EFFECTIVE LEGAL NEGOTIATION AND SETTLEMENT

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PREFACE

This booklet was prepared by Professor Charles B. Craver to accompany his six, nine, and twelve hour programs on EFFECTIVE LEGAL NEGOTIATION AND SETTLEMENT. Professor Craver has presented his EFFECTIVE LEGAL NEGOTIATION AND SETTLEMENT seminar to over eighty-five thousand legal practitioners in over forty states, the District of Columbia, Canada, Mexico, Austria, England, Germany, Puerto Rico, Turkey, and China. He has also made numerous presentations to judges and attorneys in various states on ALTERNATIVE DISPUTE RESOLUTION PROCEDURES concerning the use of negotiation, mediation, case evaluation, mini-trials, and arbitration techniques to resolve legal controversies.

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Professor Craver is author of Effective Legal Negotiation and Settlement (LEXIS: 6th ed. 2009) [to order call LEXIS at (800)

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INTRODUCTION

The art of legal negotiating concerns skills rarely taught in traditional law school curricula, even though practicing attorneys regularly encounter situations that require various forms of negotiation. While the negotiation process is clearly applicable to lawsuit settlements, contractual undertakings, business transactions, and so forth, it is easy to ignore its application to other equally important areas of law practice.

Lawyers' relationships with clients are usually very much influenced by the negotiations that take place between them. These concern both financial matters and the ability of attorneys to effectively provide legal advice to clients. The bargaining process also affects the way in which lawyers deal with fellow associates, partners, legal assistants, and secretaries within their own law firms.

When most attorneys prepare for negotiation encounters, they spend hours on the factual, legal, economic, and political issues, and no more than ten to fifteen minutes on their actual negotiation strategy. They usually have only three things in mind relevant to bargaining strategy: (1) their planned opening
position; (2) their negotiation goals; and (3) their bottom line. Between their opening position and final agreement, they “wing it,” viewing the interaction as wholly unstructured.

Many attorneys believe they must be proficient negotiators simply because they have been interacting with others professionally for twenty or twenty five years. This fact alone does not guarantee bargaining competency. Lawyers who do not continuously study the negotiation process and try to learn from their past interactions are unlikely to improve their bargaining skills significantly. While they spend hours each month keeping up with their substantive areas of expertise, they rarely think about their negotiation skills. A great negotiator will almost always prevail over a great substantive expert, because the final terms will be determined more by negotiation skill than substantive expertise. Substantive experts tend to possess high abstract reasoning ability, while great negotiators have high interpersonal skills or emotional intelligence.

A few individuals think they are skilled negotiators because they always obtain what they want when they bargain with others. These individuals tend to be the least effective negotiators. There is only one way to always get what you want when you negotiate – don’t want anything! The most proficient negotiators generally have elevated aspirations and are disappointed by their inability to get everything they hope to get. Persons who always obtain everything they hope to get should begin to raise their aspiration levels until they begin to come up short.
Some people think that bargaining outcomes can be determined through the application of objective criteria that will logically lead to the “correct” result. This ignores the fact that an inexact “science” such as law cannot be combined with an inexact “science” such as human behavior and be rationally quantified. While the so-called objective factors define the settlement range between the parties’ bottom lines, they do not necessarily determine the final terms. What goes on in the settlement range involves a psychological battle of wills.

The negotiation process has little to do with traditional legal doctrines, except perhaps those of basic contract law. It is instead governed by the same psychological and sociological principles that influence other interpersonal transactions. As a result, lawyers who employ a conventional legal framework to guide their negotiations often ignore the most relevant factors.

This course will explore the factors that most directly affect the negotiation process. Negotiators must recognize that they are involved with a process that takes time to develop. The various phases must evolve, and certain ritualistic behavior must normally occur. Patient bargainers who permit the process to unfold in a deliberate manner can usually obtain efficient and expeditious settlement agreements. On the other hand, impatient participants who endeavor to accelerate the process are likely to encounter needless problems and extend the time necessary to complete their transactions. Impatient negotiators also tend to achieve less efficient accords.
Attorneys feel uncomfortable when they negotiate about the disingenuous behavior that frequently takes place. Someone who hopes to obtain $500,000 begins the discussions by saying that it will take $750,000 to resolve the matter. Does such a statement violate Model Rule 4.1 that prohibits knowing misrepresentations of material law or fact? Not under a Reporter’s Comment indicating that statements regarding a party’s intentions as to what is acceptable and estimates as to the value or price of what is being exchanged do not constitute “material” facts. As a result, what is commonly called “puffing” and “embellishment” are excluded from the scope of Rule 4.1.

A person's negotiating ability is directly influenced by his or her own personal strengths and weaknesses, and the pertinent personal factors vary greatly from individual to individual. Some effective negotiators employ a style that is aggressive and occasionally abrasive, while others obtain successful results using a calm and even deferential manner. As a result, this course will not provide a specific negotiating style intended to work effectively for everyone. It will instead identify the most relevant considerations and assist individual participants to understand their own personal attributes. It is hoped that participants will obtain a better understanding of the way they react to other people in stressful situations and, conversely, how others react to them. This should enable them to use their strengths more effectively in future negotiations, while minimizing the impact of their weaknesses.
This course examines general negotiating principles and sets out practical exercises to guide participants with their personal exploration. Participants will be asked to engage in several different types of negotiations designed to provide them with insights into their own strengths and weaknesses. They will not be called on to explain their negotiating results, however, thus should not fear possible embarrassment regarding their negotiating behavior. Through these exercises, they should begin to appreciate how differently diverse individuals evaluate the identical bargaining information.

**COMMUNICATION EXERCISE:** The object of the negotiation process is to satisfy the needs of the participants. Crucial forms of communication transcend the particular issue(s).

You and the person next to you will negotiate a personal injury problem, but you may not talk or gesticulate. All communication must occur on paper. Only monetary sums representing offers or demands may be exchanged. You will have three minutes to reach an agreement.

Assume that a 20-year-old, unmarried woman has been injured in an automobile accident with the defendant. Due to flying glass, she has lost the sight in her left eye and has suffered permanent facial scars. She still suffers from occasional bad headaches. Her unpaid medical bills to date amount to $20,000. It is clear that the defendant was negligent, but it is disputed whether the plaintiff was also negligent. Assume you are in a state where contributory negligence is still a total bar to recovery. A suit for $300,000 has been filed.
(A) The plaintiff is totally broke and desperately needs money. She wants to get $20,000 now to pay her medical expenses. Although her headaches have abated, her mental state has recently deteriorated due to the pending litigation. Her psychiatrist has informed you, with her permission, that if the case is not resolved quickly, she is likely to suffer an emotional relapse and commit suicide. She has instructed you to settle immediately for any amount over $20,000 (assume that you are representing the plaintiff on a pro bono, no-fee basis).

(B) The defendant insurance company lacks the personnel to try this case and believes the plaintiff will be an appealing witness. It fears a judgment well in excess of the modest $300,000 being sought if the case is tried, and will be obliged to pay the entire verdict if that fear is realized. You have thus been instructed to settle the case immediately for any amount up to $300,000. You will be fired if you do not achieve a settlement.

From this brief exercise, several highly relevant phenomena should be apparent:

1. People perceive the value of the same case differently, with high aspiration participants being more likely to obtain better results than low aspiration participants;

2. Few participants want to achieve average settlements—most try to get above-average results for their clients;

3. Some participants feel a greater need to settle than others, with risk-averse participants being less willing to accept the possibility of non-settlements than risk-taking individuals;

4. It is uncomfortable and difficult to conduct negotiations when you can only communicate about the specific items in issue, since ancillary discussions are needed to keep the process going between position
changes; and
5. Skewed outcomes tend to result from abbreviated interactions, because the participants have not been able to develop the relevant phases in a sufficiently thorough manner.

I. BASIC FACTORS AFFECTING NEGOTIATIONS

A. Human Behavior

Because all bargaining involves social interaction, an understanding of general principles of human behavior is essential. Psychological and sociological factors significantly influence the negotiation process.

B. Methods of Communication

1. Verbal discourse
   a. Meaning apparent on face ("I cannot offer more").
   b. Meaning equivocal ("My client is not inclined/does not want to offer any more"; "I cannot offer more at this time"; "My client would like to get $50,000"; “That’s about as far as I can go”/"I don’t have much more room").
   c. Indicating item priorities: “I must have X, I really need Y, and I want Z”).
   d. Negotiators should listen for "verbal leaks" that are associated with equivocal statements.

2. Nonverbal signals [covered in detail in Part VIII]
a. Obvious examples (loss of temper; open expression of pleasure, relief, etc.).

b. Subtle varieties (furtive expression, telltale mannerisms, gross body movement, etc.).

C. Consideration of **Personal Needs**

1. **Own side's** direct and indirect needs.
   a. What are your client's (and your own) underlying interests, and how may they be satisfied?
   b. Try to recognize your own indirect motivational forces and those of your client.
   c. Try to discern the manner in which your opponent perceives the needs of your side, because this may significantly affect your interaction.

2. **Opponent's** direct and indirect needs (consider those of both opposing advocate and his/her client).
   a. Direct objectives of present negotiation.
      1. What are the opposing client's underlying interests, and how may they be satisfied?
      2. What are the opposing counsel's underlying interests, and how may they be satisfied?
   b. Indirect personal needs (motivational forces) -- May include need for retribution, alleviation of internal tension, ego gratification, acceptance in relevant community, etc.-- Counsel should try to satisfy these needs in manner likely to attain his/her own goals (e.g., appealing to
opponent's need for acceptance by praising his/her "reasonableness" when he/she makes concessions).

D. **Negotiation Styles** of Participants (G. Williams 1983 & A. Schneider, 2002)

Most negotiators tend to exhibit a "cooperative" or a "competitive" style, with "cooperative" advocates using a problem-solving approach and with "competitive" advocates employing a more adversarial methodology. Certain traits are used to distinguish between these two diverse styles.

<table>
<thead>
<tr>
<th>COOPERATIVE/PROBLEM-SOLVING</th>
<th>COMPETITIVE/ADVERSARIAL</th>
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<tr>
<td>Move Psychologically <strong>Toward</strong> Opponents</td>
<td>Move Psychologically <strong>Against</strong> Opponents</td>
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<tr>
<td>Try to Maximize <strong>Joint</strong> Return</td>
<td>Try to Maximize <strong>Own</strong> Return</td>
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<tr>
<td>Seek Reasonable Results</td>
<td>Seek Extreme Results</td>
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<tr>
<td>Courteous &amp; Sincere</td>
<td>Adversarial &amp; Disingenuous</td>
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<tr>
<td>Realistic Opening Positions</td>
<td>Unrealistic Opening Positions</td>
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<tr>
<td>Rely on Objective Standards To Guide Discussions</td>
<td>Focus on Positions Rather Than Neutral Standards</td>
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<tr>
<td>Rarely Use Threats</td>
<td>Frequently Use Threats</td>
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<tr>
<td>Maximize Information Disclosure</td>
<td>Minimize Information Disclosure</td>
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<tr>
<td>Open &amp; Trusting</td>
<td>Closed &amp; Untrusting</td>
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<tr>
<td>Reason With Opponents</td>
<td>Manipulate Opponents</td>
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1. Williams 1976 study of attorneys in Phoenix found that 65% of negotiators were considered “Cooperative/Problem-Solvers,” 24% “competitive/Adversarial,” and 11% unclassifiable.

2. "Competitive" negotiators tend to act competitively with both "cooperative" and "competitive" opponents, while "cooperative" negotiators tend to act cooperatively with "cooperative" opponents and competitively with "competitive" opponents.

3. Williams study found that a greater percentage of "cooperative" negotiators viewed as effective (59%) by other lawyers than "competitive" advocates (25%), while greater percentage of "competitive" persons considered ineffective (33%) than "cooperative" persons (3%).

4. Schneider study found two significant changes compared with prior Williams study.
   b. While 54% of "cooperative" negotiators viewed as effective, only 9% of "competitive" advocates are and while only 4% of "cooperative" negotiators considered ineffective, 53% of "competitive" bargainers seen as ineffective.

5. Although "competitive" negotiators are more likely to obtain extreme results than "cooperative"
participants, they generate far more non-settlements and tend to generate less efficient agreements.

6. Effective "cooperative" and "competitive" negotiators are thoroughly prepared, behave in an ethical manner, are perceptive readers of opponent cues, are realistic and forceful advocates, observe common courtesies, and try to maximize own client return.

These findings suggest that the most effective negotiators are "competitive/problem-solving" lawyers who seek "competitive" results, but do so in a seemingly "cooperative" manner designed to maximize the joint returns of the parties - "WIN-win" negotiators.

7. Lawyers increasingly view opponents as the “enemy” and are personally offended by opponent efforts to advance client interests-- Attorneys must realize that opponents are not the “enemy” but their best friends, since they enable them to earn a living.

E. Type of Negotiation

Different kinds of negotiations involve different participants and/or unique considerations that may influence the negotiation process and should be taken into account when negotiating strategy is being planned.

1. Some transactions are very legalistic in nature (complex antitrust or security law case;
corporate merger agreement), while others may not be (factual personal injury dispute; basic contract arrangement).

a. Attempt to minimize needless reliance upon "legal principle" where this only locks participants into uncompromising positions -- Be flexible where legal needs of the situation can be effectively satisfied in alternative ways.

b. Emphasize areas of agreement, since this approach tends to diminish impact of controverted areas.

2. In some negotiations, each party is in a position to deal with other persons if an agreement is not achieved with the current participants, while in other settings the result of non-settlement is either a trial or no transaction -- This factor directly affects the need of parties to reach mutual accord, and it determines relative bargaining strength.

3. Some transactions involve one-time interactions between clients (many law suits), while others entail continuing relationships (labor-management; post-divorce spouses; lease and franchise arrangements).

a. Where clients are likely to have future dealings, this frequently influences the tactics
used during the present negotiation, because no short-term gain should be allowed to undermine a long-term relationship.

b. Even where the clients are unlikely to have future dealings, their respective attorneys are likely to and this may affect the manner in which they deal with each other - Negotiators should never use tactics that if discovered by opponents would undermine their future interactions.

4. Personal interests of the attorneys may vary depending upon type of negotiation involved.
   a. Lawyers being paid on a fixed-fee or a no-fee basis are not directly affected by monetary outcomes and may wish to resolve cases quickly.
   b. Lawyers being paid on a contingent fee basis have a direct interest in final result, but may still try to settle cases on an expedited basis.
   c. Attorneys being compensated on an hourly basis may wish to run up their fees in large cases, and their opponents should be careful not to make generous offers prematurely.

5. In many negotiations, respective clients possess final authority over transaction, while in others, one or both sides may have additional constituencies that must approve proposed agreements.
6. In some settings, the negotiated agreement is to be satisfied immediately (personal injury cash payment), while other situations require the accord to be carried out over a period of time, often in phases (construction contract) -- Animosity or distrust engendered during negotiation process may manifest itself through future recalcitrance with respect to honoring of agreement by dissatisfied party.

II. PREPARATION STAGE [Establishing Limits & Goals]

Knowing your own situation and as much as possible about your opponent's circumstances is very important if you wish to achieve optimal results.

A. Basic Areas [See APPENDIX A Preparation Form]

1. Be fully prepared regarding relevant facts and law, Plus any relevant economic and/or political issues.
2. Prepare all relevant arguments supporting own positions-- Consider innovative formulations.
3. Anticipate opponent's arguments and prepare effective counter-arguments-- This will bolster own confidence and undermine that of opponent.
4. Try not to over-estimate own weaknesses or to ignore weaknesses influencing your opponent.
5. What is your BATNA [Best Alternative to Negotiated Agreement] - i.e., your Bottom Line.
6. What is your **opponent’s BATNA** - Try to appreciate Options and pressures affecting your opponent.

**B. Assumptions**

1. Regarding own position.
2. Regarding adversary's situation-- Try not to use your own value system when evaluating opponent's likely position but endeavor to really place yourself in shoes of opponent.

**C. Establishment of Aspiration Level - For Each Issue.**

This is a crucial factor, because negotiators who start with high aspirations usually obtain better results than those who do not begin with firm goals.

