5 *Overview of Negotiation Techniques Generally*

Negotiation theory identifies two general negotiation models, though there are multiple names for both models and there is no consensus about their definitions.[1] One model is called positional, zero-sum, distributive, competitive, adversarial, or hard negotiation. In the extreme version of this model, negotiators exchange offers trying to get the best possible outcome for themselves, assume that one side's gain is necessarily the other side's loss, make legal arguments to gain partisan advantage, act tough, and use hard-bargaining tactics to gain advantage over their adversaries.

The other model is called interest-based, win-win, integrative, cooperative, problem-solving, or principled negotiation. In the ideal version of this model, negotiators seek outcomes benefitting both parties, explicitly identify their interests, generate numerous options that might satisfy the parties' interests, consider various factors in negotiation (such as the parties' interests, values, and the law), and seek to build cooperative relationships.

Based on my own and others' empirical research of legal negotiation, I have identified a third model, which is not part of traditional negotiation theory and which I call "ordinary legal negotiation." In this model, counterpart lawyers work together to produce a good result for both parties based on typical negotiation and trial outcomes in their practice communities. The lawyers primarily use respectful conversation rather than exchanging offers or analyzing the parties' interests and potential options for satisfying their interests.

My research shows that the theoretical models are confusing and do not fit many real-life negotiations very well. The models—and common understandings of them—assume that the elements of each are highly correlated as coherent behavior patterns, which sometimes isn't the case. For example, the classic positional model assumes that negotiators are likely to act in a tough manner when, in practice, lawyers exchanging offers often are quite friendly and respectful. Similarly, some people consider friendly negotiations to be interest-based even when there is little or no discussion of interests or options.

I also found that in many cases, lawyers use a mix of elements from different models. This mixing of models is not surprising, considering that lawyers negotiate over many things during the course of a case. For example, in a divorce case, the negotiators used a positional approach to negotiate child support, an interest-based approach to negotiate disposition of the family home, and ordinary legal negotiation to negotiate parenting issues.

The two traditional models assume false dichotomies about critical variables in negotiation. In fact, negotiators' behaviors often are somewhere in between polar extremes. For example, lawyers may act more or less friendly toward each other and are not limited to the two modes of being either extremely friendly or extremely hostile. Similarly, lawyers may help create more or less value in a negotiation, not just zero value or the most possible value.

The models are also problematic because not all negotiators use the same approach in a negotiation. For example, one party may want to reach a mutually advantageous agreement but the other is not similarly motivated. Additionally, often there are differences between parties and their lawyers about various aspects of negotiation.

Considering the problematic assumptions of these models, it is more helpful to consider the separate elements of the models and specific techniques you might use. The following section discusses some key factors that may affect any negotiation process.

Key Factors Affecting Negotiation

Communication Process. Lawyers often negotiate by exchanging offers and counteroffers. Typically, each side starts with an extreme position, expecting that the other side will not accept the offer but will, instead, make a counteroffer. Each side knows how this "game" is played and typically responds with a less demanding counteroffer. Eventually the parties may settle on an agreement somewhere between the two initial positions. Normally, each side makes the smallest concessions it reasonably can to settle as close as possible to its initial position. For example, a plaintiff may make an initial demand of $100,000, then the defendant offers $30,000, which prompts a series of counteroffers of $70,000 (plaintiff), $40,000 (defendant), $60,000 (plaintiff), and finally $50,000 (defendant), which the plaintiff accepts, settling the case.

This is a very common approach for lawyers in the United States. Lawyers can protect their clients by demanding a lot (or offering a little) at the outset, since they expect to make a series of concessions during the negotiation. They can manage the negotiation by controlling the timing and amount of concessions, depending on various factors. If one side believes that it is in a

strong bargaining position, it may make small concessions and drag out the process. If people feel that they are in a weak position and are anxious to settle, they are likely to make large concessions and proceed more quickly.

Lawyers sometimes use another approach in which the negotiators explicitly discuss both parties' interests, identify a range of options for satisfying those interests, and then select an option that best fulfills the parties' interests. This approach can be summarized as "us working together against the problem" instead of "me fighting you." It is based on the assumption that there are usually multiple ways to satisfy a party's interest. Parties often get stuck by having too narrow a view of possible solutions and thinking that their preferred position is the only or best way to satisfy their interests. The process of analyzing parties' interests and options can help them think more systematically and creatively about solutions that would satisfy them. It is especially appropriate when there are multiple issues, some shared interests, and/or the potential for an ongoing relationship in the future. For example, in a patent infringement suit, the parties might consider their business interests and a range of options in addition to payment of damages, such as negotiation of a licensing agreement.

