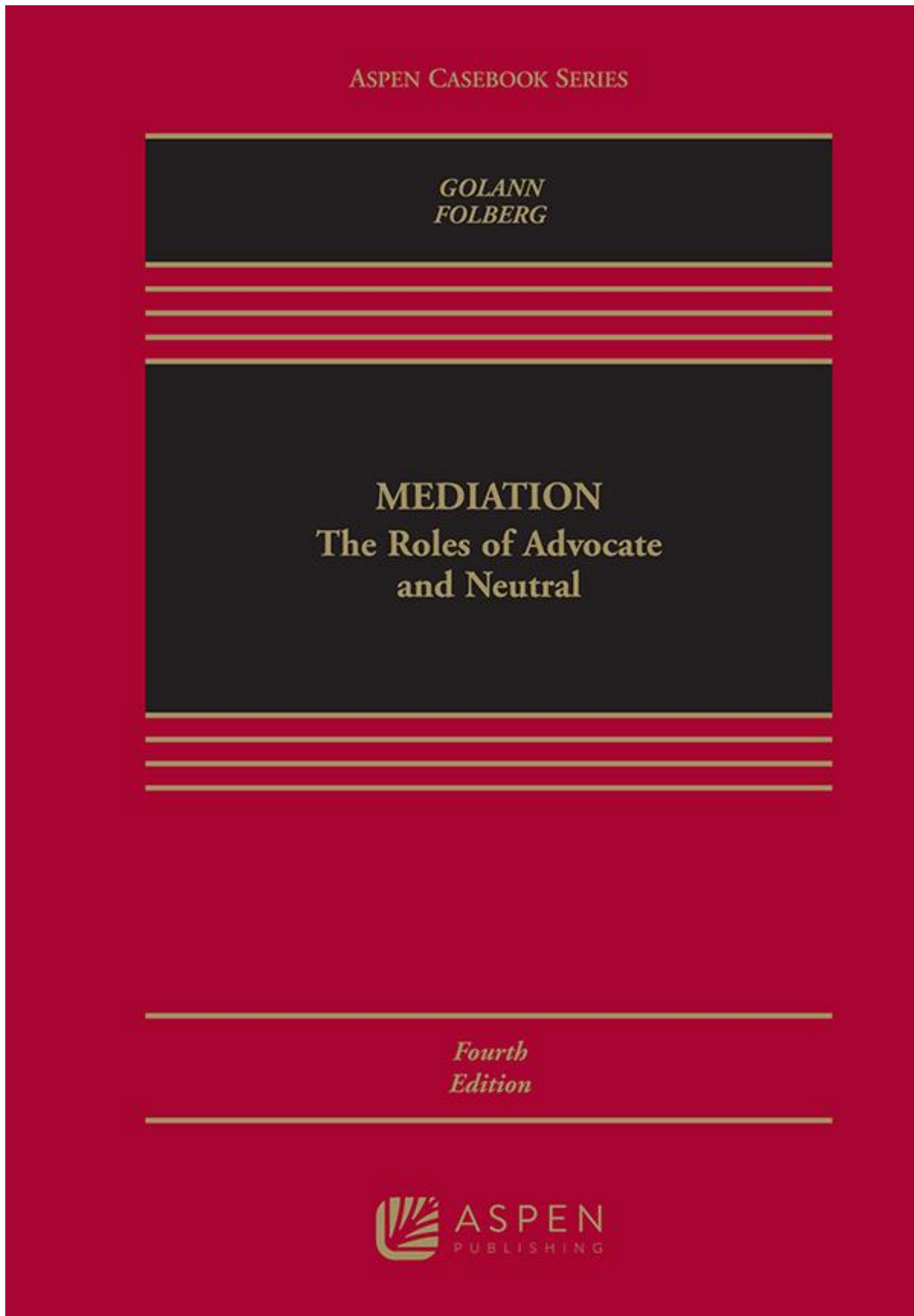
EXCERPTS FROM …



CHAPTER 1

The Origins of Disputes

Legend has it that the use of lawyers in court evolved from disputants hiring warriors to fight in their place. Referring to attorneys as modern-day warriors is, however, a misnomer. It is the parties who bear most of the costs, risks, and injuries in modern legal combat.

Today people have options to resolve disputes other than traditional litigation, and to represent clients successfully lawyers must be skilled in using these techniques. The adage that to someone with only a hammer, everything looks like a nail suggests the limitations of an attorney who only knows how to litigate. This book seeks to teach you how to counsel clients about an increasingly popular alternative to legal combat—mediation—and the skills to represent clients effectively in the mediation process.

A. The Nature of Disputing in America

Most of the disputes clients bring to you will barely resemble the cases you encountered in first-year courses in law school. In place of a clearly defined contest between named parties over narrow issues, practicing lawyers typically deal with inchoate mixtures of grievances, emotions, and justifications. Clients are usually clear about the heroes and villains in their disputes, but many other key facts are in doubt. Lacking a precise appellate record, attorneys typically work with, and must make decisions based on, fallible witnesses and incomplete documentation. In many situations, a lawyer must rely heavily on experience and intuition to assess what a client's dispute is really about, and how it may unfold in court.

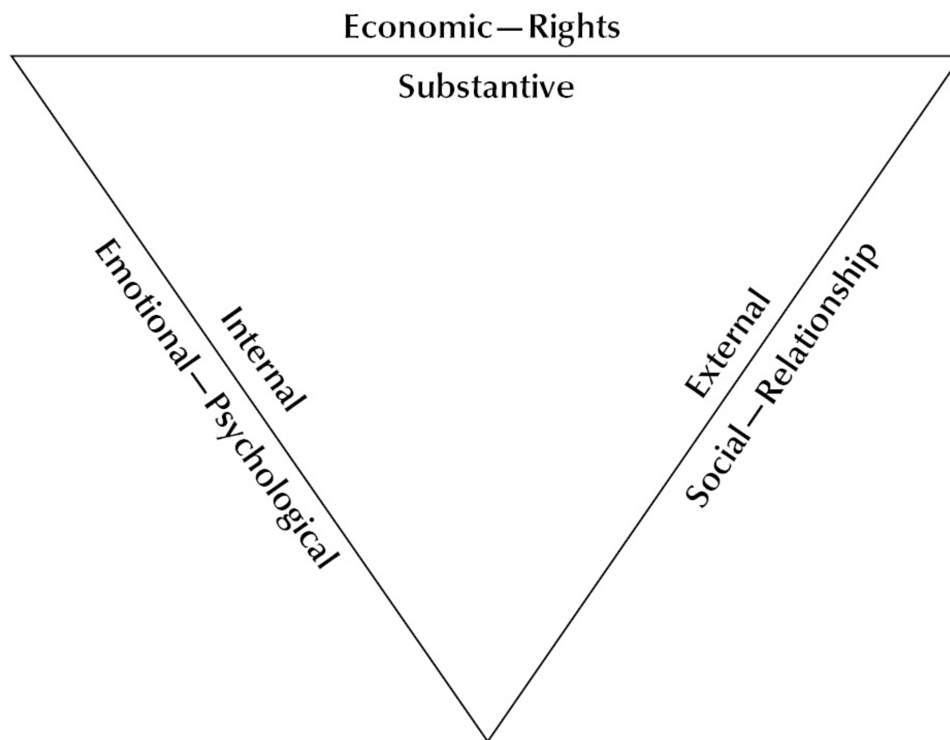
Most of us say we do not want conflict in our lives. Conflict can create a crisis mentality that can be destructive and draining, and every day we see examples of the damage it can create, from bickering neighbors to combative politicians to warring countries. And the Internet, which has created so many opportunities for community and collaboration, is often the site, if not the instigator and exacerbator, of intense conflicts.

Although conflict can cause distress, it can also function in positive ways, by motivating us to take actions that improve our lives and better fulfill our interests. Conflict may alert us to relationship problems, organizational shortcomings, or systemic inequities. In short, while conflict may be difficult, it is an unavoidable aspect of human life. ***p. 4***

Lawyers, to whom clients often turn when conflict seems unmanageable, can help create more constructive outcomes or make difficult situations worse. The ability to help clients better understand a situation, reframe issues, and achieve their deeper interests is an important lawyering skill. To be an effective attorney you must therefore be able to assess and evaluate your clients' conflicts.

Conflict can be thought of as falling into two categories: *interpersonal* (differences between individuals or groups) and *internal* (conflicts within an individual). In interpersonal conflict, parties each want something that they perceive as incompatible with what the other person wants and may retain lawyers to help them obtain it. A client also may be conflicted internally; for example, does a terminated employee really want to return to her job, or only to restore her self-respect and get compensation for her economic losses? Does the father you represent in a divorce really want custody of the children, or is he ambivalent about divorcing and trying to hold onto the marital relationship? Recognizing the two different types of conflict can be critical in achieving client goals.

Another way of thinking about conflict is distinguishing *manifest* conflict, which is overt or expressed, from *underlying* conflict, which is hidden or not recognized. Lawyers most often deal with manifest conflicts, but a manifest conflict may be only a part or symbol of the parties' underlying differences. Two brothers may feel safer, for example, fighting over control of a family business than talking about their feelings over who was the favored child. A patent dispute may focus on lost revenue, while the parties' real conflict is about who should be recognized for creating it. Resolving a conflict well requires understanding and focusing on the emotional and relationship components and other interests which may be the driving it.



The Conflict Triangle

As this diagram shows, there are three sets of factors, or interests, at work in most conflicts which must be addressed to reach a satisfactory settlement. The three sides of the triangle are interrelated and affect each other. ***p. 5***

- *Economic/Rights*: Money issues and legal rights, the focus of lawsuits.
- *Emotional/Psychological*: The internal influences that involve how parties feel about themselves and see a situation.
- *Social/Relationship*: How others will view what is going on, how the dispute will affect a person's status and self-respect, and similar factors.

The mix of what matters for purposes of resolving a conflict varies depending on the subject, sensitivities of the disputants, and perhaps their past interactions. Commercial disputes, for example, tend to focus on solely economic considerations, but other elements of the triangle are likely also to be involved to some degree. A businessperson sued for breach of contract, for instance, may dispute the plaintiff's money claim and also be angry at being accused and concerned about his reputation. Parties to a divorce may litigate over legal rights and money but be motivated by their concern about how their children, grandparents, or neighbors will think about their actions. A plaintiff in a wrongful termination case may be worried about how agreeing to a confidential settlement and dismissing his claim will appear to co-workers.

Traditionally lawyers have focused primarily on the manifest, interpersonal aspects of disputes and on economic considerations, rather than relationship or emotional concerns. But if a settlement addresses only the manifest issues in a conflict, it is less likely to be implemented successfully. Surfacing and addressing the underlying conflicts can generate new possibilities for resolution and improve relationships, but doing so may be uncomfortable both for clients and lawyers. We will look more into the emotional and psychological barriers to resolution in Chapter 4.

Questions

1. What is an example of a "good" conflict? What makes it good?

2. Even though conflict is pervasive in human life, it is not always obvious how to deal with it productively. In *The Conflict Paradox*, Bernie Mayer lists seven familiar dilemmas that emerge in conflict situations:

- Compete or cooperate?
- Avoid or engage?
- Be optimistic or realistic about the potential for resolution?
- Rely on principles or be ready to compromise?
- Respond with emotion or logic? Stay neutral or advocate?
- Concern yourself with autonomy or community?

When you find yourself involved in a conflict, which of these dilemmas is most pressing for you? Does the context matter?

3. How would you describe your default approach to conflict?

p. 6

B. How a Conflict Becomes a Dispute

What pushes some people to engage lawyers to pursue claims while others do not? William Felstiner, Richard Abel, and Austin Sarat have described how harms do or do not become disputes through a sequence of "naming, blaming, and claiming."[1]

Naming occurs when people recognize that they have been harmed and want to do something about it. The distinguishing factor is not whether the victim is aware of the harm, but rather his reaction to it. Some persons accept harm simply as fate or an inevitable aspect of life and move on, while others feel that a particular injury is too great to be ignored.

In ***blaming***, the person identifies a person and/or entity as having caused her injury (assuming she can identify them) and decides to hold them responsible. The victim must also engage in *claiming,* by voicing a complaint against the perceived wrongdoer and asking that the wrong be remedied. Many—arguably the vast majority of—persons who name and blame a wrongdoer do not voice a complaint, preferring to drop the matter—what some call "lumping" (as in "lump it") behavior.

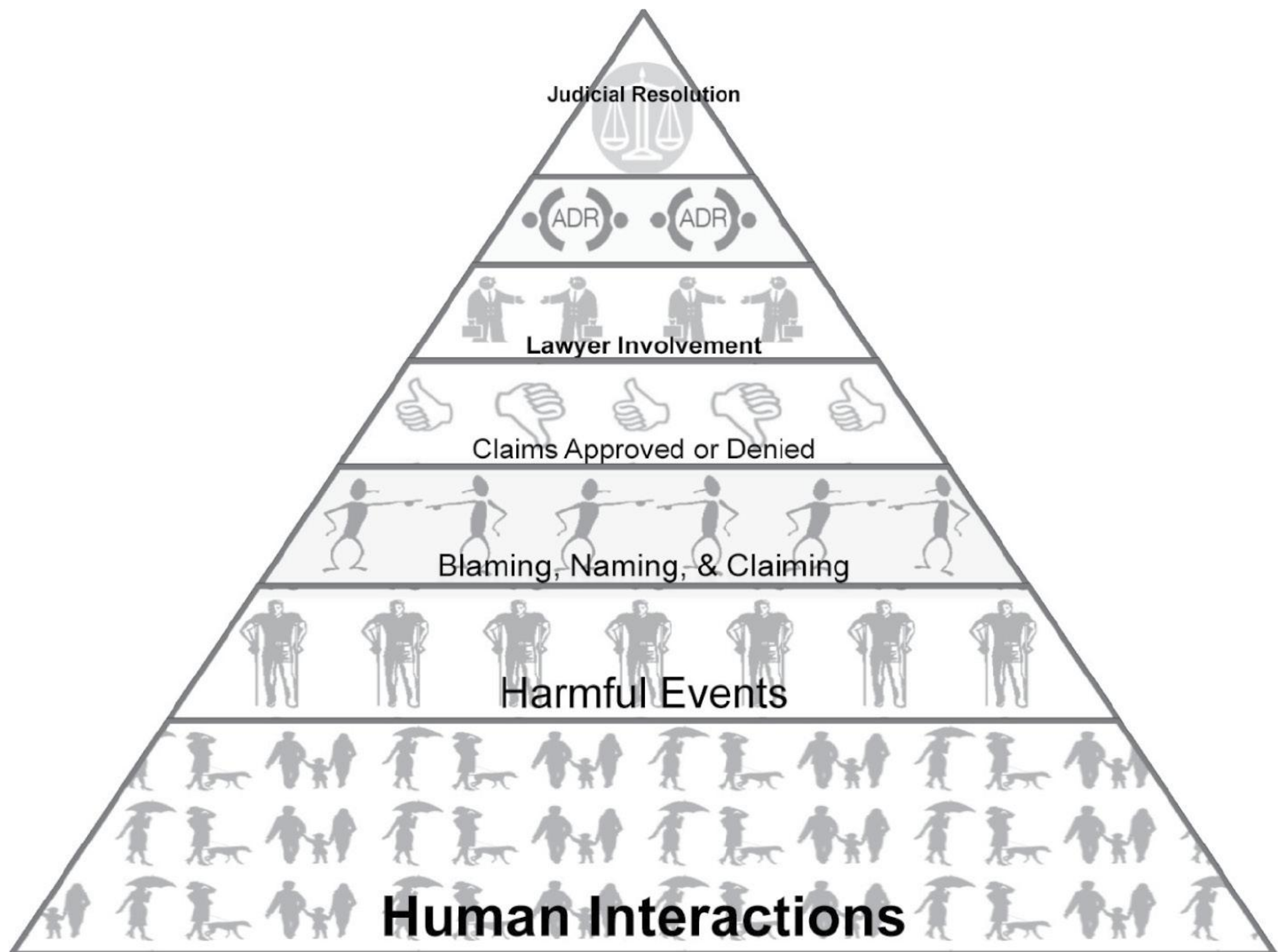
If a **claim** that has been voiced is rejected or responded to unsatisfactorily, the matter becomes a full-fledged dispute. Even then, however, it usually does not enter the legal system. Aggrieved persons often address disputes through informal mechanisms such as complaint hotlines, online resolution programs, social media posts or government agencies, usually without the help of a lawyer. Only a very small percentage of such disputes are brought to lawyers.