1. Attorneys who occasionally wish they had done better at end of negotiations have usually established beneficial aspiration levels and have achieved desirable results.

2. Attorneys who always achieve their negotiation goals should increase their aspiration levels, since they are probably establishing inadequate objectives.

3. Negotiators should initially:
   a. Seek high, yet seemingly "reasonable" initial positions that will not cause opponents to lose all interest -- Try to begin as far from actual objectives as you can while still being able to rationally defend your proposals.
Due to “anchoring”, people who begin with generous opening offers embolden opponents who think they’ll do better than they thought while those who begin with less generous offers undermine opponents who think they will not do as well as they hoped.

b. Lawyers should try to offer opponents terms that seem like gains rather than losses because of gain-loss framing – People offered sure gain and possibility of greater gain or no gain tend to be risk averse while persons offered sure loss and possibility of greater loss or no loss tend to be risk takers trying to avoid any loss.

c. Negotiators should also be aware of impact of the endowment effect – Persons who own something tend to over-value those items while people who are thinking of buying the same items tend to under-value those goods.

d. Successful negotiators are usually people who are able to prepare for negotiations by convincing themselves of the reasonableness of seemingly unreasonable positions.

1. This bolsters their confidence when they begin the negotiation process.

2. A confident manner often causes uncertain opponents to reconsider their preliminary
assessments in favor of the confident party.
e. Establish "principled opening positions" that can be defended "objectively" when presented to adversaries-- Prepare logical rationales to explain each component of positions.
1. Bolsters own confidence and undermines that of uncertain opponents.
2. Explains reasons for choosing overall positions selected, rather than less beneficial starting points.
3. Frequently allows person to control agenda, by causing opponents to directly focus upon each segment of stated positions.

D. Planning Strategy and Tactics

1. Carefully plan your desired methodology as if you were choreographing the movement from your opening offer to your desired objective.
2. Consider appropriate modifications to your plan that may be necessitated by changed circumstances that may arise during the negotiations (e.g., overly generous first offer or unexpectedly large subsequent concession by opponent).
   a. Imagine a road map with various routes from opening position to ultimate objective.
   b. You must be prepared to change routes in response to opponent tactics.
E. Negotiators must develop bargaining strategies that will culminate in "final offers" that are sufficiently tempting to risk-averse opponents vis-a-vis consequences of non-settlements that opponents will be afraid to reject the proposed terms.

F. Negotiators must always remember their **Best Alternatives to Negotiated Agreements**, so that they can comprehend the consequences of non-settlements-- If non-settlements would be preferable to opponent last offers, negotiators should not hesitate to reject the proposed terms.

III. **PRELIMINARY STAGE [Establishing Identity & Tone]**

Establishment of Negotiator Identities and Overt Tone For the Negotiations.

A. **Initial Exchange of Professional/Personal Information**

1. Status Factors:
   a. Name of law firm or legal agency with which participants are associated.
   b. Educational background.
   c. Possible professional name-dropping.

2. Experience Factors:
   a. General legal experience.
   b. Familiarity with areas relevant to particular matter to be negotiated.

B. **Establishing Overt Tone** of Negotiations-- Openly
Competitive/Cooperative, Congenial/Unfriendly, etc.

1. Negotiators should initially reestablish rapport with opponents they already know and work to establish rapport with opponents they don’t know.
   a. They should look for common interests that may make them more likeable since it is harder to reject requests from people we like than from persons we dislike.
   b. They may have attended the same schools, they may like the same sports, music, or other activities, or they may share other interests

2. Studies show that the negotiator moods significantly affect the way in which bargaining interactions are conducted.
   a. Negotiators who begin interactions in a positive mood behave more cooperatively, reach more agreements, and achieve more efficient distributions of the terms agreed upon.
   b. Negotiators who begin an interaction in a negative mood behave more competitively, reach more impasses, and achieve less efficient distributions of the terms agreed upon.

C. When negotiators approach interaction with vastly different views of tone to be set for the process, "Attitudinal Bargaining" may be used to influence the manner in which bargaining will proceed.
1. Many attorneys are so enamored of the "adversarial" nature of the legal system that they view negotiations as "win-lose" endeavors.

a. Be wary of opponents who normally address you by your first name but formally address you as Mr. and Ms. during negotiations, since this technique permits them to depersonalize bargaining interaction in way that allows them to act more competitively.

   When opponents depersonalize interactions, take the time to establish more personal relationships-- Use warm handshakes and other casual touching, and maintain non-threatening eye contact-- to make it more difficult for your opponents to employ inappropriate tactics against you.

b. If you are negotiating in opponent offices and feel uncomfortable, try to ascertain if your opponents have intentionally created an intimidating atmosphere by placing you in a short and uncomfortable chair or with your back literally against the wall, or by placing themselves in raised position of dominance.

   1. Don’t hesitate to rearrange the furniture or select another chair that will be more comfortable.
2. When your opponents leave the office to get a file or some coffee, take their seats and indicate, when they return, that you prefer the view from those locations.

2. When opponents appear to begin interactions in negative moods, take the time to generate more positive moods by indicating the mutual benefits to be derived from the immediate interactions.

D. Since most negotiations can achieve "win-win" results where both sides are satisfied with the agreements achieved, it is beneficial to begin the process in a cooperative and trusting way.

1. Encourages cooperative behavior and enhances probability of negotiation success.

2. Generates mutually beneficial relationships that will enhance future dealings.

E. Remember that the negotiation process begins with first contact with opponents-- Parties who initially dictate the time, date, and location for interactions may gain an important psychological advantage even before the substantive discussions have begun.

IV. INFORMATION STAGE ["Value Creation"]

Focus Upon Opponent's Initial Positions and Underlying Needs and Desires to Ascertain What May be Divided Up.
A. Seek as much information from opponent as possible, while being careful not to disclose inadvertently information you wish to remain confidential.

Try to ascertain what options are available to opponent if no agreement is achieved with you, since this defines that party's bargaining power.

B. Initially ask **Information Seeking Questions**.

1. Narrowly-focused leading questions generally do not elicit new information, but tend to confirm information currently possessed.

2. **Broad, open-ended questions** tend to elicit the most new information since they induce opponents to talk-- Only narrow your questions during final stages of the information retrieval process.

   a. Try to maintain good eye contact during the Information Phase-- Take as few notes as possible to permit you to focus upon opponent's verbal and nonverbal signals.

   b. Restate in your own words important information opponent has apparently disclosed, to verify/clarify information actually divulged.

C. Decide what **information you need to disclose** to opponent to facilitate negotiation process and determine how you plan to divulge this information.

1. Information you volunteer tends to be devalued
as self-serving ("Reactive Devaluation").

2. Information you provide in response to opponent's questions usually considered more credible than information you voluntarily disclose in an unsolicited manner.

3. Keep answers to opponent's questions short to avoid unintended verbal and nonverbal disclosures.

D. Employ **Blocking Techniques** to avoid answering opponent questions about highly sensitive areas.

1. Simply ignore apparent inquiry and move on to some other area you would prefer to discuss.

2. Answer only the beneficial part of a complex question, ignoring threatening portions of it.

3. Over- or under- answer the question propounded.
   a. Respond generally to a specific inquiry.
   b. Respond specifically to a general inquiry.

4. Answer a different question-- Respond to one previously asked or to a misconstrued form of the inquiry actually propounded.

5. Answer opponent's question with a question of your own-- *E.g.,* In response to "Are you authorized to pay $100,000," simply ask opponent "Are you willing to accept $100,000."

   You may alternatively treat such question as a new offer, placing opponent on defensive.

6. Rule the question out of bounds as an improper
or inappropriate inquiry.

E. **Plan** intended **Blocking Techniques** in advance, since this will most effectively prevent unintended verbal and nonverbal leaks.

1. Plan to vary your Blocking Techniques to keep opponent off balance.

2. Use Blocking Techniques only when necessary to protect your critical information to avoid needless loss of credibility.

F. When both sides are aware of narrow settlement range one side may begin with reasonable offer just inside range hoping to preempt negotiations and induce other side to accept offer without any haggling.

G. In most other bargaining situations, it is generally beneficial to **induce opponent** to make the **first offer**—Be certain you get the first **real** offer, since outrageous proposal really same as no offer.

1. Generous initial offer may provide unexpected information—Opponent may know more about own weaknesses than you do, or has overestimated your strengths—Either occurrence should induce you to contemplate an increased aspiration level.

2. After you receive opponent's initial offer, you can begin with position that places your goal in the middle, since parties tend to move toward center of their opening offers ["Bracketing"].
3. Party who makes the first offer likely to make the first *concession*, and studies indicate that the party who makes initial *concession* tends to achieve less beneficial results than opponent.

H. *Observe carefully* and *probe opponent* to ascertain his/her perception of situation, because it may be more favorable to own side than anticipated.

1. Categories of Information Regarding the Opponent:
   a. Personal skill.
   b. Negotiating experience.
   c. Relevant personal beliefs and attitudes.
   d. Opponent's perception of current situation.
   e. Resources available to opposing party.

2. Sources of Information:
   a. Choice of topics and sequence of presentation critical when multi-item negotiations are involved.
      1. Some negotiators begin with their most important topics in effort to get them resolved quickly and diminish the anxiety they are experiencing regarding the possibility of no settlement.
         Increases likelihood of quick impasse over critical items and no agreement.
      2. Other negotiators begin with their least important items—either intending to make
concessions on them to induce opponent to make subsequent concessions on major items or to obtain psychological advantage by winning minor items while creating concession-oriented attitude in opponent. Enhances probability of settlement by beginning process successfully and developing psychological commitment in participants to mutual accord.

b. Verbal leaks and nonverbal clues

3. Problems of Interpretation:
   a. Credibility of information received.
   b. Validity of your perceptions of opponent.
   c. Attribution-- Meanings you attribute to opponent's ambiguous signals (verbal and nonverbal).

4. Verification Mechanisms:
   a. Overall behavior patterns.
   b. Consistency of verbal and nonverbal signals.
   c. Use of questioning and probing.

I. Beneficial to ask relatively neutral questions for purpose of ascertaining underlying bases (assumptions, values, personal needs, goals, etc.) for opponent's stated positions.

1. Explore relevant factual circumstances in an objective, non-evaluative manner-- If both sides
can agree upon underlying factors in a non-threatening way, probability of achieving successful result increases substantially.

2. Endeavor to ascertain external pressures operating on opponent and his/her client, since such factors directly influence their assessment of situation.

3. Specifically focus upon underlying needs and interests of both sides, rather than simply upon expressed positions.
   a. Emphasis upon stated positions more likely to generate internecine conflict than exploration of underlying interests.
   b. Remember that positions frequently reflect only some of underlying needs and interests—Use *Brainstorming* to generate innovative options. Discovery of undisclosed motivational factors will often enhance possibility of settlement by allowing parties to explore unarticulated alternatives that may be mutually beneficial--For example, you may find that a plaintiff in a defamation action seeking a substantial monetary sum would prefer to obtain retraction and public apology or a corporate seller may accept some goods or services instead of cash.
V. DISTRIBUTIVE/COMPETITIVE STAGE ["Value Claiming"]

Focus Upon Own Side's Objectives and Interests as Parties Divide Up Items They Discovered During Information Stage.

A. Direct competitive phase during which each advocate endeavors to obtain as much from opponent as possible.

Negotiators should:

1. Carefully think out "concession pattern" in advance in manner that will not inadvertently disclose confidential information. You may use bracketing to keep own goal between current positions of the parties, making equal concessions until you end up in area you hoped to achieve.

2. Start from "principled opening position" to explain and support initial presentation.
   a. To reinforce confidence in own position.
   b. To induce opponent to reassess own position.

3. Try to make only "principled concessions", instead of unexplainable jumps, so they can convincingly explain why a particular concession is being made and why a larger concession cannot now be provided.

4. Avoid unreciprocated concessions in which they bid against themselves without obtaining reciprocal position changes from other side.

5. Focus on aspiration level, not bottom line, throughout the distributive stage. Less proficient
bargainers tend to focus on bottom line and relax once it is achieved, while skilled negotiators focus on aspiration level and try not to relax until they achieve real goal.

B. **Common Techniques** (usually occur in combination):

1. Argument (legal and nonlegal).
2. Overt threats or more subtle warnings.
3. Rational or emotional appeals.
4. Challenges to opponent's various contentions.
5. Ridicule of opponent or of his/her position.
6. Control of agenda (its content and order of items).
7. Intransigence.
8. Straight-forwardness.
9. Flattery (including real or feigned respect).
10. Manipulation of contextual factors (time, location, etc., of negotiations).
11. Humor can be used by many people to ridicule unreasonable positions being taken by opponent or to reduce built-up bargaining tension.
12. Silence (people often talk to fill silent void, thus inadvertently disclosing information).
13. Patience (powerful weapon since many negotiators make concessions simply to end process)-- Time pressure can be effectively used against opponent who has an artificially curtailed time constraint.
14. Creation of guilt or embarrassment, since such feelings often precipitate concessions.

C. Characteristics of **Persuasive Argument:**

1. Even-handed and seemingly objective.
2. Presented in logical, orderly, comprehensive, and articulate manner to enhance cumulative impact.
3. Beyond what is expected, forcing the opponent to reconsider his/her perception of matter in issue.

D. Characteristics of **Effective Threats:**

1. Carefully communicated to and completely understood by opponent.
2. Proportionate to the present situation (i.e., must constitute believable alternative to settlement).
3. Supported by corroborative information.
4. Never issue ultimatum you are not prepared to effectuate if necessary.

E. Distinguishing Between **Threats** and **Warnings:**

1. **Threats** are actions communicator may take to punish recalcitrant opponent while **warnings** are consequences that will result from actions of others if requested behavior not carried out.
2. **Threats** more disruptive than **warnings** since more direct affront to person being threatened than predicted actions of others.
3. **Warnings** more credible than **threats** since appear to be beyond control of communicator.
F. **Affirmative Promise** ("If you do this, I'll do ____")
   more likely to induce position change and less disruptive than negative threat/warning, due to face-saving nature of promise, yet negative threat/warning more likely to be remembered than affirmative promise.

G. The *purpose* of **power bargaining** is to influence opponent's evaluation of:
   1. His/her own situation.
   2. Your position and your external options.
   3. Your side's capabilities.

H. Counsel should **consider** the following **consequences** of **settlement** and **non-settlement**:
   1. Likely outcome if no settlement is achieved, including transactional and psychological costs--to own side and to opposing side.
   2. Total monetary and emotional costs of settlement.
   3. Impact on future dealings between the parties.

VI. **CLOSING STAGE** ["Value Solidifying"]

Critical point near the end of successful competitive phase when parties begin to realize that an agreement within their respective settlement ranges is likely and they become psychologically committed to that result.

A. Parties who become **overly anxious** about achievement of accord frequently **move too quickly** toward closure.
   1. They forget the patience, carefully planned
concession pattern, and thought-out tactics that got them to this beneficial position, and they try to move directly to a final agreement.

2. Parties who make excessive and unreciprocated concessions in an effort to conclude transaction are likely to give up the gains they achieved during prior competitive phase.

   65-75% of concessions made during last 20-30% of negotiation, although these position changes tend to be smaller than those made earlier.

B. Both parties need to **close remaining gap together**--
Alternating concessions of a reciprocal nature should be employed, to ensure that one side does not concede more than its fair share.

1. During the Closing Stage, parties occasionally make concessions that are larger than those made just prior to entry into this stage of process--This is not inappropriate, so long as opponent is being equally generous and such reciprocal concessions do not unfairly disadvantage one side due to its previous position changes.

2. Continue to use principled concessions and relevant negotiating techniques to keep process moving inexorably toward a satisfactory conclusion.

C. As the parties enter the Closing Stage, each is
concerned about the possibility of conceding too much– Assist opponent by using face-saving techniques to resolve the remaining issues.

1. Use of threats/warnings during Closing Stage is generally counter-productive, since threats/warnings are offensive rather than cooperative and are more likely to disrupt the process.

