



**Beyond The Bar**

EFFECTIVE LEGAL  
NEGOTIATION TOOLKIT



THOMSON REUTERS

**WEST**<sup>®</sup>



# CHARLES B. CRAVER

GEORGE WASHINGTON UNIVERSITY  
NATIONAL LAW CENTER WASHINGTON DC

Prior to joining the faculty at George Washington Law School, Professor Charles Craver taught at the University of Illinois, University of California, Davis, University of Virginia, and University of Florida. He also practiced law with Morrison & Foerster in San Francisco and clerked for Judge George MacKinnon of the U.S. Court of Appeals for the D.C. Circuit.

Professor Craver is co-author of *Alternative Dispute Resolution: The Advocate's Perspective* (5th ed. 2016), *Legal Negotiating* (2007), *Employment Law Treatise* (2 Vol. 5th ed. 2014), *Employment Law Hornbook* (5th ed. 2015), *Human Resources and the Law* (1994), *Labor Relations Law* (13th ed. 2016), *Employment Discrimination Law* (8th ed. 2016), *Collective Bargaining and Labor Arbitration* (1988), *Labor Relations Law in the Public Sector* (4th ed. 1991), and *Skills & Values: Alternative Dispute Resolution* (2013). He is also the author of *Can Unions Survive?* (1993), *Effective Legal Negotiation and Settlement* (8th ed. 2016), *The Art of Negotiation in the Business World* (2014); *Skills & Values: Legal Negotiating* (3rd ed. 2016), *The Intelligent Negotiator* (2002), and numerous law review articles pertaining to labor and employment law and dispute resolution.

He is a member of the American Law Institute, the National Academy of Arbitrators, the American

Arbitration Association, the International Society for Labor and Social Security Law, the Labor & Employment Relations Association, the Association for Conflict Resolution, and the Labor and Employment Law and Alternative Dispute Resolution Sections of the ABA. Craver is also a fellow of the College of Labor and Employment Lawyers, and served as secretary to the ABA Labor and Employment Law Section in 1986-87.

Over the past 35 years, Professor Craver has taught negotiation skills to over 95,000 lawyers throughout the United States and around the world. He has received awards for outstanding teaching from three different law schools, including George Washington Law School.

**In 2018, he received the ABA Dispute Resolution Section Award for Outstanding Scholarly Work.**

Professor Craver earned his B.S. and M.I.L.R. from Cornell University and his J.D. from the University of Michigan.



## LEGAL NEGOTIATING

By Gerald R. Williams, Charles  
B Craver  
Copyright: 2007  
ISBN-13: 9780314066060

Series: American Casebook  
Brand: West Law School  
Pages: 249

## DESCRIPTION

## AUTHOR

Effective Legal Negotiation and  
Settlement (8th ed. 2016)

The intelligent Negotiator (2002)

The Art of Negotiation in the  
Business World (2014)

Skills & Values: Legal Negotiating  
(3rd ed. 2016)

## CO-AUTHOR

Legal Negotiating (2007)

Skills & Values: Alternative Dispute  
Resolution (2013)

Alternative Dispute Resolution The  
Advocates Perspective  
(5th ed. 2016)

This book is an excellent resource for law students learning negotiation skills in clinical courses and for practicing attorneys who want to enhance their negotiation proficiency. The book explores the three basic negotiator styles: the “win–lose” competitive/adversarial style; the “win–win” cooperative/ problem-solving style; and the “WIN–win” competitive/problem- solving style. It describes the six stages of the negotiation process, various negotiation tactics, the psychological factors that influence bargaining interactions, and applicable legal rules and economic principles. The book finally explores the impact of abstract reasoning skills, emotional intelligence, and negotiator gender and race on bargaining interactions. The appendixes include transcripts from lawyer-to-lawyer negotiations.



# NEGOTIATION ETHICS

---

1. Negotiating is a deceptive process as both sides try to convince counterparts they have to obtain better terms than they actually have to get. Lawyers over- and under-state the value of items being exchanged for strategic purposes, and demand more and offer less than they are prepared to accept.
2. Model Rule 4.1 says it is unethical for lawyers to “knowingly make a false statement of material fact or law to a third person.”
3. Comment 2 recognizes that “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 ordinarily in this category.” It is thus acceptable for lawyers to engage in “puffing” and “embellishment” when they negotiate in an effort to advance their side’s interests.
4. Attorneys who misrepresent material information behave unethically and expose their clients to liability for fraud. Their reputations for dishonesty will also undermine their ability to negotiate with others in the future.

