

# 3

## The Negotiation Process \* Product Details

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### I. INTRODUCTION

- A. Scope of Chapter **§3.1**
- B. Purpose of Chapter **§3.2**
- C. Definitions **§3.3**
- D. What Is the Purpose of Settlement? **§3.4**
  - 1. Seek a Result That Beats Litigation, for Both Sides **§3.5**
  - 2. Find Ways for Both Sides to Win Relative to Litigation, Not for One Side to Win Relative to the Other **§3.6**

### II. THE OPENING **§3.7**

- A. Set the Right Tone **§3.8**
  - 1. Develop Rapport **§3.9**
  - 2. Convey Understanding of or Empathy Toward the Other Side **§3.10**
  - 3. Assure the Other Side That You Are Participating in Good Faith **§3.11**
  - 4. Pay Attention to Body Language **§3.12**
- B. Introduce Problem-Solving Orientation **§3.13**
  - 1. Do Not Argue About Right and Wrong **§3.14**
  - 2. Turn the Dispute Into a Deal **§3.15**
  - 3. Approach Their Problem as *Your* Problem **§3.16**
- C. Convey Your Client's Perspective and Aspirations for Settlement **§3.17**
  - 1. Be Firm but Flexible **§3.18**
  - 2. Avoid Making Judgments **§3.19**
    - a. State Your Client's Point of View in Terms of Subjective Experience **§3.20**
    - b. Focus on the Impact on Your Client of the Events in Question, Not the Possible Intent or Motivations Behind Them **§3.21**
  - 3. Emphasize the Client's Interests, Not Positions **§3.22**
  - 4. Avoid Extreme Contentions **§3.23**
- D. Agree on Agenda, Goals, and Process **§3.24**

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1. Agenda and Goals **§3.25**
  2. Process **§3.26**
    - a. Get Mini-Agreements Along the Way **§3.27**
    - b. Negotiate Ground Rules **§3.28**
  - E. Negotiation Styles **§3.29**
    1. Competitor-Competitor Dynamic **§3.30**
    2. Competitor-Accommodator Dynamic **§3.31**
    3. Competitor-Avoider Dynamic **§3.32**
    4. Accommodator-Accommodator Dynamic **§3.33**
- III. EXCHANGING INFORMATION **§3.34**
- A. The Information-Sharing Process **§3.35**
    1. Reasons to Share Information
      - a. Deepening Your Understanding of the Dispute **§3.36**
      - b. Understanding Is Not Agreeing **§3.37**
      - c. Increasing Opportunities to Create Value **§3.38**
    2. When to Exchange Information **§3.39**
    3. How to Structure the Process of Sharing Information **§3.40**
      - a. Decide Who Will Participate **§3.41**
      - b. Decide What Supporting Evidence Is Needed **§3.42**
      - c. Create a Safe Environment **§3.43**
      - d. Avoid Rehashing Legal Arguments **§3.44**
      - e. Consider Postponing the Discussion of Solutions **§3.45**
  - B. Listening and Questioning Techniques **§3.46**
    1. The Importance of Listening **§3.47**
      - a. Listening Is a Source of Strength **§3.48**
      - b. Listening Is More Important Than Talking **§3.49**
      - c. Listening Tones Things Down **§3.50**
    2. Active Listening Techniques
      - a. Loop of Understanding **§3.51**
        - (1) Set Intention to Understand **§3.52**
        - (2) Pay Close Attention to the Speaker **§3.53**
        - (3) Reflect Back What You Understood **§3.54**
      - b. Focus on the Issue, Not the Speaker **§3.55**
      - c. Make Your Counterpart Want to Tell You More **§3.56**
    3. Active Listening Pitfalls
      - a. Responding With a Counterargument **§3.57**
      - b. Asking Another Question **§3.58**
      - c. Stating That You Have Understood **§3.59**
    4. Effective Questioning Techniques
      - a. Ask Open-Ended Questions to Elicit Information **§3.60**
      - b. Ask Closed-Ended Questions to Confirm Understanding **§3.61**

- c. Use The “Funnel” Technique **§3.62**
  - d. Helpful Questions
    - (1) Open-Ended Questions **§3.63**
    - (2) Questions That Clarify **§3.64**
    - (3) Questions That Encourage **§3.65**
    - (4) Questions That Diagnose **§3.66**
    - (5) Questions That Elicit Underlying Interests **§3.67**
- C. Managing the Exchange of Information **§3.68**
  - 1. Getting Information
    - a. What to Consider Getting **§3.69**
      - (1) Information About Underlying Interests **§3.70**
      - (2) Information About Their Reservation Point **§3.71**
      - (3) Information About Alternatives **§3.72**
      - (4) Information About Assumptions **§3.73**
      - (5) Information That May Identify Value-Creating Opportunities **§3.74**
    - b. Effective Ways to Get Information
      - (1) Get Information Before You Give It **§3.75**
      - (2) Use Active Listening and Effective Questioning Techniques **§3.76**
      - (3) Get and Give Information in Equal Amounts **§3.77**
  - 2. Giving Information
    - a. What to Consider Giving **§3.78**
    - b. Effective Ways to Give Information
      - (1) Invoke the Reciprocity Principle **§3.79**
      - (2) Give Only What Is Necessary **§3.80**
      - (3) Time Your Disclosures Wisely **§3.81**
  - 3. Guarding Information
    - a. What to Consider Guarding **§3.82**
      - (1) Reservation Points **§3.83**
      - (2) Why Your Client Wants to Settle **§3.84**
      - (3) Damaging Facts **§3.85**
    - b. Effective Ways to Guard Information **§3.86**
      - (1) Answer With a Question **§3.87**
      - (2) Answer a Different Question **§3.88**
      - (3) Over-Answer **§3.89**
      - (4) Openly Refuse to Answer, Citing Some Explanation **§3.90**
      - (5) Claim the Question Is Irrelevant **§3.91**
      - (6) Beware of Misrepresentation **§3.92**
- IV. THE NUMBERS GAME: OPENING OFFERS AND DEMANDS, CONCESSIONS, AND HARD-BARGAINING TACTICS **§3.93**
  - A. Knowing Your Reference Points **§3.94**
    - 1. Reservation Point **§3.95**
      - a. Be Clear About the Reservation Point **§3.96**

- b. Do Not Stray From the Reservation Point **§3.97**
    - 2. Target Point **§3.98**
    - 3. Opening Offer or Demand **§3.99**
  - B. Making Opening Offers and Demands
    - 1. Should You Make the First Offer or Demand? **§3.100**
      - a. Disadvantages of Going First
        - (1) You May Undervalue Your Case **§3.101**
        - (2) The Other Side May Undervalue Its Case **§3.102**
        - (3) You May Underestimate What the Other Side Will Pay or Accept **§3.103**
      - b. Advantages of Going First
        - (1) Anchoring Effect **§3.104**
        - (2) Building Trust and Optimism **§3.105**
      - c. Special Situations That Favor Going First
        - (1) Available Reference Points **§3.106**
        - (2) Strong Leverage **§3.107**
        - (3) Important Existing or Future Relationship **§3.108**
    - 2. How Optimistically Should You Open? **§3.109**
      - a. Advantages of Opening Optimistically
        - (1) People Who Ask for More Get More **§3.110**
        - (2) Greater Flexibility to Make Concessions **§3.111**
        - (3) The “Contrast Principle” **§3.112**
      - b. Disadvantages of Opening Optimistically **§3.113**
        - (1) Sending the Wrong Signal **§3.114**
        - (2) Looking Ridiculous **§3.115**
        - (3) Deadlock **§3.116**
      - c. Situations Not Conducive to Opening Optimistically **§3.117**
        - (1) When You Lack Leverage **§3.118**
        - (2) When the Other Side Will Not Negotiate **§3.119**
        - (3) When the Relationship Is More Important **§3.120**
  - C. Concessions **§3.121**
    - 1. Messages Communicated by Different Types of Concessions **§3.122**
      - a. Large Concessions
        - (1) Issues Conceded Were Not Important **§3.123**
        - (2) Weakness **§3.124**
        - (3) Lack of Credibility **§3.125**
        - (4) Indication of Future Concessions **§3.126**
      - b. Small Concessions
        - (1) Lack of Seriousness Regarding Settlement **§3.127**
        - (2) Approaching Reservation Point **§3.128**
      - c. Two Concessions in a Row **§3.129**
    - 2. Concession Strategies

- a. Resist the Urge to “Cut to the Chase” **§3.130**
- b. Consider Typical Concession Patterns
  - (1) Progressively Smaller Concessions **§3.131**
  - (2) Progressively Larger Concessions **§3.132**
  - (3) Concessions Followed by No Movement **§3.133**
- c. Do Not Bid Against Yourself **§3.134**
- d. Ask for and Make Return Concessions **§3.135**
- e. State Reasons Behind a Concession **§3.136**
- f. Use Concessions as a Means of Acknowledgment **§3.137**
- g. Express Willingness to Be Flexible **§3.138**
- D. Hard-Bargaining Tactics **§3.139**
  - 1. Hard-Bargaining Tactics to Watch Out For
    - a. Bluffing and Misrepresentation **§3.140**
    - b. “Take-It-or-Leave-It” Offers, Deadlines, and Walkouts **§3.141**
    - c. Aggression, Threats, and Blame **§3.142**
    - d. “I Moved This Much, Now You Move This Much” **§3.143**
      - (1) Not All Money Is Created Equal **§3.144**
      - (2) Opening Offers and Demands Are Arbitrary **§3.145**
    - e. No Authority **§3.146**
    - f. Last-Minute Terms and Costs **§3.147**
  - 2. Effective Countermeasures **§3.148**
    - a. Don’t Lose Sight of Your Alternatives **§3.149**
    - b. Change Players **§3.150**
    - c. Name the Game **§3.151**
    - d. Take a Break **§3.152**
    - e. Ignore the Tactic **§3.153**
    - f. Propose a Different Way **§3.154**
- V. PROBLEM-SOLVING APPROACHES TO NEGOTIATION **§3.155**
  - A. Focus on Interests More Than Positions **§3.156**
    - 1. Positions **§3.157**
    - 2. Interests **§3.158**
    - 3. The Problem With Negotiating Over Positions **§3.159**
    - 4. The Advantage of Negotiating Over Interests **§3.160**
    - 5. Examples of Positions and Corresponding Interests
      - a. Positions **§3.161**
      - b. Possible Corresponding Interests **§3.162**
      - c. Putting Positions and Interests Together **§3.163**
    - 6. Focus on Things Other Than Money **§3.164**
    - 7. Frame Interests in the Positive **§3.165**
    - 8. Get the Clients Involved **§3.166**
  - B. Expand the Settlement Pie **§3.167**
    - 1. Identify Shared Aversion to Risk **§3.168**

2. Identify Shared Interests **§3.169**
3. Identify Different Resources, Valuations, or Preferences **§3.170**
  - a. Different Resources or Valuation of Resources **§3.171**
  - b. Different Valuations of Time **§3.172**
  - c. Different Interests and Priorities **§3.173**
4. Aggregate Issues **§3.174**
5. Disaggregate Issues **§3.175**
6. Reduce Transaction Costs **§3.176**
7. “Split the Difference” Only After You Have Looked for Value-Creating Opportunities **§3.177**
- C. Develop Creative Settlement Options **§3.178**
  1. Invent the Options
    - a. Brainstorm Options **§3.179**
    - b. Postpone Evaluating Options Until After Brainstorming Them **§3.180**
    - c. Resist Looking for One Best Answer **§3.181**
    - d. Consider Unrelated Options **§3.182**
  2. Evaluate the Options **§3.183**
    - a. Evaluating Options Against Interests **§3.184**
    - b. Evaluating Options Against Alternatives **§3.185**
    - c. Evaluating Options Against Objective Criteria **§3.186**
    - d. Evaluating Options Against Your Client’s Reservation Point **§3.187**
  3. Refine the Options **§3.188**

## VI. TIPS FOR BREAKING THROUGH AN IMPASSE

- A. Use Your Leverage **§3.189**
  1. Types of Leverage **§3.190**
    - a. Situational Leverage **§3.191**
    - b. Personal Leverage **§3.192**
  2. Using Leverage
    - a. Don’t Threaten the Other Side **§3.193**
    - b. Discuss Alternatives to Reaching Agreement **§3.194**
    - c. Don’t Argue About the Merits **§3.195**
    - d. Improve Your Alternatives **§3.196**
  3. When You Have No Situational Leverage **§3.197**
    - a. Emphasize Uncertainty **§3.198**
    - b. Use Personal Leverage **§3.199**
    - c. Bluff With Caution **§3.200**
- B. Use Objective Standards **§3.201**
  1. Characteristics of a Viable “Objective Standard” **§3.202**
    - a. Neutrality **§3.203**
    - b. Reliability **§3.204**
    - c. Relevance **§3.205**

- 2. Examples of Objective Standards
  - a. Comparable Settlements **§3.206**
  - b. Reported Jury Verdicts **§3.207**
  - d. Laws, Rules, or Precedents **§3.208**
  - e. Industry Norms or Customs **§3.209**
- 3. Examples of Objective Procedures **§3.210**
  - a. One Cuts, the Other Chooses **§3.211**
  - b. Mediator or Neutral Third Party **§3.212**
- 4. Negotiating With Objective Standards **§3.213**
  - a. Gain Agreement on Objective Standards **§3.214**
  - b. Make Your Case Using the Objective Standard **§3.215**
  - c. If All Else Fails, Make Your Case Using Their Standards **§3.216**
  - C. Name the Dynamic **§3.217**
  - D. Exchange More Information **§3.218**
  - E. Reiterate Problem-Solving **§3.219**
  - F. Take a Break **§3.220**
  - G. Carve Out Issues That Cannot Be Negotiated **§3.221**
  - H. Reexamine Your Position **§3.222**
- VII. SELECTED BIBLIOGRAPHY **§3.223**
- VIII. CHECKLIST **§3.224**

## **I. INTRODUCTION**

### **§3.1 A. Scope of Chapter**

This chapter is subdivided into five main parts, which roughly track the phases of a settlement negotiation following the preparation phase (detailed in chap 2):

The first part presents the beginning of a negotiation and touches on such issues as how to build rapport, what to convey in your opening remarks, and how to structure the discussion to best achieve your client's objectives. On the opening, see §§3.7–3.33.

The second part covers the often overlooked process of giving and obtaining information. Topics treated in this part include effective techniques for giving, getting, and guarding information. On exchanging information, see §§3.34–3.92.

The third part discusses reaching a settlement outcome through the exchange of offers, demands, and concessions. It provides suggestions on opening demands and offers, concession strategies, and how to bargain effectively to obtain the optimal result for your client. It also offers tips for how to recognize and cope with classic hard-bargaining tactics. On the numbers game and bargaining tactics, see §§3.93–3.154.

The fourth part introduces problem-solving approaches to negotiation, *i.e.*, the ways in which both sides can work together to find overlooked opportunities to maximize their joint gain. If the traditional bargaining process can be thought of as dividing up a settlement “pie,” problem-solving approaches seek to expand the pie before it is divided. On problem-solving approaches to negotiation, see §§3.155–3.188.

Finally, the fifth part offers practical tips for moving the negotiation forward in the event of a stalemate or impasse. Topics discussed include the use of leverage and reference to objective standards and criteria. On overcoming impasse, see §§3.189–3.222.

This chapter includes a selected bibliography setting out some of the negotiation literature from which this chapter draws and offering sources for further research on negotiation theory and practice. See §3.223.

A checklist covering the important considerations in the negotiation process is provided at the end of the chapter. Counsel may find it useful to copy this checklist into their client files and consider the listed points when forming their negotiation strategy. See §3.224.

### **§3.2 B. Purpose of Chapter**

This chapter is designed to articulate the principles and strategies that effective negotiators use in the process of reaching a settlement agreement. It will also be helpful to attorneys negotiating a settlement with the assistance of a mediator. Using principles taken from academic research on negotiation, examples from a wide range of dispute settings, and concrete recommendations from practitioners in the field, it provides a framework for the major considerations that arise in settling a case.

Some attorneys will, understandably, be skeptical about the need for a full-length chapter on the negotiation process. Perhaps they think that good litigation skills readily translate into good negotiation skills, or perhaps they believe that negotiation has more to do with common sense than with a process guided by principles. Although there is truth to both intuitions, negotiation is materially different from litigation and requires its own form of thorough planning, thought, and strategy.

The purpose of this chapter is not to change the way attorneys negotiate or to propose the one “best” negotiation style; rather, its more modest goal is to help attorneys refine what they are already doing, by offering practical techniques and suggestions and by explaining the theory behind intuitive negotiation moves.

### §3.3 C. Definitions

**Counterpart.** As used below, “counterpart” refers to the person on the other side of the negotiating table. Unless the other side is representing itself, this will be opposing counsel.

**Party or Principal.** The terms “party” or “principal” refer specifically to the client(s), not their legal representatives.

**Other Side.** The term “other side” refers to anyone on the other side of the negotiation, *i.e.*, the counterpart, party, or principal, or all of them.

### §3.4 D. What Is the Purpose of Settlement?

Before beginning to negotiate, it is worthwhile to think about the client’s purpose in settling. Is it to right a wrong? To avoid litigation at whatever expense? To protect the client’s reputation or ensure confidentiality? Is it a combination of purposes? There are many valid reasons to settle a case, but they should be pursued only after counsel and client have considered a more fundamental purpose. On meeting with the client and preparing for negotiation, see chap 2.

### §3.5 1. Seek a Result That Beats Litigation, for Both Sides

At the most basic level, the purpose of settlement should be to place your client in a position that is superior to his next-best option—typically litigation—factoring in both the pros and cons of that option. For settlement to make sense, it should not be merely an alternative to litigation, it should be a *better* alternative.

For example, if a court victory would set a precedent favorable to your client in future cases, settlement is in your client’s interest only if it yields more than the value of the favorable precedent and ancillary benefits *minus* the combined value of the attorney fees, costs, time required to litigate, possible enforcement problems, risk of an adverse judgment, and other possible disadvantages of pursuing the favorable precedent. By the same token, if your client was clearly not at fault but the costs of defending the lawsuit would be enormous, it will be reasonable to settle for any amount less than what your client would expect to pay to be exonerated in court (factoring in the value to the client of having a day in court, the consequences of a settlement in future cases against the same or other plaintiffs, etc.). This is true even though it is clearly undesirable to pay even a penny to fend off a frivolous lawsuit.

When determining whether a particular settlement offer is superior to the result that can be achieved through litigation, attorneys

sometimes fail to fully evaluate the advantages and disadvantages of both options. Do not simply compare a settlement offer with your prediction of success on the merits or the outcome of litigation. Factor in the following additional considerations:

- The financial costs (including lost-opportunity costs) of settlement versus litigation.
- The ability to settle the case immediately versus the time it will take to prosecute or defend a lawsuit, including delays, appeals, possible remands, posttrial motions and, if you represent the plaintiff, the time it will take to enforce a favorable judgment.
- If you represent the plaintiff, the ability to walk away with money in hand versus the uncertainty of executing a favorable judgment.
- The subjective costs of settlement versus litigation. Litigation may involve intrusive discovery, appearances at depositions and in court, and other stresses associated with the adversarial process. But it may also afford the client a “day in court” or the satisfaction of vindicating a claim or defense.
- The ability to tailor a process and an outcome through a negotiated settlement versus the procedural straitjacket of litigation and the limited set of remedies awardable by a court of law.
- The privacy of settlement versus public adjudication, including the possibility of obtaining a published precedent that can be used in other cases.
- The goals and needs of your client and whether they are better served by litigation or settlement.

See also §3.176 on reducing transaction costs.

**EXAMPLE™** Your client sues Acme Corp. for fraud, seeking \$1 million. Factoring in the strength of Acme Corp.’s defenses, you believe there is a 70 percent chance that your client will prevail in the lawsuit. You expect the litigation to take at least two years, and for your client to incur \$200,000 in attorney fees and discovery and court costs (none of which is reimbursable by law). Factoring in the risks of litigation and fees and costs, the net value of the litigation thus far is approximately \$500,000 ( $\$1 \text{ million} \times 70\% = \$700,000$ ;  $\$700,000 - \$200,000 = \$500,000$ ). There may be other risks or drawbacks to the litigation for your client: Is there a risk that a favorable judgment would be unenforceable and, if so, how much would your client be willing to pay to eliminate that risk? How much would your client be willing to pay to avoid a two-year wait until judgment?

How much would your client be willing to pay to avoid the stress, frustration, and other subjective costs of litigation? Assume the total of all of these additional factors is worth \$100,000, bringing the net value of the litigation option down to \$400,000. If your client is to settle at all, it should be to *improve* on the litigation option—in this case, \$400,000. Thus, it is not in your client’s interest to settle for \$300,000, because the litigation option is better. At the same time, you would be hedging your bets in a negotiation by claiming “\$700,000 or no deal.” Although \$700,000 reflects your assessment of the chances of success on the merits, it does not incorporate other litigation-related costs to your client. If you can settle for \$700,000, all the better; however, keep in mind that any amount greater than \$400,000 represents a good settlement outcome here because it makes your client better off than the alternative of going to court.

Because it takes two to reach an out-of-court agreement, you are unlikely to settle the case unless your counterpart’s client is also better off settling than continuing to litigate. Thus, the overarching purpose of settlement may be expressed as follows: *to find a result that places both clients in a better position than the one they could achieve through their next-best alternative (typically litigation), factoring in the various risks and transaction costs associated with that alternative.*

### **§3.6            2. Find Ways for Both Sides to Win Relative to Litigation, Not for One Side to Win Relative to the Other**

In contrast to the approach described above, litigators typically seek results that reflect the “value” of the case, measured by their predictions about the likelihood of success on the merits. In some cases they view the purpose of settlement as convincing the other side that it has no case. The trouble with these approaches is that when both sides take them, the negotiation quickly devolves into a contest about who is right and who is wrong, either about the legal merits or about what happened between the parties. Each side works against the other to assert its point of view, yet there is no neutral third party to render a binding decision.

One of the underlying suggestions of this chapter is that you and your counterpart are better off shifting your attention away from arguing about right and wrong and toward the more pragmatic exercise of determining whether and how both parties can achieve superior results through a negotiated settlement. Instead of approaching settlement from inside the dispute (*i.e.*, who did what to

whom, the relative strengths of each side's argument), look outside the dispute (*i.e.*, how does a particular settlement proposal compare with the next-best alternative if no agreement is reached?). Try not to think in terms of how your client can "win" in a contest with the other side, but rather how *both* clients can win relative to their default option of litigation.