A third approach focuses on applying legal or other norms to the facts of a case. Not surprisingly, when many lawyers analyze their cases, they focus on the typical outcomes of cases in negotiation and/or trial. When negotiating with their counterparts, lawyers discuss these norms, applicable legal authorities, similar cases, and factors distinguishing the current case from other cases. Lawyers specializing in particular areas of law or industries are likely to consider how the disputed facts fit into normal business standards. The negotiation sounds like a normal conversation between reasonable, respectful professionals trying to agree on an appropriate result in the case. For example, in a labor dispute, experienced labor lawyers on both sides may analyze the case based on court and arbitration decisions, workplace norms in the industry, and the history of how the company and union have dealt with similar issues. Although the lawyers may not agree on the precise norms or appropriate outcome, if they respect each other as reasonable and competent lawyers, their assessments are likely to be close to each other and they may be able to resolve the differences fairly easily.

Many negotiations include combinations of the three communication processes, with greater emphasis on some processes than others. In each of these processes, there may be variations in key factors, such as the extent

of concern about the other side's interests, effort to create value, tone of interactions, source of norms, and use of power. These factors as well as common tactics in these communication processes, and advantages and disadvantages of the processes, are described below.

Concern about the Other Side's Interests. Many people assume that each side in a negotiation is concerned only about maximizing its own interests without any concern about the other side's interests. Sometimes this is based on a zero-sum assumption: one side's gain is inevitably equal to the other side's loss. (This assumption is described further in the next section.) In some cases, negotiators not only want to maximize their own interests, they also want the other side to suffer.

On the other hand, some parties care deeply about each other. In some divorces, spouses value each other as good parents even though they don't want to remain married. Even beyond their value as important people in their children's lives, some spouses want the best for each other after they divorce. For example, one lawyer described a case in which the husband initiated the divorce and wanted to protect his financial interests but also wanted take care of his wife and kids financially during the divorce.

While divorces may provide the strongest example of "opposing" parties caring about each other, this sometimes happens in other types of cases, especially when the parties have had a relationship, such as contract, probate, business dissolution, employment, and landlord-tenant cases. Many cases probably are somewhere in the middle—parties don't try to advance each other's interests, but they aren't motivated to harm each other.

Each side's attitudes about the other can change during the course of a case. Sometimes people antagonize each other during the litigation process, decreasing the goodwill toward each other. The process can go in the other direction as people become more sympathetic to each other, though that probably is less common in litigation-as-usual.

You have the power to change people's attitudes in many of these cases, so you should not assume that attitudes will always remain the same as at the outset of a case. You can aggravate tensions by taking actions that the other side considers unreasonable, treating them disrespectfully, or simply using a negative tone in your communications. On the other hand, you can also improve relationships by doing the opposite: acting reasonably and respectfully. Indeed, if you take the initiative to act constructively (as

described in Chapter 4), you and your counterpart can help your respective clients to focus on the heart of their problems and resolve their disputes without getting distracted by hard feelings.

Effort to Create Value. As noted above, some negotiators assume that there is a fixed amount of resources to divide—a "zero-sum" situation—where the sum of one side's gain in a change in bargaining position exactly equals the amount of the other side's loss. So if a plaintiff initially demands $100,000 and then offers to accept $70,000, the plaintiff's "loss" of $30,000 (compared with the initial demand) represents the defendant's $30,000 "gain."

It is possible, however, for negotiators to "create value," i.e., reach positive-sum agreements that make both parties better off (or at least one party better off without harming the other). The key to doing so is figuring out what each party values and trading things that one party values more than the other. For example, when a divorcing couple divides two items of property that have equal market value but the parties value them differently, you can create value by giving each party the item that he or she values more than the other party. Even for supposedly "zero-sum" monetary issues (such as the amount of child support), there may be other issues that can be linked and traded. The linked issues might be directly related to each other (such as the amount of child support and division of responsibility to pay for certain items for the children) or not (such as child support and property division).