# NEGOTIATOR STYLES

---

1. Cooperative/Problem-Solvers – “win-win” – Open and trusting negotiators who begin with reasonable opening offers and seek to maximize the joint returns by reasoning with their counterparts. More than half of Cooperative/Problem-Solvers are considered by their peers to be effective negotiators. Counterparts also tend to look forward to future interactions with these persons.
2. Competitive/Adversarial – “win-lose” – Closed and untrusting negotiators who begin with one-sided opening offers and seek to maximize their own side results. Few overtly Competitive/Adversarial are considered by their peers to be effective negotiators. Counterparts dislike the prospect of future interactions with these persons.
3. Competitive/Problem-Solvers – “WIN-win” – Appear to be open and trusting negotiators, but they are not entirely open and they use subtle manipulation to maximize their own side results. Once they obtain what they want, however, they work to maximize counterpart returns. Since these individuals are usually considered by counterparts to be Cooperative/Problem-Solvers, those persons generally look forward to future interactions with these negotiators.
4. The most effective negotiators are persons whose counterparts think they are completely open and cooperative, but who admit to being somewhat manipulative to enable them to claim more of the joint surplus generated by the bargaining parties.
5. Naturally cooperative negotiators should slowly disclose some of their important information and see if their openness is being reciprocated. If the other side is not being as open, they must behave more strategically by being less open to avoid exploitation by manipulative counterparts.

# Negotiation Preparation Form

[ To Assist Lawyers When They Prepare For Bargaining Interactions ]

---

1. Your **minimum settlement point** (lowest result would accept given your alternatives to settlement – Including **transaction costs** of both settlement and non-settlement):
2. Your **target point** (best result you might achieve) – Is your **aspiration level** high enough? Never begin negotiation until you have solidified goal with respect to each item:
3. Your estimate of **counterpart's minimum settlement point** (what external options appear to be available to them):
4. Your estimate of **counterpart's target point** (try to use their value system when estimating their target point):
5. Your **factual and legal leverage** re each issue (strengths and weaknesses of case) – Prepare logical explanations to support each strength and anticipate ways you might minimize weaknesses:
6. Your planned **opening offer** – Try to start a reasonable distance from where you hope to end up, but always begin with a position you can logically explain (“**principled opening offer**”) to provide yourself with credibility:
7. Your **counterpart's factual and legal leverage** regarding each issue (prepare effective counter-arguments):
8. What **information** do you plan to elicit during **Information Phase** to determine counterpart's underlying needs, interests, and objectives? What questions will you ask? (Begin with broad, open-ended questions.):
9. What **information** are you **willing to disclose** and how do you plan to divulge it? (Best to disclose important information in response to counterpart questions.) How do you plan to prevent disclosure of sensitive information? (Plan use of “**blocking techniques.**”):
10. Your **negotiation strategy** (agenda and tactics) – Plan your anticipated **concession pattern** carefully to disclose only information you intend to divulge and prepare **principled explanations** for each concession:
11. Your prediction of **counterpart's negotiation strategy** and your planned **counter-measures** – You may be able to neutralize counterpart's strengths and emphasize his/her weaknesses:
12. **Negotiating techniques** you plan to use to advance interests (be prepared to vary/combine them for optimal impact):
13. **Negotiating techniques** you expect **counterpart** will use, and way you plan to counteract:

# The Stages of Negotiation

## PREPARATION STAGE

### Establishing Limits and Objectives

Learning about own *and* counterpart's circumstances critical to achievement of optimal results.

#### 1. Basic Areas

- a. Prepared re relevant facts, law and economics issues.
- b. Prepare relevant arguments supporting *own positions* – Consider innovative formulations.
- c. Anticipate *other side's arguments* and prepare effective counter- arguments to bolster own confidence and undermine that of opponent.
- d. Don't over-estimate own weaknesses you see that may not be obvious to other side, and don't ignore weaknesses of other side.
- e. Don't use own value system when evaluating counterpart's likely position – Try to place self in counterpart's shoes.

#### 2. Planning Strategy and tactics

- a. Carefully plan desired methodology as if choreographing movement from your opening offer to final objectives.
- b. Consider appropriate modifications to plan necessitated by changed circumstances (e.g., overly generous first offer of large subsequent concessions by counterpart).

#### 3. Establishing aspiration level – Critical to have goal for *each item* involved

- a. Negotiators who begin with high aspirations obtain better results than those who don't.
- b. Negotiators who wish they had done better at end have usually achieved desirable results.
- c. Negotiators who always achieve goals should increase aspiration levels, since they probably have inadequate objectives.
- d. Negotiators should initially:
  - 1) Seek high yet seemingly reasonable positions that won't cause counterparts to lose interest.
  - 2) Begin as far from actual goals as possible while being able to rationally defend proposals (“**anchoring effect**”).
  - 3) Convince selves of reasonableness of seemingly unreasonable positions to bolster their own **confidence** and undermine that of the other side.
  - 4) **Establish “principled opening positions”** that can be defended objectively when presented – Prepare logical rationales to explain each component to preserve credibility.
    - a. Explains reasons for choosing positions selected, rather than less beneficial starting points.
    - b. Frequently allows person to control agenda, by causing others to focus on each segment of stated positions
  - 5) **Determine best alternatives to negotiated agreements (BATNA)**, to realize consequences of nonsettlements – If nonsettlements preferable to final counterpart offers, reject those offers and accept nonsttlement option.
  - 6) **Try to estimate counterpart's** nonsettlement options – If they are worse than your option, then you have greater bargaining power.