Even when disputes are presented to attorneys, they usually do not become formal legal cases. Good lawyers perform an important screening function, measuring their clients' grievances against the requirements of the law and, perhaps even more critically, the client's larger interests. Is there a viable legal theory? Will discovery produce evidence to support the claim? Will the client be willing to persevere after his initial anger and frustration have died down, and does he have the resources to do so? Is it in the client's best long-term interest to be involved in litigation? Is a court likely to rule in favor of the client, and if it does, will the defendant be able to satisfy a judgment?

Just as very few screenplays ever become movies, a large majority of potential legal cases never reach a courtroom, and many cases that are filed are later abandoned. (As one example, almost half of all claims of medical malpractice are later abandoned by the plaintiff without a court decision or monetary payment.)[2]

If a lawyer does take a case, there are usually further negotiations, before or after filing in court. Even including cases that are decided without a trial, *a large majority of civil cases are never adjudicated on the merits*. Adjudication thus forms only the tiny point of an immense triangle or pyramid. The possibility of going to trial, however, affects litigants' decisions out of proportion to its frequency. Parties' decisions to settle are often driven by a wish to avoid the risk of trial. Litigants, in other words, bargain in the "shadow of the law."[3] ***p. 7***

The overall triangle might look like this—although the layers of human interactions and harmful events that make up its base are much too large to draw on a single page.



The Dispute Pyramid

Questions

4. Have you experienced a personal injury or an economic loss that you could attribute to a specific wrongdoer, but decided not to pursue the matter? What led you not to assert a claim?

5. What are some of the reasons that a person might decide to forgo or "lump" a valid legal claim?

6. Have friends or family ever asked you, as someone who they see as expert in law, if they should pursue a claim for an injury or a wrong? How did you advise them, and why?

7. People with higher education or income are much more likely to pursue claims related to products they buy than others. Why do you think this is so? Do issues of class, race, gender, or power affect whether someone moves from blaming to claiming?

8. When you were a child, how did your family deal with conflict? Has your upbringing in any way influenced your own instinctive response to dealing with disputes? How?

p. 8

C. Conclusion

A lawyer's challenge is to select the right process for a particular client's problem and use it effectively. Litigation culminating in a trial is still the forum of choice when it is important to establish a public finding about what happened and force an unwilling adversary to act. A party can use adjudication, for example, to obtain a judgment to enforce a financial obligation or compel specific performance of a contract. Judicial decisions can establish precedent or rally people behind a principle or a cause. Disputants also use the litigation process to create the conditions for successful negotiation.

Of course, the irony is that most of these advantages also can be drawbacks: Each reason for you to pursue litigation can also be a reason for your opponent to do so. The ultimate curse may be to have a case in which both your client and the other side are sure that they are right and determined to persevere!

Mediation is a more appropriate choice when potential litigation costs are high relative to the amount in controversy or one or both parties do not want to bear the risk of an adverse result. Mediation is also likely to be appealing when the limited remedies available from a court do not meet the disputants' real needs or parties want a voice in shaping the outcome.

The kinds of disputes you encounter in practice will depend in large part on your professional path. As a transactional lawyer, you will help clients to evaluate and structure potential deals and negotiate terms that give them the greatest advantages and least possible risk. Clients will respect you for your ability to keep them out of disputes and value you for your skill in bringing disparate parties together.

If you become an inside counsel to a corporation or nonprofit organization, you will negotiate regularly as well, both with your counterparts in other entities and with colleagues in your own office. You may be surprised to learn that experienced corporate counsel often describe themselves as "mediators with a small 'm.'" Inside lawyers often find that they have multiple "clients," in the form of the different personalities and constituencies in their organization. Unless such a lawyer brings his internal constituencies to consensus on a common course of action, it is very difficult for him to negotiate effectively with outsiders. Thus, corporate counsel must often play the role of "honest broker," using mediative skills to forge agreement among their multidimensional client. They may also design systems to resolve disputes within a company or with customers and others outside the organization.

If you are a litigator, you will settle many more cases than will ever be decided by a court. Indeed, an increasing number of lawyers now resolve more cases through mediation than direct negotiation. Litigators, too, sometimes find themselves acting as "small m" mediators, for example, to forge a common bargaining position among several executives, or multiple plaintiffs

or defendants in a case. The most direct and inexpensive path to resolving a dispute, however, remains negotiation, and mediation is itself a process of assisted bargaining. For that reason, we begin by exploring how lawyers negotiate.

Notes

1. Felstiner, William L.F., Abel, Richard, & Sarat, Austin. (1981) *The Emergence and Transformation of Disputes: Naming, Blaming, and Claiming*, 15 Law & Soc'y Rev. 631.

2. Golann, Dwight. (July 2011) *Abandoned Medical Malpractice Claims: Their Surprising Frequency, Apparent Causes, and Potential Remedies*, 30 Health Affairs 7.

3. Mnookin, Robert, H. & Kornhauser, Lewis. (1979) *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 Yale L. J. 950, 966.

CHAPTER 2

Negotiator Styles

Negotiation is the process of communication used to get something we want when another person has control over whether or how we can get it. Everyone negotiates as part of modern life, and some people—like lawyers—are paid to negotiate on behalf of others. The vast majority of disputes are negotiated to settlement or plea bargain without trial, and many transactions are also the result of negotiated agreements. In short, negotiation is at the core of what lawyers do in representing clients.

Most lawyers think they are skilled negotiators because they negotiate frequently. However, negotiating often does not necessarily result in negotiating effectively. Unlike trial practice, negotiation is usually done in private, without a clear measure of success or the opportunity to compare results or benefit from a critique. People with whom you negotiate rarely give you an honest assessment of how you did, and it is most often in their interest for you to believe you did well. Regardless of our intuitive ability, negotiation skills and results can be improved with analysis and understanding, as well as practice.

A. Matters of Style

We begin by examining negotiation styles. Many terms are used to describe different negotiating styles, such as "hard and soft," "competitive and cooperative," or "adversarial and problem-solving." The distinctions between "hard" styles such as competitive and adversarial, on the one hand, and "soft" styles like cooperative and problem-solving, on the other hand, are not always clear. Depending on context, strategy and personal preferences, negotiators may move between competitive and cooperative styles in a single interaction. Deciding whether and how to shift styles is a key challenge for negotiators. Your style choices will depend on a variety of internal and external considerations.

Although now known as a philanthropist, Bill Gates became one of the richest people in the world by being smart, diligent, and keenly competitive. As a negotiator, he was known for being aggressive and competitive. In the following example, however, Gates used different approaches at different stages of the dispute. ***p. 12***

Problem: Microsoft v. Stac

Stac Electronics was a computer engineering company that developed software that expanded data storage capacity. Bill Gates wanted Stac's technology. He met personally with its president to discuss licensing its software, then turned the negotiations over to others. Microsoft was willing to pay a gross fee, but refused to pay a per-user royalty. It threatened that if Stac refused it would go to other sources for the technology, threatening Stac's existence.

Negotiations broke off and Microsoft released a new system that competed with Stac's. Stac believed Microsoft had stolen its IP and filed a patent infringement suit; Microsoft counterclaimed. A jury awarded Stac $120 million in damages, and simultaneously awarded Microsoft $13.6 million on its counterclaim. Feelings were intensely negative, and both CEOs made public statements demeaning the other's integrity.

Both sides could have appealed the verdicts, but they opted instead to negotiate a deal that increased the share price of both companies. The agreement provided for the dismissal of all claims and cross licensing of products. Microsoft also agreed to pay Stac a royalty and invest in the company. The total cost of the deal for Microsoft was less than it had already charged off for the jury verdict, while Stac received more money, net of taxes, than it would have obtained from winning in court and also allied itself with the most powerful player in the industry.

Stac's CEO said, "this is not personal. This makes good business sense going forward. . . . This demonstrates it is possible to do win-win deals." Microsoft's executives concurred: "This is a lot more fun than disagreeing," said Michael Brown, Microsoft's vice president of finance.[1]

Questions

1. Why might Gates have played hardball when he first negotiated with Stac, and then have his lawyers negotiate a more cooperative deal?
2. What are the advantages and disadvantages of each bargaining approach?

B. Competitive and Adversarial Approaches

1. Competitive Approach

We start with the competitive model because lawyers and others frequently use it in everyday bargaining and settlement negotiations. The *competitive* approach assumes that the purpose of bargaining is to obtain the best possible economic result for yourself, usually at the expense of the other side. A competitive bargainer is likely to think that negotiation involves a limited amount of resources that negotiators must divide—in effect, a fixed economic "pie"—in which anything gained by one side is lost by the other. ***p. 13***

Competitive negotiating covers a continuum of behaviors, from simple unreflective actions to highly conscious, planned moves. Competitive tactics can range from "light," such as ingratiation or flattery, to "heavy," such as anger or threats. A skilled competitive negotiator may combine competitive moves with a friendly demeanor, even appearing cooperative. At their best, competitive bargainers are like athletes who fight hard, but fairly, to prevail.

To competitors the parties' relationships and other intangibles are not of primary importance. The competitive bargainer's goal is to pay as little as possible, if she is a buyer or defendant, or obtain

as much as possible, if she is a seller or plaintiff, as a dollar more for an opponent is necessarily a dollar less for her. A competitive bargainer thus sees negotiation much as a litigator sees a trial: Someone must win and someone must lose, and the primary mission is to win. Competitive/adversarial approaches are also known as "distributive," "zero-sum," or "positional" bargaining because the negotiators see their task as trading positions to distribute a fixed resource between them.

All good negotiators are likely to seek out information, but a competitive negotiator's aim is to get as much information from the other side as possible while disclosing as little as he can about his situation. He sees the key as to sound out the party's bottom line, while concealing or misrepresenting what he will settle for. A competitor will often bluff, suggesting that he is ready to walk away unless he gets certain terms, even when he has no intention of doing so.

Although the classic competitive negotiation is over a single issue, money, competitive strategies are equally applicable to more complex negotiations that involve multiple issues or parties. As Gary Goodpaster writes, negotiators may choose a competitive approach when any of the following factors are present: "the parties have an adversarial relationship; a negotiator has a bargaining power advantage and can dominate the situation; a negotiator perceives an opportunity for gain at the expense of the other party; the other party appears susceptible to competitive tactics; the negotiator is defending against competitive moves; or there is no concern for the future relationship between the parties."[2]

Negotiations between lawyers and insurance companies over how much the insurer will pay on an accident claim are typically competitive processes. If the lawyer and insurance adjuster are in distant cities and the client has changed insurance companies, neither side is likely to have much interest in nurturing a relationship. Rather, both usually want to get through the process as efficiently and quickly as possible. The lawyer and adjuster may treat each other politely, but their sole goal will be to agree on a dollar amount the company will pay the insured to give up his claim, with a better settlement for one resulting in a worse settlement for the other.

In this example, the accident victim's lawyer is expected to make an opening offer, or "demand," that is typically much higher than the amount she expects to receive in settlement. The bargainers are then likely to talk, with each side exaggerating the strength of its legal case and concealing any weaknesses, while denigrating the other's legal position. The insurer eventually will make a low, equally unrealistic counteroffer. The bargainers then trade concessions to narrow the gap while continuing to argue about the likely outcome in court.

As the process continues, the parties' dollar figures may become increasingly divorced from any objective standard or rationale, with their motivation being simply to close the remaining gap on terms as favorable as possible to their side. The process may have begun with information-based discussions, but at some point **p. 14** becomes a game of "chicken" between two drivers hurtling toward each other, trying to get the best possible deal while avoiding a collision in court. If the bargainers are sensible and attuned to the customs of the "game" of dollar bargaining, they will succeed in arriving at a number both can accept.

2. Adversarial Approach

Beyond the boundaries of the competitive approach is the adversarial approach, a more aggressive or extreme version of competitiveness. A competitive bargainer will "play hard, but by the rules," for example, bluffing about her bottom line but not lying about whether a document exists. Adversarial bargainers, by contrast, view negotiation as a form of war and believe that all is fair in winning it. An adversarial negotiator will, if necessary, misstate evidence, renege on tentative agreements, misrepresent the limits of their authority, or make threats. Although such tactics may provide an advantage for the negotiator in the short term, they increase the risk of ending the negotiation with no agreement, jeopardize any continuing relationship, and affect the negotiator's reputation.

Adversarial bargainers often capture the imagination of the public because they remind us of tough, dramatic characters in a movie or story. Many guides to "tough" bargaining" appear to assume that the opposing side is ignorant or gullible and will never be able to retaliate, while others bemoan "hardball" tactics but warn you of what you might encounter. Roger Dawson, the author of *Secrets of Power Negotiating*, for example, suggests these gambits about how to bargain adversarially:

- *Ask for an outrageous amount*: You can get away with an extreme opening position if you imply some flexibility.
- *Flinch at proposals*: The other side may not expect to get what is asked for, but if you do not show surprise, you're communicating that it is a possibility.
- *Nibbling*: After you have agreed on everything and the other side has relaxed and committed itself, take away terms.
- *Red herring*: Make a phony demand, then withdraw it in exchange for a concession.
- *Time pressure*: If you sense the other side has a time constraint, create an artificial deadline to squeeze them.
- *Ultimatums*: If you are dealing with an inexperienced negotiator, make an ultimatum to strike fear in their heart.[3]

Questions

3. Do any of these tactics seem not merely tough, but unethical?
4. Is there a difference between hard, competitive negotiation and "dirty," adversarial bargaining tricks? If so, how would you distinguish them?
5. If any of these behaviors were used against a colleague, how would you advise her to respond? ***p. 15***

C. Cooperative and Problem-Solving Approaches

1. Cooperative Approach

A cooperative negotiator does not view the negotiation "pie" as fixed. Cooperative bargainers work to identify interests and examine differences in how the parties value items, searching jointly with the other negotiator — viewed more as a partner rather than an opponent—for options and a solution that will best satisfy both parties' interests. Along with working to "expand the pie," cooperative bargainers approach the task of dividing it up by seeking to understand one another's perceptions and arrive at a shared picture or a mutually acceptable allocation.

This cooperative approach is frequently called "integrative" bargaining, because it emphasizes integrating the parties' needs to find the best joint solution. It is also referred to as "interest-based" negotiation because it sees the goal of bargaining as satisfying people's underlying interests, which are often more complex than monetary goals.

However, bargainers can also use a cooperative approach to resolve "pure money" issues, such as how much an accident victim will be paid for a claim. In such a case there might not be a "pie" to bake, but the dollar question would be resolved by referring to an accepted objective standard, such as how much is typically paid for such a claim, or a multiple of some component of the claim, such as lost wages.

In their best-selling book *Getting to Yes*, Roger Fisher, William Ury and Bruce Patton advocate this approach, suggesting that "you can change the game" and that negotiation need not be positional or competitive.[4] In addition to prescribing an interest-based approach to create value, they propose using objective criteria to allocate the fruits of cooperation, something they refer to as "principled" negotiation or "negotiation on the merits."

The cooperative or collaborative approach assumes that in most disputes parties have underlying needs, or interests, that go beyond money, and that because of this it is possible to find terms that have multiple interests of varying intensities, including:

- *Process interests*. People have a "process" interest in having disagreements resolved in a manner they consider fair. This usually includes the opportunity to tell their story and have the feeling that they have been understood. A cooperative negotiator will sometimes address this interest by listening attentively while an opponent vents his, or his client's, angry emotions or accusations, then demonstrating, for example, by summarizing what has been said, that while the listener does not agree with what the speaker has said, he has heard and made an effort to understand it. Participants may also have a process interest in having a negotiation proceed in an orderly and predictable way.
- *Personal interests.* Most people have a personal interest in feeling respected in their work and as unique human beings, and in being seen as acting ***p. 16*** consistently with what they have said in the past and in accordance with their moral standards. Negotiators might address these personal interests by treating everyone courteously and attending to "face saving" needs.

