2. *Managing Information*

Effective negotiators know how to manage information and thoughtfully determine what information to seek, to provide, when to provide it, and what information to guard. (Gupta 2015) Generally, it is better to receive more information than you give, but this is not an absolute. The distinction between managing information and purposely deceiving is a thin line and is examined in the section on negotiation ethics.

The following selection provides advice and discusses issues regarding obtaining and providing information. Professor Nelken first focuses on managing and bargaining for information in distributive situations and then on the benefits and concerns of sharing information in more integrative negotiations. The separation between distributive and integrative negotiation is not always clear—her comments may apply to both.

❖ Melissa L. Nelken, *NEGOTIATION: THEORY AND PRACTICE* 41 (Anderson Publishing, 2007)

In the course of the negotiation, you will try to learn things about the other party's case, and about his perception of your case, that you don't know when the negotiation starts. He, of course, will do the same with you. Another important aspect of preparation, then, is deciding what you need to find out before you actually make a deal. Without considering what information you need to gather in the early stages of the negotiation, you will not be able to gauge how well the actual situation fits the assumptions you have made in preparing to negotiate. You may have overestimated how much the other party needs a deal with you, or underestimated the value he places on what you are selling. Only careful attention to gathering information will enable you to adjust your goals appropriately. In addition to what you want to learn, you also have to decide what information you are willing, or even eager, to divulge to the other party—for example, the large number of offers you have already received for the subject property—and what information you want to conceal—for example, the fact that none of those offers exceeds the price you paid for the property originally. Managing information is a central feature of distributive bargaining, and you have to plan to do it well.

A beginning negotiator often feels that she has to conceal as much as possible, that virtually anything she reveals will hurt her or be used against her. . . . [Y]ou are more likely to feel this way if you have not thought through your case and prepared how to present it in the best light that you realistically can. If you choose when and how you will reveal information, rather than anxiously concealing as much as possible, you gain a degree of control over the negotiation that you lack when you merely react to what your counterpart says or does. Increasing the amount of information you are prepared to reveal, and reducing the amount you feel you absolutely must conceal, will help you make a stronger case for your client. In addition, the more willing you are to share information that the other party considers useful, the more likely you are to learn what you need to know from your counterpart before you make a deal. . . .

Bargaining for Information

A central aspect of distributive bargaining is bargaining for information. In the course of planning, you have to make certain working assumptions about the motives and wishes of the other side, as well as about the factual context of the negotiation. In addition, we all have a tendency to "fill in" missing information in order to create a coherent picture of a situation. For a negotiator, it is imperative to separate out what you know to be true from what you merely believe to be true by testing your assumptions during the early stages of the negotiation. Otherwise, you risk making decisions based on inaccurate information and misunderstanding what the other side actually tells you. . . .

Many negotiators forget that they start with only a partial picture of the situation, and they push to "get down to numbers" before learning anything about the other side's point of view. Yet the relevant facts of a situation are not immutable; they are often dependent on your perspective. Knowing the other side's perspective is a valuable source of information about possibilities for settlement. The most obvious way to gather that information is by asking questions, especially about the reasons behind positions taken by the other party. Why does a deal have to be made today? How good are her alternatives to settlement with you? What is the basis for a particular offer? Asking questions allows you to test the assumptions that you bring to the negotiation about both parties' situations. Questions also permit you to gauge the firmness of stated positions by learning how well supported they are by facts. In addition, the information you gather can alert you to issues that are important (or unimportant) to your counterpart, opening up possibilities for an advantageous settlement if you value those issues differently.

In addition to asking questions, you have to learn to listen carefully to what the other party says, to look for verbal and nonverbal cues that either reinforce or contradict the surface message conveyed. If someone tells you that he wants $40,000-50,000 to settle, you can be sure that he will settle for $40,000, or less. If he starts a sentence by saying, "I'll be perfectly frank with you . . . ," take whatever follows with a large grain of salt and test it against other things you have heard. Asking questions is only one way to gather information, and not always the most informative one. You also have to listen for what someone omits from an answer, for answers that are not answers or that deflect the question, for hesitations and vagueness in the responses that you get. There is no simple formula for what such things mean, but the more alert you are for ways in which you are not getting information in a straightforward way, the better able you will be to sort through the information that you get. . . .

