Tuesday, May 1
8:30–10:30 am

701 Building Better Negotiation Skills
General Session

Charles B. Craver
Freda H. Alverson Professor of Law
The George Washington University Law School

LEGAL NEGOTIATION PROCESS AND TECHNIQUES

BY CHARLES B. CRAVER

FREDA H. ALVERSON PROFESSOR
GEORGE WASHINGTON UNIVERSITY LAW SCHOOL
WASHINGTON, D.C.

PREFACE

Professor Craver has made presentations on **EFFECTIVE LEGAL NEGOTIATION AND SETTLEMENT** and **ALTERNATIVE DISPUTE RESOLUTION PROCEDURES** to over seventy-five thousand legal practitioners in over forty states, the District of Columbia, Canada, England, Mexico, Austria, Germany, Puerto Rico, and the People's Republic of China. He is the Freda H. Alverson Professor of Law at the George Washington University Law School, where he regularly teaches a course on Legal Negotiating. He was formerly associated with Morrison & Foerster in San Francisco, where he specialized in employment and litigation practice.

Professor Craver is author of ***Effective Legal Negotiation and Settlement*** (LEXIS: 5th ed. 2005), ***The Intelligent Negotiator*** (Prima/Crown 2002), and co-author of ***Alternative Dispute Resolution: The Advocate's Perspective*** (LEXIS: 3rd ed. 2006). He is also author of ***Can Unions Survive? The Rejuvenation of the American Labor Movement*** (N.Y.U. Press: 1993) and co-author of ***Employment Law Treatise*** (2 Vols.) (West: 3rd ed. 2004), ***Employment Law Hornbook*** (West: 3rd ed. 2005), ***Human Resources and the Law*** (B.N.A. 1994), ***Labor Relations Law*** (LEXIS: 11th ed. 2005), ***Employment Discrimination Law*** (LEXIS: 6th ed. 2006), ***Collective Bargaining and Labor Arbitration*** (Michie: 3rd ed. 1988), and ***Labor Relations Law in the Public Sector*** (Michie: 4th ed. 1991). Professor Craver has published numerous law review articles on dispute resolution and labor/employment law.

Professor Craver received his B.S. from Cornell University in 1967, his Master's Degree from the Cornell University School of Industrial and Labor Relations in 1968, and his J.D. from the University of Michigan in 1971. Before joining the George Washington University Law Faculty, he taught at the Universities of Illinois, California, Davis, Virginia, and Florida.

Professor Craver's book ***Effective Legal Negotiation and Settlement*** (5th ed. 2005) may be ordered directly from **LEXIS-NEXIS Publishing** [(800) 446-3410]. ***The Intelligent Negotiator*** may be obtained from online book sellers.

VIDEO and **AUDIO TAPES** of **EFFECTIVE LEGAL NEGOTIATION AND SETTLEMENT** and **ALTERNATIVE DISPUTE RESOLUTION PROCEDURES** may be obtained from ***International Communications Corp.*** **[800)422-5134].**

CONTENTS

D. Use Blocking Techniques to Protect Your Sensitive Information
E. Plan Blocking Techniques in Advance
F. When Making First Offer Advantageous
G. Usually Good to Have Opponent Make First Offer
H. Carefully Observe and Probe Opponent
I. Objectively Explore Underlying Needs and Interests of Parties

VI. DISTRIBUTIVE/COMPETITIVE STAGE ["Value Claiming"]

A. Each Side Trying to Maximize Result
B. Common Techniques
C. Characteristics of Persuasive Argument
D. Characteristics of Effective Threats
E. Distinguishing Between Threats & Warnings
F. Affirmative Promises
G. Purpose of Power Bargaining
H. Must Consider Consequences of Non-Settlement

VII. CLOSING STAGE ["Value Solidifying"]

A. Parties who Become Overly Anxious About Agreement Often Move too Quickly Toward Closure
B. Both Parties Need to Close Remaining Gap Together
C. Assist Opponent to Reach Final Agreement
D. Important to Remember that Closing Phase is Highly Competitive

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

A. Explore Alternative Formulations Once Tentative Settlement Achieved
B. Tell Opponent You Are in Cooperative Phase
C. Carefully Review the Final Terms Agreed Upon
D. Prepare Final Agreement Whenever Possible
E. Carefully Review Draft Prepared by Opponent

IX. NEGOTIATION GAMES/TECHNIQUES

A. Nature and Objectives
B. Fundamental Negotiation Games/Techniques
C. Recognition Crucial to Gamesmanship Defense

X. ETHICAL CONSIDERATIONS

A. Attorneys Must Represent Clients Zealously Within Bounds of Professional Propriety
B. Attorneys Must Maintain Professional Integrity

C. Ethical Dilemmas Frequently Encountered During Negotiations

APPENDIX A: ***Sexual Harassment Exercise***

APPENDIX B: ***Selected Negotiation Bibliography***

THE LEGAL NEGOTIATION PROCESS AND TECHNIQUES

By Charles B. Craver

INTRODUCTION

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

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

It is imperative that negotiators recognize that they are involved with a process that takes time to develop. The various stages must evolve, and certain ritualistic behavior must normally occur. Patient bargainers who permit the process to unfold in a deliberate manner can usually obtain expeditious and efficient settlement agreements. On the other hand, impatient participants who endeavor to accelerate the process are likely to encounter needless problems and extend the time necessary to complete their transactions.