## PRELIMINARY STAGE

### Establishing Identities and Tone

1. **Ritualistic** discussion of sports, politics and weather. People who rush negotiations take longer and generate less efficient agreements.
2. **Initial exchange of professional/ personal information** re status (background/firm) and experience.
3. **Negotiators who establish good rapport** with counterparts have more pleasant interactions and more efficient results than those who do not do so.
4. **Establishing overt tone** for negotiations – Competitive/cooperative, congenial/unfriendly, etc.
  - a. When negotiators approach interaction with vastly different views of tone for process, “**attitudinal bargaining**” may be used to influence way bargaining will proceed.
    - 1) Many attorneys enamored of “adversarial” nature of the legal system and view negotiations as “win-lose” interactions.
      - a. When others depersonalize Interactions (e.g., use only last names), take time to establish more personal relationships – Use warm handshakes/other casual touching and maintain non-threatening eye contact.
      - b. If negotiating in counterpart offices and feel uncomfortable, have counterparts created intimidating atmosphere by placing you in uncomfortable chair or with back against wall, or by placing themselves in raised position of dominance.
    - 2) Since most negotiations can achieve “win-win” results, good to begin process in cooperative and trusting way to encourage cooperative behavior and enhance probability of success.
    - 3) Party who dictates time, date, and location for interaction may gain psychological advantage before substantive talks have even begun.
5. **People who begin bargaining interactions in positive moods** behave more cooperatively, reach more efficient agreements, and have fewer impasses than individuals who begin in bad moods.



## INFORMATION STAGE “Value Creation”

Focus on counterpart’s initial positions and underlying needs and desires to ascertain what may be divided up.

1. Maximize information retrieval from counterpart, while withholding information you wish to keep confidential.
2. Determine options available to counterpart if no accord achieved, since this defines their bargaining power.
3. Initially ask information seeking questions.
  - a. Narrow questions do not elicit new information, but confirm information currently possessed.
  - b. Broad, open-ended questions elicit the most new information by inducing counterparts to talk. Use *what* and *why* questions to discover counterpart issues and underlying interests.
  - c. Narrow questions during latter stages of information retrieval process to confirm what has been divulged.
    - 1) Maintain good eye contact and take as few notes as possible to focus on other side’s verbal and nonverbal signs.
    - 2) Restate in own words important information disclosed by counterpart, to verify/clarity information actually divulged.
4. Decide what information you should disclose to facilitate negotiation process and how you plan to divulge it.
  - a. Information you volunteer tends to be devalued as self-serving (“reactive devaluation”).
  - b. Information you provide in response to counterpart’s questions considered more credible than information you voluntarily disclose.
  - c. Keep answers to counterpart’s questions short to avoid unintended verbal and nonverbal disclosures.
  - d. If counterpart not disclosing much information, limit own disclosures to avoid exploitation by manipulative counterpart.
5. Listen carefully for “verbal leaks” that disclose true meaning of equivocal statements.
  - a. Meaning apparent on face (“I cannot offer more”) – Must decide if speaker being truthful.
  - b. Words **equivocal** (“My client is **not inclined** to offer more”; “I cannot offer more **now**”; “My client **would like** to get \$50,000”) – Doubtful speaker intends what he/she appears to be saying.
  - c. Prioritizing (“I must have X, I really need Y, and I want Z”) – X is critical, Y is important, and Z is insignificant.
  - d. “That’s **about as far as** I can go;”; “I don’t have **much more room**.” – Not yet final offer.
6. Employ **blocking techniques** to avoid answering questions about sensitive areas.
  - a. Ignore apparent inquiry and focus on other area you prefer to discuss.
  - b. Answer beneficial part of a complex question, ignoring threatening portions.
  - c. Over- or under- answer question propounded, responding generally to specific inquiry and narrowly to general inquiry.
- d. Reframe question and answer inquiry as you have misconstrued it.
- e. Answer counterpart’s question with own question (e.g., in response to “Are you authorized to pay X” ask counterpart if he/she willing to accept X) – May alternatively treat such question as new offer, placing counterpart on defensive.
- f. Rule question out of bounds as inappropriate.
7. Beneficial to **induce counterpart to make first offer**.
  - a. Generous offer may provide unexpected information – Other side may know more about own weaknesses than you do, or has overestimated your strengths – You should contemplate increased aspiration level.
  - b. After counterpart’s initial offer, you can begin with position that places your goal in middle, since parties tend to move toward center of opening offers (“**bracketing effect**”).
  - c. Party who makes first offer likely to make first **concession**, with party making initial **concession** likely to achieve less beneficial results.
8. Categories of information regarding counterpart:
  - a. Personal skill.
  - b. Negotiating experience.
  - c. Personal beliefs and attitudes.
  - d. Perception of current situation.
  - e. Available resources.
9. In **multi-issue** negotiations, most negotiators begin real discussions with group of most or least important items.
  - a. Anxious negotiators begin with most important topics to get them resolved quickly, but increase likelihood of quick impasse.
  - b. Patient negotiators begin with least important items to develop mutual psychological commitment to accord.
  - c. Beneficial to begin with less significant items to generate preliminary agreement and create psychological commitment to agreement before they reach controverted items.
10. Beneficial to **ask relatively neutral questions** to ascertain underlying bases (assumptions, values, needs, goals, etc.) for counterpart’s stated positions.
  - a. Ask them **what** he/she wants and **why** they want each item.
  - b. Try to ascertain external pressures affecting other side **and** his/her client, since they influence their assessment of situation.
  - c. Focus on underlying **needs** and **interests** of both sides, rather than expressed positions, looking for areas of possible overlap.
    - 1) Emphasis on stated positions more likely to generate conflict than exploration of underlying interests.
    - 2) Positions only reflect some of underlying needs and interests, and discovery of undisclosed motivating factors should enhance possibility of settlement.

