

for use by negotiators through the writing of a Harvard mathematician, Howard Raiffa, *Negotiation Analysis: The Science of Art and Collaborative Decision Making* (2002). See also Joel Watson, *Strategy: An Introduction to Game Theory, Third Edition* (2013); William Spaniel, *Game Theory 101: Bargaining* (2014).

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

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

248 (Jullundur Press, 2003)

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

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 Of course, if the matter proceeds, this offer will be withdrawn, and I can give you my personal assurance, Mr.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

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

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

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

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

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

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

“So gentlemen, I suggest each of you call me when you are ready.”

He turned and walked to the door. . . .

## B. Moving Toward Closure

### 1. *The Role of Power and Commitment*

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

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

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

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

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

Negotiation Theory and Practice 127 (J. Z. Rubin & W. Breslin eds., 1991)

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

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

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

### How Should We Define Negotiating Power?

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

A general who commands a real tank battalion, however, is in a far stronger position than one in charge of a row of cardboard tanks. A false impression of power is extremely vulnerable, capable of being destroyed by a word. In order to avoid focusing our attention on how to deceive other people, it seems best at the outset to identify what constitutes "real" negotiating power—an ability to influence the decisions of others assuming they know the truth. We can then go on to recognize that, in addition, it will be possible at times to influence others through deception, through creating an illusion of power. Even for that purpose, we will need to know what illusion we wish to create. If we are bluffing, what are we bluffing about? . . .

### Categories of Power

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

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

#### 1. The Power of Skill and Knowledge

All things being equal, a skilled negotiator is better able to influence the decision of others than is an unskilled negotiator. Strong evidence suggests that negotiating skills can be both learned and taught. One way to become a more powerful negotiator is to become a more skillful one. Some of these skills are those of dealing with people: the ability to listen, to become aware of the emotions and psychological concerns of others, to empathize, to be sensitive to their

feelings and one's own, to speak different languages, to communicate clearly and effectively, to become integrated so that one's words and nonverbal behavior are congruent and reinforce each other, and so forth. . . .

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

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

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

### **2. The Power of a Good Relationship**

The better a working relationship I establish in advance with those with whom I will be negotiating, the more powerful I am. A good working relationship does not necessarily imply approval of each other's conduct, though mutual respect and even mutual affection—when it exists—may help, the two most critical elements of a working relationship are, first, trust, and second, the ability to communicate easily and effectively.

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

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

### **3. The Power of a Good Alternative to Negotiation**

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

### **4. The Power of an Elegant Solution**

In any negotiation, there is a mélange of shared and conflicting interests. The parties face a problem. One way to influence the other side in a negotiation

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

### 5. The Power of Legitimacy

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

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

### 6. The Power of Commitment

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

- (a) Affirmative commitments
  - (1) An offer of what I am willing to agree to.
  - (2) An offer of what, failing agreement, I am willing to do under certain conditions.
- (b) Negative commitments
  - (1) A commitment that I am unwilling to make certain agreements (even though they would be better for me than no agreement).
  - (2) A commitment or threat that, failing agreement, I will engage in certain negative conduct (even though to do so would be worse for me than a simple absence of agreement).

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

a job offer, it is operational. It says, "I am willing to do this. If you agree, we have a deal." . . .

A negative commitment is the most controversial and troublesome element of negotiating power. No doubt, by tying my own hands I may be able to influence you to accept something more favorable to me than you otherwise would. The theory is simple. For almost every potential agreement there is a range within which each of us is better off having an agreement than walking away. Suppose that you would be willing to pay \$75,000 for my house if you had to; but for a price above that figure you would rather buy a different house. The best offer I have received from someone else is \$62,000, and I will accept that offer unless you give me a better one. At any price between \$62,000 and \$75,000 we are both better off than if no agreement is reached. If you offer me \$62,100, and so tie your hands by a negative commitment that you cannot raise your offer, presumably, I will accept it since it is better than \$62,000. On the other hand, if I can commit myself not to drop the price below \$75,000, you presumably will buy the house at that price. This logic may lead us to engage in a battle of negative commitments. Logic suggests that "victory" goes to the one who first and most convincingly ties his own hands at an appropriate figure. Other things being equal, an early and rigid negative commitment at the right point should prove persuasive.

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

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

#### **The Power of Knowledge**

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

#### **The Power of a Good Relationship**

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

#### **The Power of a Good Alternative**

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

#### **The Power of an Elegant Solution**

The early use of a negative commitment reduces the likelihood that the choice being considered by the other side is one that best meets its interests

consistent with any given degree of meeting our interests. If we announce early in the negotiation process that we will accept no agreement other than Plan X, Plan X probably takes care of most of our interests. But it is quite likely that Plan X could be improved. With further study and time, it may be possible to modify Plan X so that it serves our interests even better at little or no cost to the interests of the other side.

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

### **The Power of Legitimacy**

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

### **The Power of an Affirmative Commitment**

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

### **Conclusion**

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

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

### Questions

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

1. Does the above essay by Professor Fisher on negotiating power depart from the principles of *Getting to Yes*? How is it consistent or inconsistent?
2. Does an affirmative commitment always create more power than a negative commitment or threat? Are threats ever appropriate in negotiation? If so, when and under what circumstances?
3. Have you experienced or heard reports of threats that seemed irrational but succeeded in getting the threatening party what it wanted?

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

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

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

A commercial negotiator can exert persuasive power by threatening to end a negotiation so that both sides will lose what they want, even if the result is irrational. The threat of going to trial over a small monetary dispute, for example, may seem irrational. However, if the commitment appears real and the means exist for the threat to proceed, the power of irrationality may prevail. The apparent irrationality may be explained by an absolute commitment to prevail, but it is no less effective. If in a game of "chicken" an opposing driver, headed toward

you on a narrow road, removed her steering wheel and threw it out the window, would you get off the road? Would you be more persuaded to concede if you thought the oncoming driver was carrying a load of dynamite and you were on a road wide enough for only one vehicle?

The road-chicken example of the power of commitment and many others are discussed in an essay by Thomas Schelling, who shared the 2005 Nobel Prize in Economics for his writing on non-cooperative bargaining and game theory. Schelling provides another example of the power of irrational threats: "If a man knocks at your door and says that he will stab himself on the porch unless given \$10, he is more likely to get the \$10 if his eyes are bloodshot." Schelling equates bargaining power with the firmness of one's commitment as communicated to an opponent. A sophisticated, rational negotiator has difficulty appearing obstinate and may have trouble bluffing. Threats and commitment to an outcome may be more believable from a madman or from someone irrevocably locked into a position by outside influences. Schelling cites examples of leverage derived from being locked into a position, including the added international bargaining power of a U.S. president negotiating under a congressional mandate on tariffs and a labor leader's leverage in negotiating with management following a union vote to strike if a set wage limit is not met.