- *Relational interests.* The parties might also have an interest in preserving or creating an ongoing relationship. This is often true of contractual disputes because the existence of a contract indicates that the parties once saw a benefit in relating, but it can also be true in disputes that arise from less formal connections. Examples of situations with relational interests include divorce and child custody disputes, controversies between neighbors, workplace disputes, and disagreements between companies and longtime customers.
- *Economic interests.* Disputants usually have economic or substantive interests. This is where most negotiations begin and where many end unsuccessfully because other interests are not addressed. Economic interests are most easy to state in the form of monetary demands and offers, but people need money to satisfy other needs, whether material, social, or emotional. Finding out how the money will be used or what needs it will satisfy is essential to fashioning an interest-based agreement or integrative outcome. And even when something is "just about money," it may be important to one side when or how it is paid.
- *Community interests.* A negotiation may consider the interests of people away from the table, and these impacts may be relevant considerations for the parties. For example, two companies bargaining over a supply chain agreement may want to take into account the effects of the agreement on employees, other businesses, and perhaps even neighboring communities.

Note: Critique and Response

Not everyone is a fan of "principled" negotiation. Professor James White authored a powerful critique describing *Getting to Yes* as "often helpful" but also "frequently naïve" and "occasionally self-righteous." One of his primary concerns was that the authors did not deal realistically or effectively with the question of distribution:

Unfortunately the book's emphasis upon mutually profitable adjustment, on the "problem solving" aspect of bargaining, is also the book's weakness. It is a weakness because emphasis of this aspect of bargaining is done to almost total exclusion of the other aspect of bargaining, "distributional bargaining," where one for me is minus one for you. . . . [S]ome would describe a typical negotiation as one in which the parties initially begin by cooperative or efficiency bargaining in which each gains something with each new adjustment without the other losing any significant benefit. Eventually, however, one comes to bargaining in which added benefits to one impose corresponding significant costs on the other. . . .***p. 17***

In response, *Getting to Yes* co-author Roger Fisher emphasized the importance of process in managing distributional issues in a principled manner:

The most fundamental difference between White's way of thinking and mine seems to concern the negotiation of distributional issues "where one for me is minus one for you." . . . By focusing on the substantive issues (where the parties' interests may be directly opposed), White overlooks the

shared interest that the parties continue to have in the process for resolving that substantive difference. How to resolve the substantive difference is a shared problem. Both parties have an interest in identifying quickly and amicably a result acceptable to each, if one is possible. How to do so is a problem. A good solution to that process-problem requires joint action. . . .

The guts of the negotiation problem, in my view, is not who gets the last dollar, but what is the best process for resolving that issue. It is certainly a mistake to assume that the only process available for resolving distributional questions is hard bargaining over positions. In my judgment it is also a mistake to assume that such hard bargaining is the best process for resolving differences efficiently and in the long-term interest of either side. . . .

Are you more persuaded by White or Fisher? Is Professor Fisher naive, or is Professor White too skeptical? Can they both be correct in some ways?

Problem 1: Getting a Raise

Imagine that you are counseling a colleague who wants a raise. "Tell me more," you say. "Why are you asking for more money?" Make a list of the possible reasons that your colleague may provide. Then think about these as the *underlying interests* informing your colleague's *position* that he wants a money raise. Based on this list, are there other terms, in addition to or in place of more money, that might satisfy your colleague's interests?

2. Problem-Solving Approach

A variation of the cooperative approach is *problem solving,* sometimes called "collaborative" bargaining. Problem-solving negotiators employ intensely cooperative, interest-based tactics. Problem solvers focus almost exclusively on finding solutions that maximize the value of the outcome for both parties. Problem solvers do not want to obtain a better result for their client if it comes at the unfair expense of their counterpart. They also insist on using genuinely neutral principles to accomplish the task of allocating benefits. ***p. 18***

Questions

6. For lawyers, is it better to be more competitive/adversarial or more cooperative/problem-solving? Why? If you believe it depends on the context, in what contexts is one or the other approach better?
7. Do bargainers need particular skills or strengths to implement cooperative/problem-solving approaches? Are these skills within the repertoire of most attorneys? Why or why not?
8. Professor Menkel-Meadow writes that "[t]he attraction of the problem-solving approach to negotiations is that it returns the solution of the problem to the client."

Why is involving the client beneficial? Is it possible that some clients want less involvement in the solution of their case?

9. Can cooperative/problem-solving negotiation occur if only one side wants to pursue this approach? Explain.

Problem 2: Video Analysis

For this problem you are going to be viewing and analyzing some video clips of real lawyers negotiating a case. Video analysis is one of the most effective methods for assessing style, strategy, and tactics in bargaining, and we will offer it extensively in this book.

Quality Quarry is a large company that has purchased a 2,500-acre tract and wishes to mine it. One of their neighbors, the Branams, have lived on an adjoining 100-acre tract for generations and operate a farm stand on the land. The Branam family has challenged the Quarry's application for a mining permit and the Quarry has proposed to resolve the case by buying the Branams' land.

1. On the companion Web site for this book, watch the video excerpt entitled Quarry 1, showing the first few minutes of the negotiation between Boston lawyers for the Branams and Quality Quarry. Note what style each lawyer is using. Which appears to be more effective and why? Which style would you use? One of the lawyers is a litigator and one is a transactional lawyer. Can you tell which is which?
2. Now watch Quarry 2, which shows the first meeting in the same case with the parties represented by Cincinnati lawyers. These lawyers chose to start in a different way, reflecting, they said, bargaining customs in their community. Does the setting appear to have any effect on the process?How would you characterize the styles of these lawyers? How do their styles differ from the Boston lawyers? The woman is the general counsel of a financial services company and the man is a lawyer and former judge. Do their backgrounds affect how they bargain?
3. Finally, watch Quarry 3, showing the last few minutes of the Boston negotiation. Has either lawyer changed her style, or use elements of different styles? How do the lawyers use references to each side's alternative to settlement, objective principles, and/or interests? Quarry's lawyer states at one point that it has an "absolute cap . . . a hard stop," but then goes higher. How does the Branams' lawyer make this happen?

Quarry 1

Quarry 2

Quarry 3

D. Creating Value and Claiming Value—The Negotiator's Dilemma

In the Microsoft-Stac dispute, negotiators faced a dilemma: should they pursue cooperative moves to enhance the total value available, or should they use competitive behavior to individually claim value and gain an advantage? Moving between cooperative and competitive approaches can create tension, because after value is created through cooperation and sharing information about interests, value claiming is likely to occur, and the information we share in the first phase can be used against us.

David Lax and James Sebenius have described this tension as the "negotiator's dilemma," the potential conflict that exists between behaviors that create value and those claim it. They write:

> *Value creating and value claiming are linked parts of negotiation. Both processes are present. No matter how much creative problem solving enlarges the pie, it must still be divided; value that has been created must be claimed. . . . Moves to claim value . . . tend to drive out moves to create it. Yet, if both choose to claim value, by being dishonest or less than forthcoming about preferences, beliefs, or minimum requirements, they may miss mutually beneficial terms for agreement. Indeed, the structure of many bargaining situations suggests that negotiators will tend to leave joint gains on the table or even reach impasses when mutually acceptable agreements are available.*[5]

A cooperative approach has clear advantages. It can add value to what is being negotiated and is more likely to preserve and improve relationships. But cooperative methods also pose what has been called the "negotiator's dilemma"—even the largest pies must be divided up.

Cooperatives look for a way to divide pies fairly, usually by finding a fair principle. They discuss possible standards in good faith, with the goal of achieving consensus about what is fair. This can be difficult at times, however, even for people who mean well, because near the end of the process it is usually clear which rule will give each bargainer more of the "pie." Faced with such a disagreement, one option for problem-solving bargainers is to recognize that they have a good-faith difference and agree to split evenly the difference between the outcomes under each principle.

When bargainers have a competitive streak, however, problems arise because tactics used to create value, such as disclosing what you want most, can expose a ***p. 20*** bargainer to exploitation. A competitive bargainer may exaggerate how expensive it would be to give up a term or pretend that an item she wants badly is worth little to her. When principles are discussed, a competitive negotiator selects a principle that provides him with more of the value in play, then proposes to split the difference with his fair-minded counterpart.

Making things even more complex, competitive bargainers may not act that way. Savvy competitors, in fact, often use a cooperative *manner* while pursuing competitive *goals*. This makes them what Professor Charles Craver has called "competitive/problem-solvers."[6]

Competitive/Problem-Solvers are individuals who strive for ***competitive*** *objectives—maximization of their own side's returns—but work to accomplish this goal in a* ***non-adversarial way****. . . . They actually endeavor to* ***create value*** *. . . but they are not entirely forthcoming. They may over- or under-state the value of items they desire . . . to* ***claim*** *more of the joint surplus than they give to their opponents . . . As a result of [their] apparent openness . . . opponents usually think they are Cooperative/Problem-Solvers . . . when they are really endeavoring to obtain "WIN-win" distributions favoring their own side. . . .*

Competitive/Problem-Solvers are successful because they recognize the fact that most negotiators judge their satisfaction with bargaining outcomes more by the degree to which they believe the ***process*** *was fair and respectful than by the objective value of the terms obtained. Competitive/Problem-Solver negotiators are personable and respectful. They avoid overtly competitive behavior, and act as if they are Cooperative/Problem-Solvers. Their adversaries are so appreciative of their seemingly open and courteous conduct that they over-value the actual worth of the terms they obtain.*

[Even] competitive persons . . . work diligently to ascertain the non-distributive needs of their opponents and to satisfy those desires. They do not do this because of altruistic considerations. They instead appreciate the fact that if they provide their adversaries with what those parties require in these areas, it will be easier for them to obtain more of the . . . surplus which has been created.

Professor Craver notes that good competitive/problem solvers do not lie about material facts, though they may engage in puffery about their bottom line and withhold information. In addition, he comments that they always treat their opponents with respect and professionalism, keeping in mind the likelihood they will encounter their adversaries in the future.

Questions

10. Would you feel comfortable using the approach described by Professor Craver? Would you use it if a client told you he wanted you to? Why or why not?

p. 21

11. Have you experienced situations in which you were open and cooperative initially, but later felt that you might have revealed too much or been too accommodating?

12. What tactics or approach would you recommend that a cooperative negotiator use to deal with a competitive/problem solver?

13. What should an attorney do if she suspects that a client is willing to pay a premium to take advantage of the attorney's reputation for openness and cooperation to engage in competitive bargaining or sharp tactics in a specific case?

1. Dealing with Adversarial Bargainers and "Dirty Tricks"

Among competitive bargainers, deception is common. Negotiators accept some "tricks" as "part of the game," like a basketball player who feints one way and cuts the other, or a tennis player who uses back spin to place a ball where the other player does not expect. Being sportsmanlike, in other words, does not usually require total candor. Other forms of trickiness in sports, however, are not allowed: A basketball player cannot grab an opponent's clothing, and a tennis player who manipulates line calls is unethical.

Competitive bargainers similarly accept certain forms of deception in bargaining, misleading each other about their true bottom lines, exaggerating the strength of their legal cases, and so on. Other conduct, however, marks a bargainer as adversarial or unethical. Where is the boundary between an honest competitor and a "dirty player" in bargaining? In general terms, adversarial tactics are:

- *Inefficient*: They waste time and opportunities. A negotiator who bargains for days to arrive at a deal, for example, then reneges on a term seeking to "nibble" for advantage, wastes everyone's time.
- *One-sided:* The perpetrator usually won't allow a counterpart to use the same tactic. An adversarial bargainer, for example, may yell, but doesn't like being yelled at back.
- *Egregious:* The tactic is "out of bounds" in a specific setting. Lawyers in small towns or a narrow legal specialty who engage with each other repeatedly, for example, are much more civil and open than "sharks" in large metropolitan areas who don't expect to encounter an opponent again.

Common Tricks

The following tricks are common in hard bargaining situations:[7]

- *Stonewalling:* Taking a position, then refusing to offer concessions or to give a reasonable explanation ("$1,000 is all we'll pay . . . We're not interested in talking about it. . . .") ***p.22***
- *Deceiving:* Lying about facts or breaking agreed rules of procedure. ("My shipping department won't be able to provide the discount we talked about yesterday. But we have a deal on everything else. . . .")
- *Threatening:* Threatening harm on an issue outside the negotiation. ("Drop the infringement suit or we'll see to it that you won't get business from anyone in our trade association.")
- *Attacking:* Challenging another person's competence, ethics or dignity. ("You [fill in ethnicity, gender, age, etc.] people just can't understand sales. . . .")

Common Responses to Dirty Tricks

- *Accept the tactic.* You can allow the other side to use the tactic, "We *really* need this deal!" By giving in, you avoid an immediate confrontation, but your response won't motivate them to change their approach and may encourage them to escalate. It may also make you or your client angry, leading to additional problems.
- *Retaliate with a similar tactic.* Fighting fire with fire may be necessary in some situations. It is dangerous, however; unless you are careful, your opponent will probably answer by escalating its own tactics.
- *Break off the process completely.* Walking away from the table may be the right response in some situations and may change the other side's behavior. But if the negotiation ends, you'll lose whatever could have been achieved through agreement.

General Strategies for Dealing with Adversarial Bargainers

Instead of adopting these responses consider the following five-point strategy:

- Don't react immediately; instead, distance yourself.
- Analyze the situation.
- Work to reform, rather than punish, them.
- Negotiate over process rules.
- Retaliate if necessary, but do so in a controlled way.

Don't React Immediately; Instead, Distance Yourself

Don't make a gesture or say anything right away, unless the situation demands it and you're confident of making the right response. Except in unusual situations, try not to give in to strong emotions, which distort judgment. Instead, take a moment to collect your thoughts; in William Ury's memorable phrase, "go to the balcony" (metaphorically speaking). You may want to take a break to do this—say, for example, that you want to consult with others.

Analyze the Situation

Unless your opponent is irrational, his trick is probably an intentional tactic. Use whatever time is available to ask yourself or your team what he's trying to accomplish. Why is he doing this, and what does it tell you about his view of the ***p. 23*** situation? For example, is he lashing out because he feels powerful or because he feels frustrated? What's your goal in this negotiation? How good is your alternative to continuing and what is your opponent's likely alternative? Considering everything, is it in your best interest to end the process now? If in doubt, don't terminate.

Work to Reform Rather than Punish Them

The first response to a dirty trick is often to retaliate in kind but focusing on reform is usually more effective. This means giving your opponent an incentive to change her behavior and making it as easy as possible for her to do so.

Sometimes an adversary is simply testing you and if you ignore the trick, she will drop it. If a bargainer makes a "stonewall" demand and you treat it as a wish or request and continue to bargain, she may move on as well. Similarly, negotiators who act angry may become embarrassed if you ignore their ranting. Some adversaries, however, read a lack of response as an invitation to escalate their tactic and some ploys, such as giving false information, make it hard to continue bargaining.

Another option is to note the tactic but in a non-confrontational way that allows the other side to retreat. You can, for instance, recharacterize a stonewall offer as a wish (e.g., "I understand that it's very important to you that. . . ."). Attacks can also be recast (e.g., "I'm going to treat that as a high inside fastball. . . .").

If a trick is motivated by strong emotions or a distorted view of your position, partially agreeing can change your opponent's attitude. You should not, of course, concede entirely, but you may be able to adopt their perspective on small points.

These responses share a common theme: None punish the other side, and all make it easier for the adversary to retreat without suffering loss of face.

Negotiate over Process Rules

You can label the tactic and negotiate openly over it. In doing this you are in essence bargaining about how the negotiation will be conducted. Your goal should be to make the ground rules efficient, non-abrasive, and reciprocal.

If this is a fair tactic, it should be based on a principle. What is the other side's reason for doing what it did? If, for instance, it has given you inaccurate data, you can ask why that's useful—it just slows the process as you verify it.

Apply a standard of reciprocity: Would they object to you using that tactic too? Can we agree on ground rules? If, for example, the other side nibbles at a deal, suggest that all terms remain open for 24 hours after tentative acceptance, or that both sides be allowed to reopen terms at will (note the difference between raising this option openly and responding by reneging yourself).

Consider bringing in an outside monitor whom your adversary will be reluctant to offend or who can report the conduct to outsiders. This can be as simple as cc'ing someone on emails.

Retaliate if Necessary, But in a Controlled Way

At some point you may have to retaliate—but do so carefully. Communications in adversarial negotiations are often confusing with each side putting a ***p. 24*** negative interpretation on what the other does.[8] In such an atmosphere it is easy for even mild retaliation to escalate out of control.

