B. Negotiating Within Your Comfort Zone

Choosing to be cooperative, problem solving, competitive, or adversarial is, at least in part, dependent on:

- The subject and nature of the negotiation
- The interrelation between issues
- The past or anticipated future relationship between the parties and between the attorneys
- Your counterpart's negotiation approach
- The customs and conventions where the negotiation occurs
- The amount of time available
- The amount at stake

Each of these factors may influence your approach to negotiation. The biggest factor, however, is your own comfort zone, formed by your personality and values. To the extent that how you negotiate is driven by personality and values, it may be better described as a matter of style rather than approach. Behavioral style is in large part a function of who you are. Choosing a style that does not fit your personality and values, if not a recipe for failure, is likely to make your work as a negotiator difficult and dissatisfying. To succeed as a professional and find satisfaction in what you are doing, you must negotiate within your personal comfort zone.

Defining our negotiating comfort zone is not always an easy task. It is a common desire to be liked rather than disliked. We know that we are more likely to be liked when we are cooperative and giving than when we are adversarial and taking. We also know that winners are admired, and we want to be respected for vigorously representing our clients' interests and succeeding when we negotiate on their behalf. Law students without legal experience may share the view of attorneys popularized in movies and television series as hard-charging and aggressive. Students may extrapolate from the highly adversarial scenes popularly portrayed in dramatized jury trials to all opposing lawyer interactions. As a result, many students have a latent fear that their preference for cooperation and friendliness will not serve them or their clients well in negotiation.

Other students may have thrived on competition and winning in sports and other contests. We know that law students are a self-selected group of achievers who have succeeded, at least academically, and made it into law school through a competitive admissions process. Competition appears to be encouraged by the legal system, where cooperation and generosity may be viewed as a virtuous but less-valued quality. So it is understandable that some students are conflicted about whether negotiation should be approached as a professional game in which their competitive qualities are let loose and rewarded with success.

Those of you who have enjoyed competition know from your experience that good competitors can be friendly, gracious, and ethical. Similarly, not all competitive negotiators manifest an adversarial persona. A pleasant and respectful personal style is not necessarily inconsistent with competitive negotiation, any more than being cordial in competitive sports is inconsistent with wanting to win. The style you choose in negotiation may depend on how you define the "game" and the relationship you want with your counterpart in the negotiation.

Your negotiation style may also depend in large measure on your ingrained personality pattern. If personality patterns drive how we and others approach negotiation, can we discern those patterns in ourselves and others, and how can we benefit from the information?

Because personality does matter in how we interact with others, how we deal with conflict, and how we negotiate, researchers have attempted to test and measure personality traits that influence these functions. The *Thomas-Kilmann Conflict Mode Instrument* is a tested method available to assess one's tendencies as a negotiator and is administered in some law school negotiation courses. This widely used personality instrument measures five dimensions of how individuals deal with conflict and negotiation to determine their degree of assertiveness and/or cooperation. The Thomas-Kilmann "test" asks for responses to 30 statements (for example, "I feel that differences are not always worth worrying about" or "I make some effort to get my way") and respondents self-score their answers. The results give respondents a profile of how strongly they score in all five categories: competitor, accommodator (sometimes also called cooperator), avoider, compromiser, and collaborator (sometimes called problem solver).

One of the strengths of the instrument is that it provides relative scores rather than a simple yes-no or categorical placement: When you take the test, you receive a score along a continuum from very high to very low as a Competitor, for instance. Respondents receive scores in all five categories. This provides a nuanced portrait as a composite of several, sometimes conflicting, tendencies. Each of the Thomas-Kilmann conflict management categories has advantages and disadvantages in negotiation (See R. Mnookin, S. Peppet, and A. Tulumello, "Negotiator's Empathy and Assertiveness," 14 Alternatives 133 (1996).)

The five categories of conflict management styles are:

- *Competing*—high on assertiveness and low on cooperation
- *Accommodating*—low on assertiveness and high on cooperation
- *Avoiding*—low on assertiveness and cooperation
- *Compromising*—moderate on assertiveness and cooperation
- *Collaborating*—high on assertiveness and cooperation

Another personality test is the *five-factor model* of personality, also known as the "Big Five" taxonomy. This test is used extensively in experimental psychology to determine the five major categories describing broad personality traits, and it has been applied to negotiation outcomes. (See B. Barry and R. Friedman, *Bargainer Characteristics in Distributive and Integrative Negotiation*, 74 J. Personality & Soc. Psychol. 345 (1998).) The five factors that comprise the test are:

- *Extroversion*—sociable, assertive, and talkative
- *Agreeableness*—flexible, cooperative, and trusting
- *Conscientiousness*—responsible, organized, and achievement oriented
- *Emotional stability*—secure and confident
- *Openness*—imaginative, broad-minded, and curious

The best-known and most widely referred to personality test is the *Myers-Briggs Type Indicator*. You may have taken this test. It is administered over 2 million times a year by large companies, the U.S. government, and academic

institutions. It is the subject of countless research studies and articles, including ones that analyze the impact of personality variables on negotiation. (See D. Peters, "Forever Jung: Psychological Type Theory, The Myers-Briggs Type Indicator and Learning Negotiation," 42 Drake L. Rev. 1 (1993).) Myers-Briggs measures four sets of contrasting personality dimensions:

- *Introverted* or *extroverted*
- *Sensing* or *intuitive*
- *Thinking* or *feeling*
- *Perceiving* or *judging*

There is now considerable literature on the role of personality in negotiation styles and outcomes, based on studies of personality test results and experimental research. However, the utility of this literature for instructional purposes is limited because of the lack of consensus among the studies and the limitations of their methodology. The following reading recognizes those limitations, but offers answers to the questions most often asked about personality and negotiation.

❖ Sheila Heen & John Richardson, *"I See a Pattern Here and the Pattern Is You": Personality and Dispute Resolution*

The Handbook of Dispute Resolution 202
(M.L. Moffitt & R.C. Bordone eds., 2005)

Anyone who has more than one child knows that differences in personality are real. The first born may be quiet, eager to please, and shy in new situations. His sister comes along and is an extrovert—smiling early and befriending strangers as a toddler. These traits may remain constant throughout life as the first-born becomes a writer and his sister makes friends easily and often as a college student, professional, and retiree.

Intuitively, we know that there are differences between individuals. Your spouse is agreeable, your brother irascible, your coworker weepy, and your neighbor hyperrational.

The hard question is this: are there ways to describe the differences in people's personalities that can be useful in conducting and advising negotiations? After all, negotiation is all about dealing with people, getting along with them, and persuading them. Shouldn't knowing how people are different (and what to do about it) be an integral part of negotiation theory and strategy?