2. Use of promise technique is particularly effective, since it permits parties to move together-- e.g., agreeing to "split difference" between positions currently on negotiating table.

D. Important to remember that Closing Stage is highly competitive part of negotiation process.

1. If one party is more anxious to close than other party, he/she is susceptible to larger and more numerous concessions causing poor result.

2. Once you recognize that your opponent has become psychologically committed to settlement, evidenced by such closing behavior as more rapid and more generous concessions, do not move too quickly.
   a. Be patient and encourage your opponent to close more of the remaining gap.
   b. Indicate that you have minimal bargaining room left to induce opponent to believe he/she must close most of remaining gap.
   c. Emphasize your prior concessions in effort to
generate guilt that may induce your opponent to be more generous now.

d. Be supportive of opponent's position changes--Praise that party's reasonableness and indicate that an agreement is certain if he/she can provide you with the few additional items you need to satisfy your side's minimal goals.

e. If opponent prematurely offers to split the difference between the parties, you may offer to split remaining difference inducing opponent to close 75 percent of gap.

VII. COOPERATIVE/INTEGRATIVE STAGE ["Value Maximizing"]

This phase is applicable to nonzero sum negotiations in which one party can enhance his/her position with either minimal cost to opponent or perhaps even some benefit to other party--Remember that what may initially appear to be a zero sum transaction may be converted to a nonzero sum negotiation, if parties explore alternative options that may prove to be mutually beneficial (e.g., personal injury case where unacceptably large current lump sum payment is replaced by defendant's promise to pay all of plaintiff's future medical and rehabilitative costs).

A. When a tentative settlement is first achieved, it is often advantageous to explore alternative trade-offs
that may enhance the interests of both sides – Look for items that may have ended on wrong side of table as parties over- and under-stated the value of items for strategic reasons during prior exchanges.

1. Although parties may be mentally exhausted and want to memorialize their agreement, they should briefly explore alternative formulations that may be mutually advantageous but were previously ignored.

2. While minimal candor is required during this part of interaction, even Cooperative Stage continues to have a competitive aspect, since each side is still trying to obtain as much as possible from opponent.

B. Be certain opponent recognizes that you are engaged in "cooperative bargaining" at end of "Closing Stage," since your proposed alternatives may be less beneficial to him/her than your tentative agreement, and if he/she does not realize that you are simply exploring possible alternatives, claims of bad faith or deceit may arise.

C. Once a final agreement is achieved, the parties should carefully review the final terms agreed upon to make sure there has been a complete meeting of the minds.

1. If any misunderstandings are found, this is the best time to resolve them since the parties are
psychologically committed to a final accord.

2. If misunderstandings are not found until later, they are likely to be more difficult to resolve.

D. When the negotiation process concludes with a mutual accord, it is beneficial to **draft the final agreement**-
   While no attorney should contemplate the deletion or alteration of term agreed upon or the addition of new provisions, since such behavior would be unethical and probably fraudulent, he/she should seize the chance to draft provisions that best reflect his/her understanding of terms negotiated.

E. If your opponent drafts the final agreement, you should **carefully review** that **draft** to be sure it is accurate.
   1. Make sure the language selected reflects your understanding of the terms agreed upon.
   2. Be certain that nothing has been added that was never agreed upon.
   3. Make sure that nothing that was agreed upon has been omitted from the final agreement.

F. Although competitive tendencies are inherently associated with legal negotiations, attorneys can minimize the need for needlessly adversarial behavior. They should follow the "**Tit-for-Tat**" approach developed by Anatol Rapoport to encourage cooperative rather than unnecessarily competitive interactions.
1. Do Not Be Envious of Adversary's Success-- Base your evaluation of transaction on value to own side and not on how well you think you have done vis-a-vis opponent (i.e. don’t be “win-lose” negotiator).

2. Do Not Be First Party to Employ Inappropriate Tactics-- Begin with cooperative approach designed to encourage reciprocal behavior.

3. Be Provocable-- Be prepared to punish defection by opponent with your own comparable defection to deter future transgressions.

4. Be Forgiving-- When opponent resumes cooperative behavior, you should do likewise and indicate future interest in cooperative behavior.

5. Be Transparent and Establish Appropriate Reputation-- Act in a sufficiently consistent manner that opponents understand your willingness to cooperate-- and to retaliate when necessary to deter inappropriate conduct.

VIII. IMPORTANCE OF NONVERBAL COMMUNICATION

A. Independent Source of Information-- May obtain vital information from opponents through their nonverbal disclosures while they are speaking and listening.

1. Are nonverbal signals congruent or inconsistent with verbal messages being articulated?
2. Do not ignore your "feelings," since they are frequently based upon your subconscious reading of nonverbal signals and are often sound.

3. Since negotiators tend to look at the faces of opponents more when speaking than when listening, it is easy to understand why many nonverbal messages are not observed while the opponents are talking.
   a. Endeavor to observe opponent carefully while you are speaking and when he/she is talking.
   b. Try not to focus so intently upon what you are saying or plan to say in response to your opponent's statements that you wholly ignore valuable nonverbal messages.

4. A single nonverbal clue is rarely dispositive—Observers must look for changes in normal behavior and for indicative patterns of behavior.

B. Common Forms of Nonverbal Communication:

1. Facial Expressions may indicate pleasure, anxiety, relief, and so forth (facial expressions most easily manipulated form of nonverbal communication).

   Look for inappropriate smile while client or opponent explains problem, since such "double-message" [verbal request for help and smile indicating pleasure] may indicate that person
not really interested in finding solution.

2. **Flinch/Pained Facial Expression** may be uncontrolled response to surprisingly inadequate opening offer or contrived way to challenge opponent’s opening offer hoping to induce careless adversary to bid against self through consecutive opening offers.

3. **Scratching Head/Brushing Cheek with Hand** usually indicates puzzlement or difficulty comprehending what is being heard.

4. **Involuntary Raising of One Eyebrow** generally connotes skepticism. It may indicate that actor is suspicious of opponent overtures. It may also be disingenuously used by manipulative person to suggest his/her disappointment with new offer.

5. **Wringing or Twisting of Hands** is usually an indication of serious frustration.

6. **Tightly Gripping Arm Rests** or **Drumming on Table** is often evidence of impatience or frustration.

7. **Biting Lower Lip or Fingernails/Running Fingers Through Hair** are signs of stress or frustration.

8. **Eyes Wandering/Looking at Watch/Crossing & Uncrossing Legs/Doodling/Head Resting in Hand** are signs of boredom and/or disinterest suggesting that person is not interested in what is taking place. You may wish to ask such an opponent questions designed to get person more involved in talks.
9. **Hands Neatly Folded in Lap** frequently denotes contrite penitence and even submissiveness.

10. **Shifting Back and Forth in Chair/Opening and Closing Mouth Without Speaking** are indications of indecision with actor unsure how to proceed.

11. **Sitting on Edge of Chair** may indicate interest in present occurrences-- Opponent who leans slightly forward in chair following new offer indicates real interest in that offer.

12. **Hands Touching Face/Playing with Glasses/Looking at Notes** often used to cover periods of silent meditation while actor considers next move-- Following new offer, may suggest that person is seriously considering your proposal.

13. **Leaning Back in Chair with Hands on Back of Head** is an indication of real confidence-- When used by men interacting with females, it frequently signifies perceived domination. Women who encounter such behavior by male opponents should be cautious, since their opponents think things are going very well.

14. **Steepling Gesture** with fingers or hands together and uplifted frequently evidences confidence.

15. **Extending Hands Toward Opponent with Fingers Pointed Upward and Palms Facing Out** is often exhibited by individuals being verbally assaulted.
It is used to symbolically protect actors against oral onslaught emanating from their aggressive opponent.

16. **Rubbing Hands Together in Anticipatory Manner** often exhibited by anxious negotiator anticipating good response from opponent-- Suggests over-eagerness that may be satisfied with minimal concession.

17. **Casual Touching** of Other Person (e.g., prolonged hand shake; arm on shoulder) may indicate sincerity and diminish possibility of interpersonal conflict-- May be used paternalistically to indicate approval.

18. **Open or Uplifted Hands** often express sincerity and honesty, as does the placing of one's right palm over one's heart-- Frequently exhibited when final offers are being tendered.

19. **Crossed Arms and Crossed Legs** may be combative or defensive posture depending on exact position.
   a. Person who crosses arms high on chest and crosses legs in "Figure-4" style (ankle resting on other knee) exhibits combative posture.
   b. Person who crosses arms low on chest and folds one leg over other exhibits a defensive posture, particularly when he/she leans back in chair and pulls head close to body.

20. **Gnashing of Teeth** (evidenced by contraction and
relaxation of muscles on side of face) often indicates anxiety, anger, or frustration.

21. **Direct Eye Contact** can greatly influence interactions.
   a. **Warm Eye Contact** can be used to establish beneficial rapport with opponents.
   b. **Intense Staring** can be used as an aggressive and intimidating gesture.

22. People often **Cover and Rub One Eye** when they find it difficult to accept something being said to them, which is a crucial clue for person trying to educate an unreceptive opponent about an important topic.

23. **Head Nodding** is often used by active listeners to indicate that they understand what is being said--It may occasionally be misinterpreted by speakers as a sign of agreement.

24. **Turning Around in Chair and Looking Away From Opponent After Making Offer** may be indication actor hates to compromise and cannot stand to look at opponents after they make concessions.

C. **Nonverbal Indications of Deception** [P. Ekman, 1992]—Looking for signs of stress from people afraid of truth or getting caught lying and behavior deliberately designed to enhance credibility of person about to lie.

   1. **Signal Words** ("to be candid"; "to be truthful") may
preface deceitful representations in an effort to enhance their credibility.

2. **Decrease or Increase in Specificity of Statements** - When people tell the truth, they fill in little details as they recall them adding a substantial amount of incidental information. When people lie, there are no details to remember and they often omit the usual amplifying information. On the other hand, persons who have prepared elaborate lies may provide an excessive amount of information trying to make their fabrication seem more credible.

3. **Reduced Gross Body Movement** may be conscious effort to look less shifty and more believable, while **Increased Gross Body Movement** may indicate stress associated with deception.

4. **Casual Placing of Hand Over Mouth** while speaking may constitute subconscious effort to prevent utterance of "wrongful" misrepresentation.

5. **Negative Shaking of Head** when making affirmative verbal representation or **Positive Nodding of Head** when expressing negative message may suggest that stated representation is deceitful.

6. **Involuntary Raising of Inner Portions of Eyebrows, More Frequent Blinking, and/or Dilation of Eye Pupils** indicate greater internal stress.

7. **Narrowing and Tightening of Red Margin of Lips** just
before person speaks evidences the stress often associated with deception.

8. People who lie often *Speak More Deliberately* to be sure listeners hear their message and with a *Higher Pitched Voice* due to increased stress; some speak *More Rapidly* due to increased stress.

9. Persons who lie tend to *Clear Their Throat More Frequently* due to the tension they are experiencing.

10. Deceitful individuals often have an *Increased Number of Speech Errors* (represented by broken phrases, incomplete sentences, stuttering, and more nonsubstantive modifiers).

11. Some people preparing to lie *Make an Obvious Effort to Look Listeners in the Eye* to enhance the credibility of their misrepresentations, while other deceptive persons become more anxious about their behavior and *Make Less Eye Contact*.

12. *Duping Delight* -- Pleasure evidenced by liars who enjoy the challenge of successful deception.

D. Factors to Remember:

1. It is often helpful to have a negotiating partner who can concentrate on the nonverbal signals emanating from your opponent(s) [and yourself].

2. You should recognize that your opponent is also endeavoring to "read" your nonverbal signs.
IX. NEGOTIATING GAMES/TECHNIQUES

A. Nature and Objectives:

1. Seemingly ingenuous remarks that disguise ulterior motives are common to most negotiations as people endeavor to move opponents in desired direction.
   a. Attorneys may use them to create an impression of greater actual or believed bargaining power than really exists to enhance that power.
   b. Such ploys may be used to diminish an opponent's bargaining strength by creating the impression that the speaker is ignorant regarding that party's actual power, since bargaining power is defined more by perception rather than by objective standards.

2. Psychological ploys may be used to induce opponents to respond in a beneficial way that is not based on wholly rational considerations. Examples include:
   a. False flattery to precipitate concessions.
   b. Feigned weakness to evoke sympathy.
   c. Feigned anger to generate guilt.

B. Fundamental Negotiation Games/Techniques:

Although some negotiators use particular techniques one at a time, most employ several techniques simultaneously or resort to different tactics in a seriatim manner to keep their opponents off balance.
1. **Numerically Superior Bargaining Team.**
   a. Single people who negotiate against two or three opponents are usually at a distinct disadvantage.
   b. Their opponents can more easily monitor their verbal and nonverbal signals and they can compare ideas during separate caucus sessions.
   c. Individuals who must negotiate against several opponents should have colleagues join them to counteract the numerical superiority possessed by the other side.
   d. People who have 15 or 20 persons on their side of table are at disadvantage against smaller teams, and they should conduct intra-organizational interaction during Preparation Stage to generate common goals and common strategy.

2. **Asymmetrical Time Pressure.**
   a. If one side is under more time pressure than the other, a patient participant may take advantage of this imbalance.
   b. Negotiators must recognize that opponents also have deadlines that affect their behavior.
   c. Advocates can often hide their time constraints.
   d. Transaction negotiators may preempt the time element by announcing the deadline that must be
met by both sides if a deal is to be consummated.

3. **Extreme Initial Offer/Demand.**

   a. Creates high aspirations in self and may induce careless opponent to reconsider own evaluation.

   b. May cause opponent to conclude that matter cannot be reasonably resolved, or may place offeror in position from which he/she may end up retreating in uncontrolled fashion.

   c. Counter-measures:

      1. Important to directly inform offeror of how unreasonable his/her opening position is, to disabuse him/her of any notion that position is even remotely realistic.

      2. You may refuse to state your own opening position until some meaningful offer is presented to you, but this forces opponents to bid against themselves.

      3. You may respond with equally outrageous position of your own, hoping to talk opponent into joint resort to realistic positions.

      4. May come out with own realistic position, but must realize that this will require opponent to make concessions on 10:1 or 20:1 basis.
4. **Probing Questions.**
   a. Advocates confronted by truly extreme positions may generate a more flexible atmosphere through the use of probing questions designed to induce opponents to explain the positions being taken.
   b. Use of neutral, nonjudgmental inquiries is often more effective than direct challenge to positions being taken by intransigent persons.
   c. Ask opponents to value most finite items first, writing down figures that are remotely realistic.
   d. If unreasonable figure cited, calmly indicate lack of objective basis for position and ask how opponent determined that number.
   e. When done, total position usually three times opponent’s offer or one-third of his/her demand.

5. **Boulwareism/Best Offer First Bargaining.**
   a. Presenting best offer at outset, explaining that you do not wish to waste time engaging in usual "auction" bargaining since this is all you are willing to offer-- Frequently employed by insurance company representatives.
   b. Impossible to know true value of transaction from own side’s perspective-- Must meet with opponent to determine how much he/she wants an agreement.
c. May only be employed effectively by person with bargaining power—Party with such power can afford to be generous with process and let other party think he/she has influenced the outcome, since he/she may be willing to pay for privilege.

d. Entails substantial risk that opponent will react negatively to such paternalistic offer no matter how reasonable it is, due to feeling that he/she was denied opportunity to participate in process.

   Opponent may even accept less through auction process than you were willing to offer.

e. Recipients of Boulwareistic offers should assess them on merits and not merely reject them due to patronizing manner of presentation.

6. Range Offers.

   a. Some negotiators phase monetary offers/demands in terms of a range rather than as a single figure—e.g., “We expect something in the $10,000, $15,000, or $20,000 area.”

   b. Such offers tend to indicate uncertainty in the mind of the offeror, since more prepared person would have determined precise number to be used.

   c. Recipients of range offers should focus on most
beneficial end of spectrum – i.e., plaintiff attorney should discuss $20,000 figure while defendant lawyer should explore $10,000 demand.