Warn them first (e.g., "If you can't find a comfortable room for our side to talk, let's hold the meetings at our place") and don't up the ante. It's natural to retaliate at a higher level to show an opponent that bad behavior does not pay, but escalation often leads to counter-escalation.

Be clear; to reform the adversary must understand why you are retaliating. If there is any doubt explain what you are going to do in non-inflammatory, "I'm simply reciprocating your action" language.

Allow the other side to reform. The goal, after all, is ordinarily to re-establish the bargaining process, not destroy it. One option is to split warnings and retaliations into stages, so that your opponent can return to a sensible process.

Finally, give them a choice; don't end a negotiation without giving the other side a final chance to reform. Be careful how you present the choice, however: Warnings are often heard by an opponent as threats. And beware particularly of issuing warnings that you aren't ready to carry out.

2. Comfort Zones

Behavioral style is in large part a function of who you are and what your "comfort zone" is in a particular situation. Choosing a negotiation style that does not fit your personality and values may be a recipe for failure. Indeed, even in the best of circumstances, choosing an ill-fitting style may make negotiating difficult and dissatisfying. To succeed as a professional and find satisfaction in what you are doing, you must understand your own comfort zone.

Defining our negotiating comfort zone is not always an easy task. It's common to wish to be liked rather than disliked, and we know that we are more likely to be liked when we are cooperative and giving than if we are adversarial and taking. We also know that winners are admired, and we want to be respected for vigorously representing our clients' interests. Students may extrapolate from the highly adversarial scenes portrayed in the media, and fear that their preference for cooperation and friendliness will not serve them or their clients well in negotiation.

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

Those of you who have enjoyed competition know from your experience that good competitors can be friendly, gracious and ethical, without adversarial attitudes. A pleasant and respectful personal style is not inconsistent with competitive negotiation, any more than being a "good sport" is inconsistent with wanting to win. Likewise, those of you who tend toward cooperative approaches may know from experience that sometimes the situation calls for a tougher stance. The style ***p. 25*** you choose in negotiation depends in part on how you define the "game," what the stakes are, and what kind of relationship you want with your counterpart during and after the negotiation.

A considerable literature exists on the role of personality in negotiation styles and outcomes, based on studies of personality test results and experimental research. Sheila Heen and John Richardson, for example, have argued that although personality differences are real, the available research does not answer definitively which traits lead to better outcomes in negotiation and traits are not consistent across different situations or over time. They recommend developing deeper knowledge about yourself and others, then applying that knowledge strategically when making choices around negotiation style:

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

Familiarity with personality differences can also be a self-reflection and coaching tool for you, helping you identify and work on behavior that doesn't come naturally. It can also help you to explain your traits to others: "I've learned that I'm not very comfortable making commitments before I have a chance to think things through. Can you give me the weekend and we'll nail this down on Monday?" Becoming familiar with some of the factors that affect your ability to negotiate, mediate or respond well to disputes can help you become more aware of the situations that bring out these traits, and other ways of handling them.[9]

Questions

14. How accurate are personality or style tests, in your experience? What kinds of factors may affect how people respond?

15. Given that most personality tests rely on self-assessment, do you think your assessments are likely to match the assessments by opponents, family, friends, and colleagues?

Ultimately, choices around negotiation style must be made with an eye toward situational factors, strategy, effectiveness, and comfort zone, as well as relationships and the value of a reputation for honest dealing. You need not choose to negotiate collaboratively merely out of self-interest, but also because doing so is virtuous, decent, and key to building a better society.[10]

E. Cooperation vs. Competitiveness—Who Decides?

Lawyers do not make choices around negotiation styles in a vacuum. Read and think about this next problem before continuing to the discussion below.

p. 26

Problem 3: Negotiating with a Client

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

1. What would you tell him?
2. Who should decide negotiation strategies and approaches, you or your client?
3. Do the immediate pecuniary interests of the client and the longer-term interests of the attorney in maintaining good working relations with other lawyers or a reputation for honesty and cooperation create a conflict of interest between attorney and client?

In general clients are accorded the power to choose the objectives of a negotiation, while lawyers have discretion to use their judgment in selecting the means of achieving those objectives. Of course, it’s not quite so simple. As a lawyer pursues an objective, for example, he must also act consistently with the requirement of honest dealings with others.

Professor Robert Condlin points to practical norms that may differ from ethical norms for attorneys, distinguishing between the reality of what lawyers do in negotiation and what ethical rules appear to demand. According to Condlin, lawyers must be substantively competitive in negotiating for clients but can choose their own personal style.

We suggest you assume that lawyers, when negotiating for clients, do have a choice whether to be more cooperative or competitive in their negotiation approach. Cooperation may be the best approach when an integrative outcome is possible that allows each party to get enough of what they want. A competitive approach may produce a favorable outcome for a party but increase the risk of impasse and affect the reputations of both lawyer and client.

Notes

1. Carlton, Jim. (1994) *Microsoft, Stac End Battle with Pact, A Win-Win Cross-Licensing Agreement,* Wall Street Journal.

2. Goodpaster, Gary. (1996) *Primer on Competitive Bargaining*, 1996 J. Disp. Resol. 325, 375-376.

3. Dawson, Roger. (2001) *Secrets of Power Negotiating* (2d ed.).

4. Fisher, Roger, Ury, William J., & Patton, Bruce. (1991) *Getting to Yes* (2d ed.).

5. *See* Lax, David A., & Sebenius, James K. (1986) *The Manager as Negotiator: Bargaining for Cooperation and Competitive Gain*.

6. Craver, Charles B. (2010) "*The Inherent Tension Between Value Creation and Value Claiming During Bargaining Interactions*," 12 Cardozo J. of Conflict Resolution 101.

7. These categories, and some of the suggested responses, are taken from Ury, William. (1991) *Getting Past No: Negotiating with Difficult People*, which should be read for more information.

8. This is the phenomenon of "attribution bias," discussed in Chapter 4. For a discussion of how suspicion escalates in the context of litigation, *see* Arrow, Kenneth J., et al. (1995) *Barriers to Conflict Resolution*, 191-192.

9. Heen, Sheila, & Richardson, John. (2005) *I See a Pattern Here and the Pattern Is You*, in *The Handbook of Dispute Resolution* (Michael Moffitt and Robert C. Bordone, eds.).

10. Wetlaufer, Gerald B. (1996) *The Limits of Integrative Bargaining,* 85 Geo. L.J. 369, 394.

CHAPTER 3

The Negotiation Dance—Step by Step

A. The Seven Stages of Negotiation

Negotiation, whether carried out through a competitive, cooperative or mixed approach, occurs in stages. In practice the stages overlap and vary from one negotiation to another, but breaking bargaining into segments will help you understand and prepare for the process. It will also assist you to maintain your inner balance and composure as the bargaining unfolds, a key to negotiating effectiveness.

Listed below are activities that typically occur in seven stages of competitive or cooperative negotiation. The activities mix and alternate between competitive and cooperative styles. As we have seen, the styles themselves can be complex. Also, the timing of similar steps may vary depending on a bargainer's style: Making explicit offers, for example, usually occurs more quickly in a competitive than a cooperative process.

Stage	Competitive/adversarial approach activities	Cooperative/problem-solving approach activities
1. Preparing to Negotiate	➢ Interviewing and counseling client about negotiation ➢ Setting goals ➢ Assessing **power** of each party ➢ Formulating best alternative to negotiated agreement (**BATNA**), reservation point, and starting position	➢ Interviewing and counseling client about negotiation ➢ Setting goals ➢ Assessing **needs and interests** of both parties ➢ Formulating best alternative to negotiated agreement (**BATNA**) and reservation point
2. Managing Initial Interactions	➢ Setting tone ➢ Establishing credentials/power	➢ Setting tone ➢ Establishing rapport and trust

	➢ Making first demand or offer	➢ Agreeing on agenda
3. Exchanging Information	➢ Arguing and persuading ➢ Making concessions ➢ Bluffing and holding out	➢ Proposing objective standards ➢ Applying principled criteria ➢ Exploring relative priorities and developing solutions
4. Bargaining	➢ Arguing and persuading ➢ Making concessions ➢ Bluffing and holding out	➢ Proposing objective standards ➢ Applying principled criteria ➢ Exploring relative priorities and developing solutions
5. Moving Toward Closure	➢ Using power and threats ➢ Imposing deadlines ➢ Evaluating offers ➢ Setting up final moves	➢ Examining BATNAs ➢ Agreeing on time frames ➢ Analyzing options ➢ Looking for equitable solutions
6. Reaching Impasse or Agreement	➢ Possible impasse ➢ Reluctant compromise ➢ Final maneuvering	➢ Searching for agreement ➢ Reaching mutual decisions through problem solving
7. Finalizing and Writing Agreements	➢ Preparing opposing drafts ➢ Negotiating over terms ➢ Approval, and buy-in (if necessary)	➢ Memorializing terms ➢ Discussing a single text ➢ Approval and buy-in (if necessary)

B. ***<u>STAGE ONE</u>***: Preparing to Negotiate

It's tempting to think that success in bargaining depends entirely on intuitive ability, cleverness and quick thinking, so we have no options but to "wing it." But like any disciplined endeavor, your success in negotiation in fact depends in large part on whether you plan and prepare for it.

1. Basic Categories of Preparation

Preparing involves more than figuring out your bottom line or whether you will take a competitive or cooperative stance. Effective negotiators consider the following factors:

- **Interests**. As we discussed in the previous chapter, interests are the hopes, fears, concerns, preferences, and needs that bring us to the bargaining table. To prepare effectively, you must:
  - Discuss with your client interests he would like to satisfy in the process
  - Equally important, seek to identify the other side's interests
  - Develop potential options that meet each side's key interests at low cost.

p. 31

- **Alternatives**. You hope to reach agreement, but what will happen if you don't? You will have to do something else, and identifying that something else is a crucial step in preparing. It's often called your "best alternative to a negotiated agreement, or "BATNA." It's crucial because unless you know your alternative, you can't rationally decide whether an offer is acceptable. For a rational negotiator, her BATNA is also her "reservation value or "bottom line." We say more about this concept below.
- **Goals**. A risk in analyzing your BATNA is that it becomes your benchmark for success: People who focus only on what will happen if they can't agree become psychologically "anchored" to it, treating terms that are only marginally better than the alternative as acceptable. Doing so will often leave money and other value "on the table."

  To avoid this, set an aspiration or goal that is the highest reasonable expectation of what you can achieve (because you mentally conceded everything better than your aspiration). We suggest setting multiple goals for every negotiation:
  - ***An "A" outcome***: The best result that you can reasonably justify.
  - ***A "C" goal***: The very least you'll accept or most you'll pay. This should equal your BATNA (because logic says one should take any final offer better than one's alternative away from the table, and decline any terms worse than your BATNA).
  - ***Perhaps also "B" goal***—a result between the first two goals, significantly above the C goal, with which you'll be happy.

- **Objective standards**. Principled negotiators use outside criteria or standards to help them evaluate proposed deals and find common ground. If you are buying a house, for example, you might research sales prices for similar houses to justify offers and arrive at a fair outcome. As part of your prep, look for standards that would justify your A, B and C goals, and offers between them.

  In a competitive process, just as good coaches think about what the other team's strategy will be, you should think about what standards your counterpart may cite for less attractive deals and how you might argue against them.

- **Relationships**. In some negotiations, like a house purchase, parties typically don't know each other going into the process and don't expect to have a significant relationship afterwards. When this is true your relationship goal simply will be to establish a civil basis for bargaining.

  When the parties expect or want to have a future relationship, as in a negotiation over terms for a new job or to create a joint venture, bargaining in a way that establishes a basis for working well together in the future is a key concern.

  In general, think about what kind of relationship, if any, the lawyers and parties have going into the process and what relationship you want during and afterwards, and consider how to establish it.

- **Style of bargaining**. We saw in Chapter 2 that bargainers vary widely, both in their style of bargaining and the topics on which they prefer to focus.

p. 32

  - What style and focus do you and your client want for this negotiation?
  - What do you expect the other side to want?
  - If the two sides' preferences differ, how can you bridge them?

Questions

1. If preparation to bargain is very helpful advice, why might a negotiator fail to follow it in practice?
2. People who enter negotiations with high goals consistently get better results than bargainers who have only modest goals or haven't clearly defined them. But again, many bargainers don't set ambitious goals. Why might someone avoid doing so?
3. Does the advice to set a high expectation work only if the other side doesn't do the same? If the other side has also set a high goal and they don't overlap, how would you respond to the situation?
4. A key source in defining your goals for a negotiation is what you or others have achieved in similar situations. But when you are new in practice you won't have many similar cases to refer back to. Where can you find information to support your planning?

C. <u>*STAGE TWO*</u>: Managing Initial Interactions

How we feel about those with whom we negotiate is critical to whether we'll succeed. You may believe you can quickly "read" the character and trustworthiness of those you face; in the same way, others are forming quick impressions of you.

Your counterpart will probably begin to form an impression of you before you meet, and your reputation will precede you into the negotiation. They can contact your peers or simply look at the web. The effect is that people's sense of whether you can be trusted flows from your entire professional and, if it's available online, your personal, life. Misimpressions can be corrected, but it's an uphill struggle.

People's first impression of you in person, or even on video, flows from many things, including your appearance, posture, eye-contact, and how you greet them. A firm handshake, for example, is generally seen in America as a signal of willingness to engage cooperatively and with trust, although this is not necessarily true in other cultures.

In one study, for example, a group of MBA students were assigned to negotiate a real estate deal. Half the pairs were told to begin with a handshake; the other half were seated across the table from one another and not given this instruction. Bargainers who shook hands tended to be less misleading and reported that they were more content with their deals than those who did not.[1]

The impact of trust-building is not limited to business students. In another experiment students from two law schools negotiated with each other.[2] Half were ***p. 33*** told to engage in "small talk" before negotiating, while the others had no specific instructions. The chats were in one sense meaningless (e.g., "How's the weather up there?" "Cold!"), but they had an impact on what happened next. The small talk group:

- Reported that they felt more cooperative toward the other bargainer than the other group.
- Offered more information, which their counterparts reciprocated.
- Made fewer threats to walk out, felt less angry or cold and trusted the other person more.
- Rated the other bargainer as more skilled and effective.
- Had only one-quarter—9 percent vs. 40 percent—as many impasses.
- Made better decisions: All the "small talker" impasses occurred outside the potential bargaining zone, while 64 percent of the non-talkers who reached impasse rejected a deal that was better than both of their alternatives and should have been accepted.
- The objective value of the settlements reached by each group, however, was on average equal.

What might explain this? Small talk may help to resolve the "negotiator's dilemma" of balancing cooperation and competition. It may also lead to less "self/other discrepancy": Feeling a personal connection, the small-talkers rated the other person as more like them in competence and intent.

An important aspect of trust is personal rapport, based on showing trustworthiness but also finding common ground. The more you know about your negotiating counterpart and her client, the more you may find experiences and relationships that you share. Discovering connections and commonalities is surprisingly effective in building rapport.

Trust can be thought of as a metaphorical bank account. You begin your account with early deposits based on a good reputation, initial positive interactions, and acknowledging an opponent's perceptions. During a negotiation you may have to draw on your trust currency to persuade your counterpart that your representations are credible and proposals sincere. The flip side of trust—distrust—inhibits negotiation; it tends to be reciprocated, becoming a self-fulfilling prophecy that hinders collaboration and problem solving.

D. *STAGE THREE*: Exchanging Information

Bargaining over and exchanging information is a third important step in the negotiation process. When we film experienced lawyers negotiating, we often see them spend as much as half the time allocated for the process feeling each other out and probing for and providing information, before anyone makes a specific proposal. Good negotiators, in other words, bargain over data before they negotiate over terms. The corollary is that a key skill for effective negotiators, whether competitive or cooperative, is to ask questions and listen well.

p. 34

1. Listening, Observing, and Questioning

Lawyers are often characterized as good talkers. But in negotiation, being a good listener and knowing how to obtain information through questions is more important than talking. This is true whether you are consulting with clients or in the negotiation process itself. It is also important to observe the nonverbal cues your clients and bargaining counterparts give out. A person's facial and body language often communicates more about how they feel than what they say.

If you can learn what is in the brain and heart of an opponent, you can make a personal connection, satisfy their needs, and get what your client wants at the lowest possible cost. The key lesson here is easy: Talk less; listen and observe more. When you do speak, do so in a way that elicits more information or helps shape the process.