One would think so. And yet, the intersection of dispute resolution and personality is a tangle of confusion and contradiction. It is not unexplored territory—scholars have tried to find answers. And it is interesting—there is fascinating work going on and much speculation about what is being learned. Yet there are few clear, satisfying answers to questions that interest dispute resolution professionals most: Are particular personalities better negotiators? Should I negotiate differently with different personalities? And what about when the people and their problematic personalities really are the problem?

[After reviewing the most widely used personality tests, their limitations, and the literature about the reported results, the authors list and answer six questions asked about personality and negotiation.]

1. *Is there really such a thing as personality differences?*

It certainly seems so. Whether hard wired by genes or chemical mix, prompted by experience or influenced by the context, two people in a similar situation will often respond differently. This may be particularly so in the pressurized context of a dispute.

Personality researchers attempt to identify and isolate traits that are consistent across situations and different between individuals. This is where things get tricky. Human beings are complex enough, and adaptable enough, that defining and tracking traits, particularly through the dynamic process of negotiation, has proven very difficult.

2. *Or are there particular personality traits that give better outcomes?*

With the exception of cognitive ability (more is better), there is no strong answer in the current research. Although you can find small-scale studies suggesting this or that trait is helpful, you can also find studies that say it does not improve outcomes.

3. *Okay, so should I negotiate differently with different personality types?*

The biggest obstacle to setting your negotiation strategy based on the other person's personality is figuring out what it is. Because people act differently in different situations, researchers have found that people consistently misperceive the personality traits of those with whom they negotiate or are in dispute.

The best advice is to be aware of your own tendencies, have a broad repertoire of approaches and strategies, and be able to engage difficulties constructively as they come up. Pay attention to particular behavior you see, rather than trying to globalize how the other person "is." And if one approach doesn't seem to be working, try another.

4. *Isn't it true that some disputes are hopeless because people's personalities just aren't going to change?*

It is certainly true that there are limits to what can change, and that some differences between people are harder to reconcile than others. And there are definitely limits to *your ability to change the other person's personality.*

Yet the impulse to throw up our hands and attribute the problem to the other person's personality flaws is a dangerous one. It blames the other person for the dispute, blinding us to our own contributions to the problem. It may also encourage us to give up on a relationship or dispute too easily or too quickly, when finding a way to work together with less frustration remains possible.

In addition, there are at least three paths forward that personality finger-pointing ignores. Remember that human beings' *behavior* can often change without a grand *personality* change. You might shift the context—offering a private caucus or written channel of communication, for example. You can try to influence the other person's behavior by influencing the story he or she tells about what's going on. Or you might try changing your contribution to the dynamic between you. The other person is reacting both to you and to his or her own experiences, tendencies, and stories, and that's a complex enough set of factors to suggest that progress is possible.

Finally, do not underestimate people's ability to change over time. As a person ages, encounters different life experiences, and makes the transition to new

phases in life (where he or she may feel more secure or happier, or have more room for reflection for example), his or her traits and tendencies evolve. You may find that your personality gradually moves into a different era, one you would not have predicted from where you stand now.

5. *Why is personality profiling so popular, if it's so inconclusive?*

People love to talk about themselves. And they especially love to talk about other people. Personality profiling also fits our interest in simplifying the world and the infinitely complex relationships in it. Researchers have long documented the effects of the fundamental attribution error, where we believe we know why people act the way they do, and tend to attribute especially bad behavior to their problematic personality.

People are so complicated that we can't really describe them with few enough variables to meet our needs for parsimony. People can only keep about seven items in their head at one time, before they go into cognitive overload. So they make up something that they can handle in their heads, whether or not it is accurate.

6. *So why pay attention to personality at all?*

The fields of personality and negotiation are both relatively young. Our ability to map interaction in negotiation and dispute resolution, and to recommend paths of influence, is in its infancy. And our ability to isolate traits and trace them through complex interaction is still maturing.

Still, familiarity with common differences between individuals is useful. It reminds us that not every approach to influence works with every person. It can help us generate diagnostic hypotheses about why a negotiation is in trouble ("Ah! We may proceed to closure at different paces"), and come up with prescriptive advice to try out. It may also help us be more forgiving of others' seemingly crazy behavior if we can spot it as a difference in the way the two of us see and respond to the world.

Familiarity with personality differences can also be a self-reflection and coaching tool for yourself. It can help you identify and work on behavior that doesn't come naturally to you. It can also help you explain your behavior to others: "I've learned that I'm not very comfortable making commitments before I have a chance to think things through. Can you give me the weekend and we'll nail this down on Monday?" Becoming familiar with some of the traits that affect your ability to mediate, negotiate, or respond well to disputes can help you become more aware of the situations that bring out these traits, and other choices you might make.

Questions

5. Are the style categories and personality dimensions used by the three test instruments just different ways to label the same personality traits, or do they really measure different aspects of personality?
6. After 17 years or more as a student and as an experienced test taker, if your negotiation course readings and class discussion gave you the impression that your instructor valued collaboration more than avoidance or competition, do you think your responses to the 30 statements

on the Thomas-Kilmann test (e.g., "I feel that differences are not always worth worrying about" or "I make some effort to get my way") might be influenced by the instructor's values or not provide a totally accurate measure of your conflict style?

7. Given that all three of the personality tests described above rely on self-assessment, do you think the results are likely to match the assessment of your personality by opponents, family, friends, and colleagues?
8. Do you feel that personality testing is helpful as an aid to better understand and improve how you negotiate? Does your answer depend on your view of whether personality traits and behavior can be altered?
9. Do you consciously take stock of the personality type of your counterparts when negotiating? Are there ways you can find out about their personalities before engaging with them?

Problem

You are planning to buy a new car upon graduation. You are living in a metropolitan area and have many dealers to choose from. You plan to have your local mechanic service the vehicle and don't expect problems with it (if you did, you would look to the manufacturer), so you don't expect to see the dealer much after the sale. You are preoccupied with the bar exam and don't want to do the bargaining yourself. Luckily you have the option of asking either of two relatives to serve as your negotiator in this transaction. Your sister Jill is an avid shopper, who enjoys the give and take of haggling and bargains assertively for the last dollar (she can be somewhat stubborn and argumentative at times). Your cousin Brian is much more agreeable, personable, and accommodating. He thinks that it is important to meet both sides' needs in a deal, and seems more fair-minded than Jill.

1. Which would you ask to negotiate for you to buy the car?
2. Assume that you are still bargaining for a car after graduation, but your plans have changed. You will be moving to a small community in which dealers are few and far between. Moreover, you can't afford a new car yet, so you are looking for a vehicle three to five years old. You expect to return to the seller for routine maintenance and servicing. Which relative would you choose for this negotiation?
3. If your choices varied depending on the situation, or the choice was at least a much closer call in one scenario than the other, what does this say about your personal view of whether one bargaining style is more effective than another in all settings?