In this course, we will explore the negotiation process - the different stages and the objectives to be accomplished in each. We will also cover the negotiation techniques individuals are likely to encounter when they bargain with others. The more people appreciate how structured the negotiation process is, the more they can determine the optimal way to behave to achieve their desired goals.

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

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

Assume that a 20-year-old, unmarried woman has been injured in an automobile accident with the defendant. Due to flying glass, she has lost the sight in her left eye and has suffered permanent facial scars. She still suffers from occasional bad headaches. Her unpaid medical bills to date amount to $20,000. It is clear that the defendant was negligent, but it is disputed whether the plaintiff was also negligent. Assume you are in a state where contributory negligence is still a total bar to recovery. A suit for $300,000 has been filed.

(A) The plaintiff is totally broke and desperately needs money. She wants to get $20,000 now to pay her medical expenses. Although her headaches have abated, her mental state has recently deteriorated due to the pending litigation. Her psychiatrist has informed you, with her permission, that if the case is not resolved quickly, she is likely to suffer an emotional relapse and commit suicide. She has instructed you to settle immediately for any amount over $20,000 (assume that you are representing the plaintiff on a pro bono, no-fee basis).

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

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

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

2. Some participants feel a greater need to settle than others, with risk-averse participants being less willing

to accept the possibility of non-settlements than risk-taking individuals; and

3. It is uncomfortable and difficult to conduct negotiations when you can only communicate about the specific items in issue, since ancillary discussions are needed to keep the process going between position changes.

I. UNDERSTANDING VERBAL COMMUNICATION/VERBAL LEAKS

A. Meaning apparent on face ("I cannot offer more").

B. Meaning equivocal ("My client is ***not inclined***/ does ***not want*** to offer any more"; "I cannot offer more ***at this time***"; "My client ***would like*** to get $50,000"; "That's ***about as far*** as I can go"/"I don't have ***much more room***").

C. Indicating item priorities: "I ***must have*** X, I ***really need*** Y, and I ***want*** Z").

D. Negotiators should listen for "verbal leaks" that are associated with equivocal statements.

II. NEGOTIATOR STYLES (G. Williams, 1983 & A. Schneider, 2002)

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

COOPERATIVE/PROBLEM-SOLVING	COMPETITIVE/ADVERSARIAL
Move Psychologically *Toward* Opponents	Move Psychologically *Against* Opponents
Try to Maximize *Joint* Return	Try to Maximize *Own* Return
Seek Reasonable Results	Seek Extreme Results
Courteous & Sincere	Adversarial & Disingenuous
Realistic Opening Positions	Unrealistic Opening Positions
Rely on Objective Standards To Guide Discussions	Focus on Positions Rather Than Neutral Standards
Rarely Use Threats	Frequently Use Threats

Maximize Information Disclosure	Minimize Information Disclosure
Open & Trusting	Closed & Untrusting
Reason With Opponents	Manipulate Opponents

A. Williams study of attorneys in Denver and Phoenix found that ***65%*** of negotiators were considered ***"Cooperative/Problem-Solvers," 24% "competitive/ Adversarial,"*** and 11% unclassifiable.

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

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

D. Schneider study found two ***significant changes*** compared with prior Williams study.

1. "Competitive" negotiators viewed more negatively today than in 1980 - nastier and more abrasive.

2. While 54% of "cooperative" negotiators viewed as *effective*, only 9% of "competitive" advocates are and while only 3.5% of "cooperative" negotiators considered *ineffective*, 53% of "competitive" bargainers seen as *ineffective*.

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

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

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

returns of the parties.

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

III. PREPARATION STAGE [*Establishing Limits & Goals*]

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

A. ***Basic Areas***

1. Be fully prepared regarding relevant facts and law, Plus any relevant economic and/or political issues.

2. Prepare all relevant arguments supporting own positions-- Consider innovative formulations.

3. Anticipate opponent's arguments and prepare effective counter-arguments-- This will bolster own confidence and undermine that of opponent.

4. Try not to over-estimate own weaknesses or to ignore weaknesses influencing your opponent.

5. What is **your BATNA** [Best Alternative to Negotiated Agreement] - *i.e.*, your **Bottom Line**.

6. What is your **opponent's BATNA** - Try to appreciate Options and pressures affecting your opponent.

B. ***Assumptions***

1. Regarding own position.

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

C. Establishment of ***Aspiration Level***

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

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

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

3. Negotiators should initially:

   a. Seek high, yet seemingly "reasonable" initial positions that will not cause opponents to lose all interest -- Try to begin as far from actual objectives as you can while still being able to rationally defend your proposals.

      Due to ***"anchoring"***, people who begin with generous opening offers embolden opponents who think they'll do better than they thought while those who begin with less generous offers undermine opponents who think they'll not do as well as they hoped.

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

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

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

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

      2. A confident manner often causes uncertain opponents to reconsider their preliminary assessments in favor of the confident party.

e. Establish "***principled opening positions***" that can be defended "objectively" when presented to adversaries-- Prepare logical rationales to explain each component of positions.

1. Bolsters own confidence and undermines that of uncertain opponents.

2. Explains reasons for choosing overall positions selected, rather than less beneficial starting points.

3. Frequently allows person to control agenda, by causing opponents to directly focus upon each segment of stated positions.

D. ***Planning Strategy and Tactics***

1. Carefully plan your desired methodology as if you were choreographing the movement from your opening offer to your desired objective.

2. Consider appropriate modifications to your plan that may be necessitated by changed circumstances that may arise during the negotiations (***e.g.***, overly generous first offer or unexpectedly large subsequent concession by opponent).

a. Imagine a road map with various routes from opening position to ultimate objective.

b. You must be prepared to change routes in response to opponent tactics.