# The Stages of Negotiation, cont.

## IV COMPETITIVE / DISTRIBUTIVE STAGE “Value Claiming”

Focus on **own side’s** objectives and interests as parties divide items they discovered during Information Stage. Remember inherent tension between **value creation** during Information Stage and the **value claiming** during Distributive Stage.

1. Highly **competitive phase** with each advocate usually trying to obtain as much from counterpart as possible.

### Negotiators should:

- a. Carefully plan concession pattern to avoid inadvertent disclosure of confidential information.
- b. Start from “**principled opening position**” to explain initial presentation, to reinforce own confidence and induce counterpart to reassess own position.
- c. Make “**principled concessions**,” instead of inexplicable jumps, to explain why each specific concession being made.
- d. Focus on **aspirations** – Not bottom lines – To help you obtain optimal results.

2. **Common techniques** (usually occur in combination):

- a. Argument (legal, nonlegal and emotional)  
Characteristics of **persuasive argument**:
  - 1) Even-handed and seemingly objective.
  - 2) Presented in logical, comprehensive, and articulate manner to enhance cumulative impact.
  - 3) Beyond expected, forcing counterpart to reconsider his/her perception of interaction
- b. **Threats, warnings and promises.**
  - 1) Characteristics of **effective threats**:
    - a. Carefully communicated to counterpart.
    - b. Proportionate to the situation (*i.e.*, believable alternative to settlement).
    - c. Supported by corroborative information.
    - d. Never issue ultimatum not prepared to effectuate if necessary, since failure to do so would weaken credibility.

- 2) Distinguishing between **threats** and **warnings**:
  - a. **Threats** actions communicator may take against counterpart while **warnings** consequences that will result from actions of others.
  - b. **Threats** more disruptive than **warnings** since more direct affront to person being threatened than predicted actions of others.
  - c. **Warnings** more credible than **threats** since appear to be beyond control of communicator.
- 3) Affirmative promise (“If you do this, I’ll \_\_\_\_\_”) more likely to induce position change and less disruptive than negative threat/warning, due to face-saving nature.

- c. Rational or emotional appeals.
- d. Ridicule of counterpart or of his/her position.
- e. Control of agenda (content and order of items).
- f. Intransigence.
- g. Straight-forwardness.
- h. Manipulation of contextual factors (time, location, etc.).
- i. Humor used ridicule unreasonable counterpart positions or to reduce bargaining tension.
- j. Silence – People often talk to fill silent void, inadvertently disclosing information.
- k. Patience – Takes time for persons to lower their sights, and many negotiators make concessions simply to end process.
- l. Time pressure can be used against party feeling greater need to conclude interaction. Always remember that *both sides* have time pressures affecting them.
- m. Creation of guilt or embarrassment, since may generate concessions from uneasy counterparts.

3. Counsel should **consider consequences of settlement and non-settlement**:

- a. Likely outcome if no settlement achieved, including transactional and psychological costs – To own side *and* other side.
- b. Monetary and emotional costs of settlement
- c. Impact on future dealings between the parties.

## V CLOSING STAGE “Value Solidifying”

Critical point near end of Competitive/Distributive Stage when parties realize agreement is likely and become psychologically committed to that result.