7. **Settlement Brochure.**

   a. Preparation of written document, with pictures if appropriate, to establish highly-principled initial position and induce opponent to argue from this document [creates aura of legitimacy]. Some parties now prepare video reenactments of relevant circumstances to enhance their respective bargaining positions.

   b. Do not make mistake of arguing from opponent's agenda, unless this will enhance your case.

   c. Carefully evaluate validity of underlying assumptions set forth in opponent’s brochure.

   d. You may prepare counter-brochure to induce your opponent to approach problem from your viewpoint.

8. **Multiple Issue/Equal Value Offers.**

   a. Offeror suggests several different, but equal value, offers designed to reveal relative values of items involved.

   b. Excellent way to encourage cooperative bargaining designed to generate efficient agreements.

9. **Limited Authority/Lack of Authority.**
a. Opponent claims any tentative agreement must be approved by absent client with final authority over situation allowing opponent to obtain psychological commitment from you he/she may later modify due to unexpected demands of client.

b. If opponent lacks authority to bind his/her side, it is often beneficial to place self in same position or to refuse to bargain until person with final authority can participate.

c. If opponent's claimed lack of authority is impediment to final agreement, provide him/her with face-saving escape by suggesting that he/she contact client to obtain further authorization.

   If you disingenuously claim lack of authority and wish to accept current opponent offer, ask to call client to obtain final authority.

d. Do **not negotiate** with opponent with **no authority**, since he/she will try to induce you to bargain against yourself in a no-win manner—Such an opponent hopes to extract concessions from you as a prerequisite to discussions with an individual who possesses real authority.
Ask such opponent to obtain authority or have someone with authority call so that you can discuss your respective positions.

   a. After "final" agreement is achieved, opponent demands one additional concession—Party psychologically committed to agreement often concedes requested item to preserve accord.
   b. Don't merely ask how much own side wants pact—Other side is unlikely to let the settlement fail over your side's unwillingness to accept their new demand.
   c. Best to counter other side's new demand with appropriate demand of your own.
      1. If other party is sincere, he/she will be willing to discuss reciprocal arrangement.
      2. If other party insincere, likely to demand honoring of original terms agreed upon.

11. Decreasing or Limited Time Offers.
   a. During early stages of law suits, some attorneys make realistic offers that must be accepted by a set time or be withdrawn or reduced by a certain amount with the passage of time—Tell opponent of time limit to avoid misunderstandings.
   b. This technique may offend opponents and increase likelihood of non-settlement, but may be
employed successfully by negotiators with reputation for carrying out their stated intentions.

12. **Real or Feigned Anger.**
   a. Real anger quite dangerous since loss of control may cause party to convey information he/she did not intend to divulge.
   b. Can be employed to convince opponent of the seriousness of your situation and to frighten that person sufficiently to precipitate a position reconsideration.
   c. Counter-measures:
      1. Carefully observe angry opponent for helpful clues that may be inadvertently disclosed.
      2. Appear personally offended in manner that may create guilt or embarrassment and precipitate concession to assuage your feelings.
      3. Respond in kind or terminate session.

13. **Aggressive Behavior.**
   a. Similar to use of Anger.
   b. Opponent may frequently interrupt you in effort to undermine your momentum.
   c. Aggressive negotiators should carefully monitor nonverbal signals emanating from opponent (e.g., clenched jaw, defensive posture) to avoid
causing unintended frustration or termination of talks.

d. Attitudinal Bargaining may be used to convince opponent that you are not willing to tolerate such "inappropriate" tactics.

14. **Walking Out/Hanging Up Telephone.**

a. Frequently employed to convince opponent that actor is unwilling to make further concessions.

b. Negotiators should not let this type of bullying tactic intimidate them into unwise concessions—They should review their non-settlement options and determine whether further movement by them would be appropriate.

c. Don’t immediately telephone opponent or follow him/her out the door, since this would be viewed as clear sign of weakness.

15. **Irrational Behavior.**

a. A few negotiators try to obtain an advantage through seemingly irrational conduct—Some attribute irrationality to absent clients, while others exhibit their own bizarre behavior.

b. Seemingly irrational negotiators hope to convince opponents they must either accept their one-sided demands or face consequences associated with ongoing dispute with unstable adversaries.
c. Few successful lawyers or corporate leaders are truly irrational-- If they were, they would be unlikely to consistently achieve good results.

d. In most cases, it is best to ignore seemingly irrational conduct by opponents, since they will generally evaluate any proposals in logical manner as soon as they caucus.

e. On rare occasion when truly irrational opponent is encountered, you must consider non-settlement options and decide whether opponent’s demands are preferable to non-settlement alternatives.

16. "If it Weren't For You" (Or Your Client).

a. Party complains about your negotiating behavior or claims to have been forced into his/her present situation by opponent's previous unfair actions to generate feelings of guilt.

b. Don't allow opponent to create unfair guilt in you by raising prior matters that are not directly relevant to present negotiation – Simply apologize and get on with discussions.

17. False Demands (Discerned During Information Stage).

a. If made with respect to items opponent desires, can strengthen your position by enabling you to make "concessions" later for items you want.

b. Risk that opponent may call your bluff by conceding items to you or may discover that you
are being untruthful with respect to these items and distrust your other claims.

18. **Uproar.**
   a. Where one side threatens havoc (e.g., mass layoffs) and then offers to prevent the dire consequences if other side accepts its draconian demands (e.g., salary reductions).
   b. This technique is used to precipitate unilateral concessions from parties striving to avoid the threatened devastation.
   c. Counter-measures:
      1. Carefully evaluate the likelihood that the threatened disaster will actually occur.
      2. Determine consequences for the threatening party if it does occur—Situation might be worse for threatening party than for you, in which case you might indicate willingness to accept the dire consequences if opponent does not provide appropriate concessions.

19. **"So What."**
   a. Attempt to detract from party's concession by characterizing it as relatively unimportant.
   b. If your concession is really worth little to your opponent, then he/she should not mind if you withdraw it due to its importance to your side.
20. "Mutt and Jeff" [Reasonable-Unreasonable Dichotomy].

   a. Situation where "reasonable" opponent sympathizes with your "generous" concessions but emphasizes need for greater concessions by you to satisfy his/her "unreasonable" partner or client.

       A single negotiator can use "unreasonable" absent client to effectuate this technique.

   b. Do not make mistake of directing all of your arguments and concessions to "unreasonable" party in effort to achieve his/her acceptance.

       1. If you can satisfy "reasonable" opponent, you may be able to divide opponents and whipsaw "unreasonable" person to accept offer viewed as acceptable by "reasonable" partner.

       2. If "reasonable" person indicates that he/she must defer to partner's opinion, it is clear they are using Mutt and Jeff technique.

21. "Brer Rabbit" [Reverse Psychology]

   a. Negotiator tells opponent he/she must have items A, B, C, and D, which are actually person's secondary goals-- Negotiator then indicates need for "at least X, Y, and Z," which are really person's primary objectives, hoping that win-
lose opponent will impose least desired terms.

This technique is often effective against win-lose bargainer who may wish to provide the result opponent seems to want least, in an effort to be punitive.

b. While an adroit negotiator may induce a win-lose opponent to provide what is actually desired, this technique should not be used against win-win opponent who may be induced to provide person with the result he/she does not really prefer.

22. **Passive-Aggressive Behavior.**

   a. Generally employed by seemingly passive person who is really very aggressive-- Person does not directly indicate his/her dissatisfaction with negotiation process but instead tries to disrupt the transaction indirectly (e.g., shows up late for session; fails to bring needed papers).

   b. Take control of the situation by obtaining the needed documents yourself and by preparing draft of agreement reached to preempt that person's ability to disrupt things-- Once person is faced with fait accompli, he/she tends to give up rather than directly challenge situation.

23. **Belly-Up ("Yes, But").**

   a. Party (often wolf in sheepskin) feigns lack of
negotiating ability and knowledge in effort to evoke sympathy and weaken opponent's resolve--

Usually acknowledges reasonableness of opponent's concessions but proceeds to explain why the concessions are not sufficient.

b. Most dangerous of all negotiators, since they basically refuse to play "game" fairly--They make opponents work to satisfy their needs by inducing adversaries to prove that they can formulate a settlement that will be satisfactory to them.

c. Counter-measures:

1. Never allow Belly-Up opponent to evoke such sympathy that you alter your negotiation plans and concede everything in an effort to find a "solution" for this poor soul.
2. Force Belly-Up opponent to state own position that you can directly challenge--Adroit Belly-Up negotiator will try to avoid stating own definitive position at all.

C. Recognition Crucial to Gamesmanship Defense.

1. Negotiators should be aware of the types of games frequently played during negotiations and know how to recognize which tactics are being employed.
2. Once an attempted technique is recognized, a negotiator can minimize its psychological
effectiveness and perhaps even turn the circumstances to his/her own advantage.

X. CULTURAL ASPECTS OF NEGOTIATIONS

A. Factors Affecting Negotiations Because of Different Cultural Expectations:

1. Transference-- Transference phenomena may influence irrationally your assessment of other party due to stereotyped beliefs, and may cause similar response in him/her to you ("counter-transference").

2. Cultural Interpretations-- Verbal and nonverbal signals may have different meanings for people from different cultural backgrounds. For instance:
   a. Punctuality is more important to Americans than to people of many other cultures.
   b. Americans often separate business and social discussions unlike people from other cultures.
   c. Spatial conversational distance varies greatly among different cultures.
   d. Some cultures consider the overt display of power to be very crude, while others do not.
   e. Americans more accepting of open conflict than are members of many other cultures.

3. Individuals tend to bargain more cooperatively
with opponents of same culture than with people of different culture, due to fact similarity induces trust and reduces the need to maintain a certain face or posture in the eyes of someone different.

a. When commencing a negotiation with a person from a different culture, it may be beneficial to have a more expansive Preliminary Stage to permit the development of a more open and trusting relationship before the commencement of substantive bargaining.

b. Negotiators from different cultures must try to minimize the negative impact of stereotyping and attempt to understand seemingly irrational reactions opponents may initially exhibit toward them due to counter-transference.

c. My students continue to assume that the quintessential competitive win-lose negotiator is the Caucasian male.

1. They assume that African-Americans, Asian-Americans, and Latino-Americans are more cooperative and less competitive.

2. I have found absolutely no support for these assumptions among law students, with members from each group demonstrating highly competitive tendencies as well as
highly cooperative tendencies.

3. I have found no statistically significant differences in the results achieved on negotiation exercises by law students based upon race or ethnicity.

d. Never make the mistake of assuming a lack of negotiation proficiency in opponents because of their race or ethnicity.

B. Gender-based stereotypes may cause problems when some lawyers negotiate with attorneys of the opposite sex.

1. Males (and females) often expect females to behave like "ladies" during negotiating interactions.

   Overt aggressiveness viewed as vigorous representation when done by males may be characterized as offensive and personally threatening when engaged in by females.

2. Males and females tend to exhibit different styles when they communicate with others.

   b. In typical male-female interactions, men speak 60-65% of time, while women speak 35-40% of time-- If females speak 50% of time, they are likely to be perceived as "domineering."

   c. Men interrupt women more than women interrupt men and change the topic of conversation more frequently than do women.

   d. Men tend to use more direct language when
trying to influence others, while women tend to use less direct language when doing so.

e. Women tend to use more modifiers ("you know"; "don’t you think"; "it seems to me") when they communicate than their male cohorts.

f. Women tend to be better readers of nonverbal signals than men, and they tend to be better listeners with respect to verbal discourse.

3. Although men and women tend to lie to others as often, they tend to use misrepresentations differently.

a. Men tend to engage in self-oriented lying to enhance their images ("braggadocio").

b. Women tend to engage in other-oriented lying to make others feel good about themselves.

4. Because of societal expectations, we tend to over-value the success of males and under-value the success of females.

a. When males are successful, results tend to be attributed to intrinsic factors such as diligence and intelligence.

b. When females are successful, results generally attributed to extrinsic factors such as luck or assistance of others.

5. Males tend to be over-confident of their abilities while females tend to be under-confident.
a. No matter how unprepared men are, they tend to think they can wing it and get by.

b. No matter how thoroughly prepared women are, they tend to feel insufficiently prepared.

6. Appearance influences the way in which male and female negotiators are stereotypically perceived.

a. Attractive men tend to be considered more competent than less attractive males with respect to ability to perform traditionally masculine tasks, while less attractive women are considered more capable than their more attractive cohorts vis-a-vis such tasks.

b. Women with "less feminine" appearance (tailored clothes with jacket, subtle make-up, and short hair or hair swept away from face) more likely to be taken seriously (especially by males) and be viewed as more assertive, more logical, and less emotional in crucial situations than are women with a more feminine appearance.

7. Many men unwilling to act as competitively toward female opponents as they do toward male opponents, providing women opponents with inherent advantage. Some men still fear losing to females and prefer non-settlements to possible humiliation associated with losses to female opponents.
8. Men assume female opponents will not engage in as many "games" as "competitive" male opponents. Many women assume that other females will not employ Machiavellian techniques stereotypically attributed to competitive male culture.

9. Some men try to gain advantage against aggressive female opponents by suggesting that they are not behaving like "ladies."

   Appropriate response is that one acting as lawyer in a setting where one's gender is irrelevant.

10. Studies indicate that male and female subjects do not behave identically in competitive settings.

   a. Boys are raised to be more comfortable with overt competition and win-lose activities than are girls.

      A greater percentage of females take my Legal Negotiation course on a Credit/No-Credit basis than men.

   b. Girls are raised to be more concerned with relationships than boys.

   c. Females tend to be more trusting initially and more trustworthy than males, but less willing to forgive violations of trust than males.

11. I have found no statistically significant
differences in the results achieved on negotiation exercises by male and female law students.

Females taken lightly by male opponents should take advantage of their naivete and clean them out.

XI. PSYCHOLOGICAL ENTRAPMENT ["Dollar Auction"]

Do not become so caught up in the negotiation "game" that you find yourself compelled to achieve a final settlement no matter the cost—Recognize when you are engaged in a losing endeavor and attempt to minimize your losses using information obtained from negotiation process.

A. Except in rare circumstances, you will have external alternatives to "settlement."

1. Negotiators must determine at outset the options available to them if no agreement is obtained.

2. When external alternatives are preferable to terms necessary to achieve a negotiated agreement, a non-negotiated solution is the preferable option.

3. Negotiation efforts have not been wasted—They had to be used to see if settlement possibilities were better than external alternatives.

B. Never continue a negotiation merely because you have expended a substantial amount of time and/or resources, particularly if you are doing so in an
effort to "punish" your recalcitrant opponent.

1. Know when to cut your losses and take advantage of most advantageous external option.

2. Simply inform opponent that his/her current offer is unacceptable-- There is always chance he/she will reconsider situation and provide you with more beneficial proposals.

XII. SPECIFIC NEGOTIATION ISSUES

A. Initiating Litigation Settlement Discussions.

The vast majority of law suits are going to be resolved through settlement agreements, thus there is no reason not to raise the possibility of settlement discussions during early stages of litigation process.

1. Plaintiff attorneys should not hesitate to phone opponents and tell them what they want.

2. Defense counsel should not hesitate to phone plaintiff attorneys and ask what they want.

3. Always be willing to explore settlement if opponent is willing to do so meaningfully.

B. Client Presence During Negotiating Sessions.

1. It is generally preferable not to have one's client attend negotiating sessions. Client presence makes it difficult to employ such effective techniques as "Limited Authority"
and "Mutt and Jeff."

2. Many clients would be likely to make unintended verbal and nonverbal disclosures if they were allowed to participate in negotiation talks.

3. In emotionally charged situations, it may be beneficial to permit opponent to cast aspersions on own client at outset of a negotiation. These cathartic expressions may relieve festering animosity and enhance the likelihood of an accord. If the client were present when these statements were being made, his/her counsel would feel compelled to defend the client before the cathartic process was completed.

4. If clients must be present during negotiations to provide needed expertise or because of personal insistence, they should be carefully prepared beforehand. They should be instructed to speak only when asked to do so by their own counsel. They should be cautioned about the substantial risk of inadvertent nonverbal disclosures.