E. Negotiators must develop bargaining strategies that will culminate in "final offers" that are sufficiently tempting to risk-averse opponents vis-a-vis consequences of non-settlements that opponents will be afraid to reject the proposed terms.

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

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

Establishment of Negotiator Identities and Overt Tone For the Negotiations.

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

1. Status Factors:

   a. Name of law firm or legal agency with which participants are associated.

   b. Educational background.

   c. Possible professional name-dropping.

2. Experience Factors:

   a. General legal experience.

   b. Familiarity with areas relevant to particular matter to be negotiated.

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

1. Negotiators should initially reestablish rapport with opponents they already know and work to establish rapport with opponents they don't know.

   a. They should look for common interests that may make them more likeable since it is harder to reject requests from people we like than from persons we dislike.

   b. They may have attended the same schools, they may like the same sports, music, or other activities, or they may share other interests.

2. Studies show that the ***negotiator moods*** significantly affect the way in which bargaining interactions are conducted.

   a. Negotiators who begin interactions in a positive mood behave more cooperatively, reach more agreements, and achieve more efficient distributions of the terms agreed upon.

   b. Negotiators who begin an interaction in a negative mood behave more competitively, reach more impasses, and achieve less efficient distributions of the terms agreed upon.

C. When negotiators approach interaction with vastly different views of tone to be set for the process,

"***Attitudinal Bargaining***" may be used to influence the manner in which bargaining will proceed.

1. Many attorneys are so enamored of the "adversarial" nature of the legal system that they view negotiations as "win-lose" endeavors.

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

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

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

        1. Don't hesitate to rearrange the furniture or select another chair that will be more comfortable.

        2. When your opponents leave the office to get a file or some coffee, take their seats and indicate, when they return, that you prefer the view from those locations.

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

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

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

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

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

V. INFORMATION STAGE ["*Value Creation*"]

Focus Upon ***Opponent's*** Initial ***Positions*** and ***Underlying Needs and Desires*** to Ascertain What May be Divided Up.

A. ***Seek*** as much ***information*** from opponent as possible, while being careful not to disclose inadvertently information you wish to remain confidential.

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

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

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

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

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

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

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

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

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

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

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

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

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

3. Over- or under- answer the question propounded.

a. Respond generally to a specific inquiry.

b. Respond specifically to a general inquiry.

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

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

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

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

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

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

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

F. When both sides are aware of ***narrow settlement range*** one side may ***begin*** with ***reasonable offer*** just inside

range hoping to preempt negotiations and induce other side to accept offer without any haggling.

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

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

2. After you receive opponent's initial offer, you can begin with position that places your goal in the middle, since parties tend to move toward center of their opening offers [***"Bracketing"***].

3. Party who makes the first offer likely to make the first ***concession***, and studies indicate that the party who makes initial ***concession*** tends to achieve less beneficial results than opponent.

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

1. Categories of Information Regarding the Opponent:

a. Personal skill.

b. Negotiating experience.

c. Relevant personal beliefs and attitudes.

d. Opponent's perception of current situation.

e. Resources available to opposing party.

2. Sources of Information:

a. Choice of topics and sequence of presentation critical when multi-item negotiations involved.

1. Some negotiators begin with their most important topics in effort to get them resolved quickly and diminish the anxiety they are experiencing regarding the possibility of no settlement.

Increases likelihood of quick impasse over critical items and non-settlement.

2. Other negotiators begin with their least important items-- either intending to make concessions on them to induce opponent to make subsequent concessions on major items or to obtain psychological advantage by winning minor items while creating concession-oriented attitude in opponent.

Enhances probability of settlement by beginning process successfully and developing psychological commitment in participants to mutual accord.

b. Verbal leaks and nonverbal clues

3. Problems of Interpretation:

a. Credibility of information received.

b. Validity of your perceptions of opponent.

c. Attribution-- Meanings you attribute to opponent's ambiguous signals (verbal and nonverbal).

4. Verification Mechanisms:

a. Overall behavior patterns.

b. Consistency of verbal and nonverbal signals.

c. Use of questioning and probing.

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

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

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

3. Specifically focus upon underlying needs and interests of both sides, rather than simply upon expressed positions.

   a. Emphasis upon stated positions more likely to generate internecine conflict than exploration of underlying interests.

   b. Remember that positions frequently reflect only some of underlying needs and interests- Use ***Brainstorming*** to generate innovative options. Discovery of undisclosed motivational factors will often enhance possibility of settlement by allowing parties to explore unarticulated alternatives that may be mutually beneficial-- For example, you may find that a plaintiff in a defamation action seeking a substantial monetary sum would prefer to obtain retraction and public apology or a corporate seller may accept some goods or services instead of cash.

VI. DISTRIBUTIVE/COMPETITIVE STAGE [*"Value Claiming"*]

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

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

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

   2. Start from "***principled opening position***" to explain and support initial presentation.

      a. To reinforce confidence in own position.

      b. To induce opponent to reassess own position.

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

   4. Avoid unreciprocated concessions in which they

bid against themselves without obtaining reciprocal position changes from other side.

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

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

1. Argument (legal and nonlegal).

2. Overt threats or more subtle warnings.

3. Rational or emotional appeals.

4. Challenges to opponent's various contentions.

5. Ridicule of opponent or of his/her position.

6. Control of agenda (its content and order of items).

7. Intransigence.

8. Straight-forwardness.

9. Flattery (including real or feigned respect).

10. Manipulation of contextual factors (time, location, etc., of negotiations).

11. Humor can be used by many people to ridicule unreasonable positions being taken by opponent or to reduce built-up bargaining tension.

