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Case Studies: The Ways to Achieve More Effective Negotiations

Renee A. Pistone

INTRODUCTION

For many lawyers, deciding which negotiation strategy to employ depends on the specific context of a negotiation.¹ In fact, the attorney faces a complex choice in their selection from among the different negotiation strategies and must frequently negotiate any particular matter using a combination of more than one negotiation strategy.² Further, that the craftiness of the attorney negotiator when employing the specific negotiation strategy actually determines how successful that attorney will be in her procurement of the outcome the client desires.³ More importantly, the attorney negotiator must strive to comply with ethical guidelines set forth by the American Bar Association's Model Rules of Professional Conduct ("Model Rules") and their internal moral compass.⁴

Most lawyers use the art of negotiation as a tool in their daily practice.⁵ The trend is that many attorneys and clients decide to negotiate their disputes themselves rather than have a Judge make the decision, due to the cost and delay.⁶ Hence, there is increased pressure to negotiate and/or to

1. See, e.g., HOWARD RAIFFA, *THE ART AND SCIENCE OF NEGOTIATION* (1982) (giving a professional summarization of the resolution of conflicts and gaining the benefits of bargaining).

2. See generally Walter W. Steele, *Deceptive Negotiating and High-Toned Morality*, 39 VAND. L. REV. 1387 (1986).

3. See Andrea Kupfer Schneider, *Building a Pedagogy of Problem-Solving: Learning to Choose Among ADR Processes*, 5 HARV. NEGOT. L. REV. 113, 128 (2000) ("A problem solving approach to the negotiation makes it more likely that the entire panoply of needs will be met.").

4. See ROBERT H. MNOOKIN ET AL., *BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES* 288-94 (2000).

5. See generally Paul Rosenberger, *Laissez-Fair: An Argument for the Status Quo Ethical Constraints on Lawyers a Negotiators*, 13 OHIO ST. J. ON DISP. RESOL. 611 (1998).

6. See generally THOMAS C. SHELLING, *THE STRATEGY OF CONFLICT* (1960).

enter into more formal mediation rather than litigate a dispute, whenever possible.⁷

Part I of this paper focuses on the three main tensions present in all traditional lawyer-to-lawyer negotiations. Part II is an illustration of negotiation principles within a “live” negotiation. Part III summarizes the main ideas of the paper. Part IV concludes the paper.

PART I: ELEMENTS IN NEGOTIATIONS

A. The Main Tensions Present in a Negotiation

Negotiations are dynamic and some are plagued by certain tensions.⁸ Tensions are stressors felt by parties in their efforts to get their needs met.⁹ A tension occurs when both parties’ interests diverge rather than overlap on an issue.¹⁰ It can be an impossible task to eliminate all three of these tensions but there are ways that they can be managed effectively.¹¹

1. The Desire for Distributive Gain

The first of the three tensions that must be navigated by a skilled negotiator is the “desire for distributive gain, or getting a bigger slice of the pie.”¹² Conflict will arise as both parties recognize that although they want to get the most, they also face that they are (to a degree) dependent on each other to resolve the dispute. The tension results from the realization by both parties that they will eventually divide up the pie that they must expand and create together.¹³ To do this, both negotiators must be open and willing to share information in order to create value in the negotiation. Each party should divulge their interests, resources, and alternatives to some extent in order for the negotiation to be effective.¹⁴

7. See ROGER FISHER ET AL., *BEYOND MACHIAVELLI: TOOLS FOR COPING WITH CONFLICT* (1994).

8. *Id.*

9. See Carrie Menkel-Meadow, *Toward Another View of Legal Negotiations: The Structure of Problem Solving*, 31 *UCLA L. REV.* 754, 798-801 (1984).

10. Menkel-Meadow, *supra* note 9, at 799-800.

11. MNOOKIN, *supra* note 4, at 11-43. See also ROGER FISHER & SCOTT BROWN, *BUILDING RELATIONSHIPS AS WE NEGOTIATE* 9-12 (1989).

12. MNOOKIN, *supra* note 4, at 9-10.

13. *Id.* at 9.

14. *Id.*

2. The Experiential Tension

Experts refer to the second tension as the experiential tension because it involves a negotiator's struggle to effectively listen to her opponent's point of view when she wants to inject her own views.¹⁵ The negotiator lessens this tension by making open-ended statements that will lead to collaboration rather than to an expansion of the conflict. The negotiator will refrain from interrupting the speaker. She will be emphatic and demonstrate her patience to prevent a combative approach to the negotiation.¹⁶ The negotiator must assert her own views, interests, and concerns in a respectful way to the opposing party to create value. There may be an interest that is paramount to one party and trivial to the other party. It is in this manner that in a successful negotiation the parties are trading on their differences.¹⁷

3. The Conflicts of Interest Tension

The third tension occurs when a lawyer as agent faces conflicts of interest with his own business or views while he is negotiating on behalf of a principal.¹⁸ The views may not be shared by both the principal and the agent. The tension stems from the agent's concern about his own needs and the wants and desires of the principal. There are times when the principal may desire that an agent do something that is contrary to the agent's beliefs.

Example: 1. The Desire for Distributive Gain

Both parties have a natural desire to garner as much as possible in a distributive negotiation where there are a specific number of items over which that negotiators are dealing.¹⁹ A way to resolve this first tension is to devise creative ways that result in an expansion of the pie.²⁰ During a distributive negotiation where the negotiators divide up something, the goal is to expand the things that the parties ultimately divide in unique ways with the challenge to brainstorm and develop ways to enhance the value of the items for which the parties negotiate. Once the negotiator enhances the value

15. *Id.* at 9-10.

16. *Id.*

17. MNOOKIN, *supra* note 4, at 10.

18. *Id.*

19. *Id.*

20. *Id.* at 12.

of the item the enhancement itself becomes another thing in addition to the actual item for which the parties negotiate.²¹ To illustrate this tension, imagine that X and Y begin to negotiate the sale of a chair but are unable to agree on the price. The seller expands the pie with an offer to assemble and install the chair for the buyer in return for the full price minus, a 10% discount for cash.

This offer creates value and works because the buyer did not want to assemble the chair and would have had to pay someone else to do it. In order to expand the pie, the negotiator needs to know the underlying motivations for why his client and the opponent's client wants something in particular.²² Instead of forcing the other party to accept one-sided terms, both negotiators create additional aspects by introducing objective solutions palatable to both sides.

Compare the following resolutions in this distributive negotiation, where someone is selling a service to a willing buyer:

MATT: I paint yachts for \$1,200.00.

SUE: \$1,200.00! That's a small fortune. Why should I pay you that kind of money? This is a harbor town with plenty of people painting yachts for a living. By the way, I heard that you painted Professor Dunlip's boat.

MATT: He's a great guy-I had him for Constitutional Law. I have to charge \$1,200.00. I have certain obligations to my family.

SUE: We have something in common. I had Professor Dunlip for Constitutional Law, too. But I really cannot afford that price.

MATT: Listen, I'm worth the money because I take out all of the glass and painstakingly paint each crevice. You've got yourself a beautiful vessel. Maybe we can work something out since we are both former students of Professor Dunlip.

SUE: All I know is that I am losing a lot of money this summer. I cannot supplement my income by fishing in Nantucket.

21. *Id.* at 13-21.

22. *See generally* MARY P. FOLLETT, DYNAMIC ADMINISTRATION (Henry C. Metcalf & L. Urwick, eds. 1942) *reprinted in* THE EARLY SOCIOLOGY OF MANAGEMENT AND ORGANIZATIONS VOL III (Kenneth Thompson ed., Routhedge 2003).

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MATT: Oh really, why can't you fish this summer? Listen, I cannot afford to lower my price this time. I'm saving money to take my family on a summer vacation to Nantucket. We have not had one in two years. Look, in determining my price, I have spoken to numerous people at the docks, and they charge double and do not even remove the glass.

SUE: Well, I use the boat for two weeks in June to catch and sell lobster to pay for my law books. I cannot fish this year as I have to study for the bar exam so I am losing money [almost \$300.00]. Nantucket is a great place for family vacation plans.

MATT: We have no plans right now. This job would have given me enough money to rent a boat and sail away.

SUE: I really need you to paint my boat because the bottom will rot out once I put it in the seawater.

MATT: I really need this job. My wife is bothering me about taking a vacation.

SUE: [Hmm] We seem to have similar problems in a way.

MATT: Listen, I can paint your boat for \$600.00 if you sign an agreement that allows me to use the boat (for two weeks in June to sail to Nantucket with my wife and kids). I'll pay for my own gas and bring the boat back on a full tank.

SUE: How about three weeks in June and you paint the boat for nothing [before you set sail]?

MATT: Give me four weeks and I'll paint the boat for free [tomorrow], and pay you \$300.00. Either one of us can draw up the contract since we're both lawyers.

SUE: You've got a deal. You draw up the contract since I'm not licensed [yet] and contract language is construed against the drafter in court [laughing].

Analysis

Matt and Sue faced the tension of both wanting as much as possible. Sue wanted to pay the lowest possible price because she was running low on funds. Matt sought the highest price paid for his services because he needed to take a family vacation. They resolved the tension of desire for distributive gain by an expansion of new ideas and that leads each of them to generate better creative offers that meet both sets of needs.

Example 2. The Experiential Tension

The negotiator should seek whenever possible to demonstrate her understanding of the opposing side's interests and stake in the matter.²³ It is critical for an effective negotiator to demonstrate this kind of empathy. The experiential tension occurs as the negotiator struggles to express empathy for the opposing party and to assert her own client's view.²⁴ One way to ease the second tension is for the negotiator to diffuse tension and share information about her client's interests and concerns.²⁵ It is hard for the attorney to remain silent and listen when she wants to communicate her client's position.

A genuine communication of emphatic feelings can translate into mutual understanding between both parties.²⁶ As a result, both sides may be more forthright in their respective interests and more willing to expand the pie. Below is an example of how the patient negotiator allows the opposing negotiator to speak and to clarify confusion and that translates into more successful negotiations for both parties and their clients:

JOHN: Just to reiterate, my client's final offer for the Lexus dealership is two million dollars. Now, I understand that your client refuses to allow my client to re-name the dealership.

ROSE: Yes, that is correct. The family name must stay and it is with good reason.

JOHN: Well, we understand your client's position but my client wants his own name on the dealership. This is not unreasonable as my client is paying a significant sum of money.

