BATNA—by using the same methods you would use in preparing for client counseling (see §17.3.1).

Research does show a correlation between a forceful, but credible, initial offer and a better result for the party making the offer.<sup>2</sup> Apparently, such offers can convey the message that you are convinced of the strength of the case. The danger, of course, is that the other side will immediately reject it. If you stick to your guns, the other party might remain at the bargaining table—or might not. If the offer is rejected, you might have to make a quick concession that would send the exact opposite message—that you were really bluffing—unless you are committed to your offer and are willing to pursue your BATNA instead of negotiation. You might decide instead to demonstrate the strength of your case through persuasive arguments rather than by inflating your initial offer.

Credibility problems can arise through “Boulwarism”—making only one offer, which you believe is reasonable and just, and telling the other side that you will settle on no other terms. Boulwarism is named after a former vice-president of General Electric who used this tactic in labor negotiations in the 1950s. Although his offers might be considered fair objectively, they generated controversy and friction and made settlement more difficult. When the other side has hired someone—a union leader or a lawyer—to do the bargaining, one of the other side's interests may be to get enough out of the negotiation to make it appear the bargainer was worth hiring.

Most negotiators enter the bargaining process intending to give and take. Boulwarism, by challenging that basic notion, raises significant risks. Boulwarism can be effective only if three things are true: you have enough information to be reasonably certain that your one offer is better than the other side's BATNA; you can convince the other side of that; and you can convince the other side that you will not make any further concessions. If you try Boulwarism and it fails, you must either make a concession, losing credibility in the process, or stick to your initial offer and retreat to your own BATNA when it is rejected.

Generally, a good initial offer—a forceful, but credible one—is aimed further, but not too much further, than the best terms on which you think the other side might settle. Suppose you represent a plaintiff who is suing for \$150,000, and you believe that the most the defendant might be willing to settle for is \$85,000. Your initial offer should not be \$85,000. If you offer that, the defendant will insist

2. Donald G. Gifford, *Legal Negotiation: Theory and Applications* 99 (1989).

that you retreat—the process of give and take—and retreating would produce a settlement of less than \$85,000. Instead, you offer to settle for more than that, but not so much more that you lose credibility. If you were to offer to settle for \$150,000—the amount you sued for—the other side would laugh and ask you to get back in touch with them when you decide to negotiate. Instead, you offer to settle for the highest figure that does not hurt your credibility, perhaps \$135,000.

### §24.1.3 PRESENTING YOUR INITIAL OFFER

As with so much of lawyering, the way you communicate the initial offer is crucial to its effectiveness. You must convince the other side that your bottom line is high (even if your client has not set a bottom line).<sup>3</sup> The key to such a presentation is *credibility*. Unless the other party believes that you are committed to your position, you will not induce it to reassess its bargaining position.

Compare two versions of initial offers from Ransom's lawyer in *Ransom v. Dusak*:

#### *Initial Offer—Example 1*

Unless repairs are made to Ransom's apartment within the next few weeks, we're going to take this case to trial. We also want \$5,000 in damages. That's for the loss of use of her apartment for the last few months and for her medical bills. You know that because of the lack of heat in her apartment last winter her two-year-old and four-year-old came down with bronchitis, and my client had to pay the doctor bills. And there were other expenses resulting from the wretched conditions too. You know what they are; we've laid them out in the complaint. We also want punitive damages for her mental anguish. We are willing to waive some of those damages if the repairs are made as soon as possible.

#### *Initial Offer—Example 2*

We demand that the following repairs be made to my client's apartment by August 8: the roof must be repaired in the master bedroom by a licensed contractor; the entire apartment must be fumigated by a licensed exterminator; and the heating system must be repaired by a licensed plumber. By August 10, a representative from the Health Department will inspect to verify the fulfillment of these conditions. For breach of the warranty of habitability, we demand actual damages in the amount of \$1,950—that's one-half of the rent paid from January to June. As I'm sure your client will acknowledge, the bedroom is one-half of the usable space in the apartment. Also, we want reimbursement for the \$250 doctor bill my client paid because of the bronchitis caused by the lack of heat. Here's a copy of the bill. We'll also agree to only \$250 in punitive damages if the repairs are made by August 8. As you know, Judge Lopez is hard on landlords who breach the warranty of habitability. Just last month, she assessed \$2,000 in punitive damages against A & E Realty in a similar case.

These two examples illustrate the factors that most affect the credibility of initial offers: *specificity, justification, and consequence*.

3. Bastress & Harbaugh, *supra* note 1, at 507.

*Specificity* reflects a firmness of the negotiator's commitment.<sup>4</sup> As you learned in §13.3.1, specific facts are more credible than mere conclusions because specific facts paint a clear and vivid picture while conclusions are ambiguous. Similarly, by presenting specific offers and demands in negotiation, you show your client's commitment to a position in clear terms. In Example 1, the lawyer ambiguously says that her client wants "repairs made . . . within the next few weeks," "damages for the loss of use of her apartment for the last few months," "other expenses," and "punitive damages." By not specifying the exact conditions her client wants repaired, the time deadline for the repairs, the amount of damages, and the precise basis for damages, she gives the impression that her client is ambivalent about her demands. Indeed, without an exact offer, the client appears to be unsure of her bottom line and open to making concessions.

The specificity in Example 2, on the other hand, demonstrates a strong commitment of the client to her particular positions: she knows when she wants the conditions remedied; what exact amount of damages she wants; and what the grounds are for her claims. And by specifying that she wants all the work performed by licensed contractors and to be confirmed by the representative from the Health Department, the lawyer tells the other side her client "means business" when she says she wants the work done properly.

*Justification* means clearly communicated reasons for your client's offer. Sound reasons give a ring of legitimacy to an offer. Your client did not arbitrarily pick this amount or take this position but instead has seriously considered it and is committed to it for the reasons you describe. And you rely on the logic of the justification to convince the other side that your offer is better than its BATNA. For this reason, the stronger the logic of your reasoning, the more credible is the specific justification.

Again, consider the two examples from *Ransom v. Dusak*. In Example 1, the lawyer gives no justification for her demand for damages for the loss of the apartment. She vaguely refers to "other expenses resulting from the wretched conditions," does not explicitly point to any claims for relief in the complaint, and gives no reasons for the punitive damages except for a feeble reference to "mental anguish." The overall impact of this justification is weak. It appears that the lawyer has not done her homework, that neither she nor her client has seriously thought through the \$5,000 demand, and that, therefore, her client is not firmly committed to the offer.

In contrast, the lawyer in Example 2 gives the legal basis for her claim, provides explicit arguments for the 50% abatement in rent, and even provides the other party's lawyer with evidence of damages. And by agreeing to only \$250 in punitive damages if the repairs are made by August 8, she furnishes a credible rationale for the offer.

