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The Benefits to Be Derived from Post-Negotiation Assessments

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I. INTRODUCTION

Lawyers negotiate regularly, even when they do not appreciate the fact they are engaged in such activities. They negotiate with their own partners, associates, and legal assistants, as well as with prospective clients and current clients. They also negotiate with outside parties on behalf of their clients. Most legal practitioners have had minimal formal training with respect to this critical lawyering skill, and few spend much time thinking about what they are doing when they engage in bargaining interactions with others.

When attorneys prepare for negotiation sessions, they spend hours on the relevant factual, legal, economic, cultural, and political issues. How much time do they spend on their *negotiating strategy*? Most spend no more than ten to fifteen minutes! When they commence bargaining interactions, the only strategic matters they have in mind concern their bottom lines, their aspirations, and their planned opening positions. In between where they start and where they end up, they wing it, thinking of these endeavors as entirely unstructured. When they conclude one negotiation, they move on to another and another, without ever taking the time to ask themselves how they did and what they might have done differently. If they were to conduct occasional post-negotiation assessments, they could significantly enhance their bargaining capabilities.

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For over thirty-five years I have taught negotiation courses to both law students and legal practitioners through continuing legal education programs and in-house law firm training sessions. When I teach my three credit hour full semester course, I assign readings from my basic text book[2] covering the impact of negotiator styles, the six stages of the negotiation process, the importance of verbal and nonverbal communication, different negotiation techniques, telephone and e-mail interactions, transnational dealings, mediation assistance, and negotiation ethics. The students engage in a series of five or six practice negotiation exercises which do not influence their course grades, to demonstrate the concepts being taught and to allow them to experiment to determine which style and approach works effectively for them. They then work on five or six additional exercises, the results of which are rank-ordered from high to low, with these scores accounting for one-half of their final grades.[3] They take these graded exercises far more seriously than they take their practice exercises. Although they generally spend no more than thirty or forty minutes on the practice exercises, they rarely spend less than one to two hours on each graded exercise, and some students spend even more time on those interactions. They may take the class on a credit/no-credit basis, and the students who choose this option obtain average negotiation exercise results well below those achieved by their graded cohorts.[4]

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[2] CHARLES B. CRAVER, EFFECTIVE LEGAL NEGOTIATION AND SETTLEMENT (7th ed. 2012).

[3] The other half of their grades is determined by ten to fifteen page papers they write on what they learned during the semester from the readings, class discussions, and negotiation exercises.

[4] *See* Charles B. Craver, *The Impact of a Pass/Fail Option on Negotiation Course Performance*, 48 J. LEGAL EDUC. 176 (1998).

I also teach an intensive one-credit hour course which meets on four consecutive Friday mornings from 9:30 a.m. through 1:00 p.m. They read my *Skills & Values* book,[5] explore the same basic areas covered in my full semester course, and work on a number of different exercises. This class is graded entirely on a credit/no-credit basis, and the students clearly do not take the exercises as seriously as the graded students do in my full semester course.

Following each exercise, I tell the students to conduct their own post-negotiation assessments with each other, and we go over those assessments in class. I want them to think about what they did well and what they might have done differently. Did they use the different negotiation stages effectively? What tactics did they use, and what tactics did the other side employ? Did they listen carefully for verbal leaks and look for subtle nonverbal signals? Did the two sides work to maximize the joint returns they achieved to generate mutually efficient contractual terms?[6] They are encouraged to always ask two critical questions. First, what did they do that they wished they had not done? This inquiry pertains to mistakes they may have made. They should endeavor to avoid such errors in their future interactions. Second, what did they not do that they wish they had done? This question concerns other techniques and approaches they might have employed to generate more beneficial final terms. It is designed to get them to think about things they should do differently in their future bargaining encounters.

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[5] CHARLES B. CRAVER, SKILLS & VALUES: LEGAL NEGOTIATING (2nd ed. 2012).

[6] I assign point values for the different issues, which effectively represent client values. Some issues are valued more by one side than by the other ("integrative" terms) which should be given to the side which considers them more important. Other items are of relatively equal value to both sides ("distributive" items), and they seek to claim more of these terms than they give up. *See* Charles B. Craver, *The Inherent Tension Between Value Creation and Value Claiming During Bargaining Interactions*, 12 CARDOZO J. CONFLICT RES. 1 (2010).

As semesters evolve and students work on a number of exercises and perform careful post-negotiation assessments, they clearly improve their bargaining skills. They begin to appreciate how much the basic concepts we are exploring influence negotiation outcomes. Students who are initially hesitant and uncertain become more confident and assertive. Individuals who begin the semester with relatively modest aspirations learn to raise their expectations. These insights enable them to generate more efficient and more personally rewarding future agreements. Even students who perform well on the practice exercises begin to appreciate what they are doing effectively, and they think about what they could do even more proficiently.

If practicing lawyers were to take a few minutes following their more significant bargaining interactions to conduct post-negotiation assessments, they could meaningfully enhance their negotiation skills. They would develop greater insights with respect to their weaknesses and their strengths, and be able to improve their future performances. This article will explore the issues attorneys should address when they perform such evaluations.[7]

II. THOROUGHNESS OF PREPARATION STAGE

The most significant stage of the bargaining process takes place before serious discussions with the other side even commence. During the Preparation Stage, lawyers need to ascertain the pertinent factual, legal, economic, cultural, and political issues. They must initially meet with their clients and the agents of those parties, and ask detailed questions designed to elicit the relevant factual, economic, cultural, and political issues. It is imperative

[7] A Post Negotiation Checklist Form which they may use is set forth in the Appendix to this article.

that they do not simply ask about the circumstances supporting their client interests. They must also explore the negative considerations. What factors might undermine their objectives? If they are preparing to negotiate with the other side with respect to a potential law suit, what facts favor their side and which ones support the other side? They should strive to communicate with client agents who are intimately familiar with the underlying circumstances. If they confine their discussions to in-house counsel or corporate officials, they will only obtain information which was filtered as it moved its way up the firm hierarchy. They must seek to personally interview the individuals directly involved with the matter in question.

Once legal representatives have ascertained the operative facts, they must explore the relevant legal issues. What statutes and/or judicial decisions are relevant with respect to these circumstances? It is imperative that they appreciate the legal doctrines favoring their own side, as well as the rules favoring the other side. They must then discuss these issues with their clients to apprise them of the strengths and weaknesses involved.

Negotiators must carefully explore their client value system. What are the different economic and non-economic issues the client wants to have addressed, and how to they value these terms? Lawyers need to mentally generate value systems similar to those I provide my students in my course exercises. Which items are *essential*? These are the terms which must be achieved if mutual agreements are to be developed. Which items are *important*? These are valuable issues, but ones the client would exchange for more significant terms. Which items are *desirable*? These are things the clients would like to obtain, but which they would readily trade for anything more significant. When I assist practicing lawyers with their negotiations, I

try to get them to assign figurative points to the different issues. They might allocate 100 or more points to essential terms, 40 to 60 points to important terms, and 10 to 30 points to desirable terms. Their ultimate objective should be to obtain accords which most effectively satisfy their client interests. These seemingly artificial point designations allow them to know which items to trade for other terms when they interact with opposing counsel. Even within the same groupings, they might value terms differently. For example, within the important category, one item might be valued at 60 points, with another at 40. These relative values are critical when they interact with the other side and have to decide whether to trade one of these items for something else. With all things being equal, they would certainly be better off trading the 40 point item for something instead of the 60 point item.