Another way of framing the underlying purpose of settlement is to think of converting the dispute into a transaction or deal. Your counterpart may not appreciate this approach, but his business-minded client probably will. Settlement should be a constructive, forward-looking process—an opportunity for both sides to improve the status quo, not a way to play out the litigation in an abbreviated format. If your efforts at negotiation fail, you always have litigation as a backup. Meanwhile, however, you need to garner the other side's cooperation and interest if you want a stipulated dismissal of the lawsuit. See §3.15.

### **§3.7            II. THE OPENING**

Whether it happens informally on the telephone or in a more formal face-to-face meeting, the beginning of a negotiation can be critical to its success. First words and impressions are lasting; if you get off to the wrong start, it can erode trust, dampen optimism about the outlook for settlement, and increase the probability of deadlock. The extra attention you pay to the opening will greatly outweigh the time and effort you may later expend rescuing a negotiation built on faulty foundations.

Think of the opening as an opportunity to set a positive, productive tone for the remainder of your discussion. Beyond that, the opening can be used to clarify assumptions and expectations, build rapport, and lend structure to the discussion. Use the opening to introduce your client's positions, interests, and aspirations, while you invite your counterpart to participate in setting the agenda and a joint process.

### **§3.8            A. Set the Right Tone**

How to set the right tone for the negotiation depends in large part on what tone you wish to convey. For example, you may strongly believe that a particular lawsuit instituted against your client was frivolous and brought in bad faith. In that case, your attitude toward settlement may understandably be very different than if you believe that resolution is in the best interests of all parties involved.

### §3.9 1. Develop Rapport

Establishing a good rapport with your counterpart will go a long way toward fostering conditions that facilitate settlement. Rapport can be established in a number of ways, including chit-chat, paying compliments, humor, and graciousness. Choose a method that comes naturally and works for you; it is less important how you do it than the sincerity with which you do it. People are remarkably sensitive to false expressions of warmth. Note that you can be sincere about wanting to build rapport even if your ultimate goal is to get the most for your client from a settlement. Moreover, building rapport for purposes of the negotiation does not necessarily mean you have to like or become friends with your counterpart.

### §3.10 2. Convey Understanding of or Empathy Toward the Other Side

People want to be heard and to have their perspectives acknowledged. One of the best things to do at the outset of a settlement negotiation is to show your understanding of how the other side may be feeling as a result of the underlying events or why it is taking a certain position or advancing a certain argument.

**PRACTICE TIP™** Try putting yourself in the other party's shoes for a moment. What could the other party be going through? What might the other party be feeling about your client? How might the other party or your counterpart be reacting to how you have chosen to litigate the case? If you are not sure, express your willingness to listen and understand.

By understanding and acknowledging the other party's point of view first, *before* you forge ahead with your own, you are sending a signal that you are prepared to be fair and balanced. This can go a long way toward setting a constructive tone for the negotiation.

The key here is not just to understand but to *demonstrate* your understanding through your words, your acts, and, most important, your sincerity. Do not simply state that you understand or know how the other party feels; rather, refer to specific things they said, point to particular facts or events, and relate your personal experiences. See §§3.54, 3.59.

Demonstrating your understanding of the other side does not in any way imply that you agree with them or that you are giving up on your client's side of the story. See §3.37. You can empathize with the situation of the other side even as you continue to defend or assert your client's perspective.

**EXAMPLE™** If you represent the defendant in a wrongful death case, it obviously pays to begin the negotiation by acknowledging the plaintiff's loss, no matter how meritless the case may be. Do not simply say you are sorry; instead, try relating what you learned about the decedent through discovery, or drawing on your own experience to put into words what the plaintiff must be going through. If there is some reason why the other side believes your client to be at fault, show them that you understand how they could come to this conclusion *without* necessarily agreeing with it. If you are prepared to admit some contributory fault, oversight, or even innocent neglect, consider doing so.

### **§3.11            3. Assure the Other Side That You Are Participating in Good Faith**

Negotiations often fail because one or both sides feel that the other side is not coming to the table in good faith. For example, your counterpart may interpret your words or conduct to suggest that your client is not seriously interested in settlement or that you are using the negotiation as a “fishing expedition” to discover more facts. However unwarranted, such conclusions are understandable given the extent to which surprise, secrecy, and ambiguity are acceptable moves in litigation.

Convey your client's sincerity and optimism about settlement. One way to do this is to explain *why* your client is interested in terminating the litigation at this time.

**PRACTICE TIP™** Your counterpart may try to argue that you are being inconsistent or two-faced by, on the one hand, stating that your client is genuinely interested in exploring settlement and, on the other, stating that the settlement must fall within a certain range to make sense for your client. There is no inconsistency here, however. If your client can achieve more for himself through litigation than through settlement, it would be foolish to choose settlement no matter how well-intentioned your client may be about it. Remember, settlement makes sense only if it is a *better* alternative than litigation. See §§3.4–3.6. When faced with this argument by your counterpart, explain this logic in a nonconfrontational way.

Conduct is just as important as words in conveying your client's seriousness about settlement. Attorneys often interpret a lack of responsiveness to settlement overtures as a sign that the other side is not acting in good faith. To leave the option open in the future, extend your counterpart the courtesy of returning his or her telephone calls, e-

mails, and other correspondence even if your client is not interested at the present time. Possibilities for settlement arise in unexpected ways during the life of a lawsuit. Although you may consider yourself to be in a position of strength now, changed circumstances, further discovery, or rulings from the court may lead you to a very different conclusion in the future. Keep your options open.

Finally, be transparent. If your client is of two minds about settlement, say so. The less you have to hide, the more you will seem sincere to your counterpart.

### **§3.12 4. Pay Attention to Body Language**

Trial lawyers know the way in which body language can make a difference in the courtroom. The same is no less true in a face-to-face negotiation. Be attuned to the nonverbal cues you transmit, such as facial expressions and hand gestures. Sit in an open position with your legs and arms parallel, not crossed; crossing can suggest rigidity and reluctance. Position yourself so that you are facing your counterpart directly as opposed to at an angle, which can convey that you are not giving your counterpart your full attention or respect. Try to sit reasonably close to your counterpart; physical proximity can suggest a closeness in your working relationship.

In addition to your own body language, pay attention to that of your counterpart. In recent years, negotiators have begun to follow the growing research and literature on how to “read” unconscious body movements and facial expressions for the emotions they disclose. Familiarizing yourself with such research can be highly beneficial: For example, the ability to discern a feeling of surprise or happiness in your counterpart when you make a settlement offer can give you the confidence to resist your counterpart’s efforts to bargain for more. Similarly, noticing a discrepancy between your counterpart’s statements and body language could alert you to situations in which your counterpart may not be telling the truth. A full discussion of this topic is beyond the scope of this chapter. Readers interested in this subject should consult the bibliography at the end of this chapter. For further reading, see Ekman, *Emotions Revealed: Recognizing Faces and Feelings to Improve Communication and Emotional Life* (2003).

### **§3.13 B. Introduce Problem-Solving Orientation**

Litigators often bring an adversarial mind-set with them to the settlement table. This can manifest itself in posturing, or in each side’s emphasizing (or perhaps threatening) what will happen in court if the case does not settle. The result is that the negotiators work against

each other to worsen the problem, rather than *with* each other to solve it.

An important component of setting a positive tone for the settlement is to steer away from an adversarial orientation and toward a problem-solving one. What can you do to foster such a problem-solving atmosphere? Below are some suggestions.

**NOTE™** Problem-solving is not the same as compromising or shying away from your client's interests; it simply means working in concert with your counterpart to frame the problem in a way that addresses *both* parties' concerns and interests. Every inch of cooperation that you give your counterpart does not necessarily translate into an inch of assertion that you take away from your client. Although it sounds paradoxical, it is possible to be both highly assertive about your client's interests and highly cooperative with your counterpart at the same time.

### **§3.14      1. Do Not Argue About Right and Wrong**

One way to promote problem-solving is to discourage a discussion of who was right and who was wrong, either in relation to the law or the underlying conduct of the parties. Arguing about the merits is of little use in the absence of a judge or jury to declare one side the winner. Further, although there is a place for making reasoned arguments during settlement discussions, as a practical matter it is extremely unlikely that you will convince the other side to accept your legal position wholesale—no matter how correct or persuasive you believe that position to be.

Instead of discussing how one side's legal or factual position is superior to the other's, it is far more productive to determine how both sides could be better off by settling rather than taking their chances in court. As discussed in §3.5, the goal of a good settlement is to place the parties in a position superior to that of litigation. Inviting the other side to join in the pursuit of this goal is to appeal to their practical and business sense, not their command of technical arguments or their desire to win. It is forward-looking and focuses on the positive (how both sides can start to benefit) rather than being backward-looking and focusing on the negative (how one side was wronged by the other).

**NOTE™** When trying to figure out whether any particular settlement option is superior to litigation, you will undoubtedly find yourselves looking at the merits of the case. But here the purpose of analyzing the merits should not be to "win" relative to the other side, but rather for both sides to evaluate whether the

settlement option is truly better than the alternative of continuing litigation.

### **§3.15      2. Turn the Dispute Into a Deal**

Another way to introduce a problem-solving orientation is to think of converting the dispute into a deal. See §3.6. Unless you represent a plaintiff willing to dismiss the case for nothing in return, the reality is that you need the other side's cooperation to resolve the lawsuit out of court. Instead of looking at your counterpart as the enemy, look at your counterpart as a partner who can help both of your clients avoid a potentially much larger problem, *i.e.*, the costs, time, and risk of continued litigation. Invite your counterpart to view you and your client in the same light. Reframe your negotiation not as a contest about who can get more for his client, but as a deal that could make both clients better off than the alternative of going to court.

### **§3.16      3. Approach Their Problem as *Your* Problem**

It is tempting to think of yourself as responsible only for your client's side of the equation, *e.g.*, how best to satisfy your client's needs and interests or overcome your client's constraints. Under this view, the other side's problems are for them to fix.

In reality, however, you are unlikely to get an agreement from the other side unless you also manage to address their side of the equation: What are they trying to achieve? What is important to them? What do they need? A problem-solving orientation takes the other side's perspectives and realities into account.

Frame the negotiation as a joint search for solutions to joint problems, not as a separate search for partisan solutions. When making offers or demands, think of your task as developing "yesable" proposals—proposals that will be difficult for the other side to turn down.

### **§3.17      C. Convey Your Client's Perspective and Aspirations for Settlement**

Another component of the opening phase of a negotiation is articulating your client's intentions, needs, and hopes regarding a settlement. It is important to be forthright about this to avoid misunderstandings and inflated expectations. The following are some suggestions for asserting your client's point of view in a way that can also foster an atmosphere conducive to settlement.

### **§3.18 1. Be Firm but Flexible**

Your client may hold strong views about what happened or who was at fault. If so, be true to the weight of your client's feelings but remain open to the possibility that the other side has a plausible alternative explanation. Similarly, your client may have rigid requirements about a settlement range; when conveying those requirements, try to express flexibility and an openness to considering alternatives.

Avoid using terms such as "no" or "never." Instead, try to use other expressions that will keep the other side's expectations in check but still convey optimism and possibility, *e.g.*, "maybe," "possibly," "unlikely, but..."

**NOTE™** A willingness to be flexible does not compromise your professional duty to act as a zealous advocate of your client. It takes two to settle a case; flexibility is in your client's interest because it gives you room to craft a solution that will be sellable to the other side. It is not inconsistent to be firm about what is important to your client *and* to remain flexible about the details of how your client's needs are satisfied.

### **§3.19 2. Avoid Making Judgments**

The dispute that gave rise to litigation may be highly contentious and elicit heated emotions from both sides. In these circumstances it is very easy to make judgments about one side's conduct or character, or to make statements that appear accusatory or defensive.

There are two ways to mitigate this tendency. First, eschew judgments of the other side in favor of subjective descriptions of your client's experience. Second, disentangle the intentions behind words or conduct from the impact of those words or conduct. These techniques are explained below.

### **§3.20 a. State Your Client's Point of View in Terms of Subjective Experience**

Consider the example of a client suing her physician for malpractice. One way to state the client's position would be to say, "What the defendant did was totally incompetent; this has to be one of the most egregious cases of malpractice I have seen for quite some time." Although these judgments may be supportable, the problem with them is that they can involve you in a debate with the other side about whether or not the conduct was in fact "incompetent," or whether this was indeed one of the worst cases of malpractice in recent times.

A far more effective approach would be to convey the same points using a combination of concrete facts and your client's personal experience. For example, "When it was later discovered that my client's tumor was in fact malignant, can you imagine for a moment what my client went through?" Or, "Regardless of whether there was any malpractice, when your client denied any possibility of wrongdoing and then demanded payment for services, my client felt as if the person she trusted and relied on had suddenly turned against her."

The advantage of this approach is that it gives the other side little or no leeway to engage in debate. Whether or not the conduct was incompetent or egregious, the fact still remains that your client suffered what she suffered and felt what she felt. Your client is the ultimate arbiter of those subjective facts.

### **§3.21      b. Focus on the Impact on Your Client of the Events in Question, Not the Possible Intent or Motivations Behind Them**

We often draw unwarranted conclusions and judgments because we conflate one party's intentions in saying or doing something with the impact that those words or deeds have on us. For example, if you represent an African American employee who was terminated by his employer, you may infer from the circumstances that his termination was racially motivated. Even if a racial motivation seems obvious from the situation, try and refrain from making a judgment about the employer's state of mind. Why? Because motives are complex: There is rarely one clear intention behind our acts. There may have been a discriminatory component to the termination, but there may also have been other, more legitimate reasons for it, *e.g.*, the employee's unsatisfactory performance or the employer's business needs.

Instead of jumping to conclusions about the other side's motives or intentions, convey your client's position from the perspective he knows best: the impact that the termination had on him. Explain how your client felt and what your client inferred given the circumstances. If you are persuasive, it may get your counterpart to think about the way a jury might feel if apprised of the same facts.

### **§3.22      3. Emphasize the Client's Interests, Not Positions**

At the outset of the negotiation it is wise not to start with a particular position such as "My client needs at least \$100,000 to settle this case." Positions can be satisfied only if the other side agrees to

them; yet it is unlikely that you will elicit such agreement so early in the negotiation. Positions can therefore seem inflexible and somewhat arbitrary.

Instead, emphasize what motivates your client's position. Why does your client need \$100,000? Is it important to your client to have enough financial resources to honor other contractual obligations? Does your client seek some kind of insurance against future breaches by the same party? Is it important that your client feel respected or receive some acknowledgment or apology for the breach? By getting to the root of what is important to your client, you can demonstrate flexibility about outcomes. See §§3.156–3.166.

**PRACTICE TIP™** Revealing your client's motives and underlying interests early on in the negotiation may leave your client exposed. Care must be given to what and how much is disclosed at the outset. Nonetheless, expressing your client's desires and aspirations for settlement in terms of primary concerns—*i.e.*, what is most important to your client—is typically a more fruitful strategy than issuing a narrow or specific demand.

### **§3.23      4. Avoid Extreme Contentions**

Litigators tend to see things in black and white; skilled negotiators are better at thinking in terms of shades of gray. When it comes to human interactions, sweeping conclusions and absolute judgments are extremely difficult to support. Declarations such as “We did nothing wrong” or “It was all their fault” are true less often than we like to believe. By making such claims, you are more likely to alienate than to convince your counterpart.

Instead, try to embrace the multifaceted aspect of every human interaction and acknowledge the role, however small, that your client had or may have had in causing or worsening the problem. For example, in a partnership dispute, it may be clear that one partner failed to fulfill certain partnership duties. Rather than arguing that it was all that partner's fault, consider whether your client may have contributed to this situation. Did your client cut back on available resources, making the partner's role more difficult? Did your client fail to give moral support to allow the partner to blossom in his or her role? Even if neither of these things is material from a legal or even a moral point of view, simply acknowledging the complexity and multiplicity of perspectives in your presentation of the issues will go a long way toward creating an amicable environment for settlement.

Similarly, if you believe that the other side was clearly at fault, try to put yourself in their situation to see if there were aspects of their conduct that were not blameworthy. For example, in a wrongful

termination case based on gender discrimination, even though the evidence may clearly suggest a discriminatory motive, consider whether there might also have been legitimate reasons for the termination. Legitimate reasons can coexist with illegitimate ones—perhaps each side is simply focusing on the aspects of the underlying conduct that support their case.

Finally, admit your client's error or inadvertence when appropriate. Remember that the burden of proof in civil cases is preponderance of the evidence; it is not necessary for the winner of a lawsuit to be 100 percent right and for the loser to be 100 percent wrong. Even if you believe your client will win at trial, you still have room to concede some uncertainty.

### **§3.24 D. Agree on Agenda, Goals, and Process**

Settlement discussions may take shape during informal discussions between the principals, or they may be highly orchestrated, set to begin and end in a conference room, with multiple participants flying in from around the country. It is a good idea toward the beginning of the process to reach some agreements about how you are going to work together and what you are going to accomplish.

### **§3.25 1. Agenda and Goals**

Conducting settlement discussions without an agenda is like driving to an unfamiliar destination without a roadmap: It is possible, and in fact many people do it, but it is not very efficient. If time and professionalism are valuable to you, consider inviting the other side to help you come up with an agenda. The agenda can be limited to an upcoming meeting or it can be more ambitious, setting the framework for a series of meetings. It doesn't have to be drawn up in advance, either: If you find yourself in a meeting that is not getting any traction, call a break and get everyone's input on how you can make the most productive use of your remaining time.

Some of the issues you may wish to address include the following:

- What is the purpose of our discussion?
- Is the goal to resolve the entire case, or to carve out some issues for adjudication and others for settlement?
- Should we deal with all of the defendants/plaintiffs concurrently, or does it make more sense to pursue discussions with each group one after the other?
- What can we realistically expect to achieve in this meeting?
- What issues do we want to discuss or resolve in this meeting?

- How much time do we have?
- What needs to be done in preparation for the meeting, by when, and by whom?

Even if you stray from your agenda, the simple act of focusing your thoughts on what tasks need to be accomplished will save time and prevent discussion of unnecessary subjects. In addition, do not underestimate the value of agreeing on something as simple as an agenda. By doing so, you are foreshadowing future agreements and setting the stage for a cooperative working relationship.

### **§3.26      2. Process**

Instead of bumping your way through an imperfect settlement process, or imposing a process that does not work for your counterpart, consider designing a *joint* process that is tailored to both of your needs, both of your clients' needs, and both of your negotiating styles. Will it be necessary to structure some formal exchange of documents as part of the settlement process? Will it help to have input from the litigants, from third parties, or from experts, or will a simple back-and-forth of numbers by e-mail be sufficient?

You stand the best chance of getting a good outcome by starting with a good process. Why? Because negotiating *how* you will work together—not just *what* you will try to achieve—helps you and your counterpart take ownership of the process. Below are some other considerations for cultivating a good process.

### **§3.27      a. Get Mini-Agreements Along the Way**

One aspect of negotiating a process is to make sure that your counterpart continues to be interested and engaged every step of the way. You can achieve this by getting agreement each time you move to the discussion of a new topic, or move into a different phase of the negotiation. For example, if you think it is time to start talking numbers, you might consider first asking whether your counterpart is also prepared to do this. If you feel it would be helpful to try brainstorming ways to create value (see §§3.179–3.182), explain what you propose to do and get buy-in from your counterpart. If it is getting late but you would rather keep the momentum going than adjourn until a later date, ask if your counterpart is similarly inclined before simply assuming this to be the case.

By getting agreement from your counterpart for every aspect of your joint process, you ensure that your counterpart feels ownership in it. That way, if the negotiation takes an unproductive turn, you will

each feel more responsibility for rescuing the process than if the process had been forced on one of you.

### **§3.28      b. Negotiate Ground Rules**

Although they can often seem cumbersome, you may find it helpful to suggest a set of ground rules to facilitate your joint and full participation. Discuss such agreements with your counterpart and reduce them to writing. For example:

- If important trade secrets or other sensitive information is involved, consider a default rule that all information exchanged will be confidential or “attorney eyes only” unless otherwise agreed. See §3.43.
- If you are concerned about the effect of waiver or estoppel, have some understanding that nothing said or done during settlement discussions can be used against you in future litigation.
- In extremely contentious cases, consider ground rules such as not interrupting, and being respectful.

### **§3.29      E. Negotiation Styles**

Negotiators come in all different stripes. Perhaps you are someone who prefers to avoid confrontation but your counterpart enjoys the tug-of-war of negotiation. Perhaps both of you are extremely conciliatory, to the point that you end up reaching an agreement before even realizing it. Difficulties can sometimes arise when you and your counterpart have mismatched negotiating styles.

It may be helpful to understand your own negotiation style and how it interacts with other styles, including that of your counterpart. There are many ways of classifying negotiation styles and of describing the way they interact. None is perfect and all involve a degree of generalization. Nonetheless, consider some of the following common dynamics. See Mnookin, Peppet, & Tulumello, *Beyond Winning: Negotiating to Create Value in Deals and Disputes* 53–54 (2000); Thomas & Kilman, *The Thomas-Kilman Conflict Mode Instrument*, CPP, Inc., available online at <http://www.cpp.com/products/tki/index.asp>.

### **§3.30      1. Competitor-Competitor Dynamic**

In the competitor-competitor dynamic, both sides are highly assertive and naturally inclined to try and “win” as much as possible for the client. Both are strong-willed and can become argumentative to

the point that they may exchange threats about what they will do to the other side in litigation if the case does not settle.

Although competitors are sometimes well-paired against each other, the problem with this pairing is that it often results in impasse. If you notice a competitor-competitor dynamic in your negotiation, it may be helpful to use more active-listening skills to try to see the problem from the other side's perspective (see §§3.51–3.56), or to steer yourselves away from a “win-lose” mentality and toward figuring out how *both* of you can “win” by avoiding litigation. Remember, no matter how competitive you get, at the end of the day you each need the other's cooperation to avoid litigation.

### **§3.31      2. Competitor-Accommodator Dynamic**

In the competitor-accommodator dynamic, one side is naturally inclined to press its client's interests while the other side is more comfortable trying not to rock the boat. Problems can arise when the accommodator reveals all his cards immediately in the hope of facilitating a speedy and amicable settlement. The competitor may refuse to make reciprocal disclosures and then take advantage of the imbalance of information. Alternatively, the competitor may exert pressure on the accommodator to make unwise concessions or perhaps more concessions than the accommodator was prepared to make. Accommodators need to be aware of this possibility so that they do not concede too much and shortchange their clients. Competitors should also consider the problems associated with “bulldozing” an accommodating counterpart if they seek a final agreement that will stick. The accommodator who one day concedes too much may the next day be looking for ways to undo the agreement.