Schelling notes that his examples have instructive characteristics in common:

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

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

We know that perceptions can be manipulated to project power that otherwise would not exist. Perception becomes reality for purposes of negotiation. A classic example of perceived power resulting from illusion is portrayed in L. Frank Baum's popular tale the *Wizard of Oz*, which was made into the classic 1939 film featuring Judy Garland as Dorothy, and more recently the Broadway musical spin-off *Wicked*. The Wizard was created by the special effects of a meek, old man to be an image of power. The sorcerer was merely a carnival huckster whose hot air balloon was blown off course and ended up in Oz. This Wizard was able to create power and meet the needs of Dorothy and her rag-tag friends by manipulating their perceptions, and thus he also fulfilled his interest in banishing the Wicked Witch of the West. If only success in life and negotiation could be as easy as following the yellow brick road. The *Wizard of Oz* illustrates how power is in the mind of the beholder and that real power comes from being able to meet the needs of others. (See Hetherington 2001.)

ns-  
has  
ner  
we  
has  
on  
nat  
on

art  
nt?  
ga-  
n?  
al

get  
can  
hev  
ries  
the  
with  
nal,

son  
the  
rad  
ave  
wer  
lass  
ind

d a  
ra-  
le,  
uns  
ar-  
t it  
rd

## 2. *Deadlines and Final Offers*

The well-known maxim that work expands to fill the time available applies to negotiation. Negotiations often continue until time runs out. As available time to conclude an agreement decreases, slow-moving or stalled negotiations seem to move toward closure. Concessions are offered and compromises are sometimes reached near the forced end of negotiations even though the same concessions would not be considered at the earlier stages. As Dawson noted in *Secrets of Power Negotiating*, quoted in Chapter 3, “the rule in negotiating is that 80 percent of the concessions occur in the last 20 percent of time available.” More competitive negotiators will attempt to take advantage of any perceived need of the other side to conclude a deal, while hiding their own need for quick closure. However, creative solutions also materialize for more cooperative negotiators as available time comes to an end. Experienced cooperative negotiators will discuss their time constraints and agree on a time frame for the negotiation.

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

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

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

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

384 (Berkeley Hills Books, 2003)

Tom Pfister showed up with the President of Denny’s and began to present Denny’s offer, as we sat and listened in our conference room. He explained what corrective action Denny’s was willing to undertake, and, in some cases, had already undertaken. Much of that already was required under the agreement with the United States Department of Justice and we had no quarrel with the requirements of that agreement, except that it didn’t go far enough. Then

## B. Moving Toward Closure

Tom addressed the damage issues, explaining that Denny's would donate \$3 million to various civil rights groups. . . . I interrupted Tom before he finished, demanding, "Is that it? Is that all the money you're offering?" Tom said it was. So I said, "OK, I've heard enough" . . . .

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

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

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

---

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

### Note: The Effect of Scarcity and Deadlines

Moving to closure by imposing deadlines or making an "exploding offer," which becomes unavailable if not accepted by a deadline imposed by the offer, is a tactic in negotiation to take advantage of what is known as the "scarcity effect." The scarcity effect enhances the value of a desired item by making it appear less available or fleeting. We tend to pay more for something now if we

## CHAPTER

### 7

---

# Negotiation Step by Step — The End

## A. Impasse or Agreement

Although a negotiation appears to be moving toward closure, progress may stall and an impasse looms. The impasse may be because of a gap between “last” offers and demands or because something else gets in the way of a final agreement. It is not always clear what that something is. Late-game impasses can occur for several reasons beside a money gap, including:

- A focus on money to the exclusion of other interests
- Misunderstanding the other side’s needs or problems that must be addressed to reach agreement
- Failing to concede low-priority interests to satisfy high-priority interests
- Differing views about future events or contingencies
- Forgetting to realistically reconsider and adjust BATNAs and WATNAs (worst alternatives to a negotiated agreement)
- Decision fatigue and the perfect solution fallacy

Your preparation for negotiation should include gathering information to assess the other party’s needs and what it might take to satisfy those needs in order to reach agreement. As we now know, the positions taken during a negotiation may be different than the underlying interests that need to be addressed. If the negotiation has focused exclusively on incremental compromises from initial positions, the concessions made may not meet other essential needs and the deal cannot be sealed, particularly if the concessions have only been monetary. Successfully negotiating a settlement depends on satisfying the three sets of needs—economic, emotional, and extrinsic (social)—that form the three sides of the settlement triangle presented in Chapter 1. The triangle is like a three-legged stool: If any of the three sets of needs is not addressed, the deal is likely to fail.

All sides must assess if what is on the table is or is not better than no agreement by realistically considering their BATNAs, as well as their WATNAs, in light of new information gained during the negotiation. Cooperative negotiators will see the cloud of impasse as the time for joint problem solving and the need to explore the possibility of improving the outcome for all parties in order to create an acceptable resolution. More competitive bargainers may test an opponent’s resolve by threatening to end the negotiation, and adversarial negotiators may

sense an opportunity and add new demands or conditions. Several endgame moves or collaborative strategies are available to bring closure. Some of these look for agreement by attending to matters beyond money and others focus on closing remaining economic gaps in the settlement or transaction. We now look at some approaches to breaking impasse.

### *1. Apologies*

Economic needs can be quantified and satisfied with money. Emotional and extrinsic factors are more nebulous, but there are ways to satisfy emotional and social needs in a manner that creates value. Offering something other than money that fills a perceived need can be worth more to the recipient than what is given up by the offering party. An apology and its acceptance may satisfy important emotional and social needs.

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

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

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

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

The role of apologies in settling cases has become a subject of increased interest as states consider legislation providing evidentiary protection or "safe harbor" for apologies made by people who have done harm to those on the receiving end of a tort or wrong. Several significant law review articles have examined the appropriateness and effect of apologies on settlement, most drawing

on psychological literature and anecdotal experience. (See, e.g., O'Hara and Yarn 2002; Taft 2000; Cohen 1999.) The following reading reports on new systematic studies using a large number of participants, presented with two personal injury factual scenarios, to gauge the effects of different types of apologies on settlement negotiations. Receipt of a full apology expressing responsibility increased the acceptability of a settlement offer. In contrast, a partial apology expressing regret and sympathy, but not responsibility, did not help, and in the case of more clear liability and greater injuries, a partial apology appears to increase the likelihood that a settlement offer will be rejected.

❖ Jennifer K. Robbennolt, *APOLOGIES AND LEGAL SETTLEMENT:  
AN EMPIRICAL EXAMINATION*

---

102 Mich. L. Rev. 460 (2003)

It is often said that U.S. legal culture discourages apologies. Defendants, defense counsel, and insurers worry that statements of apology will be admissible at trial and will be interpreted by jurors and judges as admissions of responsibility. In recent years, however, several legal commentators have suggested that disputants in civil lawsuits should be encouraged to apologize to opposing parties. They claim that apologies will avert lawsuits and promote settlement. . . .

Survey research suggests that claimants desire apologies and that some would not have filed suit had an apology been offered. In addition, there is anecdotal evidence of . . . settlement negotiations coming to a standstill over the issue of apology even after agreement on an appropriate damage amount has been reached, of plaintiffs who would have preferred an apology as part of a settlement, and of occasions on which a failure to apologize promoted litigation by adding insult to injury. . . . [The author explains her experimental simulation methods for studying the role of apologies in legal settlement negotiations.]