Legal practitioners must be careful not to substitute their own value system for that of their client. Attorneys tend to focus significantly on money, because we tend to think most people focus on this issue. Persons who do this may ignore equally important non-monetary items. When emotional issues are involved, a sincere apology may be desired ahead of monetary relief.[8] Someone who has lost their job may forego significant monetary compensation in exchange for reinstatement. A business partner who believes that another partner has violated the terms of their basic agreement may want a promise that such behavior will not occur again. A supplier that did not provide high quality goods may agree to

[8] I have mediated hostile environment sexual harassment cases in which the claimant will forego significant monetary relief if her employer will apologize for not correcting the situation more expeditiously and indicate that she is a valued employee. This is based upon the fact that such claimants frequently think that their employer did not move more swiftly due to their lack of respect for their capabilities.

modify operations to insure that such problems will not arise again, just as a supplier whose goods arrived late could promise to take specific steps to avoid future delays.

Are there any internal political issues affecting their side – or operating on the opposing side? How might these be neutralized – or at lease minimized? When dealing with government agencies, lawyers must appreciate the political factors which may affect the decisions made by such politically accountable individuals. When dealing with labor organizations, employer representatives must realize how political union leaders are, since most desire to be reelected to their current positions. It can be highly beneficial when interacting with such political parties to take steps designed to make them look good in the eyes of their constituents.

What cultural issues might influence this bargaining interaction? When conducting transnational negotiations with foreign parties, it is imperative for United States practitioners to appreciate the impact of different cultures on their dealings.[9] Individuals who ignore these factors may either fail to achieve beneficial agreements that might have been generated, or develop poor future relationships with their new business partners. Attorneys should also appreciate the fact that we even have cultural differences within the United States – and even within particular states. The East, Midwest, South, and West have somewhat different cultures. Persons from the New York City area are quite different from persons from upstate New York, just as individuals from Chicago differ from downstate Illinois residents. The Northern California culture differs from the cultures in Southern California and in central valley

[9] For general descriptions of different negotiation cultures, *see* OLEGARIO LLAMAZARES, HOW TO NEGOTIATE SUCCESSFULLY IN 50 COUNTRIES (2008); TERRI MORRISON & WAYNE A. CONAWAY, KISS, BOW, OR SHAKE HANDS (2nd ed. 2006).

communities. If we appreciate these cultural differences and do not try to impose our own cultures on others, we will enhance the likelihood of negotiating beneficial accords.

Once negotiators have explored the above issues, they must ask themselves and their client three crucial questions. First, what happens to their side if no agreement is achieved? They must determine their side's BATNA – Best Alternative to a Negotiated Agreement.[10] They must carefully explore the nonsettlement options available to their side, and appreciate the fact that a poor deal would be worse than no deal. The answer to this question should help them establish their *bottom line* – the point they will not go above or below at the bargaining table. Almost all proficient legal representatives establish this point before they commence serious negotiations.

Once lawyers and their client determine their own bottom line, they must take a few minutes to explore the circumstances affecting the *other side*. What do they think would be the BATNA of that party? They must endeavor to place themselves in the shoes of the other side, and seek to appreciate the value system influencing that party. Many attorneys never think about this issue, believing that they lack the information necessary to determine the correct answer. If the parties are contemplating a business deal, what other options do they think the other side would have if they reached no accord with them? If potential litigation is involved, what would be the upside or downside risk to the other side? Plaintiffs have to consider the possibility they will not prevail at trial and would end up with nothing, while

[10] *See* ROGER FISHER & WILLIAM URY, GETTING TO YES 101-111 (1981). Litigators facing the possibility of negative results if cases go to trial often use the term WATNA to reflect their Worse Alternatives to a Negotiated Agreements.

defendants have to contemplate the possibility the plaintiff could prevail and ask themselves how much they might be required to pay. They should then be careful to include *transaction costs*. Plaintiffs must *subtract* their likely transaction costs from any potential verdict in their favor, while defendants must *add* their expected transaction costs to any verdict they might lose. Although plaintiffs tend to over-estimate the likelihood of trial success and defendants under-estimate the probability of plaintiff victories,[11] the inclusion of such cost factors tends to narrow the distance between their predicted outcomes.

Once legal representatives appreciate their own bottom line and the likely BATNA of the other side, they must establish *aspirations* for the items to be exchanged. Over the many years I have taught negotiation courses, I have found a direct correlation between student goals and bargaining outcomes. Individuals who think they should obtain elevated results tend to get better outcomes than persons with more modest goals. On the other hand, negotiators must establish *realistic* objectives, or they will have no hope of achieving mutual accords. It is thus important for persons preparing for impending interactions to formulate *elevated but realistic* aspirations that they could reasonably hope to achieve.

I have also noticed an additional factor associated with student aspiration levels. The students who initially believe that they have obtained highly beneficial results usually end up in the bottom third of class negotiators, while those who think they have not done particularly well end up in the top third. This phenomenon is due to the fact that the individuals with

[11] *See* HERB COHEN, NEGOTIATE THIS! 167-168 (2003); Daniel Khaneman & Amos Tversky, *Conflict Resolution: A Cognitive Perspective* in BARRIERS TO CONFLICT RESOLUTION 45, 46-47 (K. Arrow, R. Mnookin, L. Ross, A. Tversky & R. Wilson, eds. 1995).

minimal objectives got everything they desired and feel great, while the persons with elevated goals were unable to get everything they sought and are dissatisfied. People who get most of what they want when they negotiate should begin to gradually raise their expectations until they begin to come up short. The must appreciate the fact that proficient bargainers rarely obtain everything they initially hoped to achieve.

When multiple item negotiations are involved, the advocates must establish appropriate goals for *each item* to be exchanged. If they only create objectives for the more important terms, they are likely to give up the other issues without obtaining much, if anything, in return. They should use their basic priority designations (essential, important, and desirable) and determine within each category the relative values of the different items involved. This will enable them to decide which terms should be exchanged for other things they prefer. They need to develop cogent reasons to support the goals they create, both to help themselves feel confident regarding what they wish to achieve and to enable them to logically explain to the other side why they expect to obtain what they want. After agreements have been generated, they should also review their aspirations to decide whether they were sufficiently elevated.

The last thing legal representatives must calculate during the Preparation Stage is what their *opening offer* should be. Some persons hesitate to articulate high demands or low offers for fear of discouraging the opposing side. As a result, they begin with positions close to where they hope to end up. They erroneously believe that this approach will generate reasonable counter offers from the other side. Such an approach provides them with minimal bargaining room, and often causes them to end up near their actual bottom lines. They fail to appreciate

the impact of *anchoring*.[12] When individuals receive more generous offers than they anticipated, they usually question their own preliminary assessments, think they will do better than they imagined, and *increase* their own aspiration levels. This causes them to move away from the initial offeror. On the other hand, when they receive less generous opening offers, they lower their original expectations, begin to move psychologically toward the offeror, and counter with more generous position statements of their own.

It is important for individuals preparing for bargaining encounters to develop "principled" opening offers they can logically explain to the other side.[13] Attorneys representing the plaintiff in a personal injury case who wish to demand $750,000 should carefully substantiate, both factually and legally, the liability of the defendant. They must then calculate the medical expenses, likely future rehabilitative costs, prior and anticipated future lost earnings, property losses, etc., and add an appropriate amount for pain and suffering. Lawyers representing someone hoping to sell their business and plan to open with a demand of $20,000,000 should similarly consider all of the factors that would support such a valuation. These explanations will help the persons articulating them to feel comfortable with the positions they are taking, and they will begin to undermine the confidence opposing counsel may have in their own position.