We have explored the choice of negotiation approaches or styles based upon effectiveness in maximizing gain, comfort consistent with our personality, and as a response to the approach of our counterparts. We can also fit our negotiating style to cultural norms and expectations. Perhaps a more compelling reason

to utilize an open and cooperative negotiation approach is based on the importance of relationships and the value of honest dealing. For some, the other proffered rationales of integrative bargaining and enlightened self-interest are not necessary in making the choice to negotiate collaboratively. It is enough to do so because this approach is ethical, and will help to build a better society.

❖ Gerald B. Wetlaufer, *THE LIMITS OF INTEGRATIVE BARGAINING*

85 Geo. L.J. 369 (1996)

It is now conventional wisdom that opportunities for integrative bargaining are widely available, that they are often unrecognized and unexploited, and that as a result both parties to negotiations and society as a whole are worse off than would otherwise have been the case. The failure to recognize and exploit these opportunities may reflect a failure of education, curable either by reading or by attending a course or seminar. It may reflect the "I'm right, you're wrong, and I can prove it" style of discourse associated with law school education and historically male modes of moral reasoning. Or it may be the result of the "negotiator's dilemma" in which the open and cooperative tactics thought appropriate to integrative bargaining are systematically exploited and driven out by the more combative tactics generally associated with distributive bargaining—starting high, conceding slowly, concealing and misrepresenting one's own interests, arguing coercively, threatening, and bluffing.

If the problem at hand is our failure to recognize and exploit opportunities for integrative bargaining, the solution, we are told, is to shift away from the tactics of distributive bargaining and toward the tactics appropriate to integrative bargaining: cooperation, openness, and truth telling. Individual negotiators should embrace these tactics not because they are good or ethical, or because they will help to build a better society, but instead because they will promote the individual's immediate pecuniary self-interest. . . .

The proponents of integrative bargaining usually assert that opportunities for such bargaining are widely, if not universally, available. Lax and Sebenius, in the most important contribution yet made to our understanding of these matters, catalogue the opportunities for integrative bargaining. Their list includes differences between the parties in terms of (1) their interests, (2) their projections concerning possible future events (3) their willingness to accept risks, and (4) their time preferences regarding payment or performance. . . . All four of these circumstances will sometimes, but only under certain further conditions and with certain important qualifications, afford opportunities for the parties to expand the pie through integrative bargaining. . . .

[The author next argues and attempts to demonstrate that the listed differences between negotiating parties rarely provide opportunities to lastingly expand the pie and create joint, integrative gains.]

A final claim that can now be evaluated is that opportunities for integrative bargaining necessarily imply that it is in a negotiator's immediate pecuniary self-interest to engage in the tactics of cooperation, openness, truth telling, honesty, and trust. First, I have demonstrated that opportunities for integrative

bargaining, especially meaningful opportunities for integrative bargaining (e.g., where the pie may be made to expand and to stay expanded), exist within a narrower range of circumstances than sometimes has been claimed. Some of the differences cited by Lax and Sebenius simply do not create opportunities for integrative bargaining. Others, namely those involving different assessments regarding future events, create opportunities to expand the pie only if the parties are willing to bet on their projections. And even when the parties are willing to bet, there will be opportunities for integrative bargaining only some of the time and only in ways that will sometimes prove self-defeating in the sense that the pie may eventually return to its original size. If the pie shrinks back, one or both of the parties will be worse off than they had expected to be and, potentially worse off than they would have been had they not entered the agreement. Other circumstances named by Lax and Sebenius—multiple issues differently valued, differing projections concerning future events, differing time preferences, differing levels of risk aversion—sometimes offer opportunities for integrative bargaining but sometimes do not. Although the general claim is made that opportunities for integrative bargaining provide a reason, based solely on immediate pecuniary self-interest, to engage in openness and truth telling, those opportunities are considerably less pervasive than has been announced. Thus, this argument for openness and truth telling is, in that degree, narrower and less persuasive.

Second, even within the range of circumstances in which there are significant opportunities for integrative bargaining, the bargainer must almost always engage in distributive bargaining as well. Therefore, it is in the bargainer's self-interest not just to adopt the tactics of openness and truth telling that are said to be appropriate to integrative bargaining, but somehow also to adopt the tactics of truth-hiding and dissimulation that are said to be appropriate in distributive bargaining. However we might manage these incompatible tactics, this situation presents at most a weak and highly qualified argument for openness and truth telling. Moreover, the argument for openness and truth telling is not an argument for openness and truth telling with respect to everything, but instead, is limited to information useful in identifying and exploiting opportunities for integrative bargaining. Thus, an opportunity for integrative bargaining will present an occasion for a certain amount of truth telling with respect to one's relative interest in various issues (or one's projections about the future or aversion to risk) without also presenting even a weak argument for truth telling with respect to one's reservation price. . . .

If there is a general case for cooperation, openness, and truth telling in negotiations, that case is multidimensional and parts of it are expressly ethical. Certainly, because there are opportunities for integrative bargaining, a measure of openness and truth telling is sometimes warranted as a matter of a negotiator's immediate pecuniary self-interest. Similarly, a negotiator's long-term pecuniary self-interest may sometimes be served by openness and truth telling because of the costs that may be associated with a reputation for sharp dealing. But it is also true that a negotiator's pecuniary self-interest is, at best, only a portion of his true self-interest. Thus, it may be in his true self- interest to accept some pecuniary costs for the sake of living in a community in which cooperation, truthtelling, and ethical behavior are the norm. Moreover, Plato's Socrates

may have been right when he argued that a person who has some combination of wealth and virtue may be happier and better off than a person who has more wealth but less virtue. . . .

We have, in certain respects, allowed ourselves to be dazzled and seduced by the possibilities of integrative or "win-win" bargaining. That, in turn, has led to a certain amount of over claiming. The reason, I think, is that if we hold these possibilities in a certain light and squint our eyes just hard enough, they look for all the world like the Holy Grail of negotiations. They seem to offer that which we have wanted most to find. What they seem to offer—though in the end it is only an illusion—is the long-sought proof that cooperation, honesty, and good behavior will carry the day not because they are virtuous, not because they will benefit society as a whole, but because they are in everyone's individual and pecuniary self-interest. But however much we may want "honesty" to be "the best policy" in this strong sense, the discovery of integrative bargaining has not, at least so far, provided that long-sought proof.

Perhaps the time has finally come to consider the possibility that this proof will always elude us, for the simple reason that the world in which we live does not, in this particular way, conform to our wishes. Even if there is just the chance that this is so, and it looks much more like a certainty than a chance, it would be appropriate to acknowledge the ultimate insufficiency of understanding self-interest in narrowly pecuniary terms. It would be appropriate to attend in a systematic way to the facts that, even when it is contrary to our pecuniary self-interest, relationships matter; that we care about our reputations, not just for effectiveness but also for decency and good behavior: that we care about living in—and helping to create—communities in which pecuniary self-interest is not the only language that is spoken; and that Plato's Socrates may have gotten it right. And it would be appropriate to acknowledge the central importance of the ethical case against certain forms of competitive and self-interested behavior, especially those forms of behavior, central to the process of negotiations, that involve misrepresentations and other conduct that imposes harm upon others.