23. FOLLET, *supra* note 22.

24. *Id.*

25. MNOOKIN, *supra* note 4, at 13-18.

26. *Id.*

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ROSE: My client is adamant about this condition simply because he has certain political aspirations. It is not because of his ego.

JOHN: I understand that your client has owned the dealership for twenty years and has some pride but my client feels that it's time for a change.

ROSE: So your client wants to make the business his own. But what about the success he is paying for? Look, John, I'm going to level with you here, my client really needs the name recognition associated with the dealership because he is running for Congress with the Libertarian party. It's all over today's newspapers just how close this race will be.

JOHN: Really? My client enthusiastically supports that party and he ran for office unsuccessfully. This might prove to be a great public relations/marketing tool for my client's newly acquired dealership.

ROSE: Well, having lost a race, your client understands how hard it is to garner support when you are not a "mainstream" political party candidate. I agree, maybe the Libertarian party angle can come in handy, somehow, from a purely marketing perspective.

JOHN: [laughing] It's funny because my client kept telling me that there was something familiar about your client. I now understand the reasoning for your client's position and will confer with my client.

Analysis

Rose and John's forthright approach enabled them to unite their respective clients based on the common ground of both clients having political interests in the Libertarian party. Rose and John reached and exhibited a mutual understanding early on. Their approaches and the language that they used with one another was emphatic.

Example: 3. The Agent/Principal Conflict

Lawyers, as agents, face various conflicts as they act as agents for principals.²⁷ There are many times when their mutual interests conflict because the principal asks the lawyer to do something in violation of the Model Rules.²⁸ The attorney negotiator can relieve the third tension by making sure that information and incentives for succeeding in the negotiation are shared between the principal and the agent.²⁹ The attorney negotiator, in working to lessen this particular tension, seeks to prevent conflicts of interest as much as possible.³⁰ For example, consider the following exchanges:

TED: As Corporate Counsel for Med-Mart, I can tell you that if you distribute those defective flame retardant clothes to the public, you will be held strictly liable under the products liability laws.

DEE: The Board of Directors has already approved the mass manufacture and distribution of the merchandise worldwide. Our profit margins will widen.

TED: But the research shows that 150 out of 10,000 children will die. That risk is too great and the negative publicity could put you out of business. If you do not pull the line then I shall have to resign.

DEE: Everyone here at Med-Mart will be sorry to see you go. Please clear out your desk by noon.

Analysis

Ted has a conflict of interest between what the corporation wants to do and what he knows to be the ethically and morally prudent thing to do. In order to resolve his dilemma and avoid any impropriety, Ted advises the corporation about the negative implications of their actions. Unfortunately, the corporation was unyielding leaving Ted few alternatives but to resign from the corporation. Ted must also consider if this corporate plan is criminal in nature. The plan to manufacture these clothes may cause the

27. See *supra* notes 8-18 and accompanying text.

28. MNOOKIN, *supra* note 4, at 282.

29. *Id.* at 70-71. See also ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (1983).

30. MNOOKIN, *supra* note 4, at 8.

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requisite imminent harm that requires him (as an attorney) to breach client confidentiality by informing the authorities.

B. Typical Negotiation Strategies

Once an attorney understands the three tensions present in every negotiation, she can move to select a strategy. There are many different approaches that an attorney can use. The strategy that she employs serves to shape her particular approach. A strategy can be defined as the attorney's view or philosophy, which shows how the attorney plans to negotiate. The attorney's strategy determines whether the attorney will employ a "winner-take-all" approach or a more interest-based and bargaining style to achieve the desired end. The attorney's personality traits do play a role in how she ultimately negotiates, but strategy is more than personality. It is a set of behaviors or tactics that anyone can employ.

1. The Competitive Strategy

The first is the competitive strategy, which involves the usage of hard-bargaining tactics.³¹ A competitive strategy can easily turn into a power struggle because each negotiator remains positional.³² By being positional, the negotiator is unwilling to yield or compromise her client's position in any way, with the goal being "winner takes all." The competitive negotiator makes few to no concessions at all.³³ Yet, the competitive negotiator demands that a concession be granted "as a precondition to negotiating at all."³⁴ The negotiator employing this strategy exhibits typical competitive behavior such as intimidation.³⁵ These negotiators usually begin with initial demands that are "high, firm, and sometimes false."³⁶ Thus, this competitive strategy may employ the use of hard-bargaining tactics such as sarcasm with ultimatums that may lead to impasse.³⁷

For example, examine the following statements:

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31. DONALD G. GIFFORD, *LEGAL NEGOTIATION: THEORY & APPLICATIONS* 74 (1989).
 32. *Id.* at 16.
 33. *Id.* at 75.
 34. *Id.* at 10.
 35. *Id.* at 10-11.
 36. *Id.* at 11.
 37. GIFFORD, *supra* note 31, at 9-11.

ARTHUR: I can't sell you this limited edition baseball card for less than \$10,000. I need \$10,000 and will not accept anything less. I want to win and I don't care if the buyer walks away. I know what I have to sell is very valuable.

LEE: \$10,000 is just an absurd amount for that—he's not even a Yankee! The book value is only \$5,000. This guy has to be kidding. He is just too competitive. He obviously does not want to sell the item bad enough.

ARTHUR: The price is \$10,000. You can take it or leave it!

LEE: No. I employed this competitive approach since I felt that I had nothing to lose since my profit margins were high last quarter. I'm going to continue this strategy elsewhere. Eventually someone will give me my price. I don't care if I lose Lee as a customer; there will always be someone else.

Analysis

Arthur does not care about maintaining good relations in the future with this person. He just wants to obtain the highest price and will employ any means necessary. Arthur is positional with a "take no prisoners" attitude. He fails to realize that this style leads to an impasse that will completely and unnecessarily frustrate the negotiation.

2. The Cooperative Strategy

A second strategy that the attorney negotiator can employ is the cooperative strategy. The negotiator using the cooperative strategy is interested in gathering and sharing information.³⁸ This negotiator is still positioning but is posited on fairness rather than just winning. He is willing to engage in brainstorming and moves to a fair point.³⁹ For example, consider the following interactions:

ARTHUR: Lee, I just can't sell you this limited edition baseball card for less than \$9,500. I'm going to employ another positional type of approach (this time cooperative rather than competitive) in an effort to be more civil and fair with Lee. I shall begin with a lower price and see what happens this time. I now realize that I must consider that I own a small business and rely

38. *Id.* at 10-12.

39. *Id.* at 16.

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on Lee's continued business as he is a loyal customer. Many other local businesses are facing bankruptcy and mine could be next if I keep losing customers.

LEE: \$9,500. is too much money for that card. The book value is only \$8,500. I do want to purchase a limited edition baseball card-but it must be a former Yankee player. You know that I'm a serious buyer as I have been a loyal customer for the past five years.

ARTHUR: Look, I only have this one to sell. I do appreciate your business so I'll be fair with you. I know of a customer who might buy it for \$9,500.

LEE: Well, that's not definite, keep me in mind, I'm willing to pay \$7,500. for it today.

ARTHUR: No, I need at least \$9,000.

LEE: How about \$8,500 in cash right now?

ARTHUR: Okay.

Analysis

Arthur employs a cooperative strategy that is positional but in this negotiation (unlike in his competitive negotiation), Arthur is concerned with fairness issues. Arthur wants to continue his business relationship with Lee. He does not want to gouge the buyer.

3. The Problem-Solving Strategy

A third negotiation strategy that can be utilized is called problem-solving because the negotiators proposed creative solutions to problems.⁴⁰ Here, the negotiator attempts to "bridge any gaps" between the parties rather than create conflict by using an approach based solely on alternate and fixed positions.⁴¹ The problem-solving strategy encourages both parties to create

40. *Id.* at 17.

41. *Id.* at 17-18.

and develop solutions to the conflict.⁴² For example, consider the following problem-solving dialogues:

ARTHUR: Lee, you've been a loyal customer and I would love to sell you the Yankee player card for \$9,000 but I'm getting a divorce and I have to pay my lawyer a \$10,000 retainer fee. As a result, I cannot offer any discounts on my most prized merchandise but I will discount the Mets card that your friend offered me \$5,000 for last week.

LEE: How much are we talking about? My friend just got married and his young wife might get mad. She wants him to use his money to buy furniture. You know how it is.

ARTHUR: All too well and, in fact, that's why I'm getting divorced. I wanted to play cards, drink, and party when my (soon to be ex-wife) expected me to stay home and pay the bills. Well, I could sell you the Yankee card for \$9,000 if your friend pays me \$2,000 for the Mets card. Then, I would have enough money to pay my lawyer and a little left over to go to the track tonight.

LEE: That sounds great. If you sell me the Yankee card for \$9,000 then I can come with you to the track tonight. Also, \$2,500 is a great price it's well below fair market value. My friend and his wife will be very pleased with a 50% discount. It is always a pleasure doing business with you, Arthur, and I shall pick you up at 8.

Analysis

Arthur and Lee are able to work together to solve their mutual problems in this friendly exchange. Both negotiators are forthright and interested in finding solutions that work the best for everyone involved. The negotiation goes so well that they end up solving more problems than they had anticipated by expanding the pie.

C. Preparation for a Negotiation & Choosing a Strategy

A first step to employing a negotiation strategy successfully is for the attorney to prepare.⁴³ To prepare and create a negotiation strategy, the attorney meets with the client beforehand to determine both the so-called

42. *Id.* at 15.

43. MELISSA L. NELKEN, UNDERSTANDING NEGOTIATION 63, 63 (2001). \

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walkaway and target points.⁴⁴ During this preparation meeting the attorney and client should also map out the firm demands and when and if any first offers the client should make.⁴⁵ It is very important that the client be clear about her demands.⁴⁶ The demands often can shape the character of the negotiation and help choose the right strategy or combination of strategies to employ in the negotiation.⁴⁷ The attorney needs to know what will be flexible points and therefore when she can make concessions or not.⁴⁸

1. Determining the Client's Best Alternative to a Negotiated Agreement

There are key elements in preparation for a negotiation that include the identification of the client's Best Alternative to a Negotiated Agreement ("BATNA"). The client's BATNA is defined as what will happen (or what is the best that I can do) if the negotiation does not work and/or we do not settle.⁴⁹ During the preparation session, it is necessary to first determine the client's BATNA prior to selection of which strategy to employ.⁵⁰ Next, the negotiator and client should then begin to map out the interests.⁵¹ Both sides should begin to generate legitimate options and palatable solutions to any barriers that may stem from any attempts of conflict resolution. This preparation session will also serve to allow for the attorney to anticipate the other side's case and opinions on the matter.⁵² The client and attorney negotiator will also consider the relationship between the parties and the importance (if any) of future continuous relations. Consider the following exchanges between attorney and client during a mock preparation session:

ATTORNEY: Will you accept between 700 and 710 thousand dollars for the house? I need to know a dollar amount here. She keeps telling me that she needs a lot of money. I need to know what is at stake here and how fast she needs to sell.