---

1. Parties who become **overly anxious** about accord often **move too quickly** toward closure and concede too much
  - a. Anxious parties forget patience, planned concession pattern, and tactics that got them this far and try to move directly to accord.
  - b. Parties who make excessive/ unreciprocated concessions in rush to conclude transaction give up gains achieved during Competitive/Distributive Stage

70 to 80% of concessions made during last 20 to 30% of negotiation, although in smaller increments.
2. Both parties must **close remaining gap together** using reciprocal concessions to avoid exploitation.
3. Continue to use principled concessions and relevant negotiating techniques to keep process moving toward satisfactory conclusion.
  - a. Use of **threats/warnings** during closing stage often counter-productive, since likely to disrupt process.
  - b. Use of **promise technique** particularly effective, since it permits parties to move together – e.g., splitting remaining difference between current positions.
4. If counterpart has locked self into specific positions, provide face-saving escape to resolve remaining issues.
5. Remember that **Closing Stage** is **highly competitive** part of negotiation process, with more patient party often inducing anxious counterpart to close more of remaining gap.

## VI COOPERATIVE / INTEGRATIVE STAGE “Value Maximizing”

Applicable to nonzero sum negotiations in which one party can enhance own position with minimal or no cost to opponent.

---

1. When tentative settlement first achieved, advantageous to **explore trade-offs** that may benefit both sides. Parties can expand overall pie and simultaneously improve the results for both sides.
2. Be certain counterpart realizes you're engaged in cooperative bargaining at end of Closing Stage, since proposed options may be less beneficial to him/her than tentative agreement, leading to claims of bad faith or deceit.
3. Once final agreement achieved, parties should carefully **review final terms** to ensure complete meeting of the minds.
  - a. If misunderstandings found, best time to resolve them since parties psychologically committed to final accord.
  - b. If misunderstandings are not found until later, likely to be more difficult to resolve.
4. When mutual accord achieved, try to **draft final agreement** to allow you to draft provisions that best reflect your understanding of terms negotiated.
5. If other sidet drafts final agreement, **carefully review draft**.
  - a. Make sure language selected reflects your understanding of terms agreed upon.
  - b. Be certain nothing included that was not agreed upon.
  - c. Make sure that nothing agreed upon has been omitted from final agreement.
  - d. If misunderstandings found, give counterpart face-saving chance to correct them.

# 23 Negotiating Techniques/Tactics

| TECHNIQUE OR TACTIC   | POSSIBLE RESPONSE   | GAME OR TECHNIQUE   | POSSIBLE RESPONSE   |
|---|---|---|---|
| <p><b>1. Numerically Superior Bargaining Team (Two or Three on One).</b></p> <p>Larger team can more easily monitor other side's verbal and nonverbal signals, and out-think single participant.</p>  | <p>Have colleague(s) join you to counteract numerical superiority possessed by other side.</p>  | <p><b>7. Limited Authority.</b></p> <p>Claim that any tentative agreement must be approved by absent principal with final authority.</p> <p>Allows user to obtain psychological commitment to settlement he/she may thereafter modify due to "unexpected" demands of principal.</p>   | <p>Place self in same position or refuse to bargain until person with final authority can participate.</p> <p>Provide him/her with face-saving escape by suggesting he/she contact client to obtain needed authorization.</p>   |
| <p><b>2. Asymmetrical Time Pressure.</b></p> <p>If one side under more time pressure than the other, patient participant may take advantage of imbalance.</p>   | <p>Recognize that counterparts may also have deadlines.</p> <p>Hide time constraints.</p> <p>Preempt time element by announcing deadline that both sides must meet.</p>   | <p><b>8. Lack of Authority.</b></p> <p>Used to induce careless counterpart to bid against self through consecutive opening offers.</p>  | <p>Don't negotiate with person with <b>no authority</b> – Ask them to obtain authority or get someone with power.</p>   |