**PRACTICE TIP™** If you are an accommodator, consider recruiting a more assertive partner or associate to help you negotiate with a competitor.

### **§3.32      3. Competitor-Avoider Dynamic**

The competitor-avoider dynamic is very similar to the competitor-accommodator dynamic, except that the competitor's counterpart is more comfortable putting off or avoiding the negotiation than engaging in it. The avoider in this situation finds excuses to delay or get out of settlement discussions by saying, *e.g.*, “It is not worth our time,” “They will never listen,” “This is not the type of case that can settle.” The competitor in this situation is typically dealing with someone who does not return phone calls or respond to settlement

overtures, or perhaps someone who consistently shows up unprepared or defers making decisions.

The competitor-avoider dynamic can leave the competitor suspicious of the other side's sincerity and interest in settlement. The task for the competitor is to realize that what appears to be a lack of good-faith participation could simply be a well-intentioned but "avoiding" negotiation style. Instead of putting more pressure on your counterpart, a better approach may be to make a safe, inviting proposition and help the avoider to initiate engagement.

By contrast, the avoider may be tempted to cut off negotiations prematurely, feeling bullied or cornered by the competitor. Prematurely ending settlement talks may produce less-than-optimal results for the avoider's client, however. The task for the avoider is therefore to find a way to be more assertive, perhaps by teaming up with a colleague or associate or by making explicit the terms on which the avoider is willing and able to participate.

### **§3.33      4. Accommodator-Accommodator Dynamic**

Are you both extremely nice to each other? Is there a preexisting professional or personal relationship between you that could be jeopardized by an extremely contentious negotiation? Do you each find yourself empathizing with the situation of your counterpart's client? Answering "yes" to one or all of these questions may suggest that you are both accommodators.

Negotiations between accommodators can often result in a surprisingly quick agreement. But the seeming ease of the settlement may mask lost opportunities for both sides. In their zeal for maintaining a cordial relationship, either between themselves as negotiators or between their clients, accommodators sometimes overlook superior outcomes.

If you find yourself in an accommodator-accommodator dynamic, try to find the wellsprings of your assertiveness. If you need to take a harder line, *e.g.*, by asking for more or conceding less of something, it may help to frame your position in terms of your duty to act in the best interests of your client. Alternatively, inspire yourself and your counterpart to think of the negotiation as a way of maximizing joint "winnings," measured by what you can accomplish or gain for your clients by settling rather than by proceeding with litigation.

### **§3.34 III. EXCHANGING INFORMATION**

Information exchanged—or not exchanged—in the negotiation process will affect the result obtained for your client. Gaining a full understanding of the problem from all perspectives will better equip you and your counterpart to identify solutions that satisfy not just your own client’s interests, but also the interests of the other side.

Attorneys often skip over the process of exchanging information, preferring instead to dive straight into a discussion of what the case is “worth.” By the time settlement discussions take place, they have usually conducted discovery and researched the relevant legal issues. What more information would they possibly need to obtain?

The answer is, a whole lot more. Litigation is a narrow way of framing a dispute. It forces the parties to filter their experience into legally cognizable claims and remedies, even though the dispute itself is likely animated by a much wider range of issues—issues that, while perhaps legally inconsequential, may be highly relevant in motivating the parties to settle. Such issues may include the parties’ motives and intentions, their perceptions and assumptions, their feelings, what is important or meaningful to them, and what concerns or frightens them.

The point is not to try and resolve the underlying issues, but rather to use your understanding of those issues to terminate the litigation. For example, assisting your client to reach a sensible divorce settlement does not entail helping your client gain closure on the deeper issues of the relationship. Nonetheless, having a more global understanding of the problem from each party’s perspective will leave you that much better equipped to facilitate and structure an end to the lawsuit.

### **§3.35 A. The Information-Sharing Process**

Consider dedicating a part of the negotiation to a process of exchanging information. You can think of this as an opportunity for each side to ask questions about the other’s perspective, goals, and underlying interests. You can also use this time to present your client’s particular concerns or viewpoints, your assessment of the strengths and weaknesses of each side’s case, or any other issue that would increase your collective knowledge about the dispute and how best to resolve it.

**NOTE™** Resist the urge to suggest solutions, make proposals, or talk numbers during the information-exchange phase. The purpose of sharing information is to promote a comprehensive understanding of the problem in order to come up with sensible

and mutually agreeable solutions. Talking about solutions *before* you have made inroads into this process places the cart before the horse.

## 1. Reasons to Share Information

### §3.36 a. Deepening Your Understanding of the Dispute

As noted above, exchanging information has the benefit of refining your understanding of the parties' dispute and their constraints, interests, and aspirations for settlement. If you have followed the suggestions in the chapter on preparing for negotiation (see chap 2), you may already have gained an understanding of these issues from your client's perspective. Exchanging information during the negotiation process is an opportunity for you now to learn more about the other side's perspective.

Why do this? Aside from making you a more effective problem-solver, a more multifaceted understanding of the various perspectives will enable you to identify more-sophisticated solutions—solutions that stand a better chance of meeting the interests of your client *and* of the other side.

**PRACTICE TIP™** Don't assume that you know the other side's motivations, interests, and constraints. Resist the urge to analogize to prior cases. Chances are that some of your assumptions and inferences will be accurate but that some will not be. You won't really know which until you do some information-gathering.

### §3.37 b. Understanding Is Not Agreeing

Litigators often overlook the importance of understanding the other side. This may stem from a fear that by trying to identify with the other side's perspective or situation, you might end up agreeing with it, which in turn could affect your duty to zealously represent your client. Alternatively, you might believe understanding to be futile because you cannot envision ever agreeing with the other side and you carry no hope that they will ever agree with you.

In both cases, the error is to equate understanding the other side with agreeing with them. Disagreement is just as likely an outcome of understanding as is agreement. The expression "Know your enemy" underscores both the possibility and value of understanding someone or something with which you know you will never agree.

### §3.38 c. Increasing Opportunities to Create Value

Negotiators can leave money on the table because they fail to exchange enough information with one another. You give yourself the greatest chance of identifying optimal results for both parties if you discover what is important to the other side *and* if you share what is important to yours. Why? Because you each have separate knowledge about your clients' interests, resources, and preferences. By understanding what the parties want or have in common, you identify possible synergies that could result in mutual gain. See §§3.168–3.169. By learning what they have or value differently, you identify trade-offs that can leave each side better off by redistributing assets. §§3.170–3.173.

**EXAMPLE™** A stay-at-home husband and a workaholic wife are negotiating the terms of their divorce. One settlement option would be to split custody and the community property 50-50. But a different division may suggest itself after you collect more information about the parties' respective interests, priorities, and resources. What if it turns out the wife views raising children as a hindrance to her career and would rather have more money than parental responsibility, while the husband, who just inherited separate property, cares more about the custody than he does about his share of the communal assets? Although this is a simplistic example, it illustrates the way that gathering more information can point to superior outcomes. A settlement package whereby the husband gets something more than 50 percent custody and the wife gets something more than 50 percent of the community property will leave both better off than a simple 50-50 split.

Note that revealing information is just as important as obtaining it for purposes of identifying value-creating opportunities. There are at least two reasons for this. First, you and your counterpart each bring to the bargaining table different sets of information from your respective clients, as well as your highly individual skills and perspectives. What seems like a trivial or insignificant detail to you may suggest a viable settlement option to your counterpart. Second, you cannot expect the other side to give you much information about what is important to them if you do not reciprocate by giving information in return.

**NOTE™** The possibility of exploitation always exists when information is shared. You must determine whether the risk of revealing information that may give the other side a strategic or

negotiating advantage is outweighed by the potential for mutual gain from disclosure.

### **§3.39            2. When to Exchange Information**

Negotiators differ in their views about the timing of the exchange of information. Some suggest it is best to have such a process early in the negotiation, before discussing numbers. Others maintain that information exchange cannot happen in earnest until both sides have started to formulate solutions and realize that they need to gather more information. Still others think of exchanging information as a dynamic process, one that punctuates the entire negotiation and is not reducible to a discrete period or phase.

In an ideal world, it is more efficient to exchange information before ever talking about solutions. Reality, however, is much messier. Take whatever approach appears to make the most sense to you and your counterpart. It is far worse to impose a rigid order on the negotiation than to find yourselves exchanging information in fits and starts.

### **§3.40            3. How to Structure the Process of Sharing Information**

You and your counterpart may wish to consider the following guidelines to facilitate a thorough and meaningful exchange of information.

#### **§3.41            a. Decide Who Will Participate**

A threshold issue is to determine who needs to be present for the exchange of information. In most negotiations, the attorneys alone may be sufficient. Yet legal representatives are no substitute for the principals if your goal is to understand the underlying concerns and interests of the ultimate decision-makers. Even if the parties do not take part in the entire negotiation, you might suggest a phone conference or a special meeting in which principals from both sides participate solely for purposes of sharing information. A similar arrangement is appropriate if you are dealing with a complex case in which it may be useful to have input from third parties, experts, or others.

### **§3.42      b. Decide What Supporting Evidence Is Needed**

It often becomes necessary to resolve factual issues in order to move forward with settlement discussions. Before you begin a structured information-gathering process, determine what information you need from the other side to resolve such issues. For example, will it help for either side to have documentary evidence in the form of invoices or receipts to establish whether payment was made on a contract, or the amount of each payment? If so, make a joint list of the evidence you will need to assemble so that the exchange of information can proceed in the most efficient and productive manner possible.

### **§3.43      c. Create a Safe Environment**

The extent to which people are willing to divulge information depends largely on how comfortable they feel. Do not underestimate the extent to which even experienced litigators may feel vulnerable participating in an exchange of information.

Consider what both sides may need to feel comfortable sharing information—especially information of a sensitive nature or information that would not otherwise be discoverable in litigation. It could be as simple as giving assurances or making preliminary remarks about the need for trust in the process, or something more formal, such as establishing guidelines designed to promote confidentiality or a nonthreatening atmosphere.

**PRACTICE TIP™** If sensitive or private information, or confidential information such as trade secrets may need to be discussed during the exchange of information, give some thought to formalizing a confidentiality agreement and perhaps a protective order. In addition to giving your client legal protection in the event of disclosure, a confidentiality agreement may help foster an environment in which both sides feel they can discuss issues freely.

### **§3.44      d. Avoid Rehashing Legal Arguments**

A process of exchanging information can often be co-opted into a forum for arguing over the legal merits. Rather than a joint exploration of underlying interests, goals, and priorities, the process can look more like a search for information that merely backs up each side's legal theory.

If you notice this happening, discuss your concerns and try to steer the conversation in a more productive direction. See §§3.217, 3.219–

3.220. Try to craft a prior understanding or ground rule that the point of sharing information is not to fuel a discussion about who is correct under the law or who will win in court. See §3.28.

**NOTE™** There is a distinction between arguing the merits to convince your counterpart that you are right, and discussing the merits as a way of figuring out at what cost it makes more sense for both parties to settle than to continue to litigate. Only the former should be discouraged. Why? Because you are less likely to convince your counterpart and more likely simply to alienate each other. Instead, listen carefully to the problems in your case and convey your view of the risks in your counterpart's case. You can “agree to disagree” and still have a productive discussion about the merits.

### **§3.45 e. Consider Postponing the Discussion of Solutions**

The purpose of exchanging information is to gain a comprehensive understanding of the issues to arrive at superior solutions. By jumping to solutions before gaining an appreciation of the true complexity of the dispute, you may find yourselves returning to the drawing board each time you discover more information.

If this becomes a problem for you, consider making it a ground rule that you will not discuss any solutions until your information-gathering on the entire problem—or at least one particular aspect of it—is reasonably complete. If your counterpart starts making proposals prematurely, write the proposals down for future consideration and redirect the conversation to the task of gathering information.

### **§3.46 B. Listening and Questioning Techniques**

If there is one thing that academic research on negotiation seems to confirm over and over again, it is that skilled negotiators focus more on listening and questioning than on speaking and answering. For example, a famous study of negotiation effectiveness showed that “skilled” negotiators spend 38.5 percent of their time eliciting information through questions, making sure they have fully understood their counterpart, and summarizing whatever understandings have been reached. Average negotiators, by contrast, spend only 17.9 percent of their time on the same tasks. Similarly, a study of American bankers identified “listening skill” as one of the top three traits of the most successful negotiators, while a study of American lawyers found the ability to read cues and to probe an

opponent's position as among the highest negotiation talents. Shell, *Bargaining for Advantage: Negotiation Strategies for Reasonable People* 144–145 (1999).

Why is listening so important, and how can you sharpen your listening and probing skills?

### **§3.47      1. The Importance of Listening**

You improve the chances of persuading your counterpart if you can both understand *and* demonstrate your understanding to the other side. Active listening can develop and refine this understanding by helping you to tune in to subtle or mixed messages, to identify tacit assumptions or expectations, and to lend order to confusing or unorganized communication. In addition, it can improve your ability to show your understanding to the other side.

### **§3.48      a. Listening Is a Source of Strength**

The popular image of a strong negotiator is one who dominates the conversation and tenaciously argues the client's case, rather than one who pauses to listen closely to what the other side is saying. In real life, the opposite is more likely to be true: Inexperienced negotiators tend to focus on their arguments and positions, while skilled negotiators focus more on learning as much as they can about the other side. The more adept you are at listening, the more successful you will be at eliciting important information from your counterpart.

**PRACTICE TIP™** If you find yourself talking more than your counterpart, stop. Listen. Negotiation is a golden opportunity to step inside the other's shoes, figure out weaknesses and motivations, and perhaps glimpse closely held views about the case or about settlement. A conversational face-to-face meeting is your chance to obtain information not available through a contested discovery process. Remember, understanding the other side's perspective is not the same as agreeing with it. See §3.37.

### **§3.49      b. Listening Is More Important Than Talking**

Strive to listen more than you talk. By doing so, you ensure that the net flow of information is toward you rather than away from you.

Attorneys often believe that by saying more they will be more persuasive or will eventually get the other side to see things the way they do. Far from convincing the other side, the reality is that by saying more you may alienate them and, worse, unwittingly disclose

information that hurts your client or that benefits your counterpart in ways you perhaps do not realize. The less you say, the less you expose your client to this possibility. If your goal is to build a crushing argument with a mountain of evidence, you might consider a round of pretrial motions before engaging in settlement talks.

**PRACTICE TIP™** Do not talk simply for the sake of talking or to fill a pregnant silence. Many people are uncomfortable staring across at someone without exchanging words. Experienced negotiators know that simply by waiting patiently for the other side to break the silence, they can sometimes get extremely valuable information. Do not fall into this trap!

### **§3.50 c. Listening Tones Things Down**

At some point you may find yourself in a heated argument with your counterpart. You may be involved in a case in which emotions run high. Or perhaps you are dealing with someone who is unusually adamant or rigid about a certain issue.

Active listening techniques can sometimes help to lower the emotional temperature in the room. People sometimes become angry and inflexible when they perceive that their views or feelings have not been heard. By using active listening skills, you slow things down and give the other side assurances that you have understood both the meaning and gravity of their message—even if you do not ultimately agree with it. See §§3.51–3.56.

## **2. Active Listening Techniques**

### **§3.51 a. Loop of Understanding**

The “loop of understanding” describes a three-step process that you can use to understand the speaker, demonstrate your understanding, and confirm that your understanding was correct. The process works as follows: (1) Set an intention to understand; (2) pay close attention to the speaker; and (3) reflect back to the speaker what you have understood.

### **§3.52 (1) Set Intention to Understand**

In everyday life, we listen for a variety of purposes—to allow the speaker to vent, to find holes in the speaker’s reasoning, or to try to solve the speaker’s problem. By contrast, listening *actively* requires you to listen for the sake of listening. Set aside your other motives for now. Start from a point of genuine curiosity about what the speaker is saying, even if the speaker’s message sounds ridiculous at first. You

can always disagree after you have satisfied yourself that you have given the other side a full hearing. Remember, understanding is not agreeing. See §3.37.

### **§3.53 (2) Pay Close Attention to the Speaker**

This stage has three components. First, understand the speaker, both in terms of the content of what is being said and the feeling that goes into it.

Second, track yourself: Are you truly listening, or are you thinking about what you are going to say in response? Clear your mind of any internal noises. If you feel a need to respond, write a note to yourself and respond later.

Third, pay attention to dynamics. Does the speaker seem evasive? Does the speaker seem uncomfortable or reluctant to share information? Being attuned to these dynamics may help you avoid or resolve an impasse. See §§3.151, 3.217.

### **§3.54 (3) Reflect Back What You Understood**

This is your opportunity to demonstrate to the speaker that you have understood what has been said. Paraphrase the crux of the message, using your own words. Parroting or giving a verbatim summary will not sound genuine, so be selective about what is important. In addition, finding your own words to reconvey the kernel of the speaker's message will help you to sharpen your own understanding of what was said.

It may also be appropriate to reflect back the emotional content of the speaker's message, particularly if you are hearing directly from your counterpart's client. For example, you might reply, "It sounds as though your client must have felt powerless in that situation..." Demonstrating empathy for the client's situation may help you develop rapport with your counterpart.

Is it always necessary to repeat back what the person has just said? No—you should use your judgment. But keep in mind that your counterpart does not have access to your thoughts and that it is helpful to give some outward indication that you have taken in what was said. Nodding your head or saying "yes" can help, but the best way to demonstrate your understanding is simply to paraphrase back the gist of what was said, including the emotional content if appropriate. This is the only way your counterpart can be certain that you have truly understood.

**PRACTICE TIP™** The following expressions may help you begin to reflect back what you have heard: "It sounds as though... ,"

“What I’m hearing is that...,” “I could be wrong, but my understanding is that...,” “What you just said was important/interesting because you said that...”

After you have demonstrated your understanding, seek some clarification from the other side that you have understood them completely. Is there anything you missed? Is there anything they wish to add? Miscommunications frequently occur during a negotiation; it pays to review the main points with the speaker to minimize this risk.

### **§3.55      b. Focus on the Issue, Not the Speaker**

We sometimes stop listening carefully because we dislike our counterpart or because our counterpart is acting in a way that makes us angry. Although this is sometimes extremely difficult, try to focus your attention away from the speaker’s personality and toward understanding the issues being discussed or the problem you are both trying to solve. Focus on what is being said, not who is saying it.

### **§3.56      c. Make Your Counterpart Want to Tell You More**

Make the other side feel that you are genuinely interested in finding out more about their position. The other side will be more willing to divulge information if they feel that you are open to understanding. Remember, seeking to understand the other side does not entail sympathizing or agreeing with them. See §3.37.

**PRACTICE TIP™** Phrases such as “What you just said is very important” or “I’m glad you mentioned that” are useful because they signal to the other side that you are interested in learning more. Even if you do not believe that what was said was important, merely uttering the phrase can help you focus on eliciting more information.

## **3. Active Listening Pitfalls**

### **§3.57      a. Responding With a Counterargument**

Think of your conversation as due diligence, not as oral argument. If your counterpart says something that you disagree with or that you believe is false or incorrect, resist the temptation to respond with a counterargument. Although responding is sometimes necessary, the downside is that it can quickly turn the best of intentions into a shouting match.

Arguing is also of little use in a negotiation in which there is no third party neutral to render a decision, and there are confidentiality agreements and other protections that significantly minimize the risk of something you said or failed to say being held against you later.

Thus, instead of trying to score points or correct the record, try to understand how the other side sees things the way they do.

### **§3.58      b. Asking Another Question**

You may find yourself asking many follow-up questions, either because you are interested in learning more or as a way of showing your interest. Although follow-up questions are useful and sometimes necessary, they are distinct from the process of listening. Questioning and listening are related insofar as they both help to improve understanding, but questioning does not itself improve the quality of your listening. Thus, before you ask follow-up questions, make sure you have first listened well. Reflect back what you heard so that your counterpart can be sure of this too.

### **§3.59      c. Stating That You Have Understood**

Negotiators often nod their heads or say, “I understand,” to assure the other side that the message was received. Simply saying that you understand does not *demonstrate* that you in fact do so—not to mention with the kind of nuance and gravity that the speaker employed. In addition, saying “I understand” risks coming off as too smug. It is far better simply to reflect back the crux of what you heard.

## **4. Effective Questioning Techniques**

### **§3.60      a. Ask Open-Ended Questions to Elicit Information**

The most efficient way to gather information from someone is to ask open-ended questions, *i.e.*, questions that can be answered in a potentially infinite number of ways, thereby giving the speaker a broad canvas to tell you what is most important to him or her. Examples of open-ended questions are “Could you tell me more about...?” and “Why?” and “What would you ideally like to accomplish here?” See §3.63.

Unlike open-ended questions, closed-ended questions are narrow in scope and can typically be answered only “yes” or “no.” Instead of remaining open to whatever direction the speaker takes you, in asking a closed-ended question you narrow the playing field through assumptions about what is likely to be important or relevant to the

speaker. Sometimes these assumptions will be correct; nonetheless, unless you test the assumptions, you may never realize that you are getting an incomplete picture.

**EXAMPLE™** At the beginning of settlement negotiations in a wrongful termination case, the defendant’s attorney asks, “Do you think your client will settle for around \$100,000? Because if not, I think we’re wasting our time.” The plaintiff’s attorney responds, “Unfortunately, I don’t think so—we were thinking more in the \$500,000 range.” The effect of this closed-ended question is to focus the discussion prematurely on money. Although money is one component of what the plaintiff wants, it may turn out that the plaintiff has other, equally important or perhaps more-important concerns, such as receiving an apology, maintaining a spotless reputation, or getting a strong reference for new employment elsewhere. By limiting yourself to closed-ended questions that assume that money is all-important, you may never understand the value of these other things to the plaintiff and how they can be incorporated into a cost-effective settlement package. Examples of more-open-ended questions in this situation would be “What are the various elements you would like to see in a settlement?” or “What are you hoping to get in this process?”

### **§3.61            b. Ask Closed-Ended Questions to Confirm Understanding**

Asking closed-ended questions is more effective in confirming your grasp of what the other side has said than in gathering new information. This type of question can also be used to refine your comprehension of a certain point or to fill out details.

### **§3.62            c. Use The “Funnel” Technique**

Often used in deposition practice, this technique involves starting off with open-ended, general questions and gradually moving to more-closed-ended, specific questions as you obtain more information.