To create value, you should figure out the interests and priorities of both parties and then identify items that your client values more than the other side, and vice versa. This can help you develop agreements that satisfy both parties. One lawyer described a case in which he represented the seller in a dispute over price adjustments in a long-term supply agreement. The parties disagreed about whether the seller was entitled to a price increase under the contract. They ultimately reached an agreement under which the price was increased about half as much as the seller initially demanded, and the buyer agreed to increase the amount of its purchases. This agreement created value because the seller valued the increased sales volume more than the additional price increase, while the buyer was particularly concerned about the amount of the price increase but didn't mind buying more from the seller.

Similarly, Bruce Whitney, the former chief litigation counsel of Air Products and Chemicals, described a case in which Air Products sued a defendant that wasn't willing to pay a monetary settlement but agreed to a new transaction that didn't cost anything from the defendant but that had great value to Air Products. Whitney recommends anticipating possible "gap-fillers" like this, which can lead to an agreement when the parties have a gap between their financial positions.

Tone of Interactions. The tone of interactions in a case can vary widely. People can be more formal or informal or more friendly or unfriendly, for example. Sometimes this reflects people's general personalities. Lawyers sometimes adjust their tone to reflect the dynamics of particular cases and clients' preferences.

Lawyers often have general philosophies about how their tone can help them achieve their goals. Some lawyers believe that it is important to adopt a tough tone to signal that they have high expectations and will fight vigorously if they do not get what they want. In some cases, this may be effective in persuading the other side to be accommodating, though it can backfire if it prompts the other side to respond in kind. Some lawyers have the opposite philosophy, adopting a friendly tone to encourage cooperation. This may lead the other side to reciprocate with cooperation, though some counterparts may interpret it as weakness and try to take advantage. As described in Chapters 1 and 4, you are likely to get good results in most cases if you communicate a preference for cooperation *and also* a willingness to fight vigorously if needed.

Source of Norms. Lawyer may rely on various types of norms to justify their positions and persuade the other side to accept them. Not surprisingly, lawyers often rely on legal norms based on statutes, appellate cases, trial verdicts, settlements, and local legal culture. In a counteroffer negotiation process, both sides typically use these norms to convince their counterparts that they would get a favorable result at trial, as described in the following section.

In a process focused on finding an appropriate result by applying norms to the facts, lawyers may use similar sources of legal norms but use a different process to negotiate. In this kind of communication process,

lawyers may use other sources of norms instead of or in addition to legal norms. These might include industry standards, practices, terms, rates, or norms derived from the parties' history of interactions. For example, a lawyer described a case about a commodity-pricing dispute where the parties based their decision, in part, on market prices for the commodity.

A third source of norms is the parties' interests. Rather than negotiating based on legal precedents or business or community norms, parties may negotiate based on criteria that they particularly value. For example, in a divorce case, both spouses had a strong interest in financial security and managing their risks. To satisfy their interests, they reached an alimony agreement that was calculated as a percentage of the husband's income and that included other provisions to protect both parties in the event of various contingencies.

Use of Power. The parties' use of power obviously can make a big difference in negotiation. The strength of one's bargaining position is affected by many factors, including the assessment of the possible outcome if the parties do not reach agreement. Analysis of alternatives to a negotiated agreement is important because it can provide the basis of implicit or explicit threats to walk away from negotiation if the other side does not give in to one's demands. For example, if both parties are certain that a plaintiff would get a $100,000 verdict at trial, one would generally expect that they would settle for about $100,000 (ignoring, for the moment, legal fees and other factors). If the most that the defendant would offer would be a lot less—say, $50,000—the plaintiff would presumably decide that she would get a more favorable result if she went to trial. Similarly, if $150,000 is the least that the plaintiff would accept, the defendant presumably would decide to try the case to reduce its liability.