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[12] *See* Russell Korobkin & Joseph Doherty, *Who Wins in Settlement Negotiations?* 11 AMER. L. & ECON. REV. 162, 177-178 (2009); Dan Orr & Chris Guthrie, *Anchoring, Information, Expertise, and Negotiation: New Insights From Meta-Analysis*, 21 OHIO ST. J. DISP. RES. 597, 599-611 (2006); DAVID LAX & JAMES SEBENIUS, 3-D NEGOTIATION 187-189 (2006).

[13] *See* DEEPAK MALHOTRA & MAX H. BAZERMAN, NEGOTIATION GENIUS 34-35 (2007); LEIGH THOMPSON, THE MIND AND HEART OF THE NEGOTIATOR 51-52 (2005).

Once lawyers have established their bottom lines, their aspiration levels, and their planned opening positions, they have to develop a *negotiation strategy* they think will most effectively move them from their initial positions to their actual objectives. Should they make the first offer or endeavor to induce the other side to go first? Do they plan to make a number of small position changes or a few larger ones? What negotiation techniques do they anticipate using to further their objectives? What cogent arguments can they articulate to support the positions they put forth? What tactics do they anticipate the opposing side will employ, and how do they plan to counter those techniques?

As they conduct post-negotiation evaluations of their actual interactions, they must ask themselves how accurately their pre-bargaining prognostications proved to be. Did the other side open near where they thought they would? Did that party employ tactics they expected, and were those tactics effectively countered? Which side controlled the *contextual factors* – the time and location of the discussions? The party that determines these factors tends to obtain a psychological advantage, based upon the fact they have already obtained concessions on these issues from the other side before the formal talks have begun. It may also enable the dictating party to provide the invited persons with food and drink which may subtly create feelings of obligation in those individuals which may be reciprocated with substantive bargaining concessions during the subsequent discussions. Did these factors actually influence negotiation developments?

III. WAS THE PRELIMINARY STAGE USED EFFECTIVELY

One of the most significant parts of bargaining interactions takes place when the participants first begin to interact substantively by phone, e-mail, or in person. I like to refer to this part of their encounter as the Preliminary Stage. This is where they establish personal rapport and the tone for their talks. If they have dealt with each other many times before and are familiar with their respective negotiating styles, they can usually commence new discussions without having to establish preliminary ground rules. Nonetheless, they should still take some time to reestablish cordial environments that will contribute positively to their substantive talks. If they have not had significant previous dealings with each other, they may have to set forth some ground rules for their impending interaction.[14]

American negotiators are considered by persons from many other cultures to be impatient. We do not like to spend much time with small talk, and like to get immediately involved with the substantive matters. We often begin our interactions with a brief "how are you?" followed by "how much do you want?" We thus underestimate the importance of both the relationships we have with persons on the other side, and the nature of the environments in which we will conduct our discussions. During this stage of their interaction, negotiators should explore common interests they may share with people on the opposite side.[15] They may be from the same city or state, they attended the same college or law school, they enjoy the same music or sports, etc. Persons who can identify and share such common interests tend

[14] *See* DONALD GIFFORD, LEGAL NEGOTIATION: THEORY AND APPLICATIONS 77-97 (2nd ed. 2007).

[15] *See* DANIEL GOLEMAN, SOCIAL INTELLIGENCE 29-30 (2006); ROGER FISHER & DANIEL SHAPIRO, BEYOND REASON 55-56 (2005).

to enhance the probability they will like each other and will develop mutually beneficial working relationships.[16]

If negotiators take a few minutes to develop positive rapport with opposing counsel, they can enhance their substantive discussions and reduce their anxiety. This enhances the likelihood the parties will interact in a more open and cooperative manner. On the other hand, if the encounter commences in an unpleasant and distrusting manner, the subsequent talks are likely to be less open and more adversarial.[17] Even inherently competitive legal negotiations – such as those pertaining primarily to money – do not have to be conducted in an adversarial manner. Negotiators who can induce opposing counsel to like them and their clients and treat those persons respectfully are usually able to obtain better results than bargainers who do not generate such sympathetic feelings.[18] They should also endeavor to use the Preliminary Stage to create positive negotiation environments which help to generate more cooperative interactions.

Lawyers are increasingly commencing – and even conducting – bargaining interactions through e-mail exchanges, especially younger attorneys who have grown up using e-mail, text-messaging, and similar electronic means of interacting with others.[19] Persons who

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[16] *See* Christopher Guthrie, *Principles of Influence in Negotiation*, 87 MARQUETTE L. REV. 829, 831 (2004).

[17] *See* BOB WOOLF, FRIENDLY PERSUASION 34-35 (1990).

[18] *See* MARTIN E. LATZ, GAIN THE EDGE 52-54 (2004); Rebecca Hollander-Blumoff & Tom Tyler, *Procedural Justice in Negotiation: Procedural Fairness, Outcome Acceptance, and Integrative Potential*, 33 L. & SOC. INQUIRY 473, 484 (2008). *See generally* Rebecca Hollander-Blumoff, *Just Negotiation*, 88 WASH. U. L. REV. 381 (2010) (persons who think the bargaining *process* was fair and they were treated respectfully more satisfied with objectively less beneficial terms than persons who think the process was not fair but who got objectively more beneficial terms).

[19] *See* David Allen Larson, *technology Mediated Dispute Resolution(TMDR): A New Paradigm for ADR*, 21 OHIO ST. J. DISP. RES. 629, 637-639 (2006).

limit most of their transactions to electronic communications are not comfortable with the traditional negotiation process. They forget that bargaining involves uniquely personal encounters that are not easily conducted entirely through impersonal written exchanges.[20] Before legal representatives begin to interact primarily through electronic communications, they should take a few minutes to speak with each other by phone to establish some rapport and a positive relationship. This will increase the likelihood the parties will behave more cooperatively, reach more agreements, and achieve more efficient terms.[21]

Some attorneys view bargaining encounters as highly competitive endeavors, and they commence such interactions in a highly combative manner. What should practitioners do when they have to deal with such individuals? They should use "attitudinal bargaining" to induce such opponents to tone down their negative behavior.[22] They should politely, but forcefully, indicate that such conduct will not enhance the bargaining process.

After they complete bargaining interactions, lawyers should ask themselves if they took sufficient time to establish some rapport and positive environments? If not, what might they have done differently? If they encountered overtly competitive opponents, did they use attitudinal bargaining to tone down their behavior? Did their efforts seem to create a more positive bargaining situation?

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[20] *See* Leigh Thompson & Janice Nadler, *Negotiating Via Information Technology: Theory and Application*, 58 J. SOC. ISSUES 109 (2002); Janice Nadler, *Electronically-Mediated Dispute Resolution and E-Commerce*, NEGOT. J. 333 (Oct. 2001).

[21] *See id.* During the subsequent stages of the bargaining process, persons who e-mail proposals to their opponents should telephone them shortly thereafter to hear the response of those persons, because they may read too much or too little into what has been sent, and react negatively. A phone conversation can diminish this possibility.

[22] *See generally* WILLIAM URY, GETTING GPAST NO: NEGOTIATING WITH DIFFICULT PEOPLE ((1991). *See also* WILLIAM URY, THE POWER OF A POSITIVE NO (2007).

When individuals with on-going relationships have encountered inter-personal difficulties, aggressive conduct may result due to the other side's desire for revenge. They may be angry regarding the perceived unwillingness of the responsible person to acknowledge their contribution to the situation. In such circumstances, it can be beneficial to use an apology to let the other party know that you understand their feelings and are sorry for what has happened.[23] Such an apology does not always require an admission of liability, but may only involve an expression of sympathy for what has happened to the other individual. On other occasions, only an acceptance of personal responsibility for what has occurred would be sufficient. Such expressions can significantly diminish the negative emotions being experienced by the other side, and enhance the likelihood the parties can more objectively work to rectify the situation.