### **d. Helpful Questions**

#### **§3.63            (1) Open-Ended Questions**

The following are helpful open-ended questions: Why? What would you like to see happen? What concerns you most? Where would you like to begin?

### **§3.64 (2) Questions That Clarify**

The following are helpful clarifying questions: Tell me more about..., What do you mean by...? Can you put that in other words? Can you be more specific? What specifically makes you say that...?

### **§3.65 (3) Questions That Encourage**

The following are helpful to encourage further response: Can you tell me more? Go on.... Can you elaborate? What you said was important/interesting/helpful—can you say more about that?

### **§3.66 (4) Questions That Diagnose**

The following are helpful questions to diagnose the situation: Why do you believe that? What evidence supports your conclusion? Can you give me a specific example of why...? What are the implications of...? Where do you want to be in five years and how does what you've proposed further that goal?

### **§3.67 (5) Questions That Elicit Underlying Interests**

The following are questions designed to elicit underlying interests: Why is \_\_\_\_\_ important to you? What is significant to you about \_\_\_\_\_? What interests of yours does \_\_\_\_\_ meet? What if you don't get \_\_\_\_\_? What does \_\_\_\_\_ mean to you? What will getting/having \_\_\_\_\_ do for you? In an ideal world, what would you want and why? See §§3.156–3.163.

### **§3.68 C. Managing the Exchange of Information**

Information is power. Hardball negotiators will use this to their advantage by getting you to reveal all your cards before they reveal any of their own. The more they know about what it is like from your perspective—your constraints, your needs, and your concerns—the better positioned they will be to take advantage of your weaknesses and tailor their responses to your questions. How you manage information can influence the result you obtain for your client.

One way to manage information is to think in terms of what Joseph Harbaugh has termed “giving,” “getting,” and “guarding” information. The following are some considerations you may wish to take into account. See also chap 2.

## **1. Getting Information**

### **§3.69 a. What to Consider Getting**

What information you will seek from the other side will obviously vary from case to case. Nonetheless, some regularly important categories should be considered.

### **§3.70 (1) Information About Underlying Interests**

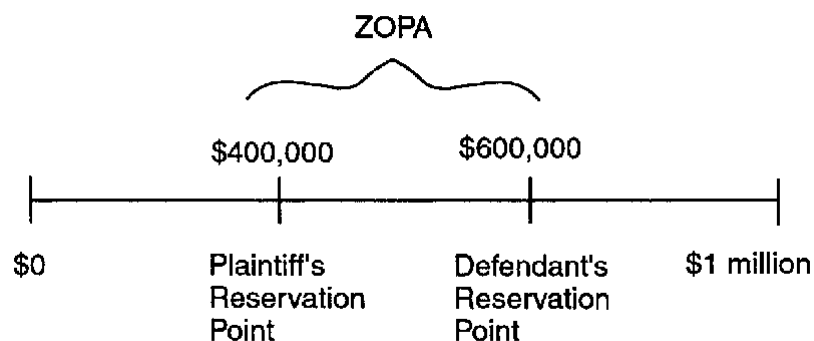
If your counterpart has made an offer or demand, or staked out some other requirement or condition for settlement, find out what underlies it. It is useful to think of your counterpart's concrete positions as just one particular iteration of his or her client's more generalized needs and interests. The trick is to see if you can identify the underlying interest—the root of the problem—and find a way to satisfy it without necessarily agreeing with the particular position advanced. See §§3.156–3.166.

Another way to approach this is to try to understand what is important to the other side or what they would like to achieve. Questions such as “In an ideal world, what does your client need to feel good about settling this case?” or “Where would your client like to be in five or ten years' time?” may allow the other side to better understand what truly motivates them. This, in turn, will give you a better idea of what they truly need, as opposed to what they say they need.

### **§3.71 (2) Information About Their Reservation Point**

In any negotiation there is often, but not always, a “bargaining range.” The bargaining range is defined at the upper limit by the defendant's “reservation point” (the point above which the defendant has determined that it is better off proceeding with litigation) and at the lower limit by the plaintiff's reservation point (the point below which the plaintiff is unwilling to settle). See also §2.27. This range represents the zone of possible agreement (sometimes referred to as “ZOPA”). If a settlement happens at all, by definition it will occur somewhere within the ZOPA.

**EXAMPLE™** Plaintiff sues defendant for \$1 million. Plaintiff's reservation point is \$400,000 and defendant's reservation point is \$600,000. There is a ZOPA of \$200,000 (between \$400,000 and \$600,000) within which a settlement is possible.



If plaintiff's reservation point were higher than defendant's reservation point (*e.g.*, plaintiff would not accept anything less than \$700,000 to settle), there would be no overlap and consequently no ZOPA. Unless one or both parties reevaluated their reservation point, a negotiated outcome would not be possible.

You know your client's reservation point; the challenge is to figure out the other side's reservation point so you have as clear a picture as possible of the bargaining range. This will involve gathering enough information to cut beneath the posturing about what the other side is or is not willing to pay and assess where its true reservation point lies. This is important for at least two reasons. First, it can give you an idea of whether a settlement is even possible, *i.e.*, whether the plaintiff's reservation point is lower than the defendant's. Second, to maximize value for your client, you should aim to settle as close to the other side's reservation point as possible. The more information you collect, the better positioned you will be to discern their true reservation point (not just what they say is their reservation point).

### §3.72 (3) Information About Alternatives

One way to improve your leverage is to obtain more information about the other side's alternatives to reaching a settlement. If those alternatives are few and not very attractive, gaining that knowledge places you in a stronger bargaining position. On the other hand, if those alternatives are robust, knowing that early on will allow you to tailor your negotiation strategy to deal with your counterpart's apparent strength.

The main alternative to settling a case is to continue litigation. You might therefore research how good an alternative litigation is for the other side by considering, *e.g.*, what would happen if the case went to trial; what resources the other side has to continue with litigation; whether litigation is creating publicity or investor-relations problems

for the other side or otherwise affecting the well-being of third parties in a way that might create external pressure to settle.

**PRACTICE TIP™** When broaching the topic of litigation as an alternative to settlement, be wary of allowing the discussion to slip into a contest of who has the better argument on the merits. Get your counterpart to think more in terms of the risks versus the benefits of continued litigation for both sides. Instead of arguing about who will win or lose, ask what both sides stand to gain by reaching agreement rather than by proceeding with litigation.

### **§3.73 (4) Information About Assumptions**

One of the biggest reasons why negotiators reach less-than-optimal agreements is that they fail to correct mistaken assumptions. Don't assume that your counterpart approaches or views the issues the way you do. What seems to you like a weakness in your client's case may not seem important to your counterpart. Your ideas about what is important to the other side may be very different from the truth. Test the waters and see if your assumptions are shared or different and, if the latter, find out why.

Assumptions often come into play in the context of demands. Beware of the tendency to draw negative inferences about the motives or reasons behind your counterpart's demands. For example, a high demand from a plaintiff's attorney in a case of little merit may lead you to believe that the attorney is just being greedy about a contingency fee, perhaps at the expense of a sensible resolution for the client. This may be true, but you will not know for certain until you gather more information. Perhaps the attorney simply has a very different but equally plausible view of the merits. Perhaps the contingency fee arrangement is different from what you envision. Or perhaps it is equally important to the client to see that the attorney is well-compensated.

### **§3.74 (5) Information That May Identify Value-Creating Opportunities**

Consider probing for information that may help you and your counterpart to create value, as opposed to dividing it up between yourselves. Examples of such information include the other side's aversion to risk; differences in resources, valuations, or preferences that may enable both sides to structure "win-win" trade-offs; and information about the other side's transaction costs. See §§3.167–3.177.

## **b. Effective Ways to Get Information**

### **§3.75 (1) Get Information Before You Give It**

Skilled negotiators try to get as much information as possible from their counterparts before revealing any of their own. The more complete a picture you have of what the other side is seeking and what it deems important, the better placed you are to understand how information that you have not yet disclosed to them will play to their strengths and weaknesses.

**PRACTICE TIP™** Be the first to begin asking questions and probing for information. If your counterpart surprises you early on with questions about your client's interests or goals, combine your answers with return questions to make it clear that you do not intend to reveal all your cards before starting your own information-gathering.

### **§3.76 (2) Use Active Listening and Effective Questioning Techniques**

The most effective way to get information is to use active listening and effective questioning techniques. See §§3.51–3.67.

### **§3.77 (3) Get and Give Information in Equal Amounts**

It is difficult to justify asking for more information when you have not given any in return. Although it is best to get information before giving it, when it comes to the net amount of information exchanged, equality is a reasonable benchmark. Of course, if your counterpart fails to ask for information, there is little reason for you to make voluntary disclosures.

**NOTE™** You will sometimes be asked for information that reveals a weakness. What looks to you like a weakness, however, may be viewed differently by others. Do not assume that the other side sees things the same way you do. See §3.73. In addition to getting the other side to open up more, disclosing the “weakness” may help both sides identify value-creating opportunities. See §§3.167–3.177.

## **2. Giving Information**

### **§3.78 a. What to Consider Giving**

Consider volunteering information about your client's underlying interests, strengths, and leverage. However, because the information

you choose to give depends largely on what the other side requests, it may be more useful to think in terms of what information you will *not* give, *i.e.*, information you plan to guard. See §§3.82–3.92 on guarding information.

## **b. Effective Ways to Give Information**

### **§3.79 (1) Invoke the Reciprocity Principle**

The goal is to achieve a balanced exchange of information, not one-way information-giving. If you feel that the other side is not revealing information in equal proportion to what you are revealing, invoke the reciprocity principle. See §3.135. After answering a question from the other side, follow up with your own question before they ask something else. Chances are that your act of responding will trigger a sense of obligation on their part to make reciprocal disclosures.

If this does not work, condition future responses on getting your own questions answered. Remind the other side that information exchange is a two-way process.

### **§3.80 (2) Give Only What Is Necessary**

Do not gratuitously give out information that may result in harming your side. You never know exactly how information in your possession will play to your counterpart. What may seem like a fairly innocuous factual detail could turn out to be very helpful to the other side.

**PRACTICE TIP™** Provide information only in a planned way or in response to a specific question. Resist the urge to divulge information to fill silence or compensate for some other gap in the conversation. There should be a good reason for every piece of information you give out.

### **§3.81 (3) Time Your Disclosures Wisely**

The timing of disclosures will generally depend on whether you are disclosing “bad news” or “good news.” Most negotiators agree that it is best to give bad news, *i.e.*, news that tends to disappoint your counterpart, as soon as possible. By giving information about your comparative strength or leverage early, you avoid inflating the other side’s expectations. If your client has a strong hand, or if her criteria for settlement are very narrow, say so with all deliberate speed. If you indulge the other side in what they may view as a pointless exercise, they will feel strung along.

With respect to information your counterpart would consider good news, there is less consensus about timing. For example, if your client is willing to concede a large point or if there is some mutually beneficial solution, early disclosure may set an optimistic tone for the negotiation. On the other hand, if you have been asked about something that might give the other side more leverage over you, consider postponing the disclosure until a time when the information may be less consequential. On leverage, see §§3.189–3.200.

### **3. Guarding Information**

#### **§3.82 a. What to Consider Guarding**

If you have prepared well for a settlement negotiation, you have already determined what information you will not disclose to the other side. Although it varies from case to case, categories of information that you may want to keep confidential include the following.

#### **§3.83 (1) Reservation Points**

There is no duty to disclose your client’s reservation point in a negotiation. In fact, keeping the other side guessing about your client’s reservation point can be considered an essential aspect of any negotiation. Because of this, legal and ethical rules about misrepresenting reservation points are typically relaxed. See chap 4 (citing ABA Model Rules of Professional Conduct 4.1, comment 2).

#### **§3.84 (2) Why Your Client Wants to Settle**

Experienced negotiators frequently suggest guarding information about your client’s needs, constraints, or other reasons for settling. They argue that the more the other side knows about your side’s motives and limitations regarding settlement, the more leverage they have over you.

However, hiding the ball in this fashion can come with a cost, in that it can cause you to miss out on value-creating opportunities that are only possible if both sides cooperate and share information. Even worse, negotiators who play everything “too close to the vest” do not develop rapport and are often deemed to be untrustworthy. The better advice may be to guard information about why your client seeks to settle until after you get the other side to disclose their reasons for settling or you have reason to believe that your counterpart will be equally forthcoming about his or her client’s needs and interests.

### **§3.85 (3) Damaging Facts**

Obviously, you will want to keep any damaging facts private to preserve your client's leverage. Note, however, that incomplete disclosure, and nondisclosure of facts that would be reasonably necessary to correct a misleading statement, may amount to actionable misrepresentation. See *Randi W. v Muroc Joint Unified Sch. Dist.* (1997) 14 C4th 1066, 1084, 60 CR2d 263 (allegation of incomplete disclosure amounting to "misleading half-truths" stated claim of misrepresentation); *Vega v Jones, Day, Reavis & Pogue* (2004) 121 CA4th 282, 292, 17 CR3d 26 ("Even where no duty to disclose would otherwise exist, 'where one does speak he must speak the whole truth to the end that he does not conceal any facts which materially qualify those stated. One who is asked for or volunteers information must be truthful, and the telling of a half-truth calculated to deceive is fraud. [citations omitted]"); CACI 1901; see also BAJI 12.37; 5 Witkin, Summary of California Law, *Torts* §§767–830 (10th ed 2005).

### **§3.86 b. Effective Ways to Guard Information**

If you have prepared well for the negotiation, you have given some thought about how you will deflect a request for information that you do not wish to reveal. There are numerous ways to do this; the trick is to do it in a way that does not tip the other side off to the fact that you are being evasive. Because most attorneys find this difficult to do in the heat of the moment, it is a good idea to plan your responses in advance of the negotiation.

The following are some effective techniques that you may wish to consider for guarding information. Note that many of these techniques can be combined with one another.

### **§3.87 (1) Answer With a Question**

By returning a question with another question, you buy time to steer the conversation in a different direction. Examples of return questions are "Why do you ask?" or "Can you explain what you mean by that?" The key is to get the other party to answer your question. Once the other side has given you an answer, you have more flexibility to direct the train of thought toward a different subject.

### **§3.88 (2) Answer a Different Question**

This is a variant of answering a question with a question (see §3.87). Answering a question that is slightly different from the one

posed is another way of steering the conversation in a different direction.

### **§3.89 (3) Over-Answer**

The key here is to hide the true answer to the question among many alternative plausible answers and not to commit to any particular one. In this way, you have provided the answer to the question, but your counterpart does not necessarily know which of the answers you have provided is the correct one. This can be achieved, for example, by giving an excessively detailed answer that emphasizes complexities, contingencies, or different ways of looking at the issue.

### **§3.90 (4) Openly Refuse to Answer, Citing Some Explanation**

Because a naked refusal to answer a question will arouse suspicions, it is important to give an explanation that puts the refusal out of your power or control. The most effective explanations are legal privileges. Other plausible explanations include honoring the client's request to keep certain information private, the need to keep trade secrets or other valuable information confidential, and fairness to third parties or other interests that might be adversely affected by disclosure.

### **§3.91 (5) Claim the Question Is Irrelevant**

Convince your counterpart that the issue or matter at hand can be resolved without answering the question; in other words, that giving an answer will not materially assist the negotiation.

### **§3.92 (6) Beware of Misrepresentation**

Misrepresentation, or in some cases outright lying, is frequently used by some negotiators to conceal sensitive or damaging facts. Before you make misrepresentations or omissions to conceal a weakness, consider the ethical and legal injunctions, as well as the effect that your conduct may have on the outlook for settlement if it is later discovered by the other side. See §§3.85, 3.140, and chap 4.

**§3.93 IV. THE NUMBERS GAME: OPENING OFFERS AND DEMANDS, CONCESSIONS, AND HARD-BARGAINING TACTICS**

Money is either the predominant component of a settlement or one of many components to a settlement package. Thus, at some point in the negotiation you will need to bargain about money or about other quantifiable settlement terms.

Attorneys frequently say they detest the bargaining process because it appears haphazard, not rule-bound and predictable like litigation. This section will help you lend rationality to the process so that you can begin to bargain from principle and not from instinct. For purposes of simplicity, it is limited to a consideration of monetary settlements; nonetheless, the principles discussed can be applied to nonmonetary commodities and intangibles as well.

**§3.94 A. Knowing Your Reference Points**

To negotiate with numbers in a principled fashion, you first need to be clear about three things: (1) your client's "reservation point," (2) your client's "target point," and (3) your "opening offer or demand." These three values will serve as signposts to help orient you as you navigate the possibilities for settlement.

If you have prepared for the negotiation in consultation with the chapter on preparing for negotiation in this book (see chap 2), you will already be acquainted with these numbers. They are reintroduced below.

**§3.95 1. Reservation Point**

As discussed in §§3.4–3.6, settlement should not be merely an alternative to litigation, it should be a *better* alternative. See The reservation point, otherwise known as "bottom line" or "walk-away price," is the point at which you and your client have determined that you are better off litigating (or pursuing some other alternative) than settling.

**EXAMPLE™** Using the hypothetical example in §3.71, the plaintiff's "reservation point" would be \$400,000. It does not make sense for the plaintiff to settle for any amount less than \$400,000, because litigation is expected to produce that result. In reality it will not be possible to determine the reservation point with such precision, because of the uncertainties and subjective factors that must be taken into account. Nonetheless, the hypothetical example illustrates the principle involved.

### **§3.96 a. Be Clear About the Reservation Point**

The reservation point may be expressed as a monetary amount or as a package that involves quantifiable and nonquantifiable elements. Either way, it is important to have a clear idea of what the reservation point is. This will help you assess how offers and counteroffers made during the negotiation compare against it. It will also ensure that you do not accidentally exceed the reservation point.

**NOTE™** Exceeding your client’s reservation point will put you in breach of your ethical and professional duties (see Cal Rules of Prof Cond 3–110, requiring attorneys to perform legal services with competence) or, worse, could subject you to malpractice liability. See *Marriage of Helsel* (1988) 198 CA3d 332, 338, 243 CR 657 (client whose lawyer exceeds authority in settlement negotiation “retains a viable remedy against the lawyer—both in terms of a malpractice suit and State Bar disciplinary action...”). Thus, you should plan your moves so as to settle well within the reservation point. Also, unexpected issues may arise after an agreement in principle has been reached, making it a good idea to leave yourself some room for further give-and-take. See §3.147. For further discussion on exceeding your settlement authority, see chaps 2 and 4.

### **§3.97 b. Do Not Stray From the Reservation Point**

Set the reservation point so it will remain fixed. Clients sometimes relax their reservation points to reach a settlement that appears within their grasp. Although it is tempting to stretch to achieve a settlement—particularly if it is late at night or you have invested a lot of time and effort into the process—think twice before advising your client to do so. If you prepared well for the negotiation, you and your client have made a considered judgment about the point beyond which it is better to pursue litigation. Any alterations to the reservation point made in the heat of the negotiation would not benefit from the same considered judgment unless new information was subsequently discovered that affected your calculation.

**PRACTICE TIP™** No agreement is better than a bad agreement.

### **§3.98 2. Target Point**

The target point should represent your client’s optimistic goal for a settlement outcome. It should be a monetary amount (or a package that involves quantifiable and nonquantifiable elements) that lies

somewhere between the reservation point and the opening offer or demand. See §3.99. Think of the target point as where you expect to end up, not as a fantasy or ideal outcome from which you will inevitably deviate. When making concessions, for instance, plan them so that you can reach a settlement at or above the target point.

**PRACTICE TIP™** Write the target point down and have it clear in your mind when you begin the “numbers dance.” Starting a negotiation without a target point is like going shopping without a budget: It’s possible, and people do it, but it doesn’t guarantee wise results.

Negotiators often treat the reservation point as their target point, as if they would be happy for the case to settle for their client’s lowest expectation. It may well be that an agreement is possible only at or close to the reservation point, but do not prejudge the outcome. The higher your expectations and goals for settlement, the more you are likely to obtain for your client. You won’t get what you don’t ask for.

### **§3.99      3. Opening Offer or Demand**

The opening offer or demand is your client’s offer or demand, *i.e.*, the position with which your side will begin the bargaining process. It should be even more optimistic than your target point because settlement negotiations usually involve a process of give-and-take, in which each side makes concessions upward or downward from the opening offer or demand to a mutually acceptable figure. Thus, you should calculate your opening offer or demand in such a way as to give yourself room for several rounds of concessions. See §§3.121–3.138. The key is to balance maximizing your client’s share of the pie with keeping the other side interested in the process.

**NOTE™** You walk a fine line when calculating your optimistic opening offer or demand. If you open too aggressively, you risk alienating the other side or, worse, shutting down the negotiation. If you open too demurely, you risk short-changing your client.

## **B. Making Opening Offers and Demands**

### **§3.100      1. Should You Make the First Offer or Demand?**

Skilled negotiators disagree about whether it is more advantageous to make the first offer or demand, or to let the other side go first. Although the correct approach will likely vary from case to case, in

the context of settling litigation, it is often advisable to have the other side open. Below are some reasons why.

#### **a. Disadvantages of Going First**

##### **§3.101 (1) You May Undervalue Your Case**

Even if you feel certain of your assessment of your case or defense, you might undervalue it if you lack complete information. For example, perhaps you have overlooked the significance of a fact or piece of evidence, or perhaps there are facts in the exclusive possession of the other side that bear on your assessment. When it is difficult to value a case or when you do not have sufficient information about the other side's strengths, weaknesses, and subjective valuations, it will be to your advantage to have the other side open first.

##### **§3.102 (2) The Other Side May Undervalue Its Case**

By the same token, the other side will sometimes surprise you with an unexpectedly favorable opening because it has undervalued its own case. There may be numerous other reasons for this, *e.g.*, a desire to settle swiftly and painlessly or the interests of third parties. By waiting for the other side to open, you can take advantage of the small but real possibility that this will happen to you.

##### **§3.103 (3) You May Underestimate What the Other Side Will Pay or Accept**

No matter how strong their case is on the merits, there could be numerous reasons why your counterpart prefers to settle rather than litigate. For example, they may view the case as "small beans" or they may be concerned about adverse publicity or setting bad precedent. In these circumstances, the other side may be willing to agree to an outcome that is much more favorable to your client than you might have initially thought.

#### **b. Advantages of Going First**

##### **§3.104 (1) Anchoring Effect**

By making the first offer or demand, you may be able to take advantage of what is known as the "anchoring effect." Psychological studies have shown that when people are asked to give an estimate of value, their estimates are greatly influenced by the first number they

see or hear, even if that number has no necessary connection to the thing being appraised. See Bazerman & Neale, *Negotiating Rationally* 23–30 (1992).