Questions

10. Professor Wetlaufer concludes that being open and cooperative in negotiations may not benefit immediate pecuniary interests, but that relationships matter and that Plato may have been correct in teaching that virtue is more important than wealth. Even if we believe this is true when we negotiate for ourselves, as lawyers who negotiate for clients, can we trade off a client's potential gain for our sense of virtue?
11. Do clients have a say in what information is voluntarily revealed and how cooperative they want their attorney to be in negotiating on their behalf?
12. Do the immediate pecuniary interests of the client and the longer-term interests of the attorney in maintaining good working relations with other lawyers or a reputation for "decency" create a conflict of interest between attorney and client?

B. Cooperation vs. Competitiveness—Who Decides?

Problem

Assume that you have established yourself as an effective attorney with a good reputation for your straightforward, cooperative style. You have been a guest lecturer at local law schools about civility in the practice of law and the importance of maintaining a credible professional reputation. Your largest individual client, the president of a regional bank, which your firm also represents, has retained you to represent him in a divorce action initiated by his wife, knowing that you have experience in domestic relations practice. He explains that his highest priority is to retain total control of the bank with no share of the bank stock going to his wife, even though the law might give her a claim to some of it. He wants you to seek for him primary custody of their two middle-school-aged children, for whom he and his wife have both been active parents, so you can use that as a bargaining chip later to assure his retention of the bank stock.

1. What would you tell him?
2. Who should decide negotiation strategies and approaches, you or your client?

Ends vs. Means

Generally clients get to choose the objective of negotiation, and lawyers use their professional judgment in selecting the means of obtaining the client's objectives. Of course, it's not quite so simple. In matters of litigation, the lawyer owes the client an ethical obligation of zealous advocacy in pursuit of a client's interests. Some scholars interpret the ethical norms to mean "the final authority on important issues of strategy rests with the client; and the client may discharge his lawyer at will, but the lawyer has only limited ability to withdraw from representation" (Gilson and Mnookin 1995, 550). Mnookin and Gilson believe that a lawyer who wishes to pursue a cooperative approach, with a sensitivity for long-term professional relationships with other attorneys, may not be able to do so in the litigation context, or at least that the client calls the negotiation shots. They also point out that the client can fire the lawyer at will if the lawyer seems more cooperative than the client wishes, but that ethical norms do not always allow the lawyer to quit if the client insists on a more aggressive strategy.

A different perspective is offered by Professor Robert J. Condlin, who points to practical norms that may differ from ethical norms for attorneys. He distinguishes between the reality of what lawyers do in negotiation and what the ethical rules appear to demand. The distinction, according to Condlin, is really between ends and means. Clients have control over the end result desired, and lawyers choose the means. "Lawyers are persons in their own right, with moral and political rights and obligations of their own, and even though they must

take direction from their clients, they need not do everything asked. For example, the duty of deference distinguishes between questions of ends and questions of means, and reserves to lawyers the tactical and technical decisions of how best to advance client objectives" (Condlin 1992, 71).

According to Condlin, lawyers must be substantively competitive in negotiating for clients but can choose their own personal style. Competitive attorneys can adopt a cordial and respectful persona in their negotiations, though this can be a fine and difficult distinction. Condlin refers to this tug between a client's wishes for the lawyer to defect from a pattern of cooperation and the lawyer's desire for long-term cooperation as the "bargainer's dilemma." Like the prisoners' dilemma, different negotiation tactics may be called for if the situation is viewed as a single- or multiple-round game. Clients tend to view litigation and some deals as a one-round game. Lawyers usually view their negotiation with other lawyers as unlimited multiple rounds, where any defect will bring future retaliation and a blemished reputation. Thus, the "bargainer's dilemma."

We probe this dilemma in more depth when we examine the ethical constraints on lawyer negotiation in Chapter 10. In the meantime, assume that lawyers, when negotiating for clients, do have a choice of being more cooperative or more competitive in their negotiation approach. Also recall that the choice of how to fulfill clients' interests is not completely bipolar. Cooperation may be the best way to fill the needs of all clients in negotiation when an integrative outcome is possible that allows each party to get some of what they want. In such situations, a competitive approach may eliminate the possibility of a win-win outcome that is otherwise available; however, it may produce an outcome most favorable for the client of a successful competitive negotiator.

CHAPTER 5

Negotiation Step by Step—The Beginning

A. Negotiation Stages and Approaches

Negotiation, whether competitive, cooperative, or a mixed approach, can initially be understood as occurring in stages. Even though lawyer negotiation often is not a tidy process, breaking negotiation into stages is a way to help comprehend and analyze the process. There is, however, no script—all negotiations do not follow the same lineal staging, and each stage and set of activities will not necessarily be completed in every negotiation. After mastering the basic structure and concepts of negotiation, you may find yourself improvising in a more dynamic process of give and take or problem solving.

Listed below are the activities typically occurring in the seven stages of competitive negotiation in one column and in the other column cooperative negotiation. The activities within each stage can be mixed or alternated between competitive and cooperative, bearing in mind the warning that cooperation is commonly driven out by competitiveness. Of course, the labels "competitive" and "cooperative," like all one-word descriptions, are too simple. Adversarial and problem-solving, positional and interest-based, or distributive and integrative may better capture the behavioral contrast. Finally, note that although some of the activities and tasks within the two approaches are similar, the sequence of activities may vary between positional and interest-based approaches. For example, making demands and offers comes earlier in positional negotiation and later in interest negotiation, following the exchange of information, if at all.