| <p><b>3. Extreme Initial Offer/Demand.</b></p> <p>Good because it creates high aspirations and may induce careless counterpart to reconsider own evaluation (<b>anchoring</b>).</p> <p>Bad because it may cause them to think matter cannot be resolved. Extreme offeror may have to retreat in uncontrolled fashion.</p>   | <p>Directly inform offeror that opening position is unreasonable.</p> <p>Refuse to state own position until meaningful offer presented to you.</p> <p>Respond with equally outrageous position.</p> <p>Make realistic offer (but must realize this will require counterpart to make concessions on 10:1 or 20:1 basis).</p> | <p><b>9. "Nibble" Technique.</b></p> <p>After "Final" agreement achieved, person demands extra concession(s) – Party psychologically committed to agreement often concedes item(s) to preserve accord.</p>  | <p>Don't merely ask how much <b>own side</b> wants pact – Other side is unlikely to let the deal fall over these items.</p> <p>Counter other sides new demand with appropriate reciprocal demands.</p>  |
| <p><b>4. Probing Questions.</b></p> <p>Use of non-judgmental inquiries often more effective than direct challenge to unrealistic positions being taken by intransigent persons.</p> <ul style="list-style-type: none"> <li>Ask other side to value most finite items first, writing down figures that are remotely realistic.</li> <li>If unreasonable figure cited, indicate lack of objective basis and ask how counterpart got number.</li> <li>When done, total usually five times counterpart's offer (or one-fifth of his/her demand).</li> </ul> |   | <p><b>10. Decreasing or Limited Time Offers.</b></p> <p>Offers that must be accepted by set time or be withdrawn or reduced in value with passage of time. (Must tell counterpart of time limit to avoid misunderstanding or claim of bad faith.)</p> <p>Technique may offend other side and increase likelihood of non-settlement, but may be employed successfully by negotiators with reputation for firmness.</p> | <p>Don't be intimidated by such artificial time limits.</p> <p>Review own non-settlement options.</p> <p>If you seem to ignore approaching deadline, other side may let it pass and continue discussions.</p>   |
| <p><b>5. Boulwareism ("Best-Offer-First Bargaining").</b></p> <p>Presenting best offer at outset – Used by people who do not wish to waste time with usual "auction" bargaining.</p> <p>Substantial risk counterpart will react negatively to such paternalistic offer no matter how reasonable, since denied opportunity to participate in process.</p> <p>Opponent may have accepted less than Boulwareistic offeror gave unilaterally.</p>   | <p>Recipients of Boulwareistic offers should assess them on merits and not reject them merely due to patronizing manner of presentation.</p>  | <p><b>11. Real or Feigned Anger.</b></p> <p><u>Real</u> anger dangerous since loss of control may cause unintended information disclosures.</p> <p>Used to convince others of seriousness of situation and to intimidate counterpart.</p>   | <p>Observe angry counterpart for nonverbal clues and listen for verbal leaks.</p> <p>Appear personally offended to create guilt or embarrassment designed to generate concessions.</p> <p>Respond in kind or terminate session.</p>   |
| <p><b>6. Settlement Brochure (Principled Offer in Writing).</b></p> <p>Highly-principled initial position used to induce counterpart to argue from this document.</p>   | <p>Mistake to argue from other side's agenda, unless it enhances your case.</p> <p>Carefully evaluate underlying assumptions in counterpart's brochure.</p> <p>Prepare counter-brochure to induce counterpart to approach problem from your perspective.</p>  | <p><b>12. Aggressive Behavior.</b></p> <p>Used like anger to demonstrate seriousness of situation.</p> <p>Aggressive negotiators should monitor other side's nonverbal signals (e.g., clenched jaw, defensive posture) indicating frustration that may cause end of talks.</p>  | <p>Attitudinal bargaining may be used to convince counterpart you are unwilling to tolerate such improper tactics.</p>  |
|   |   | <p><b>13. Walking Out / Hanging Up Telephone.</b></p> <p>Used to convince counterpart that actor unwilling to make further concessions.</p>   | <p>Do not immediately telephone other side or follow him/her out the door, since clear sign of weakness.</p> <p>Do not let bullying tactics intimidate you into unwise concessions.</p> <p>Review your non-settlement options and determine whether further movement warranted.</p> |