**EXAMPLE™** Have you ever tried haggling at a bazaar on one of your trips abroad, or perhaps at a used car dealership back home? Sellers in these situations typically open high, and in the absence of more data about market prices, this often causes us to revise our initial valuations upward. All of a sudden that Berber carpet seems much more valuable than you thought and you almost feel embarrassed to counter with a low-ball offer. In fact, however, the seller’s opening price may bear little relation to the true value of the item and may just be a ploy to get you to out-bid yourself. If this has ever happened to you, you may have felt the effects of anchoring.

In the same way, do not underestimate the ability of your opening offer or demand to “anchor” the other side, *i.e.*, to adjust their expectations or perception of the bargaining range toward your initial figure. In extreme cases, the anchoring effect may even cause the other side to reevaluate their target or reservation points.

By the same token, if you allow the other side to open, be cognizant of the potential anchoring effect on you. Unless you learned new information that materially changes the calculation of your opening offer or demand, or target or reservation points, do not revise those reference points on the basis of the other side’s opening offer or demand.

**NOTE™** The anchoring effect is most effective when settlement negotiations are undertaken early in the life of the lawsuit, before the other side has had a chance to do a comprehensive analysis of damages or of the likelihood of success on the merits. The anchoring effect helps influence the other side’s valuation of the case; it is of little use after the other side has had an opportunity to conduct a thorough valuation of the case independent of any demands or offers from you.

### **§3.105 (2) Building Trust and Optimism**

Starting the negotiation with a reasonable or even modest opening can go a long way toward building trust, healing a severed relationship, or projecting optimism about the possibility of settlement. These considerations may be important in cases in which there is an ongoing relationship between the parties, or when the concerns about reputation or the interests of third parties balance or outweigh the need to maximize monetary gain for your client.

### **c. Special Situations That Favor Going First**

#### **§3.106 (1) Available Reference Points**

If you have reliable information about the bargaining range, *e.g.*, because there are objective indicia of market value, or because you have accurate data about the other side's reservation point, it is probably safe to open. Similarly, in smaller or less complex cases in which damages are not in dispute, or when legal outcomes are predictable with a high degree of certainty, it may be to your advantage to open first.

#### **§3.107 (2) Strong Leverage**

It will not hurt to make the first offer if you believe that your client's best interests are served by pursuing solid alternatives other than settlement, or if you and your client have determined that it makes sense to settle only above or below a certain amount. Going first in these circumstances may help send a clear signal from the outset that your range of acceptable settlement is narrow.

**PRACTICE TIP™** If you choose to go first in part to send such a signal, pay attention to the way you do so. Far from taming your counterpart's expectations, a "take-it-or-leave-it" approach will be perceived as a hard-bargaining tactic. If the other side is offended by the manner in which the opening offer or demand was conveyed, the other side may find it difficult to give the offer the consideration it deserves.

#### **§3.108 (3) Important Existing or Future Relationship**

In cases in which the parties value their ongoing relationship, it may be less important to wring the most out of settlement for your client. Indeed, the opposite may be true, insofar as a generous offer or temperate demand may set the tone for an amicable resolution and perhaps for some needed healing between the disputants.

In the business context, disputes often arise in the context of long-term relationships, such as long-term supply agreements, project and infrastructure agreements, strategic alliances, joint ventures, and development agreements. When the long-range success of the business enterprise or relationship is just as important as or perhaps more important than maximizing your client's share of the settlement, it is generally safe to open first.

### **§3.109      2. How Optimistically Should You Open?**

The answer to this question will depend on the case and on your level of comfort. In general, if the overriding goal is to get the most money for your client, consider setting your opening offer or demand at the highest (or lowest) possible point that is reasonably supportable by reference to law, facts, or other arguments—in other words, just shy of where your opponent will feel that you are not bargaining credibly or in good faith.

On the other hand, if the parties are likely to have an ongoing business or personal relationship that might be adversely affected by continued litigation or if other considerations weigh against nickel-and-diming your counterpart, consider opening with a more modest number.

Whatever approach you take, the key is to balance maximizing gain for your client with promoting a problem-solving process that keeps the other side interested. If you open with too much, you risk deadlock. If you open with too little, you risk leaving yourself little room to make concessions. See §§3.130–3.138.

#### **a. Advantages of Opening Optimistically**

##### **§3.110      (1) People Who Ask for More Get More**

You won't get what you don't ask for. Studies have consistently found that those who open high end up getting more for their clients than those who open low or modestly. See Shell, *Bargaining for Advantage: Negotiation Strategies for Reasonable People* 31–32 (1999); Bazerman & Neale, *Negotiating Rationally* 28 (1992).

**NOTE™** Opening optimistically doesn't mean that you have to be aggressive about it or that you have to employ hardball tactics during the negotiation. You can foster a collaborative, problem-solving atmosphere and still seek to get the most for your client.

##### **§3.111      (2) Greater Flexibility to Make Concessions**

Inexperienced negotiators often underestimate both the number and the size of the concessions it takes to arrive at a mutually agreeable settlement figure. By opening high, you give yourself more opportunities to make such concessions before reaching your target point or reservation point.

### **§3.112 (3) The “Contrast Principle”**

If you open high, it is possible to make your target point appear more palatable to the other side than if you had opened closer to it. The key here is to take advantage of the “contrast principle,” which states that the bigger the difference or “contrast” between the opening figure and target point, the more likely your counterpart will find the latter acceptable.

**EXAMPLE™** Assume that your target point is to settle the case for \$100,000. By opening at \$200,000, your final settlement demand of \$100,000, a 50 percent reduction, appears reasonable. On the other hand, if you had opened with \$125,000, your counterpart will be less likely to find \$100,000 reasonable and will probably attempt to bargain further.

The contrast principle has its limits. By aiming for too much of a contrast between the opening and target figures, you may risk making the opening figure itself appear unreasonable.

### **§3.113 b. Disadvantages of Opening Optimistically**

Although an optimistic opening can be effective, it can sometimes backfire even if it is made in good faith or is supported by concrete facts and arguments.

### **§3.114 (1) Sending the Wrong Signal**

Perhaps the most common inference your counterpart will make in response to an overly optimistic opening is that you and your client are not bargaining in good faith. This can seriously undermine any trust that you have built up during the negotiation and can make it harder for the other side to feel able to settle.

### **§3.115 (2) Looking Ridiculous**

An overly aggressive opening can appear ridiculous to your counterpart and destroy your credibility and trustworthiness.

### **§3.116 (3) Deadlock**

Studies have shown that people who engage in aggressive negotiating tactics are more likely to deadlock in negotiation than those who are more flexible and willing to compromise. If an aggressive opening is perceived as part of an overall hardball strategy,

it could make the other side seek to work against you rather than with you.

### **§3.117      c. Situations Not Conducive to Opening Optimistically**

In the context of a settlement negotiation, it is generally preferable to make an optimistic opening rather than a reasonable or modest one. However, there are exceptions that may lead you to draw a different conclusion.

#### **§3.118      (1) When You Lack Leverage**

Obviously, if you have little leverage or bargaining power it does not help to open high. On leverage, see §§3.189–3.200. In fact, being too presumptuous in such circumstances could invite a similar aggressive bargaining posture from the other side, which may leave you worse off than if you had opened with more moderation. Further, when there is a marked difference in leverage, an aggressive opening could cause the stronger party simply to walk away from the table.

#### **§3.119      (2) When the Other Side Will Not Negotiate**

Similarly, if the other side refuses to negotiate and you find yourself in the position of convincing them to come to the settlement table, it pays to be modest with your opening figure.

#### **§3.120      (3) When the Relationship Is More Important**

As discussed in §3.108, there are situations in which the ongoing relationship between the parties is just as valuable or even more valuable than getting the best result from a settlement. In these situations, it may be advisable not to open optimistically, to send a signal that your client places a certain value on preserving the underlying relationship.

### **§3.121      C. Concessions**

Concessions are an inevitable part of any negotiation. The number and extent of the concessions you make will vary from one situation to another. Nonetheless, it is useful to pay attention to the way that certain types of concessions can impart certain kinds of messages, and to the various strategic considerations involved in making

concessions. In addition, give some thought to planning a concession strategy in advance of the negotiation. See §§3.130–3.138.

### **§3.122      1. Messages Communicated by Different Types of Concessions**

Negotiators often overlook the ways in which concessions can signal crucial bits of information about their case. The number, type, and pattern of concessions can indicate to a skilled negotiator information such as your reservation point, what issues are important to you, and your level of seriousness about settling the case. Concessions, in short, are a form of communication. Just as it is important to pay attention to verbal messages in a negotiation, so too is it important to consider the messages you send and receive through concessions.

#### **a. Large Concessions**

### **§3.123      (1) Issues Conceded Were Not Important**

Large concessions can often communicate to the other side that the issue or issues conceded were not important. Why else would you have given up so much all at once? Thus, even if the issue is truly unimportant to your client, it will behoove you to make moderate concessions so as to retain some leverage in the bargaining process.

**NOTE™** We tend to undervalue things that are free or that we obtain with little or no effort. Similarly, in the negotiation context psychologists have identified what has come to be known as “concession devaluation,” that is, the way in which we instinctively devalue concessions that are made too easily. Negotiators sometimes say that making a generous concession helps to build trust and rapport, thereby facilitating the bargaining process. Although this may be true in some cases, the effect of concession devaluation suggests the opposite result: namely, the very size and ease of the concession will make it seem much less like a sacrifice to your counterpart.

### **§3.124      (2) Weakness**

Large concessions can sometimes help to develop goodwill with your counterpart, which is critical in the early stages of a negotiation. Nonetheless, making large concessions early on can signal a need or urgency to settle. Large concessions made during the initial phase of a negotiation can also suggest a lack of confidence in your case or arguments.

### **§3.125 (3) Lack of Credibility**

Large concessions early on can also suggest a lack of credibility, especially when coupled with representations or other verbal cues that are inconsistent with such concessions, such as the claim that you have a strong case on the merits.

**PRACTICE TIP™** Remember that concessions are essentially a form of nonverbal communication. Pay attention to them as you would any other type of communication, verbal or otherwise.

### **§3.126 (4) Indication of Future Concessions**

Your counterpart may look at your first several concessions as an indication of the type of concessions to expect from you during the remainder of the negotiation. By making large concessions at the outset, you run the risk of sending mixed messages if you are later forced to make much smaller concessions (or perhaps no concessions at all) to avoid exceeding your target or reservation points.

**PRACTICE TIP™** Large initial concessions followed by little or no movement can make you appear to be inflexible or to be acting in bad faith. This type of concession pattern is typically a deal breaker. If, for whatever reason, you need to make a large concession towards the beginning of the negotiation, you may wish to communicate clearly to the other side that the size of the concession should not be taken as setting a precedent for the types of concessions you may later make.

#### **b. Small Concessions**

### **§3.127 (1) Lack of Seriousness Regarding Settlement**

Small concessions early on can give the impression that you are *unwilling* to budge and thus that you are not interested in settlement. This can be both positive and negative. On the one hand, it can suggest a position of strength, *i.e.*, that you are perfectly happy with your next-best alternative of going to court. On the other hand, it can escalate the contentiousness of a negotiation by conveying a lack of good faith participation.

### **§3.128 (2) Approaching Reservation Point**

By contrast, small concessions later in the negotiation suggest that you are *unable* to budge—in other words, that you are approaching your reservation point. Skilled negotiators will time their concessions

so as to make progressively smaller ones as they reach their target point—*i.e.*, well above or below, depending on which side they represent, their reservation point—thus creating the impression that they have “maxed out” well before they have in fact done so.

### **§3.129 c. Two Concessions in a Row**

Making two or more concessions before receiving a return concession, otherwise known as “bidding against yourself,” signals desperation and should be avoided. Make the other side concede something first. Even a token concession is better than nothing. Alternatively, you may decide to shift gears by exchanging more information or brainstorming other settlement options. Doing this may disclose new information or lead one or both of you to revise your expectations. New information or changed circumstances will mitigate the effect of bargaining against yourself.

**NOTE™** If the other side starts bargaining against itself, it is a telltale sign of eagerness to settle. This will allow you to set higher expectations for your side.

## **2. Concession Strategies**

### **§3.130 a. Resist the Urge to “Cut to the Chase”**

Attorneys often ask whether it is truly necessary to haggle, *i.e.*, for each side to start at either end of a settlement range and gradually meet somewhere in the middle. Why not save time by starting out closer to the middle? Better yet, why not start with your client’s reservation point and just get it over with?

One answer is that you will get better results by engaging in a bargaining process rather than by jumping to a conclusion based on your client’s reservation point or even target point. Engaging in a dynamic process gives you the opportunity to discover more information, such as the other side’s preferences, interests, weaknesses, and goals. The information discovered may help you bargain for a larger piece of the settlement pie, or may help you locate value-creating opportunities that expand the pie for both sides.

Another explanation is that on one level, people *expect* to haggle. Indeed, research reveals that people are more satisfied with a negotiated result if they engage in a process of give-and-take than if they had simply paid a nonnegotiable price. This appears to be true even when the nonnegotiable price is *more* favorable than a price reached through a process of haggling. See Shell, Bargaining for

Advantage: Negotiation Strategies for Reasonable People 164–165 (1999).

**PRACTICE TIP™** As a practical reality, by starting at or close to where you and your client wish to end up, you risk leaving your client with little flexibility to participate in the inevitable give-and-take of negotiation. Far from eliciting a correspondingly “reasonable” approach from the other side, starting with your final offer may inflate their expectations, which will lead to disappointment if you can make no further concessions. After all, your counterpart cannot know for certain that you are at or near your client’s reservation point just because you declare it to be so. You are more likely to persuade the other side to accept a particular outcome if you allow them to reach that outcome through a process of reciprocal concessions than through a preemptive bid to “cut to the chase.”

### **b. Consider Typical Concession Patterns**

#### **§3.131 (1) Progressively Smaller Concessions**

A very effective concession pattern to employ when settling litigation is to make progressively smaller concessions. As your concessions decrease in size, you signal to your counterpart that you are reaching your client’s reservation point. Skilled negotiators will make smaller and smaller concessions so as to make their client’s target point seem like their reservation point.

**EXAMPLE™** Assume your client is not willing under any circumstances to pay more than \$100,000 to settle a case brought by the plaintiff (the reservation point). Assume further that settling the case for \$60,000 would be an excellent result for your client (the target point). An effective concession strategy is to decrease the size of your concessions as you inch up to \$60,000, so as to make it appear that your client cannot pay more than the target point, when in fact your client is prepared to go up to \$100,000.

#### **§3.132 (2) Progressively Larger Concessions**

The opposite tactic is to make progressively larger concessions. This is generally not advisable, because it can leave your counterpart wondering what more can be gotten from you. The exception may be cases in which an ongoing relationship between the parties is more important than the amount you can get for your client in settlement. In such cases, progressively larger concessions can signal that you value

the long-term relationship more than short-term gain in the settlement negotiation.

### **§3.133 (3) Concessions Followed by No Movement**

This pattern sometimes occurs when negotiators seek to “cut to the chase” early in the negotiation by going straight to their Target or reservation point. See §3.130. The problem with this strategy is that the other side may not be willing to move quite so quickly to their bottom line, in which case you will be stuck at your limit with no more room to make concessions.

Although you may have no choice but to stand firm in such a situation, your counterpart will interpret your lack of movement as intransigence. After all, your counterpart cannot know for certain that you have truly reached your client’s bottom line. This, in turn, will make it difficult for your counterpart to make any further concessions.

### **§3.134 c. Do Not Bid Against Yourself**

In general, do not make more than one concession before receiving a return concession. See §3.129.

**NOTE™** There are rare circumstances, however, in which you might bid against yourself, such as when you have rethought a situation because of some new information, or when circumstances have materially changed and settlement is a larger priority. The key is to ask yourself whether the potential adverse effect of bidding against yourself is still better than your client’s next-best alternative of litigation. If so, bidding against yourself may be appropriate.

### **§3.135 d. Ask for and Make Return Concessions**

Cognitive psychologists have identified a phenomenon that has come to be known as the “reciprocity principle,” *i.e.*, we feel an instinctive obligation to return things of value given to us. In the context of concessions, the reciprocity principle has been found to trigger a sense of obligation, however slight, to reciprocate with a similar concession. On using the reciprocity principle when exchanging information, see §3.79.

Capitalize on the force of the reciprocity principle by always asking for a return concession. This can be done in several ways. For example, you can make an unconditional concession and then invite the other side to make a similar move. At the other extreme, you can

make a concession that is explicitly conditioned on reciprocation from the other side. Between these poles there are numerous ways in which to use the reciprocity principle to your advantage.

Similarly, when you receive a concession, consider reciprocating it to keep the goodwill and collaborative atmosphere alive. The fact that you made a return concession will be more important than whether it is equal in size to the other side's concession.

**PRACTICE TIP™** If you absolutely cannot make the particular concession asked for, make a substitute concession in return for the lack of movement on the desired point. At minimum, this can help move the negotiation along by keeping the pattern of reciprocal concessions going.

### **§3.136 e. State Reasons Behind a Concession**

Concessions are a form of communication. See §3.122. But because the message carried by concessions is not as explicit as a verbal message, it is possible for the other side to misunderstand the import of your concession or to fail to grasp that the concession implies meaning in the first place. Making the concession in conjunction with a verbal explanation or rationale is one way of making your meanings and intentions clear. For example, if you are making a concession on an issue that is extremely important to your client, it may be advantageous to explain to your counterpart the nature of your client's sacrifice rather than to make the concession without any clarification. Of course, some concessions will not need an explanation because their import is either obvious or trivial. But in many cases, it can be helpful to clarify why you are making a particular concession.

**PRACTICE TIP™** It is often effective to explain that your concession is in appreciation of a prior concession made by your counterpart. By taking advantage of the reciprocity principle, this tactic may help to bring about a cycle of reciprocal concessions that can propel the negotiation forward.

### **§3.137 f. Use Concessions as a Means of Acknowledgment**

It is particularly helpful to link any concession you make with a point or argument made by the other side. People have a deep desire to feel heard; indeed, the feeling of being understood is often necessary to motivate people to engage constructively in settlement talks. Concessions are a powerful way to demonstrate your understanding of a point or issue raised by the other side.

**EXAMPLE™** Assume your counterpart has argued that your client is liable under a certain line of cases. Review the cases and see if there is some way in which the argument might be correct. Even if you ultimately disagree with the argument, the next time you make a concession you can explain that the concession was motivated by, among other things, your consideration of the argument and the possibility that a court could accept it. Even if you go on to explain that you believe the argument is incorrect, at least you have demonstrated to the other side that you heard and considered their point of view and, moreover, that you are willing to put your money where your mouth is.

Another advantage of tying a concession to a point or concern raised by the other side is that it makes the concession appear hard-earned, more the product of a rational discussion between the parties and less the result of an arbitrary “numbers dance.”

### **§3.138      g. Express Willingness to Be Flexible**

It is a natural part of settling a case that your concessions, however generous, will seem disappointing to the other side. Similarly, the concessions you receive will seem meager to you even though they may represent significant sacrifices by your counterpart. This can dash both sides’ hopes for settlement.

The key is not to focus on what each side’s incremental moves mean for the likelihood of settlement, and instead to focus on maintaining a constructive atmosphere that is conducive to resolving the case. One way to do this is to express a willingness to be flexible and to entertain further ideas, options, and arguments even as your offers may fall short of your counterpart’s expectations. You can also clarify that just because your client is not prepared to reach a certain number today does not preclude this possibility at a future date. You can be absolute about how much your client is willing to concede on one particular occasion and still convey flexibility about the overall conditions under which your client will settle.

### **§3.139      D. Hard-Bargaining Tactics**

In the course of a negotiation, you may be tempted to use some classic “hard bargaining” tactics. Alternatively, you may be the victim of such tactics. Although hard-bargaining tactics can be advantageous, in the long run they do not further a problem-solving approach to negotiation. Instead, by using them you risk escalating the conflict, leaving money on the table, and possibly creating unnecessary deadlock.

The following are examples of some common hard-bargaining techniques to watch out for—both in yourself and from your opponent—as well as suggestions for how to deal with such tactics in a constructive way.

## **1. Hard-Bargaining Tactics to Watch Out For**

### **§3.140 a. Bluffing and Misrepresentation**

Negotiators often attempt to gain tactical advantage through exaggeration, bluffing, and sometimes through outright lies. Although a good poker face can come in handy to hide a weak hand, beware of trying to achieve too much by ruse. Stories of attorneys bluffing their way to an unexpected windfall for their clients—while perhaps true—are not representative of actual practice. Keep in mind that you will never hear about the other 99 percent of the cases, when the bluffs either failed or did not produce any measurable advantage. More important, skilled negotiators are extremely difficult to fool: They are keen readers of body language and they have done their homework on your case.

The adverse consequences of misrepresentation likely outweigh any benefits. For example, bluffing is often used to hide a party's motives for settling, or to make unimportant issues seem important and vice versa. This may lead you to reach agreements that neither side truly wanted because each was so busy bluffing the other. A study of experienced and inexperienced negotiators found this to be the case roughly 20 percent of the time when bluffs were used. See Shell, *Bargaining for Advantage: Negotiation Strategies for Reasonable People* 148 (1999). Finally, if your counterpart calls your bluff, you will be in a much weaker negotiating position and you may also earn a reputation for dishonesty.

**NOTE™** Negotiators may be liable for misrepresentation and certain types of nondisclosure during the course of a negotiation. See *Vega v Jones, Day, Reavis & Pogue* (2004) 121 CA4th 282, 291, 17 CR3d 26 (attorneys “may be liable to a nonclient for fraudulent statements made during business negotiations”); see §§3.85, 3.92, chap 4.

### **§3.141 b. “Take-It-or-Leave-It” Offers, Deadlines, and Walkouts**

Negotiators employ the “take-it-or-leave-it” approach when they seek to project leverage, or when they sincerely believe their case is strong and that settlement is possible only within narrow limits.

“Take-it-or-leave-it” offers can be advantageous because they can place the offeror in the position of calling the shots. However, there are at least two disadvantages. First, the offeree does not necessarily know if the offeror is coming from an actual position of strength or merely posturing. Thus, even well-intentioned “take-it-or-leave-it” offers, *e.g.*, offers that seek to “cut to the chase,” can be met with skepticism. Second, “take-it-or-leave-it” offers are unilateral: They do not invite the other side to engage in a joint process. The danger here is that the offeree will be so offended by the manner in which the offer is presented that he or she will refuse even to consider its reasonableness.