**Effects of Apologies on Settlement Decisionmaking [First Study]**

The first study examined recipients' interpretations of apologies and the effects of those apologies on willingness to accept a settlement offer in the dispute. The hypothetical scenario detailed a relatively simple personal-injury dispute: a pedestrian-bicycle accident. All participants reviewed this scenario and evaluated the same settlement offer.

Control participants evaluated a version of the scenario in which no apology was offered. Additional participants evaluated versions of the scenario in which two variables, the nature of the apology offered and the nature of the applicable evidentiary rule, were varied. First, the nature of the apology offered was varied to compare the effects of a partial apology, in which the other party merely expressed sympathy for the potential claimant's injuries, with the effects of a full apology, in which he or she also took responsibility for causing the injuries. Second, the evidentiary rule described to participants was varied to examine how different evidentiary rules influence the interpretation and effectiveness of an apology, comparing respondents' reactions to an apology where the evidentiary rules protected the apology, where the evidentiary rules did not protect the apology, and where no evidentiary rule was described. Thus, there were seven

different variations of the basic scenario. One hundred forty-five people participated in the study and were randomly assigned to the experimental conditions.

### **Effects of Apology on Settlement**

The first set of analyses compared the two different types of apology (partial and full) to the no-apology control where no evidentiary rule was specified. It was predicted that the nature of the apology would influence participants' settlement decisions. Moreover, based on the previous research on the psychological effects of apologies, it was predicted that an apology would influence settlement decisionmaking through its effects on participants' perceptions and attributions. That is, participants' interpretations of the apology, their affective reactions, and their evaluations of the situation and the offender were expected to mediate the effects of an apology on their settlement decisions: the nature of the apology would influence these perceptions and attributions, which would in turn influence settlement decisions.

### **Effect of Apology on Settlement Decisions**

First, even though all participants were told that they had suffered the same injuries and received the same offer of settlement, the nature of the apology offered influenced recipients' willingness to accept the offer. . . . When no apology was offered 52% of respondents indicated that they would definitely or probably accept the offer, while 43% would definitely or probably reject the offer and 5% were unsure. When a partial apology was offered, only 35% of respondents were inclined to accept the offer, 25% were inclined to reject it, and 40% indicated that they were unsure. In contrast, when a full apology was offered, 73% of respondents were inclined to accept the offer, with only 13-14% each inclined to reject it or remaining unsure. . . .

Comparing each type of apology to the condition in which no apology was received, receiving a partial apology increased the likelihood that the respondent would be unsure about how to respond to the settlement offer, and receiving a full apology increased the likelihood that the respondent would choose to accept the offer and decreased the likelihood that the respondent would choose to reject the offer.

### **The Role of Perceptions and Attributions**

Next, the study examined the effects of the nature of the apology on a number of constructs thought to underlie the effect of apology on settlement decisionmaking. Where there were differences in participants' responses across conditions, the differences follow a strikingly similar pattern: offering no apology or a partial apology elicited equivalent responses that were both different from the responses elicited when a full apology was offered. . . .

Thus, a full apology was viewed as more sufficient than either a partial apology or no apology. An offender who offered a full apology was seen as experiencing more regret, as more moral, and as more likely to be careful in the future than one offering a partial or no apology. While an offender offering a full apology was seen as believing that he or she was more responsible for the incident than one who offered a partial or no apology, the conduct of the full apologizer was

judged more favorably than that of offenders who offered either a partial or no apology. Participants expressed greater sympathy and less anger at the offender who offered a full apology than they did at offenders who offered either a partial or no apology. Participants also indicated more willingness to forgive an offender who gave a full apology than they did for offenders offering a partial or no apology and expected that less damage to the parties' relationship would result following a full apology than they did following a partial or no apology. Finally, participants indicated that the settlement offer would better make up for their injuries when they had received a full apology than when they had received either a partial or no apology.

Therefore, apologies influenced the inclination to accept or reject a settlement offer. The effect of an apology on settlement decisions was complex, however, and depended on the type of apology offered. Only the full, responsibility-accepting apology increased the likelihood that the offer would be accepted. The partial, sympathy-expressing, apology, in contrast, increased participants' uncertainty about whether or not to accept the offer. . . .

#### **Factors Influencing the Effects of Apologies [Second Study]**

A second study was conducted to explore the boundaries of these findings. This study, again, examined recipients' interpretations of apologies and the effect of those apologies on willingness to accept a settlement offer in the dispute. This time, however, in addition to the nature of the apology and the type of evidentiary rule, the strength of the evidence of the offender's fault and the severity of the resulting injury were manipulated. . . .

Consistent with the results of the first study, apologies influenced participants' attributions and perceptions of the situation and the offender. Overall, full apologies improved the participants' perceptions of the situation and the offender, while partial apologies did little to alter such perceptions. Exploration of the possible moderating influences of the severity of the injury and the evidence of the offender's responsibility revealed some interesting boundary conditions on these overall results. In particular, there were patterns in the data suggesting both that partial apologies may negatively impact perceptions where responsibility is relatively clear or where the injury is more severe and that partial apologies may positively impact perceptions where responsibility is relatively less clear or where the injury is relatively minor. . . .

#### **Defendants**

In the absence of statutory protection, defendants or potential defendants who desire to apologize are faced with balancing the effects of apologies on different types of judgments—settlement decisionmaking, liability decisions, and decisions about appropriate damage awards—as well as weighing the less strategic aspects of apologizing. The results of the instant studies inform one important component of these interrelated decisions—the impact of apology on settlement decisions. An important lesson for defendants to draw from these data is that apologies can have beneficial effects on settlement, altering the injured parties' perceptions of the situation and the offender so as to make them more amenable to settlement discussions and ultimately more likely to accept an offer.

As a general matter, the results of the present study provide evidence that a full apology that both expresses sympathy for the victim's injuries and accepts responsibility for those injuries influences a variety of perceptions and attributions about the situation and the other party that might lead to a settlement or allow the parties to begin discussions. Full apologies were seen as more sufficient apologies, as evidencing more regret and a greater likelihood of care in the future, and as offered by people of higher moral character. Full apologies favorably altered assessments of the conduct leading to the injuries and changed the emotions of the injured party so as to reduce anger and increase sympathy for the offender. Full apologies were seen as mitigating potential damage to the relationship, were more likely to lead to forgiveness, and inclined injured parties to look more favorably on the settlement offer. In addition, the results of the first study demonstrated that full apologies, through these effects on perceptions and attributions, increased the likelihood that the settlement offer would be accepted.

Accordingly, full apologies that include accepting responsibility for the incident may facilitate the settling of lawsuits. These "responsibility-accepting" apologies, however, are precisely the type of apologies that most clearly raise concerns about the effects of apologizing on liability decisionmaking and are not likely to be protected by evidentiary rules protecting apologies. Making a statement that admits fault and that might be admissible at trial, while improving the prospects for settling the case, is thought to increase the risk that the offender will be found liable.