C. *Weakening Opponent's Position of Strength.*

1. Power usually defined by an opponent's perception of the situation, rather than by actual circumstances. If a negotiator can convince a stronger opponent that he/she is unaware of that
party's actual strength, this may weaken stronger party's position and cause that person to suffer a general loss of confidence.

2. Children usually prevail in negotiations with parents by ignoring parental authority involved.


1. A weak position may be strengthened if it is made inflexible, preventing the bargaining agent from accepting less than established minimum. This may be achieved by endowing the negotiator with limited authority and portraying absent client as unreasonable party that must be satisfied ("Mutt & Jeff" approach).

2. The negotiator can also limit own flexibility by convincing his/her principal that anything less than a beneficial minimum settlement would be "unreasonable," but this may cause non-settlement.

3. The negotiator can publicly announcing minimum "fair" settlement acceptable to his/her side so that opponent will recognize that publicly locked in party cannot substantially change his/her demands without suffering complete loss of face.

E. *Confronting Opponent's Inflexibility.*

1. When opponents are committed to unfavorable positions, it is preferable not to challenge
them directly but to use a "face saving" approach.

2. Focus on their expressed needs/interests instead of on own stated positions, and try to convince opponents to reassess their positions in light of non-threatening needs/interests analysis.

3. Explore alternatives that might be mutually beneficial. Emphasize areas of mutual interest, rather than areas of disagreement.

F. Telephone Negotiations.

1. Parties frequently settle matters via the phone instead of in person. They must remember that basic negotiation principles still apply, even though phone negotiations tend to involve series of short interactions instead of in-person transactions of longer duration.

2. Even though opponents cannot see speaker, they can obtain important information from speaker's pitch, pace, tone, volume, pauses, topic selection, etc.
   a. Lawyers must plan their negotiating strategy carefully before they call adversaries, instead of trying to do so while on the phone.
   b. If opponents call unexpectedly when recipients are not prepared to discuss matter, they should not hesitate to reply that they
are busy and will return the call—when fully prepared to negotiate.

1. If they fail to do so, they may forget prior discussions give away important information inadvertently.

2. They may fail to remember who made the last concession during their prior discussions and carelessly make unreciprocated concessions.

3. Attorneys who interpret nonverbal cues more effectively in person may wish to schedule face-to-face sessions for important matters. The increased cost may be more than offset by the benefits derived from the in-person negotiations.

4. **Cell Phone** interactions raise significant issues since may occur while surrounded by strangers.
   a. Model Rule 1.6 duty to protect confidential client information from disclosure to others.
   b. Surrounding distractions may inhibit serious and focused discussions.
   c. Ask call recipient to call back when in optimal location for beneficial talks.

G. **Negotiating by E-Mail or Through Fax Transmissions.**

1. Some people like to conduct negotiations primarily through e-mail or fax transmissions.
   a. They tend to feel uncomfortable with the
negotiation process and try to limit the need for direct personal interactions.

b. The negotiation process involves personal interactions, and it is difficult to maintain personal interactions entirely in writing.

c. If negotiations must be conducted primarily through e-mail or fax transmissions, the parties should initially interact in person or through telephone calls to establish more personal relationships and positive tones.

2. The use of e-mail or fax to conduct negotiations is cumbersome and may be ineffective.

a. Written messages may be misinterpreted by recipients who read too much into them.

b. When people negotiate in-person or on the phone, they obtain direct feedback and have the chance to correct misunderstandings.

3. When proposals must be sent by e-mail or fax, senders should phone the recipients to determine how they have interpreted the written terms they have received.

4. Recipients of e-mail files can mine the metadata and discern all changes made to that document - considered ethical by ABA but not several states.

5. Ethical duty under Rule 1.6 to avoid inclusion of metadata in electronic files.
a. Use scrubbing software to cleanse files of such metadata.

b. Create new file and insert existing file into new file to eliminate metadata from old file.

c. Send document in PDF format which eliminates almost all of the metadata in file.

H. **Opponent Not Seriously Endeavoring to Convince Own Client of Reasonableness of your Offer.**

Affected lawyer may arrange a meeting to be attended by opponent and his/her client (e.g., deposition or status conference). While the attorney could not ethically communicate directly with that client, he/she could carefully explain the reasonable basis for his/her most recent offer to counsel in client's presence.

I. **Pre-Trial Settlement Conferences.**

[See Judicial Mediation Materials in Appendix I]

1. Many courts now require pre-trial settlement conferences for all civil cases.

a. Clients are often required to attend.

b. An Advocate should not make mistake of attending such a conference unprepared, since this may create false confidence in his/her opponent and will inhibit the ability of the judge to understand the case.

c. The lawyer must also prepare his/her client
for what is likely to occur, so that he/she will understand the role being performed by the judge and will not be unduly surprised by conference developments.

2. Many judges ask detailed questions regarding the relevant facts and law. They may challenge the positions taken by counsel and even suggest possible compromises. Advocates should try to de-emphasize the adversarial nature of the litigation process to facilitate the judicial mediation function.

3. Lawyers certainly have the right to disagree respectfully with the judge's assessment of the case. They may even use the judge to exert pressure on a recalcitrant opponent or to help to educate their own intransigent client.

4. Some judges like to discuss case separately with each side. While judges generally try to maintain the confidentiality of the information provided in such a setting, candid assessments of the matter may be indirectly disclosed to opponents via a proposed solution presented by the judge.

5. Advocates should only divulge the confidential information they would be willing to have the judge inferentially convey to their opponents.

6. Lawyers should not appear too accommodating in an
effort to placate the judge, since he/she is likely to seek more concessions from the more malleable party.

7. Attorneys should never lie to a judicial officer, since any misrepresentation would violate Model Rule 3.3(a)(1) which requires attorney candor to tribunals (ABA Formal Opin. 06-439 (2006)).

J. **Negotiating With Government Agencies.**

1. Bargaining with government agencies is often analogous to cross-cultural interactions due to the different value systems involved.
   a. While private sector participants carefully consider the monetary costs involved, government administrators seldom do.
   b. Government agencies rarely pay their own legal costs and agency officials tend to overestimate the likelihood of litigation success, due to the judicial deference given to administrative determinations.
   c. Administrators consider their rules and regulations sacrosanct and will not concede the invalidity of those items.

2. Government lawyers are rarely given the authority to resolve controversies without the ultimate approval of higher agency officials. Nonetheless, experienced government attorneys
usually know what they can sell to their principals. Give them the information they need to obtain agency approval of proposed deals.

3. Many administrators are hesitant to make decisions, since they may be held responsible for their mistakes. It is important to find officials who are willing and empowered to make decisions and to convince them that it is in their interest to decide the present matter.

4. Timing is important, because many officials only make decisions as deadlines approach.

5. Administrators know how much private parties fear litigation against government agencies. They often use this fact to drive hard bargains. When necessary, private parties must be willing to challenge agency actions in court to maintain their credibility.

K. Keeping Client Informed During Negotiations.

1. Frequent client complaints concern the failure of attorneys to keep them apprised of case developments as is required by Model Rule 1.4(a).
   a. While lawyers should not unduly heighten client anxiety or client expectation levels, it is beneficial to keep clients informed of all relevant developments.
   b. This lets the clients know their attorneys
are performing services for them, and lessons
the likelihood they will feel their lawyers
have not earned their fee.

2. Attorneys must recognize the need to perform
an educational role vis-a-vis their clients. If
they explain the process ahead of time and begin
to prepare clients for the realization that they
may not obtain everything they may initially
expect, lawyers will have an easier time
explaining the reasonableness of proposed
settlements they have obtained.

L. **Client Acceptance of Offers Over Advice of Counsel.**

1. The pressures of litigation are such that clients
occasionally accept settlements despite the
contrary advice of their lawyers. Since it is
their case, they certainly possess this right
under Model Rule 1.2(a).

2. To protect themselves against possible
malpractice suits should clients subsequently
decide that they did not obtain results as
generous as they originally believed, attorneys
may wish to communicate the reasons for their
recommendation that settlement offers be rejected
in the letters sent to the clients with the
settlement documents.

A few attorneys even record-- with the
client's consent-- the reasons they give the clients for recommending that the proposed offers be rejected.

XIII. ETHICAL CONSIDERATIONS

[See Prisoner's Dilemma Exercise in Appendix C]

A. Attorneys are obligated to represent clients zealously, within the bounds of professional propriety.
   1. They should remember that they must live with their own consciences and not those of their clients.
   2. Lawyers with reputations as deceitful negotiators have a difficult time representing clients effectively, since their representations can no longer be accepted by their opponents.

B. Attorneys should strive to achieve excellence and to maintain their personal integrity, since this will enable them in the long run to optimally serve the interests of both their clients and society.
   ("Always do right. This will gratify some people, and astonish the rest."--Mark Twain)

C. Ethical Dilemmas Frequently Encountered by Negotiators:
   1. Should attorneys merely endeavor to obtain settlements that are "satisfactory" to clients or to maximize return to their clients?
   2. Should attorneys seek more than "fair settlements" if they think that more can be ethically obtained?
3. If negotiators must avoid "unconscionable" results, who is to decide what is "unconscionable?"

4. Should we expect less candor from personal injury or criminal defense attorneys than from commercial litigators or estate planning lawyers?

5. Can "truth" really be separated from "justice" in the adversarial system?

6. When, if ever, may negotiators appropriately lie?

   Model Rule 4.1(a) states that "a lawyer shall not knowingly make a false statement of material fact or law to a third person," but a Reporter's Comment indicates that different mores apply during negotiation interactions:

   Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are in this category.

   a. Is it less opprobrious to withhold the truth than to affirmatively distort it?

   b. What is the difference between acceptable "puffing" and inappropriate mendacity?

   c. When are negotiators obliged to disclose factual information to opposing counsel?

   d. When, if ever, are attorneys obliged to disclose information about own client value
systems?

e. When may attorneys misrepresent client settlement intentions?

f. May attorneys lie about the authorized limits given them by their clients?

7. To what degree may a lawyer representing a person with a severely sprained ankle embellish the nature of the injury involved?

a. May he/she imply a greater amount of pain and/or injury duration than is actually present?

b. May he/she ever suggest the presence of a broken or cracked bone?

c. If defense counsel responds to representations by plaintiff's lawyer about the extent of soft tissue injury by noting that broken bones can involve enduring pain, is plaintiff counsel obliged to correct defense lawyer's erroneous assumption regarding broken bones?

   Is the sin of omission in such a situation less culpable than a sin of commission where you directly generate the misunderstanding?

8. If lawyers fail to find cases in their jurisdiction supporting their position, must opposing counsel to tell them about the cases they have not found?

   Model Rule 3.3(a)(2) requires litigators to
 disclose those cases to the tribunal.

9. Would defense counsel in contributory negligence state be obliged to divulge, prior to settlement, fact that State Supreme Court had just substituted comparative negligence doctrine for the contributory negligence doctrine in decision issued that morning?

10. If lawyer knows that opposing counsel is recovering from a recent heart attack or nervous breakdown, may he/she employ his/her usually aggressive/abrasive negotiating tactics?

11. May negotiators employ tactics that are designed to intimidate or harass their opponents?
    Model Rule 4.4 prohibits the use of tactics that "have no substantial purpose other than to embarrass, delay, or burden a third person . . ."

12. May attorney representing plaintiff in civil case involving criminal overtones suggest possibility of criminal charges if civil case is not settled or might this constitute extortion or misprision of felony?
    In Formal Opinion 92-363, ABA Standing Committee on Ethics said that such conduct not unethical so long as attorney does not indicate improper influence over criminal process and does not demand excessive compensation that may

APPENDIX A

Negotiation Preparation Form

1. Your *minimum settlement point [BATNA]* - Lowest result you would accept given your alternatives to negotiated settlement (including *transaction costs* associated with both settlement and non-settlement):

2. Your *target point* (best result you might achieve)-- Is your *aspiration level* high enough? Never commence a negotiation until you have mentally solidified your ultimate goal with respect to *each item* to be negotiated:

3. Your estimate of *opponent's minimum settlement point* (what external options appear to be available to opponent):

4. Your estimate of *opponent's target point* (try to use his/her value system when estimating opponent's target point instead of using your own value system):

5. Your *factual and legal leverage* with respect to each issue (strengths and weaknesses of case)-- Prepare logical explanations supporting each strength and anticipate ways in which you might minimize your weaknesses. Prepare rational explanations to support each component of opening position (*i.e.*, prepare *“principled opening offer”*):

6. Your *opponent's factual and legal leverage* regarding each issue (prepare effective counter-arguments):

7. What *information* do you plan to elicit during *Information Stage* to determine opponent's underlying needs, interests, and objectives? What questions do you anticipate using? (Try to begin with broad, open-ended questions):
8. What information are you willing to disclose and how do you plan to divulge it? (Best to disclose important information in response to opponent questions) How do you plan to prevent disclosure of sensitive information (plan use of "Blocking Techniques"):

9. Your negotiation strategy (agenda and tactics)--Plan your anticipated concession pattern carefully to disclose only the information you intend to divulge and prepare principled explanations for each planned concession:

10. Your prediction of opponent's negotiation strategy and your planned counter-measures-- You may be able to neutralize opponent's strengths and emphasize his/her weaknesses:

11. What negotiating techniques do you plan to use to advance your interests? (Be prepared to vary them and to combine them for optimal impact):

12. Negotiating techniques you expect your opponent will use, and way you plan to counter those actions:
APPENDIX B

Post Negotiation Evaluation Checklist

1. Was your **pre-negotiation preparation** sufficiently thorough? Were you completely familiar with 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 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 fact you did not establish sufficiently high objectives? Was your aspiration level so unrealistic that it provided 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 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 negotiating environment? Did you employ **Attitudinal Bargaining** to modify inappropriate opponent behavior?

8. Did the **Information Stage** develop sufficiently to provide participants with the knowledge they needed to understand their respective needs and interests and to enable them to consummate an optimal agreement? Did you use **broad, open-ended questions** to determine what the other side wanted and use **what** and **why questions** to ascertain their **interests**?
9. Were any unintended verbal or nonverbal disclosures made? What precipitated such revelations? Were you able to use Blocking Techniques to prevent the disclosure of sensitive information?

10. Who made the first offer? The first "real" offer? Was a "principled" initial offer made by you? By your opponent? 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 and how were these tactics countered by you? What else might you have done to counter these tactics?

13. What particular negotiation devices were employed by you to advance your position? Did the opponent appear to recognize the various negotiating techniques you used, and, if so, how did he/she endeavor to minimize their impact? What other tactics 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? You should keep a record of each concession made by you and by your opponent throughout the transaction.

15. Were "principled" concessions articulated by you? By your opponent? Did successive position changes involve decreasing increments and were those increments relatively reciprocal to the other side's concomitant movement?

16. How did the parties close the deal once they realized that they had overlapping needs and interests? Did either side appear to make greater concessions during closing phase?

17. Did the parties resort to cooperative/integrative bargaining to maximize their aggregate return?
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 your opponent.

20. Did either party resort to deceitful tactics or deliberate misrepresentations to enhance its situation? Did these pertain to material law or fact, or only to value system or settlement intentions?

21. What finally induced you to accept the terms agreed upon or to reject the final offer made by the other party?

22. 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?

23. If no settlement was achieved, what might have been done differently with respect to client preparation and/or bargaining developments to produce a different result?

24. What did you do that you wish 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?
Assume that you and your partner have been arrested for a crime that you committed together. The prosecution wants at least one of you to confess to ensure the conviction of both. If only one confesses, he/she will be treated leniently, while the silent partner will be severely punished. If neither confesses, both will receive relatively short prison terms. If both confess, more substantial terms will be given to both.

The problem is represented by the following diagram:

<table>
<thead>
<tr>
<th>PRISONER A</th>
<th>Does Not Confess</th>
<th>Confess</th>
</tr>
</thead>
<tbody>
<tr>
<td>Does Not</td>
<td>2 Years for A</td>
<td>10 Years for A</td>
</tr>
<tr>
<td>Confess</td>
<td>2 Years for B*</td>
<td>6 Months for B</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>PRISONER B</th>
<th>Does Not Confess</th>
<th>Confess</th>
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</thead>
<tbody>
<tr>
<td>Does Not</td>
<td>6 Months for A</td>
<td>5 Years for A</td>
</tr>
<tr>
<td>Confess</td>
<td>10 Years for B</td>
<td>5 Years for B**</td>
</tr>
</tbody>
</table>

* Cooperative Solution-- Best combined result for both.