**PRACTICE TIP™** If you truly believe that your chances of success in litigation are high and that there is no room to settle outside a narrow range, consider whether negotiation, or even mediation, is appropriate for your client. Also consider using limited discovery or pretrial practice before, or in conjunction with, settlement discussions as a way of building your case to make your “take-it-or-leave-it” offer more persuasive.

Related to “take-it-or-leave-it” offers are deadlines and walkouts. For example: “This offer will expire in forty-eight hours”; “We are prepared to settle for \$200,000 today, but after this, all bets are off.” These tactics take advantage of the “scarcity principle,” *i.e.*, things appear more valuable to us when their availability is limited. A deadline is no more than an enforced scarcity of time. A walkout magnifies the effect of the scarcity principle because studies show that we value something more if we had it and lose it than if we never had it to begin with. Cialdini, *Influence: The Psychology of Persuasion* 244–251 (rev ed 1993). Both tactics play on our fears of no deal.

### **§3.142 c. Aggression, Threats, and Blame**

Aggression can manifest itself in many different ways. At one end of the spectrum it can take the form of subtle put-downs or inconsiderate behavior. At the other end it can take the form of threats or some other type of open hostility. In whatever form, aggression is designed to play to your fears and shake you off course.

Threats are perhaps the most common form of aggression in settlement negotiations and are typically couched in terms of what the threatener will accomplish in litigation if an agreement cannot be reached. Sometimes the threatener intends to intimidate. Other times, however, the threatener simply seeks to perform a “reality check,” *i.e.*, to convince the other side that litigation is a bad option, but this is taken as an act of intimidation. If you find yourself on the other end of

what seems like a threat, consider whether your counterpart may be trying to educate you about his or her view of the case, and whether you and your client stand to gain something by considering that view seriously.

Blaming or attacking can start out as reactions to events during the litigation preceding settlement talks, *e.g.*, discovery disputes, unreturned telephone calls, and other forms of sharp dealing. Each side continues reacting to perceived wrongdoing by the other, which only escalates the conflict by providing justification for further blame or attacks.

### **§3.143      d. “I Moved This Much, Now You Move This Much”**

When arguing over money, a common tactic employed by negotiators is to put pressure on the side that has conceded less by claiming that it is only “fair” for both sides to concede in roughly equal amounts. “Look how much we came down,” they will say. A variant of this strategy is the proposal to “split the difference” after you have negotiated for some time and then reached an impasse. Both tactics are difficult to resist, due in large part to the effect of the reciprocity principle. See §3.135. Here are some considerations that may help you stand your ground.

### **§3.144      (1) Not All Money Is Created Equal**

It is one thing for a plaintiff in a defamation action to reduce her claim from \$1 million down to \$600,000; it is quite another to expect an uninsured defendant to move the same amount, from \$200,000 to \$600,000, to meet the plaintiff halfway. In this example, the defendant is bargaining with real, hard-earned money: Every dollar the defendant concedes is a dollar out of his pocket. By contrast, the plaintiff is bargaining with constructive money—money to which the plaintiff *may* be entitled after proving the case in court. In this context, comparing the respective concessions made by the plaintiff and the defendant is like comparing apples and oranges.

### **§3.145      (2) Opening Offers and Demands Are Arbitrary**

Opening offers and demands bear little relationship to reservation points or target points. Demure negotiators will open close to their reservation point while aggressive negotiators will open much further away. If one is pitted against the other in a negotiation, it becomes readily apparent how equal concessions would produce distinctly

unfair results. The same is true in the case of a proposal to split the difference at the very end.

**PRACTICE TIP™** Instead of focusing on the respective size of each side's concessions, make concession determinations on the basis of your reference points, specifically, your reservation point and your target point.

### **§3.146 e. No Authority**

In this ploy, the hard bargainer uses the negotiation as a fishing expedition to collect information about the case as well as about the other side's strengths, weaknesses, and reservation point. When the negotiation comes to a head, the hard bargainer claims that he does not have authority or that his authority has already been exceeded. Alternatively, the hard bargainer states that any agreement reached will be only tentative because it requires approval from the board of directors or from an insurance adjuster.

The "no authority" routine has been used so often that it will likely be seen as transparent. If your counterpart believes you are insincere about reaching an agreement or are merely fishing for information, the loss of trust may well jeopardize any future attempts to settle.

**PRACTICE TIP™** If you fear this tactic will be used against you, determine the extent of your counterpart's authority before you begin discussing numbers. If you are caught by a "no authority" routine after reaching what you thought was a final agreement, make it clear that you too reserve the right to withdraw or to propose further changes until final approval is forthcoming.

### **§3.147 f. Last-Minute Terms and Costs**

If you have ever bought a new car, you have experienced the surprise when the dealer informs you after the fact of the myriad small costs associated with the transaction. There is a reason why you are not told about these costs before you have agreed on a purchase price. It has to do with a phenomenon psychologists refer to as "commitment": After you have expended significant time and energy crafting an agreement, you are more likely to give in to substantive last-minute requests for the sake of keeping the deal together. Had you known about those costs in advance, however, you probably would have negotiated a lower price.

Hard bargainers will use a similar tactic in settlement negotiations. Even after the main settlement terms are agreed on in principle, a skilled negotiator will find ways to extract more value by inserting

onerous conditions or costs in the agreement. Had you known about the conditions earlier, you might have negotiated a different settlement amount. When you complain, your counterpart asks rhetorically, “Do you really want to undo our agreement over *this*?”

### **§3.148      2. Effective Countermeasures**

There are many possible ways to respond to hard-bargaining tactics. The method you choose will depend on the type of negotiation you want to foster, *i.e.*, adversarial or problem-solving. The key is not to react with your own hardball tactics, which will likely only escalate the conflict.

### **§3.149      a. Don’t Lose Sight of Your Alternatives**

Many hard-bargaining tactics prey on our fears: “Take-it-or-leave-it” offers feed our fear of no deal; last-minute terms and conditions exploit our fear that we might lose a hard-earned deal.

You have less reason to fear, however, if you are secure in your next-best alternative to settlement: litigation. Develop your litigation options; don’t put the brakes on them just because you are in the middle of settlement discussions. The clearer your picture of the risks, costs, and potential benefits of litigation, the more secure you will feel refusing a last-minute condition or a “take-it-or-leave-it” offer that leaves your client worse off.

### **§3.150      b. Change Players**

Perhaps you and your counterpart have such different negotiating styles (see §§3.29–3.33) that it would help to team up with a colleague who can complement your strengths and weaknesses. Alternatively, you might enlist the aid of a neutral third party such as a mediator or, if you represent an insured defendant, the insurance adjuster. If you believe your counterpart is unnecessarily hindering settlement, you might suggest that the parties negotiate on their own without attorneys. Alternatively, consider making a formal offer to compromise that details your reasoning and assessment of the case. Your counterpart will then be obligated to show the offer letter to his or her client. See Bus & P C §6103.5 (attorneys “shall” communicate to their clients “all amounts, terms, and conditions of any written offer”).

### **§3.151 c. Name the Game**

If you recognize or suspect a hard-bargaining tactic such as the claim of “no authority” or the addition of last-minute terms and costs, name what you see. Naming the game has several advantages. First, if it is couched in terms of what you perceive rather than as a final judgment, it can help identify situations in which your counterpart is not intending to bargain sharply. For example, what seems to you as a threat may have been intended merely to persuade you that your chances of success in litigation are slim. Second, by exposing the tactic, you rob it of its effectiveness. This gives you the opportunity to suggest a different way of negotiating that does not involve the use of hard-bargaining tactics. See §3.217.

### **§3.152 d. Take a Break**

If you get caught in an escalating pattern of threats and attacks, or if you sense some other hard-bargaining ploy but do not know how to react to it, ask for a five-minute break to collect your thoughts and plan your next move. If you cannot take a break, think of taking a mental time-out. Slowing things down so that you can make a reasoned response is far better than shooting from the hip. See §3.220.

### **§3.153 e. Ignore the Tactic**

Another technique is simply to focus on your strategy and try not to let the hard bargainer shake you. If you receive a “take-it-or-leave-it” offer, for example, treat it as a normal offer and counter with your own. If your counterpart pressures you to match his concession, stick to your reference points and explain why you cannot do so. If you are faced with a threatened walkout, let them leave: If the walkout is merely a ploy, they will eventually come back. And if it is sincere, they are not going anywhere anyway; they are stuck in litigation until one of you wins or both of you reach an agreement.

### **§3.154 f. Propose a Different Way**

Hard bargainers can obtain superior outcomes if pitted against those who do not employ the same tactics. But here’s the catch: If both sides are hard bargainers, unnecessary delay, escalation of conflict, and deadlock are almost guaranteed results.

If you are faced with a hard-bargaining tactic, present your counterpart with a choice: You could both employ the same sharp tactics, or you could both seek a different, more constructive method of engagement. For example, if you have reason to believe that the

other side is misrepresenting something, suggest that you, too, could engage in misrepresentation but that both of you would gain more by working together. If you are presented with a “take-it-or-leave-it” offer, describe what you anticipate would happen if you, too, stuck to that position and then suggest a more cooperative alternative. Hard bargainers will feel they are giving up something by not using their tactics, but the reality is that they stand more to lose if both of you use those tactics against each other.

**NOTE™** To successfully reorient hard bargainers, you will first have to win their trust because hard bargainers have the least trust in cooperative problem-solving. Their modus operandi for maximizing gain is to work alone—and against—their counterparts. Problem-solvers, on the other hand, seek to work together to find solutions that maximize gains for both sides. This type of cooperation requires a baseline level of trust.

### **§3.155 V. PROBLEM-SOLVING APPROACHES TO NEGOTIATION**

Negotiations rarely proceed as smoothly or swiftly as we first envision. The difficulty stems in part from the fact that settling a case requires finding a result that satisfies both parties, yet litigators are trained to be zealous advocates for their clients and their clients alone. More often than not, litigators view settlement negotiations as just another forum of strategic interaction, in which the goal is to work against the other side. When one or both sides approach the negotiation with an adversarial mind-set, efforts to settle a case can quickly become stymied.

Instead of thinking how much you can get for your client relative to how much your counterpart can get for his or her own, try thinking in terms of how much more you could *both* get for your clients relative to their second-best alternative of litigating in court. See §§3.5–3.6. Can you and your counterpart come up with a creative solution that would leave the parties better off than if they proceeded in court, factoring in the attendant risks, time, expense and psychological cost of litigation? This is the essence of a “win-win” solution, in which both sides do better than their likely and reasonable alternatives. True, one side may walk away with a larger share of the cooperative surplus than the other. But here you have to ask yourself which is more important: getting more for your client in the absolute, or getting more for your client relative to what your counterpart got for his or hers. You will settle far more cases if you focus on the former rather than on the latter.

**NOTE™** A problem-solving orientation does not require you to compromise your client's position or give up more than you get back. It doesn't even mean you have to be nice! You can seek to maximize your client's fair share while still recognizing that you stand more to gain by working with the other side—not to help them, but to help both of you achieve better results. Think of it as making a deal, not winning a contest. However much you view the other side as wrong or unreasonable, the reality is that you need to make a deal with them to get your client out of the litigation here and now. See §3.15.

Below are some problem-solving techniques that you can consider to help you, your client, and your counterpart move the negotiation process forward when it appears to be stuck. You may find it effective to use only some or all of these techniques at varying points in the negotiation, or to combine them in a way that makes sense for the particular situation you face.

### **§3.156      A. Focus on Interests More Than Positions**

A big reason that negotiations break down is that counsel is often unable to distinguish between the client's stated positions and the more general interests that underlie them. Drawing such a distinction is useful because it can enable you and your counterpart to think in more-flexible terms about what your respective clients truly need to settle the case, thereby opening up avenues for settlement that did not, at first glance, appear possible.

### **§3.157      1. Positions**

Positions are highly concrete, particular expressions of what a party wants. The primary characteristic of a position is that it is nonnegotiable, *i.e.*, it can be satisfied only in one way or in a small number of ways.

### **§3.158      2. Interests**

Interests are more general needs and desires that underlie particular positions. If positions describe *what* a party wants, interests explain *why* they want it. At the most general and abstract level, interests can be expressed in terms of basic human needs. The following are examples:

- Economic well-being
- Control

- Recognition
- Security

### **§3.159      3. The Problem With Negotiating Over Positions**

If the negotiation remains on the level of each party's positions, the options for a truly satisfactory, comprehensive settlement are limited. One side can surrender its position to accommodate the other side, or both sides can compromise and split the difference. Either way, one or both parties will be left dissatisfied with the result. In the worst case, each side digs even deeper into its position, at which point impasse is all but certain.

The alternative is to probe below the level of positions, to identify the interests that motivate them. The key is to see if it is possible to satisfy each side's basic interests without necessarily satisfying the particular positions they have staked. This provides a way of getting *both* sides what they truly want, not what they claim they want.

### **§3.160      4. The Advantage of Negotiating Over Interests**

Interests afford a way to talk about each party's wants and needs in more-flexible terms. Unlike positions, which can be satisfied only in one or a small number of ways, the ways in which to meet an interest are potentially infinite, limited only by the creativity of the negotiators. For example, a plaintiff's interest in vindication might be satisfied by money, some type of payment in-kind, an apology or acknowledgment, or a combination of the above. By identifying the underlying interest, you get to the root of the issue and thereby broaden the scope for negotiation. On the other hand, by focusing only on the plaintiff's money demand, you limit yourself to just one avenue for solving the plaintiff's problem.

## **5. Examples of Positions and Corresponding Interests**

### **§3.161      a. Positions**

In each of the following examples, the attorney or client has staked a position that is only narrowly negotiable:

- "Acme Corp. needs at least \$1 million to settle this case."
- "I want custody of the children."

- “Jacob is the sole owner of the copyright and doesn’t owe Jonah anything.”
- “Our client needs millions for the lost future profits caused by your client’s trademark infringement.”

### **§3.162      b. Possible Corresponding Interests**

The following are the possible corresponding interests to the positions staked out above (see §§3.158, 3.162):

- “Acme Corp. needs enough money to tide itself over until it can get another round of financing.” (Economic well-being)
- “I want control over my children’s upbringing because I don’t trust my spouse to do a good job.” (Control)
- “Jacob wants to receive credit for his work.” (Recognition)
- “Our client needs some protection against the potential long-term dilution of its mark.” (Security)

**NOTE™** Positions and interests lie at opposite ends of a conceptual spectrum. At times, what looks like a position can also look like an interest, and the line between the two can blur. It is less important to label something as a “position” or an “interest” than it is to remember that by looking beneath the surface, any particular claim, desire, or need can always be expressed in a more general and less positional manner, thus creating more room for negotiation.

### **§3.163      c. Putting Positions and Interests Together**

The following example illustrates how to probe below the positions to identify the interests, and the benefit of doing so:

A high-tech company claims that an innovative software program developed by one of its former employees during work hours and using work computers is a work for hire. The company attempts to prevent the employee from selling the program to its competitor.

In the course of settlement negotiations, the company’s attorney demands \$3 million to settle the case. This is a position that is capable of being satisfied only if your client agrees to pay \$3 million.

This position is likely fueled by a number of different interests. The company may feel a need to send a message, so that other employees do not do the same thing. It may want acknowledgment for its role or contribution, however slight, in the development of an innovative program. It may be concerned about the competitor’s gaining a

commercial advantage by purchasing the software rights. Or, sensing the economic potential of the program, it may just be greedy and want to share in any profits.

Identifying these interests can help you come up with solutions that meet the company's underlying concerns but that do not necessarily require the employee to pay \$3 million. For example, the need for recognition could suggest a solution whereby the software program is touted as a joint creation by the company and the employee. The need for security about the competitor, coupled with the company's optimistic assessment of the program's economic potential, may lead the company to purchase the rights to the program, figuring that revenue from sales will more than compensate it in return. Although some type of lump-sum payment to the company may be unavoidable, looking at the company's underlying interests may help you create more flexibility about that sum.

### **§3.164      6. Focus on Things Other Than Money**

True, money is almost always involved: No matter how genuine or elaborate, an apology is unlikely to make the plaintiff's entire damages claim disappear.

However, money is almost always *not* the entire picture. It is simply a convenient, indiscriminate way of addressing deeper interests such as security, recognition, well-being, or control. The purpose of money is to enable people to realize these interests privately, after they have settled the case and returned to their own business.

If money is an obstacle, try a different path: Find out what the parties seek to achieve with money, and use the negotiation to help them achieve those things without money exchanging hands. Look for value-creating opportunities made possible by shared interests or differences in resources and preferences. Think of your task as shifting the perspective from "It's all about money" to "It's about money *and...*" What you identify in the "and..." category may reduce the amount of money required to seal a deal. For further suggestions, see §§3.167–3.177 on expanding the settlement pie.

### **§3.165      7. Frame Interests in the Positive**

The same interest can usually be characterized positively or negatively. Always focus on the positive formulation, either when reflecting back your understanding of the interest as part of your active listening (see §3.54), or when brainstorming solutions that address the interest (see §§3.178–3.188).

**EXAMPLE™** In a dispute between joint authors of an unfinished work, it may emerge that one author does not want the other to publish the work under any circumstances. You might formulate the underlying interest as “X does not want Y to receive the attention of publishing the work,” or “X does not want the public to see an unfinished (or imperfect) product.” These are negative formulations because they describe what X is *not* interested in. Although there are advantages to knowing what somebody does not want, this is not as useful as knowing what they actually do want. Thus, in the first example, perhaps it is important for X to receive equal attention or recognition as Y for the work. In the second example, perhaps X is interested in perfection or his reputation. Focus on these positive formulations.

### **§3.166      8. Get the Clients Involved**

In litigation, all activity and communication in the case tends to get filtered through the attorney representatives. Attorneys and clients often expect this and follow this model when trying to settle a case.

In practice, however, this is not necessarily the best approach. The client is in a superior position to understand its interests and to convey them in the most profound and nuanced way possible. The attorney, even though he or she may have discussed interests with the client, is a poor substitute.

**PRACTICE TIP™** Try to get the clients involved somehow in your settlement efforts. Propose a meeting specifically so that each side can explore the other’s underlying interests in the presence of the principals. If your counterpart is reluctant to do this, suggest that the parties have this conversation alone, without attorneys present. See §3.41.

### **§3.167      B. Expand the Settlement Pie**

Litigation is a “zero-sum” game: One party’s gain is directly proportional to the other party’s loss. For example, a court cannot award judgment in full for both sides or rule that a certain piece of evidence is both admissible and inadmissible. Although each side can win parts of a case, such as one of several claims in a complaint, each partial victory will entail a corresponding loss by the other side.

Litigators often approach settlement as if it too were a zero-sum game. This is known as the “fixed-pie bias.” The tendency is to assume that settlement negotiations are all about how to divide up a fixed pie (usually money) when in fact there may be numerous ways to make the pie bigger before you divide it.

One of the advantages of negotiation over litigation is that it enables us to look for value-creating opportunities, *i.e.*, opportunities that expand the pie, instead of simply fighting about how to divide up what appear to be fixed resources. The following are some considerations and techniques that may help you find such “win-win” opportunities.

### **§3.168 1. Identify Shared Aversion to Risk**

Although people hold different attitudes toward risk, in general they are risk averse. For example, when asked to choose between (a) a sure gain of \$24 and (b) a 25 percent chance to gain \$100, more people prefer the certainty of choice (a) even though, statistically, choice (b) is superior because the value of the probability is \$25.

The settlement pie can sometimes be enlarged when both sides are risk averse, *i.e.*, they would each prefer to pay or accept a sum certain that is less than the more optimistic amount they expect to pay or receive by rolling the dice in court. Thus, suppose the plaintiff sues the defendant for injury to its business reputation and seeks \$500,000 in damages. Both sides privately estimate that the plaintiff has a 60 percent chance of prevailing on the merits. If both sides are risk averse, the plaintiff should be willing to accept something *less* than \$300,000 ( $\$500,000 \times 60\%$ ) and the defendant should be willing to pay something *more* than \$300,000 to settle the case (not taking into account the various transaction costs discussed below—see §3.176). By identifying a mutual desire to avoid risk, you may succeed in creating a bargaining zone that did not seem possible at first glance.

**NOTE™** This is less likely when only one party is risk averse or when both parties are risk-seeking. In such cases, it may be necessary to look for other ways to create value.

### **§3.169 2. Identify Shared Interests**

Beneath the parties’ opposing positions, you may discover interests that are surprisingly aligned. These shared interests can create opportunities that allow both parties to create value. For example, in a patent dispute between rival software companies, both sides may have a common interest in capturing greater market share from other competitors. By putting their differences behind them and entering into a strategic alliance or merger, they may turn the litigation into an opportunity from which both can profit.

Similarly, in a partnership situation, both parties may have a shared interest in continuing the business or a part of the business despite their ongoing dispute. By focusing on ways to align their common

goals, *e.g.*, making the partnership more profitable or more valuable to the partners, the parties may find ways to structure settlement terms that go beyond money. In each of these scenarios, what might have appeared at first glance to be a zero-sum game turned out to be an opportunity for *both* to win.

The extent to which shared interests go untapped is remarkable. In a study of more than 5000 negotiators, researchers found that the negotiators underutilized shared interests approximately half of the time. This is likely to be even more true in the litigation context, because the adversarial process may leave each side skeptical that shared interests could exist in the first place or reluctant to exploit such interests together. One way to improve your ability to draw on shared interests is to introduce a problem-solving orientation and develop a level of trust early in the negotiation. See Shell, *Bargaining for Advantage: Negotiation Strategies for Reasonable People* 79 (1999).

### **§3.170      3. Identify Different Resources, Valuations, or Preferences**

Like shared interests, differences in the parties' resources, valuations, and preferences can provide opportunities for turning the dispute into a deal. We tend to think that our differences drive us further apart. In fact, they may bring us together by making possible value-creating trades. Trades are usually possible only when one side prefers to give up something that the other side prefers to have. Below are some examples of salient differences that can be used to create beneficial trade-offs.

#### **§3.171      a. Different Resources or Valuation of Resources**

Look for trade-offs that can be made in which each side has different resources that the other wants. If both sides want the same resource, look for differences in the relative value or cost of that resource for each party.