12. Silence (people often talk to fill silent void, thus inadvertently disclosing information).

13. Patience (powerful weapon since many negotiators make concessions simply to end process)-- Time pressure can be effectively used against opponent who has an artificially curtailed time constraint.

14. Creation of guilt or embarrassment, since such feelings often precipitate concessions.

C. Characteristics of ***Persuasive Argument***:

1. Even-handed and seemingly objective.

2. Presented in logical, orderly, comprehensive, and articulate manner to enhance cumulative impact.

3. Beyond what is expected, forcing the opponent to reconsider his/her perception of matter in issue.

D. Characteristics of ***Effective Threats***:

1. Carefully communicated to and completely understood by opponent.

2. Proportionate to the present situation (***i.e.***, must constitute believable alternative to settlement).

3. Supported by corroborative information.

4. Never issue ultimatum you are not prepared to effectuate if necessary.

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

1. ***Threats*** are actions communicator may take to punish recalcitrant opponent while ***warnings*** are consequences that will result from actions of others if requested behavior not carried out.

2. ***Threats*** more disruptive than ***warnings*** since more direct affront to person being threatened than predicted actions of others.

3. ***Warnings*** more credible than ***threats*** since appear to be beyond control of communicator.

F. ***Affirmative Promise*** ("If you do this, I'll do _____") more likely to induce position change and less disruptive than negative threat/warning, due to face-saving nature of promise, yet negative threat/warning more likely to be remembered than affirmative promise.

G. The ***purpose*** of ***power bargaining*** is to influence opponent's evaluation of:

1. His/her own situation.

2. Your position and your external options.

3. Your side's capabilities.

H. Counsel should ***consider*** the following ***consequences*** of ***settlement*** and ***non-settlement***:

1. Likely outcome if no settlement is achieved, including transactional and psychological costs-- to own side ***and*** to opposing side.

2. Total monetary and emotional costs of settlement.

3. Impact on future dealings between the parties.

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

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

A. Parties who become ***overly anxious*** about achievement of accord frequently ***move too quickly*** toward closure.

1. They forget the patience, carefully planned concession pattern, and thought-out tactics that got them to this beneficial position, and they try to move directly to a final agreement.

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

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

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

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

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

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

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

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

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

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

2. Once you recognize that your opponent has become psychologically committed to settlement, evidenced by such closing behavior as more rapid and more generous concessions, do not move too quickly.

a. Be patient and encourage your opponent to close more of the remaining gap.

b. Indicate that you have minimal bargaining room left to induce opponent to believe he/she must close most of remaining gap.

c. Emphasize your prior concessions in effort to generate guilt that may induce your opponent to be more generous now.

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

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

VIII. COOPERATIVE/INTEGRATIVE STAGE [*"Value Maximizing"*]

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

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

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

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

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

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

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

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

D. When the negotiation process concludes with a mutual accord, it is beneficial to ***draft the final agreement***--

While no attorney should contemplate the deletion or alteration of term agreed upon or the addition of new provisions, since such behavior would be unethical and probably fraudulent, he/she should seize the chance to draft provisions that best reflect his/her understanding of terms negotiated.

E. If your opponent drafts the final agreement, you should ***carefully review*** that ***draft*** to be sure it is accurate.

1. Make sure the language selected reflects your understanding of the terms agreed upon.

2. Be certain that nothing has been added that was never agreed upon.

3. Make sure that nothing that was agreed upon has been omitted from the final agreement.

IX. NEGOTIATING GAMES/TECHNIQUES

A. ***Nature and Objectives:***

1. Seemingly ingenuous remarks that disguise ulterior motives are common to most negotiations as people endeavor to move opponents in desired direction.

a. Attorneys may use them to create an impression of greater actual or believed bargaining power than really exists to enhance that power.

b. Such ploys may be used to diminish opponent's bargaining strength by creating the impression that the speaker is ignorant regarding that party's actual power, since bargaining power is defined more by perception rather than by objective standards.

2. Psychological ploys may be used to induce opponents to respond in a beneficial way that is not based on wholly rational considerations. Examples include:

a. False flattery to precipitate concessions.

b. Feigned weakness to evoke sympathy.

c. Feigned anger to generate guilt.

B. Fundamental ***Negotiation Games/Techniques***:

Although some negotiators use particular techniques one at a time, most employ several techniques simultaneously or resort to different tactics in a seriatim manner to keep their opponents off balance.

1. ***Numerically Superior Bargaining Team.***

   a. Single people who negotiate against two or three opponents are usually at a distinct disadvantage.

   b. Their opponents can more easily monitor their verbal and nonverbal signals and they can compare ideas during separate caucus sessions.

   c. Individuals who must negotiate against several opponents should have colleagues join them to counteract the numerical superiority possessed by the other side.

   d. People who have 15 or 20 persons on their side of table are at disadvantage against smaller teams, and they should conduct intra-organizational interaction during Preparation Stage to generate common goals and common strategy.

2. ***Asymmetrical Time Pressure.***

   a. If one side is under more time pressure than the other, a patient participant may take advantage of this imbalance.

   b. Negotiators must recognize that opponents also have deadlines that affect their behavior.

   c. Advocates can often hide their time constraints.

   d. Transaction negotiators may preempt the time element by announcing the deadline that must be met by both sides if a deal is to be consummated.