One of the most effective and underutilized methods of bargaining for information is silence. Many inexperienced negotiators, especially lawyer-negotiators, think that they are paid to talk and are not comfortable sitting quietly. If you can teach yourself to do so, you will find that you often learn things that would never be revealed in response to a direct question. When silences occur, people tend to fill them in; and because the silence is unstructured, what they say is often more spontaneous than any answer to a question would be. Since you are interested in gathering new information in the course of the negotiation, it is useful to keep in mind that if you are talking, you probably aren't hearing anything you do not already know. Therefore, silence is truly golden. . . .

Sharing Information

All that has been said so far about integrative bargaining suggests that lawyers will only be able to do a good job if they share substantive information about their clients' needs and preferences and look for ways to make their differences work for them in the negotiation. According to Follett (1942, p. 36), "the first rule . . . for obtaining integration is to put your cards on the table, face the real issue, uncover the conflict, bring the whole thing into the open." This is a far cry from the bargaining for information that characterizes distributive negotiations, where each side seeks to learn as much as possible about the other while revealing as little as it can. The more straightforward and clear the negotiators' communications are, the fewer obstacles there will be to recognizing and capitalizing on opportunities for mutual gain. This means, first, that they must be clear about their clients' goals, even if they are open as to the means of reaching those goals. In addition, there must be sufficient trust between them so that both are willing to reveal their clients' true motivations. Such trust may be based on past experience, but it may also be developed in the course of a negotiation, as the negotiators exchange information and evaluate the information they have received. It does not have to be based on an assumption that the other side has your best interest at heart, but only that he is as interested as you are in uncovering ways that you can both do better through negotiation. Self-interest can keep both sides honest in the process, even where there might be a short-term gain from misrepresentation. Of course, the need to share information in order to optimize results creates risks for the negotiators as well. . . .

Flexibility, rather than rigid positions, is key to integrative bargaining, since the outcome will depend on fitting together the parties' needs as much as possible. When the negotiators share adequate information, they may end up redefining the conflict they are trying to resolve. For example, what seemed a specific problem about failure to fulfill the terms of a contract may turn out to be a more fundamental difficulty with the structure of the contract itself. A better outcome for both sides may result if the contract is renegotiated. . . .

Strategic Use of Information

There is also anxiety because the amount of shared information needed for integrative bargaining to succeed may be more than a distributive bargainer wants to reveal. For example, a distributively-inclined buyer may prefer that his counterpart think that time of delivery, which he does not care much about, is very important to him, so that he can exact concessions on other aspects of the deal by "giving in" to a later delivery to accommodate the seller. Since it is hard to know in advance what issues will be most significant to the other side, it can be difficult to decide how much information to share and how to evaluate the quality of the information you receive about your counterpart's priorities. The fear of being taken advantage of often results in both sides' taking preemptive action focused on "winning" rather than on collaborating. Sometimes such strategies are effective; but they are also likely to impede or prevent what could be a fruitful search for joint gains.

E. Opening Demands and Offers

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

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

The negotiation guidebooks are full of advice on making offers, much of it contradictory. There appears to be consensus that in distributive negotiations more extreme or aggressive offers result in more favorable outcomes. (An exaggerated offer can come before or after learning the other side's opening position.) This consensus, focused on distributive negotiation, doesn't help you on how to start an integrative negotiation.

The selection below, which is based on Professor Williams's extensive empirical research of lawyer negotiators, weighs the advantages and disadvantages of three different opening strategies.

❖ Gerald R. Williams & Charles Craver, *LEGAL NEGOTIATION* 79 (West Publishing, 2007)

. . . The lawyers articulate their opening positions. At this early stage in the dispute, that exchange is not as simple as it appears. The facts are not all in, the legal questions are not fully researched, and unforeseen developments loom on the horizon. In the face of these uncertainties, the negotiators must leave themselves a certain amount of latitude, yet they must develop credible opening demands and offers. . . .

[T]here are essentially three strategies that can be used in framing an opening position. . . . Negotiators may adopt the *maximalist strategy* of asking for more than they expect to obtain, they may adopt the *equitable strategy* of taking positions that are fair to both sides, or they may adopt the *integrative strategy* of

searching for alternative solutions that would generate the most attractive combination for all concerned. Each strategy has its own strengths and weaknesses.