You develop your justifications from your assessments of interests, rights, and power (Charts 21A, 21B, 21C, and 21D). Sometimes, you can use a particular interest of your client—or of the other side—to establish the credibility of your

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4. Richard E. Walton & Robert B. McKersie, *A Behavioral Theory of Labor Negotiations* 93–94 (1965). Of course, if the offer is unrealistic, no degree of specificity will increase its credibility (see §24.1.2).

offer. If, for example, Dusak worries about his reputation in the community, Ransom's lawyer might use that interest as a justification for an expedited schedule for work on the apartment. In other situations, you might want to visit the strengths and weaknesses portions of the rights assessment chart (Chart 21B on page 244) to develop a justification. And in still other situations, you may want to rely on power imbalances to "leverage" a deal. If, for example, Ransom is a member of a tenants group whose members are ready to withhold rent, she may have a very strong justification for requesting substantial damages.

*Consequence* means that the offer communicates the consequences that will ensue if the other side rejects it. Your statement of consequences will be credible only if the other side knows that you are willing and able to follow through with it. A strong commitment to the offer can be demonstrated by an explicit description of the consequences of its rejection. Often, but not always, the consequence is that you will pursue your BATNA rather than continue negotiating.

In Example 1 the lawyer vaguely refers to the consequences of "going to take this case to trial"—as though she is going through the motions of stating a consequence, rather than developing one persuasively. In Example 2, on the other hand, the lawyer specifically spells out the consequences: "As you know, Judge Lopez is hard on landlords who breach the warranty of habitability. Just last month, she assessed \$2,000 in punitive damages against A & E Realty in a similar case." By providing a detailed account of the possible consequences, this lawyer communicates both her knowledge of the legal situation and her conviction as to the merits of her case. In framing your initial offer, always try to describe your BATNA in the most persuasive way possible.

#### **§24.1.4 MAKING SUBSEQUENT DEMANDS AND CONCESSIONS**

Unless the other side immediately accepts your initial offer, it might make counteroffers, and you will have to determine how to follow through with your strategy. One thing, however, is almost certain: you will not want to increase your demands. Although the law of professional responsibility does not prohibit such a tactic, it can cause you to lose a great deal of credibility and severely damage your relationship with the other side. If you have demonstrated a firm commitment to your initial offer, it seems illogical to be augmenting it. Moreover, the other party will most likely consider an increase in demand as an act of bad faith and mistrust your motives in any future bargaining. That tactic is warranted only when a surprising piece of significant information appears and significantly changes the complexion of the case in your favor. If that happens, explain to the other side clearly and logically the reasons for your reverse in course.

Accordingly, after the initial offer and counteroffer, both sides will eventually have to make concessions of some kind. Indeed, in your planning for an adversarial negotiation, you identify various concession points between your initial offer and your bottom line (see §22.4). The fact that you identify these points in your preparation, however, does not mean that you automatically make a concession when you receive a counteroffer. Remember that your goal in adversarial bargaining is maximizing your gain. One of the ways of achieving this goal is to give the other side the impression that your client's bottom line is higher on the

bargaining range than your client has actually placed it. Research has shown that a grudging approach to concessions pays off with better outcomes.<sup>5</sup> Rapid, and especially large, concessions, on the other hand, send the opposite message: after making an inflated initial offer, your client is willing to make substantial and continuing concessions. Similarly, if you make a series of concessions without receiving any from the other side, you communicate a weak commitment to your positions.

Nevertheless, concessions will be required in certain circumstances.<sup>6</sup> First, concessions may be needed to prevent deadlocks. Lawyers generally understand that in adversarial bargaining a deal is possible within the two bargaining ranges only if each party makes at least some concessions. If you are not close to your client's bottom line, failure to make a concession when both parties dig in their heels will harm your client's interests unless your client's BATNA is better than any deal you foresee getting out of the negotiation.

The second reason for conceding something is to persuade the other side to make concessions, too. In some negotiations, the parties get stuck at a given point and refuse to move. Even a slight concession shows some flexibility and may encourage some movement from the other side.

Third, concessions may be necessary to maintain a good working relationship with the other side. If your client and the other side plan to have an ongoing relationship after this particular negotiation, contentious scrabbling at each point in the bargaining can damage that relationship. Again, a flexible concession strategy may be needed.

Finally, concessions may be required when both parties face a deadline. Unless your client wants to abandon the negotiation and pursue her BATNA instead, you may need to make concessions as a deadline approaches. In the dispute context, this reason for concessions can be very important when a judge, hearing officer, or arbitrator is encouraging settlement. If the adjudicator views your intransigence as the reason for the negotiation's failure, you may enter the trial or hearing at a disadvantage.

Once you have decided to make a concession, think about how to package it in a way that will minimize an impression of weakness. Let us revisit the *Ransom v. Dusak* case and assume that Dusak's lawyer has responded to Ransom's initial offer by saying his client will only pay \$100 nominal damages. Here are two possible ways of conceding:

*Concession—Example 3*

All right, to move the negotiations along, my client will agree to damages of \$1,550. But that's my client's bottom line. She won't move any further.

*Concession—Example 4*

I think my client might agree to a slight decrease in damages just to get this case moving. We both know how long it takes to get a case on the trial calendar before Judge Lopez, and my client wants the money now to pay the medical bill. If you look

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5. Bastress & Harbaugh, *supra* note 1, at 520.

6. See generally *Id.* at 516–18; Gifford, *supra* note 2, at 147–49.

at Judge Lopez's decision in the A & E Realty case, the smallest abatement she will give us is one-half. So to get this case settled now, we'll agree to a one-third abatement plus the \$250 medical bill—that's \$1,550. That's as generous as we can get. Under no circumstances is my client going to accept nominal damages of \$100. Your client will have to get realistic.

In two ways, the concession in Example 4 is much stronger. First, it includes *a specific justification for the concession*. While the Example 3 lawyer gives no justification for her concession, the lawyer in Example 4 gives reasons: her client wants to pay the medical bill and does not have to wait for a trial. Just as in our analysis of the initial offers, a justification adds credibility to the position. Here, the concession does not come out of nowhere but instead reflects the interests of the conceding lawyer's client.

If you force yourself to give a specific justification for each concession, you impose a self-discipline that helps you resist the psychological pressure many young lawyers feel to make concessions just to "get along" with the other side. If you and your client cannot identify a rationale for a concession, you should probably stand pat. As with initial offers, examine your assessment of interests, rights, and power to identify the bases for each concession.

Second, the lawyer in Example 4 *makes it clear that this concession will not inevitably lead to others*. She refers to Judge Lopez's decision in the A & E Realty case that allowed for a 50% abatement and argues that a one-third abatement is as generous as she can be. The message is clear: the consequence of a rejection of this offer will be trial, not further concessions. The Example 3 lawyer on the other hand merely makes the conclusory statement that her concession is her client's bottom line. By giving no explanation, she appears to be doing little more than bluffing.