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

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

   b. May cause opponent to conclude that matter cannot be reasonably resolved, or may place

offeror in position from which he/she may end up retreating in uncontrolled fashion.

c. Counter-measures:

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

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

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

4. May come out with own realistic position, but must realize that this will require opponent to make concessions on 10:1 or 20:1 basis.

4. ***Probing Questions.***

a. Advocates confronted by truly extreme positions may generate a more flexible atmosphere through the use of probing questions designed to induce opponents to explain the positions being taken.

b. Use of neutral, nonjudgmental inquiries is often more effective than direct challenge to positions being taken by intransigent persons.

c. Ask opponents to value most finite items first, writing down figures that are remotely realistic.

d. If unreasonable figure cited, calmly indicate lack of objective basis for position and ask how opponent determined that number.

e. When done, total position usually three times opponent's offer or one-third of his/her demand.

5. ***Boulwareism/Best Offer First Bargaining.***

a. Presenting best offer at outset, explaining

that you do not wish to waste time engaging in usual "auction" bargaining since this is all you are willing to offer-- Frequently employed by insurance company representatives.

b. Impossible to know true value of transaction from own side's perspective-- Must meet with opponent to determine how much he/she wants an agreement.

c. May only be employed effectively by person with bargaining power-- Party with such power can afford to be generous with process and let other party think he/she has influenced the outcome, since he/she may be willing to pay for privilege.

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

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

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

6. ***Range Offers.***

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

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

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

7. ***Settlement Brochure.***

a. Preparation of written document, with pictures

if appropriate, to establish highly-principled initial position and induce opponent to argue from this document [creates aura of legitimacy].

Some parties now prepare video reenactments of relevant circumstances to enhance their respective bargaining positions.

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

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

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

8. ***Limited Authority/Lack of Authority.***

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

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

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

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

d. Do ***not negotiate*** with opponent with ***no authority***, since he/she will try to induce you to bargain against yourself in a no-win manner-- Such an opponent hopes to extract concessions from you as a prerequisite to discussions with an individual who possesses real authority.

Ask such opponent to obtain authority or have someone with authority call so that you can discuss your respective positions.

9. ***"Nibble" Technique.***

   a. After "final" agreement is achieved, opponent demands one additional concession-- Party psychologically committed to agreement often concedes requested item to preserve accord.

   b. Don't merely ask how much ***own side*** wants pact-- Other side is unlikely to let the settlement fail over your side's unwillingness to accept their new demand.

   c. Best to counter other side's new demand with appropriate demand of your own.

      1. If other party is sincere, he/she will be willing to discuss reciprocal arrangement.

      2. If other party insincere, likely to demand honoring of original terms agreed upon.

10. ***Decreasing or Limited Time Offers.***

   a. During early stages of law suits, some attorneys make realistic offers that must be accepted by a set time or be withdrawn or reduced by a certain amount with the passage of time-- Tell opponent of time limit to avoid misunderstandings.

   b. This technique may offend opponents and increase likelihood of non-settlement, but may be employed successfully by negotiators with reputation for carrying out their stated intentions.

11. ***Real or Feigned Anger.***

   a. Real anger quite dangerous since loss of control may cause party to convey information he/she did not intend to divulge.

   b. Can be employed to convince opponent of the seriousness of your situation and to frighten that person sufficiently to precipitate a position reconsideration.

c. Counter-measures:

1. Carefully observe angry opponent for helpful clues that may be inadvertently disclosed.

2. Appear personally offended in manner that may create guilt or embarrassment and precipitate concession to assuage your feelings.

3. Respond in kind or terminate session.

12. ***Aggressive Behavior.***

a. Similar to use of Anger.

b. Opponent may frequently interrupt you in effort to undermine your momentum.

c. Aggressive negotiators should carefully monitor nonverbal signals emanating from opponent (*e.g.*, clenched jaw, defensive posture) to avoid causing unintended frustration or termination of talks.

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

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

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

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

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

14. ***Irrational Behavior.***

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

b. Seemingly irrational negotiators hope to convince opponents they must either accept their one-sided demands or face consequences associated with ongoing dispute with unstable adversaries.

c. Few successful lawyers or corporate leaders are truly irrational-- If they were, they would be unlikely to consistently achieve good results.

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

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

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

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

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

16. ***False Demands (Discerned During Information Stage).***

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

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

17. ***Uproar.***

a. Where one side threatens havoc (e.g., mass layoffs) and then offers to prevent the dire consequences if other side accepts its draconian demands (e.g., salary reductions).

b. This technique is used to precipitate unilateral concessions from parties striving to avoid the threatened devastation.

c. Counter-measures:

1. Carefully evaluate the likelihood that the threatened disaster will actually occur.

2. Determine consequences for the threatening party if it does occur-- Situation might be worse for threatening party than for you, in which case you might indicate willingness to accept the dire consequences if opponent does not provide appropriate concessions.

18. ***"So What."***

a. Attempt to detract from party's concession by characterizing it as relatively unimportant.

b. If your concession is really worth little to your opponent, then he/she should not mind if you withdraw it due to its importance to your side.

19. ***"Mutt and Jeff" [Reasonable-Unreasonable Dichotomy].***

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

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

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

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

2. If "reasonable" person indicates that he/she must defer to partner's opinion, it

is clear they are using Mutt and Jeff technique.

20. ***"Brer Rabbit" [Reverse Psychology]***

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

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

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

21. ***Passive-Aggressive Behavior.***

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

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

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

a. Party (often wolf in sheepskin) feigns lack of negotiating ability and knowledge in effort to evoke sympathy and weaken opponent's resolve-- Usually acknowledges reasonableness of opponent's concessions ***but*** proceeds to explain why the concessions are not sufficient.