** Minimax Solution-- Solution that offers each the greatest promise of success in view of opponent's alternative capabilities.
Appendix D

Peterson-Denver Exercise

General Information

At approximately 11:30 p.m. on a rainy and dark Friday evening last November, accountant Jim Denver was driving his Continental up Powell Street in San Francisco. He had just completed a long and acrimonious dinner meeting with a difficult, but important, client. Although he had consumed three or four Martinis during the course of his lengthy discussions, he felt in complete control of his faculties when he concluded the meeting.

As a result of the emergency session with his client, Denver was forced to miss a prestigious social event that his wife had been eagerly anticipating. He realized she was very angry over the situation, and he was in a great hurry to return home to assuage her feelings. As Denver was heading up a particularly steep portion of Powell Street, he swerved toward the middle of the road to avoid a double-parked car, and he drove precariously close to an oncoming cable car on which Norma Peterson was riding.

Denver's mind was on both the problems with his client and his wife's ire, and he did not see Peterson, who was clumsily dismounting from the cable car in front of him. Peterson slipped on the wet pavement into the path of Denver's automobile, and she was directly struck before Denver could even apply his brakes.

Peterson suffered a broken back resulting in paralysis from the waist down. She was 40 years old at the time of the mishap. Peterson, who was a successful patent attorney at the time of the accident with Denver, has adapted herself extremely well to her present condition and is currently able to conduct her practice as effectively as ever. However, one month ago, her husband instituted dissolution proceedings. She contends that this was brought on by her paralyzed condition.

Peterson has sued Denver for $5,000,000. Her medical expenses and lost earnings total about $250,000. The State of California is a comparative negligence jurisdiction. Any settlement figure agreed upon must be paid to Peterson immediately.
CONFIDENTIAL INFORMATION -- PETERSON’S ATTORNEY

You are aware that on the night of the accident, Peterson had been drinking heavily at a bar with a favorite male associate from her office. She had not intended to leave the cable car where she did, but, in her intoxicated state, she had fallen off the car and slipped on the wet pavement into the path of Denver's automobile. Nevertheless, you have located an apparently reliable witness who is positive that Denver was speeding and swerving sharply at the moment he struck Peterson. You have suspicions that Denver may have consumed several drinks too many before he commenced his drive home, but you have not been able to substantiate this fact.

You have been informed that Mr. Peterson had been planning to dissolve his marriage prior to the accident due to his wife's extra-marital affairs, and you know that her injury did not precipitate this action. In fact, Peterson's disability may have precluded his filing for dissolution at an earlier time.

Peterson, who is reputed to be a solid citizen, is terrified of the adverse consequences which might be caused to her lucrative practice should her clients learn of her drinking and "dating" proclivities. She has thus decided not to press her suit against Denver to trial. She would like to recover at least $250,000 to cover her medical expenses and lost earnings, and would be pleased to recover any amount above that figure. She is presently earning $375,000 per year.

Since Peterson does not wish to take this case to trial, you will automatically be placed at the bottom of Plaintiff groups if you fail to reach any agreement. If you achieve a settlement, your group placement will be determined by the amount of money Peterson is to receive.
You know that your client had been drinking on the night in question, but you doubt that this adversely influenced his driving ability. However, you suspect that he was driving too fast for such a damp and dark night on busy Powell Street. You also realize that Denver's mind was on his client and wife at the moment it should have been concentrating on the traffic, and you believe that a jury could conclude that he had driven negligently.

You have learned of the excellent reputation which Peterson has in the community, and you have been led to believe that her paralysis has caused her husband to sue for dissolution after 15 years of apparently blissful marriage. You have discovered from investigation that Peterson had visited a bar with one of her male associates prior to the time she had boarded the cable car on Powell Street, but she has stated that she had only stopped off after work to help him celebrate his birthday. She has denied any heavy drinking. Although you believe that she had been out quite late to have merely been engaged in a friendly birthday celebration, you have no hard evidence to refute Peterson's story.

Your client is worried about the effect which any adverse publicity could have on his business, and he would like to settle the case as soon as possible. Denver has a $1,000,000 automobile insurance policy, and has the personal assets to cover an additional $1,000,000. The insurance carrier has authorized you to pay the entire $1,000,000 policy limit, and Denver has said that he is willing to provide an additional $1,000,000 cash, if necessary. He is hoping, however, that you will be able to settle this matter within the scope of his insurance coverage.

If you reach a settlement, your group placement will be determined by the amount of money you agree to pay to Peterson. If you do not achieve any settlement, you will be treated as if you lost a $2,000,000 judgment, with that $2,000,000 figure being used to determine your group placement.
APPENDIX E

Sexual Harassment Exercise

GENERAL INFORMATION

Last year, Jane Doe was a first year law student at the Yalebridge Law School, which is part of Yalebridge University, a private, non-sectarian institution. Ms. Doe was a student in Professor Alexander Palsgraf's Tort Law class.

During the first semester, Professor Palsgraf made sexually suggestive comments to Ms. Doe on several occasions. These comments were always made outside of the classroom and when no other individuals were present. Ms. Doe unequivocally indicated her personal revulsion toward Professor Palsgraf's remarks and informed him that they were entirely improper and unappreciated.

During the latter part of the second semester, Professor Palsgraf suggested to Ms. Doe in his private office that she have sexual relations with him. Ms. Doe immediately rejected his suggestion and told Professor Palsgraf that he was "a degenerate and disgusting old man who was a disgrace to the teaching profession."

Last June, Ms. Doe received her first year law school grades. She received one "A", two "A-", one "B+", and one "D", the latter grade pertaining to her Tort Law class. She immediately went to see Professor Palsgraf to ask him about her low grade. He said that he was sorry about her "D", but indicated that the result might well have been different had she only acquiesced in his previous request for sexual favors.

Ms. Doe then had Professor Irving Prosser, who also teaches Tort Law at Yalebridge, review her exam. He said that it was a "most respectable paper" which should certainly have earned her an "A-" or "B+", and possibly even an "A".

Ms. Doe has sued Professor Palsgraf in state court for $250,000 based upon three separate causes of action: (1) sexual harassment in violation of Title IX of the Education Amendments of 1972; (2) intentional infliction of emotional distress; and (3) fraud. Professor Palsgraf has a net worth of $450,000, including a $350,000 equity in his house and a $50,000 library of ancient Gilbert's outlines.

It is now early August, and Ms. Doe will begin her second year of law school in several weeks.
CONFIDENTIAL INFORMATION -- JANE DOE

Your client wants to obtain several forms of relief from Professor Palsgraf:

(1) A grade of "A" or "A-" in Tort Law;

(2) The resignation of Professor Palsgraf from the Yalebridge Law School; and

(3) A sufficiently large sum of money to deter such offensive conduct by other professors in the future.

(I) Score **plus 35 points** if Professor Palsgraf agrees to change Ms. Doe's Tort Law grade to "A-", and **plus 50 points** if he agrees to change her grade to "A".

(II) Score **plus 200 points** if Professor Palsgraf agrees to resign from the Yalebridge Law School faculty. If Professor Palsgraf does not resign, but agrees to take a one-year "leave of absence" or a one-year "sabbatical leave" from the Law School during the **Coming academic year (i.e., Ms. Doe's second year)**, score **plus 50 points**. If Professor Palsgraf agrees to take a leave of absence and/or sabbatical leave during the coming year and the following year (i.e., Ms. Doe's final two years of law school), score **plus 75 points**.

(III) If Professor Palsgraf does not resign, but does agree to seek psychiatric counseling and to personally apologize to Ms. Doe, score **plus 50 points**.

(IV) Score **plus 2 points** for each $1,000, or part thereof, Professor Palsgraf agrees to immediately pay Ms. Doe in settlement of her suit.

(V) Ms. Doe is concerned about the publicity surrounding this matter and the impact that publicity may have on her future employment opportunities. Score **plus 50 points** for a clause guaranteeing the confidentiality of any settlement reached with Professor Palsgraf.

Since Ms. Doe wishes to have this matter resolved now so that she may concentrate fully on her legal education, you will automatically be placed at the **bottom of Plaintiff groups** if no settlement is achieved.
CONFIDENTIAL INFORMATION -- PROFESSOR PALSGRAF

Your client realizes that his conduct was entirely inappropriate, and he is deeply sorry for the difficulty he has caused Ms. Doe. He would thus be willing to submit to psychiatric counseling and to personally apologize to Ms. Doe. Should you agree to either or both of these requirements, you lose no points.

Professor Palsgraf fears that Ms. Doe may ask for his resignation from the Yalebridge Law School, and he would rather lose everything before he would forfeit his Yalebridge position. Should you agree to have Professor Palsgraf resign his Yalebridge professorship, you must deduct 500 points.

Your client recognizes that he will have to provide Ms. Doe with the grade she should have received. He is readily willing to change her grade to an "A-", and you lose no points for agreeing to such a provision. Professor Palsgraf does not think that Ms. Doe's exam performance was really worthy of an "A". You thus lose 50 points if you agree to have Ms. Doe's Tort Law grade changed to an "A".

Professor Palsgraf is currently eligible for a one-year, paid "sabbatical leave." He has been saving this leave to enable him to go to Cambridge University in two years. If you agree to have Professor Palsgraf take that paid "sabbatical leave" during either of the next two academic years, you lose 25 points. Should you agree to have him take a "leave of absence" during either of the next two years, which, unlike a "sabbatical leave," would not involve a continuation of his salary, you lose 100 points. (If you agree to both a one-year sabbatical and a one-year leave of absence, you lose a total of 125 points.)

Professor Palsgraf will almost certainly have to provide Ms. Doe with monetary compensation for the wrong he committed. You lose 3 points for each $1,000, or part thereof, you agree to pay Ms. Doe. Any agreement regarding the payment of money must be operative immediately-- no form of future compensation may be included.

Professor Palsgraf is concerned about the publicity surrounding this tragic affair. Score plus 50 points for a clause guaranteeing the confidentiality of any settlement reached. Since Professor Palsgraf believes that the continuation of this law suit may ruin his outstanding legal career, you will automatically be placed at the bottom of Defendant groups if no settlement is achieved.
APPENDIX F

Parker v. Davidson Exercise

GENERAL INFORMATION

Last September 1, at 2:35 p.m., twenty-seven year old Harry Parker was driving south in his three-year old Honda Accord on Wisconsin Avenue in Washington, D.C. This is a four-lane street that carries a substantial amount of traffic between Georgetown and the Maryland suburbs. It was a clear, sunny day, and the pavement was dry. Although the speed limit on that part of Wisconsin Avenue is 25 mph, Mr. Parker was driving 35 mph. As Mr. Parker approached the stop light at R Street, N.W., he observed a green light for southbound traffic and he continued to travel at 35 mph.

John Davidson was driving west on R Street in his new Ford Taurus. He was then employed by the District of Columbia Department of Public Works as a civil engineer. At 1:30 p.m., Mr. Davidson had become embroiled in a disagreement with his immediate supervisor concerning Mr. Davidson's dissatisfaction with the 2 percent salary increase he had recently received. Their discussion had taken more time than he had anticipated. Mr. Davidson was thus late for an important job interview he had scheduled with a private engineering firm. He was hoping to obtain a new position that would pay him almost $10,000 more per year than the $47,500 he was currently earning.

As Mr. Davidson approached Wisconsin Avenue, he was driving 37 mph in a 25 mph zone. When he arrived at the Wisconsin Avenue--R Street intersection, Mr. Davidson noticed that the light for traffic in his direction was red. Mr. Davidson reduced his speed to 25 mph and endeavored to make a right turn onto Wisconsin Avenue. His rate of speed was excessive, and his car swerved into the outer lane of southbound traffic. His car struck the left front portion of Mr. Parker's vehicle, causing that car to veer into a light pole located just below the south-west corner of the intersection. When Mr. Parker's car struck the light pole, it stopped abruptly.

Mr. Davidson was wearing his seat belt, and his air bag opened as soon as the two vehicles collided. As a result, he suffered no serious injuries. Mr. Parker was also wearing a seat belt, but the air bag in his car did not deploy until it struck the light pole. When his automobile first collided with the Davidson car (and before the air bag opened), his upper chest
struck the steering wheel. He sustained a crushing blow to the chest that caused a cracked sternum and multiple rib fractures. Mr. Parker was taken to the Georgetown University Hospital where he was thoroughly examined. They discovered the cracked sternum and the fractured ribs. They taped Mr. Parker's upper body and provided him with medication to reduce his discomfort. Although Mr. Parker's upper body was severely contused, there was no evidence of additional injury. The Emergency Room treatment cost Mr. Parker $1425. His subsequent examinations by Dr. Joan Bannon, an orthopedic specialist, cost an additional $475. He was out of work for two weeks. Mr. Parker is a self-employed electrician, and these two weeks of missed work cost him $2200. Mr. Parker continued to experience some pain for an eight-week period, but he was able to perform his usual job duties after the second week. On October 28, Dr. Bannon examined Mr. Parker and declared him recovered. Mr. Parker's Honda Accord was totally wrecked, at a loss of approximately $12,400.

Last month, Mr. Parker filed a civil action against Mr. Davidson alleging that his negligent driving caused their accident. His complaint requested $100,000. Defendant Davidson carries liability insurance providing $100,000 coverage per accident. The District of Columbia is still a contributory negligence jurisdiction.
CONFIDENTIAL INFORMATION -- PLAINTIFF PARKER

Mr. Parker sued Mr. Davidson, because he was angry about the fact that Mr. Davidson did not exhibit any sympathy following the accident. Mr. Davidson had even complained to Mr. Parker about the job opportunity he was going to lose. Since Mr. Parker's chest wounds have completely healed and he experiences only limited discomfort on cold, damp days, he does not expect a substantial sum of money. He would like to obtain at least $16,500 to cover his $1900 in medical expenses, the $12,400 value of his destroyed Honda Accord, and the $2200 in lost earnings. He has indicated that he will accept any amount over $16,500 you believe would be appropriate. Since Mr. Parker's injuries have healed, he does not want to have to take time off from work to participate in a trial. He has thus instructed you to settle this case immediately. If you fail to reach a settlement agreement, you will be placed at the bottom of Plaintiff groups.

Three months ago, you had Mr. Parker examined thoroughly by Dr. James Woods, an internist, who indicated that Mr. Parker's cracked sternum and fractured ribs had healed completely. His heart and lungs appear to be functioning properly, with no evidence of any impairment. Last week, the Defense Attorney had Mr. Parker examined by Dr. Jules Goldberg, an orthopedic/thoracic specialist. You anticipate that Dr. Goldberg will testify as an expert witness for the defense and will reiterate Dr. Woods' findings.
CONFIDENTIAL INFORMATION -- DEFENDANT DAVIDSON

You realize that your client was extremely negligent when he attempted to turn right onto Wisconsin Avenue at an excessive rate of speed and without stopping at the red light. Nonetheless, this is not your primary concern. Although Dr. Joan Bannon, who treated Mr. Parker after the accident, and Dr. James Woods, who examined Mr. Parker three months ago at the request of Plaintiff's Attorney, have indicated that Mr. Parker's chest wounds have completely healed, this is incorrect. Last week, you had Mr. Parker examined by Dr. Jules Goldberg, an orthopedic/thoracic specialist. Dr. Goldberg agreed that the cracked sternum and the fractured ribs had healed, but he discovered the early formation of an aorta aneurysm. Dr. Goldberg noted that the X-rays taken of Mr. Parker in the Georgetown University Hospital did not include any evidence of an aneurysm. The X-rays subsequently taken by Dr. Woods, an internal medicine specialist, did not appear to indicate the presence of an aneurysm. Only when Dr. Goldberg reviewed the Woods' X-rays with a magnifying glass in light of his recent findings did he notice the incipient formation of an aorta aneurysm. His recent X-rays indicate that the aneurysm has progressed. If it remains untreated, it could rupture and cause the death of Mr. Parker. Since the aneurysm was not evident in the Georgetown University Hospital X-rays, and has increased in size since then, Dr. Goldberg is convinced that the crushing chest injury inflicted in the September 1 automobile accident with Mr. Davidson caused that condition.