The approach taken by the Example 3 lawyer can often lead to "splitting the difference" positional bargaining. By failing to provide Dusak's lawyer with any justification for her concession or explanation why she will not continue to concede, the lawyer in Example 3 opens the door to this kind of response: "All right, my client will only give \$100; your client wants \$1,550. Let's split the difference, say \$725." Although that might be efficient near the end of a negotiation when the parties are very close to an agreement (see §25.4), it is dangerous at earlier stages because it focuses exclusively on the numbers rather than the reasons why the numbers exist: an analysis of your client's and the other party's interests, rights, and power. Splitting the difference is not negotiating. It is appropriate only when the parties are so close to settlement that it is no longer cost-efficient to argue about how to divide the last few inches.

The approach taken by the Example 4 lawyer also facilitates the negotiation process. By inviting Dusak's lawyer to make some concessions, she tries to engage in serious bargaining on the damages issue. She ends her concession by flatly rejecting a *de minimis* offer of damages and asks the other side to become more realistic. If Dusak's lawyer responds with an offer of \$150 or \$200, she will learn that—at least for now—there is little chance of any movement on the damages issue, and her client will have to decide whether to pursue her BATNA instead of negotiating. If Dusak's counteroffer is more substantial, Ransom's lawyer can decide whether to make further concessions.

## §24.2 PROBLEM-SOLVING APPROACH

The biggest challenge for the problem-solving negotiator is to bring the other side into the problem-solving process.

### §24.2.1 MAKING INITIAL OFFERS

Remember that, if you have chosen a problem-solving approach, your goal is to find solutions that will integrate the resources of both parties or increase resources to reach an agreement that will address both parties' interests. To achieve this goal, you want to engage in creative brainstorming with the lawyer for the other side. Fisher and Ury suggest that you try to persuade the other party to participate in an informal brainstorming session, separate from a negotiation meeting, where the parties can educate each other about their interests, and the participants can freely exchange ideas "off the record."<sup>7</sup> Although that might be worthwhile in settling international disputes or negotiations in complex, multiparty cases, in the day-to-day practice of law, it is usually not cost efficient.

Accordingly, in most situations, your initial offer is an invitation to problem-solving brainstorming within the negotiation itself. For this invitation to be effective, you need to accomplish three things: (1) identify the interests both of your client and of the other side; (2) present a solution or range of solutions that addresses these interests; and (3) open the door to joint development of other options. For example, consider the following offer from Cassini's lawyer:

Mr. Jackson, I think my client and I have a pretty good idea of the city's position. The neighbors around my client's facility are very scared about the people who are living in the house. You and I know that most of those fears are unfounded; you cannot "catch" AIDS just by living next door to someone with the condition. But these neighbors are concerned about the value of their homes, the protection of their kids, and the overall quality of life in their community. And they are putting political pressure on the city. I understand the bind that you are in. But maybe the city can help them and the people living in the homes.

What if we arrange for an educational program at the local community center for the people in the neighborhood to inform them about the precautions Ms. Cassini has in place at the home to protect the community. And then perhaps the city could provide additional garbage pick-ups and city services in the area to tell the community that the existence of the facility actually is going to benefit the community. Ms. Cassini would then be able to maintain her homes, the neighbors would feel more at ease, and the pressure would be off your client. What do you think?

As this example illustrates, explicit identification of the interests of both parties—especially those of your adversary—can help to initiate a problem-solving dialogue.

The other side will appreciate your effort to understand their needs. "People listen better if they feel that you have understood them. They tend to think that

7. Roger Fisher & William L. Ury, *Getting to Yes: Negotiating Agreement Without Giving In* 63 (2d ed. 1983).

those who understand them are intelligent and sympathetic people whose own opinions may be worth listening to. So if you want the other side to appreciate your interest, begin by demonstrating that you appreciate theirs.”<sup>8</sup> Even if you are off the mark in your speculations about their interests, the other side will appreciate your attempt to put yourself in their shoes. Statements like “I understand the bind you are in” invite the other side to look at your interests and engage in joint problem-solving. Moreover, presentation of a possible solution or range of solutions suggests that you have a serious commitment to achieving a resolution that will address both parties’ concerns. Just as a specific initial offer indicates a firm position in adversarial bargaining, concrete suggestions in the initial offer in problem-solving negotiation demonstrate that your recognition of the other party’s interests is not mere lip service.

Be careful, however, not to become so detailed in your description of the proposed solution that you give the impression that you are wedded to it. You want your initial offer to open the door to joint problem-solving, not to become the focus for positional bargaining. For that reason, it may be helpful to suggest one or two alternative options in your offer and ask the other side for its own proposals. In the Cassini negotiation, for example, the lawyer proposes a general education program and suggests additional garbage pick-up and “other services,” and then asks the other side for its response. As the city becomes more explicit as to its interests and needs, Cassini’s lawyer can work with the City Attorney to build on these proposals to develop a solution that will meet both parties’ interests.

#### **§24.2.2 HANDLING THE OTHER SIDE’S RELUCTANCE TO PROBLEM SOLVE**

In many negotiations, after you have made your initial offer of a proposed solution, the other side’s lawyer will answer with a classical adversarial response. In the Cassini case, for instance, the City Attorney might respond to the initial offer by saying: “I’m sorry, but the only solution the city will accept is the closing of these facilities. We’re open to negotiation about a possible sentence for Ms. Cassini but nothing else.” The natural tendency of many lawyers in this situation is to lecture the City Attorney about the advantages of agreeing to Cassini’s proposals or to take the bait and change to an adversarial approach contesting the merits of the city’s case. But, if you want to continue with a problem-solving approach, lectures and arguments will not help. Your goal is to convince the other side’s lawyer that such a problem-solving approach will in fact satisfy their interests better than adversarial bargaining. To accomplish this goal, you need to get the other side talking about their interests, not just adversarial positions.

To reframe the discussion and focus on interests, respond to the other side’s rigid positions with open-ended, problem-solving questions:

**1. Ask “Why?”** Try to get the other side to identify the interests underlying their position. When the City Attorney responds that the issue of the closing of the

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8. *Id.* at 51.

facilities is nonnegotiable, ask directly for the basis for his client's position. If, for example, he says, "because of the political pressure from the neighbors," you may have an opening for brainstorming ways to address that concern.

2. Ask "Why not?" Some lawyers simply will refuse to answer a direct question about their clients' interests but may be eager to criticize your proposals. So after the other side's lawyer rejects your proposal, ask what is wrong with it, and the other lawyer might start talking about the interests that lawyer is expected to protect. For instance, when the City Attorney rejects Cassini's proposal for additional services because of the strains on the city's budget, her lawyer can start discussing ways to minimize increased costs or obtain funds from other sources.

3. Ask "What if?" Another technique for initiating joint problem-solving is to probe specifics of solutions. After the City Attorney has rejected the educational program as ineffective, Cassini's lawyer could suggest alternatives: meetings with Cassini and Board of Health officials in neighbors' homes; visits by the neighbors to the facility; or participation by local clergy in the programs. Some lawyers will feel uncomfortable consistently saying "No" and may actually start brainstorming.