Research confirms that effective negotiators are better at eliciting information and do it more often than less effective ones. Neil Rackham and John Carlisle, for example, studied the behavior of English labor and contract bargainers in actual negotiations. They found that the negotiators with excellent reputations asked twice as many questions as those less highly rated and spent twice as

much time acquiring information. They also more often tested their understanding and summarized what they heard.3

Question

5. The use of silence can also be effective to elicit information. If you simply remain silent, you'll often find that within five or ten seconds the other person will fill the void by talking. Have you ever used silence as a tactic? Have you felt pressured to react to silence by others?

2. Managing Information

Along with gathering information, effective negotiators manage it well. The conventional wisdom is that it is better to receive more information than you give, but this is not always true. Interest-based and cooperative bargaining generally depends on sharing information; providing data can help a counterpart conclude that a proposed deal is valuable and fair. Similarly, as mediators we often advise disputants that they have an interest in providing information to the other side without a quid pro quo (e.g., "You're asking the other side to make what, for them, will be a very difficult decision. I'd suggest it's in your interest to give them the information they need to do that.").

The process of deciding whether and when to disclose information is a key challenge, especially for competitive bargainers. As Professor Melissa Nelken writes:

> *The more straightforward and clear the negotiators' communications are, the fewer obstacles there will be to recognizing and capitalizing on opportunities for mutual gain. . . .*
>
> ***p. 35*** *Such trust . . . does not have to be based on an assumption that the other side has your best interest at heart, but only that he is as interested as you are in uncovering ways that you can both do better through negotiation. Self-interest can keep both sides honest in the process, even where there might be a short-term gain from misrepresentation. . . .*
>
> *There is also anxiety because the amount of shared information needed for integrative bargaining to succeed may be more than a distributive bargainer wants to reveal . . . The fear of being taken advantage of often results in both sides' taking preemptive action focused on "winning" rather than on collaborating. Sometimes such strategies are effective; but they are also likely to impede or prevent what could be a fruitful search for joint gains.4*

Put another way, the advantages of interest-based negotiation may not be realized if negotiators focus too much on fear of being exploited or on "winning" in the process.

E. ***STAGE FOUR***: Bargaining

Traditional bargaining starts with each side making some type of initial offer or suggested starting point, followed by efforts to close the gap. The term “bargaining” is more associated with a competitive approach; cooperative and problem-solving negotiators are more likely to use phrases like “searching for solutions.” However, all negotiators must at some point look for terms that will resolve the dispute or create a deal.

Bargainers face the task of making an initial proposal or offer regardless of how they arrive at it. They then must move the discussion forward toward a mutually accepted conclusion. Principled bargainers, for example, might cite standards and precedents, but that does not prevent them from arguing for criteria that favor their side (Getting to Yes says it’s appropriate to use arguments that help you, but that an impartial judge might accept). Even problem solvers often give up lower priorities to obtain higher ones—a form of bargaining concession.

Some negotiators believe that it is best to formulate a realistic opening position and then stick to it while avoiding “haggling.” In some settings, one side is expected to propose terms and the other to simply agree or not (most patients, for example, don’t bargain with their surgeon over his fee). Parties to legal disputes and most legal transactions, however, start at different places. Indeed, if a bargainer does start the process by making an offer and tells her counterpart to take it or not, the other side is likely to see it as unacceptable “stonewalling.” “No” marks the beginning of most negotiations, in other words, and “yes” is rarely achieved without bargaining.

1. Opening Offers

As we noted earlier, the timing of offers varies between positional and interest-based approaches. Positional bargainers tend to make demands and offers early. In ***p. 36*** contrast, interest-based negotiators are likely to begin by exchanging information and attempt to establish a positive relationship before presenting proposals. This is partly because such bargainers need data about their counterpart’s interests and are more willing to provide it.

Whether you adopt a competitive or cooperative approach, you must decide whether to make the first offer or wait for the other side to do so and what the offer will be. We take these issues up in turn.

a. Should You Make the First Offer?

In some situations, who makes the first offer is determined by custom—plaintiffs are expected to state a claim for relief and the seller of real estate is expected to set a listing price for a property. In other contexts, you have a choice whether to make the first offer, and even in litigation the relief demanded in a legal complaint may not be the starting point for bargaining. How should you decide whether to go first? If you and your counterpart are completely cooperative, the issue largely disappears—you won’t try to “game” the other side, but instead will look for the most valuable set of terms and discuss openly how to fairly allocate the value between you. If the situation is at all competitive, however, first offers matter. Some writers insist bargainers should always go first,

others that they should never do so. In fact, there is no single rule; in competitive contexts, each approach has advantages and disadvantages.

The primary benefit of making the first offer is that it establishes an "anchor." A first offer has a psychological impact, tending to pull counterparts in your direction—a phenomenon called "anchoring." This anchoring effect is strongest when the recipient is not certain about the offeror's expectations or what is the "right" place for the negotiation to end, because there is no objective standard to dictate the outcome. One might think that experienced lawyers would be immune to anchoring, but even professionals are often influenced by the numbers they hear. In one experiment, for example, two groups of appraisers were given identical information about a set of real estate listings, except that one group's packets had higher listing prices than the other. Appraisers who received higher listing prices set consistently higher "objective" values for the properties than those who saw lower asking prices. The same is true of claims in litigation; when researchers varied the amount demanded in a complaint, lawyers' assessments of what their case was worth were similarly "anchored."5

First offers also have a potential downside: They may cut off part of the potential bargaining range. Once you make an offer, you will almost never get a deal better than that offer, and in most situations, it will be the starting point for compromise. This is a real problem if you are not sure where the "bargaining range" is—the range of outcomes that are acceptable to you and your opponent or how much a defendant will pay or a plaintiff will accept.

Any negotiator who makes the first offer runs two risks. One is that he will be "too reasonable"—that is, ask for less or offer more than his counterpart would have accepted, leaving value on the table. The other risk is that a bargainer will "over-anchor," by making an offer so extreme that the other side is discouraged from bargaining at all or responds with an equally extreme counteroffer, creating an unbridgeable gap that leads to impasse.

p. 37 Any bargainer must therefore balance the psychological advantage from making a first offer against the potential risk of starting at the wrong place. There is no amount of experience or technique that will make this problem go away; it exists for all except the most cooperative bargainers. In general, if you don't know much about the likely bargaining range you should be reluctant to go first. Instead ask questions, seeking to learn more about your counterpart's intentions and expectations before making a commitment. If you have a sense of the range and want to obtain most of the benefit for your side, go first and establish a strong anchor.

b. What Should Your Offer Be?

It's traditional for litigators to open with extreme offers. Indeed, it's become a cliché for a party to react to the other's first offer with an obligatory, "That's insulting!" and respond with an equally extreme counteroffer. You now know both the upsides and downsides of this strategy.

What other options do you have? One is to discuss standards or data that support a more reasonable starting point and outcome, and monitor if your counterpart appears open to beginning at a more reasonable range. Experts on business bargaining recommend making the largest or smallest offer that you can support with a credible justification. Be able, in other words, to phrase every offer as "I propose 'x' because . . .," and give reasons that, if not entirely convincing, are at least plausible.6

The same seems true of legal settlement negotiations, but it's also important to be aware of local customs. Some insurers, for example, expect tort claimants to settle for no more than a certain multiple of their out-of-pocket damages and expect lawyers to make an opening offer that is no more than twice the customary range for outcomes. In contract cases, mediators see plaintiffs make first offers equal to the most they could possibly recover in court under the claims asserted.

If you are in an interest-based or problem-solving process, by contrast, there is little or no exaggeration involved in setting an offer. Both sides are likely to focus first on "expanding the pie" by exchanging information and ideas, and as they approach a consensus on the most valuable possible combination of terms, begin to discuss a neutral standard to allocate the value they have created. A specific set of terms may come only at the end of the process, often preceded by multiple exchanges of possible "baskets" of terms in an effort to find the one with the greatest value to both sides.

c. If You Wait, What Should You Do?

If you wait for the other side to make an offer, don't allow it to become an "anchor" that pulls you away from your initial strategy. Indeed, some experts recommend that negotiators ignore the other side's extreme offer as much as possible on the theory that the more you mention an egregious number, the more influential it will become in both bargainer's minds.

More generally, keep in mind that anyone who makes an offer, first or second, is in essence putting a "hook into the water." Good negotiators closely observe their counterpart as they make an offer, looking for a reaction that will give a clue about what the recipient thinks of it and his intentions. Smart bargainers, aware of ***p. 38*** this, take care to manage their reaction, including words, expression and body language, as they receive an offer.

One way to respond to a first offer, unless you decide to ignore it, is to ask the offeror to explain it. A good explanation should affect your analysis, and a bad one will confirm that the offer is merely a tactic or wish rather than a reasoned position. Either way, asking about an offer gives you time to think about how to respond.

Bear in mind also that lawyers commonly negotiate by phone or video, not face to face. As a result, negotiations usually proceed in multiple short conversations, with recipients asking clarifying questions and perhaps giving a general signal, then saying, "Let me talk this over with my client and get back to you." Actual legal settlement negotiations, in other words, rarely resemble roleplaying in class (mediations, as we'll see, do occur largely in a single session). This is a real plus for a new lawyer, because it gives her time to think over how to respond and a ready excuse for not answering immediately.

Questions

6. The negotiation guidebooks are full of advice on making offers, much of it contradictory. There appears to be a consensus, however, that in competitive process a more aggressive offer generally results in a more favorable outcome—

but also raises the risk of an impasse. Should negotiators assume that all negotiations are competitive unless they have evidence to the contrary? What are the risks of doing so?

7. Should negotiators always base making a first offer or waiting on the situation, or is there value in committing to a consistent approach?

2. Planning and Managing Concessions

Concessions are the compromises parties make after their opening offers to move the negotiation toward agreement. Again, if you anticipate a continuing relationship or have a cooperative or problem-solving strategy, you will apply a concession strategy very different from one you would use in a one-time competitive negotiation.

Whatever your style and strategy, you must decide whether and when to make concessions, what to offer and how to structure them, because each side's "moves" create a pattern that suggests to the other where they intend to go in the negotiation.

In a competitive process, think about what signal each move will send, given what the other side has communicated by their last offer. In an interest-based process, consider what concessions would be of most value to the other side, at lowest cost to you, and vice versa, or would develop information to guide the parties to a valuable outcome.

If you make a concession and an opponent does not reciprocate, it may be because he is seeking more information or consulting with a client. If none is ***p. 39*** forthcoming, however, don't be afraid to say, "The ball is in your court." If possible, offer an explanation for each offer you make—doing so suggests you believe in what you are proposing, and it is the essence of principled bargaining. As a rule, present the explanation for a concession before disclosing the offer itself—recipients listen better because they are curious to hear what is coming and not preoccupied with thinking about how to respond, and explanations offered afterwards tend to be dismissed as "window dressing."

Whichever strategy you pursue, bear in mind the cardinal rule of reciprocity: Do not offer a new concession until your prior one is reciprocated—don't, in the jargon of bargaining, "bid against yourself." Demanding a concession in return for each move reinforces the value of what you have offered and signals your determination that this be a mutual process of compromise.

The pattern of each side's concessions sends a series of messages about their intentions and expectations. Particularly in a competitive process, you need to manage them carefully to send the signals you want, and closely monitor what the other side is doing. A significant move indicates that additional substantial concessions are probably available. Bargainers who want to suggest they are approaching their "bottom line" (or pretend they are) make smaller, slower, more precise or more grudging concessions, supported by arguments or warnings about lack of authority. An offer of $628,000, for example, suggests more firmness than 630, and $628,300 would be even more so. One exception to these guidelines is that as competitive parties sense they are in the final phase of bargaining their pace may quicken, with numbers going back and forth in a minute or less.

A “reasonable competitor,” for example, may start with an offer that favors his client but is not outrageous and is supported with facts and reasons. He then makes a series of moderate concessions followed by progressively smaller ones, establishing a clear pattern that communicates resolve and flexibility moving toward closure.

When negotiations involve more than a simple payment of money and multiple issues are on the table, concessions are likely to take the form of trading issues and package bargaining. An integrative bargainer typically offers “packages” with multiple terms, then changes the mix of terms in each offer, in an effort to learn what combination is most attractive to her counterpart. In this kind of process more issues create a greater opportunity for integrative bargaining and outcomes that trade more important interests for lesser. The “concession” process in such a process is as important as in a competitive one, but focused on communication rather than gaining an advantage over a counterpart.

In summary:

- Prioritize and rank concessions in advance and develop a plan for managing them.
- Provide a rationale for each offer and be extremely reluctant to move twice without reciprocation.
- In a competitive process:
    - Avoid making a first offer without a good sense of the bargaining range; if you don’t know the range, wait and gather information.
    - If you do know the bargaining range, make a first offer to establish an “anchor.” Start at the most favorable point you can justify with reasoning.

p. 40

-
    - If you make the first offer, look carefully at how your opponent responds; if you go second, be careful what you show.
    - Seek to induce your opponent to make large concessions, while conceding slowly and reluctantly yourself.
    - Structure concessions to create a pattern that implies you have a high reservation point.
- In an integrative process:
    - Look for terms that provide high value to you at low cost to a counterpart, and vice-versa.
    - Frame offers as combinations or packages of terms.
    - Change the mix in each offer to learn your counterpart’s preferences and find the combination that creates the greatest overall value and fairly allocates it between you.

Problem 1: Concession Patterns

Assume you are negotiating a personal injury claim on behalf of an injured pedestrian and liability is not clear. You have spoken with the insurance claims adjuster five times. Each time you have conceded an additional $1,000 off your initial written demand of $80,000, while offering new information or arguments in support of your claim.

What do you think the adjuster is communicating to you with each of the following four concession patterns (assume in your answer that the adjuster is using only one of the patterns)? How would the pattern influence your recommendation to a risk-averse client about accepting a $47,000 settlement after the fifth round of negotiation?

Concession Patters				
Round	**Pattern**			
	A	**B**	**C**	**D**
1	$ 0	$ 3,000	$ 40,000	$ 47,000
2	$ 0	$ 6,000	$ 45,000	$ 47,000
3	$ 0	$ 12,500	$ 46,500	$ 47,000
4	$ 0	$ 25,000	$ 47,000	$ 47,000
5	$ 47,000	$ 47,000	$ 47,000	$ 47,000

3. Value-Creating Trades and Brainstorming

Even in a cooperative process, trading packages of concessions may narrow a gap but not close it, and in competitive processes impasses are common. Brainstorming is a technique to generate ideas of new options and trade-offs. Its essence p. 41is to suspend judgment and advocacy in favor of exploring possible solutions. In effect, brainstorming is a timeout from negotiating to explore. To carry out the process:

- Neutrally frame issues in terms of interests, not offers or positions;
- Freely think of all possible ways those interests could be met;
- Do not evaluate proposed ideas (no criticism or praise);
- Do not impose ownership (suggesting a possibility does not mean agreeing to it).

Brainstorming can be used in a wide variety of situations. It is harder to use in a competitive process because it is so hard to let go of positional strategies. But even competitive lawyers sometimes work cooperatively, especially if they have reached a tentative agreement and need to find a workaround for a specific problem blocking one side from ratifying it.

F. ***STAGE FIVE***: Moving Toward Closure

1. The Role of Power and Commitment

Negotiation is often discussed in terms of how each side can use its power to get what it wants from the other side. When you think about power, persons and institutions with structural advantages often come to mind—the boss, the professor, the wealthy, the strong, or the historically privileged. A large military force or well-funded team of lawyers, for example, often seem to be in a powerful negotiating position. It is certainly true that these kinds of advantages can create power disparities in negotiation. Yet it is also true that power and leverage are not as static and one-sided as you might believe.

This is because "power" is a subjective perception that exists in the mind. If an opponent believes that you can provide or deny what they want, then you have power—whether or not you are in fact capable of doing so.

Power is linked to commitment, however, the other side must believe you will exercise it. A hostage taker, for example, might increase his power by shooting one hostage because it demonstrates his willingness to do so to others.

Power does not always remain static during a negotiation. It can change, for example, if a party finds new evidence that bolsters their legal case or acquires the ability to threaten the other side's interests.

Questions

8. Have you experienced or heard reports of threats that seemed irrational or premature, but succeeded in getting the threatener what it wanted?