In light of Dr. Goldberg's medical conclusions, Mr. Davidson's insurance carrier would like to settle this suit quickly. Neither Mr. Parker nor his attorney is aware of Dr. Goldberg's findings with respect to the aorta aneurysm. If they have additional X-rays taken before trial, they would most likely discover his serious condition. If the aneurysm did not exist, you would probably be able to settle this case for $20,000 to $25,000. If Mr. Parker's attorney was aware of the aneurysm, he would undoubtedly demand a figure ten times that range, since Mr. Parker may need surgery to correct his condition. That delicate medical procedure would be expensive, and the recovery period would be fairly long. Mr. Parker would experience prolonged discomfort, and would likely miss ten to twelve weeks of work.

Your supervisor has instructed you to resolve this matter immediately. He wants to have a complete settlement agreement before Mr. Parker undergoes further medical tests. If you do not resolve this dispute now, you will be placed at the bottom of Defendant groups.
APPENDIX G

Rodriguez v. Douglas Chemical Company

GENERAL INFORMATION

The Douglas Chemical Company ("Douglas Chemical") produces various chemical products at its East Dakota facility. Several of its manufacturing processes involve the use of highly toxic substances regulated by the East Dakota Environmental Protection Act. The East Dakota Environmental Protection Agency requires chemical companies to detoxify hazardous substances before releasing them into rivers or ground waters. Substances that cannot be detoxified must be removed by licensed toxic waste firms.

Alicia Rodriguez is a physical chemist. After she received her Ph.D. from East Dakota University fifteen years ago, she accepted a position with Douglas Chemical. Until last year, she worked in the Research and Development Department. Last December 1, she was promoted to Director of the Environmental Protection Department. Her salary was increased to $75,000 per year.

When Dr. Rodriguez took over the Environmental Protection Department, she discovered that her predecessor had been falsifying Company records to permit the release of highly toxic substances into the Green River which flows past the Douglas Chemical plant. Dr. Rodriguez found that her predecessor had been filing false reports with the East Dakota Environmental Protection Agency. Those reports indicated that only detoxified substances were being released into the Green River.

Dr. Rodriguez immediately informed Ezra Douglas, the Company President, of her discovery. Mr. Douglas indicated that the East Dakota Environmental Protection regulations were overly strict. He said that the Company was not releasing an excessive amount of toxic substances into the Green River, and he suggested that no real harm was being caused by the Company's action. He told Dr. Rodriguez that she would have to be more of a "team player" if she wished to remain at Douglas Chemical. Dr. Rodriguez stated that she would not falsify Company records to permit the unlawful release of toxic substances. Mr. Douglas informed her that any disclosure of Company practices to the East Dakota Environmental Protection Agency would result in her termination.

Last December 15, Dr. Rodriguez met with Peter Connolly, Director of the East Dakota Environmental Protection Agency. She informed Dr. Connolly of the existing Douglas Chemical toxic substances release practice and provided him with copies of both the correct and the falsified Douglas Chemical records. On December 16, Dr. Connolly had water samples taken from areas of the Green River adjacent to the Douglas Chemical facility and discovered excessive levels of toxic substances. Samples taken from the Douglas Chemical release pipes were found to contain unusually high levels of toxic substances. On December 17, the East Dakota Environmental Protection Agency issued a citation against Douglas Chemical, and on December 20, it obtained a
temporary restraining order prohibiting the further release of untreated toxic substances by Douglas Chemical.

On December 21, Mr. Douglas called Dr. Rodriguez into his office. He informed her that she was not working out in her new position. He said that he was unwilling to have a disloyal individual in his employ. Mr. Douglas then informed Dr. Rodriguez that she was being terminated.

On January 5, Mr. Douglas was contacted by Ed Barrett, a Vice President of the Jacobs Petroleum Company. Mr. Barrett told Mr. Douglas that Jacobs Petroleum was planning to ask Dr. Rodriguez to become its Director of Chemical Processing, a position that would have paid her $80,000 per year. Mr. Douglas told Mr. Barrett that Dr. Rodriguez had recently been discharged by Douglas Chemical because of her "poor attitude." He said that Dr. Rodriguez had been "a wholly uncooperative manager." On January 6, Mr. Barrett told Dr. Rodriguez that Jacobs Petroleum would be unable to offer her the Chemical Processing position, due to her "past difficulties" at Douglas Chemical.

Last February 1, Dr. Rodriguez filed a civil action in the East Dakota Circuit Court alleging: (1) that her termination based upon her unwillingness to falsify toxic chemical records contravened public policy and (2) that Mr. Douglas' statements to Mr. Barrett constituted defamation. She sought actual damages of $500,000 and punitive damages of $1,000,000.

No East Dakota statute or regulation expressly protects individuals who are terminated because of their unwillingness to participate in practices violating the State Environmental Protection Act. Although the East Dakota Supreme Court has followed the traditional "employment-at-will" doctrine, under which an employer may discharge an employee for "good cause, bad cause, or no cause," three of its seven Justices indicated in a recent decision that they might adopt a "public policy" exception if particularly egregious circumstances were involved. The East Dakota Civil Code specifically provides a "qualified immunity" against defamation liability for employers who provide reference information in response to requests for such information from other business entities.

Any monetary sum that Douglas Chemical agrees to pay to Dr. Rodriguez must be payable immediately. It may not be payable in future installments.
Dr. Rodriguez is especially concerned about her professional reputation. Although this law suit has not yet generated significant public interest, she is afraid that a public trial might cause other companies to regard her as a trouble-maker. If you fail to achieve a settlement agreement resolving this case, you will automatically be placed at the bottom of Plaintiff groups.

Dr. Rodriguez has been discussing employment opportunities with the McTavish Chemical Company. McTavish Vice President Susan Travis has told Dr. Rodriguez that she will be offered a position as Director of Research, at $78,000 per year, if she can resolve her Douglas Chemical suit expeditiously and quietly.

Dr. Rodriguez does not wish to return to Douglas Chemical—unless she is unable to obtain employment with another company. She is thus willing to forego any offer of reinstatement, so long as she obtains the other terms she desires. Although Dr. Rodriguez has not yet sustained any substantial monetary loss, she has suffered extreme emotional discomfort. She is outraged at the manner in which Douglas Chemical treated her, and believes that she deserves some meaningful monetary compensation. Score plus 2 points for each $1,000, or part thereof, in compensation you obtain from Douglas Chemical.

Dr. Rodriguez would like to obtain: (1) a favorable reference from Douglas Chemical to McTavish Chemical; (2) a "To Whom It May Concern" reference letter for future use; and (3) a promise that Douglas Chemical will provide no other reference information to prospective employers in the future. Score plus 50 points for a favorable recommendation letter from Douglas Chemical to McTavish Chemical; plus 50 points for a favorable "To Whom It May Concern" letter to be provided on Douglas Chemical stationery; and plus 50 points for a clause providing that Douglas Chemical will not provide any other reference information about Dr. Rodriguez to other prospective employers.

If Douglas Chemical refuses to provide Dr. Rodriguez with a favorable reference to McTavish Chemical, she may be forced, at least in the short run, to return to Douglas Chemical. If you are unable to obtain a favorable reference to McTavish Chemical but do obtain an offer of reinstatement to her former position in the Research and Development Department, score plus 25 points.

Dr. Rodriguez would like to ensure that the details surrounding this unfortunate situation will remain private. Score plus 50 points for a provision stating that the circumstances indigenous to this dispute and the terms of the settlement agreement will remain entirely confidential.
Douglas Chemical is concerned about the negative publicity associated with this dispute. It fears that a public trial will further exacerbate the problem. You have thus been instructed to achieve a settlement agreement, if at all possible, and will be placed at the bottom of Defendant groups if you fail to do so.

It is obvious that Dr. Rodriguez was terminated because of her disclosures to the East Dakota E.P.A. Although that Agency does not have any specific regulation protecting "whistle-blowers" and the East Dakota courts have followed the traditional "employment-at-will" doctrine, you fear that this is the type of case that might induce the East Dakota Supreme Court to reconsider the issue. If it were to adopt a "public policy" exception, Dr. Rodriguez would be able to seek monetary damages for lost earnings and emotional distress. She might even be awarded punitive damages. You also fear that the "qualified immunity" provision might not protect Douglas Chemical against liability for the negative statements made to Mr. Barrett of Jacobs Petroleum. If a jury became sufficiently outraged regarding Dr. Rodriguez's termination and the statements made to Mr. Barrett, its monetary award could be substantial.

You realize that Dr. Rodriguez is a skilled professional who should be able to obtain employment with another company in the near future, thus minimizing her lost earnings. You recognize, however, that she is entitled to some compensation for the unconscionable way in which she has been treated by Douglas Chemical. Score minus 1 point for each $1,000, or part thereof, you agree to provide up to $100,000. Score minus 3 points for each $1,000, or part thereof, you agree to provide over $100,000.

Douglas Chemical does not wish to reemploy Dr. Rodriguez, since her reinstatement might cause further difficulties. If you achieve an agreement that does not provide for any offer of reinstatement, score plus 50 points. You believe that Dr. Rodriguez will request a favorable reference letter to enhance her employment opportunities. Since she was a satisfactory employee prior to her contact with the East Dakota E.P.A., Douglas Chemical is willing to provide such a letter to enable her to obtain a new position. You have learned that McTavish Chemical is considering Dr. Rodriguez for a position. You lose no points for agreeing to provide a positive reference to McTavish Chemical. If, however, you agree to provide a more general "To Whom It May Concern" reference that could be used by Dr. Rodriguez in the future, you lose 25 points.

Douglas Chemical would desperately like to end the negative publicity associated with this controversy. Score plus 50 points if you obtain a provision specifying that the circumstances surrounding this dispute and the terms of the settlement will remain confidential.
INSTRUCTIONS: You are a member of one of two space details assigned to the mission ship "Galaxy," which was originally scheduled to rendezvous with the parent ship "Angel" on the lighted surface of the moon. Due to mechanical difficulties, however, the Galaxy was forced to land on the dark side of the moon some 200 miles from the rendezvous point. During piloting and landing, some of the crew and both Detail A and Detail B captains died. Much of the equipment aboard was damaged. No one knows for sure how long the ship's life support systems will last because all gauges were broken. Detail A piloted the mission and Detail B was to explore the surface before returning to the parent ship. Survival of both Details is crucial. Below are listed the 15 items left intact and undamaged after landing. Your task is to rank them in order of their importance to the survival of the remaining crew of the mission ship, Galaxy. Place the number 1 by the most important item, the number 2 by the second most important, and so on through number 15, the least important.
Modified NASA Exercise

INVENTORY OF UNDAMAGED MATERIAL

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<th>Item Description</th>
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<tr>
<td>10</td>
<td>Ten Blankets</td>
</tr>
<tr>
<td>100</td>
<td>100 Cartons of Food Concentrate (20-day Ration for Each Crew Member)</td>
</tr>
<tr>
<td>150</td>
<td>150 Feet of Nylon Rope</td>
</tr>
<tr>
<td>1</td>
<td>Parachute Silk (From Three Parachutes)</td>
</tr>
<tr>
<td>1</td>
<td>One Portable Heating Unit That is Self Lighting</td>
</tr>
<tr>
<td>2</td>
<td>Two .45 Caliber Loaded Pistols</td>
</tr>
<tr>
<td>1</td>
<td>One Case Dehydrated Milk</td>
</tr>
<tr>
<td>3</td>
<td>Three 100 lb. Tanks of Oxygen (Each Tank Holds 20-Day Supply for Each Crew Member)</td>
</tr>
<tr>
<td>1</td>
<td>One Stellar Map of the Moon's Constellation</td>
</tr>
<tr>
<td>1</td>
<td>One Life Raft</td>
</tr>
<tr>
<td>1</td>
<td>One Magnetic Compass That Functions on the Moon</td>
</tr>
<tr>
<td>5</td>
<td>5 Gallons of Water (Normally a 10-Day Ration for Each Member of the Crew)</td>
</tr>
<tr>
<td></td>
<td>Five Light Flares Containing Their Own Oxidizing Agent</td>
</tr>
<tr>
<td></td>
<td>First Aid Kit Containing Injection Needles</td>
</tr>
<tr>
<td></td>
<td>Solar-Powered FM Receiver-Transmitter</td>
</tr>
</tbody>
</table>
**Modified NASA Exercise**

**EXERCISE: DECISION BY CONSENSUS**

**INSTRUCTIONS:** This is an exercise in group decision-making. Your Detail is to use the method of group consensus in reaching its decision. This means that the prediction for each of the 15 survival items *must* be agreed on by each Detail member before it becomes a part of the group decision. Consensus is difficult to reach. Therefore, not every ranking will meet with everyone's complete approval. Try, as a group, to make each ranking one with which all group members can at least partially agree. Here are some guides to use in reaching consensus:

1. Avoid arguing for your own individual judgments. Approach the task on the basis of logic.

2. Avoid changing your mind only in order to reach agreement and avoid conflict. Support only solutions with which you are able to agree somewhat, at least.

3. Avoid "conflict-reducing" techniques such as majority vote, averaging or trading in reaching decisions.

4. View differences of opinion as helpful rather than as hindrances in decision-making.

On the *Modified NASA Consensus Form* place the individual rankings made earlier by each group member.
## MODIFIED NASA EXERCISE--CONSENSUS FORM

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Modified NASA Exercise

JOINT DECISION BY NEGOTIATION

INSTRUCTIONS:

Detail A will attempt to survive while waiting for help from the parent ship "Angel."

Detail B will attempt to survive and rendezvous with the parent ship "Angel."

This is an exercise in group decision-making. Your Detail is to use the method of group negotiations in reaching its decision. Both groups must decide which Detail will remain with the disabled mission ship "Galaxy" (i.e., which group will be designated "Detail A") and which group will endeavor to rendezvous with the parent ship "Angel" (i.e., which group will be designated "Detail B"). Both groups must also agree upon the division of the inventoried items between Details A and B (i.e., which items will remain with Detail A and which will be taken with Detail B).

Modified NASA Negotiated Agreement Form is provided to list your negotiated agreement.
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APPENDIX I

Judicial Mediation

I. BENEFITS TO BE ACHIEVED THROUGH JUDICIAL MEDIATION

A. Substantial monetary savings to the parties and to the judicial system.

B. Time savings to parties through elimination of trial and post-trial proceedings.

Although effective judicial mediation involves time expenditure, return through avoidance of unnecessary trial more than compensates for mediation time used.

C. Psychological benefits through expeditious and definitive resolution of underlying dispute plus avoidance of anxiety, trauma, and uncertainty associated with contested trial and post-trial delays.

D. Preferable to achieve “win-win” result mutually accepted by parties instead of having “win-lose” judicial determination by outsider imposed upon parties.

E. Although most attorneys do endeavor to settle cases before trial, and 90-95% of cases are mutually resolved, various factors may operate to impede settlement of remaining 5-10% of cases which might be settled through effective third party intervention.

1. Goldberg-Brett mediation experiment in several industries used mediation only where pre-arbitration grievance resolution efforts had been unsuccessful,
yet they produced 85% settlement rate for various cases which would otherwise have been taken to arbitral adjudication.

2. Although many judges previously believed that it was inappropriate for them to become actively involved in the settlement process, most contemporary jurists recognize the propriety of such participation.

II. PERSONALITY OF JUDGE VITAL TO MEDIATION FUNCTION

A. Mediator must rely substantially upon personal power of persuasion and reputation for impartiality and fairness.

B. Mediator must develop style consistent with own personality—Some judges have personality which permits relatively aggressive mediation tactics, while other personalities are more suited to low key approach.

C. Since lawyers rapidly become familiar with reputation of each judge with respect to that person's usual settlement tactics, generally beneficial to maintain consistent approach which enhances attorney confidence in mediation process.