4. Ask for their advice. Most lawyers love to give advice to their adversaries, especially novice lawyers. By seeking counsel from the other side's lawyer, you may be able to get him to identify his client's interests and spark some problem-solving discussion. Cassini's lawyer perhaps could say to the City Attorney: "I know my client won't close the facilities. She is very committed to helping people with AIDS. What should I tell her?" Although the response might be a lecture on the necessity of obeying zoning laws, the City Attorney might start talking about the pressure from the neighbors and give you an opportunity to start a discussion on the issue.

5. Ask "What makes that fair?" Outright rejection of the other side's position often leads to adversarial bargaining about that position. To prevent that, you might ask the other lawyer why his client's position is fair. Try to get the other side to refocus from reliance on the rights or power that support its position to an explanation of why, from a practical standpoint, this position is reasonable. Suppose, for example, that Cassini's lawyer were to ask the City Attorney: "I know your interpretation of the zoning law and don't agree with it. But, putting that issue aside, how is displacing these people with AIDS fair and reasonable?" Again, if the City Attorney starts discussing the underpinnings of the city's decision to prosecute, you have an opening for joint problem-solving.<sup>9</sup>

In many cases, the other side's lawyer will remain adamantly adversarial. The City Attorney, for instance, might consistently answer all these questions by saying: "I know your client's position, and it might be very reasonable. But the city is required to enforce the zoning laws, and Ms. Cassini broke them." At this point, you have two choices: walk away from the bargaining table or join in adversarial

9. For an in-depth description of the use of these different questioning techniques, see William Ury, *Getting Past No: Negotiating Your Way from Confrontation to Cooperation* 78-89 (1993).

bargaining. But try not to abandon prematurely your efforts to initiate problem-solving negotiation. Some lawyers do not instinctively problem solve, and it might take a while for the other lawyer to adjust to your approach. Moreover, even if you do switch to an adversarial approach, you might try to restart problem-solving efforts after you have demonstrated the strengths of your client's rights or power.

### §24.2.3 PROBLEM-SOLVING WITH THE OTHER PARTY

Even if the other lawyer agrees to join you in a problem-solving approach, your work is far from over. The fact that the other party will consider options addressing the interests of both parties does not mean that the solutions you have developed in your planning will be agreeable to the other side. In adversarial bargaining, after the initial offers, there is usually a give-and-take of concessions until an agreement is reached. In problem-solving negotiation, on the other hand, you need to work with the other lawyer to develop alternative solutions and fine tune them to try to reach a deal.

This process—referred to by William Ury as “building a golden bridge”<sup>10</sup> between your client and the other side—can be facilitated by several methods.

*1. Keep focused on the parties' interests.* For problem-solving to work, the parties need to make their interests explicit and concentrate on developing solutions to meet these needs. If the parties become distracted and entangled in wrangles about rights and power, problem-solving will fail. Assume, for instance, that the City Attorney in the Cassini case responds to her initial offer by saying: “I understand your interests, but you have to recognize where we are coming from. What if your client temporarily closes the homes, and we agree to look for other possible locations for the facilities?” If Cassini's lawyer replies, “My client has every right under the Fair Housing Act to keep these homes open,” she has invited the City Attorney to return to adversarial bargaining. Rather than focusing on rights, she should explain to the City Attorney why his proposal does not meet her client's needs.

*2. Engage in brainstorming.* Often, especially where the relationship between the parties has been good or the lawyers both have adopted a cordial style, the two sides might want to engage in a brainstorming session as part of the negotiation. This process is quite simple: after identifying their respective interests, the parties can sit facing a large pad of paper or a whiteboard and generate different solutions to the problems; they star those options which seem most promising; and then, focusing on the interests of the parties, attempt to invent improvements in those options. The key to effective brainstorming with another party is separating the inventing of the options from evaluation of their merits.

10. *Id.* at 105 (referring to a saying of Sun Tzu, “Build your opponent a golden bridge to retreat across”).

A brainstorming session is designed to produce as many ideas as possible to solve the problem at hand. The key ground rule is to postpone all criticism and evaluation of ideas. The group simply invents ideas without pausing to consider whether they are good or bad, realistic, or unrealistic. With those inhibitions removed, one idea should stimulate another, like firecrackers setting off one another.<sup>11</sup>

A neutral third party can even facilitate the discussion.

**3. Try to develop ways to meet unmet needs.** The major hang-up in problem-solving bargaining is usually that a proposed solution fails to meet the needs of a party. To address this problem, revisit the type of analysis you conducted in planning for problem-solving negotiation. Do not assume a fixed pie (one that cannot be made larger). Instead, think of ways to increase the available resources to meet that need.<sup>12</sup> If, for instance, the city worries that Cassini's proposal does not address the health needs of its sanitation workers, a possible option might be to obtain state funding to provide for equipment and training on the handling of HIV-infected materials.

Another way of dealing with unmet needs is to create conditional solutions. One of the parties in a negotiation might believe that a particular problem will arise in the future but the other disagrees. Instead of arguing over whether this contingency will occur, the parties can frame their agreement to address it. On the noise issue in the Cassini case, for example, if the neighbors fear increased traffic on their street in the evenings because of visitors to the group home, a possible solution might be a condition in the agreement that if the neighbors are bothered by noise in the evenings, Cassini will prohibit visitors to the facility after 8:00 p.m.

**4. Engage in incorporation.** In a problem-solving negotiation, if each party presents its own proposal, the parties might become so entrenched in their advocacy that the bargaining can quickly become adversarial in nature. To avoid this problem, try to incorporate elements of the other party's proposal into the modification of your own client's proposal. By recognizing some reasonableness in the other side's proposal, you continue to acknowledge its interests and keep the door open to further problem-solving. Suppose you represent the landlord in the *Ransom v. Dusak* case, and the tenant's lawyer has proposed the completion of all the work in the apartment within one week, a completely independent counterproposal might be greeted with the negative reaction that your client does not understand the terrible conditions in which Ransom lives. By agreeing to accept Ransom's repair list, but tinkering with particular work completion dates and the precise nature of the work, you might reach a deal.

**5. Help the other side to save face.** In many negotiations, the reputational and psychological needs of the parties are so important that any solution must address

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11. Fisher & Ury, *supra* note 7, at 60.

12. See §22.5.1; Ury, *supra* note 9, at 118.

them. In such situations, think about ways to help the other side "save face" without compromising any of the priority interests of your own client. In the group home case, for example, the city is under significant political pressure from the neighbors. If the students representing Cassini can work out a deal in which the neighbors are satisfied, and if city officials will be able to hold a press conference trumpeting their concern both for the needs of the African-American community and for the protection of people with AIDS, city officials will certainly be satisfied with the deal.