Of course, people are almost never certain of what would happen at trial because there are so many variables that are impossible to predict and control. Lawyers often try to predict the probable court outcome, which is called the Most Likely Alternative to a Negotiated Agreement (MLATNA) in negotiation theory. In the preceding example, the MLATNA would be $100,000. Of course, it is possible for the plaintiff to lose at trial, and the plaintiff's Worst Alternative to a Negotiated Agreement (WATNA) would be $0 (assuming that there was no counterclaim and not considering legal fees or other litigation costs). On the other hand, the plaintiff's lawyer could

estimate her Best Alternative to a Negotiated Agreement (BATNA) if she wins big. Lawyers estimate these values based on their understanding of the applicable legal rules, the strength of the evidence, and expected reactions of the trier of fact, among other factors. In many cases, parties try to get a better deal by persuading the other side that their MLATNA is less favorable than they previously thought.

Lawyers consider additional factors in developing a "bottom line"—the least they would accept or most they would pay in negotiation. For example, in the preceding example, if the plaintiff thought that there was an 80 percent chance of getting a $100,000 verdict and a 20 percent chance of a complete defense verdict, she might accept $80,000. This is the logic of decision analysis, described in Chapter 2. In addition, if the plaintiff would incur an extra $10,000 in litigation costs (above her costs to obtain the settlement), she might be willing to accept $70,000. Although this calculation already includes a risk assessment, the plaintiff might be risk-averse—uncomfortable taking risks—and might be willing to accept even less than $70,000 to gain the certainty of getting some recovery. Similarly, the plaintiff's determination of her bottom line might be adjusted to reflect her valuation of the extra time that would be required to try the case, the costs of her time to attend to the litigation, the effect of trial publicity on her reputation, the effect of continued litigation on her relationship with the defendant, and various other factors. Although these factors might lead her to reduce the amount she would be willing to accept in settlement, some factors have the opposite effect. For example, she might increase her bottom line if she wanted to obtain a larger award, gain publicity, publicize the defendant's wrongdoing, establish a precedent, demonstrate that she can't be pushed around, and so on.

Defendants generally have the opposite considerations in deciding the most that they would be willing to pay in settlement. Some defendants worry—sometimes with good reason—that if they settle too easily or too generously, others would be encouraged to file weak or frivolous claims in the hope of getting an easy settlement. So defendants may not be willing to pay as much as might seem warranted in a given case to establish a reputation for not settling too easily. On the other hand, some defendants may increase the amount they are willing to pay in order to minimize bad publicity, reduce litigation expenses, or develop a reputation for reasonableness.

There often is a "zone of possible agreement" (ZOPA), which is the difference between the parties' bottom lines. For example, if the plaintiff is willing to accept as little as $80,000 and the defendant is willing to pay as much as $120,000, the ZOPA is the $40,000 range between these two figures. The ZOPA is not a fixed range, however, because parties' bottom lines often change during negotiation. As a case proceeds, parties may learn about facts or legal authorities that change their assessments of what would happen at trial. In addition, parties' decisions about where to draw their (bottom) line in the sand is affected by their perception of what the other side is or is not willing to accept. So if one side credibly threatens to walk away from the negotiation if its demand isn't met, the other side may accept the demand even though it is less favorable than what it had previously set as its bottom line.

Of course, neither side generally will disclose its true bottom line (except, perhaps, at the very end of a negotiation) because the other side could take advantage of this disclosure by offering only that amount. Since both sides have some uncertainty about what would happen at trial and would incur additional costs if they go to trial, often there is room for compromise. Negotiations break down without agreement, however, when the parties' respective assessments of the alternatives to negotiated agreement differ substantially, at least one side would prefer an alternative to settlement, and/or at least one side is willing to take substantial risks.

The ZOPA represents the surplus generated from settlement. Even when there is a substantial ZOPA—and thus room for settlement—the parties may deadlock. This happens when they cannot agree where to settle within the ZOPA because each side wants to gain more of the surplus than the other side is willing to concede. Thus there is a risk that parties will not reach an agreement that would be in both of their interests because they can't agree on how to share the surplus.

Many factors in addition to expectations about alternatives to a negotiated agreement can affect the parties' relative bargaining power. These include experience and expertise, resources to engage in the conflict, access to critical information, weight of expert opinion, affiliation with important actors, perceived legitimacy of the individuals and entities involved, greater risk tolerance, greater patience, ability to unilaterally help or harm the other side, and personal characteristics such as status, integrity, strength, charisma, and patience. Parties also may exercise bargaining power by using "hardball"

tactics, such as threats, intimidation, misrepresentations, personal attacks, demands for "throw-away" concessions, delaying tactics, actions increasing the other side's expenses, contrived deadlines, claims of limited settlement authority, take-it-or-leave-it offers, unfavorable publicity, alliances with others, damaging relationships with third parties, stubbornness, and apparent irrationality.