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

c. Counter-measures:

1. Never allow Belly-Up opponent to evoke such sympathy that you alter your negotiation plans and concede everything in an effort to find a "solution" for this poor soul.

2. Force Belly-Up opponent to state own position that you can directly challenge--Adroit Belly-Up negotiator will try to avoid stating own definitive position at all costs.

C. ***Recognition Crucial*** to Gamesmanship Defense.

1. Negotiators should be aware of the types of games frequently played during negotiations and know how to recognize which tactics are being employed.

2. Once an attempted technique is recognized, a negotiator can minimize its psychological effectiveness and perhaps even turn the circumstances to his/her own advantage.

X. ETHICAL CONSIDERATIONS

A. Attorneys are obligated to ***represent clients zealously***, within the bounds of ***professional propriety***.

1. They should remember that they must live with their own consciences and not those of their clients.

2. Lawyers with reputations as deceitful negotiators have a difficult time representing clients effectively, since their representations can no longer be accepted by their opponents.

B. Attorneys should strive to achieve excellence and to ***maintain*** their ***personal integrity***, since this will enable them in the long run to optimally serve the interests of both their clients and society.

("Always do right. This will gratify some people, and astonish the rest."--Mark Twain)

C. ***Ethical Dilemmas*** Frequently ***Encountered*** by Negotiators:

1. Should attorneys merely endeavor to obtain settlements that are "satisfactory" to clients or to maximize return to their clients?

2. Should attorneys seek more than "fair settlements" if they think that more can be ethically obtained?

3. If negotiators must avoid "unconscionable" results, who is to decide what is "unconscionable?"

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

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

6. When, if ever, may negotiators appropriately lie? Model Rule 4.1(a) states that "a lawyer shall not knowingly make a false statement of material fact or law to a third person," but a Reporter's Comment indicates that different mores apply during negotiation interactions:

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

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

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

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

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

e. When may attorneys misrepresent client settlement intentions?

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

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

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

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

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

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

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

   Model Rule 3.3(a)(3) requires litigators to disclose those cases to the tribunal.

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

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

11. May negotiators employ tactics that are designed to intimidate or harass their opponents?

Model Rule 4.4 prohibits the use of tactics that "have no substantial purpose other than to embarrass, delay, or burden a third person ..."

12. May attorney representing plaintiff in civil case involving criminal overtones suggest possibility of criminal charges if civil case is not settled?

In Formal Opinion 92-363, ABA Standing Committee on Ethics said that such conduct not unethical so long as attorney does not indicate improper influence over criminal process ***and*** does not demand excessive compensation that may violate extortion laws. Accord, *Comm. on Legal Ethics v. Printz*, 416 S.E.2d 720 (W. Va. Sup. Ct. 1992). Compare *In re Charles*, 290 Or. 127, 618 P.2d 1281, (1980)(threat of criminal charges ***solely*** to obtain advantage in civil matter unethical).

APPENDIX A

Sexual Harassment Exercise

GENERAL INFORMATION

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

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

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

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

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

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

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

CONFIDENTIAL INFORMATION -- JANE DOE

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

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

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

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

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

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

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

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

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

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

CONFIDENTIAL INFORMATION -- PROFESSOR PALSGRAF

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

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

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

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

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

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

APPENDIX B

SELECTED NEGOTIATION BIBLIOGRAPHY

Acuff, F., ***How to Negotiate Anything with Anyone Anywhere Around the World*** (1997)

Anderson, D., ***Dispute Resolution: Bridging the Settlement Gap*** (1996)

Arrow, K., Mnookin, R., Ross, L., Tversky, A. & Wilson, R., ***Barriers to Conlict Resolution*** (1995)

Axelrod, R., ***The Evolution of Cooperation*** (1984)

Babcock, L. & Laschever, S., ***Women Don't Ask*** (2003)

Bacharach, S. & Lawler, E., ***Bargaining: Power, Tactics and Outcomes*** (1981)

Bastress, R. & Harbaugh, J., ***Interviewing, Counseling and Negotiating*** (1990)

Bazerman, M. & Neale, M., ***Negotiating Rationally*** (1992)

Beier, E. & Valens, E., ***People Reading*** (1975)

Bellow, G. & Moulton, B., ***Negotiation*** (1981)

Bendahmane, D. & McDonald, J., ***Perspectives on Negotiation*** (1986)

Berne, E., ***Games People Play*** (1964)

Brockner, J. & Rubin, J., ***Entrapment in Escalating Conflicts*** (1985)

Brunet, E. & Craver, C., ***Alternative Dispute Resolution: The Advocate's Perspective*** (3nd ed. 2006)

Camp, J., ***Start With No*** (2002)

Cohen. H., ***Negotiate This*** (2003)

Cohen, H., ***You Can Negotiate Anything*** (1980)

Craver, C., ***Effective Legal Negotiation and Settlement*** (5th ed. 2005)

Craver, C., ***The Intelligent Negotiator*** (2002)

Craver, "Clinical Negotiating Achievement as a Function of Traditional Law School Success and as a Predictor of Future Negotiating Performance," 1986 ***Mo. J. Dispute Res.*** 63 (1986)

Craver, "The Impact of Student GPAs and a Pass/Fail Option on Clinical Negotiation Course Performance," 15 ***Ohio State J. of Dispute Res.*** 373 (2000)