Stage	*Competitive/adversarial approach activities*	*Cooperative/problem-solving approach activities*
1. Preparation and Setting Goals	➢ Interviewing and counseling client about negotiation ➢ Setting goals ➢ Assessing power of each party ➢ Planning and research ➢ Formulating positions and bottom line	➢ Interviewing and counseling client about negotiation ➢ Setting goals ➢ Assessing needs of each party ➢ Planning and research ➢ Formulating best alternative to negotiated agreement (BATNA) and reservation point

Stage	*Competitive/adversarial approach activities*	*Cooperative/problem-solving approach activities*
2. Initial Interactions	➢ Setting tone ➢ Establishing credentials/ authority ➢ Making first demand or offer	➢ Setting tone ➢ Establishing rapport and trust ➢ Agreeing on agenda
3. Exchanging and Refining Information	➢ Asking questions ➢ Offering overstated or understated valuations ➢ Informational bargaining ➢ Formal discovery ➢ Stating positions (often exaggerated)	➢ Asking questions ➢ Sharing assessments or appraisals ➢ Information exchange ➢ Informal discovery (I'll show you mine, if you'll show me yours) ➢ Stating needs or interests
4. Bargaining	➢ Argument and persuasion ➢ Making concessions ➢ Forming coalitions and holding out	➢ Proposing principles ➢ Applying principled criteria ➢ Trading off priorities and brainstorming solutions
5. Moving Toward Closure	➢ Using power and threats ➢ Creating time crisis ➢ Evaluating offers	➢ Examining BATNAs ➢ Agreeing on deadlines ➢ Decision analysis
6. Reaching Impasse or Agreement	➢ Possible impasse ➢ Compromising ➢ Adding conditions	➢ Possible, but less likely, impasse ➢ Reaching mutual decisions through joint problem solving ➢ Creating alternative outcomes
7. Finalizing and Writing Agreements	➢ Preparing opposing drafts of agreement ➢ Negotiating over drafts ➢ Approval, ratification, and buy-in (if necessary)	➢ Memorializing terms ➢ Concurring on single text agreement ➢ Approval, ratification, and buy-in (if necessary)

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Note and Questions

Professor Williams, in his article "Negotiation as a Healing Process," part of which is excerpted in Chapter 1, refers to negotiation as a ritual. He goes on to say:

> **In law school we learn that no two cases are alike, and in our culture we assume that no two people are alike. We might surmise from this that no**

two negotiations are alike. Fortunately, this is only partially true. One of the defining characteristics of a ritual, including the ritual of negotiation, is that it provides an accepted structure for and sequencing of events. As a general proposition, then, we can say *the ritual of negotiation unfolds in predictable stages over time.* The predictability helps explain why so many lawyers lose patience with the process; it is highly repetitive, and thus not as stimulating as new adventures would be. This aspect of ritual is well captured by W. John Smith when he says, "*ritual* connotes . . . behavior that is formally organized into repeatable patterns. Perhaps the fundamental and pervasive function of these patterns is to facilitate orderly interactions between individuals." The point could not be more clear. Negotiation is a highly repetitive process. Without predictable patterns, the negotiators could not hope to achieve orderly interaction with each other. As Smith explains: "Ritual behavior facilitates interactions because it makes available information about the nature of events, and about the participants in them, that each participating individual must have to interact without generating chaos." The task now is to develop a working knowledge of the predictable stages of the negotiation process. (Williams 1996, 33)

1. Have you found negotiations in which you were involved to be predictable in process? What types of negotiations are most likely to follow a ritualistic or predictable pattern? Might there be different negotiation rituals depending on what is being negotiated and the setting of the negotiation?
2. Can you think of how concurring on a single text agreement, listed on the chart as Stage 7, "Finalizing and Writing Agreements," might be taken up out of order and used in earlier stages to help formulate choices, bargain, and reach decisions? For a fascinating application of the single text procedure in reaching agreement between Israel and Egypt at Camp David, see Jimmy Carter's book *Keeping Faith: Memoirs of a President* (1982).

B. Getting Ready to Negotiate

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

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

1. *Preparation*

❖ Russell Korobkin, *A POSITIVE THEORY OF LEGAL NEGOTIATION*

88 Geo. L.J. 1789 (2000)

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

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

1. Internal Preparation: Alternatives and BATNAs

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

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

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

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

In most circumstances, however, the subject of a negotiation and the negotiator's BATNA are not perfect substitutes. If Jacob's business is of higher quality, has

a higher earnings potential, or is located closer to Esau's home, he would probably be willing to pay a premium for it over what he would pay for the alternative choice. For example, if the alternative business is selling for $190,000, Esau might determine he would be willing to pay up to a $10,000 premium over the alternative for Jacob's business and thus set his RP at $200,000. On the other hand, if Esau's BATNA is more desirable to him than Jacob's business, Esau will discount the value of his BATNA by the amount necessary to make the two alternatives equally desirable values for the money; perhaps he will set his RP at $180,000 in recognition that his BATNA is $10,000 more desirable than Jacob's business, and Jacob's business would be equally desirable only at a $10,000 discount.

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

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

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

By investigating an even wider range of alternatives to reaching agreement and by more thoroughly investigating the value of obvious alternatives, the negotiator can alter his RP in a way that will shift the bargaining zone to his advantage. Rather than just considering the asking price of other catering companies listed for sale in his town, Esau might contact catering companies that are not for sale to find out if their owners might consider selling under the right conditions. This could lead to the identification of a company similar to Jacob's that could be purchased for $175,000, which would have the effect of reducing Esau's RP to $175,000 and therefore shifting the bargaining zone lower. Goliath's attorney might conduct additional legal research, perhaps exploring

other, more novel, theories of liability. If he determines that one or more alternative legal theories has a reasonable chance of success in court, Goliath might adjust upward his estimate of prevailing at trial—and therefore the value of his BATNA of trial—allowing him to adjust upward his RP.

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

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

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

2. Setting Goals

In addition to thinking through the least you can accept, or your reservation point, it is also helpful to formulate goals and set high expectations. High

expectations lead to better outcomes, as discussed in this excerpt by Richard Shell.

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

28 (Penguin, 2006)

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

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

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

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

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

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

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

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

Goals Versus "Bottom Lines"

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

"positive bargaining zone." When the two bottom lines do not overlap, they speak of a "negative bargaining zone". . . .

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

Researchers have discovered that humans have a limited capacity for maintaining focus in complex, stressful situations such as negotiations. Consequently, once a negotiation is under way, we gravitate toward the single focal point that has the psychological significance for us. Once most people set a firm bottom line in a negotiation, that becomes their dominant reference point as discussions proceed. They measure success or failure with reference to their bottom line. Having a goal as your reference point, by contrast, prompts you to think you are facing a potential "loss" for any offer you receive below your goal. And we know that avoiding losses is a powerful motivating force. This power is not working as strongly for you when you focus solely on your bottom line.

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

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

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

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

Set an Optimistic, Justifiable Target

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

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

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

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

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

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

Questions

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

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

3. Negotiation Preparation Checklist

The following checklist expands on the concepts developed in the previous readings and includes some points from the selections that follow. You may want to create a personal, comprehensive checklist to use in preparing for negotiations in both litigation and transactional settings. Using a checklist is a way to discipline your thinking so you may eventually not need the list. This checklist, although longer than one you might create, provides an inventory of helpful questions from which you can choose, depending on the case and the time available. Good preparation is more than you minimally need. Thorough preparation can minimize surprises and allow you to better respond to what you can't anticipate.