Just because people have potential sources of power doesn't mean that they will necessarily use them in negotiation. For example, some people may not be aware of potential sources of power. Some prefer to focus instead on other factors, such as parties' interests or shared norms. Some may be wary about using power because they worry that power tactics can backfire if they prompt the other side to resist instead of capitulate. So when you negotiate, you should carefully consider the potential benefits and risks of using various power tactics.

Tactics in Exchanging Offers

Lawyers follow certain conventions when they negotiate by exchanging offers (which I will call "counteroffer negotiation"). Typically, each side believes that it would get a bad deal if it started by offering an amount that it believes is reasonable. For example, if a plaintiff believes that $60,000 is a reasonable settlement and starts the negotiation by demanding that amount, the defendant would presumably start with a much lower number—say, $10,000—and the final settlement might be around $30,000. So the plaintiff might initially demand $100,000 even though that is more than what he thinks is a reasonable settlement. Similarly, if the defendant's first offer was $60,000, the final settlement would presumably be higher than that, perhaps $80,000. Because everyone expects that both sides will make a series of concessions, there is an incentive to start with extreme positions to leave room to make concessions and still (hopefully) end up with a favorable agreement.

Under the conventions of counteroffer negotiation, it is considered bad faith to go back on an offer unless, in the interim, there is significant new information or the circumstances change substantially. In other words, if a plaintiff demands $100,000, defendants would be insulted if the plaintiff later demanded $150,000. Similarly, if a defendant offers $30,000, it is considered bad form to later offer only $20,000.

Another convention is that parties alternate making offers so that, for example, if a plaintiff demands $100,000 she would not then demand $90,000 unless the defendant makes an intervening offer. This is called "bidding against oneself" and is considered a sign of great weakness, which is why negotiators are extremely reluctant to do it.

Negotiators have a major challenge in deciding when to begin making offers. Lawyers worry that even suggesting negotiation may make them appear weak, which would put them at a disadvantage. This is based on the assumption that lawyers suggest negotiation only if they don't have confidence that they would win at trial. Although this logic is seriously flawed—parties with strong positions usually have an interest in settling for an appropriate amount—it is deeply ingrained in our legal culture. Since negotiators on both sides can have the same fears, this often leads to delay in starting negotiation. Indeed, this dynamic, coupled with a desire to complete most or all discovery before starting to negotiate and the deadline-oriented nature of most law practices, often leads lawyers to delay negotiation until late in litigation. This dynamic is a key part of the prison of fear described in Chapter 1.

Negotiators sometimes worry about the amount they should use for their initial offer. Each side has an incentive to make an extreme offer in the hope of ending up with what it considers to be a favorable result, or at least a result that is as good as possible under the circumstances. Although experienced lawyers expect the other side to start with an extreme position, they are (or act as if they are) offended when the other side takes what they consider to be an excessively extreme position. Starting with an opening position that the other side considers "out of the ballpark" risks ending the negotiation right from the start, as the insulted side "packs up its briefcase" and leaves. Even if the offended negotiators do not leave, they may not be willing to make a counteroffer, putting the first side in the awkward position of bidding against itself. And even if the other side makes a counteroffer, an extreme initial position risks straining the relationship in negotiation, making the negotiation unnecessarily difficult, and possibly failing to reach an agreement that would be in both parties' interest.

Each side also generally wants to avoid starting with an offer that is too generous given the norms of counteroffer negotiation. If one side starts with what the other side (privately) considers an overly generous offer, the recipient may interpret it as a sign of weakness, desperation, and/or lack of

negotiation skill. This may put the offeror in a difficult position because there may be little room to make concessions and reach an acceptable outcome. It is particularly problematic if the other side "smells blood," prompting them to use a tough bargaining strategy.

Considering all this, some parties want the other side to make the first offer because this reduces the risk of making an initial offer that is too high or low. Parties who are particularly confident, however, may prefer to make the first offer to assert control and set expectations. In any case, parties who are interested in settling are likely to start with the most extreme offer that they think would not prompt the other side to quit the negotiation.