Craver & Barnes, "Gender, Risk Taking, and Negotiation Performance," 5 ***Mich. J. Gender & Law*** 299 (1999)

Craver, "The Impact of Gender on Clinical Negotiating Achievement," 6 ***Ohio State J. Dispute Res.*** 1 (1990)

Craver, "The Impact of a Pass/Fail Option on Negotiation Course Performance," 48 ***J. Legal Educ.*** 176 (1998)

Craver, "Negotiation as a Distinct Area of Specialization," 9 ***Amer. J. Trial Advocacy*** 377 (1986)

Craver, "Negotiation Ethics: How to be Deceptive Without Being Dishonest/How to be Assertive Without Being Offensive," 38 ***South Texas L. Rev.*** 713 (1997)

Craver, "The Negotiation Process," 27 ***Amer. J. Trial Advocacy*** 271 (2003)

Craver, "Negotiation Styles: The Impact on Bargaining Transactions," ***Disp. Res. J.*** 48(Feb.-Apr. 2003)

Craver, "Negotiation Techniques," 24 ***Trial*** No. 6, 65 (June, 1988)

Craver, "Race and Negotiation Performance," ***Dispute Resolution Magazine*** 22 (Fall 2001)

Crowley, T., ***Settle It Out of Court*** (1994)

Dawson, R., ***Secrets of Power Negotiating*** (2nd ed. 2000)

Dawson, R., ***You Can Get Anything You Want*** (1985)

Deaux, K., ***The Behavior of Women and Men*** (1976)

Dimitrius, Jo-E. & Mazzarella, M., ***Reading People*** (1998)

Druckman, D., ***Negotiations: Social-Psychological Perspectives*** (1977)

Druckman, D., Rozelle, R. & Baxter, J., ***Nonverbal Communication*** (1982)

Edwards, H. & White, J., ***The Lawyer as a Negotiator*** (1977)

Ekman, P., ***Telling Lies*** (1992)

Ekamn, P. & Friesen, W., ***Unmasking the Face: A Guide to Recognizing Emotions from Facial Clues*** (1975)

Elgin, S., ***The Gentle Art of Verbal Self-Defense*** (1980)

Fast, J., ***Body Language*** (1970)

Felder, R., ***Bare-Knuckle Negotiation*** (2004)

Fisher, R. & Ertel, D., ***Getting Ready to Negotiate*** (1995)

Fisher, R., Kopelman, E. & Schneider, A., ***Beyond Machiavelli*** (1994)

Fisher, R. & Ury, W., ***Getting to Yes*** (1981)

Ford, C., ***Lies! Lies! Lies!*** (1996)

Freund, J., ***Smart Negotiating*** (1992)

Gelfand, M. & Brett, J., ***The Handbook of Negotiation and Culture*** (2004)

Gifford, D., ***Legal Negotiation: Theory and Applications*** (1989)

Gilligan, C., ***In a Different Voice*** (1982)

Goldman, A., ***Settling for More*** (1991)

Goodpaster, G., ***A Guide to Negotiation and Mediation*** (1997)

Guernsey, T., ***A Practical Guide to Negotiation*** (1996)

Gulliver, P., ***Disputes and Negotiations: A Cross-Cultural Perspective*** (1979)

Hall, E., ***The Silent Language*** (1973)

Hall, J., ***Nonverbal Sex Differences*** (1984)

Hall, Lavinia, ***Negotiation: Strategies for Mutual Gain*** (1993)

Harper, R., Wiens, A. & Matarazzo, J., ***Nonverbal Communication: The State of the Art*** (1978)

Harragan, B., ***Games Mother Never Taught You*** (1977)

Harvard Business Essentials, ***Negotiation*** (2003)

Henley, N., ***Body Politics: Power, Sex, and Nonverbal Communication*** (1977)

Hermann, P., ***Better Settlements Through Leverage*** (1965)

Illich, J., ***Power Negotiating*** (1980)

Jandt, F., ***Win-Win Negotiating: Turning Conflict into Agreement*** (1985)

Karrass, C., ***Give and Take*** (1974)

Karrass, C., ***The Negotiating Game*** (1970)

Karrass, G., ***Negotiate to Close*** (1985)

Kochan, T. & Lipsky, D., ***Negotiations and Change*** (2003)

Kohn, A., ***No Contest*** (1986)

Kolb, D. & Williams, J., ***The Shadow Negotiation*** (2000)

Kolb, D. & Willimas, J., ***Everyday Negotiation*** (2003)

Korda, M., ***Male Chauvinism: How it Works*** (1972)

Korda, M., ***Power: How to Get It, How to Use It*** (1975)

Kramer, H., ***Game, Set, Match: Winning the Negotiations Game*** (2001)

Kritek, P., ***Negotiating at an Uneven Table*** (1994)

Kritzer, H., ***Let's Make a Deal*** (1991)

Latz, M., ***Gain the Edge: Negotiating to Get What You Want*** (2004)

Lax, D. & Sebenius, J., ***The Manager as Negotiator: Bargaining for Cooperation and Competitive Gain*** (1986)

Lebow, R., ***The Art of Bargaining*** (1996)

Levin, E., ***Negotiating Tactics*** (1980)

Levine, S., ***Getting to Resolution*** (1998)

Levinson, J., Smith, M. & Wilson, O., ***Guerrilla Negotiating*** (1999)

Lewicki, R., Saunders, D. & Minton, J., ***Negotiation*** (3rd ed.1999)

Lewis, D., ***Power Negotiating Tactics and Techniques*** (1981)