# CHAPTER 25

## NEGOTIATION TACTICS

### §25.1 INFORMATION BARGAINING

As we discussed in §22.6, whether you are bargaining adversarially or in problem-solving, you will engage in information bargaining. This section explains methods for gathering and concealing information.

#### §25.1.1 GATHERING INFORMATION

The techniques for gathering information during a negotiation are similar to those used in any other kind of fact retrieval: from client interviewing (Chapter 6) and witness interviewing (Chapter 7) to depositions. Your goal is to encourage a free flow of information, and your methods need to facilitate this process. While in a client interview, the client may be unwilling to provide needed facts because of embarrassment, mistrust, or psychological pressures, in a negotiation the other side's lawyer may be reluctant to share information for purely tactical reasons. In either case, you need to break down the barriers to communication.

1. *Broad questions.* As in client interviewing, the use of broad questions can facilitate information gathering in negotiation. Broad questions give the respondent some room to decide how much to discuss the topic (see §6.3.2). Many novice lawyers view negotiations primarily as a time to pontificate about the merits of their case, making confident statements to the other party's lawyer in hopes that the other side will capitulate. "Statements [however] generate resis-

tance, whereas questions generate answers.”<sup>1</sup> If you want needed information to evaluate your bargaining range in adversarial bargaining and to develop alternative solutions in problem-solving negotiation, the easiest method is broad questioning, not lecturing.

Consider, for instance, two approaches by Ransom’s lawyer in the *Ransom v. Dusak* case for obtaining information about Dusak’s assessment of the conditions in the apartment:

*Example 1*

My client has been living in those wretched conditions for months: rodents, falling ceiling, lack of heat. She’s complained to Dusak, and he has done nothing. The Health Department has been out there—they verify the problems and are ready to take some action. What’s your client going to do about it?

*Example 2*

What does your client think about the conditions in the apartment?

If Ransom’s lawyer wants to get as much information as possible about the other side’s evaluation of the conditions of the apartment, Example 1 does not accomplish it. By assuming in the question that the contested conditions exist and accusing Dusak of ignoring them, she puts the other lawyer on the defensive and closes the door on disclosure. The opposing lawyer’s response will probably be an argument either contesting the particular conditions or whether the landlord failed to act.

The lawyer in Example 2, on the other hand, takes a nonjudgmental approach that invites as full a response as possible. In answering, Dusak’s lawyer might divulge new facts—about the conditions in the apartment or about Dusak’s conduct. Even if the lawyer asking the question is using an adversarial approach to the negotiation, the question still might help. Its purpose is to obtain information to aid in assessing Dusak’s bargaining range—not to compel a concession. Throughout a negotiation, think carefully about the purpose of your communication with the other lawyer. The very same statement or question can be either beneficial or harmful depending upon its context. For example, in adversarial bargaining, Example 1, while it does not facilitate information bargaining, might help in arguing for a concession from Dusak.

After you ask broad questions, you can ask narrow ones to elicit further information (§6.3.2). If, for instance, Dusak’s lawyer replies to the Example 2 question that his client knows about a heating problem, Ransom’s lawyer might want to pose a series of “Anything else?” questions until she has exhausted the lawyer’s knowledge. Then she might want to ask narrow questions exploring the specifics of Dusak’s information on each condition. And finally, she might use leading questions to pin down the lawyer about particular facts, such as, “So Dusak knew that the exterminator was unable to get into the apartment?” The obvious danger with this approach is that the opposing lawyer may object that

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1. Roger Fisher & William L. Ury, *Getting to Yes: Negotiating Agreement Without Giving In* 111 (2d ed. 1983).

you are deposing rather than negotiating and refuse to answer the questions. Therefore, be selective in the areas in which you use this approach, and try to phrase the questions in noncombative ways that do not prejudice the issues or raise the ire of the other side.

**2. Active listening.** You have already learned about active listening in §6.1.2. In interviewing, the primary purpose of active listening is to establish rapport with the client. In information bargaining, it serves another objective as well: by expressing understanding of the other party's situation, you encourage full responses to questions. People feel that if you are willing to understand their point of view, they are comfortable telling you more about it.

Suppose you represent the seller in a negotiation for the sale of a house, and the inspection report has identified termite damage, a slight foundation problem under the bedroom, and some roof damage over the patio. Although all three of the problems can be remedied at a modest cost, the buyer's lawyer insists that the entire price has to be renegotiated. Despite your broad questioning, the other lawyer is evasive as to the reasons for his client's position. Your use of an active listening approach—especially with the buyer present—might prompt a more specific response: "I certainly understand your concerns. I remember when I was a first-time buyer. The inspection report upset me too, but I can assure you these problems can be easily remedied. What specifically disturbs you about them?" By acknowledging the feelings of the other side, you possibly stimulate a response.

**3. Probing questions.** In client interviewing, situations arise in which your client will simply say, "I just can't remember when it happened." At this point, you do not give up but ask probing questions to try to stimulate the client's memory: "Was it raining out that day?" or "Was it close to Christmas?" (See §5.6.) In information bargaining, there are times when the other lawyer will simply say, "I can't tell you." This failure to respond is usually caused not by a memory lapse but by the other lawyer's tactical need to keep the information from you. But the same probing technique that helps in interviewing can be beneficial here.

In information bargaining, probing entails giving the other lawyer an incentive to give a response. One technique is to confront that lawyer with your knowledge of his evasiveness and to state that you assume the answer would be damaging to his client's case.<sup>2</sup> Consider, for example, this exchange in the *Ransom v. Dusak* case:

**Ransom's Attorney:** How many times did your client try to send an exterminator to the apartment?

**Dusak's Attorney:** I don't think this information is relevant to this case. If you want to negotiate, let's negotiate. If you want to try the case, let's go to trial.

2. See Robert M. Bastress & Joseph D. Harbaugh, *Interviewing, Counseling, and Negotiating: Skills for Effective Representation* 415 (1990).

*Ransom's Attorney:* I'm sorry, but I do think this information is very relevant to our warranty of habitability claim. And regrettably I have to assume from your response that the exterminator only came once. That certainly strengthens our claim.

Although Dusak's lawyer can simply ignore the response, it might motivate him to become more forthcoming about the information requested. A related technique is to tell the other lawyer that the information is essential for your client's assessment of the case, and bargaining cannot continue without it.

4. *Silence.* A final technique for encouraging full responses is to respond to inadequate answers with silence. "If you have asked an honest question to which they have provided an insufficient answer, just wait. People tend to feel uncomfortable with silence, particularly if they have doubts about the merits of something they have said."<sup>3</sup> This may be hard given the tendency of most lawyers to talk more than they need to. But sometimes it can be the most effective technique. For instance, when Dusak's lawyer answered that the number of visits by the exterminator was irrelevant to the case, silence by Ransom's lawyer would have sent the message, "Come on now, let's get real! That's what this case is all about?" Without the combativeness of a verbal response, a long pause and expectant stare by Ransom's lawyer might embarrass Dusak's lawyer into a more acceptable response.