For this reason, there is growing interest in ways in which offenders can apologize without exposing themselves to the same risks attendant to a full, responsibility-accepting apology. The present research suggests that the effects of such partial apologies are complex and identifies several aspects of the case that defendants ought to take into account when considering a partial apology. First, the effects of partial apologies on settlement decisionmaking appear to be much more complicated than the effects of full apologies. On the whole, partial apologies did not appear to facilitate settlement in the ways hoped by proponents. The most consistent finding was that partial apologies tended to be no better (or worse) than not offering an apology. Across both studies, regardless of the level of responsibility and the level of injury, there were no differences between those receiving partial apologies and no apology in their evaluations of the offender's conduct, the offender's regret, the offender's belief that he or she was responsible, damage to the relationship, anger, the degree to which the offer would make up for the injuries, or forgiveness. . . . Thus, a defendant or potential defendant who wants to fully apologize may face the uncertain effects of the apology on liability and damage-award decisions if settlement negotiations fail, but may benefit from an improved settlement climate and an improved chance of avoiding litigation altogether.

Defendants contemplating a partial, sympathy-expressing apology may not face the same liability risks. The beneficial effects of such apologies are not clear, however, and there is evidence of some risk that perceptions will be negatively impacted. Thus, defendants must be carefully attuned to the types of factors identified here, in particular the severity of the plaintiff's injury and the degree to which the offender appears to be responsible, in evaluating these rules.

### Plaintiffs

In contrast to defendants, plaintiffs or potential plaintiffs must determine how to respond to an apology from someone they believe has wronged them. . . . The results of the present studies suggest that plaintiffs may, in fact, be able to critically evaluate the content of an apology and to distinguish those that they find credible and that communicate the necessary information from those that do not. Participants in the studies evaluated partial apologies very differently from full apologies. Participants did not interpret partial apologies as conveying the same evidence of regret, acceptance of responsibility, or likelihood of greater care in the future as full apologies. . . . [H]owever, it is plausible that some plaintiffs would be willing to accept a smaller financial settlement if they receive an apology. If this is true, one explanation may be that they have been unfairly induced to forego their rightful compensation. An alternative explanation may be that they are more satisfied by a combination of financial compensation and the apology than they would have been with a larger monetary amount and no apology. Plaintiffs may value the apology more than or differently from financial compensation. Indeed, motivations other than legal entitlement and monetary recovery may be important to plaintiffs. While a monetary settlement may adequately restore financial losses resulting from an injury, an apology may be a better mechanism for restoring less tangible damage, expressing the proper relative moral positions of the parties, assuring the injured party that the offender will not reoffend, or achieving restorative justice. . . .

---

### Note: Evidentiary Consequences of Apologies

Pursuant to the Federal Rules of Evidence and state evidence rules, admissions by party opponents are generally admissible at trial, as an exception to the hearsay rule. Apologies that include admissions of fault would be admissible under Federal Rule of Evidence 801(d)(2) and under state rules of evidence. However, most states now have confidentiality protections that preclude admission into evidence of what is said and done in mediation. Apologies offered as part of the mediation process are generally safe from evidentiary admission.

Several states have enacted laws intended to encourage apologies and "other benevolent gestures" on the scene of an accident and in negotiations afterwards. In 1986, Massachusetts became the first state to adopt a rule of evidence intended to preclude evidentiary admission of apologies for purposes of establishing liability. Following the lead of Massachusetts, Texas (1999), California (2000), Florida (2001), and Washington (2002) amended their evidence codes to provide some protection for certain types of apologies. Although the language varies from state to state, California Evidence Code section 1160 is typical: "The portion of statements, writings, or benevolent gestures expressing sympathy or a general sense of benevolence relating to the pain, suffering, or death of a person involved in an accident . . . and made to that person or to the family of that person shall be inadmissible as evidence of an admission of liability in a civil action. A statement of fault, however, which is part of, or in addition to, any of the above shall not be inadmissible pursuant to this section." It is important to note that the California legislation, as well as that of other states, only encourages partial apologies that do not admit fault.

Colorado has gone further to encourage full apologies in medical malpractice situations. The Colorado “I’m Sorry” rule provides: “[I]n any civil action brought by an alleged victim of an unanticipated outcome of medical care, or in any arbitration proceeding related to such civil action, any and all statements, affirmations, gestures, or conduct expressing apology, fault, sympathy, commiseration, condolence, compassion, or a general sense of benevolence which are made by a health care provider or an employee of a health care provider to the alleged victim, a relative of the alleged victim, or a representative of the alleged victim and which relate to the discomfort, pain, suffering, injury, or death of the alleged victim as the result of the unanticipated outcome of medical care shall be inadmissible as evidence of an admission of liability or as evidence of an admission against interest” (Colo. Rev. Stat. Sec. 13-25-135). Since the passage of the Colorado statute in 2003, many states have enacted legislation providing some form of protection for apologies by health care providers, including Oregon, Oklahoma, Wyoming, Ohio, North Carolina, South Dakota, West Virginia, Maryland, Georgia, and Arizona.

#### Questions

1. The Colorado rule quoted above was part of a tort reform campaign. Do you feel that the protection provided to health-care providers by this exclusionary rule is likely to encourage meaningful apologies? Does the rule in any way favor health-care providers at the expense of malpractice victims? (See Dauer 2005, 47.)
2. Does the California “benevolent gesture” rule go far enough? Would you support legislation that protected from evidentiary admission full apologies that refer to a tortfeasor’s blame or wrongdoing? Why or why not?
3. In what type of cases would an apology be most effective to bring closure? What needs might an apology fill in such a case? Are there cases in which an apology would not work or would not be appropriate?
4. A highly publicized apology from basketball star Kobe Bryant in 2004 played a role in the dropping of criminal rape charges by the recipient of the apology and the settlement of a related civil suit. Do you think the following apology by Mr. Bryant was a spontaneous, benevolent gesture, or the result of careful drafting and negotiation by attorneys? What policy issues are raised by this apology, the subsequent dropping of criminal charges, and the negotiated settlement in 2005 that resolved the civil suit? What considerations and motivations, from both sides, prompted the inclusion of the specific wording that was used? What purpose did this apology serve?

First, I want to apologize directly to the young woman involved in this incident. I want to apologize to her for my behavior that night and for the consequences she has suffered in the past year. Although this year has been incredibly difficult

for me personally, I can only imagine the pain she has had to endure. I also want to apologize to her parents and family members, and to my family and friends and supporters, and to the citizens of Eagle, Colorado.

I also want to make it clear that I do not question the motives of this young woman. No money has been paid to this woman. She has agreed that this statement will not be used against me in the civil case. Although I truly believe this encounter between us was consensual, I recognize now that she did not and does not view this incident the same way I did. After months of reviewing discovery, listening to her attorney, and even her testimony in person, I now understand how she feels that she did not consent to this encounter.

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

5. In testimony on June 17, 2010, before the U.S. House of Representatives' Energy Committee, BP's then-CEO Tony Hayward offered this apology for the worst environmental catastrophe in U.S. history: "The explosion and fire aboard the Deepwater Horizon and the resulting oil spill in the Gulf of Mexico never should have happened and I'm deeply sorry that it did." Hayward went on to detail what BP was doing to remedy the spill, and BP did pledge a fund of \$20 billion to pay resulting claims. However, Hayward did not admit BP's fault. Does the Hayward "apology" help or hurt BP? Why?