During their post-negotiation assessments, attorneys should ask whether they or their client worked to reduce the emotional tensions surrounding the present circumstances? Did they consider the benefits to be derived from a sincere apology? Did they find that such conduct improved the bargaining environment? What else might they have done to minimize such negative factors?

IV. WAS THE INFORMATION STAGE EFFECTIVELY EMPLOYED TO ASCERTAIN THE RELEVANT ISSUES AND THE UNDERLYING INTERESTS OF THE PARTIES

Once the Preliminary Stage is finished, the negotiators move into the Information Stage, which involves *value creation*. Individuals can usually recognize the transition between

[23] *See* JAY FOLBERG & DWIGHT GOLANN, LAWYER NEGOTIATION THEORY, PRACTICE, AND LAW 139-146 (2nd ed. 2011); Jennifer Gararda Brown, *The Role of Apology in Negotiation*, 87 MARQUETTE L. REV. 665 (2004).

these two stages, because this point coincides with a shift from "small talk" to questions regarding each side's needs and objectives. The parties are endeavoring to determine the issues to be divided, and the interests underlying their stated positions. The more effectively they can expand the overall pie to be divided between themselves, the more efficiently they should be able to divide the items on the bargaining table.[24] The optimal way to elicit information from opposing parties is to *ask questions*.[25] Individuals who make the mistake of talking about their own interests during this part of bargaining interactions simply give away information without obtaining it. This explains why proficient bargainers spend twice as much time asking opponents questions than their less capable cohorts.[26]

The focus of the Information Stage is always on the knowledge and desires of the *opposing party*. Each participant is asking the other side which items they want and why they wish to obtain them. It is initially beneficial to begin this stage with broad, open-ended inquiries which cannot be answered with short and minimally revealing answers. Many persons make the mistake during this part of their interactions of asking narrow, highly-focused questions that can be answered with brief responses. As a result, they only confirm what the questioners already suspect. This is why it is important to employ open-ended information seeking inquiries.[27] This induces the other side to speak, and the more they do so,

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[24] *See* ROBERT M. MNOOKIN, SCOTT R. PEPPET & ANDREW S. TULUMELLO, BEYOND WINNING 11-43 (2000).

[25] *See* RONALD M. SHAPIRO, DARE TO PREPARE 113-120 (2008); MALHOTRA & BAZERMAN, *supra* Note 13, at 40-41.

[26] *See* Hal Movius, *The Effectiveness of Negotiation Training*, 24 NEGOT. J. 509, 513-514 (2008).

[27] *See* LAX & SEBENIUS, *supra* note 12, at 208-209; ROGER VOLKEMA, LEVERAGE 46-47 (2006).

the more they disclose.[28] Negotiators who suspect something regarding a particular area, should formulate several expansive questions concerning that topic. The persons being interrogated have no idea how much the questioners actually know, and they frequently assume they know more than they do. As a result, when they respond to the expansive inquiries they disclose new leads and additional pieces of information.

As they get further into the Information Stage, negotiators tend to ask more specific inquiries to confirm what they have surmised from the answers to their more general questions. They want to be sure they have obtained a good idea regarding the other side's perspective. Once they have accomplished this objective, they should use more specific *what* and *why* inquiries. The "what" questions are designed to determine the specific terms desired by the other side, while the "why" questions are employed to explore the interests underlying those items. This side may not be willing to provide the other party with what it is specifically requesting, but it might be able to satisfy the underlying interests of that party in a way that is more acceptable to it.

Questioning individuals tend to obtain more information when they are active listeners. They maintain supportive eye contact, smile, nod their heads, and interject occasional "um-hums" to indicate that they understand what is being said.[29] When negotiators question opposing parties, they must listen carefully for *verbal leaks* and look for *nonverbal signals*. Verbal leaks involve the use of words that modify what the person appears to be saying. For example, someone might indicate that she is "not *inclined* to go higher" or is

[28] *See* COHEN, *supra* note 11, at 226-229.

[29] *See* PAUL J. ZWIER & THOMAS F. GUERNSEY, ADVANCED NEGOTIATION AND MEDIATION THEORY AND PRACTICE 113-115 (2005); HARVARD BUSINESS ESSENTIALS, NEGOTIATION 58-60 (2003).

"not *that* interested in a specific item. The word "inclined" in the first comment would suggest that she can definitely go higher, just as the word "that" in the second phrase would indicate that she is interested. Parties may inadvertently give away their priorities through verbal leaks. They may indicate that they *have to have* Item 1, *really want* Item 2, and *would like* to get Item 3. Item 1 is essential, since they have to have it. Item 2 is important – they really want it – but they do not have to obtain it. Item 3 is desirable. They would like to get it, but would presumably exchange it for any term of greater significance. As she approaches her bottom line, she might indicate that she "doesn't have much more room," which clearly suggests she can go higher or lower.

Negotiators should not readily volunteer their own important information. They should instead make their opponents work to extract it. The more pertinent facts should be slowly divulged in response to opponent inquiries. When others ask questions, they listen intently to the replies they elicit, because they want to hear the responses to their own questions. They thus comprehend more of what the responder is saying. In addition, they attribute the speaker's revelations to their interrogating ability, and accord them more credibility than if the same information had been voluntarily divulged.[30]

What should bargainers do when they are asked about areas they do not wish to focus on? They can use *blocking techniques* to avoid complete answers.[31] They may ignore one question, answer the beneficial part of a compound inquiry, over-answer a narrow question or under-answer a general inquiry, misinterpret the question posed and answer the one they

[30] *See* COHEN, *supra* note 11, at 150-153.

[31] *See* ROBERT M. BASTRESS & JOSEPH D. HARBAUGH, INTERVIEWING, COUNSELING & NEGOTIATING: SKILLS FOR EFFECTIVE REPRESENTATION 422-428 (1990).

have articulated, or respond with a different question of their own. If they use these techniques carefully and not in immediate order, they can often avoid the need to provide complete responses to opponent inquiries.

Much of what is communicated during bargaining interactions is conveyed through nonverbal signals.[32] When they initiate their interactions, negotiators must work to establish benchmarks for the persons on the opposite side of the table. They should carefully observe the facial expressions, hand movements, gross body movements, and body postures of those individuals. What are their normal nonverbal habits? The answer to this question allows observers to look for *changes in behavior* and *patterns of behavior* compared to their usual conduct. Negotiators should learn to trust the "feelings" they experience when interacting with others, since many of these are based upon salient nonverbal signs that have been subconsciously discerned.

Facial expressions can be quite informative. A smile may indicate pleasure, a relaxed face may suggest relief, a frown may show displeasure, while taut lips and/or the gnashing of teeth may demonstrate frustration. If such signs appear to be inadvertent, they are usually accurate, but if they seem to be contrived, they probably suggest the opposite of what they appear to indicate.

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[32] *See generally* JOE NAVARRO, WHAT EVERY BODY IS SAYING (2008); GREGORY HARTLEY & MARYANN KARINCH, I CAN READ YOU LIKE A BOOK (2007); ELIZABETH KUHNKE, BODY LANGUAGE FOR DUMMIES ((2007); ALLAN & BARBARA PEASE, THE DEFINITIVE BOOK OF BODY LANGUAGE (2006); HENRY H. CALERO, THE POWER OF NONVERBAL COMMUNICATION (2005); PETER A. ANDERSON, THE COMPLETE IDIOT'S GUIDE TO BODY LANGUAGE (2004); DESMOND MORRIS, BODYTALK (1994).