44. *Id.* at 64.

45. *Id.* at 64-66.

46. *Id.* at 66.

47. *Id.* at 65.

48. *Id.* at 67.

49. NELKEN, *supra* note 46, at 67.

50. *Id.* at 68.

51. *Id.*

52. *Id.* at 68.

CLIENT: Well, actually my accountant told me that I must net at least 710 thousand dollars between selling the house and car in order to avoid personal bankruptcy.

ATTORNEY: You have serious financial issues and you need to sell fairly quickly. I would not want to employ a competitive strategy and risk offending a potential buyer that may abandon the deal. I shall probably employ a cooperative strategy unless new information comes to light. I shall negotiate the sale of the house and car together, if possible. It should be easier to get more money for two items rather than two large amounts on each separate purchase. For example, I could say give me the asking price for the house and I can throw in the car as a way to generate more options.

CLIENT: The house is in a flood zone and the buyer must purchase flood insurance. We never did get water in the house even during the worst storms. The fact that its located in a flood zone will affect the value. However, there are actually pluses with this fact because the house has never been "flooded" in over 30 years. The property taxes remain substantially low for that amount of living space.

ATTORNEY: In considering your dire financial condition, I should add a provision to the contract that the house is being sold "as is." The "as is" provision prevents you from being held responsible for any needed repairs.

CLIENT: Okay, that sounds good. At my age, and with my husband gone, I have no one to make repairs and really cannot be bothered with it. I just want to cash out, move to Miami, and play Bridge.

ATTORNEY: Are you including any furniture or fixtures with the sale of the house? Is there any item that I should specifically exclude from the sale in the contract.

CLIENT: All of the furniture and fixtures are included with the sale of the house but I must get my price, if you know what I mean. There is an Oriental rug worth \$3,000. Here is an itemized list of the value of everything. I expect you to get the market value for these items. I have a lot of antiques, too. All of the chair rails in the rooms were made from imported wood. The floors are all Italian marble. I'm going to miss it.

ATTORNEY: Are you certain that you want to include such valuable items in the sale?

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CLIENT: Yes, I do not have any relatives/family to leave it to. Harry and I never did have any children.

ATTORNEY: What if the buyers don't want your furniture and offer less than 710 thousand dollars for the house and car? Will you consider selling the furniture and fixtures to an estate liquidating company to make up the difference? I think that you should call a few of them and have them give you estimates. Sometimes, buyers want the house to be completely emptied so they can move in right away. I need to know if I can employ a competitive strategy or if she has other options.

CLIENT: I have received three estimates for my furnishings ranging from 100-110 thousand dollars for everything. The realtor told me not to sell my furnishings since it may help sell the house (if all of my furnishings are still there). If she sells the furniture, she can hold off her creditors for a few months. I can then hold out and employ the competitive strategy. I'll bet that I can get the asking price. I'm not going to do that, unless I know that she has enough money to live on, and can then afford to turn away buyers.

ATTORNEY: In considering your financial situation, and based on this list that you just handed me, I think that 110 thousand dollars is a very good price. You should consider selling the furnishings now to pay off some of your creditors. It would buy more time to hold out for a higher price on the house. The buyers are interested in purchasing a house and not necessarily the furnishings. I do not need to use the furnishing as leverage with any potential buyer. She seems to think that I need things like the furniture to bargain with but I don't. There are enough pluses with the house itself especially the real estate taxes which makes the house a steal. I know a builder who would buy the property and just level the house in order to build corporate offices. It's actually zoned for that because it sits on 3 acres in a remote section of town.

CLIENT: That makes sense and then I can move to Miami next week two months ahead of schedule. Will you handle everything for me and call me on the phone with any offers? I'll pay you \$150 per hour.

ATTORNEY: If you decide to move now there is no need for you to fly up here. We can do everything via Federal Express and I can also work with

your accountant, if you choose. There is no fee for my services because Harry and I were great friends and it is my pleasure to help out.

Analysis

This preparation session worked because the attorney and the client mapped out the client's needs and interests in an orderly fashion. The attorney was meticulously trying to prevent any misunderstandings between himself and the client. Based on this preparation session the attorney should be well prepared to handle any thing that may arise in the negotiation with any potential buyer.

2. Effect on Choosing Location as a Planning Issue

Another factor in the key to success in implementing different negotiating strategies during the negotiation is the location and timing of the meeting.⁵³ Research and planning are required to ascertain the relative power between the two parties to use this technique.⁵⁴ For example, if one side is more powerful than the other side, the courtroom usually levels the playing field, but here, there is no courtroom and no Judge within the negotiation context.⁵⁵ So, if the other side is more powerful, for example, questions may arise such as, should you go to their office, or a neutral place.⁵⁶ Further, the economic conditions of both parties' clients can play a crucial role in the negotiation impacting the outcome.⁵⁷ In short, there always seems to be one party who needs to settle faster than the other.⁵⁸ For example, consider the following situation:

I want the negotiation to be on my client's turf. It impresses people when they see how wealthy and important he is. Everyone follows him around at his golf/country club. This is the image that I want to be portrayed.

PAUL: My client prefers to negotiate the final terms of the deal while playing golf.

53. *Id.* at 129.

54. *Id.* at 124.

55. See generally Roger Fischer, *Negotiating Power: Getting and Using Influence*, 27 AM. BEHAV. SCI. 149 (1983).

56. GIFFORD, *supra* note 31, at 73-74, 80. The author calls this a form of agenda control. *Id.*

57. *Id.* at 26-30.

58. *Id.* at 26. The author discusses the relative bargaining power of the parties. *Id.*

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ANN: Truthfully, my client does not play golf very well and is uncomfortable with holding this meeting on the green. He prefers a more structured presentation using plastic models to illustrate what he plans to construct. Can we just meet in my conference room? I will have the meeting catered with gourmet food and international coffees.

My client suffers from severe anxiety and needs to make this presentation in an office/conference room setting because that is what he is used to. He uses plastic models to appear confident and to give his clients the correct idea of exactly what they are constructing.

PAUL: Sorry, it makes more sense for us to meet on the golf course and discuss the construction of the new golf course as we are playing. Your client is free to refrain from playing. [laughing] Why don't you teach him some moves?

I am growing concerned by his position over this minor matter. Is he trying to set the stage for all future negotiations that it's "his way or the highway?" This competitive strategy over the location is bothersome. This is a deal-breaker for my client because his health comes first. He will not make the presentation in any other location. I have to somehow "finesse" this situation.

ANN: That is ridiculous. I would hate for this to be a deal-breaker. For your information, Mark Harrison the bank's President also hates to play golf. He considers it to be a huge waste of time.

PAUL: Oh, I didn't know that. Fine, then we'll all meet in my office at noon tomorrow. **We have a very tight deadline and need for construction to begin by next week.** Okay, well, this is getting a little better but the plastic model of the re-modeled golf course is not ready yet and my client is not ready to go.

ANN: That is too soon. The architect has not finished the plastic model of the new golf course, yet. My client needs that in order to illustrate the work that he plans to do. I have to level with him a little bit. I don't want to seem like I'm being too competitive over this matter but I have to consider my client's health.

PAUL: Your people are simply not ready for this negotiation. You'd better get it together- we have a deadline.

ANN: You are being unreasonable. You gave my office two days to prepare and review all of the documentation. Look, my client is a Builder not a golfer. He is paid to construct a more modern golf course not to turn into the next Arnold Palmer.

PAUL: Is it my fault that the documents never arrived via Federal Express? We will have the meeting in your office this Friday and then play golf on Saturday. Your client need not attend on Saturday.

Alright, I shall let him think that he won.

ANN: Fair enough- but all future meetings will be held at the bank in their conference room. Mark Harrison wants it that way and his bank is financing three million dollars to make this deal happen. He has the power of the purse.

PAUL: But we are the lawyers. The meetings should be in our offices. I mean, all he is doing is signing the check. We are drafting all of the documents and this is so unfair.

Analysis

The location of the negotiation was of primary importance. There were many reasons why each respective client wanted to negotiate on their own premises. Everyone involved was acting egotistically. Each person played a role in this negotiation over where the meeting would ultimately take place causing an unnecessary delay.

PART II: ANATOMY OF A LIVE NEGOTIATION

A. Hypothetical One: Context

The following hypothetical involves a transactional dispute with two attorneys representing each of the parties and there is no neutral mediator.⁵⁹

59. This particular hypothetical was loosely based on Sally Soprano in terms of the similar situations that both Soprano and Jordani, the client in this hypothetical, were in. Soprano and Jordani were both older stars that were negotiating their "comebacks." Sally Soprano is a case that

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On the one hand, the attorney for the National Basketball Association (NBA) is employing the competitive strategy. On the other hand, I am the attorney negotiating as the agent for the player. I am attempting to employ a problem-solving strategy.

B. Preparation

1. Attorney/Client Preparation Meeting Prior to a Negotiation

I have preliminarily met with my client and went over his demands. We also successfully figured out his Best Alternative to a Negotiated agreement.⁶⁰ His BATNA is to play for another team. We tried to anticipate the other side's arguments and developed counter arguments for our view. As a result, I feel that I am ready for this negotiation and should not be caught off guard. The client and lawyer together decided on the client's absence from the negotiation. The client's absence should even out the balance of power between the two sides because two lawyers are arguably equally powerful in a any legal context.⁶¹ It is no longer my client versus the NBA, so to speak. With that in mind, I feel that I should be able to disarm the other side should any problem arise, while I try to employ a problem-solving strategy.

2. Anticipation of the Opponent's Approach and Strategy

Based on my knowledge about the other side's negotiator, I am already anticipating that he will employ a competitive strategy. I already know that his client, the owner of the NBA Clippers, will not be there because of their attorney's notorious preference to negotiate alone. He would not want his client there to answer any of my questions.

3. Background

My client, Michael Jordani was seen and drafted by scouts in 1998 from the NBA team called the L.A. Clippers in 1998. At age 20, Jordani was still

was prepared by Professor Norbert S. Jacker of DePaul University College of Law in 1985. It has been revised for use by the Harvard Negotiation Project by Mark Gordon, Bruce Patton, and others.