I. Information and Strategy

1. Information

- ☐ What information about opposing counsel and parties might help you connect and establish rapport?
- ☐ What information will help determine your opponent's needs, interests, and objectives?
- ☐ What questions will you ask to elicit such information?
- ☐ What information is the other side likely to seek?
- ☐ What are you willing to reveal, and how do you plan to disclose it?
- ☐ What should you be careful to protect, and how do you prevent disclosure?
- ☐ Are there any advantageous trades of information?

2. *Alternatives*

- ☐ What is your best alternative if no agreement is reached (BATNA)?
- ☐ Can you improve your BATNA or the way it is perceived?
- ☐ What is your worst alternative if no agreement is reached?
- ☐ What are your opponent's best and worst alternatives?
- ☐ How can you change how your opponent perceives his alternatives?
- ☐ If an offered settlement is not accepted, are costs and attorneys' fees triggered?

3. *Interests*

- ☐ What are your client's interests and their relative importance?
- ☐ How does your opponent see your client's interests?
- ☐ What are your opponent's interests?
- ☐ How can you change your opponent's perspective about his and your client's interests?

4. *Solutions and Positions*

- ☐ What ideas do you have for a solution (based on what you know now)?
- ☐ Will you assert a position, and if so, what will it be?
- ☐ What is your opponent's current position or proposed solution?

5. *Principles and Standards*

- ☐ What principles can you cite in support of your position?
- ☐ Which are most persuasive?
- ☐ What principles is your opponent likely to cite?

6. *Communication*

- ☐ Should you communicate prior to a negotiation meeting?
- ☐ What theme or story will best present your case?
- ☐ What messages do you want to send?
- ☐ Are there any special communication issues to consider based on culture?

7. *Relationship*

- ☐ Who should be at the table?
- ☐ Are there any relationship problems?
- ☐ Will there be a continuing relationship?
- ☐ Is there trust between you and your opponent?
- ☐ How can you build trust and credibility?

II. Bargaining

1. Process and Location

- ☐ Should you establish an agenda?
- ☐ Are there applicable negotiation customs or rituals?
- ☐ Can you negotiate over or influence the process?
- ☐ Where do you want to negotiate?

2. *Expectations and Bottom Lines*

- ☐ What goals and objectives do you hope to achieve?
- ☐ What is the best outcome you can realistically envision?
- ☐ What minimum terms are you willing to accept?
- ☐ What is your reservation or walkaway point?
- ☐ What are your opponent's likely goals and expectations?
- ☐ What value system will your opponent use in assessing his case?

3. *Your Tactics*

- ☐ What negotiation style or approach will you take?
- ☐ Should you insist on any "preconditions"?
- ☐ What should be your first demand or offer?
- ☐ How will you support your demands and offers?
- ☐ How will you move from your starting point to where you would like to end?

4. *Your Opponent's Tactics*

- ☐ What is the style of your opponent?
- ☐ What negotiation techniques do you expect your opponent to use?
- ☐ What pattern or moves do you anticipate? How will you counter those tactics?

5. *Concessions*

- ☐ What early concession will you make, if necessary?
- ☐ Do you have any easy "giveaways"?
- ☐ Are there any non-monetary concessions you can give?
- ☐ Are there concessions of low cost to you and of greater value to your opponent?
- ☐ What messages do you want to send with your concessions?
- ☐ What concessions do you anticipate receiving?

III. Settlement/Deal

- ☐ What terms will you insist upon?
- ☐ Do you have specific language for a final agreement?
- ☐ Are there terms and provisions you anticipate your opponent will insist on?
- ☐ What legal requirements are there for an enforceable settlement or deal?
- ☐ Who must sign or approve the agreement?
- ☐ Will there be time factors to consider?
- ☐ Will you or your opponent insist that the settlement be confidential?
- ☐ Should the settlement/deal be publicized? If so, how?

4. *Web and Computer-Assisted Preparation*

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

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

Googling your negotiation counterparts and checking them out on social and professional networking sites is an easy way to learn about their background

and experience. You can use the Web to obtain clues about how they might negotiate, the value they might place on items of potential trade, and their interests. Knowing more about an opponent can also aid in how to establish trust and rapport. Please don't forget that the people with whom you negotiate will likely use Web searches to learn all they can about you as well.

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

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

Although these programs are sophisticated with a type of built-in negotiation intelligence, like with any productivity software, the quality of the result ultimately depends on the input you provide. If nothing else, a good negotiation software program can provide a guide for what you should do before the negotiation to be well prepared and what strategies to use during the negotiation, as well as suggestions about what to do if the negotiation gets stuck. At the time of this writing, two software programs for negotiation preparation and planning are available at *ExpertNegotiator.com* and *NegotiatorPro.com/negpro50coms.html.* There is also a smartphone app to help you assess your negotiation style and determine after a negotiation how you can improve from the experience and what you can do better next time; look for Negotiation 360. Computer-based negotiation assistance and online dispute resolution (ODR) are covered further in Chapter 8.

C. Initial Interaction

How we feel about those with whom we negotiate is a critical element to whether an agreement will be reached. Just as you may believe you can quickly "read" the character and trustworthiness of those you face, so others are forming quick impressions of you. The maxims that "you never get a second chance to make a first impression" and "first impressions matter" need to be considered as you prepare for and commence a negotiation.

1. Trust

The impression you make on an opponent will probably be formed, in part, before you meet. If the negotiation is of significance, you and your opponent will find out what you can about one another. Your reputation will precede you into the negotiation. In addition to informal inquiries among those with whom you have previously negotiated or had other professional contact, the Internet opens your public history, both accomplishments and mistakes, for all to see. So your preparation for a negotiation, in terms of the impression you make and whether you can be trusted, involves your entire professional life. Although a misimpression can be corrected, it is an uphill struggle because of what we know about self-fulfilling prophecies and the selective way we view evidence to support earlier impressions.

By the time you are in law school, you have, no doubt, learned how to make a good impression. Little things matter, including appearance, posture, eye-contact, and how you greet someone. For example, a firm handshake, or its cultural equivalent, is generally accepted as code language to show a willingness to engage cooperatively and with trust. In a classroom study, Harvard MBA students were assigned to negotiate a real estate deal. Half of the pairs of negotiators were instructed to begin their session with a handshake; the other half were seated across the table from one another and not instructed to shake hands. Those who shook hands before commencing to negotiate were observed to be less misleading then those who did not shake. Both buyers and sellers who shook hands at the outset reported to be more content with the deal. In another study, the MBA students who shook hands prior to negotiating an employment contract were observed to be more open to the other's preferences and achieved more positive joint outcomes. (See Schroeder, Risen, Gino, and Norton 2014.)