### §25.1.2 CONCEALING INFORMATION

Part of your planning for information bargaining is deciding which facts you need to conceal. There are ethical constraints on your ability to hide information; you cannot lie, for example (see §20.5). But within those limitations, a number of techniques can help block disclosure of information.

1. *Under-answering a question.* Suppose you represent the defendant in a drug possession case and want to conceal your client's alcoholism. The prosecutor asks if your client has any addictions. The answer, "He does not use controlled substances" is honest, if incomplete.
2. *Answer a question with a question.* In the same drug possession case, the prosecutor asks whether your client has ever used controlled substances. If you respond, "Was any drug paraphernalia found at the scene?" you might create a distraction that could divert the prosecutor into a different line of questions.
3. *Answer a different question.* Your client in the drug possession case has a record for possession that does not show up on the rap sheet, and the prosecutor asks you whether your client has any prior record for possession. "Look at what

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3. Fisher & Ury, *supra* note 1, at 112.

the rap sheet says” is not an untrue statement, but it is also not an answer to the question asked.

**4. Ignore the question and shift to another topic.** When the prosecutor asks whether your client has ever used a controlled substance, you might dodge the question by arguing that the lab reports are insufficient to show a controlled substance was even found on your client. By attacking the sufficiency of the case, you might divert the prosecutor’s attention from your client’s use of a controlled substance.

All these techniques have disadvantages. Many experienced lawyers know about them and will persevere, trying to pin you down to an answer. In fact, if a cordial relationship with the other lawyer is important to your strategy, these techniques could actually be detrimental to your bargaining.

Moreover, since, in some instances, the other side will have access to other sources of proof for the requested information, your game-playing might have no effect other than to alienate the other lawyer. For this reason, in many cases where you have a strong need to conceal information, you may simply want to refuse to answer questions about that area and explain the reasons for your refusal. A forthright answer that “My client’s prior use of controlled substances is irrelevant to this particular proceeding” may be more far more effective than a dance around the issue.

## §25.2 COMMUNICATING ABOUT RIGHTS AND POWER

A party using an adversarial approach will usually use rights-based arguments and power-based threats or warnings in attempts to compel concessions by the other side. In problem-solving bargaining, even though the parties focus primarily on their mutual interests, they often use rights-based arguments to develop possible solutions. If, for example, parties in a sexual harassment dispute are trying to agree on standards for the employer’s future policies, they may look to Equal Employment Opportunity Commission regulations for guidance and might argue about their meaning. And to a lesser extent, problem-solving negotiators also use power-based tactics to accomplish their goals. They may assert their power in the first instance to try to force the other side into problem-solving or, in the midst of the negotiation, power imbalances may set limits on the range of solutions available. If a tenants’ group is negotiating with the landlord about problems in the building, for instance, as eager as both sides may be to work together to solve the problem, the landlord will probably not entertain an option that the tenants take over management of the building.

Negotiation is not just a series of offers, counteroffers, and concessions. Nor is it limited to the identification of interests, generation of options, and development of solutions. The energy that fuels both of these processes—what moves parties to concessions or mutual solutions—comes from communications about the parties’ rights and power. The ability to communicate effectively about the parties’ respective rights and power, therefore, is an essential skill in negotiation.

### §25.2.1 ARGUING ABOUT RIGHTS

An argument is a group of ideas, arranged logically to convince somebody to do a particular thing or to adopt a particular belief. Lawyers argue about rights in a number of contexts—in motion practice in trial courts, in closing arguments before juries, in oral arguments in appellate courts, and in negotiations. Although all legal arguments have some similarities, argument in negotiation is unique. You are not trying to convince a neutral decision-maker but instead are trying to persuade somebody whose interests are at least initially in conflict with yours and your client's. This skill entails a number of important elements.<sup>4</sup>

**1. Develop a detailed and organized argument.** To be effective, all legal argument must be both well-developed and organized. That is especially true in a negotiation when you are trying to persuade someone who has the potential for being hostile to your argument. Detailed argumentation requires a crisp, explicit statement of the legal basis of the argument, a specific description of the facts supporting the application of the legal rule in this case, and a conclusion. This is the same kind of analysis as is used in the legal elements model for organizing facts (see Chapter 9).

Consider, for example, the persuasive impact of these different arguments of Ransom's lawyer in the *Ransom v. Dusak* case:

*Example 3*

My client is entitled to a \$1,950 abatement of rent because your client has breached the warranty of habitability by failing to provide necessary services in Ransom's apartment.

*Example 4*

As I'm sure you know, under section 500 of the Property Code, your client had a duty to provide Ransom with an apartment fit for human habitation. Your client breached this duty when he failed to provide sufficient heat during last winter, to repair a leaking ceiling in the bedroom, and to spray the apartment for roaches. And, I'm also sure you know, under that same section of the Code, my client is entitled to actual and punitive damages for this violation. Here, she lost use of one-half of the apartment for six months, entitling her to a \$1,950 abatement and \$250 in punitive damages.

In Example 3, the lawyer merely states a conclusion without taking the listener through an analysis. (The late Judge Hubert L. Will of the U.S. District Court for the Northern District of Illinois used to call this type of argument "prayer balls to the gods": the lawyer throws out a legal rule and expects the judge or other listener to conduct the analysis herself.) The Example 4 lawyer does much better by providing a step-by-step review of the rules, facts, and conclusion. He provides necessary details to support the argument (citation to the statutory

4. These elements were adapted from Robert J. Condlin, "Cases on Both Sides": *Patterns of Argument in Legal Dispute-Negotiation*, 44 Md. L. Rev. 65 (1985).

authority, specific description of the conditions, explicit statement of damages) in a clear and tight format.

Obviously, this approach has limits. A lengthy discourse on the nuances of the law or an extensive review of the evidence, especially if both parties have a thorough understanding of the law and facts, can appear pedantic and turn the listener off. Sometimes, you need only mention the legal rules, focusing your presentation on the factual evidence. At other times, when the facts are not in dispute but the law is, you might need to concentrate on the case law supporting your interpretation of the rules. But beware of assuming that the other side's lawyer understands all the issues. Identify the important issues in dispute about the parties' rights and present a detailed and organized argument on those issues.

**2. Engage in multi-dimensional reasoning.** An argument can be based on any number of standards: legal rules; policies; common sense; tradition; business standards; professional judgment, or other norms. And often a number of items of evidence support the application of the standard in the case. The strength of your argument can be increased if you can expand the number of standards and/or facts upon which you rely. Your rights assessment in the case (Charts 21B and 21C) can provide you with these additional reasons.

Assume, for example, a lawyer represents a manufacturer that wants to build a small factory near a residential community. In negotiation with a community group, she can argue simply that the local zoning ordinance allows for the siting of the factory on this property. Alternatively, she can make the following argument:

As I am sure that city officials have told you, the zoning ordinances allow us to build the factory here without the issuance of a permit or variance. Additionally, three similar factories have been built in other areas zoned I-A in the past five years without any city intervention. But most importantly, consider the jobs this factory will create for your community. The other two factories we operate each employ 50 people from the surrounding community. Finally, your fears about air pollution are unfounded. As our consultant's report shows, our environmental safety record is excellent.