60. NELKEN, *supra* note 46, at 67.

61. GIFFORD, *supra* note 31, at 98-101.

in college at the University of Connecticut. He then played for the Clippers for four years from 1999 to 2002 and became truly famous as a “slam dunk” legend. His NBA contract with the Clippers paid him as follows: 5 million dollars in year one, 6 million dollars in year two, and 7 million dollars in both year 3 and year 4. Jordani, at age 24 had scored more points than any other player during his four years with the Clippers.

Jordani was a Sports Illustrated darling, depicted on the cover of the magazine at least three times. Jordani had also earned lucrative endorsements from Pepsi Cola and Nike. However, the money from those endorsements reverted back to the Clippers pursuant to a clause in Jordani’s original 1998 contract. Jordani was forced to agree to these terms in exchange for the chance to play for the Clippers. If he did not agree to it, then, there was no deal. Nevertheless, his future looked bright and he seemed to be unstoppable.

During the last year of his contract Jordani was injured. There were seconds left on the clock before the game was over. The Clippers were a basket away from winning. Jordani performed his trademark slam dunk scoring the winning points. The Plexsi-glass above the net shattered the wrong way. Jordani lost his balance and fell down with his knees landing on top of the razor sharp fragments. This freak accident left Jordani with extensive damage to the cartilage in both knees.

Jordani underwent two surgical procedures and he was involved in physical therapy for six months. His physicians said that he probably would not play professionally again. However, they could not be sure, due to his tender age and peak physical condition.

The management at the L.A. Clippers did not renew Jordani’s contract. In the previous years, Jordani had made substantial contributions to charity and several bad investments in junk bonds. He had nothing left. Yet, under a provision that I put in his contract, they had to pay him the remainder of the full contract price whether he played in that year or not. The bad news was that there was a clause in his original contract that barred him from suing the L.A. Clippers or from pursuing any potential products liability claim. They owned the basketball net and the stadium where he was injured. The Clippers’ management feared any negative publicity. Jordani accepted this clause, against my advice, in exchange for a higher than average starting salary.

After the accident, Jordani decided to move back to East Haven, Connecticut where he came from. He was still considered a local hero to many. He turned down a lucrative position as a Sports News commentator on ESPN. Under NBA rules, Jordani would have had to formally retire his “player number” in order to take that job.

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Jordani never lost hope that he would play again someday. Therefore, retiring his number was out of the question. Instead, he decided to teach high school athletics to underprivileged children. He also continued working out and training with his old coach and he trained intensively over the next six months. He felt great and informed me that he was ready to play again. I contacted the L.A. Clippers and asked them if Jordani could attend a practice game. He did and they liked what they saw.

Jordani seemed to be a bit slower running down to the other end of the court. However, when the ball was passed to him, he made every shot, and from every angle. Remarkably, he seemed restored to his former greatness and he was dazzling on the court.

The client gave me the go ahead to set the stage for the negotiations as we had planned. So, I called the Editor of Sports Illustrated, an old friend of mine and invited some reporters to the next practice game. In setting the stage for the negotiation that was to come, I thought that the publicity would be good right before our negotiation. It was also a useful tool to “jump start” Jordani’s career. The other side and other NBA teams could then see how well Jordani played, since the injury last year. At the second practice game, Jordani really shined. The media was all over the story. The management for the Clippers called me and they were now ready to negotiate a contract for Jordani.

After talking with Jordani, we both decided that it would be best for me to employ a problem-solving strategy in negotiating the contract terms. I also informed the client that based on my previous experience with the other side that they would be employing a competitive strategy. I had explained to Jordani the different tactics that I could employ in order to elicit a more cooperative strategy.

During our preparation conference, Jordani had informed me that he wanted to play professionally again more than anything. He said for ultimately not to blow the deal in any way.⁶² So I had to figure out how to reconcile this in my own mind.⁶³ Technically, it is a contradiction in terms

62. I wanted to make sure that my advice fell within the scope of § 3.2.4 of the ABA 2002 Ethical Guidelines for Settlement Negotiations: Assisting Client Without Impairing Client’s Decision Making Authority. The lawyer must explain the advantages and disadvantages of each position to the client. The client can then make a better informed decision.

63. The attorney must be consistent with allowing the client to make the final decision in accepting a settlement offer. Therefore, the client tells the lawyer what they want to do and the lawyer figures out how within the confines of the law and in compliance with attorney ethical

because I could not employ two different strategies all at once. However, I might be successful if I employed two strategies, at different times and moments during the negotiation, as I perceived the situation.

In brainstorming with the client during the preparation session, Jordani strongly desired a two-year contract at 9 million dollars per year. Also, he wanted the exclusive rights to the monies stemming from any future product endorsements. This was very important because I called a publisher with whom I went to law school, and told her that I was representing Jordani again, as his agent. The publisher said that after the first few games, depending on his play, she wanted Jordani to write an autobiography and a manual for coaching basketball. Jordani had a lot at stake but so did the Clippers, as I would later find out. The book deal will be made public and it will be separate from all product endorsements and Jordani keeps all of the royalties. The book deal can be used in the negotiation as a tool to make the Clippers want Jordani realizing how famous he is. The message is that his fame will pack the stadium raising ticket sales volume.

I was playing billiards with Ron McMaster, the CEO of Ticketmaster, at his mansion in Las Vegas this past July, and he was complaining about how the L.A. Clippers were costing him too much money. He said that their ticket sales had dropped sharply and he was really shooting his mouth off. I was embarrassed and tried to excuse myself but he would not let me leave. Finally, I told him that I was negotiating a contract with them and this information was prejudicial. I said that, if he continued, that I would have to leave the room. He apologized and started complaining about some rock band that he had to bail out of jail.

I had received the information, and it was my duty to disclose to the NBA Attorney, if asked, that I knew about their fiscal problems. I figured out that ticket sales had slumped in the last year since Jordani was injured and stopped playing. The ball club was heavily loaded with debt and they needed a charismatic player like Jordani to pique interest in the sport again. Jordani's personality and style could attract new fans and corporate sponsors.

In fact, the team had suffered so much that they were having a hard time attracting young new talent to play. There was still one opening remaining, even this late, in the recruitment season. It seemed that all the best starters wanted to play for the Lakers. They needed Jordani about as much as he needed them. When the word got out about our negotiations, the sports commentators from ESPN called it, "a match made in heaven." I actually said the same thing that night at McMaster's mansion. Luckily, no one at

standards to do it. I would be ineffective as a counselor if I merely told the client what to do. The client has to live with the outcome for the rest of his life.

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ESPN mentioned my name and that I had said it. I did not want my name so intimately linked with McMaster and the press crew from ESPN, just yet.

I called back Clint Blass Westwood, an attorney, who is the authorized agent for the NBA Clippers. He asked me to meet with him to negotiate the contract terms. Westwood is an experienced and crafty negotiator. He insisted that we meet in his Park Avenue office to negotiate the terms of Jordani's contract. I did not feel comfortable on his turf. I considered the balance of power between each of our clients and decided that we should meet somewhere neutral but tilted more in my favor. I told him that I was hungry and that we should meet at the Russian Tea Room.

I told him that I had already made the lunch reservations. Westwood arrived by limousine and was dressed to the nines with platinum cuff links. I arrived via taxi wearing a dark suit and he was waiting for me. I anticipated that and had told the hostess to seat Westwood at my usual table. The staff had made a fuss when I walked in. Westwood was impressed that I was a regular customer at such an exclusive restaurant. We knew each other from our college days. We went to rival schools and his school beat mine five times in a row in hockey; a fact that Westwood rarely ever lets me forget. Westwood opened up the dialogue with his usual sarcasm.

Below, Westwood begins to employ hard-bargaining tactics a main characteristic of the competitive negotiation strategy. He uses his sarcasm combined with personal insults in an effort to try to ruffle my feathers.⁶⁴

ATTORNEY WESTWOOD FOR NBA CLIPPERS (NBA): So, little miss, I guess that you think your running with us big boys now. I heard that you negotiated the deal for Larry J. Bird. What did he get, 15 million to start for the Knicks?

Here, I try to deflect his comments by complimenting him to show that I am not losing my cool.⁶⁵

ATTORNEY FOR JORDANI (PLAYER'S ATTORNEY): Well, Westwood, little me, a big boy, not all of us lawyers have the distinction of

64. MNOOKIN, *supra* note 4, at 214-17.

65. See *id.* at 211-23 for examples on how to combat hard-bargaining tactics.

graduating first in our class from law school. Yes, I negotiated that one. I see your sarcastic tone is still fully intact.

He continues to attack me personally. Things start to intensify and he moves toward giving me a take it or leave it offer.⁶⁶

(NBA) ATTORNEY: [laughs] Okay, good for you-but I am telling you right now sweetcakes, this deal will not be anywhere near that number. You may as well march back up to your posh Fifth Avenue office with your tail between your legs.

I try to reframe the discussion in order to try to dissuade him from giving me a take it or leave it offer because I want to continue the negotiation. He continues with the personal attacks and I use humor to combat them.⁶⁷ He uses the gender-based insults to try to get me to back off.

(PLAYER'S) ATTORNEY: Would you please explain for me how much money are we talking here? Please refrain from calling me sweet cakes (laughing) at least, until, after our business is concluded and I can file a grievance against you [laughing].

It seems to work because he does not give me a take it or leave it offer. The offer is okay and more importantly he is not trying to "low-ball" me with some ridiculous figure.⁶⁸

(NBA): Seriously, I am prepared to offer Jordani a three-year contract for 12 million dollars. Now that's a great offer and I suggest that you snatch it up. I mean, let's face it, we are doing him a big favor in taking him back like this. Well, under the circumstances.

I sense that I can work with this offer and start moving towards working out the details of the contract. I do not accept the offer or tell him that I can take this to my client, though.⁶⁹

66. *Id.* at 213-15.

67. *Id.* at 220-23. The author is suggesting using humor as a way to dodge personal attacks.
Id.

68. MNOOKIN, *supra* note 4, at 215. Mnookin argues that during hard-ball negotiations the other side will often put forth a take it or leave it offer. *Id.* This can lead to a dead lock in the negotiations. *Id.*

69. I have to keep in mind that I am obligated to communicate all settlement offers to the client.

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(PLAYER'S ATTORNEY): [Smiling], Oh right, doing us a favor, during six practice games, Jordani did not even miss one basket. Look, face it -our interests match. You need a great player with "star power" and my client wants to make this comeback with the Clippers. He feels a sense of loyalty to the Clippers. So, lets talk about the terms and provisions of the contract.