Note and Questions

THE HANDSHAKE THAT SHOOK THE WESTERN HEMISPHERE

It was just a handshake and not even the first between Barack Obama and Raúl Castro, but when historians come to select the images that best reflect the legacy of the two leaders, this may be among the pictures that define their efforts to end half a century of Cold War animosity: The widely anticipated moment came at the inauguration ceremony for the Summit of the Americas in Panama, the first occasion for the two presidents to get together since their surprise announcement on 17 December that they would move to normalize relations between their two countries. [cnn.com/2015/04/10]

1. Does the refusal by some Saudi officials in 2015 to shake the hand of Michelle Obama indicate distrust or disrespect?
2. Are there cultural or religiously based reasons to refuse a handshake?

Trust can be thought of as a metaphorical bank account. You begin the trust account with early deposits based on a good reputation, initial positive interactions like handshakes, showing respect, acting professionally, listening, and acknowledging an opponent's perceptions. During the negotiation you may

have to draw upon your trust currency when you need to persuade your counterpart that your assertions are credible and your proposals are reasonable.

The flip side of trust—distrust—inhibits negotiation. Distrust tends to be reciprocated and becomes a self-fulfilling prophecy engendering negative behavior and selective perceptions that confirm the reasons for not trusting one another. Distrust is an obstacle to the exchange of information and collaboration or joint problem solving.

Unless negotiators know one another socially or have had positive professional experiences together, mistrust may be more the norm at the beginning of a negotiation because you know the other side can prevent you from getting something you want. So, setting a positive tone and making early moves to build trust are important. If you can start on a positive note, you can build a momentum of trust that can carry the negotiations through difficult times. Trust initiated through good listening, sincere compliments, or small opening concessions builds upon itself through reciprocity.

2. *Rapport and Reciprocity*

Considerable research has been done on ways to build rapport and influence attitudes for purposes of marketing and sales. Much of this research has applicability to negotiation and can be put to good use, provided it is implemented subtly enough that you appear sincere and don't come across like a salesperson and arouse suspicion. All the personal skills that you have been taught, and probably admire in others, come into play in establishing rapport: listening intensely, showing real interest in others, being respectful and polite, agreeing, and saying yes when it is possible to do so honestly.

One core finding of the research is that people tend to reciprocate small favors and concessions by giving more than they receive. (See Cialdini 2008.) You have probably received in the mail solicitations from charities that enclose a small gift, like personalized address labels or a small packet of flower seeds. Experience has proven that these token gifts generate larger contributions. Our embedded sense of reciprocal obligation is the source of the old saying "Nothing is more costly than something received free of charge." Similarly, making a small concession at the beginning of a negotiation can help create rapport and trigger a tendency to reciprocate with a larger concession later in the negotiation. Saying "yes" when possible not only builds rapport but plants the seeds of reciprocity that can produce more agreement from the other side. (See Martin et al. 2014.)

Another base of rapport is finding common ground. The more you know about your negotiating counterparts and their clients, the more you might find points of interest, background, experiences, and relationships that you share. Discovering connections and commonalities is a good start to building rapport.

In our chart of negotiation stages at the beginning of this chapter, we listed first demands and offers as part of initial interactions under the competitive/adversarial approach, but omitted them in the interest-based approach. Even competitive negotiators may seek to establish a positive relationship and exchange information before discussing proposals. We will return to demands and offers after the following discussion about gathering and managing information.

D. Exchanging and Refining Information

The task of finding out all that you can about the other side, their needs, their case, their BATNA, and other factors affecting their reservation point, is a significant part of the preparation stage and pervades the entire negotiation process. Similarly, disclosing and managing information in your control that may shape the other side's perceptions or that they want to know is also a continual part of the process. Exchanging and refining information is listed as a separate step only to emphasize its importance in the process and to recognize that there are points in the negotiation where information is expected to be exchanged formally or informally. Exchanging and refining information is a dynamic that continually shapes expectations and effects negotiation and decision making. Information may be the subject of bargaining before negotiating over outcomes.

A hallmark of effective negotiators, whether competitive or cooperative, is their ability to listen, their propensity to ask questions, and their desire to continually gather information. (As will be presented later, information is power in negotiations.) Information is not limited to what is written or spoken; it is gathered through all the senses, including keen observation. This is sometimes referred to as "360° awareness," which distinguishes successful negotiators. (See Molly Fletcher, *A Winner's Guide to Negotiating* 16 (2015).)

1. Listening, Observing, and Questioning

Lawyers are often characterized as good talkers, who love to argue. In court, being a "silver-tongued" attorney may be valued. In negotiations, as in conversations, being a good listener and knowing how to obtain information through the use of questions is more important than talking. This is true in interacting with clients when preparing to negotiate for them, as well as in negotiating. The old wisdom that "we were born with one tongue and two ears so that we can hear from others twice as much as we speak," is good advice for negotiators.

The same ratio of two eyes and one tongue might also be noted to emphasize the importance of observing speakers for nonverbal cues and the information they reveal. Observing facial and body language of a person talking to you may communicate more about how they feel than their words. The dynamics between opposing counsel and her client or between members of multiple parties on the other side may offer important clues about what they might be willing to pay or accept to settle a dispute or close a deal. This is also referred to as situational awareness, which combines astute observation with interpretation based on your experience. (See Wheeler 2013.)

If you can learn what is in the brain and heart of an opponent, you can make a personal connection, satisfy their needs, and get what you want at the lowest possible cost. If you actively allow others to openly express themselves, they usually will tell you what you want to know. The more you talk, the less they can say, and the less you can listen and learn. We seldom learn anything new by speaking. The key lesson here is easy: **Talk less; listen and observe more.** When you do speak in a negotiation, do so in a way that elicits more information, directly

or indirectly, or that helps shape the negotiation. Sometimes giving information is a way to get information, but know when and how to listen.

Research results confirm that effective negotiators are better at eliciting information and do more of it than less effective negotiators. Disclosing information, whether by arguing the merits of your case or asserting your position early on, generally results in worse outcomes than first asking questions and listening. Neil Rackham and John Carlisle studied the behavior of English labor and contract negotiators. The more successful negotiators asked twice the number of questions asked by less successful negotiators and spent twice as much time acquiring information. Effective negotiators tested their understanding of what was said and summarized what they heard (Rackman and Carlisle 1978).

Rackham and Carlisle's research supports what psychologists and interviewers have known: The most effective listening is active listening. Active listening is the opposite of deadpan, silent, passive listening. During active listening you focus your energy on what the speaker is communicating and provide responses that encourage the speaker to open up and say more. In active listening you hear not only the content, but also identify the emotion or sentiment expressed. You then briefly restate in your own words the feeling and some of the content you heard communicated so the speaker can confirm, clarify, or amplify. Most important, your response lets speakers know you heard what they said and that you care about how they feel.

The following selection provides a guide for active listening and purposeful questioning when you are negotiating.