9. Can you think of a situation where someone's reliance on power has led to failing in a negotiation? ***p. 42***

2. Deadlines and Final Offers

Making concessions in competitive situations is painful, both because doing so imposes a loss and because it may be taken as a signal of weakness or willingness to give up even more. The effect is that competitive bargainers often avoid making serious concessions until they confront a serious deadline or other risk of loss.

This means that a competitive bargainer can gain an edge by creating a situation in which the other side will lose unless it concedes. Insurance companies, for example, sometimes use tort claimants' need for funds as a lever to push them to reduce their demands. If both sides try to take advantage of the other side's fear of losing, the effect can be a sophisticated version of "chicken." Cooperative bargainers, by contrast, are likely to disclose their constraints honestly and agree on a process that accommodates them.

Hard bargainers may seek to intensify their power advantage by locking themselves in. A bargainer might, for instance, impose a time deadline (e.g., "Accept this settlement amount by 5:00 p.m. or we go to trial.") Paradoxically, a bargainer can sometimes gain power by depriving himself of the ability to act. Imagine, for example, a driver in a game of "chicken" who ostentatiously rips out his steering wheel and throws it out the window; by depriving himself of the ability to swerve, he limits the other driver's choice to swerving or crashing (of course if the other side is stubborn, both will crash). The same happens when two "tough" bargainers lock themselves into positions from which neither will move, and there occurs the bargaining equivalent of a fatal collision.

Self-imposed constraints are a form of commitment, and so work only to the degree the opponent believes they will be carried out. This means that a negotiator who threatens action must be willing to carry it out. A bargainer who draws a line in the sand that his opponent crosses must either accept an impasse or admit that he was bluffing.

G. ***STAGE SIX***: Impasse or Agreement

Even when a negotiation appears to be moving toward closure, an impasse can arise. It may be caused by a gap between "last" offers or something else. We think of impasses in terms of money gaps, but they can occur due to:

- Misunderstanding the other side's needs or problems.
- Failing to concede low-priority interests to satisfy higher-priority ones.
- Failing to realistically consider and adjust BATNAs and WATNAs (worst alternatives to a negotiated agreement) in light of new information or developments.
- Misestimating the bargaining zone—digging into a position that the other side rejects because it appears to be worse than its BATNA.
- Decision fatigue, anger, and other emotions.

Successfully negotiating a settlement depends on finding an acceptable balance for both sides among the three sets of needs—economic, emotional, p. 43and social—in the settlement triangle presented in Chapter 1. The triangle is like a three-legged stool: If any of the needs is not addressed, the deal is likely to fail.

You can use a variety of endgame moves or collaborative strategies to arrive at closure. Some rely on exploiting the parties' differing interests, while others focus on closing a monetary gap. We explore some examples below.

1. Splitting the Difference

Professor Shell writes, "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 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."7

The idea of "meeting in the middle" or "coming halfway" is deeply ingrained in the human psyche because everyone loses and gains the same amount. It may also be easier than figuring out a customized solution. It can be problematic, however. First, "splitting" is subject to tactical manipulation: If one side makes a reasonable offer and the other one clings to a hard stance, splitting the difference favors the less reasonable person. The tactic also forgoes the possibility of finding creative options. An employee and employer who split the difference over how large a raise to give the employee, for example, may miss out on more valuable solutions such as work hours, job titles, parking, and other perks.

2. Opening a Door

Impasses are sometimes like logjams: a small step may be enough to restore movement. Professor Shell gives this example:

> *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.*
>
> ***p. 44*** *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.*

Sometimes further discussion may seem pointless because the issues appear hopelessly incompatible or emotions are heated. At that point, however, good negotiators take care to part under terms that leave the possibility of movement in the future. They know that when tempers cool and people have an opportunity to gather additional information new paths forward may emerge.

Questions

10. Have you ever split the difference to conclude a negotiation or sale? Looking back, was it the best way to close the deal? Have you ever been manipulated, or used this tactic to your own advantage?

11. If you propose splitting the difference and the other side does not immediately accept the proposal, it may treat the midpoint as your new position for compromise going forward? Is there a way to avoid being penalized for proposing this?

12. How might creating an impasse—or at least the appearance of one—be helpful in some negotiations? How and when might a bargainer do so?

3. Logrolling and Packaging

We've stressed that bargainers can create value by trading items that have different values to each side, a process often called "logrolling." Legislators logroll when they trade their vote on a matter of little concern to their constituents for another legislator's vote for an issue that is more important in their district. For example, a western congressman might support a bill subsidizing rapid transit in return for a New York City congressman's vote for grazing subsidies.

A difference between overlapping reservation points, or "bottom lines," of negotiators creates a "bargaining zone"—a range of outcomes that would provide more value for each side than their alternative to agreement. By trading or adding items to the discussion, interest-based negotiators can expand a bargaining zone. ***p. 45***

4. Reconsidering BATNAs and WATNAs

Parties facing difficulty should look again at their respective alternatives—both the best that they can get without an agreement and the worst that may happen—in light of information they acquire during the process. The data you have near the end of a negotiation may be more accurate than what you knew when you began. If you do not change a BATNA assessment that is now inaccurate, for instance, you risk rejecting terms that are better than what you will have if you do not agree.

Rather than cling to a pre-negotiation goal, assessment or reservation point, take a hard look at each based on what you have learned about the transaction and the other side. You might also suggest diplomatically that your counterpart do the same.

5. Decision Fatigue, Glucose, and the Nirvana Fallacy

After intense negotiations and multiple decisions, a relatively small issue may be the "straw" that blocks agreement. Researchers confirm that our ability to make good decisions declines over a long, mentally demanding process. Unlike physical fatigue, however, you may not be consciously aware of how much your ability to make good decisions has declined over a bargaining process.

You or your client may become rigid or impulsive (e.g., "If you won't pay an additional $2,000, I will see you in court!") or may have difficulty making decisions at all.8 Poor decision making is associated with fatigue and low glucose levels, and the antidote may be to take a break to eat or get a good night's rest before declaring impasse.

Another potential obstacle is the search for a perfect solution, sometimes called the "nirvana fallacy." Bargainers will sometimes reject a worthwhile deal because they think there is some better solution even if they can't find it. The adage that "the perfect is the enemy of the good" applies to bargaining too.

H. ***STAGE SEVEN***: Finalizing and Writing the Agreement

After you reach agreement your work as a lawyer is not complete. The relief you feel can lead you to neglect the important task of resolving how your agreement will be worded and documented. Parties may reach a simple agreement on a dollar amount, for example, only to learn later that the defendant's assent was conditional on paying the sum over time, something not acceptable to the plaintiff, or the plaintiff may demand security which a defendant cannot provide.

p. 46 Ironically, interest-based settlements may be more vulnerable to drafting problems than flat money payments because they have more "moving parts"—steps that each party must take, often over a period of time, and perhaps a relationship in the future that must be carefully defined. A partnership or marriage dispute, for example, resolved with a one-time payment is relatively easy to write up and implement, while a resolution that involves spouses reconciling or sharing custody of a child or business is much more open to ambiguities, second thoughts, and discord.

Careful drafting can uncover and resolve points on which the parties did not reach a complete "meeting of the minds," and can protect your client from an opportunistic opponent who seizes on ambiguities in a tentative deal to escape obligations or rewrite the settlement in their favor. Any agreement must meet the basic requirements of contract law. Both transactional and litigation agreements have economic terms — who will be paid how much, or do what, and so on. Settlements of litigation also typically contain terms that may not have been part of the discussion, such as dismissal of all outstanding claims with prejudice, mutual releases of liability, and confidentiality.

1. Putting It All Together

As a reminder, negotiation includes these seven stages:

1. Preparing to Negotiate
2. Managing Initial Interactions
3. Exchanging Information
4. Bargaining
5. Moving Toward Closure

6. Reaching Agreement or Impasse
7. Finalizing and Writing Agreements

We think of the moves in these stages as the "negotiation dance," because they are complex and require practice to carry out gracefully and well. And, because negotiation is a social interaction, you will sometimes be leading your bargaining partners and at other times responding to them, and your choices will depend upon what is happening around you. Learning a structured framework for thinking about the negotiation process helps keep bargainers centered and focused when the process becomes tense or complicated.

NOTES

1. Schroeder, Juliana, Risen, Jane L., Gino, Francesca & Norton, Michael I. (2014) Handshaking Promotes Cooperative Dealmaking, Harv. Bus. Rev.

2. Nadler, Janice. (2004) Rapport in Legal Negotiation: How Small Talk Can Facilitate E-mail Dealmaking, 9 Harv. Negot. L. Rev. 223; Morris, Michael, et al. (2002) Schmooze or Lose: Social Friction and Lubrication in E-Mail Negotiations, 6 Group Dynamics: Theory, Res., & Prac. 89.

3. Rackham, Neil & Carlisle, John. (1978) The Effective Negotiator—Part 1: The Behaviour of Successful Negotiators, J. of European Indus. Training, Vol. 2 No. 6.

4. Nelken, Melissa L. (2007) Negotiation: Theory and Practice (2d ed.).

5. Northcraft, Gregory B. & Neale, Margaret A. (1987) Experts, Amateurs, and Real Estate: An Anchoring-and-Adjustment on Property Pricing Decisions, Org. Behav. & Human Decision Proc.

6. Malhotra, Deepak & Bazerman, Max. (2008) Negotiation Genius; Shell, Richard G. (2006) Bargaining for Advantage: Negotiation Strategies for Reasonable People (2d ed.).

7. Shell, Richard G. (2006) Bargaining for Advantage: Negotiation Strategies for Reasonable People (2d ed.).

8. Tierney, John. (2011) Do You Suffer from Decision Fatigue, N.Y. Times, Aug. 17, 2011, at https://www.nytimes.com/2011/08/21/magazine/do-you-suffer-from-decision-fatigue.html.

CHAPTER 4

Barriers to Settlement

If all negotiations were successful, the dispute resolution pyramid in Chapter 1 would have its top lopped off. Disputants, assisted by lawyers, would reach accommodations with their opponents, making it unnecessary for a party to file a case in court, much less go to trial. However, conflicts—in particular, legal disputes—often do fail to settle, and some lawsuits go on for months or years, imposing high costs on the participants.

When parties are not able to negotiate settlements their failure has causes, and mediators must identify the obstacles to deal with them. We sometimes think of a mediator as a "negotiation doctor." Parties rarely ask for a mediator's help when a negotiation is going well; rather, she is called in to treat negotiations that are "sick"—that is, stalled or broken down or likely to do so.

Neutrals must diagnose the "illness" afflicting a settlement process to treat it. In this chapter we examine some of the most important forces that may impede or derail the settlement process.

A. Strategic Barriers

Robert H. Mnookin

Why Negotiations Fail: An Exploration of Barriers to the Resolution of Conflict1

Conflict is inevitable, but efficient and fair resolution is not. . . . In our everyday personal and professional lives, we have all witnessed disputes where the absence of a resolution imposes substantial and avoidable costs on all parties. . . . Let me offer a few examples where, at least with the benefit of hindsight, it is easy to identify alternative resolutions that might have left both parties better off.

*My first example involves a divorcing family in California. . . . Mary and Paul Templeton spent three years fighting over the custody of their seven-year-old daughter Tracy after Mary filed for divorce. . . . Mary wanted sole custody; Paul wanted joint physical custody. This middle-income family spent over $37,000*1 on* **p. 50** *lawyers and experts. In the process, they traumatized Tracy and inflicted great emotional pain on each other. More to the point, the conflict over who would best care for their daughter damaged each parent's relationship with Tracy, who has suffered terribly by being caught in the middle of her parents' conflict. Ultimately the divorce decree provided that Mary would have primary physical custody of Tracy, and Paul would be entitled to reasonable weekend visitation. The parents' inability to negotiate with one another led to a result in which mother, father and daughter were all losers.*

A conflict between Eastern Airlines and its unions represents another conspicuous example of a lose-lose outcome. . . . Frank Lorenzo took over Eastern, then the eighth largest American airline, with over 42,000 employees and about 1,000 daily flights to seventy cities. For the next three years, Lorenzo, considered a union buster by organized labor, pressed the airline's unions for various concessions, and laid off workers to reduce costs. The unions retaliated in a variety of ways, including a public relations campaign suggesting Eastern's airplanes were being improperly maintained because Lorenzo was inappropriately cutting costs [and] labor-management skirmishes turned into all-out war. Eastern's machinists went on strike, and the pilots and flight attendants initially joined in. The ensuing "no holds barred" battle between Lorenzo and the machinists led to losses on both sides.

Soon after the strike began, to put pressure on the unions and to avoid creditor claims, Eastern's management filed for bankruptcy, hired permanent replacements for the strikers, and began to sell off assets. While the pilots and flight attendants held out only a few months, the machinists' union persisted in its strike, determined to get rid of Lorenzo at whatever cost. In one sense, they succeeded, for . . . the bankruptcy court forced Lorenzo to relinquish control of Eastern. It turned out to be a pyrrhic victory for the union, however . . . [A year later] Eastern Airlines permanently shut down operations.

The titanic struggle between Texaco and Pennzoil over Getty Oil provides another example of a bargaining failure, although of a somewhat more subtle sort. Here, both corporations survived, with a clear winner and loser; Texaco paid Pennzoil $3 billion in cash to end the dispute. . . . The parties reached settlement, however, only after a year-long bankruptcy proceeding for Texaco and protracted legal wrangling in various courts. While the dispute dragged on, the combined equity value of the two companies was reduced by some $3.4 billion. A settlement before Texaco filed for bankruptcy would have used up fewer social resources and would have been more valuable to the shareholders of both companies than the resolution created by the bankruptcy court about a year later.

My last example is an Art Buchwald story—but it isn't a laughing matter, at least, not for Buchwald. He and his partner, Alain Bernheim, submitted Buchwald's two and a half page "treatment" for a story called "King for a Day" to Paramount Pictures. . . . [Later] Buchwald and Bernheim sued Paramount for breach of contract. They claimed that the studio had based Eddie Murphy's film "Coming to America" on their treatment but had failed to give them their due. After three years of bitter litigation, a trial judge awarded Buchwald $150,000 and Bernheim $750,000. In the initial newspaper accounts, both sides claimed victory, but this is hardly an example of "win-win."

***p. 51** Paramount claimed to be the winner because the legal fees of the plaintiffs' lawyers exceeded $2.5 million and the total recovery of only $900,000 was a small fraction of the $6.2 million Buchwald and Bernheim had requested in their final arguments. As it turns out, Buchwald and Bernheim will not have to pay the full legal fees because of a contingency arrangement with their law firm, but Buchwald has acknowledged that his share of out-of-pocket expenses alone exceeds $200,000 and that as a consequence he will have no net recovery. On the other hand, Buchwald ridiculed Paramount's claim of*

victory. How, he asked, could it be a victory for a defendant to pay out nearly $1 million in damages, and, in addition, have legal fees of its own in excess of $3 million? Seems like lose-lose to me.

. . . Examples like these, and I am sure you could add many more of your own, suggest a central question for those of us concerned with dispute resolution: Why is it that under circumstances where there are resolutions that better serve disputants, negotiations often fail to achieve efficient resolutions? In other words, what are the barriers to the negotiated resolution of conflict?. . .

STRATEGIC BARRIERS

The first barrier to the negotiated resolution of conflict is inherent in a central characteristic of negotiation. Negotiation can be metaphorically compared to making a pie and then dividing it up. The process of conflict resolution affects both the size of the pie, and who gets what size slice. . . .

Even when both parties know all the relevant information, and that potential gains may result from a negotiated deal, strategic bargaining over how to divide the pie can still lead to deadlock (with no deal at all) or protracted and expensive bargaining, thus shrinking the pie. For example, suppose Nancy has a house for sale for which she has a reservation price of $245,000. I am willing to pay up to $295,000 for the house. . . . If we disagree about how the $50,000 "surplus" should be divided (each wanting all or most of it), our negotiation may end in a deadlock. We might engage in hardball negotiation tactics in which each tried to persuade the other that he or she was committed to walking away from a beneficial deal, rather than accept less than $40,000 of the surplus. . . .

Strategic behavior—which may be rational for a self-interested party concerned with maximizing the size of his or her own slice—can often lead to inefficient outcomes. . . . Those experienced in the civil litigation process see this all the time. One or both sides often attempt to use pre-trial discovery as leverage to force the other side into agreeing to a more favorable settlement. Often the net result, however, is simply that both sides spend unnecessary money on the dispute resolution process.