## 2. *Splitting the Difference and Leaving the Door Open*

A deceptively simple concluding technique for avoiding impasse, often used in both competitive and cooperative negotiations, is "splitting the difference." The rationale for splitting the difference and a couple of caveats about agreeing to it are discussed in a negotiation guide by Richard Shell. Professor Shell also offers advice on leaving the door open and other tactics when the remaining gap causes the negotiation to reach impasse.

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

185 (Penguin, 2006)

Perhaps the most frequently used closing technique is splitting the difference. Bargaining research tells us that the most likely settlement point in any given transaction is the midpoint between the two opening offers. People who instinctively prefer a compromise style like to cut through the whole bargaining

process by getting the two opening numbers on the table and then splitting them right down the middle.

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

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

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

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

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

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

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

### **What Happens If Negotiations Break Down?**

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

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

### **Jump-Starting the Negotiation Process**

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

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

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

In America, the sport of professional baseball lost nearly two full seasons in the 1990s because of an impasse in negotiations between the players' union and the club owners. The team owners from the big cities wanted to limit the size of team payrolls. The team owners from smaller cities wanted the team owners from big cities to subsidize their franchises. The players wanted more money. It was a three-ring circus. The breakthrough came when the owners hired a new negotiator—a lawyer named Randy Levine—to represent them at the table. Levine acted in the role of mediator as much as advocate and brought a high degree of both credibility and creativity to the process that, according to one participant, "broke the dam of mistrust" that had built up between the parties. Another move that helped move the talks beyond impasse was getting all parties to agree to stop talking to the press and taking public positions that made it hard for them to compromise at the table. . . . [P]ublic commitments can help you stick to your goals, but there comes a time when it is in everyone's interest to get unstuck from their positions. In a high stakes negotiation such as a labor strike, this often means getting the parties out of the spotlight so they can work in private.

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

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

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

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

“What are those for?” asked her counterparts.

“They are to keep score,” she said.

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

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

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

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

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

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

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

### Questions

7. Have you ever “split the difference” to conclude a negotiation or sale? Looking back, was that the best way to close the deal? Are you now sure you were not manipulated into an outcome or price that was more favorable to the other side? Have you used this closing tactic to your advantage?
8. If you propose splitting the difference and the other side does not immediately accept the proposal, does the added or subtracted amount from your previous position become your new, less favorable, number going forward? How can you prevent this from causing you a loss when they propose a split between your “new” proposed compromise number (the gap’s mid-point) and their last number?
9. Do you agree that an impasse can be helpful? If so, when? Why would anyone plan an impasse as part of their negotiating strategy?

### 3. Logrolling and Packaging

You should now be familiar with the concept that value is created through negotiation when what is received in trade is worth more to the recipient than to the provider. “Logrolling” involves conceding on low-priority interests to satisfy high-priority interests. Legislators logroll when they trade their vote on a matter

of little concern in their district for another legislator's vote on an important issue in their own district. For example, a congressman from Montana might agree to vote for a federal rapid transit subsidy bill in return for a New York City congressman's vote for federal animal grazing subsidies. Logrolling creates value, because both legislators are better off if both bills pass than if neither passes. The New York congressman strongly favors the rapid transit bill, while only moderately opposing the grazing bill, and the Montana legislator strongly favors the animal grazing bill and only moderately opposes the rapid transit bill.

You should also understand that the difference between overlapping reservation points, or "bottom lines," of negotiators creates a bargaining zone within which agreement is likely. Differences in the value that negotiators place on multiple items or promises allow for integrated solutions that expand the bargaining zone. Packaging multiple items, adding items to the mix, and taking advantage of an expanded zone of possible agreement can help close a deal. Packaging requires flexibility and creativity because the negotiators may have initially perceived the negotiation to be fixed on a single item or a more limited set of trade-offs. Selling a car by including a longer warranty or a reduced-price luxury package is a sales example of packaging. When negotiating for office space, the landlord may not budge on the rent but will include in the package the use of his building crew to make office improvements or the use of free conference rooms.

Packaging is also used in negotiating the settlement of lawsuits. An agreement may not be possible based on the claim in litigation, but a universal settlement that resolves other pending or potential claims between the same parties or those aligned in interest may expand the bargaining range, and allow more high-priority/low-priority trade-offs that allow an agreement to be reached. It was this type of packaging that led to the "universal" settlement of the *Microsoft v. Stac* litigation described in Chapter 3. Each side agreed to drop its claims in the lawsuit in exchange for cross-licensing all of their existing patents as well as future ones over five years, and Microsoft agreed to pay Stac license royalties totaling \$43 million over 43 months, while also investing \$39.9 million for a 15 percent equity stake in Stac. Although most often associated with problem-solving negotiation, packaging and logrolling are frequently utilized by competitive negotiators at the end of the day. Effective negotiators, regardless of their general approach, will do what it takes to reach a settlement or complete a deal if they end up getting more than they have to give up.

#### ***4. Agree to Disagree: Contingent Agreements***

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

Recognition of different views and probability assessments of uncertain events can help conclude a negotiation and result in an agreement that builds on differences by rewarding the side that most accurately predicts an unknown future event or outcome. An impasse over the amount of rent for a new restaurant can

be resolved by the landlord agreeing to a lower base rent for the skeptical or risk-averse renter, with an additional amount to be determined by the restaurant's revenue. A personal injury settlement negotiation that is stalled because of different predictions about the ongoing need for medical treatment can be resolved by a lump sum amount, with a contingent amount based on the speed of recovery.

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

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

87 Marq. L. Rev. 691 (2004)

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

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

Structurally, a contingent agreement is one in which the parties identify the universe of possible future conditions and agree to take on different obligations in each of those conditions. The simplest contingent deals are those in which the future has only two possible relevant conditions. X will happen, or it will not. If X happens, the terms of our deal are ABC; otherwise, we will do DEF. If I think X is unlikely to happen, I will be happy to give you terms you prefer for ABC, in exchange for terms I favor for DEF. Believing that she will get the work finished on time, an author signs a lucrative book contract with a very harsh penalty for late completion. Buyer loves Seller's house, but really wants a property with off-street parking. Seller firmly expects that the city council will approve a variance required for construction of a new garage, but Buyer is less confident

about the likelihood of getting approval. Buyer agrees to purchase the property from Seller at a reduced price, with a substantial additional payment to Seller if the City Council grants a variance within the next twelve months. Negotiators can craft attractive trades by establishing obligations that are contingent on a future uncertain event that affects each side's valuation of the agreement.