Maximalist Positioning

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

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

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

Equitable Positioning

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

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

effective cooperative/problem-solvers, but it is likely to be deficient when used by ineffective cooperative/problem-solvers. We must conclude that the positioning strategy, whether maximalist or equitable, does not guarantee success. Whichever approach is used, it must be employed with care and acumen or it will not be effective.

Integrative Positioning

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

F. To Make the First Offer or Not

In every negotiation you will need to visit anew the question of whether or not to make the first offer. The optimum decision of whether to make the first offer will depend on the subject of the negotiation, the setting, custom, and practice, and what you know about your negotiating counterpart. In some situations the first offer is, in effect, the demand stated in a served complaint or the listed price of property for sale. The principal tactical benefit of making the first offer is that it establishes an anchor by defining the favorable end of the bargaining zone. Earlier readings familiarized you with the power of an anchor number, particularly when the other party is uncertain about dollar values and there is no clear way to determine an objective value. Experiments have demonstrated that even experienced lawyers, real estate agents and appraisers are influenced by exposure to a specific number prior to formulating their expert opinion about the settlement value of a case or a fair market value. (See Northcraft and Neal 1987.)

Although making the first offer allows you to fix what you think is your most favorable number on the bargaining scale, it is advantageous only if you are sure that your best number is the other side's worst number. If you anchor the bargaining range with your best offer and later discover that your opponent was willing to pay more or accept less, you are stuck and may leave money on the table that you cannot reclaim. In other words, don't make the first offer unless

you are absolutely sure that you have enough information to know that the other side would never offer what you are demanding. Just like in classroom role-plays, in real life negotiations there is often private information regarding your opponent's perceptions, needs and situation that you don't know. That is why it is sometimes advantageous to encourage the first offer from your counterpart. You may learn something surprising about their assessment or, at worst, confirm your guess about the bargaining range without risking a costly miscalculation.

Another risk of making first offers without sufficient information is that what you believe is a reasonably aggressive first offer may be so far out of their range that it drives the other side away from the bargaining table and destroys your credibility if the negotiation is resumed. Never demand so much or offer so little that you can't explain the reason for it or can state a credible justification. Be able to phrase your first offer as "I propose this because. . . ." Your first offer or demand should be favorable to you but not so aggressive that it is the end of bargaining rather than the beginning. Think of this down home negotiator's advice: "You don't want to hang the meat so high that the dog won't jump."

Even if you prefer to make the first offer, the dynamics of the interaction may result in the first offer coming from the other side. The less prepared you are regarding facts, values, and needs of the other side, the more you are vulnerable to the effects of anchoring. When a first offer is presented to you, probe to find out if there is any new information you can obtain without opening the door to an extended, preemptive argument from the other side. If what you learn doesn't change your initial analysis, then present the opening proposal you had formulated before hearing their first offer and the reasoning behind it. At this point, you must decide whether to take a hard stand at your end of the bargaining range, or to initiate a more cooperative approach by indicating that you will need to work together to bridge the gap. (See Malhotra and Bazerman 2007.)

Note and Problem

A popular book by the big-time sports agent and lawyer Donald Dell, *Never Make the First Offer (Except When You Should)* (2009, 159), asks, "Why do you want them to make the first offer? Because you are really not seeking an offer at all; you are seeking information. The first offer gives you an insight into their thought process. It crystallizes all their thinking up to that point and boils it down to a single number or a series of deal points. It also tells you what their primary issues are. Whatever terms they throw in along with their first number are often the most important issues to them."

As evident from the book's parenthetical subtitle, Dell recognizes that there are times when it may be advantageous to make the first offer. Consider the following situation and questions:

> You are a new law school graduate. A three-lawyer firm is interested in hiring you as its first associate. The firm's size, areas of practice, and the personality of the partners are appealing to you. Your most viable alternative is as a staff

lawyer with a government agency starting at $65,000. Large firms, which do not seem like a viable alternative, are starting associates at $165,000. You are scheduled to meet with the managing partner of the firm to discuss terms of employment, which have not previously been indicated.

1. In this situation, would you make the opening salary proposal or instead ask the partner to make a salary offer?
2. What are the advantages and disadvantages of making the first salary proposal versus allowing the managing partner to propose a salary?
3. What might it be helpful for you to know before making this negotiation decision?