Parties control the timing and size of concessions to communicate with the other side and try to direct the process in their favor. Parties often try to make the smallest concessions needed to keep the other side "in the game" by prompting them to make a reasonable counteroffer and keep the negotiation going. Negotiators often hold off making concessions as long as possible to avoid appearing overeager to settle (and thus weak). They also hope that this will pressure the other side into making more generous concessions. These dynamics can contribute to what mediator Andy Little calls the "positional negotiation death spiral." This occurs when there is a substantial gap between offers and each side makes such small concessions that everyone gets discouraged and gives up negotiation even though there may be a zone of possible agreement.

Negotiators have incentives to use various tactics to get the other side to make favorable concessions. Because bargaining power and negotiation outcomes are closely related to perceptions of alternatives to a negotiated agreement as described above, parties portray the MLATNA as favoring them. Reliance on arguments about the likely court results creates an incentive to exaggerate the strength of their legal case and belittle the other side's prospects in court.

The law permits a form of misrepresentation in negotiation called "puffing." Negotiators are prohibited from making false statements of "material facts," but that term is defined to exclude some types of statements, such as characterization of the merit or value of an item or a party's beliefs about an acceptable settlement. For example, a lawyer's false statements that "we believe that we would win at trial" or "we won't accept anything less than $50,000" generally are not considered fraud or violations of lawyers' ethical

duties. The conventions of counteroffer negotiation create an incentive to make such statements, and many negotiators do so.

Advantages and Disadvantages. Lawyers in the United States generally feel comfortable with counteroffer negotiation because it is familiar, expected, and often taken for granted as the normal way to negotiate. It's pretty easy to learn the "rules of the game." If you think you have a strong legal case (and thus a strong negotiation position), you can use this approach to obtain a favorable settlement. Even if you have a weak position, you can use this approach to limit your risk of giving up too much in negotiation by making one concession at a time.

On the other hand, counteroffer negotiation creates the risk of failing to reach an agreement that both sides would find to be in their interests. Even if the parties reach an agreement, it may be of lower quality than necessary.

The process invites deception and brinksmanship, which some people find troubling. Negotiating can feel like a game, where people are expected to make offers that they don't really believe are fair or accurate estimates of the likely court results. However, you may feel trapped into playing this game because being honest puts you at risk of being a "sucker" and sacrificing your clients' interests. Unfortunately, the way this "game" is played can hurt relationships, especially for parties who are not repeat negotiators. Although sophisticated repeat-player negotiators may not be upset by the rituals of the counteroffer "negotiation dance," even some of them may be troubled by the often disingenuous and disrespectful nature of negotiations.

Counteroffer negotiation can create particular problems for lawyers, who have the duty to protect their clients' interests. Even if lawyers might find certain negotiation tactics distasteful, some may feel obliged to use them, believing that this is part of their professional duty to their clients.

Good lawyers often can avoid or reduce the risks of this process, but this can be difficult or sometimes impossible.

Tactics in Analyzing Interests and Options

The theory of interest-based negotiation prescribes a general process that lawyers typically use in Collaborative cases but generally not in most other cases. The following is a description of the theoretical process, recognizing that lawyers often do not use all prescribed elements.

In an interest-and-options process, the parties list their interests and develop an explicit agenda to deal with the issues related to the parties' interests. As described in Chapter 2, parties often have a wide range of interests in addition to getting as much money or paying as little as possible. Lawyers often don't consider the full range of clients' interests, so the process of explicitly identifying the parties' interests can be very helpful. Because the goal is to produce an agreement satisfying the key interests of both parties through cooperation, negotiators focus on learning about both sides' interests. They may begin by noting areas of agreement and disagreement and acknowledging the legitimacy of the other side's interests. They may dig deeper by asking each other why their stated interests are important to them, seeking to understand possibly hidden interests that might lead to fruitful avenues for resolution. Before considering possible resolutions of issues, parties share information that would help the other side evaluate the situation and look for options that would satisfy them.

For each issue, the parties would consider a number of options and then hopefully agree on one option that would satisfy the interests of both parties. For example, in a divorce in which the spouses need to decide what to do about a family home, they might consider options such as having one spouse buy the other spouse's interest during the divorce, buying it at some later time, taking a mortgage on the house to finance the sale, or selling it to a third party.