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

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

Precisely because contingent agreements can affect parties' behaviors, some contingent agreements risk creating conditions of moral hazard. Moral hazard is a condition in which one party, under the terms of an agreement, may undetectably or uncontrollably behave in a way that is adverse to the other party. How quickly do you take the speed bumps when you are driving a rental car? Moral hazard suggests that many drivers will drive more cautiously over the bumps if they are driving their own cars because they consider the long-term effects of

their driving behavior. Athletes' contracts often contain contingent incentive clauses. If the athlete scores a certain number of points, for example, he or she receives additional money. Moral hazard arises when, toward the end of the season, a team notices that the athlete is only a few points away from the triggering contingent event. Will the team structure its play to enable the athlete to achieve the statistical goal? If an agent's contract provides for a thirty percent commission on sales this year, but only a ten percent commission in future years, the agent will have an incentive to push deals into the current year—even if the deal he or she could have struck next year would have been on terms more favorable to the company. Negotiators crafting a contingent agreement should foresee the possibility of moral hazard and, where appropriate, structure incentives and disclosures to minimize the incentive for subsequent adverse behavior. . . .

Contingent agreements may affect negotiators' perceptions of "winning" and "losing." Classical negotiation advice counsels negotiators to conceive of negotiations in terms other than win-lose, pointing to the risk that competitive behavior may cloud opportunities for joint gains. In one respect, contingent agreements may present an opportunity for negotiators to avoid the necessity of identifying a winner. Rather than forcing one side to concede on its forecast, contingent agreements permit (in fact, require) both sides to maintain their conflicting predictions about the future. At the time of the agreement, therefore, each side can declare "victory," to the extent such a declaration is important. On the other hand, contingent agreements have the nature of a wager or a bet. Unless one counts the sheer joy of gambling as a victory, both sides cannot win a wager. The contingent event either happens or it does not. Either way, one side may be disappointed. In some organizational cultures, failure is punished more harshly than success is rewarded. A negotiator fearful of identifiable failure (for example, a wager that visibly did not pay off) may forgo an elegant contingent agreement in favor of a less efficient non-contingent deal. Elegantly structured contingent deals may help to reduce the risk of visibly "losing." For example, if the plaintiff fears that a jury may award him nothing, and a defendant fears a runaway jury award of millions, the two could agree to a small guaranteed recovery in exchange for a cap on the maximum recovery. The losing party at trial will then be grateful to have made the contingent agreement, and the winner's regret will be dampened by having won a favorable verdict. . . .

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

entive  
or she  
of the  
e trig-  
hlete  
y per-  
uture  
even  
erms  
ment  
cture  
verse  
  
ing”  
e of  
itive  
gent  
ssity  
cast,  
heir  
ere-  
por-  
iger  
ides  
her  
e is  
len-  
an  
eal.  
los-  
d a  
all  
los-  
nt,  
...  
ent  
for  
nt  
n-  
re-  
id.  
er-  
ng  
n  
te  
lit  
es  
a-  
nt

agreement to be appropriate in a given context, therefore, the perceived benefit it captures for each negotiator must exceed the transaction costs of discovering and implementing the agreement.

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

*5. Realistically Reconsider and Adjust BATNAs and WATNAs*

You know it is important before commencing a negotiation to consider all of the information available to you in determining realistic best and worst scenarios if no agreement is reached. It is also crucial to process additional information gleaned during the negotiation in order to compare what is on the table at the end of negotiation with your readjusted BATNA and WATNA. The new information may be provided directly by the other side during the negotiation or by a refinement of your pre-negotiation perceptions based on interactions, non-verbal cues and changing circumstances. The information available near the end of the negotiation is more current, reality-tested, and accurate than what you knew prior to negotiating. Too many negotiators cling to their pre-negotiation assessments and reservation points in deciding whether to accept or reject a concluding proposal, which can create an impasse that may later be regretted. We are all subject to the confirmation bias, discussed in Chapter 2, and tend to give credit only to information that is consistent with our preexisting beliefs and predictions rather than information that challenges or contradicts them. In addition to the realistic reconsideration of your client’s no-agreement alternatives, it may be necessary to remind your counterparts that their rejection of your final offer does not factor in new information that you have provided during the negotiation or changes in circumstances.

*6. Decision Fatigue, Glucose, and the Nirvana Fallacy*

After intense negotiations and the multiple decisions often necessary to reach a final agreement, a relatively small issue or the necessity of approving a comprehensive package of the component parts of a comprehensive settlement may be the “straw” that blocks agreement and causes impasse. Recent research has confirmed the deteriorating quality of decisions made after a long session of decision-making and the depletion of mental energy resulting from sustained decision making. Decision fatigue is different from ordinary physical fatigue—you’re not consciously aware of being tired, but you do become low on mental energy. The more choices you make throughout the day, the harder each one becomes for your brain and it looks for shortcuts. You might become reckless and act impulsively instead of expending energy to think through the consequences. (“If you won’t pay an additional \$2,000, I will see you in court!”) The other shortcut is the inability to decide—decision paralysis. (“I just can’t agree to that!”) (John Tierney, “Do You Suffer From Decision Fatigue?,” New York Times, Aug. 17, 2011.) Because decision fatigue correlates with low energy

and glucose levels, the anti-dote may be to take time for a sweet bite or a night's rest before declaring impasse. (See Danziger et al., *Extraneous Factors in Judicial Decisions*, Proceedings of the National Academy of Sciences 2011, [www.pnas.org/content/108/17/6889](http://www.pnas.org/content/108/17/6889). See also Baumeister et al., "The Glucose Model of Mediation," 15 *Pepp. Disp. Res. L.J.* 377 (2015).)

The perfect solution standard, or the "nirvana fallacy," can cause us to reject a mutually advantageous settlement because we can imagine something better, even though we might not be able to ever obtain it. It is a similar message to Voltaire's admonition that "perfect is the enemy of good." Comparing a realistic settlement agreement negotiated to provide much, but not all of what each party most wanted, and then rejecting it because it was not quite as good as an idealized but untested BATNA is an example of the nirvana fallacy creating impasse.

#### Problem

Assume you are negotiating with a small law firm interested in hiring you as an associate. The firm is offering you a lower salary than larger firms are paying new associates. You do not want to accept a lower salary, but you prefer a smaller firm and believe that you will be able to generate some new business. Based on the above readings, what terms of agreement might you suggest that could benefit you and be attractive to the firm?

### 7. *Win with a Shrug, Lose with a Smile*

Never celebrate a victory, at least not in the presence of the other side. If you can leave your counterpart convinced he did well, there will be fewer issues going forward and less likelihood that the other side will back out of the deal. The relationship between negotiators is strengthened if no one feels they were beaten. There is value in the rapport established for future negotiations. Conversely, if an opponent or his attorney loses face, he may feel compelled to "get even" at the next opportunity.

One of the authors remembers this example of never celebrating a victory from observing his father in action at the family's pawnshop at the end of vigorous bargaining over the price of an electric fan on a hot summer day.

*"Glen you drive a hard bargain. You can take the fan for \$17 on one condition; don't tell anyone how little you paid for it. I'm losing my shirt to you."*

*"Stop your bellyaching Lew. You gotta' be making money. How else do you stay in business and feed your family when you always lose money selling this stuff?"*

*"You're right. I lose money on almost everything I sell, but I sell so much I can afford to lose more money. It's a matter of volume!"*

Glen left the shop feeling like he had bargained well. The person you negotiate with should always feel they got a good deal. A positive experience prevents buyer's remorse and may bring them back for more. When appropriate,

congratulate your counterpart on the agreement achieved, but not too much. When negotiators lavish effusive praise on their opponents, they have reason to become suspicious and think they may have been taken. (See Folberg 2008.)