I'm tempted now to start in about the fiscal crisis that the team is going through but I really don't need to add any layers right now. Westwood is known for making extreme claims but he later makes concessions. I know that I have to be patient with him.⁷⁰

(NBA): Come on, the standard provisions will be built into the contract and must be initialed by Jordani. Everybody initials it-everybody. Except for all of your clients. Let's order our dessert, now?

Below, I am trying to get Westwood to clarify the details of the contract provisions. This is a touchy area and a potential deal breaker.⁷¹

(PLAYER'S ATTORNEY): Of course, I recommend the "death by chocolate." Honestly, no pun intended, though. Everybody? Well, my client is special. Now, by the standard provisions do you mean: (1) Jordani must allow any and all profits derived from any and all endorsements to revert back to the team ownership. (2) Jordani must agree to hold the team ownership harmless for any injuries incurred in connection with playing basketball.

Westwood was famous for using that tactic, "its not me...the client wants this..."⁷²

(NBA): That's exactly right. You know the drill. I have to adhere to that. You know that is their policy. This isn't a love fest. This is business and if you can't take the heat. . .

70. See *supra* note 69. He is making slow concessions so I do not want to give in too fast.

71. I begin to take some more risks because I perceive from his body language that he is connected to the negotiation. He clearly wants to make this deal work.

72. Here, Westwood is playing his famous good cop/bad cop routine. He tries to blame everything on the client in an effort to get me to make a concession.

Westwood notices that I am keeping my cool and his threats begin to intensify. I counter with some sarcasm of my own. If Westwood perceives any weakness in me, he will exploit it. I am thinking, okay, I can see where your client is coming from. Now, I want you to know where my client is coming from.⁷³

(PLAYER'S ATTORNEY): Oh, it's not a love fest. Your sarcasm and sweet tone had me so confused for a minute, there. Now, I was thinking more along the lines of the following as my client seeks:

-a three-year contract for a flat price of 12 million dollars per year.

(NBA): Hold on. Refresh my memory- why does Jordani deserve this special treatment?

(PLAYER'S ATTORNEY): Listen, my client needs these provisions and I already know that the average player on this team earns 15 million per year. My client has been burned before and this time he wants to do everything right. He has the star power and athletic skills to be entitled to these special provisions.

(NBA): Okay, please continue.

(PLAYER'S ATTORNEY): The offer must include a special contract buy-out provision in the event that he is injured and on the disabled list while playing basketball, whether the injury happens during practice or in a game.

-If my client is injured during the off-season time then the team will pay him the remainder of the contract for that year only.

-My client rejects the following contract provision: all sums derived from any promotional endorsements for (commercial products like Nike sneakers and beverages) that are received in connection with playing for the team will revert back to the team owners. This provision is expanded to include interviews with the media and any books that may be written in connection with the player's professional basketball career on this team.

Westwood is flustered by my assertiveness. I am calm and cool because Westwood carefully wrote down everything that I said which means to me that he is actually considering it.⁷⁴

73. At this point, communication is the most important thing. Both sides need to explain their position to each other to see where their relative interests overlap.

74. See *supra* note 69.

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(NBA): You are playing games with me. What is going here? I have been hearing a lot of talk around town that you have been entering into sweetheart deals with your hot shot friends at ESPN and in the print media. In all of my years, we have never agreed to terms that were so outrageous. You know that I could get up and walk out right now. Counselor, we both know that you have an obligation to disclose my offer to your client. You must tell him about it under the ABA Model Rules.

I begin to gauge his body language at this point. Although he is shouting, he is still connected to the discussion since he is sitting down with his pen in his hand. If he were standing and packing his things up then I would be a little worried. The fact that he is still here tells me that I have the power to set my terms.⁷⁵

(PLAYER'S ATTORNEY): Of course, I plan to convey your offer but let's see if we come up with a better one that we can take back to both of our clients. Yes, you could just leave, but do you really want to do that? Westwood, if you wanted to walk out, you would have done it already. Then, you would call me in the morning and apologize. Okay, you must have heard the news, the word on the street is that Jordani is back, and better than ever. Now, I am already fielding calls from other NBA teams. We came to you first to give you the opportunity to sign him. But I can assure you that there will be no deal if Jordani cannot opt out of the aforementioned provisions, but everything else is still negotiable.

Below, Westwood tries to play the ethics card with me.⁷⁶ He tries to assert that there may be a conflict of interest in my representation of Jordani because of my ties to ESPN executives. Then he backs off completely when he realizes that I remain calm and quiet. He starts looking for sympathy from me. This is another manipulative game that

75. *Id.* I am not giving in nor do I plan to reframe the discussion.

76. Under ABA Model Rule 1.16(a)(1) "a lawyer must withdraw from a representation rather than engage in conduct relating to settlement that will result in the lawyer's violation of the rules of professional conductor other law." It seems like Westwood is trying to get me to withdraw from this negotiation.

he plays. His emotions run from hot to cold and then back again.⁷⁷ This is all part of how he craftily employs a competitive negotiation strategy.

(NBA): I heard that you were out at McMaster's mansion talking shop. What was discussed out there in Las Vegas. Did he offer you a job? Listen, here's the deal, if Jordani opts out of the provisions, then, he has to take a smaller starting salary. Please try to work with me here. No matter what anybody says, ultimately, we are taking a chance on him. Why don't you just have your client sign right here on the dotted line?

I try to act cool and unmoved by his statement that they are taking a chance on Jordani. But his suggestion that Jordani take a smaller salary in exchange for opting out of the provisions could really work. Westwood is actually brainstorming and generating creative ideas to expand the pie. Now he is shifting from the competitive to a more cooperative, almost problem solving, negotiation strategy. I have never seen him act this way in a negotiation. They must really want Jordani very badly. I am encouraged and begin trying to anticipate what he will say next.⁷⁸

(PLAYER'S ATTORNEY): Listen, I cannot settle this dispute without my client's authorization. You are familiar with Model Rule 3.2 The Client's Authority Over the Ultimate Settlement Decision.⁷⁹ I know what Jordani is looking for just as you know what the NBA Clippers want. I mean, just take out a disability insurance policy on Jordani to transfer the risk. At any rate, how much smaller of a salary are we talking about? Jordani is going to pack your arena based on his charisma and star power alone-whether or not-he actually plays.

Westwood gets crafty again and directs his comments to me personally. In fact, he asks me to do something that is improper and unethical and he assures me that he will remain silent about it.⁸⁰ I am not sure how to

77. *Id.* I know that if heats continue to heat up. I plan to change the players. I will tell him that we should back out and let the two parties talk about the contract in our presence.

78. *Id.* Things are going well now. If Westwood should change and start backing off of the resolutions that are reached then I plan to tell him that we may need to bring in a mediator on this. Westwood hates mediators because he hates to give up control and he needs to be the center of attention.

79. §3.2.1 2002 ABA Ethical Guidelines for Settlement Negotiations.

80. Under the ABA Model Code §4.2.3 A lawyer must not agree not to report the another attorney's misconduct. In fact, under Model Rule 8.3 (a); Model Code DR 1-103A it is mandatory that the alleged misconduct is reported.

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react because he is saying things that actually could work and benefit our clients. I am getting confused and wonder if I should excuse myself to throw some cold water on my face in the ladies room.

(NBA): Yeah, but can you guarantee that? I mean, this is all between you and me? Will you use your influence with ESPN and Sports Illustrated to get us the needed press coverage? You once sat on the Board of Directors of both organizations. I heard that you play golf with media mogul Ted Turnaround. Why were you in Vegas last month? Look, I previously had offered him 12 million dollars and a three-year contract. If he opts out of the provisions, I have to cut that number down to 6 million dollars and a two-year contract. But I want your help to insure that the arena is packed on opening night.

I decide to stay seated and level with him. I tell him what I can and cannot do. I offer him no guarantees of any kind regarding media coverage.

(PLAYER'S ATTORNEY): What you are asking me to do may be a conflict of interest for me. I can only suggest what sporting events they cover. I cannot mandate that Jordani get substantially more press than the average sportsman just because he is my client. None of your business to the rest of your prying questions.

Below, Westwood calls my bluff. I don't know where he is getting his information but Jordani does have a book deal in the works. I know that I cannot exactly lie to him directly, now that he has asked the question, and maybe this will work to my advantage.⁸¹ After all, the book deal is sort of guaranteed. But Westwood will think that I pulled some strings to make it happen when I really did not as I did not make any suggestions that they ask Jordani to write a book.

(NBA): No one is suggesting that you did or do anything improper. But if you were to show me some real proof, that Jordani, will likely be a Sports Illustrated darling again, I can justify raising the salary. For example, maybe,

81. I cannot lie to opposing counsel about a material fact under the ABA Model Rules. It is a material fact that my client has a book deal in the works which is contingent upon his return to the NBA.

if he had a book deal in the works. I mean, you are not holding back on me counselor, are you? Why the hell do you want out of those provisions so badly? Please, nobody else cares about that stuff. Everybody signs and accepts the contract “as is.” Anything else is just plain unconscionable for my client.⁸²

(PLAYER’S ATTORNEY): Unconscionable for your client? Please. It is my client that would be giving up potentially millions of dollars in lucrative endorsements by agreeing to that unconscionable provision.⁸³ I have to go because I have another meeting at 4:00. Why don’t we fly down to Fort Meyers and play golf on Saturday, if you are free. We can talk more about this contract then.

(NBA): Okay, but who are you meeting with at 4:00?

(PLAYER’S ATTORNEY): Oh, I didn’t know you cared?

(NBA): Quit kidding around-is it an agent representing another team, for example, the Lakers?

(PLAYER’S ATTORNEY): No, I’m meeting with Donald Trump. Listen, I know what you are thinking but I cannot agree to refrain from entering into any further negotiations with any other teams. However, we will hold off on signing with another team at least until your client tenders its final offer. I understand that you are feeling the heat because the Lakers are number one right now.

(NBA): The Lakers are no match for us. Thank you and I want you to promise me that you will keep our settlement discussions completely confidential.⁸⁴ You may be acting in bad faith if you refuse to settle with me by moving on to another team.⁸⁵

82. Under 2002 ABA Negotiation Guidelines § 4.2.5 an attorney may not negotiate terms in a negotiation that are unconscionable or illegal.