A flinch tends to indicate displeasure toward current developments, although it may be strategically employed to mislead the other side.[33] The casual raising of one eyebrow tends to suggest skepticism toward what is taking place, while the raising of both eyebrows and/or the widening of eyes indicates surprise. The scratching of one's head or the brushing of one's face with one hand usually suggests puzzlement, while the wringing of hands is a clear sign of frustration. Another indication of frustration involves tightly gripping arm rests or drumming on the table. Biting of the lower lip and running fingers through one's hair are real signs of stress. When an individual's eyes begin to wander around the room, they repeatedly look at their watch, or cross and uncross their legs, this suggests boredom or disinterest. Shifting back and forth in a chair and opening one's mouth without speaking suggest indecision by someone who would like to speak but does not know exactly what to say. Sitting on the edge of one's chair is a definite indication of interest in what is taking place. When they are especially interested in bargaining developments, some persons lean so far forward that their elbows are on the table in front of them.

Hands touching one's face, the stroking of one's chin, or the playing with one's glasses usually suggests meditative contemplation. These signals would indicate that the actor is not sure what to do next. A steepling gesture, with the hands pressed together with the fingers uplifted in the praying position or interlocked and facing upward indicates real confidence, just as the leaning back in one's chair with both hands behind the head. Extending hands toward the other side with fingers up and palms facing out indicates sincerity, just as

[33] *See* ROGER DAWSON, SECRETS OF POWER NEGOTIATING 32-35 (3rd ed. 2011).

does the placing of one's hand over one's heart. Rubbing one's hands together is generally a sign of eager anticipation. Crossed arms and crossed legs is an unreceptive posture.

Certain nonverbal signals may be subtle indications of deception.[34] These usually involve signs of stress experienced by persons who are about to tell lies, or nonverbal behavior deliberately designed to enhance the credibility of people preparing to utter false statements. When individuals experience stress, they tend to increase their gross body movement, while others trying to look less fidgety may deliberately reduce their gross body movement. When people lie, they often place their hand over their mouth as if they are subconsciously trying to hold in the lie they know is morally wrongful. Someone may nod their head affirmatively while saying no, or negatively shake their head while saying yes. The head movement is often more credible than what is being stated. When persons experience stress, they often blink more frequently, narrow and tighten their lips, or lick their lips. They also speak in a higher pitched voice. Persons experiencing stress often speak more rapidly, while others endeavoring to enhance their credibility may speak more deliberately. Someone who has not looked the others in the eyes very much may make an obvious effort to do so now to enhance their credibility, while someone who has made good eye contact may now look away in embarrassment regarding their deception.

During the Information Stage, participants must be patient and give the other side the time they need to articulate their real needs and interests. If negotiators think opponent answers are incomplete, they should remain silent hoping to induce those persons to provide

[34] *See generally* PAMELA MEYER, LIESPOTTING (2010); GREGORY HARTLEY & MARYANN KARINCH, HOW TO SPOT A LIAR (2005); PAUL EKMAN, TELLING LIES (1992).

additional information. Impatient individuals who are unable to tolerate silent pauses usually give away far more information than they receive, and they tend to make more concessions than their counterparts.

Why must negotiators go behind the stated positions and look for the interests underlying those terms? They want to look for ways to expand the overall pie and work to ensure that the items favored more by one side are given to that side in exchange for the terms the other party prefers more. In the negotiation exercises I assign in my course, I provide the students with point values for each item to be exchanged. If one term is worth 50 points to one side and 25 to the other, the side that values it less should trade it for anything worth more than 25 points. Although my students work hard to generate final accords that favor their own side to enhance their final grades, they quickly learn that it is easier to accomplish their goal if they maximize the joint surplus to be divided. When bargaining teams leave client satisfaction on the bargaining table due to errors in this regard, both sides do less well than they would have if they had been aware of true party interests.

When the parties prepare to articulate their opening offers, is it preferable to go first or wait until the other side states its position? Some experts like to state their position first, because they think that this approach allows them to define the basic negotiating range, anchor the impending discussions, and discourage opponent offers that are entirely unrealistic.[35] Persons who use this approach should be cautious and only do so when they

[35] *See, e.g.*, MALHOTRA & BAZERMAN, *supra* note 13, at 27-30; THOMPSON, *supra* note 13, at 49-50; LATZ, *supra* note 18, at 151-152.

know their value and have put together a cogent and realistic plan to guide their behavior.[36] To maximize the persuasive impact of opening offers, it is important to articulate *"principled" offers* that are well supported by logical reasoning. The anchoring impact of initial offers can be especially significant when opponents are not thoroughly prepared and are not sure where they should begin.[37] On the other hand, when opposing counsel are well prepared, the anchoring impact of the first offer is likely to be minimal, and it can be advantageous to let them state their initial position first. If their offer is more generous than anticipated, this provides the respondent with the opportunity to take advantage of the situation. On the other hand, if their offer is more extreme, the responders can be careful not to express an inappropriately generous offer of their own.

A second benefit of obtaining the first offer from the other side involves the use of *bracketing*.[38] Once bargainers know the position of opposing counsel, they can articulate an offer that will place their true goal midway between the initial offers. Negotiators tend to move together toward the center of their opening positions, and this approach enhances the likelihood the party that went second will get close to its desired result. As the other side makes concessions, this side can do so in a proportionate way that is designed to keep the parties moving toward this side's initial objective.

When they review the Information Stage, negotiators should consider the degree to which they used initially general and increasingly specific questions to ascertain the items

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[36] *See* JAMES C. FREUND, SMART NEGOTIATING 115 (1992).

[37] *See* THOMPSON, *supra* note 13, at 49.

[38] *See* DAWSON, supra note 32, at 124-125; LATZ, *supra* note 18, at 156-157.

desired by the other side and sought to explore the interests underlying those terms. Did they listen carefully for verbal leaks and look for nonverbal signals? Did they observe any signs of deception? Did these misrepresentations pertain to acceptable "puffing" and "embellishment," or to material issues that may not be ethically misstated? Did they employ blocking techniques to avoid having to completely answer opponent questions they did not wish to fully answer? What else could they have done to enhance this part of the interaction? Which side made the initial offer, and how did this influence the subsequent developments? Did they articulate a "principled" opening offer that was logically supported? How did they respond to the other side's opening offer, and how did that party respond to their initial offer? Did either side begin with consecutive opening offers that were not reciprocated by the opposing side? Did they feel that they had obtained the information they needed before they contemplated transition into the Distributive Stage>

V. DID THE DISTRIBUTIVE STAGE DEVELOP BENEFICIALLY

During the Information Stage the parties *create value*, and during the Distributive Stage they *claim value*. As a result, this portion of bargaining interactions tends to be fairly competitive. Even relatively cooperative negotiators have to decide how to divide the surplus they have created. It may be easy for them to exchange the integrative items they both value differently, to be sure each ends up in the hands of the party that values it more. Nonetheless, there are generally distributive terms that both sides wish to obtain, with money being the classic one. Most legal representatives recognize their ethical obligation under Model Rule 1.3 to seek beneficial terms for their respective clients. They thus endeavor to obtain a greater share of these items than they give to the other side.