Lieberman, D., ***Never Be Lied to Again*** (1998)

Lisnek, P., ***A Lawyer's Guide to Effective Negotiation and Mediation*** (1993)

Lisnek, P., ***Winning the Mind Game: Negotiating in Business and Life*** (1996)

Maccoby, E. & Jacklin, C., ***The Psychology of Sex Differences*** (1974)

Madonik, B., ***I Hear What you Say, But What Are You Telling Me*** (2001)

Marone, N., ***Women and Risk*** (1992)

Mayer, B., ***Beyond Neutrality: Confronting the Crisis in Conflict Resolution*** (2004)

Mayer, B., ***The Dynamics of Conflict Resolution*** (2000)

Mayer, R., ***Power Plays*** (1996)

Maynard, D., ***Inside Plea Bargaining: The Language of Negotiation*** (1984)

Mayo, C. & Henley, N., ***Gender and Nonverbal Behavior*** (1981)

Menkel-Meadow, "Toward Another View of Legal Negotiation: The Structure of Problem Solving," 31 ***U.C.L.A. Law Rev.*** 754 (1984)

Miller, L. & Miller, J., ***A Woman's Guide to Successful Negotiating*** (2002)

Mnookin, R., Peppet, S. & Tulumello, A., ***Beyond Winning: Negotiating to Create Value in Deals and Disputes*** (2000)

Moffitt, M. & Bordone, R., ***The Handbook of Dispute Resolution*** (2005)

Morris, D., ***Bodytalk*** (1994)

Murnighan, J.K., ***Bargaining Games*** (1992)

Nierenberg, G., ***The Art of Negotiating*** (1968)

Nierenberg, G., ***The Complete Negotiator*** (1986)

Nierenberg, G., ***Fundamentals of Negotiating*** (1973)

Nierenberg, G. & Calero, H., ***How to Read a Person Like a Book*** (1971)

Nierenberg, G. & Calero, H., **Meta-Talk** (1973)

Nierenberg, J. & Ross, I., ***Women and the Art of Negotiating*** (1985)

Norton, "Bargaining and the Ethic of Process," 64 ***N.Y.U. Law Rev.*** 493 (1989)

Peck, C., ***Cases and Materials on Negotiation*** (1980)

Perschbacher, "Regulating Lawyers' Negotiations," 27 ***Ariz. Law Rev.*** 75 (1985)

Peters, "The Use of Lies in Negotiation," 48 ***Ohio State L.J.*** 1 (1987)

Pinkley R. & Northcraft, G., ***Get Paid What You're Worth*** (2000)

Pruitt, D., ***Negotiation Behavior*** (1981)

Raiffa, H., ***The Art and Science of Negotiation*** (1982)

Raiffa, H., ***Negotiation Analysis*** (2002)

Rich, A., ***Interracial Communication*** (1974)

Ringer, R., ***Winning Through Intimidation*** (1973)

Rubin, A., "A Causerie on Lawyers' Ethics in Negotiation," 35 ***La. Law Rev.*** 577 (1975)

Rubin, J. & Brown, B., ***The Social Psychology of Bargaining and Negotiation*** (1975)

Schatzki, M., ***Negotiation*** (1981)

Scheflen, A., ***Body Language and the Social Order*** (1972)

Schelling, T., ***The Strategy of Conflict*** (1960)

Schneider, "Effective Responses to Offensive Comments," ***Negot. Journal*** 107 (April 1994)

Schneider, "Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style," 7 ***Harv. Negot. Law Rev.*** 143 (2002)

Scott, B., ***The Skills of Negotiating*** (1981)

Shapiro, R. & Jankowski, M., ***The Power of Nice*** (2001)

Shell, G.R., ***Bargaining for Advantage: Negotiation Strategies for Reasonable People*** (1999)

Smith, M., ***When I Say No, I Feel Guilty*** (1975)

Stark, P. & Flaherty, J., ***The Only Negotiating Guide You'll Ever Need*** (2003)

Strauss, A., ***Negotiations: Varieties, Contexts, Processes, and Social Order*** (1978)

Tannen, D., ***Gender and Discourse*** (1994)

Tannen, D., ***Talking From 9 to 5*** (1994)

Tannen, D., ***That's Not What I Meant*** (1986)

Tannen, D., ***You Just Don't Understand*** (1990)

Tepley, L., ***Legal Negotiation in a Nutshell*** (1992)

Thomas, J., ***Negotiate to Win*** (2005)

Ury, W., ***Getting Past No: Negotiating With Difficult People*** (1991)

Walton, R. & McKersie, R., ***A Behavioral Theory of Labor Negotiations*** (1965)

Warschaw, T., ***Winning By Negotiation*** (1980)

Wenke, R., ***The Art of Negotiation for Lawyers*** (1985)

Whitaker, L. & Austin, E., ***The Good Girl's Guide to Negotiating*** (2001)

White, "Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation," 1980 ***A.B.F. Res. J.*** 926 (1980)

Wiggins, Charles & Lowry, L. Randolph, ***Negotiation and Settlement Advocacy*** (1997)

Williams, G., ***Legal Negotiation and Settlement*** (1983)

Winkler, J., ***Bargaining for Results*** (1984)

Wolff, B., ***Friendly Persuasion*** (1990)

Young, O., ***Bargaining: Formal Theories of Negotiation*** (1975)

Zartman, I., ***The Negotiation Process: Theories and Applications*** (1978)

Zartman, I. & Berman, M., ***The Practical Negotiator*** (1982)