83. *But see* ABA MODEL CODE OF PROF’L CONDUCT R. 1.2(d) (forbidding a lawyer from assisting a client in conduct that is criminal or fraudulent). However, a lawyer is not subject to discipline under the Model Rules for assisting a client in pursuing settlement terms that are unconscionable.

84. ABA ETHICAL GUIDELINES FOR SETTLEMENT NEGOTIATIONS §4.2.6 (2002) (stating that a lawyer may enter into an agreement not to reveal specific settlement terms).

85. *Id.* at § 4.3.1 (citing ABA Model Rules of Professional Conduct §§ 3.2, 4.4 (2002)) (“[E]thics rules, procedural rules, and statutes forbid the bad faith use of the litigation process and this ordinary prohibition is applicable to settlement negotiations.”).

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(PLAYER'S ATTORNEY): Look that is simply not true at all. Under Model Rule 4.3.1 it is not bad faith for an attorney "to refuse to engage in settlement negotiations or to refuse to settle."⁸⁶ Let us be clear about this. I will not mention your client's name, specifically. However, I may mention the contract terms that have been offered to Jordani. Under Model Rule 5.6, "the confidentiality term of the settlement agreement may not restrict a lawyer from using, as distinguished from revealing confidential information."⁸⁷ That is my right and part of my ability to practice law and effect the best settlement contract possible for my client.⁸⁸

(NBA): Okay, you are right, but my client is very interested in signing Jordani.

(PLAYER'S ATTORNEY): Your client needs him because ticket sales have been down ever since he was injured and stopped playing.

(NBA): Ticket sales are down for a variety of reasons and not just that one.

(PLAYER'S ATTORNEY): You also still have an opening this late in the season for a starter. Can you explain that?

(NBA): My client has run into some temporary hard times but this is still a great ball club to be a part of. Jordani belongs with my client's organization. The legend should continue here with the Clippers and not with the Lakers or any other team. You and I both know that. We all want the same things. Look, if your client is willing to give the team some free Public Relations spots on television, I think that my client can be persuaded to waive the provisions that your client dislikes. Let us plan to settle this on Saturday on the golf course.

(PLAYER'S ATTORNEY): I agree, since we both need additional time to confer with our clients again about the new proposal. Westwood, that is a

86. *Id.* at § 4.3.1 (addressing "Bad Faith in the Settlement Process").

87. *Id.* at §5.6.

88. ABA Comm. On Ethics and Prof'l Responsibility, Formal Op. 00-417 (2000) states it is forbidden to restrict the lawyer's right to practice law.

very creative way to expand the pie and I am impressed. I look forward to seeing you on Saturday. We tee off at 6am sharp.

Analysis

The above was the first negotiation session between the two parties. While it ended without a firm settlement, this will often be the case when there is so much at stake. This is a very complicated negotiation because both sides have similar issues and there are few differences between the two sides. Robert Mnookin said that it is the differences that bring the two sides together leading to a settlement.⁸⁹ Each side can trade off on their differences leading to compromise. It was hard to do that in this negotiation because both sides were negotiating from positions of relative strength. Jordani was a strong player making a comeback and the Clippers needed exactly that. Jordani could have signed with another professional team. The question became what price would they be willing to pay for what they desperately need.

Eventually, the attorneys worked well together. Each attorney employed a combination of the competitive and cooperative negotiation strategies. They were well suited to negotiate with each other. Each attorney respected the other because they both knew the culture of the sports agency. At first, however, the NBA attorney used gender-based insults to try to appear superior to the female attorney. He was attempting to assert his power because this area of sports law is traditionally male dominated. There was a prior relationship here between the parties plus both attorneys really knew what to expect from the other as they had negotiated together before in the past. Thus, the female attorney did not get insulted and found a way to be strong and civil. Seemingly, a mutually beneficial settlement will be reached in the future. The settlement will be reached because both attorneys tried to expand the pie and the negotiation did not plummet into an ego trip. The player's attorney actually got the NBA attorney to be interest-based.

Part III: SUMMARY

This paper explores how a negotiation, just like a conversation, is a dynamic thing. Negotiations require thoughtful preparation and require a negotiator to consider the tensions present in negotiations. If the negotiator fails to prepare and to adopt one of the negotiation strategies, he may lose the opportunity to reach a fair settlement

89. MNOOKIN, *supra* note 4, at 46-48.

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In the first negotiation, if Matt (the boat painter) did not continue the negotiation, then neither would have learned that they needed each other. Each one had the solution to each other's problem. If Sue did not bother to ask him about his vacation plans then he never would have realized that he could take the trip on her boat. Both negotiators had almost given up and neither one would have won if that happened. It took openness, persistence, and willingness to explore seemingly irrelevant topics.

Confusion can result when there are misunderstandings between attorneys. Resolving the misunderstandings is key, John exhibits empathy toward the opposing party and this behavior saves the deal. Rose presents John with a straightforward argument and she explains her client's interests. Rose does not express emphatic feelings toward John's side. They had not negotiated together before and neither one knew what to expect, so everything worked out when they found common ground. Both clients were deeply interested in politics, and similar viewpoints.

An attorney facing a conflict of interest is explored when Ted and Dee negotiate the Med-Mart situation. Ted is concerned that the deal may result in a conflict of interest and that his client could be doing something unlawful. Ted chose to resign rather than risk losing his license or advising the client to something improper and unethical.

A competitive strategy was presented as a failure when Arthur tried to employ it with Lee in selling him a baseball card. Lee really did not want the card. The competitive strategy used alone and throughout a negotiation will have the most success when the other party truly wants whatever the item is being bargaining for. Otherwise, most people will want to walk away because it is such a crude one-sided way to negotiate. The competitive negotiator just wants to win and he will simply say, "take it or leave it."

Arthur found more success in selling his baseball card when he employed a cooperative strategy. Lee and Arthur worked out an arrangement that was fair. Arthur realized that he wanted to maintain and preserve his business relationship with Lee.

Likewise, when Arthur utilized the problem solving strategy he sold the Mets card to someone that Lee knew. The negotiation never got that far when Arthur employed the competitive strategy. In employing the problem solving strategy, both men were able to both identify and achieve their goals.

Paul and Ann disagreed over the time and place of the negotiation. Ann had legitimate reasons for why the negotiation should not be outdoors on the golf course. Ann's client suffered from anxiety (triggered by public speaking) and needed to have his plastic models and to make his

presentation in a conference room. This was his requirement and a potential deal breaker to anyone who would not agree. Since it is not an unusual request, no one ever really disagreed until now. Paul also had good reasons for why his client wanted the negotiation to take place immediately and on the golf course. In the end, both of them were later outranked by the bank President's and his desire to hold all future meetings at the bank.

In the final negotiation between the Player's Attorney and the NBA's attorney, mostly all of the strategies and tensions along with ethical issues were explored. The attorneys were employing several strategies repeatedly throughout the negotiation. The attorneys were bluffing one moment, expanding the pie the next, and being competitive in the next moment. They were both completely unpredictable. Each one was trying to figure out where the other side stood on a given issue. It was not until the end that they were able to come together and level with each other. They both realized that their clients both wanted the same things.

Everything just fell into place once the NBA attorney said that his client is very interested in signing Jordani. He then invited the Player's Attorney to play golf. Traditionally, the golf game was just a formality. In the past, when the Player's Attorney arrived at these golf outings, the NBA's attorney usually handed her an envelope with the contracts signed by his client, just waiting for her client's signature. The NBA's attorney would never call her office to say that everything was done and that her client got every term and provision that he wanted.

The purpose of the presentation of the illustrations is to provide a definitional tool to explain the three different negotiation strategies. Each negotiator employed either a competitive, a cooperative, or a problem solving/interest based approach. The lesson is that each illustrated negotiation had a different outcome and it was not necessarily the desired one. The challenge for every negotiator is to reach the desired outcome as defined by a well-counseled client.

The attorney in consultation with the client has to choose the strategy most likely to achieve the client's desired results. As the attorney prepares for the negotiation she must ask the client whether the client wishes to maintain a stable future relationship with the other party as that can help dictate which strategy to use. She actually may be free to employ a competitive approach if the client does not wish to maintain a future relationship with the other party. If the client does want to maintain a future relationship with the other party, then the attorney has to consider that decision in selecting the strategy. In those cases, an attorney employs a problem solving strategy or a cooperative strategy as opposed to the competitive strategy.

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The attorney must interview the client to acquire knowledge about the other side. This knowledge can be used to further understanding about which strategy the other side will likely employ in the negotiation. The attorney needs to ascertain the opposing party's conception of what the desired future relationship is, for example, in order to aid in her own preparation for the negotiation. If she understands what is motivating the other side, then she may be able to guide the negotiation toward a more equitable settlement for both parties.

In choosing which strategy to employ the attorney needs to consider what her client's hopes and fears are. Specifically, how good or bad the client's BATNA is should play a large part in determining the negotiation style to employ. If the client perceives her BATNA as not very good, then the attorney should probably not risk alienating the other party by using the competitive strategy. Likewise, if the client perceives that her BATNA is not too bad, then the attorney is given substantially more freedom to select the appropriate strategy. Whichever strategy the attorney chooses, she must take into account her client's desired future relationship, her client's BATNA, and her knowledge of the other side.

*A. How is Mediation Conducted?*⁹⁰

Introductory, Information Gathering, Framing, Negotiating, and Concluding are the five stages in mediation with the mediator's main job to structure everything.⁹¹ In the introductory phase, the parties provide background information about their problem and the mediator explains how the mediation will be conducted.⁹² During the information gathering stage the mediator will go over the facts with the parties making sure that all of the information is correct.⁹³ While, the framing stage features discussions about each side's needs and interests.⁹⁴ The negotiation stage occurs when the issues have been framed and each party is ready to evaluate their options for settlement.⁹⁵ Concluding is done when the tentative settlement is put into writing and both parties are given a copy to look over with their lawyers.⁹⁶

90. A mediation is usually more structured than a standard negotiation.

91. KATHERINE STONER, USING DIVORCE MEDIATION 1/2-10 (2001).

92. *Id.* at 2/4.

93. *Id.* at 1/9.

94. *Id.* at 1/14.

95. *Id.* at 1/16.

96. *Id.* at 1/20.