Sometimes parties use an explicit brainstorming process in which they generate a list of every option they can think of—including some options that may seem crazy—to stimulate a creative approach to the negotiation. Under the "rules" for brainstorming, parties must resist the normal temptation to evaluate particular options until after generating the entire list, because evaluating options can dampen creativity and prevent identification of desirable options. After generating a list of options, the negotiators would evaluate all the plausible options to see how each would affect them, consider possible modifications to make them acceptable to both parties, and ideally reach an agreement that works best for everyone.

When there are differences of opinion, negotiators may look for mutually acceptable standards for decision making, such as industry standards, expert opinions, legal rules, or moral values. Discussion of legal rules and alternatives to negotiated agreement is intended to provide parameters for negotiation rather than pressure the other side to make

concessions. Thus, parties may consider their MLATNAs, described above, to decide whether a particular option would be sufficiently advantageous to accept rather than go to trial.

In some cases, negotiators may start by negotiating principles for agreement and then use those principles to work out a detailed agreement. For example, in a property dispute between two adjoining property owners involving legal title, boundaries, a driveway, landscaping, and damages, the lawyers first reached an agreement in principle and then developed specific plans to implement the principles. In some cases, negotiators may agree on procedures for resolving issues. Thus, if negotiators want to get an appraisal of an asset, they might agree on the criteria or procedures for selecting the appraiser, the information that would be provided, and whether the appraisal would be binding.

An interest-and-option process can also be helpful for negotiating procedural matters, such as arrangement for exchange of information or obtaining expert input, as well as working out the terms of an agreement, including payment schedules.

Sometimes problems arise in negotiation because of interpersonal factors, such as a history of a troubled relationship, feelings of being treated disrespectfully or unfairly, and misunderstandings. The landmark book *Getting to Yes* recommends "separating the people from the problem" by identifying the interpersonal issues and addressing them directly.[2] If one party feels offended by something that the other side did or said, the parties may discuss the incident, and there may be an exchange of explanations or apologies. Conversations like these can "clear the air" and thus remove barriers to negotiation. In some cases, the people *are* the problem if the fundamental conflict is about the parties' relationship and the dispute is a symptom of the underlying conflict. In that situation, the parties may focus on the history of the relationship and aspects of the relationship that continue to cause problems. A successful negotiation would not only resolve the immediate dispute but also help parties work better together in the future (or perhaps arrange for a respectful parting of the ways).

Advantages and Disadvantages. When successful, an interest-and-options approach produces better results than a process of exchanging offers. When parties discuss their interests openly, they are more likely to identify

differences between them that would permit them to "create value," as described above. For example, say the parties agree that the defendant will pay the plaintiff a sum of money, and if the plaintiff can afford to receive the money over a period of time, the defendant may be willing to pay a larger amount. Although negotiators can reach such agreements in a counteroffer process, they are likely to create the most value by using an interest-and-options process. For another example, in an intellectual property dispute, the parties may agree to a licensing agreement that may be worth much more to both parties than payment of a fixed amount of damages. Similarly, if a couple reaches a satisfactory agreement to resolve the issues in their divorce, they may establish a good working relationship that can enable them to successfully work through other issues as they arise in the future.

Negotiators who are comfortable using this approach are likely to find the process more satisfying and less harmful than counteroffer negotiation. It encourages negotiators to be more candid and respectful, which can lead to a pattern of reciprocal positive gestures. Thus negotiators are more likely to feel that the outcome is consistent with their values and that the other side treated them well.

An interest-and-option process can be a very efficient use of time, money, and effort in resolving disputes. If negotiators get to the heart of the dispute and focus on the critical issues, they can avoid activities in litigation that do not lead to resolution, aggravate the dispute, and increase the time and expense invested.

On the downside, some negotiators prefer a more traditional or competitive approach, either generally or in particular disputes. To be successful, negotiators must become skilled with techniques that may be unfamiliar and demonstrate more openness than they may be comfortable with. Negotiators may legitimately worry about disclosing their interests if the other side seems untrustworthy and likely to try to take advantage of candid disclosures of interests or other sensitive information. Open discussion of various options may be scary because the other side might infer that a particular option is acceptable. To perform the process well, negotiators may need some training and practice, which some may not have. Although the process can be useful even when the parties do not reach agreement, parties can spend more time and money using it than they otherwise would.