THE PRINCIPAL-AGENT PROBLEM

The second barrier is . . . called the "principal-agent" problem. . . . The basic problem is that the incentives for an agent (whether it be a lawyer, employee, or officer) negotiating on behalf of a party to a dispute may induce behavior that fails to serve the interests of the principal itself. . . .

Litigation is fraught with principal-agent problems. In civil litigation, for example—particularly where the lawyers on both sides are being paid by the p. 52hour—there is very little incentive for the opposing lawyers to cooperate, particularly if the clients have the capacity to pay for trench warfare and are angry to boot. Commentators have suggested that this is one reason many cases settle on the courthouse steps, and not before: for the lawyers, a late settlement may avoid the possible embarrassment of an extreme outcome, while at the same time providing substantial fees.

The Texaco/Pennzoil dispute may have involved a principal-agent problem of a different sort. . . . The directors and officers of Texaco were themselves defendants in fourteen lawsuits. . . . Because they faced the risk of personal liability, the directors and officers of Texaco acted in such a way as to suggest they would prefer to risk pursuing the case to the bitter end (with some slight chance of complete exoneration) rather than accept a negotiated resolution, even though in so doing they risked subjecting the corporation to a ten billion dollar judgment. The case ultimately did settle, but only through a bankruptcy proceeding in which the bankruptcy court eliminated the risk of personal liability for Texaco's officers and directors.

OVERCOMING STRATEGIC BARRIERS: THE ROLE OF NEGOTIATORS AND MEDIATORS

The study of barriers can do more than simply help us understand why negotiations sometimes fail when they should not. It can also contribute to our understanding of how to overcome these barriers. Let me illustrate this by using the preceding analysis . . . briefly to explore the role of mediators, and to suggest why neutrals can often facilitate the efficient resolution of disputes by overcoming these specific barriers.

First, let us consider the strategic barrier. To the extent that a neutral third party is trusted by both sides, the neutral may be able to induce the parties to reveal information about their underlying interests, needs, priorities, and aspirations that they would not disclose to their adversary. This information may permit a trusted mediator to help the parties enlarge the pie in circumstances where the parties acting alone could not. . . .

*A mediator also can help overcome barriers posed by principal-agent problems. . . . In circumstances where a middle manager is acting to prevent a settlement that might benefit the company, but might be harmful to the manager's own career, an astute mediator can sometimes bring another company representative to the table who does not have a personal stake in the outcome. . . .*2*

B. The Impact of Fairness

Differing views of fairness are at the heart of many litigated conflicts and failed negotiations. A client may hire you because she feels she has been treated unfairly, and her perception of what is fair may be central to her decision about whether to ***p. 53*** accept a settlement. Indeed, for someone in a dispute, obtaining an outcome that seems fair can be more important than how much money is paid, and offers that may seem sensible to you may be rejected because they seem unfair to your client.

"Ultimatum games" illustrate the importance of perceptions of fairness. In these experiments, Player 1 is given a fixed sum of money (for example, $100) and allowed to propose a division of that sum with a partner (for example, $75 to her and $25 to the partner). The partner can decide only whether to accept or reject the offer. If the partner accepts, both players will keep the money as Player 1 allocated it, but if the partner rejects, neither player receives anything.

Logic dictates that if Player 1 offers more than zero, the other player should accept it, as better than nothing. In fact, in experiments when a player offers less than 50 percent of the amount to be

allocated many recipients reject it, preferring to walk away with nothing than to accept what they perceive as an unfair result. The results underline how important it is for people to feel they have been treated fairly in decisions.

Fairness can be thought of in two ways. “Distributional” fairness focuses on the outcome: what you get. “Procedural” fairness concerns process: how you were treated in the process. Both components shape people’s decisions whether to accept a settlement.

Questions

1. More than 40,000 fans were at the ballpark to see the San Francisco Giants’ last game of the season. Most had come to see Barry Bonds add another home run to his already record-breaking total of 72. Alex Popov and Patrick Hayashi were two fans hoping to catch a Bonds home-run ball. Sure enough, Bonds’ 73rd home run sailed over the right field bleachers into Popov’s outstretched glove. Within seconds he fell to the ground as a rush of people converged on him. Madness followed before security officers arrived. When Popov was pulled from the pile, the ball was no longer in his glove—Patrick Hayashi emerged with the ball in hand.

   Both men claimed ownership of the home run ball and both thought it was worth more than $1 million, based on the recent sale of a player’s 70th home-run ball for more than $3 million. But each man offered the other less than $100,000 to relinquish his claim, arguing that he was entitled to complete ownership of the ball.

   Both cited principles of fairness and baseball culture in support of their claim. Popov argued that first possession controls, while Hayashi maintained that the fan who ended up in possession owned the ball. They insulted one another as liars and thieves, hired lawyers, and filed suit.

   Newspaper editorials, letters, talk show hosts, Barry Bonds, and several mediators all suggested that the ball be sold and the proceeds split evenly, or that the money be given to charity. However, neither Popov nor Hayashi thought an even split was fair, nor were they willing to concede anything in the face of the insults cast on them by the other. Following ***p. 54*** 18 months of public bickering and litigation, a judge ordered the ball to be sold and the proceeds evenly split.

   The ball, seated on black velvet and encased in glass, was sold at auction to a comic book impresario for a final bid of $450,000. Popov and Hayashi each received $225,000 minus auction expenses, but they each had incurred far larger attorneys’ fees. Popov, for instance, was then sued by his attorney for almost a half-million dollars.

   Neither Popov nor Hayashi appeared to be guided by rational self-interest in making decisions. What do you think got in the way?

2. Professor Nancy Welsh has written that:

> The various criteria for judging the fairness of outcomes can be distilled into four basic competing principles or rules—equality, need, generosity, and equity. The equality principle provides that everyone in a group should share its benefits equally. According to the need principle, "those who need more of a benefit should get more than those who need it less." The generosity principle decrees that one person's outcome should not exceed the outcomes achieved by others. Finally, the equity principle ties the distribution of benefits to people's relative contribution. Those who have contributed more should receive more than those who have contributed less.2

   A. Assume you are on a camping trip with friends and must decide how to divide a limited supply of food. What definition of fairness do you think you might apply in that situation?

   B. What definition do you think a nonprofit food bank would use to allocate donations among the people it serves?

C. Cognitive Barriers and the Role of Perceptions

"We do not see things as they are. We see things as we are."

— *Anaïs Nin*

A key to resolving conflict is to be aware that people often see the same situation very differently. The "Rashomon effect" refers to the fact that people often have contradictory perceptions of the same event. It derives from a classic Japanese story that explored how perceptions distort or enhance different people's memories of the death of a samurai warrior. Each person in the Rashomon story tells the "truth," but each perceives what happened differently and, as in much of life, no single truth emerges.

You have probably heard the story of blind men who touch different parts of an elephant and later describe the animal in different ways. The parable implies that our differing observations about a situation can each be accurate, but our perceptions are inherently limited by our inability to look from others' viewpoints. p. 55People each see only a small part of the "elephant" in a dispute, and believe their perspective is the correct one.

As a lawyer negotiating a dispute it may seem frustrating to hear an opponent insist that you and your client are wrong about what occurred. But attorneys often hear only their client's account, which is almost always different from what the opposing party tells their lawyer. Each may be honestly describing the situation as they perceive it, but the result is a clash of perspectives.

In addition to wide differences in how we perceive reality, human beings are subject to psychological biases that distort how they use data when making decisions about bargaining. These biases apply to parties in disputes, but also to our own perceptions and decisions. We describe below some of the most important "cognitive forces" that cause people to form distorted perceptions and make poor decisions even when they are trying to act logically. We'll look first at forces that distort people's ability to assess the value of their legal cases, then at factors that influence bargaining decisions.

Problem 1

First year students at your school come to a required orientation program. After they arrive, however, the assistant dean announces that each student will have to pay an additional $20 to cover unexpected expenses associated with the event. The students are given a choice, however: They can pay the $20 or spin a roulette wheel. If they spin the wheel, they have three chances out of four of paying nothing, and one chance in four of having to pay $100.

Will most students choose to spin the wheel or pay the $20? Which would you do?

1. Forces That Affect the Ability to Assess a Legal Case

Consider the following experiment:

Students at a well-known university are preparing to negotiate the settlement of a personal injury case. Before they begin, each student is asked to make a private prediction of the client's chance of winning, based on the student's confidential instructions. What the students don't know is that there is nothing confidential about their instructions: Both sides have received exactly the same data. Since everyone has the same information they should come to the same answer, but this is not what happens.

Law students who are told to negotiate for the plaintiff assess her chances of winning at nearly 20 percent higher than students assigned to the defense. Asked to estimate what damages the plaintiff will recover if she does win, the students show a similar disparity: Plaintiffs estimate their client's damages at an average of $264,000, while negotiators assigned to the defense set the plaintiff's damages at $188,000. ***p. 56***

MBA students show the same divergence, with a combined win percentage of 118 percent. On the issue of damages, the opinions of the business students differ even more: Plaintiffs assess damages at an average of $286,000, almost 50 percent higher than the amounts predicted by students bargaining for the defendant.

What caused the distortions in these students' analyses? It was not due to disparities in information, because both sides had identical data. Nor was it because the students lacked experience evaluating

legal cases: When the same experiment was conducted with veteran litigators who were serving as court mediators, their predictions were similarly distorted.

Disagreements like these are serious barriers to settlement because parties understandably resist accepting an outcome worse than their honest assessment of the value of their case. Moreover, in real cases such differences are even greater, because litigants don't have the same information. Each relies on data gathered from their client, and both sides tend to look for evidence favoring their own position.

a. Selective Perception

The root of peoples' tendency to see the same events differently is known as "selective perception." Humans instinctively form a viewpoint or image of any new situation—that is, they create a "frame" in which they see it, then process any new information received about the situation through their frame.

When a person receives data that conflicts with his existing frame, it creates clashing images in his mind, so-called "cognitive dissonance." The human brain instinctively eliminates such dissonance by disregarding the conflicting data.

In the experiment described above, for example, it is likely that students assigned to the plaintiff instinctively formed a view of the case that favored their client, and then unconsciously dismissed information in the instructions that contradicted their image, while students assigned to the defendant did the same based on their own initial frame.

b. Confirmation Bias

The effect of selective perception is magnified by confirmation bias. This is the tendency of humans, when perceiving conflicting data, to give more weight to information that fits their preexisting beliefs and wishes. We may, for example, see articles that support the benefits of dark chocolate or red wine, and others that question them. We may remember everything we read, but if we like chocolate or wine, we will tend to give more weight to articles that suggest these foods are good for us and disregard or forget those with a negative tone.

Selective perception and confirmation bias are major contributors to disputes. A typical litigant quickly forms an opinion about who is right in a controversy, and most people instinctively prefer to see themselves as in the right. Once a litigant forms this view, however, he becomes subject to these forces. Mediators often ***p. 57*** encounter cases in which the facts are largely undisputed, but parties disagree vehemently about who will win in court. Each side's perspective seems plausible to itself because selective perception and confirmation bias have caused it to ignore, slight, or forget the evidence that contradicts it.

These distortions are aggravated by the task of advocacy itself. Litigators focus on supporting their client's case by stressing facts and arguments that support and denigrating ones that undermine it. A litigator's job, in other words, often requires acting as if she is subject to confirmation bias. Ideally, litigants would separate the task of building a case from that of analyzing it, but many become convinced by their own arguments.

c. Availability and Vividness Bias

We tend to estimate things whose value is uncertain by comparing them to benchmarks. And we tend to remember unusual, dramatic stories rather than events and outcomes that are much more common. Put another way, unusual examples are more "vivid" and "available" to our memories than mundane ones. When a person is burned by hot soup at a restaurant, for example, she may think about a multimillion-dollar verdict rendered against McDonald's for serving hot coffee3 and decide that her claim, too, must be very valuable.

You, as a lawyer, understand that this client's case is much weaker than the McDonald's case and also know that the McDonald's verdict was later greatly reduced by the trial court, then appealed.4 You therefore adjust downward from the McDonald's number to set a value for the soup claim. The problem is that most people, and many lawyers, do not adjust far enough; they are "anchored" by their vivid benchmark and fail to account for how different their case is from the vivid one they are using as a point of comparison. When used strategically in negotiation, this is known as "anchoring."

d. Overoptimism

Humans are persistently overoptimistic about the future and are also subject to what's known as the "above-average effect." Most young people believe, for instance, that they will live longer and do better financially than the average of their high school class. Professionals are also subject to overoptimism: Doctors, for example, are four times as likely to overestimate the life expectancy of terminally ill patients as to underestimate it.

Disputants are similarly overly optimistic when predicting the outcome of legal cases. Lawyers, for instance, may concede that a court is not friendly to a particular kind of case, but nevertheless think their case is "special" in some respect, so the general run of poor results does not apply. Thus, a plaintiff who has what an objective observer would see as a slightly-better-than-even chance is likely to see her prospects as excellent, while defendants err in the opposite direction.

e. Judgmental Overconfidence

In addition to being overoptimistic, human beings are overconfident about their ability to assess unknown facts. This appears to spring from our placing too much weight on the facts we know about a situation and undervaluing data about ***p. 58*** which we are ignorant. Stated in another way, we don't discount adequately for what we don't know.

In litigation, of course, parties and lawyers are required to estimate something that is inherently uncertain—their chances of winning; this force makes them consistently overconfident about their ability to do so. When a party puts its chances of success at between 50 to 60 percent, for instance, an objective observer would see the outcome as much more uncertain, giving a range of uncertainty that might be three or four times as wide.

Making the situation worse, people become surer of their ability to assess the unknown when they have invested in their opinion. In one experiment, for example, subjects were asked to handicap a horse race and then asked how confident they were about their prediction. Some members of the

group placed a small bet on the horse they chose while others did not. The people who placed a bet were more confident that their horse would win than those who had no money at stake. In litigation, of course, parties and lawyers place large "bets" on their "horses," in the form of the resources they invest in their case. The effect is that such litigants become even more sure that their predictions about the outcome of the case is correct.

The combination of overoptimism and overconfidence can be toxic. Negotiation theory tells parties to weigh settlement offers against the value of their alternative to settlement. The cognitive forces of overoptimism and overconfidence lead litigants to be too sure they will win and too sure their predictions are correct, leading them to overvalue their alternative to agreement.

2. Forces That Affect Decisions About Bargaining

Other cognitive forces distort disputants' decisions about bargaining.

a. Attribution Bias

When we see someone as an adversary, we tend to assume the worst about them. If they take an action that seems ambiguous, we think they probably do not mean well and that it is a manifestation of their general character. If we do something similar, by contrast, we are likely to believe that our intentions were good or if they weren't, that circumstances forced us to act that way.

Peoples' tendency to assume the worst about their adversary and the best about themselves is known as "attribution bias." For example, if we are late it is for good reason; an opponent keeps us waiting on purpose. It is not difficult to understand how such assumptions, and the feelings they trigger, could influence bargainers' interpretations of the actions and offers of opponents.

b. Reactive Devaluation

Another force that distorts bargaining decisions is "reactive devaluation." To understand how this works, imagine you are the defense attorney in a case. The plaintiff has been demanding that you pay $100,000 to settle, and after hours of resistance you finally offer that amount.

Is the plaintiff pleased? To the contrary, her first reaction is likely to be that she must have undervalued her case: You, the enemy, would never offer her a fair ***p. 59*** deal! More generally, disputants tend to assume that anything done or offered by an opponent is suspect. The more adversarial the parties feel toward each other the stronger the devaluation.

A biotech company hired a contractor to install a state-of-the-art air conditioning system in its office building, but the installation process encountered repeated delays and problems. The company reacted by refusing to make the last two payments due under the contract and the contractor walked off the job. Both sides claimed the other was liable for expenses and lost profits caused by the situation.

After a long mediation session and exchange of expert reports, the contractor suggested that it pay for an independent contractor to repair the system and an outside expert to

confirm that the repairs were done properly. It also offered to give a two-year warranty on the system.