1. Hypothetical Two: Context

This hypothetical involves a divorce with two attorneys representing each of the parties and there is a neutral mediator.⁹⁷ The attorneys had failed to reach a settlement because both of them had employed competitive negotiation strategies to an extreme. The attorneys had threatened each other, were sarcastic all the time, and were using mostly hard-ball tactics. The negotiations eventually broke down and the Judge appointed an attorney to be neutral mediator in order to achieve a settlement in the negotiations.

2. The Case of Jones v. Jones

Mary Jones age 46 and Tom Jones age 50 were married for 20 years. They had two children Megan age 5 and Sam age 7 and they are getting divorced. Mary Jones works as President and Chief Executive Officer of Jones Enterprises which was started a year after her marriage. Jones Enterprises is a major for profit corporation that installs cellular towers in remote locations throughout the United States and Canada. The company was so successful that it went public two years ago. Mary Jones owns substantial amounts of stock in the company and Tom Jones works at home restoring antique furniture.

They have been separated for six months and the incident that prompted their break-up happened when Ms. Jones returned early from dropping the kids off at weekend summer camp. Ms. Jones found Tom in bed, with Rita Amloose, a girl that Tom met on an internet dating site. Mary was so angry that she started screaming at Tom and he got out of bed and lightly pushed Mary against the wall and she sustained a bloody lip. Upon hearing the shouting, the neighbors had called the police to the scene.

After they questioned Ms. Amloose, the police discovered that Rita was an under-aged minor of 16 years old. The police contacted the local Prosecutor who subsequently brought statutory rape charges against Tom and he was taken into police custody. The police had asked Mary Jones if she wanted to file simple assault charges against Tom for pushing her but she declined.

Tom has not been convicted and remains out on bail. Tom's mother bailed him out of jail with \$50,000. in cash that was obtained from a

97. This particular hypothetical with reference to the listing of and disposition of assets in a divorce is loosely based on *Ellsworth v. Ellsworth*. *Ellsworth* is a case that is based on a problem in Chapter 7 of Caleb Foote, Robert J. Levy, and Frank E. A. Sander, *Cases and Materials on Family Law*, 67 COLUM. L. REV. 1349 (2d ed. 1966). The case was adapted by Professor Michael Wheeler, and then further adapted for use by Professor Frank Sander and William Ury for the Harvard Negotiation Project of Harvard Law School.

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Western Union wire transfer withdrawn from Mary and Tom's joint checking account. Mary did not specifically authorize the transaction and found out about it when her debit card purchase was declined when she was shopping one day at Saks Fifth Avenue. When Mary called the bank they informed her that Tom authorized the wire transfer. Mary became furious with the bank but they told her that Tom was acting within his legal rights.

Mary continued living in the marital home and using the summer home as a weekend retreat. Mary has retained Robert Shrewd, the toughest most expensive divorce lawyer, in the state. Tom has retained a young wannabe hot shot Vincent Lovelost. Mr. Lovelost is eager to use this case to make his mark proving that he can handle Mary's lawyer, the older experienced guru of sorts. The two lawyers have clashed on more than one occasion since they both handle family matters exclusively. Mr. Shrewd instituted a divorce proceeding alleging the grounds of adultery, and cruel and abusive treatment, and seeking custody of their children, child support, and alimony, and division of their property.

A separation agreement was drawn up by Mary's lawyer Mr. Shrewd. But the two lawyers were unable to reach an accord on anything. Tom's lawyer, Mr. Lovelost, told his client to hold out for a greater share of the marital wealth. Mr. Lovelost was so zealous in his representation that he kept filing motion after motion over one ridiculous thing after another. Finally, the Judge was so annoyed that he appointed a neutral mediator. The mediator was instructed to try to hash out an agreement within three weeks or the issues would have to be litigated by both parties.

Tom was living with his mother and the kids were living with Mary and seeing Tom once per month. The situation was very uneasy as Tom wanted to see the kids more often and Tom's lawyer sent Mary's lawyers letters on a daily basis regarding the case. But Mary expressed to her lawyer she did not want Tom to be with the kids if he was a rapist. Mr. Shrewd told Mary that he would petition the court so that Tom could only have supervised visits with the children.

There is currently no formal agreement relative to the monthly household expenses and everything is being paid for as follows out of Mary's salary and the joint checking account:

Mortgage on the primary residence-	\$2,500.00 monthly
Mortgage on Summer House-	\$800.00 monthly
Insurance for both homes-	Built into the mortgage payments
Property Taxes-	Built into the mortgage payments

Utilities for both homes-	\$1,050.00
Clothes for two children-	\$600.00
Medical Insurance-	Provided by the corporation
Car Insurance:	
Mercedes-	\$130.00 monthly
Corvette -	\$120.00 monthly
Other:	
Incidentals -	\$300.00 monthly

*Over the past six months, Tom has paid the following expenses out of the joint checking account:

Bail Money-	\$50,000.
Food (\$150 week)-	\$3,900.
Car:	
Gasoline (\$15/week)-	\$390 monthly
Maintenance and repair-	\$202.50
Clothing for Tom-	\$525.00
Incidentals:	
Children (\$15/ per week)	\$390.00
Tom (\$22.50/per week)	\$585.00

Statement of Assets:

The joint checking account had contained \$100,000 in it and is now almost depleted. Mary was advised by her attorney not to replenish the account. Tom earns \$50,000 gross per year refurbishing antique furniture. His after-tax take home pay is around \$2,600 monthly. Tom owns \$200,000 worth of stock that he inherited. Mary earns \$400,000 a year, gross from her corporation. Her after-tax take home pay is around \$22,000 per month. Mary owns a rather substantial portfolio of stocks worth \$500,000, 60% of which she acquired prior to the marriage. The remaining 40% of stock worth \$200,000 was acquired after the marriage when her company went public.

The stocks that Mary inherited are solely in her name and produced income of about \$43,000 in dividends. The total value of Mary's stock in her corporation is over \$1,500,000. When they separated, Mary and Tom had the joint checking account and a joint savings account with \$200,000 in it. After they separated, Mary withdrew the \$200,000 from the savings account and placed it in a safety deposit box at the bank.

Mary drives a new limited edition Corvette valued at \$75,000. Tom drives an older Mercedes Benz valued at \$65,000. The primary residence is valued at 1 million dollars and the second home is on the ocean and is valued at \$900,000. Both homes have mortgages on them. The mortgage on

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the primary residence is \$600,000. The mortgage on the second home is \$150,000.

B. Mediation Session One

Stage One: Introduction

In order to comply with the Model Standards of Conduct for Mediators, that were created by a consortium of legal and non-legal experts, the mediator should clearly inform both parties that she is impartial.⁹⁸

MEDIATOR: I understand that my secretary has the signed agreement to mediate on file and I trust that you received the information about my background and experience.⁹⁹ I also understand that the parties have decided to keep this mediation confidential and it should be made clear that my role in this dispute is to be impartial and fair.¹⁰⁰ Now that the introductions are out of the way, welcome to all of you, and I look forward to working with you. This is hard work and there will be good and bad days ahead. The court has not given us a lot of time to do this so let us begin post haste.

The ground rules are that one person will speak at a time. There will be no name calling or insults. Your attorneys can feel free to attend each session. But it is mandatory that both Mr. and Mrs. Jones attend each session unless you both decide to quit mediation after you have attended the minimum number of sessions set by the court.¹⁰¹ This is technically a voluntary process.¹⁰²

This mediation will be conducted as an open forum with Mr. and Mrs. Jones speaking in their own words rather than through their lawyers. I will not make any decisions for you but will try to help both of you reach an accord.¹⁰³ I urge you both to look at many factors including the law but we

98. "A Mediator shall conduct the mediation in an impartial manner." Standard Two from the Model Standards of Conduct for Mediators (Joint Committee of Delegates from American Arbitration Association, American Bar Association, and Society of Professionals in Dispute Resolution, 1994).

99. STONER, *supra* note 91, at 2/6. It is important that the mediator clearly explain fees. *Id.*

100. *Id.* at 5/7.

101. *Id.* at 10/9.

102. See generally ROGERS & SALEM, A STUDENT'S GUIDE TO MEDIATION AND THE LAW 7-10 (1987).

103. Susskind & Ozawa, *Mediated Negotiation in the Public Sector*, 27 AM. BEHAV. SCI. 267-77 (1983).

will not focus solely on the legal answers to problems.¹⁰⁴ Is it okay if we save any questions until the end? Your attorneys provided me with your vital statistics including the date of your marriage, date of your separation, full names and ages of your children, and your ages and occupation.¹⁰⁵ Now, you both identified in the survey that I mailed to you as the custody of the children being the number one problem in your case. We'll start there next time.

The mediator evokes a non-legalistic style and this is consistent with a mediator's not being forced to advise the parties of their legal rights under the Model Standards. The mediator is trying to make it clear to the parties that they can make decisions in this particular mediation without the full knowledge of the law.¹⁰⁶ If the mediator were to start giving legal advice to parties then it may lead to mediator bias.¹⁰⁷

C. *Mediation Session Two*

Stages Two, Three and Four: Information Gathering, Framing and Negotiating

MEDIATOR: Ms. Jones can you explain to me what your children's needs are and what your needs are regarding custody and visitation?

Here, the mediator is trying to help both parties to frame the issues and start to form the basis for the negotiation that will take place between them. This is consistent with the primary purpose of the mediator and that is to "facilitate the parties' voluntary agreement."¹⁰⁸

MS. JONES: I want the children to live with me and see their father every other weekend and I think that he should be entitled to supervised visits only. I mean he committed a crime for God's sake.

104. STONER, *supra* note 91, at 7/5. Some mediators will sternly measure a settlement against the current legal standards of that state, while, other mediators consider the law to be less important in that context.

105. This is a good place to start a mediation. *See generally* STEPHEN GOLDBERG, et. al., *DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, & OTHER PROCESSES* (1999).

106. *See* STONER, *supra* note 91, at 7/7.

107. *Id.* It is important to remember that the mediator that dispenses legal advice may comply with the ABA Model Standards for attorneys but may be in violation of the mediator neutrality standards of the official Model Standards for Mediators as they are different.

108. *See* ABA Model Standards, *supra* note 98, VI cmt.

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MEDIATOR: How do you feel about that Mr. Jones and what are your needs regarding the children?

MR. JONES: Look, those charges were dropped and I did not harm that girl. I want to see my kids every other week from Thursday to Tuesday. I need to see them for two weeks a year, one week at Christmas, and one week in the summer. Mary they need their father, too.