Advocates employ a number of different bargaining techniques to advance their interests.[39] Some commence their encounters with *extreme positions* hoping to anchor the subsequent discussions and to intimidate their opponents. Persons confronted by such an approach should not casually dismiss those unrealistic position statements. The individuals articulating such positions usually realize that their opening positions are unreasonable, and they expect the other side to say so. It is thus important for recipients of extreme initial positions to directly – but politely – indicate how unrealistic they are and suggest that such an approach is unlikely to lead to mutual accords. They can then use *probing questions* to challenge those terms. They divide the overall position into finite components and begin with the ones that do not lend themselves to excessive puffing. For example, how did the other side value the real estate or the lost wages? If they receive a realistic response, they go on to the next component. On the other hand, if they obtain an unreasonable reply, they indicate that they recently had the property assessed at $10 million and wish to know how the other side got their $25 million figure – or ask how a person earning $100,000 per year who has been out of work for six months has lost earnings of $500,000. Such questions almost always cause the opening party to modify its overall demands significantly.

Individuals who do not feel comfortable negotiating occasionally begin with a tactic known as *best offer first*. They articulate a position they say they will not alter. From the offeror's perspective this is known as *best offer first* bargaining, but from the recipient's perspective it is considered to be *take it or leave it* bargaining. It is an offensive tactic that often

[39] *See generally* CRAVER, *supra* note 2, chapter 10.; CRAVER, *supra* note 5, chapter 4.

leads to bargaining breakdowns. Someone who receives such an offer should not automatically reject it. They should ask themselves whether they would have been pleased with such a result if the other side had begun higher or lower and worked its way to this area. If so, they may be better off accepting it than moving to their nonsettlement alternatives. They should not do so, however, without endeavoring to obtain some concessions from the offeror.

Many negotiators use *limited authority* to constrain their movement. Individuals confronted with this technique should not hesitate to suggest that opposing counsel contact their clients to obtain greater authority. This provides such persons with a face-saving way to modify their current positions. Opposing parties may also use *anger* or *aggressive behavior* as an intimidating approach. They may even head for the door or hang up the telephone during their discussions. Opponents should not give in to such tactics. They should employ attitudinal bargaining to modify the behavior of such persons by indicating that such conduct is not going to be successful. They should never follow such a person out the door or immediately call back someone who has rudely hung up the phone, because such behavior would actually embolden the manipulative actors.

What should negotiators do when they encounter attorneys or opposing clients who appear to be *irrational*? This tactic often induces opponents to give in to avoid complete bargaining breakdowns. It is extremely rare to encounter a successful lawyer or client who is truly irrational. The best way to counter such an approach is to ignore their behavior and respond as if they are rational actors.

Brer rabbit is an approach that can be used against parties with superior bargaining authority to generate underserved concessions. Individuals employing this technique act as if they do not know what they are doing, in an effort to generate over-confidence in the other side. Persons encountering this tactic should not modify their planned strategy. They should articulate their own positions and insist that their opponents do likewise.

The *Mutt and Jeff – Good Cop/Bad Cop* – approach can be quite effective against persons who make the mistake of arguing entirely with the bad cop. People encountering such an approach should ignore the bad cop and try to reason with the good cop. When that individual indicates that they will try to convince their negative colleague to accept a particular offer, they should be asked if *they* would be willing to accept it. They should be forced to answer with a yes or a no. If they say yes, the other side has been effectively divided, but if they say no, it will be obvious that they are engaged in a disingenuous bargaining approach.

The *nibble technique* is generally employed at the successful conclusion of bargaining interactions – or even several days after an agreement has been achieved. The nibbler asks to revisit a term that has already been agreed upon, hoping to induce a naïve opponent to make an unreciprocated concession. Recipients of such a tactic should be *provocable* – they must demand reciprocity for the modifications being sought by the nibbler. If that party really requires a modification of the agreed-upon terms, the principle of reciprocity will apply and they will offer concessions for the changes they are seeking. On the other hand, if they are true nibblers, they will reject the requested trade and insist on the terms originally agreed upon.

During their post-negotiation assessments, attorneys should ask which of these techniques they employed during the interaction, and how effectively they worked? What other techniques might they have used? What tactics did the other side use, and how well did they counter them? Are there other ways in which they might have responded?

Parties that make the first position changes during bargaining encounters tend to achieve less beneficial terms than their opponents. As a result, it can be beneficial to continue the initial discussions during the Distributive Stage, until the other side decides to announce a position change. If this party made the first concession, how did the opposing party induce it to do so? What did this side do to try to get the other side to make the first concession?

Negotiators employ different power plays to advance their interests. They regularly argue in favor of their own positions, even though such communications are primarily designed to induce position changes instead of educating listeners.[40] Arguments based upon moral positions can be especially persuasive due to the emotional appeals involved.[41] People with greater bargaining power often argue in favor of equitable distributions that reflect the relative strengths of the parties, while persons with less power tend to argue for egalitarian distributions.[42]

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[40] *See* Robert Condlin, *Cases on Both Sides: Patterns of Argument in Legal Dispute-Negotiations*, 44 MD. L. REV. 65, 73 (1985); BASTRESS & HARBAUGH, *supra* note 29, at 439-440 (1990).

[41] *See* G. RICHARD SHELL, BARGAINING FOR ADVANTAGE 104-105 (1999).

[42] *See* Richard Birke & Craig R. Fox, *Psychological Principles in Negotiating Civil Settlements*, 4 HARV. NEGOT. L. REV. 1, 34-35 (1999).

Individuals seeking to advance their bargaining objectives frequently resort to threats that will negatively affect their opponents if those persons do not give in.[43] At the opposite end of the spectrum from negative threats are what are known as affirmative promises. Instead of threatening negative consequences if positions are not modified, negotiators promise positive changes if opposing parties alter their positions.[44] The significant distinction between negative threats and affirmative promises concerns the fact that use of the former tactic tends to elicit hostility, while use of the latter approach tends to generate a positive response.[45] Most negotiators employ the promise technique from time to time when they get near the end of interactions and are not very far apart. Instead of threatening negative consequences if the other side does not alter its position, they propose joint action as the parties split the remaining distance. When they got to this stage of their interaction, did they resort to negative threats or affirmative promises? How did the other side respond to their actions in this regard?

Silence and patience are tools skilled negotiators employ to advance their interests. When progress has slowed, they realize that it takes time for people to lower their initial sights. If they rush the process, opponents will dig in and refuse to move, but if they patiently give that party more time, that side is likely to reassess its nonsettlement alternatives and realize that a joint agreement would still be preferable to an impasse. Negotiators should ask themselves whether they were able to remain silent while they allowed the other side to contemplate the

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[43] *See* LOTHAR KATZ, PRINCIPLES OF NEGOTIATING INTERNATIONAL BUSINESS 151-152 (2008); Gary T. Lowenthal, *A General Theory of Negotiation Process, Strategy, and Behavior*, 31 KANSAS L. REV. 69, 86 (1982).

[44] *See* JEFFREY Z. RUBIN & BERT BROWN, THE SOCIAL PSYCHOLOGY OF BARGAINING AND NEGOTIATING 278 (1975).

[45] *See id.* at 285.

consequences of a nonsettlement? Did they speak at times when they would have been better off remaining silent?

Negotiators should carefully monitor the concession patterns during their interactions to be sure they have not made excessive position changes. It helps for individuals to articulate specific explanations for each position change they make, both to enhance the credibility of those modifications and to help them avoid excessive changes. Anxious persons may even make consecutive concessions without appreciating the fact they have moved without receiving any corresponding position changes from the other side. When they announce new positions, individuals should be quiet in recognition of the fact it is the other party's turn to respond. On the other hand, if they are able to induce opposing persons to bid against themselves with consecutive concessions, they should encourage further movement by that side. Negotiators should always note position changes, and review bargaining interactions to see if they made any unreciprocated or unexplained position changes.