## B. Finalizing and Writing the Agreement

After you reach decisions about how a case will be settled or a deal will be structured, your work as a lawyer is not complete. The relief you feel in reaching an agreement can induce you to neglect the important task of attending to how the agreement will be worded and how the remaining details will be determined. Issues of implementation and execution may remain to be determined. The old maxim that “the devil is in the details” is an apt warning. Often, a negotiated settlement about the amount to be paid or an agreement “in principle” triggers another set of negotiations, this time over the formal terms of the settlement agreement itself. Lack of clarity about the terms of the agreement can result in perceptual differences about what was decided and the unraveling of the agreement. Inattention to how the agreement is written can also put your client’s interests at risk of intentional overreaching by the other side or unintentional differences of interpretation that do not favor your client. Not memorializing the agreement in writing as quickly as possible can lead to unnecessary expenses if more time is required to reconstruct exactly what was agreed upon or if uncertainty develops about the outcome. If you did well negotiating, the favorable result for your client can lead to buyer’s remorse, causing the other side to look for ways to change the non-finalized terms or reject the not-yet-enforceable agreement.

A negotiated business transaction is usually memorialized in the form of a written contract that incorporates the terms of the deal and follows general contract principles. An agreement to settle a legal claim may have different characteristics and requirements. A release of claims, a dismissal or other disposition of the underlying lawsuit, enforceability by entry of judgment or liquidated damages, how and when money will be paid or performance of obligations will occur, costs, expenses, and tax aspects—all of these issues must be considered when writing an agreement to settle a lawsuit. Ambiguities must be avoided; a settlement document is written to resolve an existing dispute, not foster a future one.

It is also important to attend to the psychological and relationship aspects of closing the deal. As illustrated in the pawn shop scenario, never gloat unless it is truly felt by all to be a mutually successful outcome. The relationship is strengthened if no one feels they were bested and if clients on both sides have reason to think they were well represented. (It is for this reason that a good negotiator on the other side will not give you an honest critique or tell you that you could have done better.) Even if the parties will not have an ongoing relationship, the attorneys may have future professional contact. There is value in the rapport that carries forward to future negotiations when each side is satisfied with the outcome and great cost if an opponent feels compelled to “get even” at the next opportunity because of regret over an outcome.

We present below the basics involving release of claims, structured settlements, ratification, and the use of single text agreements. Then relationship and practical issues involved in finalizing negotiated agreements, whether transactional or settlement based, are addressed. Tax considerations, which may affect some settlement terms and how the settlement agreement is written, are discussed in Chapter 11.

### *1. Release of Claims*

If the settlement agreement resolves a legal dispute between parties, the agreement should contain a clause mutually releasing one another from future legal claims, either in general or relating specifically to the present controversy. The release-of-claims clause can be broad or narrow, depending on the case, but most settlement agreements should contain mutual releases. In tort cases, the release clause usually releases the defendant from all future claims by the injured party. It may narrowly release the defendant from claims arising out of the facts alleged, or more generally from all claims arising before the settlement date. If you represent the defendant, failing to obtain such a release in the settlement agreement could expose your client to future liability. You will want the broadest release possible. If you represent the plaintiff, especially in a personal injury case where the full extent of injury and complications may not be known, you will negotiate the narrowest release possible so that damages not now known may be sought later.

A tort defendant will usually seek a settlement provision that the settlement is not an admission of liability, which could be used in actions by other parties, particularly in product liability settlements. In many cases, the defendant, particularly in employment and sexual harassment claims, will want a confidentiality provision with liquidated damages. Such a provision may be the subject of added negotiation. In product liability and malpractice cases, confidentiality provisions may raise public protection, ethics, and policy issues (addressed in Chapter 10).

In settlement agreements between businesses, your client may not want to release the other parties from all claims arising before a certain date, since the business relationship may have ongoing conflicts, and some potential future claims may not be apparent. A blanket release may not take into account realities of the continuing relationship and latent claims, so it may be wise to propose and, if necessary, negotiate a limited release.

### *2. Structured Settlements*

Structured settlements are commonly used where damages are substantial or otherwise difficult to meet in one lump-sum payment, and in cases of catastrophic injury or in significant settlements where the plaintiff is a minor. In a structured settlement, the amount recovered by the plaintiff is paid over time in installments. The defendant funds the payments by purchasing an annuity or bond, or by establishing a trust from which the plaintiff receives periodic payments. The structure can be tailored to meet a variety of circumstances.

For example, an injured child whose future earning capacity is impaired by an accident may receive a sum now for medical expenses and escalating monthly payments beginning at age 18 for supplemental income. Experts and annuity representatives are readily available to help structure the future payments and offer annuities for a time-discounted payment.

### 3. Ratification

There are many situations where final authority to sign an agreement rests with someone not directly part of the negotiation. This can result in another opportunity to reopen negotiations to obtain approval of an absent authority and, in the process, for one side to "nibble" at what was thought to be an agreed deal. They might take advantage of asymmetrical timing needs or an opponent's investment in the anticipated outcome. Clarification of who has ultimate authority and whose signature is necessary to create an enforceable agreement should occur before the negotiation begins. (Issues of enforcement and defenses are covered in Chapter 11.)

The settlement of some disputes or transactions requires ratification by a constituent group. For example, the resolution of labor-management controversies may require ratification of union members. Some corporate issues may require a vote of stockholders. Disputes involving municipalities and other public bodies may rest upon final approval of elected councils or boards. Again, it is helpful to agree at the outset of negotiations on the approval/ratification process and on mechanisms to help ensure that those engaged in the negotiation have the confidence of the final decision makers. Good faith deposits or penalty provisions if approval is not forthcoming may help guard against last minute manipulations and disappointments.

The most effective way to ensure approval and ratification of "stakeholders" or interested parties not at the table is to involve those who hold final authority in the negotiation or to structure steps that require interim approval or endorsement along the way. If the stakeholder group becomes invested in the process and aware of the value being created, as well as the BATNAs involved and the concessions leading to the proposed agreement, its members are more inclined to concur with what they feel part of than if presented with an up-or-down vote on what appears to be a fait accompli. A gradual "buy-in" is more likely to result in endorsement than an after-the-fact request, even if a group process complicates the negotiation.

### 4. Single Text Agreements

One method used by mediators can also be of help in direct negotiation, particularly when ratification may be required. The single-text approach of building an agreement by writing the provisions or sections together at the table and then circulating that section for approval before the next section is written was made famous by President Jimmy Carter during the Camp David negotiations between Egypt and Israel. (See Carter 1982.) The resulting document grows section by section with the buy-in of all approving parties along the way. The

completed agreement then reflects a joint effort that was grown to maturity by those who feel an ownership of what was built together. Of course, the pieces of an agreement are interrelated and final approval must await the completed document, so there is no guarantee that the end terms of a single text agreement will be accepted. However, using a single-text approach and getting buy-in along the way makes it more likely that there will be concurrence on the cumulative final document that represents the resulting agreement.