| GAME OR TECHNIQUE   | POSSIBLE RESPONSE  | GAME OR TECHNIQUE   | POSSIBLE RESPONSE   |
|---|--|---|---|
| <p><b>14. Irrational Behavior.</b></p> <p>A few negotiators try to obtain advantage through seemingly irrational conduct, hoping to convince others they must accept their one-sided demands or face consequences of ongoing dispute with unstable adversary.</p> | <p>Usually best to ignore seemingly irrational counterpart conduct, since they will generally evaluate proposals in logical manner when they are alone.</p> <p>On rare occasion when truly irrational counterpart encountered, must consider your non-settlement options and decide whether counterpart's demands are preferable.</p>  | <p><b>21. "Brer Rabbit" (Reverse Psychology).</b></p> <p>Negotiator tells counterpart he/she must have items A, B and C, (which are actually second goals) and then indicates need for "at least X, Y, and Z," (which are true primary objectives), hoping that win-lose counterpart will impose least desired terms.</p> <p>Technique often effective against win-lose bargainer who wants to provide result other side seems to want least.</p> <p>While adroit negotiator may induce win-lose party to provide what is actually desired, should not be used against win-win person who may actually give them A, B and C.</p>  | <p>If beneficial, give in to their stated demands and watch them equivocate as they try to move toward truly desired objectives.</p>  |
| <p><b>15. "If It Weren't For You" (Or Your Client).</b></p> <p>Party complains about your negotiating behavior or claims present situation caused by your client's prior unfair actions to generate feelings of guilt.</p>  | <ul style="list-style-type: none"> <li>Don't allow counterpart to create unfair guilt by raising prior matters that are not relevant to present negotiation.</li> </ul>  | <p><b>22. Passive-Aggressive Behavior.</b></p> <p>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 transaction indirectly (e.g., shows up late; fails to bring needed papers).</p>  | <p>Take control of situation by obtaining needed documents yourself and by preparing draft of agreement reached to preempt that person's ability to disrupt things – Once person faced with fait accompli, tend to give up.</p>                                       |
| <p><b>16. False Demands (Discerned During Information Stage).</b></p> <p>Make demands about something counterpart desires and you do not really value. Can be used to trade for other item(s) you really value.</p>   | <ul style="list-style-type: none"> <li>Counterpart may call your bluff by conceding items you don't want or by discovering your dishonesty.</li> </ul>   | <p><b>23. Belly-Up ("Yes..., But...").</b></p> <p>Party (wolf in sheepskin) feigns lack of negotiating ability and knowledge to evoke sympathy and weaken other side's resolve – Acknowledges reasonableness of their concessions <i>but</i> explains why concessions are not sufficient.</p>   | <p>Never allow belly-up counterpart to evoke such sympathy that you alter negotiation plans and concede everything in an effort to find a "solution" for this poor soul.</p> <p>Force belly-up counterpart to state own position that you can directly challenge.</p> |
| <p><b>17. Uproar ("Chicken Little").</b></p> <p>One side threatens havoc and offers to prevent the dire consequences if other side accepts its demands.</p>   | <p>Carefully evaluate likelihood that the threatened disaster will actually occur.</p> <p>Determine consequences for threatening party if it does occur – Situation may be worse for threatening party than for you.</p>   |   |   |
| <p><b>18. "So What."</b></p> <p>Attempt to minimize concession by characterizing it as relatively unimportant.</p>  | <p>If your concession is really worth little to counterpart, withdraw it. (You'll discover if it really was of minimal value.)</p>   | <p><b>Miscellaneous Negotiation Tips</b></p> <ol style="list-style-type: none"> <li>Thorough preparation of both substantive issues <i>and</i> negotiation strategy critical to negotiation success.</li> <li>Can be forceful advocate without being unpleasant. Opposing lawyer is not your enemy – They are enabling you to earn a living.</li> <li>Loss of integrity destroys negotiators effectiveness – Never misrepresent material law or fact.</li> <li>Never use tactic which if discovered by counterpart would impede future interactions.</li> <li>Silence is golden – When in doubt, wait for counterpart to speak.</li> <li>Be active and careful listener.</li> <li>Try to avoid negotiating without having specific non-settlement option.</li> <li>Always remember power of well-timed and sincere apology acknowledging counterpart's loss or emotional feelings.</li> </ol> |   |
| <p><b>19. Range Offers (\$40,000, \$45,000 or \$50,000).</b></p> <p>Usually used to indicate flexibility. (but often seen as sign of confusion/weakness.) Preferable to make definitive offer and await further developments before signaling flexibility.</p>    | <p>Recipient of range offer should focus on advantageous end (e.g., plaintiff on \$50,000/defendant on \$40,000).</p>  |   |   |
| <p><b>20. "Mutt and Jeff" (Reasonable-Unreasonable Dichotomy).</b></p> <p>Where "reasonable" person sympathizes with your "generous" concessions but emphasizes need for greater concessions to satisfy his/her "unreasonable" partner.</p>                       | <p>Do not direct all of arguments and concessions to "unreasonable" party to achieve his/her acceptance.</p> <ul style="list-style-type: none"> <li>If you can satisfy "reasonable" counterpart, you can divide counterparts and whipsaw "unreasonable" person to accept offer accepted by "reasonable" partner.</li> <li>If "reasonable" person indicates that he/she must defer to partner's opinion, clear he/she using Mutt and Jeff technique.</li> </ul> |   |   |