❖ Lee E. Miller & Jessica Miller, *A Woman's Guide to Successful Negotiating*

66 (McGraw-Hill, 2002)

Active Listening

There are numerous ways to encourage others to talk so you can find out what their real concerns are. These techniques are referred to as active listening and include the following:

Reflect Back

Restate what the other person has said in your own words. This ensures that you correctly understand what has been said, and it also shows the other person that you are trying to see things from their perspective. For example, if someone says, "I can't understand how you could come up with such an unworkable solution to our problem," you might paraphrase that by stating, "I guess we don't understand what your real needs are here."

Clarify

When something is not clear or you want a better understanding of what has been said, you can ask for clarification. For example, in response to the previous statement, you might say, "I don't understand. What do you mean by unworkable?" Or you could ask them to explain: "Why do you think it's unworkable?" In addition to giving you additional information, clarifying signals that you care about their concerns.

Encourage

Nod and smile, lean forward when others are talking, look them in the eye, and occasionally interject phrases such as "I see," "Go on," or "Really." This will encourage those who are speaking to expand upon what they are saying. The more they speak, the more information you will get. Again, by engaging in this behavior, you signal your willingness to listen and your interest in what is being said.

Acknowledge Effort

Provide positive reinforcement when the speaker tries to work with you or says something you agree with. For example, you might respond by saying "I appreciate your efforts," or "That's a good point." This will encourage further efforts to find common ground with you.

Recognize Feelings

It often helps to address the feelings that people may be experiencing but not openly sharing. In response to the statement that "The proposal is unworkable," you could reply, "I see that you're frustrated with how the discussions are proceeding." Recognizing others' feelings often defuses anger and allows them to open up. This is frequently necessary before you can move on to problem solving.

Summarize

When you believe that you understand the other person's point of view, summarize your understanding of what has been said and ask whether your understanding is correct. Do the same when you reach an agreement on a particular issue. Summarizing helps to prevent misunderstandings, and you should use it continually throughout the course of negotiations. When done on an ongoing basis, it reinforces that the parties are making progress and encourages continued efforts toward reaching an agreement.

It doesn't do much good to listen, however, if you don't act on what you hear. Don't be afraid to stray from what you had planned to say if you get signals the other side is not receptive to the approach you are taking. Moreover, nothing works better than using what the other side says. You can achieve many of your objectives just by listening carefully to what is being said and agreeing to those points that are helpful. That is why it is always best to listen first.

Purposeful Questioning

Good negotiators ask different types of questions for different reasons, from open-ended, information-gathering questions to focused questions intended to lead someone to a specific conclusion. The two primary reasons for asking questions during negotiations are to get information or to support your argument. How you ask a question will depend on what you are trying to achieve.

Ask Open-Ended Questions

You should ask open-ended questions if your goal is to obtain information or to find out what the other person is thinking. Open-ended questions can't

be answered with a yes or a no. They usually begin with "who," "what," "where," "when," "why," or "how," which allow for wide latitude as to responses. Their unstructured nature often enables you to find out what the real issues are and how you might satisfactorily resolve them. Open-ended questions such as "Tell me how you reached that conclusion" can also give you an insight into how someone else thinks.

Often, asking the right question at the right time can give you the information you need to completely turn around a negotiation. I recall one such situation. . . . I was practicing law, representing an executive who was taking a job with a new company and being asked to relocate from California to Connecticut. We had worked out the major issues—salary, bonus, stock options—to his satisfaction. The new company had a generous relocation policy, but it provided for only a 30-day temporary living allowance. My client's daughter was a senior in high school and he was not going to move his family until after she graduated. So he asked the company to pay his temporary living expenses for one year. The company representative insisted that they could not deviate from their relocation policy. My client was equally adamant and felt that if the company was taking such a bureaucratic approach to his request, it was probably not a place where he would want to work. Just when I thought the deal was about to fall through, I asked a question that allowed us to successfully conclude the negotiation. What was this brilliantly insightful question? It was simply "Why?" More specifically, I told the vice president of human resources that I couldn't understand why we were arguing about this issue. He explained that the relocation policy was written that way because the company had been burned by a senior executive who, after being paid temporary living expenses for well over a year, could not get his wife to move and rejoined his previous company. Having been embarrassed once, the vice president was not about to ask for another exception to the policy. Understanding his reasons for refusing our seemingly reasonable request enabled us to readily resolve the problem. We agreed that if my client did not move his family to Connecticut, he would repay the company for his temporary living expenses. This allowed the vice president to ask for and receive a modification to the relocation policy without the fear of looking foolish if things didn't work out. . . .

One purpose of asking open-ended questions is to keep the other side talking. The more someone talks, the more likely they are to provide valuable information. An added benefit is that it helps you develop a relationship with that person, which, in and of itself, is helpful. When you ask questions of others, people feel that you are working with them to find solutions, not negotiating against them.

Ask "Why?"

As mentioned above, often the most useful question you can ask is "Why?" Asking why works particularly well as a response to statements such as, "We can't agree to that" or "That would be contrary to policy." When you ask, "Why can't you agree to that?" or "Why do you have that policy?," you are calling for a reasoned response. After you are given a reason, you can make a case that the reason is not applicable in this instance. Alternatively, you have an opportunity to satisfy the other side's objections.

Repeat Back in Question Form

Another way to ask why is to use a variation on the reflecting back technique described above. Simply repeat what has just been said, but in question form . . . reflecting back the other side's own words when a proposal is not reasonable can be very effective. Similarly, when people make unqualified statements such as, "We never do that," a simple "Never?" will force them to either confirm that this is really the case, or, more likely, cause them to retreat to something like, "Except in very unusual circumstances." Once you get that kind of admission, you are well on your way to making your case because now you know what argument to make: that yours are unusual circumstances and require an exception to the normal practice. Once someone concedes that exceptions have been made in the past, it becomes much harder to claim that you don't deserve the same treatment.

Answer Questions with Questions

Sometimes you can answer a question with a question. If you don't want to respond to a particular question or you want to understand why someone is asking a particular question, you can respond by asking, "Well, what do you think?" If you do this too often you may appear evasive and argumentative, but using this approach sparingly can be effective.

Ask What They Would Do

Finally, if you find yourself at an impasse, you can always ask what they would do if they were in your position. This can sometimes completely change the dynamics of the negotiations by forcing the other side to come up with a solution to the problem, rather than trying to convince you that there is no problem. In doing so, a solution may emerge that would be acceptable to you or could be made so with slight modification.

Questions

5. The selection above on active listening and questioning is excerpted from a book written as a guide for women. Do you consider the advice given to be gender specific? Do you think men or women are generally better listeners? Why?
6. Are there times when active listening or responding to a question with a question should not be used? When would you find these techniques annoying or counterproductive?
7. The use of silence to elicit additional information after someone stops speaking can also be effective in situations other than negotiation. The silence should be accompanied by continued eye contact to convey an expectation or invitation for more information. Have you used this method with friends, a spouse, or children? Do you think you are susceptible to this technique when used by others?