While the first argument addresses solely the narrow issue of the zoning ordinance, the second argument raises not only that issue, but also policy reasons (the city's precedent with such projects) and factual support (increased employment and environmental safety). Whether the lawyer is using an adversarial or problem-solving approach, the second argument presents a more formidable presentation to the community group than the first.

**3. Design a balanced argument.** In any argument, balance can create an appearance of reasonableness. In negotiation, that is particularly important because the other side starts out with interests opposed to yours and thus treats you warily. By demonstrating that you understand the strengths and weaknesses on both sides of the case, you show that your assessment of rights is solid and that your reasoning is sound. The legitimacy of your argument will be significantly affected by your acknowledgment of any weaknesses in your case.

In the *Ransom* case, for example, if the landlord's lawyer makes the argument that no problems existed at the apartment, that will have little effect on Ransom's

lawyer because the argument is unbalanced or one-sided. On the other hand, if the landlord's lawyer admits that some problems did exist, but that Ransom failed to give adequate notice and even refused entry to the exterminator, the landlord's lawyer increases the odds that Ransom's lawyer will hear and be influenced by the argument. In an adversarial context, this approach may result in a concession from Ransom, and, in a problem-solving setting, it may help to create an atmosphere for joint option generation.

**4. Present facts persuasively.** In some negotiations, the most contested issues will concern disputed facts. A dry and antiseptic presentation of the facts may have very little effect on the other side or its lawyer. On the other hand, a persuasive description of the facts may significantly enhance the force of your argument. In presenting your version of the facts to the other side, consider many of the same factors you do when you are preparing for a presentation of facts at a trial or hearing: the nature of your audience, the uncontested facts, a unifying theme, and persuasive images (see Chapter 11). Think of how you can tell a persuasive story that will have an emotional impact on the other lawyer.

In the *Ransom* case, for example, if you represent Ransom and know that the landlord's lawyer has small children, you may want to focus your presentation of the facts on the effect of the inadequate conditions on your client's children. Or in a criminal case, if you represent the defendant and are plea bargaining with a prosecutor who has an extremely heavy caseload, you may want to organize the facts around the theme of the multiple inconsistencies in the prosecution's case. In this way, you subtly send a message to the prosecutor that trial of this case will be too difficult to handle.

### §25.2.2 MAKING AND HANDLING THREATS

**Making threats.** A threat is a declaration by a negotiator of an intent to assert a right or power if the other party does not comply with a request or demand. While an argument is an attempt to persuade the other side logically of a client's rights in a dispute or transaction, a threat is an effort to use your client's rights or power to coerce the other side to agreement. Fisher and Ury say that "threats are one of the most abused tactics in negotiation."<sup>5</sup> They warn that threats can lead to counterthreats from the other party, create ill-will between the parties, and even destroy relationships between the parties.

All of that is true. But there are times when logical arguments have no effect, and when the other party will not make any further concessions or agree to any alternative solutions. If your client has rights or powers that can be used to force the other party to budge, threats may be an effective tactic.

Threats work only if they are credible and will have a significant impact on the other side. If they lack credibility, the other party will just laugh them off. A threat by Ransom to stage a rent strike, for example, will have little effect if Dusak knows that no tenants organization exists and that Ransom has made no attempt to start one.

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5. Fisher & Ury, *supra* note 1, at 136.

To determine whether you have potentially effective threats, consider your assessments of rights and power (Charts 21B, 21C, and 21D). Assess the strengths and weaknesses of your client's possible legal claims and power-plays. Imagine what counterthreats could be raised against your client. Think about what steps the other side could take to shift the rights and power balances. Then ask yourself: "In light of these assessments, will a particular threat appear credible to the other side? And what impact will it have on them?"

Even if you can identify effective threats, think of ways of packaging them to lessen the potential for enmity, especially if the parties will have a continuing relationship after the negotiation. The most credible threats are not delivered with table pounding and insult. They are instead delivered in the form of subtle suggestions that demonstrate the existence of the right or power without drama. Fisher and Ury suggest the use of warnings, rather than outright threats.<sup>6</sup> "A threat comes across as what you will do to them if they do not agree. A warning comes across as what will happen if agreement is not reached."<sup>7</sup> Contrast these threats from Ransom's lawyer:

*Example 5*

If you don't agree to make the repairs in my client's apartment by June 15, she will get the tenants organization to start a rent strike and picket the building.

*Example 6*

If we can't reach an agreement to have the repairs made by June 15, it seems likely that we're not going to be able to control the tenants organization, and it may start a rent strike and picket the building.

Although both threats demonstrate Ransom's power, the second presents the consequences as though they were outside of the client's control. When Dusak's lawyer asks, "Are you threatening me?", Ransom's lawyer can reply, "I'm sorry, this is nothing personal. It's just my opinion as to how the tenants group will respond."<sup>8</sup>

*Responding to threats.* When you are confronted with a threat, you have several options. First, you can ignore the threat. If you believe that the claimed right or power underlying the threat is weak or that the other side will not carry it out, you might just write the threat off as ignorable bluster or venting by the other lawyer. If your client will not be significantly affected even if the threat is carried out, you might want to explain why it will have little impact and then continue the bargaining. There is a risk, however, that the other lawyer will try to divert you into a discussion of whether the threatened action will have the slight consequences you assert, and you may lose control of the agenda. If you consider the threat meaningless, cut this discussion off and get back to bargaining.

If the threat is credible and will have a significant impact on your client, you might explain to the other lawyer how you are able to equalize the rights or

6. *Id.* at 137; William Ury, *Getting Past No: Negotiating Your Way from Confrontation to Cooperation* 136 (1993).

7. Ury, *supra* note 6, at 137.

8. For a discussion of the ethical issues raised by this reply, see §20.5.

power imbalance. Outline the actions your client can take to neutralize the threat. You can identify these options from your rights and power assessments. For example, consider an employment discrimination dispute in which the plaintiff's lawyer threatens to seek class action certification if the employer does not agree to the plaintiff's offer. In response, the employer's lawyer might assert that the employer will extensively litigate the class certification motion, and if unsuccessful, will take an interlocutory appeal and tie up the case for years.

A third tactic is a counterthreat. From the arsenal of your own client's rights and powers, you can identify a threat that your client will carry out in retaliation if the other side follows through with its threat. In a negotiation for the sale of a house, for example, when the buyer threatens to purchase other property down the street instead, the seller can respond that it just received a call from another eager buyer. To work, this counterthreat has to be credible and has to have the potential for a significant impact on the other side—or it will be considered no more than bravado.