III. DIFFERENT MEDIATION STYLES

A. Most mediators employ a Facilitative/Elicitive Approach in which they work to regenerate stalled settlement talks and encourage the parties to achieve
mutually acceptable accords through “mediator assisted negotiations” primarily controlled by the disputants.

1. These mediators believe that disputants should control their own destiny and determine the manner in which they should resolve their own conflicts.

2. These neutrals use probing questions and subtle suggestions to keep the negotiation process moving toward settlement, but they try not to control the substantive terms agreed upon.

3. Whenever possible, they use joint sessions which permit face-to-face bargaining by the parties.

B. Some mediators use a Evaluative/Directive Approach in which they attempt to determine the final terms the parties are likely to agree upon.

1. These intervenors prefer separate caucus sessions during which they try to determine the best solution the disputants can agree upon.

2. Once these mediators determine what the parties are likely to accept, they work diligently to convince each side those are the optimal terms they can expect to achieve.

3. These neutrals think they can do a proficient job of determining the optimal terms the parties can agree upon, but they may deprive the parties of the cathartic benefit of controlling their own outcomes and increase the risk the final
settlements will not hold.

C. A new breed of mediators suggest that intervenors should employ a **Relationship-Oriented/Transformative Approach** in which they focus primarily on party relationships rather than the need for settlements of present conflicts in an effort to transform the ability of people to deal with their future disputes beneficially [Baruch Bush & Folger, 1994; 2005].

1. These neutrals believe that mediators should show parties the range of options available to them to heighten their **personal empowerment** and increase their ability to deal with future conflicts.

2. They try to induce disputants to understand the feelings of their adversaries in an effort to generate **recognition** for the situations of others.

3. While this approach may be appropriate with respect to parties with on-going relationships (e.g. business partners or spouses dissolving marriages who must deal with the rights of their children), it is unlikely to be of significant interest to judicial mediators who are primarily interested in the reduction of backlogged dockets.

**IV. TIMING OF INITIAL MEDIATION EFFORTS IMPORTANT**

A. During preliminary litigation stages, parties usually contemplate possible settlement of case and gentle but
persistent encouragement from judge at pre-trial meetings should be sufficient.

1. If it appears that parties have not meaningfully commenced negotiation process—which occasionally occurs when parties naively believe that whoever initiates settlement talks exudes weakness—judge should permit parties to save face by initiating the process for them.

2. Judge should always indicate to parties willingness to provide personal assistance at any time either or both parties request it.

B. It is immediacy of approaching trial date which causes most attorneys and their clients to recognize that impending financial and psychological pressures militate in favor of informal resolution of matter, thus judge should enhance settlement pressure by working diligently during pre-trial stages to keep case moving inexorably toward trial.

1. Shortly before trial, parties anxious to avoid formal adjudication, and they have become sufficiently familiar with relevant facts and law to make rational assessment of case value.

2. If true impasse between parties is going to result, it will likely occur at this stage of proceedings, thus indicating propriety of external intervention.
C. Once trial has commenced, usually more difficult to settle case since economies of settlement diminished, parties now fully prepared for adjudication, and each side is psychologically convinced of beneficial result.

As trial unfolds, however, unanticipated developments may induce unrealistic party to reconsider its position, and judicial encouragement may still precipitate joint settlement.

V. COMMUNICATION FACILITATION CRUCIAL ASPECT OF MEDIATION PROCESS

A. During prior settlement discussions parties may have locked themselves into unalterable "principled" positions, with those positions simply being reiterated now in non-conciliatory manner.

B. Judicial mediator must endeavor to re-establish meaningful communication between parties.

1. Imperative to meet with parties jointly during initial mediation phase, since early sessions with separate sides may understandably create mistrust.
   a. Presence of clients should be required at the first settlement conference to be sure they comprehend process and actual status of case.
   b. Have parties sit adjacent to one another,
instead of directly across from one another, to minimize confrontational aspect of encounter.

c. Explain to parties the mediative function—the non-adjudicative, problem-solving role—so they will understand your part in the process.
   1. Explain confidential nature of mediation process and inadmissability of issues explored during settlement talks.
   2. Explain that mediation is forward-looking win-win process trying to structure future relations between parties compared to litigation that is backward-looking win-lose process.

2. Have parties carefully articulate their respective positions without significant interruptions—"Active Listening" promoted through non-judgmental but empathetic interjections ("I understand", "I see").

   a. Cathartic process which permits each side to fully express underlying feelings and beliefs in relatively sympathetic atmosphere [opportunity to be heard by neutral party].

   b. May induce previously recalcitrant opponent to have greater appreciation for rationales that were rejected during the prior settlement
discussions in pro forma fashion.

c. Permits judge to demonstrate neutral familiarity with facts and law applicable to case, thereby enhancing judicial credibility and acceptance.

d. Where parties do not appear to appreciate each other's positions, often beneficial to have each party summarize position of his/her opponent until opponent is satisfied with the summary.

3. Explore operative facts and law in non-threatening, objective manner and attempt to ascertain underlying needs and desires of the parties (both the clients and their attorneys).

a. Frustration generated during previously unsuccessful settlement discussions may have made it impossible for parties to do this effectively by themselves, and settlement conference may allow parties to vent their frustration in controlled environment.

b. Parties' myopic focus upon stated positions may well have caused them to ignore alternative formulations which might equally or even more optimally satisfy their underlying interests.

c. May have to educate unrealistically recalcitrant client(s) of true realities and
explain economic and psychological costs associated with protracted litigation.

1. Watch for indirect indications that an attorney is having difficulty moderating excessive aspirations of client, and attempt to facilitate enlightenment of client in way that will not embarrass legal counsel.

2. Since interests of attorney and client do not always coincide, it may be necessary to recognize that dual needs may have to be satisfied as prerequisite to attainment of terms acceptable to particular side of case.

3. At end of settlement conference, often beneficial to have each attorney provide judge with piece of paper containing minimum settlement position--that will not be divulged to opposing side--to apprise judge of exact distance between parties.

C. Once formal settlement conference with clients present is completed, usually preferable to conduct further settlement discussions with lawyers alone, since they better understand judicial mediation function and can often be more candid regarding strengths and weaknesses of case when their clients are not in attendance.
When marital dissolutions are involved, many judges have spouses participate in on-going settlement discussions, because of the unique relationships involved, the need for joint catharsis, and the desire of the parties to determine personally the final arrangements agreed upon.

VI. EXPLORATION OF INNOVATIVE ALTERNATIVES THAT MIGHT SATISFY UNDERLYING INTERESTS OF RESPECTIVE PARTIES

A. Encourage active participation of parties [through their attorneys] in such brainstorming sessions.
   1. Will precipitate disclosure of additional information regarding underlying desires and needs of parties.
   2. Re-opens direct communication channels between the parties and may indirectly re-establish negotiation process in fashion that does not cause either party to suffer loss of face.
      a. Patience is crucial during this phase, since it takes time for parties to move from adversarial mode to cooperational mode.
      b. Once relatively cooperative communication between the parties has been re-established, silence by the mediator, accompanied by supportive smiles and gestures, frequently optimal means of encouraging negotiation
process.
c. Where necessary, use non-threatening, objective
questions and suggestions to maintain positive
negotiating atmosphere.
3. Permits exploration of remedies more suited to
optimal resolution, such as retraction or public
apology in defamation suit, that may not be
available through formal adjudicatory process.

B. Try to avoid placing party in position where it may be
forced to engage in overt capitulation, instead
providing face-saving method of compromise.
1. Where possible, have significant concession matched
by seemingly reciprocal concession by opponent to
preserve aura of mutuality.
2. Provide lawyers with rationales they can use to
convince their respective clients of reasonableness
of settlement proposals.

C. Carefully monitor verbal and nonverbal signals which
might indicate that bi-party session is approaching
irreconcilable impasse.
1. Exaggerated emphasis upon unyielding positions aimed
more at impressing own clients than opponents.
2. Physical positioning of parties in confrontational
configuration.
3. Unreceptive crossing of arms/legs, often accompanied
by such signs of frustration as gnashing of teeth
and wringing of hands.

4. Be wary of passive-aggressive types who do not directly reject suggestions, but indirectly undermine negotiation process either by obliquely undercutting seemingly reasonable offers ["Yes it's a good offer, but it doesn't enhance the interests of my particular client because . . ."] or by using procrastination or tardiness to subvert settlement discussions.

5. Be aware of problems associated with "true believer," win-lose litigators who convince selves of virtue of own positions to prepare for combative trials, since these people fear that acknowledgment of weaknesses will undermine their ability to aggressively try the case if necessary. Try to induce these individuals to explore the relevant issues in hypothetical manner which allows them to detach settlement evaluations from actual case ["If, for sake of argument, we were to assume . . ., how might such a hypothetical issue be most appropriately analyzed and resolved?"].

VII. WHEN JOINT DISCUSSIONS DETERIORATE, SEPARATE SESSIONS MAY BE ADVANTAGEOUS

A. Explain during joint meeting with parties that you would like to explore the problem with each side
individually, and emphasize that you do not plan to support either party as such and that you will carefully maintain confidences shared by attorneys in such sessions.

B. In non-judgmental manner, try to ascertain underlying interests and beliefs of respective parties and seek to determine minimal objectives each side hopes to achieve.

1. Ask each side separately what you should know that you did not learn during the joint session(s), since parties are frequently willing to convey information to you in confidence that they would not be willing to divulge in front of opponent.

2. Be particularly attuned to items where the parties' interests are not diametrically opposed, since cooperative solutions might be formulated that mutually enhance the needs of both parties.

3. Seek to minimize the points of direct confrontation by suggesting alternatives which emphasize the areas of mutual interest while minimizing the areas of direct competition.

4. Ask each party what it really hopes to achieve from the instant case, since its true objective might be quite different from what has been openly expressed.

   a. A defamation plaintiff may prefer a public
retraction to requested monetary award.

b. A spouse in a dissolution proceeding may be willing to provide more generous child support in exchange for greater visitation rights.

c. A party involved with an on-going commercial relationship may fear that settlement of this controversy may prejudice its future dealings with other party, and you may be able to formulate a mutually acceptable arrangement that would avoid such adverse consequences.

C. Once underlying interests are understood and possibly acceptable alternatives have been explored with the individual parties, try to formulate overall proposal that will approximate a mutually acceptable arrangement and will appear to entail reciprocal concessions by both sides ["Appearance of Fairness"].

Lengthy mediation efforts may be appropriate in complex cases to diminish reserve of recalcitrant parties, since fatigue factor frequently causes individuals to become more malleable.

VIII. WHEN JOINT AND SEPARATE SESSIONS DO NOT PRODUCE SETTLEMENT, FREQUENTLY BENEFICIAL TO EMPLOY CASE EVALUATION/MINITRIAL APPROACH

A. Both attorneys should be asked to orally summarize their basic evidence and supporting legal theories.
B. Judicial mediator may orally evaluate strengths and weaknesses of stated positions and indicate manner in which trial court would probably resolve the dispute. Since an experienced judge can usually provide an accurate estimate of the probable trial outcome, such an advisory opinion may induce recalcitrant party to reassess its final settlement position.

C. Use of Judge Hubert Will's "Lloyds of London" Approach.

1. After parties summarize respective positions, ask each to objectively assess likely trial result—Plaintiff attorneys usually over-estimate outcome while defense lawyers tend to under-estimate.
   a. What is the probability that plaintiff will prevail at trial?
   b. If plaintiff were to prevail at trial, what would be likely monetary judgment?
   c. Multiply each side's probability that plaintiff will prevail times likely award predicted by that side should plaintiff win to determine the probable result contemplated by each party.
   d. Transaction costs are then subtracted from plaintiff’s expected outcome and added to defendant’s anticipated result.

2. Once this technique has been used to ascertain
anticipated results from perspective of both plaintiff and defendant attorneys, judge generally has narrower settlement range to work with.

D. In larger cases, judges may use a **minitrial** in which the facts and legal arguments are summarily presented before a panel comprised of two or three top officials from the plaintiff and defendant firms/organizations to be sure those leaders appreciate the operative facts, legal issues, and trial risks involved.

1. Key witnesses may testify in a summary fashion to allow the panel of party officials to hear the individuals who would testify at trial.

2. Once the panel members gain a better understanding of the strengths and weaknesses of each side’s positions, they are encouraged to consult with their own legal representatives with the hope this will facilitate further settlement negotiations.

**IX. USE OF SUMMARY JURY TRIAL MAY EDUCATE PARTIES**

A. Judge impanels six-person **advisory jury** from regular jury pool and has each party present case to panel in summary fashion—While some judges tell panel their decision will only be advisory, others do not hoping to obtain more carefully considered judgment. Where credibility is critical, key witnesses may be allowed to present abridged testimony.
B. Once case presented, judge instructs jury and requests verdict—Preferable to use *Special Verdict Instructions* that require jurors to evaluate and report on each relevant aspect of dispute to provide parties with full appreciation of juror thinking on each issue.

C. Once parties have been apprised of jury’s thinking, they have better understanding of way in which regular jury would be likely to resolve case making it easier for judge to encourage further settlement discussions.

X. **IN CASES INVOLVING MULTIPLE PARTIES, MODIFIED MEDIATION TECHNIQUES MAY BE NECESSARY**

A. Nothing mandates equal treatment of the parties on same side, since competing equities may militate in favor of unequal burdens and/or diverse parties may have different capacity or different willingness to accept their portion of overall settlement proposal.

B. It may be possible to meet with different parties on each side separately and to "whipsaw" various participants to move inexorably toward common ground. People on same side of a case do not necessarily have homogeneous interests, thus judge should seek to ascertain overlapping and conflicting interests which may have to be treated differently.
XI. USE OF TRIAL JUDGE AS PRE-TRIAL JUDICIAL MEDIATOR

A. If the judge scheduled to try a case participates in the pre-trial settlement discussions pertaining to that case, the parties may fear prejudicial trial rulings if the matter is not amicably resolved before trial.

1. In such circumstances, judge must work diligently to maintain neutral demeanor during settlement phase.

2. Judge should emphasize to parties that settlement talks will not be considered during subsequent trial proceedings and that no party will be disadvantaged simply because it rejects a settlement proposal.

   a. Some trial judges may feel most comfortable in these circumstances merely encouraging the parties to discuss settlement possibilities more earnestly themselves, so that they do not risk possible prejudice that might arise from more detailed knowledge of settlement exchanges.

   b. To avoid undue prejudice, trial judge may simply discuss how far apart parties are instead of specific positions being maintained.

   c. To enhance settlement process, trial judge may ask magistrate [or other judge] to perform the
mediation function-- with promise that mediator will not disclose any confidential information to the trial judge.

d. When trial judge becomes too involved with unsuccessful mediation efforts, often proper to transfer the case to another judge for trial.

B. Use of trial judge frequently causes parties to be more conciliatory during settlement process, since they are normally unwilling to exaggerate strength of case too significantly or to engage in outright mendacity that would probably be discovered by the judge at trial.

Similar settlement environment might be created in circumstances where judicial mediator will not try the case, through practice that requires parties to summarize respective positions in writing as last phase of the mediation process ["mini-trial"], with those documents being given to the trial judge prior to the commencement of the actual trial.

XII. ETHICAL CONSIDERATIONS RE JUDICIAL MEDIATION

A. Never appropriate to use deliberately deceptive tactics to take unconscionable advantage of unsuspecting party.

B. Try to avoid unconscionable settlements based primarily upon one side's undue deference to judicial authority.

Ethical ramifications different if one-sided accord achieved when one party gives in to demands of the
opponent [caveat emptor?], but if such result not produced prior to intervention of judicial mediator, likely that judge was a crucial catalyst.

C. Information provided by parties in confidence during separate mediation sessions should never be directly disclosed to the opponents.

When such information is being used to formulate an overall settlement proposal which might be mutually acceptable, the judge should be circumspect regarding the drafting of terms which might inadvertently compromise a party's confidence.

D. Never appropriate to make pre-trial decisions solely to increase settlement pressure on recalcitrant party.
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APPENDIX J

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