Tactics in Applying Norms to Cases

Lawyers routinely resolve cases by jointly applying commonly recognized norms. After analyzing applicable norms, the lawyers discuss whether various parties' actions were justified and what an appropriate outcome would be based on the norms. If there is a difference of opinion about the norms or the appropriate outcomes, the lawyers might discuss the parties' interests and/or exchange counteroffers to settle the dispute. But the process does not focus primarily on analyzing parties' interests or exchanging offers.

Lawyers are likely to use this process if (1) the counterpart lawyers know each other, (2) they believe that their counterparts are experienced and competent, (3) they want to maintain reputations for reasonableness, (4) there is a relatively clear body of applicable legal or other norms, (5) the facts of a case can be readily likened to arguably comparable cases, (6) there is not enough at stake to justify an all-out adversarial battle, and (7) this process is considered a legitimate negotiation method in their particular legal community. Lawyers sometimes use this process even when some of these conditions do not exist.

The lawyers begin by investigating the case through informal exchanges of information and/or formal discovery. If the counterparts respect each other, they may be especially likely to exchange information informally. The amount of investigation needed before they are ready to settle the case will vary depending on factors such as the complexity of the case, the amount at stake, and the clients' attitudes. When the lawyers are ready to resolve the case, they discuss how the applicable norms apply to the current case.

Often, the norms are related to litigation, though the lawyers may apply other norms, such as business practices, terms, prices, etc. When the lawyers focus on legal norms, they may discuss typical outcomes of cases in negotiation and/or trial and analyze the range of likely outcomes in their cases. They may rely on applicable legal authorities, decision-making patterns of courts, and factors distinguishing the current case from other cases. The negotiation sounds like a normal conversation between reasonable, respectful professionals trying to agree on an appropriate result in the case. For example, in a divorce case, counterpart lawyers may recognize typical arrangements for parenting plans and use those arrangements as the starting point for discussion. They would consider the facts in their case that

might justify some adjustments from the norm. To vary from the typical arrangements, they might consider particular work or family situations or the preferences of the judge assigned to the case.

In a personal injury case, the lawyers might anticipate likely court decisions about liability, elements of damages, outcomes of similar cases that were settled or tried, factors distinguishing the current case from other cases, the impact of a witness or other evidence on a jury, and tendencies of juries in the particular jurisdiction. Although the lawyers may not agree on all these issues, they may agree on many of them, as well as a relatively narrow range of appropriate outcomes in the current case.

In some cases, the lawyers focus the negotiation on non-legal norms. This may happen when the lawyers specialize in particular areas of the law or industries and are familiar with typical business practices. For example, analysis by lawyers who specialize in particular areas of the law (such as construction, employment, real estate, patent, or franchise law) will be affected by the "way that things generally are done" in these areas, which are not necessarily legal norms. Similarly, lawyers who specialize in certain industries (such as energy, health care, financial services, or transportation) apply norms specific to those industries.

Advantages and Disadvantages. Negotiation based on legal or other norms can be very comfortable for lawyers who respect each other as competent and reasonable. This can lead to efficient and cooperative resolution of cases based on generally accepted norms. Some parties may feel satisfied that the results are appropriate, being consistent with legal or business norms.

This approach is problematic if the parties prefer another approach. For example, parties would be disappointed if they want their lawyers to fight vigorously to gain the most favorable possible result for them. And parties who want to focus on their interests may be disappointed if application of the norms doesn't produce a result that they feel satisfies their interests. For example, in a divorce case involving alimony, a typical outcome in negotiation or trial would have been a fixed amount of alimony. However, the parties considered their interests and various options and preferred to set the amount of alimony as a percentage of the husband's income, which might vary from year to year. Presumably, they would have been dissatisfied if their lawyers considered only the normal fixed-amount approach.

Endnotes

1. This chapter is adapted from John Lande, *A Framework for Advancing Negotiation Theory: Implications from a Study of How Lawyers Reach Agreement in Pretrial Litigation*, 16 Cardozo J. Conflict Resol. 1 (2014).

2. Roger Fisher & William Ury with Bruce Patton, Getting to Yes: Negotiating Agreement Without Giving In 17–39 (3d ed. 2011).