To the mediator this idea seemed quite promising, but the company representatives rejected it out of hand. The defendant, they said, was a sleazy fraud who would simply arrange for jury-rigged adjustments to allow the system to pass the initial tests and then disappear. They pointed to the fact that the outside expert's office was located near the contractor's office as evidence that the two were in cahoots.

c. Loss Aversion

Litigants often reject offers because they perceive they are losing by settling, a phenomenon known as "loss aversion." To understand how loss aversion works, imagine yourself in the role of a lawyer trying to settle a case. After weeks spent trading unrealistic offers, you finally get a signal that the other side is serious about settling. You've prepared your client for this moment, going over the strengths and weakness of his case and advising about the terms that would make sense to resolve it.

Your client, who has taken your advice until now, suddenly however refuses to listen. He denies the existence of vulnerabilities you had thought had been accepted long ago, and insists he's already compromised too much. He won't concede any more—in fact he tells you to take back a concession that has already been offered. You know the other side will cry "bad faith" and the retreat may well blow up the entire process.

What's going on? When people behave like this the root cause likely lies in a basic reality: Despite the popularity of "win-win" bargaining, many litigants feel they are losing when they settle for anything less than their expectations before the dispute arose. The perception of losing distorts people's decision making in powerful ways, and reactions to loss are arguably the single most important reason that negotiations fail. What causes this behavior, and how can mediators and lawyers respond to it? As we explore this question consider two cases.

A state trooper began a high-speed chase of a drunk driver in a small New England town. Pursuing rapidly, the policeman ran a stop sign. He hit a third car crossing the intersection in a "T-bone" collision. The trooper was unhurt but the driver of the third car died instantly. He was a 17-year-old boy.

p. 60 *The driver's family sued the state, arguing that the trooper had been negligent in ignoring the stop sign. It was a typical case in which a jury would have to decide whether the officer had acted carelessly, and the defense lawyer looked for evidence that the victim had been drinking or irresponsible. It seemed, however, that the boy was a model student and had left behind a loving family.*

On the other hand, the trooper was showing initiative in giving chase to a dangerous driver and juries in the area had consistently found for the police in such circumstances. Moreover, state law capped liability in the case at $150,000. The state began preparing its defense.

Two years later, as trial neared, defense counsel made a settlement offer of $100,000. It was rejected. After a few weeks with no response, the lawyer raised the offer to $120,000, and the plaintiff lawyer said he would recommend settlement to his clients. Word came back, however, that the family had refused to settle. They would not make a counteroffer and gave no reason why.

That strong emotions would affect decisions in a wrongful death case is not surprising, but consider the following dispute involving a contract claim:

The CFO of a startup sued his former company, claiming that his interest in the company had been illegally "diluted." Dilution—a reduction in the percentage of a company's stock held by an investor—is common in startups. As a venture prospers the owners solicit additional funding, which they repay by issuing new stock.

The issuance of additional shares lowers, or dilutes, the percentage of company stock held by the early investors. Additional capital and a show of confidence by outsiders typically makes shares in the company much more valuable, however, causing the total value of the founders' investment to rise.

In this case, the former executive's 2 percent stake in the current company was worth $6 million, far more than the larger percentage he'd had earlier. The plaintiff claimed, however, that he had gotten special "anti-dilution" assurances which guaranteed that his percentage of the stock would not go down, and without dilution it would be worth $9 million more. After three years of litigation the parties went to mediation.

In each of these cases, perceptions of loss posed challenges for settlement. Let's explore what they were, and how they played out.

Think for a moment about why feelings of losing in settlement are so common. To avoid having a party feel any loss, a settlement would have to restore him to where he was before the dispute arose. In a sense the common law requires this, giving a tort victim an amount of money intended to compensate him for what he has lost, and awarding the prevailing party in a contract dispute damages equal to her reasonable expectations for a deal.

p. 61 Often, however, such compensation doesn't seem adequate. An accident victim, for instance, may feel that even a "full" award of damages does not leave him as well off as before his injury, while a businessperson views the legal definition of lost profits as much too narrow to cover her expectations. A defendant who prevails in court may similarly feel that a verdict of "not liable" does not begin to compensate for the damage done to his reputation. And for most parties simply being in litigation imposes costs, in the form of legal fees and disruption.

To feel fully compensated, then, a litigant would usually have to obtain a settlement that left him better off than he was before the dispute arose, and for each side to avoid loss both would have to be made ***more*** than whole. This is nearly always impossible: Even when good negotiators bargain cooperatively, some feelings of loss in settlement are nearly inevitable.

Between the time a case arises and a party enters negotiations, of course, her benchmark for measuring gain or loss may change. Good lawyers counsel clients about the high costs and limited

remedies available in litigation as well as the risk of losing, and litigants who listen to such advice go through at least some of the process of adjusting to loss before they enter settlement discussions. Often, however, cognitive forces such as selective perception and vividness bias lead parties to cling to unrealistic benchmarks.

What standard did the parties in the auto accident and dilution cases use to measure the offers they received? In the accident case, no amount of money could replace the beloved son, and other factors may have been in play as well. In the stock dilution litigation, the plaintiff had presumably been advised to discount his claim to reflect the risk of losing. But again, as we will see, for the executive the case had other significance.

What impact does the perception of losing have on parties' decision making? Daniel Kahneman and Amos Tversky showed that people consistently take risks of sustaining large losses in the future to avoid the certainty of taking smaller ones in the present, even when this costs them more on average. People are also more prone to accept unreasonable risks to avoid a large loss than a small one. (Kahneman won a Nobel Prize in Economics for this work and later explored loss aversion in his best-selling book Thinking Fast and Slow.)

These findings have significance for legal negotiations because litigants must often make choices between accepting an immediate loss by settling or avoiding the loss for a time by continuing to litigate, at the risk of losing much more in court. Loss aversion helps explain why litigants so often embrace large, unreasonable risks of losing at trial to avoid smaller-but-certain losses in settlement.

Loss aversion is a "cognitive" phenomenon in the sense that it distorts disputants' judgment even when they feel calm, but it has an outsized impact because it also triggers intense emotions. We will describe what happened in the two cases below.

Questions

3. Can you recall an instance in which you were influenced by cognitive forces like the ones described above when making a real-life decision? ***p. 62***

4. What is a lawyer's proper role if she concludes that cognitive forces are leading a client to make a bad decision? Is a lawyer obligated to implement a client strategy which she believes is seriously distorted by psychological biases?

5. How might you counter an opponent's tendency to reject a reasonable offer because of attribution bias or reactive devaluation?

D. The Role of Emotions

Lawyers and executives are tempted to treat conflicts as contests of logic or tactics. The problem, they say, is that the other side is not analyzing the case well or isn't bargaining fairly. But feelings are at least as important as facts in creating conflict, and legal negotiations are often derailed because of them.

Humans swim in a "sea of emotions." Like fish, we may not perceive the environment in which we are operating, but it exists all around us. The judgment of participants in legal cases is often affected, and sometimes overwhelmed, by emotions ranging from guilt and sadness to jealousy, frustration, and anger. Such feelings are usually triggered by the events that gave rise to the dispute — a plaintiff's belief that a defendant intentionally cheated him, for instance.

Even when the substance of a dispute is not inflammatory, people often become angry or frustrated over how it is handled. Thus, for example, a party is likely to become very angry if he believes the other side is lying about what happened or stonewalling over settlement. Strong feelings produce irrational decisions and abrasive behavior which disrupt negotiations.

We will deal with emotional issues throughout this book. At this point, let us focus on two important ones: the feelings provoked by a disputant's perception that he is losing, and emotions stimulated by attacks on a person's identity.

1. The Effects of Loss and Grief

We've said that loss aversion distorts peoples' decision making, but its importance flows from the emotions it provokes. Suppose, for example, that a settlement seems to let an opponent "buy his way out" of improper conduct, a result that combines loss and apparent unfairness. Kahneman and Tversky found that when a decision is seen as having an unfair or immoral result, the effect is "enhanced loss aversion."5 Losing a dollar unfairly "feels," in other words, like losing $2.50 to $2.75, while gaining a dollar unexpectedly, for instance by finding it on the street, has a psychic value of only 70 to 75 cents. A loss that appears unfair, in other words, greatly outweighs an equivalent gain.

Strong reactions to loss were first reported by psychiatrists treating people suffering from purely personal tragedies such as the death of a loved one. Such persons, they reported, feel torn internally between a wish to deny their loss and knowledge that it has occurred. Sigmund Freud wrote that recovery requires a ***p. 63*** bereaved person to work out a mental "compromise" between his wish to deny the loss and reality.

Parties who have not come to terms with losing in settlement are likely to behave much like Freud's patients. As they consider making concessions, they become embroiled in two simultaneous "negotiations." One is the bargaining process with which we are familiar between the parties to the dispute. The other is a purely internal struggle that goes on inside a party's mind as it seeks to work out a resolution between the persistent demand to deny what happened and the reality of what is achievable in litigation. These internal and external negotiations go on in parallel, often leading disputants to make irrational choices. Adding to the confusion, often neither the affected person nor his lawyer is aware the internal negotiation is occurring.

In some situations the problem goes deeper, because the case itself has emotional significance for a party, and when this happens, resolving the dispute on any terms feels like a loss. The wife of a victim of the 9-11 disaster, for example, delayed for many months in filing an application for compensation although she did not have any dispute with how much she would receive. Asked why she had not gone forward she said, "It's hard. . . There's a finality about it. . . When we sign,

then it’s done. He’s really gone.” The 9-11 widow knew, of course, that her husband was dead, but keeping the claim open allowed her to avoid some of the feeling of having lost him.

Similarly, one of the authors recalls having a woman who had gone through years of bitter litigation with her children finally reach agreement to settle but then raise one obstacle after another to implementing the settlement. It seemed that, miserable as it was, the lawsuit represented her only remaining connection to her children and she did not want to end it. When a case itself has emotional meaning to a litigant, settlement is itself a loss.

What feelings did the parties in the state trooper accident and stock dilution cases bring with them to settlement discussions? In the accident case, no amount of money could replace the loved one, and even when offered almost everything they could obtain in court, the family refused to make a decision. It seems likely that pursuing the case allowed the family members to maintain a sense of connection to their loved one, making it impossible to end it.

In the fatal accident case the plaintiff lawyer called back and said that the family wanted to meet informally with the trooper. The defense lawyers were initially resistant: What was the point of having angry people rehash the facts, given that the evidence was largely undisputed? Eventually, however, they agreed.

The meeting was an extraordinary event. The victim’s mother, father, and sisters came and talked not about the case, but about their lost son and brother. The mother read a poem to the trooper describing the hopes she had had for her dead son, and the life she knew they would never be able to share.

The officer surprised everyone. Although he maintained that he had not been negligent, he said he felt awful about what had happened. He had three p. 64sons, he said, and had thought over and over about how he would feel if one of them were killed. He had asked to be assigned to desk work, he told them, because he could no longer do high-speed chases.

After some time, the defense tried to turn the discussion to settlement, but the family said they could not think about that and the meeting ended. As she left, the victim’s sister said, “It’s been three years since my brother died, and now I feel he’s finally had a funeral.”

Two weeks later, the plaintiff lawyer called to say that the family was ready to accept the state’s offer.

In the stock dilution case, the plaintiff’s lawyers presumably advised him to set a win/loss standard for settlement that discounted his claim to reflect the risk of losing in court. We will see, however, that for the executive the case had emotional significance as well.

2. Attacks on Identity

The difficult feelings engendered by perceptions of losing are magnified if a person experiences what happened as an attack on her personal identity. A worker terminated from her job, for example, may feel she has lost not only income but also her self-image as a competent professional, family breadwinner, or productive member of society. An executive accused of discrimination

may see the case as an assault on his self-respect and status in his community. Spouses in a divorce action may feel they are being attacked as not being good parents or human beings worthy of love. When a person experiences a dispute as an identity assault the effect is like striking a raw nerve in a tooth—emotions are magnified, disrupting the bargaining process, sometimes for long periods of time.

It is easy to understand why parties to employment and marital disputes might experience a dispute as an identity attack. It may be harder to imagine that this would be true in a purely contractual dispute. Let's look further, however, at the stock dilution case.

> *The parties began at extreme positions: A demand of $9 million versus an offer of $500,000. The bargaining went forward slowly, each side gradually giving ground until the parties were at $6.5 and $2.5 million respectively.*
>
> *Then, in a private meeting with the mediator, the plaintiff exploded. He attacked the CEO as an ungrateful twerp who had forgotten the crucial guidance he had given him. For the CEO to begrudge him a fair share of the bounty of this work was outrageous. The executive then reneged on an outstanding offer, and the mediation was adjourned.*
>
> *A few days later the mediator met with the plaintiff and his lawyer and asked him to tell her more about his early days at the company. p. 65He described having begun as an outside consultant, then becoming closer to the CEO. It was a chance to go far beyond his usual work, become a key player in an exciting venture, and feel he was providing a perspective crucial to the company's success. He served, he said, as a mentor, a role that gave him great satisfaction. After a few years, however, the executive shunted him aside.*
>
> *The plaintiff felt the loss of his role deeply; it also felt agonizingly unjust to be discarded just as the venture was showing its possibilities. He had invested too much, he said, to give up his case for a mediocre deal.*

This case is an example of a dispute in which the legal issues are relatively dry but explosive feelings, provoked by perceptions of loss, disrupt the settlement process.

> *After talking through his frustrations, the dilution plaintiff agreed to make a new offer. When the mediator contacted the defendant, however, she was told that the CEO was no longer interested in settling. More than a year later, the mediator saw a report in the local legal paper that the company had filed for bankruptcy. There was no indication whether the lawsuit had ever been resolved.*

Perceptions of loss, including attacks on identity, are special obstacles to bargaining for several reasons. First, loss aversion, as we've said, distorts decision making: People take on unreasonable risks to avoid what they see as a loss in settlement.

Perceptions of loss also pose a special problem because they appear at vulnerable points in the mediation process. Parties often don't feel any loss at first because their lawyers begin with extreme offers that confirm the client's unrealistic expectation. It is only when the parties are asked to make serious compromises, often not until the late afternoon or evening of a mediation, that they realize they will not obtain their hoped-for result: A discharged employee, for example,

suddenly confronts the fact that he will not get his job back or even recover most of his lost pay, while a stubborn executive is told that she cannot escape by making a trivial payment. At this point parties may become angry, rigid, and/or irrational. At the same time their opponents are likely to be feeling tired and frustrated and have no patience for disruptive behavior.

Feelings of loss are of special concern, finally, because they produce behaviors that closely resemble the tactics used by adversarial bargainers. When a party refuses to make a concession in a fit of emotion, for instance, his adversary, affected by attribution bias, is likely to see it as intentional stonewalling, while a litigant who retracts an offer because of strong feelings is seen as reneging. A party who believes its opponent is using bad-faith tactics often responds in kind, escalating the situation. ***p. 66***

Questions

6. What emotions or identity issues might have prompted the plaintiff's behavior in the stock dilution case?

7. Can you recall a case you have read about in law school in which an emotional issue made it difficult for parties to reach agreement? Did the feeling appear to involve an attack on identity, or was anyone affected by feelings of loss?

Strategic, cognitive, and emotional barriers often make it hard for bargainers to reach agreement in transactions. When people are embroiled in a dispute, however, the obstacles become much larger, often discouraging them from bargaining at all or pushing them into impasse. Lawyers have increasingly turned to mediation to help them overcome these barriers to settlement. We will now examine how the mediation process can do this, and how good lawyers can take advantage of its qualities.

Notes

1. Mnookin, Robert H. (1993) Why Negotiations Fail: An Exploration of Barriers to the Resolution of Conflict, 8 Ohio St. J. Disp. Resol. 235.

    *1 Eds: Amounts in this article should be roughly doubled to convert them to equivalent sums in 2021 dollars.

    *2 Professor Mnookin's article also describes how mediators can deal with cognitive and perceptual barriers, which are discussed below.—Eds.

2. Welsh, Nancy A. (2004) Perceptions of Fairness in Negotiation, 87 Marq. L. Rev. 753, 754-755.

3. McDonald's Cup of Scalding Coffee: $2.9 Million Award, Chi. Trib., Aug. 19, 1994, at 1.

4. The trial judge reduced the award to $640,000. Judge Reduces Award in Coffee Scalding Case, Chi. Trib., Sept. 14, 1994, at C2. McDonald's appealed and the case was later settled for an undisclosed sum, but these developments received much less attention.

5. See, e.g., Kahneman, Daniel & Tversky, Amos. (1995) Conflict Resolution: A Cognitive Perspective, in Arrow, Kenneth J. Barriers to Conflict Resolution 44, 59.