Throughout the Distributive Stage, negotiators should always remember their nonsettlement alternatives, and recognize the fact that a bad deal is worse than no deal. This is especially important when bargaining parties are moving toward a potential accord. It is at this point that some persons feel such pressure to conclude their dealings successfully that they make excessive position changes which result in terms worse than what they would have had if no agreement had been reached. It is thus important after accords have been achieved to compare the terms agreed upon with what would have occurred if an impasse had been reached.

VI. THE CLOSING STAGE

Near the end of the Distributive Stage, the parties usually see an agreement on the horizon. Anxious persons who really want to conclude the interaction frequently make the mistake of closing most of the remaining gap to the benefit of the opposing side. They do not appreciate the degree to which this behavior undermines the gains they previously obtained. They also may fail to realize the fact that a majority of concessions tend to be made during this part of interactions.[46] It is thus imperative that they move slowly and in response to opponent position changes.

Once parties enter the Closing Stage, *both sides* have become psychologically committed to final agreements. Neither wishes to risk an impasse which would preclude a mutually beneficial accord. If the participants move slowly and together, they greatly increase the likelihood of an equitable final resolution. Negotiators should carefully monitor the concession pattern at this point, to be sure they do not make consecutive position changes and to be sure they do not close an inappropriately large portion of the gap. When they make concessions, they should become silent and patiently await a response from the other side. If that party does not articulate a position change of its own, they should continue the discussions and make it clear they will not move further until their prior concession is reciprocated. During a post-negotiation assessment, lawyers should ask themselves whether the parties closed the deal together. Did one side make unreciprocated concessions? Did one side make unreasonably large changes? What factors generated these behaviors?

VII. THE COOPERATIVE/INTEGRATIVE STAGE AND BARGAINING EFFICIENCY

[46] *See* DAWSON, *supra* note 32, at 172.

As soon as parties conclude the Closing Stage with a mutual accord, they frequently think their interaction is over. If they conclude their discussions now, they may well leave client satisfaction on the bargaining table. During the prior stages of their interaction, both sides have usually under- and over-stated the values of different items for strategic purposes.[47] If one side was sure the other side wanted a particular term they did not really value, they may have indicated a desire to obtain that item to enable them to get something they valued in exchange for it. Conversely, if that side wanted something they thought the opposing party did not value, they may have under-stated the degree to which they wanted it to enable them to claim it in exchange for something of minimal value. As a result of such behavior, some items may have ended up on the wrong side of the table at the conclusion of the Closing Stage.

Negotiators often view their bargaining interactions as "fixed pie" exchanges that cannot be expanded.[48] They need to appreciate the fact that the parties rarely value the different items identically and oppositely.[49] As a result, they should use this stage to ensure that they have achieved an efficient agreement.

The parties should overtly acknowledge that they have reached a mutual accord, to avoid misunderstandings when one suggests possible modifications of the terms already

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[47] Although Model Rule 4.1 proscribes knowing misrepresentations pertaining to *material* fact, Comment 2 to that Rule expressly recognizes that statements pertaining to client values do not concern *material* information. It is thus perfectly ethical for negotiators to over- and under-state the value of the items being exchanged.

[48] *See* Robert S. Adler, *Flawed Thinking: Addressing Decision Biases in Negotiation*, 20 OHIO ST. J. DISP. RES. 683, 740-742 (2005); Birke & Fox, *supra* note 40, at 30-31.

[49] See MALHOTRA & BAZERMAN, *supra* note 24, at 108-110; MNOOKIN, PEPPET & TULUMELLO, *supra* note 23, at 14-16.

agreed upon. They should then explore possible trades that might simultaneously enhance both of their results. They want to see if they can expand the overall pie and share those gains with each other. They hope to reach the Pareto efficient point where neither can gain without some loss to the other side. They should focus on the items they believe may have ended up on the wrong side. They may have obtained something they think the other party wants more, or they may have given that party something they believe they value more than it does. If they offer to trade the former item for the later term, both sides may improve their situations. If such suggestions are all met with rejections by their opponents, then they have probably achieved efficient agreements that cannot be improved upon.

During their post-negotiation assessments, advocates should always ask themselves whether the parties used the Cooperative/Integrative Stage to ensure the attainment of mutually efficient agreements. Did they carefully consider potential changes? Even during this part of their interaction one side may seek to claim more of the additional surplus than they give up. Evaluators should thus ask themselves whether the parties divided the newly created surplus in an equitable manner or whether one side seemed to have claimed more than the other.

At the conclusion of the Closing Stage, lawyers should ask themselves what finally induced them to agree to the terms agreed upon – or what caused them to end their interaction with no accord. What made them believe that they were unlikely to achieve more beneficial terms? How did the other side induce them to accept the final deal? Did either party appear to have obtained more advantageous terms than the other? If so, how were they able to accomplish this? What could the less successful participant have done differently to avoid

this result? If no accord was achieved, what might the parties have done differently to avoid such a result? Do they really believe that their nonsettlement options were preferable to what might have been achieved at the bargaining table? Did they lock themselves into unyielding positions they could not alter without suffering a real loss of face? How might they have avoided such a plight?

VIII. ETHICAL CONSIDERATIONS

At the conclusion of their interactions, attorneys should ask themselves whether either side employed unethical tactics. Although Comment 2 to Model Rule 4.1 explicitly permits "puffing" and "embellishment, by allowing misrepresentations with respect to client values and settlement intentions, it prohibits all misrepresentations concerning *material facts*. If an attorney is representing a client who would like to sell her business for $25 million, that lawyer could tell a prospective purchaser that he will have to pay at least $30 million. Could the lawyer indicate that other parties may be interested in buying the business? Almost certainly yes, unless it was absolutely clear that no one else could possibly be interested. If that party made an offer of $20 million, could the attorney indicate that they have another offer, when they actually do not? I believe that such a factual misrepresentation would contravene Rule 4.1, since it is clearly material – or the communicator would not have used it – and might even expose the client to a fraud action.[50] If they had received an offer from another party for $22 million, could they state that they have received a $25 million offer? I think that this would be similarly unethical. On the other hand, they could truthfully indicate that they have received

[50] *See* Charles B. Craver, *Negotiation Ethics for Real World Interactions*, 25 OHIO ST. J. DISP. RES. 299, 318-320 (2010).

another offer and suggest that it will take $25 million to purchase the client's firm. If the other party were to ask them how much they have been offered, they could decline to provide a definitive answer, indicating that this inquiry concerns confidential information.

It is critical for practicing lawyers to appreciate the importance of reputations. If an attorney engages in unethical behavior, not only might they be subject to bar discipline, but, more importantly, their reputations would greatly suffer. In my Negotiations class, I have the Model Rules in force. If a charge of unethical behavior is made, a trial would be conducted in front of the remaining class members, and a specific sanction would be imposed on anyone found guilty of a violation. In all the years I have taught my course, I have never had to have a trial.

Students raising ethical issues opt for an intermediate approach where they can raise the question without seeking a formal sanction. They present their claims, and the other student responds. I then open it up for class discussion. In the vast majority of cases, class members characterize the conduct in question as acceptable "puffing" or "embellishment." On rare occasions, however, most students indicate that they regard the conduct in question as inappropriate. The student who is the target of that assessment is in big trouble. He or she usually ends up with one or two nonsettlements on subsequent exercises due to the fact their future opponents do not trust them. I could not think of a more appropriate way to demonstrate to the students the importance of their reputations.

If practicing attorneys were to be caught engaging in unethical conduct, the persons with whom they are dealing would undoubtedly tell their law firm colleagues about that

individual's improper behavior. In addition, they could even post something on the Internet regarding this matter, to ensure that other lawyers would learn of this person's dishonesty or unconscionable behavior. This would significantly affect their future interactions.