### Questions

10. Can you identify additional situations that may require ratification, formal or informal, of a negotiated settlement or deal?
11. What are the potential advantages and disadvantages of a structured settlement?

## 5. Memorializing the Agreement

❖ **Charles B. Craver, *EFFECTIVE LEGAL NEGOTIATION AND SETTLEMENT***

212 (Lexis, 2001)

### Take Time to Review Agreement

When bargaining interactions are successfully concluded, many participants are anxious to terminate their sessions and return to other client matters. As a result, they fail to ensure a clear meeting of the minds. If both sides are not in complete agreement, subsequent misunderstandings may negate their bargaining efforts. To avoid later disagreements, the participants should take the time to review the specific terms agreed upon before they adjourn their discussions. In most instances they will encounter no difficulties and will merely reaffirm the provisions they have achieved.

### Endeavor to Draft Final Agreement

Once the Competitive/Distributive, Closing, and Cooperative/Integrative Stages have been completed and a final accord has been achieved, many negotiators are readily willing to permit opposing counsel to prepare the settlement agreement. While this may save them time and effort, it is a risky practice. It is unlikely that they and the opponent would employ identical language to memorialize the specific terms agreed upon. Each would probably use slightly different terminology to represent his or her own perception of the matter. To ensure that their client's particular interests are optimally protected, bargainers should always try to be the one to draft the operative document.

No competent attorney would ever contemplate the omission of terms actually agreed upon or the inclusion of items not covered by the parties' oral understanding. Either practice would be wholly unethical and would constitute

fraud. Such disreputable behavior could subject the responsible practitioner and his or her client to substantial liability and untoward legal problems. Why then should lawyers insist upon the right to prepare the final accord? It is to allow them to draft a document that unambiguously reflects their perception of the overall agreement achieved by the parties.

Each provision should be carefully prepared to state precisely what the drafting party thinks was mutually agreed upon. When the resulting contract is then presented to the other party for execution, it is quite likely that it would be reluctant to propose alternative language, unless serious questions regarding the content of particular clauses were raised. Doubts tend to be resolved in favor of the proffered document. This approach best ensures that the final contract will most effectively protect the interests of the party who drafted it.

#### **Review Opponent's Draft Carefully**

If negotiators are unable to prepare the ultimate agreement, they should be certain to review the terms of the document drafted by the other side before they permit their client to execute it. They should compare each provision with their notes and recollections of the interaction, to be positive that their understanding of the bargaining results is accurately represented. They should be certain that nothing agreed upon has been omitted and that nothing not agreed upon has been included. If drafters suggest that certain new terms are mere "boilerplate," reviewers should make sure those terms do not alter the fundamental substantive or procedural aspects of their agreement.

#### **Unabashed Questioning of Drafts**

Agreement reviewers should not hesitate to question seemingly equivocal language that may cause future interpretive difficulties or challenge phrases that do not appear to describe precisely what they think was intended by the contracting parties. Since practitioners now use word processors to draft contractual documents, it is easy to accommodate additions, deletions, or modifications. Bargainers should never permit opponents to make them feel guilty about changes they think should be made in finally prepared agreements. It is always appropriate for non-drafting parties to be certain that the final language truly reflects what has been achieved through the negotiation process. If the other side repeatedly objects to proposed modifications because of the additional work involved, the participant suggesting the necessary alterations can quickly and effectively silence those protestations by offering to accept responsibility for the final stages of the drafting process. It is amazing how expeditiously these remonstrations cease when such an easy solution to the problem is suggested!

#### **Tact in Questioning**

When negotiators reviewing draft agreements discover apparent discrepancies, they should contact their opponents and politely question the pertinent language. They should not assume deliberate opponent deception. It is always possible that the persons challenging the prepared terminology are mistaken and that the proposed terms actually reflect what was agreed upon. The reviewers may have forgotten modifications quickly accepted near the conclusion of

the negotiation process. It is also possible that the drafting parties made honest mistakes that they would be happy to correct once they have examined their notes of the bargaining interaction. Even when document reviewers suspect intentional deception by drafting parties, they should still provide their opponents with a face-saving way out of the predicament. The best way to accomplish the desired result is to assume honest mistakes and give the drafters the opportunity to "correct" the erroneous provisions. If reviewers directly challenged opponent integrity, the dispute would probably escalate and endanger the entire accord.

#### **Vigilance Against Underhanded Tactics**

In recent years, a few unscrupulous practitioners in the corporate area have decided to take advantage of the drafting stage of large documents to obtain benefits not attained during the negotiation process. They include provisions that were never agreed upon, or modify or omit terms that were jointly accepted. They attempt to accomplish their deceptive objective by providing their opponents with copies of the agreement at the eleventh hour, hoping that time pressure will induce their unsuspecting adversaries to review the final draft in a cursory manner. Lawyers who encounter this tactic should examine each clause of the draft agreement with care to be certain it represents the actual accord achieved. If necessary, they should completely redraft the improper provisions. If their proposed terms are rejected by opposing counsel, they should insist upon a session with the clients present to determine which draft represents the true intentions of the parties. When this type of meeting is proposed, deceitful drafters are likely to "correct" the "inadvertent misunderstandings" before the clients ever get together. If a client session were to occur and the other side enthusiastically supported the deceptive drafting practices of their attorneys, it would be appropriate for the deceived lawyers to recommend that their client do business with another party.

#### **Addressing Unforeseen Ambiguities and Problems**

On some occasions, ambiguities or actual disagreements may be discerned during this stage. Negotiators should not allow these difficulties to destroy their previous progress. When good faith misunderstandings are found, the advocates should strive to resolve them before they terminate their current interaction. At the conclusion of the Closing or the Cooperative/Integrative Stage, the parties tend to be in a particularly accommodating frame of mind. They feel good about their bargaining achievements and are psychologically committed to a final accord. It is thus a propitious time to address newly discovered problems. If they do not deal with these issues now, they are likely to encounter greater difficulties when these questions arise at a later date.

#### **Writing and Signing Items as Safeguard**

A few unscrupulous negotiators attempt to obtain a tactical advantage by deliberately creating "misunderstandings" as final agreements are being drafted. They hope to extract additional concessions from unsuspecting opponents as these seeming ambiguities are being resolved. Individuals who suspect that their

the End

honest  
of their  
respect  
oppos-  
com-  
ers the  
chal-  
anger

have  
obtain  
visions  
pted.  
oppo-  
pres-  
in a  
clause  
cord  
ions.  
nsist  
s the  
itful  
the  
side  
ys, it  
lient

ned  
heir  
lvo-  
ter-  
ge,  
hey  
om-  
red  
ter

by  
ed.  
as  
eir

B. Finalizing and Writing the Agreement

adversaries may employ this tactic should insist on a careful review of the basic terms at the conclusion of the bargaining process. They should write out these items and have their opponents sign the draft to indicate their concurrence. This practice makes it difficult for adversaries to later create disingenuous "misunderstandings" that can be used to obtain unreciprocated benefits for their own side.