The danger with a counterthreat, however, is that it can lead to an escalation of tensions and a breakdown in bargaining. If your evaluation of your client's BATNA suggests that further negotiation would help, you may want to try to soften your presentation of the counterthreat. When the buyer's lawyer threatens to buy another house instead, the seller's lawyer might say: "My client also received a call today from Dandy Realty with a serious prospect for a new buyer who wants to see the house tonight. But let's not be distracted by other buyers and sellers and get back to the terms of this deal."

## §25.3 HANDLING SPECIAL PROBLEMS

### §25.3.1 EXPRESSING ANGER

Anger, whether expressed quietly or volcanically, should be used only to make a point. If anger appears simply as an emotional reaction to the conduct or arguments of the other side, it can be detrimental to your client's interests. Like threats, anger can increase animosity between the parties, result in irrational decision-making, and lead to the premature termination of bargaining. Accordingly, if you feel that you cannot control your anger, distance yourself from the negotiation by taking a break to check in with your office for messages or go to the restroom. After you have calmed yourself and feel in control, return to the table.

On occasion, however, feigned anger, used purposefully, can be an effective communication tactic. If, for example, the other lawyer is insensitive to your client's interests, refuses to recognize any strength in a rights-based argument, summarily dismisses all your attempts to initiate problem-solving negotiation, makes outrageous demands, or engages in dishonest conduct, you may want to use anger as a means of getting that lawyer's attention. In these cases, your sole purpose is to communicate the seriousness of your displeasure to the other party, not to vent your frustrations. For this reason, express the anger in a controlled, lucid, and pointed way—not in an outburst. Once the other side has shown that it has received your message, you should return to your usual style.

Overuse of this tactic can be especially counterproductive if the anger is expressed with intense emotion. A lawyer who consistently uses angry outbursts to interrupt the other side's arguments will gain a reputation for hot-headedness. Other lawyers will simply ignore the behavior, and it will have no effect.

### §25.3.2 HANDLING THE DIFFICULT ADVERSARY

Sometimes, you will face an obstreperous adversary who will try to control the negotiation by attacking you or your client. Or you will meet the dishonest lawyer who will try to prevail with phony or confusing data.

If you respond to these tactics with anger, your adversary will have accomplished something: you will lose control and be distracted from your strategy. When confronted with these tactics, you should stay focused on moving the negotiations in the direction you originally planned. In the words of William Ury, you want to "reframe" the attacks or dishonest tricks into facilitators of discussion.<sup>9</sup>

There are several ways to reframe attacks from an obstreperous lawyer. First, you can ignore an attack and continue with your argument or proposal. Once the other side understands that you will not take the bait, they may abandon their attempts to distract you.

Second, you may want to reframe a personal attack into an argument on an issue. Suppose that in the *Ransom* case Dusak's lawyer shouts at Ransom's lawyer, "You legal aid lawyers! You get paid by the government and then file volumes of frivolous claims!" If Ransom's lawyer starts defending herself and her office, she accomplishes nothing, but if she pointedly asks Dusak's lawyer to point out the parts of her papers that are frivolous, she brings the discussion back to the issues in the case.

Third, you might want to recast personal attacks regarding past wrongs into options for the future. If Ransom's lawyer attacks Dusak as "a typical slum landlord who has consistently ignored the problems faced by my client," Dusak's lawyer can respond, "Let's stop dwelling on the past and try to develop a solution that will assist both of our clients."

As to dishonest tricks, you can challenge them immediately and directly. There is a risk, however. If you are wrong and the adversary is not actually being dishonest, you might find yourself accused of dishonesty. And even if you have not erred, you may just antagonize the other lawyer and damage the possibility of further bargaining. Accordingly, before you present a direct challenge, ask clarifying questions. If the other lawyer relies on certain data or evidence, ask for the specifics, for a copy of the document or records, or for substantiating facts. Use the misrepresentation as a vehicle for discovery. If that approach does not work, you may want to call your opponent's bluff. If in the negotiations for the sale of a house, for example, the seller insists that the house was exterminated for termites less than a year ago, the buyer's lawyer can respond, "So I'm sure you would have no objection to a provision in the contract that if you cannot

9. Ury, *supra* note 6, at 91-94.

provide a copy of an invoice for such an inspection within two weeks, you will pay for a new extermination.”

## §25.4 CLOSING THE DEAL

Sometimes, toward the end of a negotiation, the parties will reach an impasse. They will be close to settlement, but neither party will make the final concession or agree to compromise a particular interest. At that point, a formulaic approach such as “splitting the difference,” might be very helpful. Although splitting the difference is inappropriate earlier in a negotiation (see §24.1.4), at the end when the parties are close to settlement principled negotiation may not be as important as a simple nudge to agreement.

After the parties have reached an agreement, you should review in detail the terms with the other lawyer, confirming all the essential components. You want to make sure there are no misunderstandings.

Then contact your client immediately. If your client did not pre-authorize the exact agreement you reached (see §21.5), the agreement is tentative and does not become real until your client approves (and until the other lawyer’s client approves, too, if the other lawyer did not have authority). If your client had pre-authorized the terms of this agreement, you at least want to share the news.

Then, the agreement is usually memorialized in writing. If parties have not been litigating against each other, the writing will usually have the word “contract” in big letters at the top of the first page. If the negotiation resolves litigation, the writing is a stipulation of settlement. A stipulation is an agreement between the parties to a lawsuit; if consideration flows in both directions, it is a contract even though it is not called one. In some litigation settings, the stipulation is recited orally “on the record” in open court, and the transcript is the writing, even though not signed by the parties.

In any event, the precise wording of the agreement is crucial because afterward the parties will be governed by the words and not by your memory of what was agreed to. If possible, write the initial draft of the agreement yourself to assure precision on the provisions that are most important to your client. In certain settings, practitioners start from—but are not limited to—form contracts or stipulations. But even in those situations, you should make sure that the boilerplate language conforms to the agreement you have actually reached. If it does not, write new language that does. When another lawyer tells you that “we don’t need to deal with that particular issue in writing,” you should rely on your own assessment of the situation, not the other lawyer’s.

Sometimes, in the drafting process a new issue will arise that was not resolved clearly during the negotiation. When that happens, decide with your client whether the issue is important enough to merit reopening the negotiation to settle it. If it is not that important, your client might agree to “constructive ambiguity.”<sup>10</sup> In other words, the parties might “agree to disagree”—to draft language that is open to several interpretations. If the issue is not important, it might not become a

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10. Donald G. Gifford, *Legal Negotiation: Theory and Applications* 167–68 (1989).

matter of contention later and the ambiguous language in the agreement might not hurt anybody. In the *Ransom* case, the parties might reach an impasse about the timing of future exterminations, the tenant wanting spraying every month, the landlord only when he thinks it necessary. To reach a deal, the parties might agree to "reasonably necessary exterminations." The dangers of this language for both parties are obvious, but in the future, if they establish a good relationship, any dispute about its meaning may be moot. The parties will have to balance their desire for agreement against the dangers of an ambiguous future.