IX. DID THAT SHOULD NOT HAVE DONE/DID NOT DO THAT SHOULD HAVE DONE

At the conclusions of their bargaining interactions, lawyers should ask themselves two final critical questions. What did they do that they wished they had not done and what did they not do that they wished they had done. The first inquiry usually relates to something they believe they did wrong. They should consider whether they made a mistake which they might have avoided. If so, do they think it might have influenced their interaction and the final result? They should appreciate the fact that they may have made a mistake that their opponent never discerned. That person may have assumed that they had done precisely what they wished to do. Nonetheless, it can be helpful for practitioners to think about such possible strategic errors, to enable them to avoid such difficulties with respect to their future encounters.

Although it is helpful for negotiators to ask both what they did that they wish they had not done and what they did not do that they wish they had done, it is interesting to note that studies indicate that the latter question is more likely to enhance their future negotiations than the former inquiry.[51] This difference is due to the fact that individuals who think about what they *did not do* are able to incorporate the missing element(s) in their future interactions. On the other hand, persons who merely think about what they *had done* that they think they should not have done can omit such behavior from their future encounters, but this

[51] *See* Laura Kray, Adam Galinsky & Keith Markman, *Counterfactual Structure and Learning from Experience in Negotiations*, 45 J. EXPERIMENTAL PSYCH. 979 (2009).

information will not necessarily induce them to appreciate what they should do instead. It is thus critical for people conducting post-negotiation assessments to focus carefully on the actions they did not take which they think would benefit them with respect to their future interactions. Answers to this question can significantly enhance their behavior in subsequent encounters.

X. CONCLUSION

Although attorneys negotiate regularly, few have had formal training in this critical professional skill, and few take the time after their bargaining interactions to conduct post-negotiation assessments. They should ask themselves how well they conducted themselves during each stage. Did they use the Preparation Stage to ascertain the factual, legal, economic, political, and cultural issues? Did they carefully determine their own bottom line and estimate that of the opposing side? Did they establish elevated, but realistic, aspirations for each issue, and develop a generous, but "principled" opening offer? Did they plan their bargaining strategy? Did they employ the Preliminary Stage to establish rapport with the persons on the other side and to create a positive negotiating environment? Did they ask many questions during the Information Stage to ascertain the needs and underlying interests of the other side? Did they carefully release their own important information in response to opponent inquiries to avoid the devaluation of information voluntarily disclosed? Did they use "blocking techniques" to avoid the need to answer difficult questions? Did they adroitly employ various bargaining techniques during the Distributive Stage to enable them to claim an appropriate proportion of the joint surplus for their own client? Did they use the Closing Stage to solidify the basic terms?

Did they move into the Cooperative/Integrative Stage to be sure the parties had maximized the joint returns and achieved efficient accords?

Did they encounter any ethically questionable behavior? What did they do that they wish they had not done, and how could they avoid such mistakes in their future interactions? What did they not do that they wish they had done, and what should they do differently in their future encounters? Through such post-negotiation assessments, attorneys should be able to significantly enhance their bargaining skills.

APPENDIX

POST-NEGOTIATION EVALUATION CHECKLIST

1. **Was Your Pre-Negotiation Preparation Sufficiently Thorough?**

   Were you completely familiar with the operative facts and law?

   Did you fully understand your client's value system?

2. **Did You Completely Determine Your Side's Bottom Line?**

   Did you carefully calculate your side's Best Alternative to a Negotiated Agreement?

   Did you attempt to estimate the bottom line of the *other side*?

3. **Was Your Initial Aspiration Level High Enough?**

   Did you have a goal for *each item* to be addressed?

   If you obtained everything you sought, was this due to the fact you had not established sufficiently high objectives?

   Was your aspiration level so unrealistic that it provided you with no meaningful guidance?

4. **Did You Prepare a "Principled" Opening Offer that Explained the Basis for Your Position?**

5. **Did Your Pre-Bargaining Prognostications Prove to be Accurate?**

   If not, what caused your miscalculations?

6. **Which Party Dictated the Contextual Factors Such as the Time and Location?**

   Did these factors influence the negotiations?

7. **Did You Use the Preliminary Stage to Establish Rapport with Your Opponent and to Create a Positive Negotiation Environment?**

   Did you employ "Attitudinal Bargaining" to modify inappropriate opponent behavior?

If you negotiated primarily through electronic exchanges, did you initially telephone the other side to establish a beneficial relationship and telephone that party shortly after you e-mailed proposals to enable you to hear their response and clarify any misconceptions they may have?

8. **Did the Information Stage Develop Sufficiently to Provide the Participants with the Knowledge They Needed to Understand their Respective Needs and Interests and to Enable Them to Consummate an Optimal Agreement?**

   Did you initially use broad, open-ended questions to determine what the other side wanted, and use what and why questions to ascertain their underlying needs and interests?

   Did you disclose your important information in response to opponent inquiries to induce them to listen more carefully to those disclosures and accord them greater respect?

9. **Were Any Unintended Verbal or Nonverbal Disclosures Made?**

   What precipitated such revelations?

   Were you able to use Blocking Techniques to avoid the disclosure of sensitive information?

10. **Which Side Made the First Offer?**

    The first “real offer”?

    Was a “principled” initial offer articulated by you?

    Was a “principled” initial offer articulated by the opposing side?

    How did your opponent react to your initial proposal?

    How did you react to your opponent’s opening offer?

11. **Were Consecutive Opening Offers Made by One Party Before the Other Side Disclosed Its Initial Position?**

12. **What Specific Bargaining Techniques Were Employed by Your Opponent During the Distributive Stage and How Were Such Tactics Countered by You?**

    What else might you have done to counter those tactics?

13. **What Particular Negotiating Techniques Were Employed by You to Advance Your Position?**

    Did the opposing side appear to recognize the various negotiating techniques you used, and, if so, how did they endeavor to minimize their impact?

    What other techniques might you have used to advance your position?

14. **Which Party Made the First Concession and How Was It Precipitated?**

    Were subsequent concessions made on an alternating basis?

    Did you keep a record of each concession made by you and your opponent throughout the interaction?

15. **Were "Principled" Concessions Articulated by You?**

    Were "principled" concessions articulated by your opponent?

    Did successive position changes involved decreasing increments and were those increments relatively reciprocal to the other side's concomitant movement?

16. **How Did the Parties Use the Closing Stage to Close the Deal Once They Realized that They Had Overlapping Needs and Interests?**

    Did either side appear to make greater concessions during the Closing Stage?

17. **Did the Parties Use the Cooperative/Integrative Stage to Maximize Their Aggregate Returns?**

18. **How Close to the Mid-Point Between the Initial Real Offers Was the Final Settlement?**

19. **How Did Time Pressures Influence the Parties and Their Respective Concession Patterns?**

    Try not to ignore the time pressures that affected the opposing side.

20. **What Finally Induced You to Accept the Terms Agreed Upon or to Reject the Final Offer Made by the Other Party?**

21. **Did Either Party Appear to Obtain More Favorable Terms Than the Other Side?**

    If so, how was this result accomplished?

What could the less successful participant have done differently to improve its situation?

22. **If No Settlement Was Achieved, What Might Have Been Done Differently With Respect to Client Preparation and/or Bargaining Developments to Have Produced a Different Result?**

23. **Did Either Party Resort to Deceitful Tactics or Deliberate Misrepresentations to Enhance Its Situation?**

24. **What Did You Do that You Wished You Had Not Done?**

    Do you think your opponent was aware of your mistake?

    How could you avoid such a mistake in the future?

25. **What Did You Not Do that You Wish You Had Done?**

    If you encountered a new technique, how could you most effectively counter this approach in the future?