Consider the case of a distributor who sues a supplier for breach of contract. The distributor claims that the supplier furnished defective goods, resulting in damages of \$100,000. The supplier claims that the goods were shipped in perfect condition. One solution would be for the parties to "split the difference," *i.e.*, for the supplier to pay the distributor \$50,000 in exchange for a dismissal with prejudice.

However, the parties may produce superior results by incorporating a trade-off of other resources into the settlement package. For

example, what if it turns out that the supplier needs to off-load excess goods to avoid accruing inventory costs, while the distributor desperately needs more goods to meet a sudden rush order? Suppose the supplier is willing to sell those goods at cost (say, \$20,000) and the distributor is willing to pay more to get the goods immediately (say, \$70,000). By giving the excess goods away for free (a value of \$20,000), the supplier will be better off than paying \$50,000 to compromise the original dispute. By receiving goods it values at \$70,000, the distributor gets more than accepting \$50,000 to settle its claim. *Both* sides are better off.

### **§3.172      b. Different Valuations of Time**

The parties will sometimes have different attitudes about whether things need to happen earlier or later, quickly or slowly, all at once or over time. These difference can sometimes be exploited to harness more value for the settlement pie.

For example, for tax or other reasons, the plaintiff may be relatively indifferent about whether she receives a lump-sum settlement or is paid over time. Value can be created for both sides by delaying payment or by allowing payment in installments, thereby reducing the net present value of the settlement to the defendant.

Similarly, the defendant may wish to settle as quickly as possible, perhaps because it wishes to avoid further adverse publicity or because its hands are tied by a preliminary injunction. If the plaintiff does not have the same pressures, it may be possible for each side to be better off by settling early for a higher price: The plaintiff can recover more money, and the defendant can mitigate what may be even greater damage caused by the further lapse of time.

### **§3.173      c. Different Interests and Priorities**

The parties' divergent interests and priorities can also suggest solutions superior to a straightforward split of the settlement pie. For example, in a wrongful termination case, the plaintiff may be interested in a letter of reference or other assistance finding a new job. If the defendant can provide such services at little or no extra cost to itself, it may be possible to substitute job-search assistance for money. Similarly, in a defamation action the plaintiff may be more concerned about its reputation than about financial gain. An elaborate retraction campaign, which might include letters, interviews, and other public apologies, may be comparatively easier for the defendant to provide than money. In both of these cases, it may be possible to find trade-offs that enhance the opportunities for settlement.

### **§3.174 4. Aggregate Issues**

As the above examples demonstrate, value can often be created if you do not limit your perspective to the particular dispute in question. Instead, think of resolving the dispute as one component of a larger deal—a deal that may include the pursuit of shared interests or trade-offs that are not strictly relevant to the dispute itself. See §3.169 on shared interests. By aggregating other components into a settlement package, it is often possible to expand the zone of possible agreement.

Related disputes or potential disputes can also be aggregated to create value. Consider two related actions between the same parties filed in two separate courts: The first is an action to partition real estate among a husband and wife and a third party, and the second is a divorce action between the husband and wife in which a motion to set child support payments has been filed. Instead of dealing with each case separately, it may be advantageous to achieve a global settlement of both, even if different attorneys are involved in the two cases. The settlement of one action may be contingent on the resolution of issues in the other, in which case it will be in the interest of all (including the third party) to deal with the issues together. In addition, if the husband and wife value resources and obligations differently, they may be able to structure value-creating trade-offs. For example, the party who would be responsible for child support payments may be willing to offer higher payments in exchange for a larger share of the real estate. The party entitled to child support payments may be willing to accept less in exchange for a favorable rental arrangement. Seeking a global resolution of all outstanding or potential disputes between the parties, rather than focusing on the particular dispute in which you represent your client, can also create value by reducing transaction costs.

### **§3.175 5. Disaggregate Issues**

If aggregation doesn't help, try disaggregating issues to open up more avenues for settlement. For example, if there are numerous claims in the complaint and there is a sharp disagreement about only one or two of the claims, one possibility is to carve out or “disaggregate” the contested claims from the settlement package. The contested claims can be litigated or submitted to arbitration or some other expedited decision-making forum; meanwhile, you and your counterpart can work out a settlement for the balance of the case.

Similarly, disaggregation can be useful if the parties differ about the likelihood of success of certain causes of action in the complaint. If the plaintiff believes he or she will not prevail on certain causes of action but the defendant takes the opposite view, it may be possible to

settle only those causes of action and continue litigating the more contested claims.

A similar result may obtain when the parties share the same predictions about a given claim; *e.g.*, both believe that the claim will succeed, or both believe that it will fail. When the parties' predictions about a claim or claims are aligned, it may be easier to settle just those claims while disaggregating the others from the settlement package.

A variant of disaggregating *issues* is to disaggregate *parties*. For example, if you represent the plaintiff in settlement negotiations with several defendants, you may find that settling with some defendants is within your reach but not with others. Settling with only some of the defendants may also give you a strategic advantage with respect to discovery or witness testimony if the case proceeds against the other defendants.

### **§3.176      6. Reduce Transaction Costs**

Encourage your client and your counterpart to take advantage of transaction cost savings by settling early. Consider with your client and your counterpart the following costs of continuing to litigate:

**Attorney Fees and Costs.** The expense of attorney fees, discovery and motion practice, and other court costs can often dwarf the original amount in dispute. Early attempts to settle the case can allow your client to take the money that would have been spent on these costs and put it toward increasing the amount ultimately available for settlement. Note, however, that attorney fees are not a significant transaction cost if the case is being handled by in-house counsel or if the entitlement to postjudgment attorney fees is clear.

**PRACTICE TIP™** In the litigation context, defendants almost always say they would prefer to pay their attorney to litigate than pay their “opponent” to settle. If you represent the defendant, consider whether this is truly in your client’s best interest. Paying an attorney to litigate does not guarantee a result, just the opportunity to make a case in court. Using that money to fund a settlement, however, will produce a full, final, and immediate result for your client.

**Time.** Litigation is time-consuming. Although several courts have fast tracks or mandate the trial date to be set within 1 year, the length of time involved is often unpredictable. Even after a judgment is handed down, consider the likelihood of an appeal and a possible remand of the case if the appeal is not affirmed in whole. If you represent the plaintiff, consider the time it will take from exhaustion of the appellate process to when your client will actually receive the

money. If enforcement proceedings are necessary, this may further increase the amount of time involved.

**PRACTICE TIP™** Accurate data on the average length of time between the filing of a complaint and a final disposition in the trial courts are readily available from published sources. See *Statewide Caseload Trends*, published by the Judicial Council of California ([http://www.courtinfo.ca.gov/reference/3\\_stats.htm](http://www.courtinfo.ca.gov/reference/3_stats.htm)) and *Federal Judicial Caseload Statistics* (<http://www.uscourts.gov/library/statisticalreports.html>).

**Subjective Costs.** These costs include the psychological burden of continued litigation, the uncertainty and lack of closure associated with pending litigation, the stress of appearing for depositions or at trial, and so on. Is your client or your counterpart's client prepared to assume these costs? How much more would they pay, or how much less would they accept, to settle the case if they knew they could avoid these added subjective costs?

**Lost-Opportunity Costs.** Individuals and corporations alike will pay a price for participating in and managing litigation. Time spent attending and preparing for depositions, responding to discovery requests, and conferring with their legal advisor might be better spent pursuing other, more forward-looking goals such as healing or moving on, other business or financial opportunities, or the implementation of preventative or remedial policies or procedures. Consider whether and to what degree it makes sense to forgo these opportunities now in order to pursue an uncertain outcome through litigation.

### **§3.177      7. “Split the Difference” Only After You Have Looked for Value-Creating Opportunities**

Negotiation is often equated with compromise or “splitting the difference.” Although this is a perfectly reasonable way of negotiating a settlement, it should not be your preferred method of doing so. As some of the examples above illustrate, by taking advantage of shared risks levels and interests, trade-offs, aggregation and disaggregation, and transaction cost savings, you and your counterpart may find a way for both parties to be better off than if you had just compromised or “split the difference.”

**PRACTICE TIP™** Look for creative ways to expand the pie *before* splitting it up. If you don't, you may miss crucial opportunities or leave significant amounts of money on the table.

### **§3.178 C. Develop Creative Settlement Options**

Negotiators often come to the table with a limited view of what settlement outcomes are possible. They discuss only a few options for settlement and then try to compromise their positions to make one of the options work.

In the vast majority of cases, however, there are more options for settlement than meet the eye. Having more options on the table increases the likelihood of finding one that is mutually acceptable. It can also help the negotiators to sustain an atmosphere of optimism that is more conducive to settlement.

The key to finding more options is to separate the creative process of coming up with options from the rational process of evaluating, rating, or criticizing them. Litigators find this difficult because of their tendency to form judgments. The problem with judgments is that they hinder the imagination. As soon as you strike down an option because it seems unrealistic, you raise the bar for yourself and your counterpart and you prematurely foreclose the consideration of other, potentially more viable options based on the option that you ruled out. Good problem-solvers are not judges; instead, they seek to consider and understand things from all different angles.

Think of developing options as a two-step process:

- Invent as many potential options as possible without prioritizing or evaluating them (the goal is quantity);
- Evaluate the many options you have proposed and sift through them to find the right fit (the goal is quality).

The following are some helpful techniques for inventing and then evaluating a wide range of settlement options.

#### **1. Invent the Options**

##### **§3.179 a. Brainstorm Options**

Consider dedicating part of the negotiation to a process of brainstorming options. You can brainstorm options with your counterpart or separately with your client in preparation for the negotiation. See chap 2. Brainstorming with your counterpart is an opportunity for both sides to use your combined perspectives to come up with outcomes superior to what you could have generated on your own and may also help to move the negotiation forward by orienting both of you toward a common goal.

**NOTE™** Attorneys can be reluctant to engage in a collaborative brainstorming process because of the concern that information may be revealed during such a process that may give the other

side more leverage or some other critical advantage. If your counterpart is opposed to the idea of joint brainstorming, consider whether you can each brainstorm separately with your respective clients and report back with your most promising options, or structure the brainstorming as a special session in which the parties also participate. Because the parties know their needs and interests better than their attorneys do, they are often more inclined and better able to brainstorm options. It may also be helpful to seek the assistance of a neutral third party or mediator to facilitate the special session.

### **§3.180      b. Postpone Evaluating Options Until After Brainstorming Them**

The purpose of inventing options is to stimulate creativity. Thus, encourage and consider all options, even those that are far-fetched; they may eventually trigger an association to another idea that is more realistic or plausible. The worst thing is for one side to suggest an idea and for the other to strike it down immediately. This raises the bar on creativity, leading to self-censorship and possibly overlooking better outcomes that were never proposed.

**PRACTICE TIP™** Write down every suggested option so that your counterpart can follow along and you have a record to which you can return later. If there are several people at the negotiating table, it may help to write the options on a whiteboard or other large surface to ensure that everyone is on the same page, both literally and figuratively.

The golden rule in the brainstorming phase is that there should be no evaluation of the ideas whatsoever. Focus on stretching your imagination. One reason for this rule is the effect of “reactive devaluation.” See also §3.215. Studies have consistently shown that we react to the same message differently on the basis of the source of the message. See Mnookin, Peppet, & Tulumello, *Beyond Winning: Negotiating to Create Value in Deals and Disputes* 165–166 (2000). Thus, you are more likely to doubt or reject the identical offer when made by your adversary than you are when it is made by your ally or a neutral third party. By suspending any evaluation of options proposed by your counterpart, you may give yourself the opportunity to seriously entertain an option that you might otherwise have rejected outright.

### **§3.181 c. Resist Looking for One Best Answer**

Do not approach the task of inventing options as finding the single perfect solution that will solve the entire problem. It is unlikely at this stage that you will succeed in doing so. Moreover, by looking for the one best answer, you risk narrowing rather than broadening the set of available options from which to choose. Perfecting the options can be done later; at this point, explore as many options as possible.

### **§3.182 d. Consider Unrelated Options**

Do not be limited to the particular dispute at hand; rather, consider options involving parties or issues with no necessary connection or relevance to the case. Value can often be created by incorporating shared interests and trade-offs into the settlement package. See §§3.167–3.177. If there are other ongoing or potential disputes between the parties, look at the bigger picture for opportunities to resolve all litigation globally.

### **§3.183 2. Evaluate the Options**

After exhausting the creative process, turn toward eliminating options that are not viable and testing those that are most viable to determine how well they meet the requirements of both sides. There are several benchmarks against which to evaluate options: How well do the options satisfy your client's underlying interests? How superior are they to your client's next-best alternatives? How well do they stand up to objective criteria? Are they superior to your client's reservation point? These benchmarks are discussed in more detail below.

### **§3.184 a. Evaluating Options Against Interests**

Make sure to revisit your clients' underlying interests. Does the particular option make sense given what your client ultimately wants to achieve? Also consider the other side's interests; it is worth paying attention to the underlying concerns and motives of both sides if you want an agreement that sticks.

### **§3.185 b. Evaluating Options Against Alternatives**

Consider how a particular option stacks up against the alternatives to settlement. Typically, those alternatives involve pursuing litigation or some other form of adjudication. Consider whether your client would be better off taking a chance in court rather than accepting the

proposed option. Also consider whether your counterpart's client would be better off with the proposed option than with going to court. The options to which you give your closest attention should all be better than the available alternatives to a settlement.

### **§3.186 c. Evaluating Options Against Objective Criteria**

Settlement options may appear to be more favorable than they really are. When possible, look at objective criteria, such as published information about settlement amounts in similar cases, reported jury verdicts, industry custom, or any other standard that can help you gauge the merit of the option under consideration.

### **§3.187 d. Evaluating Options Against Your Client's Reservation Point**

Finally, make sure that the options under consideration are well within your client's reservation point. If money is truly the only issue on the table, it may be obvious whether a particular offer or proposal is better than the reservation point. However, when unquantifiable assets or intangibles are involved, it may be more difficult to make this assessment.

### **§3.188 3. Refine the Options**

As you evaluate the options, it is useful to select those that are most promising and begin to refine them. Consider options that are similar to or variations of those that are most promising. Or create a hybrid option that merges the best aspects of two or more options. Consider the following example: A husband and wife are getting divorced and one of the most favored options is for husband and wife to sell the marital home and split the proceeds 50-50. The parties like this proposal but are not 100 percent satisfied with it and would like to explore alternatives. The following are some techniques to refine the options available to the husband and wife:

- **Develop stronger and weaker versions.** You can generate stronger and weaker versions of the option by giving one party a larger or smaller portion of the sale proceeds. A weaker version of this option might be for one party to occupy the marital home and pay 50 percent of the market rent to the other party.
- **Develop substantive or procedural versions.** A more procedural version of the option would be for the wife to suggest a way of dividing up the use or value of the house and for the husband to

allocate the division between the two; *e.g.*, the wife might suggest a division whereby one party lives in the house and pays the ousted party 50 percent of the market rent, and the husband would choose whether to be the occupying party or the party who receives rent.

- **Develop permanent or temporary versions.** A temporary version of the proposal might be for the parties to rent the house for a period of time, splitting the rental income and the costs of maintenance, and to sell when the market has improved.
- **Develop comprehensive or partial versions.** A more comprehensive version might be to talk not just about dividing the home, but about the couple's entire assets. It might make more sense for one party to keep the home and the other to get a larger portion of the remaining assets. A partial version might be possible if the house came with a rental unit. The house itself could be sold for a 50-50 split, but the couple could dispose of the rental unit in a different manner.
- **Develop unconditional and contingent versions.** A contingent version might be that the house is split 50-50 pending some other act or event, *e.g.*, an agreement on how to split the other assets.
- **Develop hybrid versions.** Hybrid versions involve taking some elements, but not others, from two or more options and combining them. Alternatively, if several options are partial in nature and address only some of the parties' interests, it may be possible to combine two or more options wholesale.
- **Solicit input from multiple perspectives.** Input from third parties may cast a different light on the option, shore up its weaknesses, or reinforce its strengths. The husband and wife could ask their children or those close to them what they think would be a good outcome. If the husband or wife is involved in another relationship already, it might be useful to get the opinion of the other party.

## VI. TIPS FOR BREAKING THROUGH AN IMPASSE

### §3.189 A. Use Your Leverage

Leverage relates to how much power you or your counterpart possesses in the negotiation. The greater your leverage, the more you can dictate terms and influence outcomes.

Determining which side has more leverage is not always easy, for two reasons. First, leverage arises more from perception than from reality. A party who needs to settle litigation as soon as possible will

have less leverage than one who can afford to wait; however, the first party can gain leverage if the other side does not know of the urgency or if an impression is conveyed that the party is in no hurry. Thus, from a negotiation standpoint, it is the *perception* of leverage—real or imagined—that you create that is important. By the same token, if you believe your counterpart has more leverage than you, think of this as a perception that may or may not be borne out after you discover more information.

Second, leverage is a dynamic concept. One party's relative leverage over another can change dramatically over the course of a negotiation as more information is exchanged, or as other events unfold (e.g., a party's changed business or personal circumstances, court rulings on discovery, evidence, or pretrial motions). Having the upper hand today does not necessarily mean having it tomorrow.

**PRACTICE TIP™** If you have leverage in the negotiation, use it to manage the other side's expectations or to create movement out of deadlock. If you don't have leverage, try alternative strategies to cope with your situation.

### **§3.190 1. Types of Leverage**

There are two types of leverage: situational and personal. Situational leverage arises from having better alternatives to settlement than your counterpart. Personal leverage arises from your personality and negotiation skill relative to that of your counterpart.

#### **§3.191 a. Situational Leverage**

Situational leverage operates on the simple premise that one is in a better position to reject or dictate settlement terms when one's alternatives are equal to or superior to those terms. For example, if a seller has received numerous offers, the highest of which is \$600,000, and is approached by a new buyer offering only \$550,000, the seller appears to have greater leverage to negotiate a better price. This leverage comes from the *situation* of being a seller with multiple bids, *i.e.*, multiple alternatives that are equal to or better than accepting the new buyer's offer.

When analyzing leverage, it is also important to look at the other side's alternatives relative to yours. Although your alternatives may be solid, the other side will have more leverage if their alternatives are even better. Returning to the earlier example, if the new buyer finds another, comparable house for less than \$600,000, the original seller may not be able to exert as much pressure as it would if the new buyer were set on buying the original seller's house.

The predominant alternative to a settlement negotiation is continuing to litigate. The attractiveness of that option depends on several factors, including the likelihood of success on the merits, the enforceability of any judgment, transaction costs, subjective costs, and other considerations, such as the type of remedies awardable by a court of law. See §3.194.

**NOTE™** The party with the better argument on the merits is not necessarily the one with greater situational leverage. Such a party would have less overall leverage if, for example, he needs to settle fast or doesn't have the financial resources to continue litigation, or if the remedies available in court are unsatisfactory. Analyzing negotiation leverage is slightly counterintuitive in that, instead of looking inward to the merits or facts of the dispute, you need to look outward at the available alternatives if the negotiation fails.

### **§3.192      b. Personal Leverage**

Some people can turn a weak hand into a strong one by the sheer force of their negotiation skill. Conversely, it is amazing how quickly a negotiator who lacks these qualities can squander strong situational leverage. Personal leverage is the power that you can exert over the other side by your ability and performance during the negotiation.

Of the qualities that lead to strong personal leverage, the following stand out: the ability to build relationships; the ability to listen and understand the other side; a basic comfort level with conflict; patience and persistence; and the ability to think imaginatively and develop creative solutions.

**PRACTICE TIP™** As with leverage in general, it is more important what perception you create of your personal leverage than your actual qualities or attributes. Convince yourself before the negotiation that you are skilled at what you do and that you are going to succeed in meeting your client's goals. You may or may not convince your counterpart of this, but you certainly will not do so if you have not already convinced yourself.

## **2. Using Leverage**

### **§3.193      a. Don't Threaten the Other Side**

The worst thing to do is to use leverage like a blunt instrument by threatening what will happen if the case proceeds to trial, *e.g.*, who will win and who will lose, what tactics you will use, or what your witnesses will say. No matter how well-intentioned, such warnings

will be taken as a sign of aggression. See §3.142. This may lead the other side to respond in kind or simply shut down.

**PRACTICE TIP™** Don't think of using leverage as pushing the other side to do something because of your greater power or resources. Instead, help them understand that your leverage is superior and let them act on their own accord. Explain your strong cards, don't brandish them.

### **§3.194      b. Discuss Alternatives to Reaching Agreement**

Instead of threatening, invite your counterpart to consider what would happen if the case did not settle. Plot out, step by step, the likely costs, risks, and outcomes of every pretrial motion you each plan to make, as well as of a full-blown trial. Factor in other concerns such as adverse publicity, the subjective costs of continued litigation, or the time to judgment that may weigh against each side. See §§3.4, 3.176. If you believe your litigation options are strong, couch your leverage in pragmatic terms (“If you cannot come up to our number, as a business matter it makes more sense for us to litigate”) rather than in terms of superiority or liability (“Given the injury your client inflicted, we won't settle for less than \$500,000”).

### **§3.195      c. Don't Argue About the Merits**

A discussion of the legal merits will likely play an important role in any analysis of your alternatives to settlement. After all, if your counterpart's claim or defense is frivolous, your alternatives to reaching agreement are likely to be very good. Nonetheless, there is a difference between considering the risks and benefits of continued litigation for purposes of assessing the likely alternatives and trying to convince your counterpart of your legal arguments. The latter will only increase the contentiousness of your negotiation and is of dubious benefit. The former is more productive because it allows you to demonstrate your relative leverage over the other side without necessarily requiring the other side to agree with your legal positions.

### **§3.196      d. Improve Your Alternatives**

If leverage is related to the quality of your alternatives, you can improve your leverage by improving those alternatives. Position your case well in litigation. Gain whatever tactical advantages you can in discovery, on evidentiary issues, and through pretrial motions. This is true even if your client wants to avoid litigation and settle as quickly

as possible. The stronger the case you build in litigation, the more leverage you will have at the settlement table.

Similarly, litigation and negotiation efforts need not be inversely related to each other. For example, starting or continuing settlement talks does not mean that discovery needs to be stayed or motions need to be postponed. If you can improve your position by continuing to litigate and if cost is not a looming concern, consider pursuing both litigation and settlement with equal energy.

### **§3.197      3. When You Have No Situational Leverage**

Sometimes you will find yourself representing a client who was clearly guilty of wrongdoing, or perhaps a plaintiff with a meritorious claim but with few resources with which to go after a large corporate defendant. If your client has little or no situational leverage, consider the following ways to improve your client's position in the negotiation.