# Nonverbal Communication (Don't Ignore Feelings)

[ Single Nonverbal Clue Rarely Dispositive – Must Look For Changes In Behavior And Indicative Patterns Of Behavior. ]

## COMMON FORMS OF NONVERBAL COMMUNICATION

| NON-VERBAL ACT  | USUALLY MEANS                           | NON-VERBAL ACT  | USUALLY MEANS                                |
|---|---|---|--|
| <b>1. Facial Expressions</b><br>(most easily faked nonverbal signs) |   | <b>12. Gripping Arm Rests/Drumming on Table</b>                       | Frustration/Impatience                       |
| • Sneer   | Disdain/Disappointment                  | <b>13. Hands Neatly Folded in Lap</b>                                 | Submissiveness                               |
| • Flinch  | Shock/Disappointment                    | <b>14. Leaning Forward in Chair</b>                                   | Interest/Eagerness                           |
| • Frown   | Sadness/Pessimism                       | <b>15. Hands Touching Face/Playing With Glasses/ Looking at Notes</b> | Meditation/Disguising<br>Contemplative Pause |
| • Smile   | Pleasure/Optimism                       | <b>16. Rubbing Hands Together in Anticipatory Manner</b>              | Eagerness/Interest                           |
| • Relaxed Features  | Relief/Optimism                         | <b>17. Leaning Back in Chair With Hands Behind Head</b>               | Confidence/Domination                        |
| • Double Message<br>(inappropriate smile)                           | Person Likes Problem<br>Being Described | <b>18. Steepling</b> (Hands Together in Uplifted/Expansive Posture)   | Confidence                                   |
| <b>2. Gnashing of Teeth</b>   | Frustration/Anxiety                     | <b>19. Hands Extended Toward Opponent With Palms Facing Out</b>       | Defensive/Fending Off<br>Verbal Onslaught    |
| <b>3. Scratching Head/Brushing Cheek</b>                            | Puzzlement                              | <b>20. Casual Touching</b>  | Sincerity/Warmth                             |
| <b>4. Running Fingers Though Hair/ Rubbing Forehead</b>             | Frustration/Stress                      | <b>21. Open/Uplifted Hands</b>  | Sincerity/Honesty                            |
| <b>5. Head Resting in Hand(s)</b>                                   | Boredom/Disinterest                     | <b>22. Crossed Arms/Crossed Legs</b>                                  | Unreceptiveness                              |
| <b>6. Warm Eye Contact</b>  | Sincerity/Openness                      | • High on Chest/Ankle on Knee   | Combative/Aggressive                         |
| <b>7. Intense Staring</b>   | Intimidation                            | • Low on Chest/Leg Draped Over  | Defensive                                    |
| <b>8. Raised Eyebrow</b>  | Skepticism/Surprise                     | <b>23. Turning Back/Looking Away After Making Offer</b>               | Disdain for Compromise                       |
| <b>9. Covering/Rubbing One Eye</b>                                  | Skepticism/Disbelief                    |   |  |
| <b>10. Head Nodding</b>   | Active Listening and<br>Comprehension   |   |  |
| <b>11. Wringing/Twisting of Hands</b>                               | Frustration/Anxiety                     |   |  |

## NONVERBAL INDICATIONS OF DECEPTION

| NON-VERBAL ACT   | USUALLY MEANS                                | NON-VERBAL ACT                | USUALLY MEANS    |
|--|--|-------------------------------|------------------|
| <b>1. Signal Words</b><br>("to be candid", "to be truthful")     | To Pique Listener Interest                   | <b>Dilated Pupils of Eyes</b> | Deceptive Stress |
| <b>2. Reduced Gross Body Movement</b>                            | Effort to Look More<br>Credible/Less Shifty  |                               |                  |
| <b>3. Increased Gross Body Movement</b>                          | Deceptive Stress                             |                               |                  |
| <b>4. Placing Hand Over Mouth</b>                                | Subconscious Effort to<br>Withhold Deception |                               |                  |
| <b>5. Touching Nose with Fingertip or Back of Finger</b>         | Deceptive Stress                             |                               |                  |
| <b>6. Negative Shaking of Head/<br/>Positive Nodding of Head</b> | Contradicting Message<br>Being Stated        |                               |                  |

- 8. **Narrowing/Tightening of Red Margin of Lips** .....Deceptive Stress
- 9. **More Deliberate Speech** .....**To Ensure Misstatement Heard**
- 10. **Higher Pitched Voice** .....**Deceptive Stress**
- 11. **More Frequent Clearing of Throat** .....**Deceptive Anxiety**
- 12. **Increased Speech Errors** .....Subconscious Effort to  
(broken phrases, stuttering) .....Disrupt Deception
- 13. **Obvious Effort to Look Listener in Eye** .....To Enhance Credibility of  
.....Misstatement
- 14. **Less Eye Contact** .....Deceptive Anxiety

# Post-Negotiation Evaluation Checklist

[ After Significant Negotiations, take Time To Ask Yourself How You Think You Did. ]

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

Were you completely familiar with the operative facts and law?

Did you fully understand your client's value system?

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

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

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

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

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

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

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

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

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

If not, what caused your miscalculations?

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

Did these factors influence the negotiations?

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

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

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

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

Did you initially use broad, open-ended questions to determine what the other side

wanted, and use what and why questions to ascertain their underlying needs and interests?

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

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

What precipitated such revelations?

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

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

The first "real offer"?

Was a "principled" initial offer articulated by you?

Was a "principled" initial offer articulated by the opposing side?

How did your counterpart react to your initial proposal?

How did you react to your counterpart's opening offer?

**11. Were Consecutive Opening Offers Made by One Party**

**Before the Other Side Disclosed Its Initial Position?**

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

What else might you have done to counter those tactics?

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

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

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

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

Were subsequent concessions made on an alternating basis?

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

**15. Were “Principled” Concessions Articulated by You?**

Were “principled” concessions articulated by your counterpart?

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

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

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

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

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

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

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

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

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

If so, how was this result accomplished?

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

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

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

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

Do you think your counterpart was aware of your mistake?

How could you avoid such a mistake in the future?

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

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

**“You don’t get what you deserve, you get what you negotiate.”**

***Chester Karrass***

**“The best negotiators get results that make people happy.”**

***Charlie Craver***