#### **§3.198      a. Emphasize Uncertainty**

If there is one constant about the future, it is uncertainty. Jury trials are an inherently unpredictable way of resolving disputes. Judges sometimes misinterpret the law. Judgments can take time to collect and, worse, may never be collectable. In short, what seems like a sure thing now could look very different in the future.

Emphasize to your counterpart the advantages of settling now, for a sum certain and a definitive end to the litigation, rather than taking chances in court. As discussed above, most people are risk averse. See §3.168. Even if the other side has more leverage, it may be willing to accept a less favorable but definite outcome over a more desirable but uncertain one.

#### **§3.199      b. Use Personal Leverage**

Rely on your strong interpersonal skills and prepare thoroughly for the negotiation. Team up with a colleague who can exert a high degree of personal leverage in a negotiation.

#### **§3.200      c. Bluff With Caution**

Negotiators with a high degree of personal leverage can often make a weak hand appear strong through bluffing, or in some cases outright misrepresentations of fact. If successful, bluffing your way through weak situational leverage can produce a surprising turnaround in your

client's fortunes and may quickly earn you a reputation as a skilled negotiator.

In reality, however, bluffs are unlikely to succeed in the litigation context. Attorneys are particularly good at sniffing them out. If this happens, you may lose not just your credibility, but also any hope of a deal. See §3.140.

### **§3.201 B. Use Objective Standards**

Negotiations often devolve into a contest of wills, in which the stronger and more assertive you are the more you seem to get. This may have clear advantages if you are the stronger party, but in most cases it simply raises the level of contentiousness and increases the chances of deadlock. The harder you push, the harder they resist and vice versa. One way to get out of this vicious cycle is to find a neutral, objective standard that can be used to evaluate each side's proposals. Examples of such benchmarks include reported jury verdicts, information about comparable settlements, or other neutral indicia such as fair market value or industry custom. The idea is to inject some rationality into the negotiation process so that it does not become a tug-of-war.

**PRACTICE TIP™** If you strongly believe that the case should settle for no more or less than a certain amount, do not merely proclaim this to be the case. It is far more effective to make your case using objective standards that your counterpart will find difficult to reject. For example, if there is a clear legal standard regarding damages, bring the case or statute. If subjective injuries such as emotional distress are involved, research comparable awards in similar cases and make an argument for damages based on objectively verifiable criteria.

### **§3.202 1. Characteristics of a Viable "Objective Standard"**

The objective standard should be acceptable to both you and your counterpart. If the standard is not viewed as authoritative by the other side, it will be of little use in taming their expectations about settlement.

A standard that is neutral, reliable, and relevant stands the best chance of being accepted by the other side.

### **§3.203 a. Neutrality**

The standard should be neutral, *i.e.*, not biased toward one or other party in the case. For example, the analysis or conclusion of an expert retained by you would not be neutral. Your opponent is unlikely to view such a report as providing an objective benchmark against which to value the case. Similarly, an unrepresentative set of jury verdicts that is skewed in favor of your client's position is unlikely to persuade your counterpart.

### **§3.204 b. Reliability**

Look for standards that are capable of confirmation or that come from reliable sources. Data about jury verdicts or comparable settlements should be trustworthy. When possible, bring documentation to support the standards you propose.

### **§3.205 c. Relevance**

When looking at jury verdicts, make sure the cases are analogous to yours in all relevant respects, *i.e.*, facts, legal issues or claims, court (state or federal), locality, and time frame. Outdated jury verdicts or verdicts in cases in which the underlying conduct is materially distinguishable are not particularly relevant.

When looking at comparable settlement amounts, pay attention to the timing of the settlement in relation to the lawsuit. If the case settles early in litigation, it typically settles for less.

## **2. Examples of Objective Standards**

### **§3.206 a. Comparable Settlements**

You wouldn't advise your client to purchase a house without looking at what comparable houses in the same neighborhood have sold for. So why would you advise your client to settle a case without looking at comparable settlements ("comps")? Make a list of five to ten comps to use as a range for planning and negotiating the settlement of your client's case. Make sure that your comps are truly comparable with the case at hand. Look for current cases, similar procedural postures, similar timing of settlement (*i.e.*, early or late in the litigation), similar facts and legal claims, etc. The more your counterpart can distinguish the comparables from your case, the less persuasive it will be.

**PRACTICE TIP™** Because of confidentiality concerns, data regarding settlement amounts and terms may not be readily available.

Nonetheless, if you specialize in a particular area of the law, you will probably have access to informal information regarding similar cases. Poll your colleagues and see if you can come up with relevant comparable settlements. If you are savvy with on-line research, try one of the settlement databases available through, *e.g.*, Westlaw or Lexis, or do your own Internet research. In addition, companies that have issued registrable securities in the United States must disclose all material information, including details of significant settlement agreements, in annual and quarterly reports to the Securities and Exchange Commission (“SEC”). Complete or redacted copies of such settlement agreements will be attached as exhibits to the reports. Several subscription websites, such as <http://www.gsonline.com/livedgar> and <http://www.10kwizard.com>, allow you to perform Boolean searches for terms such as “settlement agreement” in the SEC’s entire database.

### **§3.207      b. Reported Jury Verdicts**

Jury verdicts can provide an objective indication of a case’s value if it were to go to trial. The advantage of jury verdicts is that, unlike comparable settlements, they are public knowledge and are more readily accessible. Published appellate opinions often report the amount of a jury award together with the underlying facts. In addition, jury verdicts are often reported in legal journals and compiled in on-line databases. The disadvantage is that jury verdicts are not as direct as comparable settlements: They must be discounted for the risks of litigation, as well as for the transaction and subjective costs involved in getting to trial. See §3.176. In addition, juries are not the most reliable adjudicators and occasionally award exceptional sums in unexceptional cases and vice versa.

**PRACTICE TIP™** As with comparable settlements, make sure that you select reported jury verdicts that are reliable and relevant, *i.e.*, those that your counterpart is likely to look at as providing a supportable, rational approximation of what the case is worth. Also, remember to look at subsequent history (including appellate decisions) to see what was actually awarded.

### **§3.208      d. Laws, Rules, or Precedents**

Laws, rules, and precedents are the types of objective standards with which litigators are most familiar. If the case turns on a particular legal issue, research it and show your counterpart copies of relevant

cases or statutes. Although legal authority is not as effective as comparable settlements in providing a benchmark for what a case should ultimately settle for, it may help resolve a discrete aspect of the case.

There is a danger of referring to legal authority in that it can involve you in an argument about the merits. Nonetheless, making arguments grounded in specific legal authorities is more productive than making those arguments without any standards to support them.

### **§3.209 e. Industry Norms or Customs**

Prevailing practices or standards in certain industries or types of disputes can sometimes provide a persuasive benchmark to guide your negotiation. For example, in labor negotiations between a union and an employer over benefits, it is a common practice to look at benefits offered by other, similar employers.

Industry custom may also be useful when the calculation of damages is a significant issue in the case. For example, in a wrongful termination case in which one component of damages might be the loss of an expected bonus, data regarding how other employers in the same industry or industry segment calculate bonuses, or the average size of bonuses in that particular year for comparable employees, can provide an objective benchmark. When reasonable royalties are an available remedy in intellectual property cases, royalties paid to license the same or similar invention or copyrighted material can also help ground the negotiation in verifiable data and facts. See chap 2.

### **§3.210 3. Examples of Objective Procedures**

If you and your counterpart cannot agree on an objective standard, think of procedures that might lend objectivity to the negotiation process. The following are examples of objective procedures to consider.

#### **§3.211 a. One Cuts, the Other Chooses**

One way to guarantee fair results is to let one side decide how to divide the pie and to let the other side choose which piece of the pie to take. This gives the first party incentive to divide the pie as equally as possible. For example, if you are trying to settle a divorce case and one issue is how to divide up the marital assets—which may include several different types of property whose value is not readily ascertainable—you could propose for one side to allocate the assets into two bundles, and for the other to have first choice of the bundles.

### **§3.212      b. Mediator or Neutral Third Party**

If all else fails, consider soliciting the advice or judgment of a neutral third party. For example, a mediator can help facilitate a difficult settlement negotiation. A mediator or another attorney can give a neutral third-party opinion about the value of a case. Finally, if you feel you need something stronger than a third party opinion, you may wish to submit the entire dispute, or perhaps only certain issues, to arbitration. By doing so, however, both sides agree to be bound by the decision of the arbitrator.

### **§3.213      4. Negotiating With Objective Standards**

Once you have identified objective standards to guide the negotiation, the task is to select one with your counterpart and use it to help resolve your differences.

#### **§3.214      a. Gain Agreement on Objective Standards**

Agreeing on what standard to use may become a mini-negotiation in itself. Unfortunately, not all neutral, reliable, and relevant standards will be accepted by your counterpart. If there is resistance to a standard, either propose another standard or ask your counterpart for other suggestions. Arguing for your standard in the face of resistance is unlikely to help; the less your counterpart is on board with the standard, the less persuasive it will be.

**NOTE™** There is not necessarily one correct standard. If your case involves several distinct issues, it may make sense to apply a different standard to each.

#### **§3.215      b. Make Your Case Using the Objective Standard**

Even after you have jointly agreed on an objective standard, be prepared to negotiate about the import of that standard for the outcome of the negotiation. In other words, don't expect the standard to yield one compelling answer. It will likely cut several ways.

**EXAMPLE™** Suppose you are trying to settle a securities class action.

After failing to make any progress, you and your counterpart agree to look at settlements in comparable cases within the past three years. Chances are the settlement figures will vary widely depending on a host of factors: the legal issues and their complexity, the size of the case, the egregiousness of the

allegations (including whether criminal conduct was involved), etc. Your task will be to determine whether and how those figures support your client's case.

Take some time to study the data and what they suggest about a fair outcome. Don't focus only on aspects of the standard that support your valuation of the case, ignoring or discounting those that cast doubt on it. Beware of "reactive devaluation," that is, the tendency to reject arguments or proposals of an opponent simply because they came from the opponent. See §3.180. If you remain unreceptive to contrary evidence, you will only inspire your counterpart to do the same. This, in turn, will lead you both back to being stuck.

Unfortunately, being open to contrary evidence is no guaranty that your counterpart will be similarly disposed. If your counterpart refuses to acknowledge the way in which the objective standard cuts in your favor, don't despair. If the data are truly neutral, reliable, and relevant, their implications will be difficult to ignore. Even if your counterpart does not come around during the negotiation, he or she may do so later if given more time, corroborating data, or opportunity to save face. Attorneys do not want to advise their clients unwisely.

### **§3.216      c. If All Else Fails, Make Your Case Using Their Standards**

If you cannot convince your counterpart to adopt your standard, try to work with the standards that he or she has proposed. If your case is truly supportable, you should be able to make it using any neutral, independent, and reliable standard.

### **§3.217      C. Name the Dynamic**

If your settlement talks are like most efforts to resolve a case, chances are that at some point you will feel as though the discussion is not productive or moving forward. Figure out why you feel this way and express your intuition to your counterpart.

To do this, it may help to imagine yourself as a third party peering into the negotiation and commenting on the dynamic between the negotiators. For example, does it feel like the negotiators are going around in circles without a direction or agenda? See §§3.24–3.28. Does it seem as though they are just arguing about the law, or about which party was more culpable than the other? See §§3.6, 3.13–3.16. Are there interpersonal dynamics between them (animosity stemming from the litigation process, competitor-accommodator dynamic (see §3.31), etc.) that are getting in the way of a constructive search for resolution?

Gently broach the subject with your counterpart and invite your counterpart to share his or her perspective and ideas about how to move the negotiation forward. Express your concern in terms of your subjective experience of the dynamic—one that is open to correction—and not as an objective judgment.

**EXAMPLE™** “You know, I feel as if we’re just arguing the same points we’ve always argued about this case and that this is not getting us very far. Do you feel the same way?”

### **§3.218 D. Exchange More Information**

Did you skip over the information-exchange process because you believed that settling the case would be straightforward and that delving more deeply into the other side’s perspectives, interests, and goals would be a waste of time? Do you sense that you don’t know enough about what underlies the dispute between the parties, why your counterpart will not let go of a particular point, or what the other side truly wants to accomplish through settlement?

If the answer to any of these questions is “yes,” let your counterpart know that you need more information to settle the case properly. Ask the questions you need to ask or, alternatively, invite your counterpart to participate in a joint information-gathering session. For suggestions about information-sharing, see §§3.34–3.45.

**PRACTICE TIP™** If your counterpart is not amenable to this suggestion, acknowledge that you appear to be stuck and explain why you think exchanging more information might help. If your counterpart still thinks it would be a waste of time, suggest that both of you might waste even more time by pressing forward without complete information.

### **§3.219 E. Reiterate Problem-Solving**

Settlement negotiations often devolve into a contest about which side is right about the law or the likely outcome at trial. The problem with arguing about the merits is that in a private settlement negotiation, there is no judge or jury to declare one side the winner. Far from convincing your counterpart, arguments of this nature merely serve to polarize the negotiators and make impasse more likely.

If you notice yourself engaged in a battle about who is right and who is wrong, take a break and return to the table with a more constructive orientation. Suggest to your counterpart that arguing does not seem to be advancing the negotiations. Invite your counterpart to approach your negotiation not as a dispute but as a deal, a deal that

may leave both your clients better off than if they choose to take their chances in court. See §§3.6, 3.15. Rather than making it your goal to “win” relative to each other, think of your task as finding a way for both of your clients to win relative to continuing the litigation, taking into account the transaction costs that litigation entails. See §§3.4–3.6.

### **§3.220 F. Take a Break**

Taking a private break to collect your thoughts or adjourning the negotiation to another time can give you and your counterpart some much-needed space to reevaluate and plan your next move. If tempers are running high or you find yourself in a situation in which you don’t know what to do or say next, ask for a five-minute break. It is amazing the difference that five minutes can make. Far better to take your time than to react in an unproductive fashion or make a misstep in the heat of the moment.

If five minutes is not sufficient, suggest a longer hiatus to enable both sides to do more research and talk to their constituents. During the life of a lawsuit there are many windows of opportunity for settlement. Just because the case did not settle today does not mean that it never will.

### **§3.221 G. Carve Out Issues That Cannot Be Negotiated**

Negotiations often get stuck because certain factual or legal issues need to be resolved before a settlement of the entire dispute can be reached. If there are intractable, discrete minidisputes, consider disaggregating them for adjudication through a summary judgment or adjudication motion, or through arbitration. See §3.175. You might also enlist the aid of a mediator or other neutral third party to help resolve those disagreements. Meanwhile, focus on the other areas of the dispute that are amenable to negotiation.

**PRACTICE TIP™** Disagreements often arise when each side simply asserts its position without providing any concrete data or evidence to back it up. Sometimes, simply providing your counterpart with receipts, copies of e-mails, or other relevant documentation can clear up those disagreements without the need to involve a mediator or adjudicator.

### **§3.222 H. Reexamine Your Position**

If you think you have reached impasse and it’s all your counterpart’s fault, think again. It takes two to tango. Perhaps this is a

good opportunity to consider how things look from the other side's perspective.

The reason this is so difficult for most of us is that we suffer from what psychologists call “judgmental overconfidence”—that is, we tend to overestimate things in our favor. For example, 94 percent of university professors polled believe they do a better job than their colleagues. A similar study revealed that most negotiators believe they are more flexible, competent, and fair than their counterparts, even though this can be true only of half. See Birke & Fox, *Psychological Principles in Negotiating Civil Settlements*, 4 Harv Negot L Rev 1, 16 (1999).

Judgmental overconfidence typically manifests itself in predictions about litigation outcomes. This is nicely illustrated in a study of participants in a “baseball” arbitration, a type of arbitration in which the arbitrator has no power to make an independent decision and must instead pick either the plaintiff's or the defendant's offer of compromise. When asked to estimate the probability that their offer would be accepted, the participants estimated, on average, that they had a 68 percent chance of success. Although any one offer may have had such a high chance of success, statistically this means that the other side's offer would have had only a 32 percent chance because the arbitrator must pick one or the other proposal. The *average* chance that any one offer will succeed must therefore tally up to 50 percent. In other words, the participants polled were overconfident by 18 percent. See Bazerman & Neale, *Negotiating Rationally* 59 (1992).

Studies have shown that judgmental overconfidence leads negotiators to make fewer concessions, set more-extreme reservation points, and complete fewer deals than well-calibrated negotiators. The next time you get stuck, ask yourself whether your own judgmental overconfidence may be getting in the way. See Bazerman & Neale 59.

### **§3.223 VII. SELECTED BIBLIOGRAPHY**

Many of the concepts and strategies discussed in this chapter are derived from an extensive body of resources on negotiation, and in particular from the following highly influential sources. Readers wishing to deepen their knowledge of negotiation theory and practice are directed to the recommended readings set forth below.

- Bastress, Robert M. & Joseph D. Harbaugh. *Interviewing, Counseling and Negotiating: Skills for Effective Representation*. Boston, Little, Brown, 1990.
- Bazerman, Max & Margaret A. Neale. *Negotiating Rationally*. New York, Free Press, 1992.

- Cialdini, Robert B. *Influence: The Psychology of Persuasion*. New York, William Morrow & Co., Revised ed 1993.
- Ekman, Paul. *Emotions Revealed: Recognizing Faces and Feelings to Improve Communication and Emotional Life*. New York, Times Book, Henry Holt & Co., 2003.
- Fisher, Roger & William L. Ury. *Getting to Yes: Negotiating Agreement Without Giving In*. New York, Penguin Books, 2d ed 1991.
- Korobkin, Russell. *Negotiation Theory and Strategy*. New York, Aspen Law & Business, 2002.
- Lax, David & James Sebenius. *The Manager as Negotiator*. New York, Free Press, 1986.
- Mnookin, Robert H., Scott R. Peppet & Andrew S. Tulumello. *Beyond Winning: Negotiating to Create Value in Deals and Disputes*. Cambridge, MA, Belknap Press, 2000.
- Shell, G. Richard. *Bargaining for Advantage: Negotiation Strategies for Reasonable People*. Viking Press, 1999.
- Stone, Douglas, Bruce Patton & Sheila Heen. *Difficult Conversations: How to Discuss What Matters Most*. New York, Penguin Books, 1999.
- Thomas, Kenneth W. & Ralph H. Kilmann. *The Thomas-Kilmann Conflict Mode Instrument*. CPP, Inc., available online at <http://www.cppi.com/products/tki/index.asp>.
- Ury, William. *Getting Past No: Negotiating Your Way From Confrontation to Cooperation*. Bantam Books, 1991.

### **§3.224 VIII. CHECKLIST**

Following is a checklist covering the important considerations in the negotiation process. Each of the topics is covered thoroughly in the chapter (see referenced sections).

- \_\_\_ Keep in mind the overarching goal of a settlement negotiation: to find a result that places both parties in a better position than the one they could achieve through their next-best option—typically litigation—factoring in both the pros and cons of that option. See §§3.4–3.6.
- \_\_\_ Consider your opening to the negotiation. See §3.7.
  - \_\_\_ Determine the appropriate tone and how that tone can be most effectively conveyed. See §3.8.
  - \_\_\_ Develop rapport with your counterpart. See §3.9.

- \_\_\_ Hear and acknowledge the other side. See §3.10.
- \_\_\_ Convey your client's sincerity and optimism about settlement. See §3.11.
- \_\_\_ Introduce a problem-solving orientation. See §§3.13–3.16.
- \_\_\_ Articulate your client's intentions, needs, and perspective regarding a settlement. See §§3.17–3.23.
- \_\_\_ Agree on the agenda, goals, and process for the negotiation with your counterpart. See §§3.24–3.28.
- \_\_\_ Consider negotiation styles—understand your own style, identify your counterpart's style, and determine how to best interact. See §§3.29–3.33.
- \_\_\_ Exchange information with the other side. See §§3.34–3.38.
  - \_\_\_ Consider how to structure the process of sharing information and reach agreement on the structure with your counterpart. See §§3.40–3.45.
  - \_\_\_ Consider the timing of information-sharing. See §3.39.
  - \_\_\_ Use listening and questioning techniques, *e.g.*, active listening. See §§3.46–3.67.
  - \_\_\_ Determine what information you should get, *e.g.*, information about underlying interests and assumptions, information about the other side's "reservation point." See §§3.69–3.77.
  - \_\_\_ Determine what information you should give. See §§3.78–3.81.
  - \_\_\_ Determine what information you should guard. See §§3.82–3.92.
- \_\_\_ Know the numbers and how you will negotiate with them. See §3.93.
  - \_\_\_ Know your client's "reservation point," *i.e.*, bottom line. See §§3.95–3.97.
  - \_\_\_ Know your client's "target point," *i.e.*, optimistic goal. See §3.98.
  - \_\_\_ Determine your "opening offer or demand." See §3.99.
    - \_\_\_ Determine whether to make the first offer or demand. See §§3.100–3.108.
    - \_\_\_ Determine how optimistically to open. See §§3.109–3.120.
  - \_\_\_ Consider your concession strategy. See §§3.121, 3.130–3.138.

- Consider the messages you and your counterpart communicate to each other through your concessions. See §§3.122–3.129.
- Be prepared to recognize hard-bargaining tactics and to deal with them. See §§3.139–3.154.
- Think of problem-solving approaches. See §3.155.
  - Focus on interests over positions. See §§3.156–3.166.
  - Expand the settlement pie, *i.e.*, look for value-creating opportunities. See §§3.167–3.177.
  - Develop creative settlement options. See §3.178.
    - Brainstorm options first. See §§3.179, 3.181–3.182.
    - Evaluate options later. See §§3.180, 3.183–3.188.
- Consider ways of breaking through an impasse.
  - Use your leverage, both situational leverage (having better alternatives to settlement than your counterpart) and personal leverage (your personality and negotiation skills relative to your counterpart). See §§3.189–3.200.
  - Use objective standards to evaluate each side’s proposals, *e.g.*, reported jury verdicts and fair market value. See §§3.201–3.216.
  - Name the dynamic that is creating the impasse and work with your counterpart to move the negotiation forward. See §3.217.
  - Exchange more information—get the information you need to move forward or invite your counterpart to participate in a joint information-gathering session. See §3.218.
  - Focus on finding ways for *both* parties to be better off than their alternative of litigation, not for one side to “win” relative to the other. See §§3.219, 3.222.
  - Consider taking a break from the negotiation. See §3.220.
  - Consider carving out intractable, discrete minidisputes. See §3.221.
  - Reexamine your position from the other side’s perspective. See §3.222.