LAWYER FOR MS. JONES: Counselor, I need to see written proof that the charges were dropped.

MS. JONES: Yes, I demand to see proof that he's not a rapist, right now, or I'm leaving this room for good.

LAWYER FOR MR. JONES: Counselor, now look what you've done, that is just typical of you. Look, it's true, I called the Prosecutor's office, okay, Counselor.

MEDIATOR: Okay, fair enough, but for now, let's assume it's true and keep the discussion going. Will everyone please just calm down? (Silence fills the room).

The mediator is justified in getting involved in this balance of power issue. The attorneys are arguing and their behavior might jeopardize the negotiation between the two parties. The mediator should take action to ensure that both parties rather than their lawyers continue to participate in the negotiation.¹⁰⁹

MEDIATOR: Mr. Jones did indicate to me on his preliminary paperwork that the charges were dropped. So, Ms. Jones would you like to respond to Mr. Jones now or at a later time?

MS. JONES: Well, assuming the charges were dropped I still need to know how you intend to support Megan and Sam when they are in your care or do you expect me to support you for the rest of your life, you bum!

109. See ABA Model Standards, *supra* note 98.

LAWYER FOR MR. JONES: I will obtain the written proof by the next session.

MEDIATOR: Okay, slow down. Now, Ms. Jones we all agreed to refrain from any name calling.

The mediator is justified in chastising Ms. Jones and does not appear to be involved in conduct that gives the appearance of partiality to the other party. The mediator has the right to control the discussion and retain an air of civility in the negotiation.¹¹⁰

MS. JONES: Yes, I'm sorry that I lost my cool.

MEDIATOR: Okay. Mr. Jones would you like to make any comments at this time?

MR. JONES: Look, Mary, I want to apologize to you right now for everything. I'm truly sorry that I screwed up your life but I need your help to turn my life around. During the past six months, I went back to real estate school, and I plan to support myself and our children selling real estate. I would appreciate it if you could give out my business cards to your associates. I don't want our children to have a bum for a father.

MEDIATOR: Okay. Mary you look upset and I know this is difficult. Are you sure that you want to continue today? Your nodding, yes, but first, we are going to take a short break so that everyone can collect their thoughts including me.

MEDIATOR: Okay we're back now. Ms. Jones do you want to respond to Mr. Jones now?

MS. JONES: Tom, I appreciate what your trying to do and I am a reasonable person. I just need to see real proof of the things that your saying. . .that you have tried to turn your life around.

MEDIATOR: Mr. Jones would you care to respond?

110. See ABA Model Standards, *supra* note 98. It is interesting to note that the Model Standards do not exactly give the mediator a lot of guidance on how to handle certain problems that may arise. The Model Standards do tell you what not to do, in a sense.

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MR. JONES: Mary, let's say that I give you the proof then will you let me see Megan and Sam from Tuesday to Thursday and for those two weeks?

MEDIATOR: Ms. Jones would you like to comment?

MS. JONES: I am not sure if that will be logistically possible because I am moving out of state after the divorce is finalized.

MEDIATOR: Mr. Jones, please calm down, maybe you should step into the hallway for a minute.

MEDIATOR: Okay there is a problem. Mr. Jones is outside and he does not want to come back in and continue talking. Ms. Jones, this intention of yours is not indicated anywhere on the preliminary paperwork that you completed prior to this meeting. Are you certain about this?

LAWYER FORMS. JONES: My client has the right to leave the state if she wants to.

MS. JONES: I just realized now that this was what I wanted.

LAWYER FOR MR. JONES: Ms. Jones, but what about your children and what they need and want. I have a statement, written in crayon, from Sam (age 7) indicating that he and Megan both love their father and want him in their life. If you move away and cut off that communication you have to consider the effects on your children.

MS. JONES: Let me see that statement. Okay its genuine. Please call Tom back in.

MEDIATOR: Mr. Jones please come back in now as Mary has something very important to say to you.

MS. JONES: Tom, I will not move away but I want something in return from you.

MEDIATOR: I do allow tradeoffs but there is no blackmail allowed here.

MR. JONES: No, please let her continue.

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MS. JONES: I want to know that you will not come after me for everything that I own after all, your actions ended our marriage. What do you want from me in terms of money?

MEDIATOR: Generally, I try to take each issue separately but if you both prefer we can identify and handle them in a combined but orderly fashion. I'm going to get my chalkboard out now to chart your ideas.

MR. JONES: Mary, you give me the kids for the times that I want and I'll let you keep all of your stock/pension and everything to do with your corporation. I just want one of the houses to live in and \$2,000. a month in alimony and support for a few years until I get back on my feet. I want to keep my car. I don't need any insurance as the real estate office takes care of that for me. I'm prepared to have the mediator put that in writing.

MEDIATOR: Slow it down here, this is only the first day. Let's continue to brainstorm. Next time please be ready to add to this list of options for settlement. Our goal is to be as creative as possible.

MS. JONES: I need to think more about this but I am receptive to it. I would like to generate some ideas of my own.

MEDIATOR: Good. We'll meet in two days. Mary please be ready to discuss how this does or does not work for you. We need to know your specific reservations about what Tom has proposed. I would prefer that Mary and Tom create a list alone and then a separate list created with the help of their lawyers.

D. Mediation Session Three: An Extended Session

Stage Four: Negotiating Within A Mediated Setting

MEDIATOR: Welcome back everyone. Ms. Jones would you like to give us your ideas?

MS. JONES: Well, I would like to add another suggestion. Both of the homes are in the corporation's name and so they really do not have to be sold. Tom's credit will not suffer if he does not pay the mortgages. I always paid for them and I don't want to sell them. I would like to draw up an agreement whereby Tom could stay "rent free" for a period not to exceed two years in one of the corporation's various rental properties. Now, Tom

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you know that those rental properties are in prime locations and are luxurious. I don't want to give him the home outright; however, I do want my children to stay with him in a suitable environment. I mean that no girl can live there with him, or at least stay overnight when the kids are there, every other week. I don't want my kids exposed to that kind of element.

MEDIATOR: Okay, I shall now add that to my chart. What else would you like to add?

MS. JONES: I am willing to pay child support in the amount of \$1,000. per month since he will be living "rent free." I will pay the child support until such time as Tom starts earning more than 50 thousand dollars or for a period of five years whichever is sooner. I will pay \$2,000 for Tom to take the kids on vacation to Disneyland every summer. Tom, you may have the money in the joint checking account and you can have half of the joint savings account which totals one hundred thousand dollars.

You said that tradeoffs were allowed well, I want to retain my assets and my portfolio. I want to settle this matter and get back to running my corporation. I want Tom to keep quiet about this matter in the press because my stock is subject to fluctuations based on certain rumors. I have shareholders to answer to. They need to know that I am in charge and this company will not be divided up.

MEDIATOR: Great. I'm going to add these additional suggestions to the chart. Mr. Jones would you like to comment on what has been said and add to it?

LAWYER FOR MR. JONES: This is preposterous, why she is worth millions. Why should my client accept a mere rental for two years and no assets? Tom, let's go to court even if the Judge divides the property in half you'll make out better.

LAWYER FORMS. JONES: Do you want to litigate Counselor? Bring it on. Your client will never see his kids-do you want to take that chance, man? He has a record! The state will find him to be unfit. My client is being more than generous under the circumstances.

MEDIATOR:Gentleman, please this is not a courtroom. Your not being helpful to either one of your clients. We are trying to create resolutions to

conflict here and not open up new ones. Please sit down both of you. Mr. Jones, I'm going to ask you again, would you like to comment to what Ms. Jones had said and to add to it?

The Mediator is attempting to control the environment and is not displaying an inappropriate bias. The Mediator senses that the parties are working out their conflicts and reaching their own decisions on the issues and the mediator is trying to encourage this.¹¹¹

MR. JONES: My head is spinning. I know that I could get more money but I cannot afford to fight Mary in court over the custody issue. I don't want to lose my kids. I am more concerned with the kids than with getting my share of her money. I know that I don't deserve it. She built the company herself. I didn't do anything except make trouble for her. Mary, I don't want hard feelings between us because of the kids. I think that your proposal sounds fair. I want to add that my lawyer's fees are adding up. Will you help me pay the bill?

MS. JONES: I will pay your legal bill in full.

MEDIATOR: Okay, I'm going to add all of these suggestions to the chart. Is there anything else that anyone would like to add to the chart? Okay. Now its time to select the suggestions and ideas that you both want me to incorporate into the final settlement agreement. My memorandum will be translated into a formal settlement agreement based on your ideas that I placed on this chart. The memorandum will be itemized out as follows:

-Regarding the property: Mary Jones will retain the two homes and is responsible for all costs therein. Mary Jones will retain all assets and liabilities of her corporation named Jones Enterprises. Mary Jones will retain any and all other assets and liabilities not specifically listed. Tom Jones will retain any and all other assets and liabilities not specifically listed including the remainder of the joint checking account. Tom Jones will receive \$100,000 his share of the joint savings account and both joint accounts will be closed immediately.

-Regarding the insurance: Tom Jones will receive insurance from his job and can be removed from Mary Jones' insurance. Mary Jones will provide insurance for herself and the two children.

111. See ABA Model Standards, *supra* note 101.

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- Regarding the alimony/child support: Mary Jones will pay Tom Jones the sum of \$1,000 total per month in support payments for a period not to exceed five years or until such time as Tom Jones earns a salary of \$50,000 or more. Mary Jones will provide through her corporation “rent free” accommodations in a luxury rental property for Tom Jones and the two children. While he lives there, Tom Jones agrees to refrain from entertaining women, on an overnight basis, in the presence of his two children.
- Extras: Mary Jones will pay \$2,000. for Tom and the children to go to Disneyland on vacation every summer until the children grow older in age.
- Legal Fees: Mary Jones will pay a small portion 100% of Tom Jones legal bill.
- Regarding the cars: Mary Jones will retain her Corvette. Tom Jones will retain his Mercedes.
- Regarding Confidentiality
- Both parties and their attorneys agree not to talk to the press about the case and to keep the settlement details confidential.

D. Mediation Session Four

Stage Five: Concluding

MEDIATOR: Here are the typed up agreements that you were given copies of last week. Please read them and then sign them. I will need two signed copies for the court and these will be filed as part of the now uncontested divorce. You have both done a fine job.

LAWYER FOR MR. JONES: Thank you.

LAWYER FOR MS. JONES: Thank you.

MR. JONES: Thank you for your help.

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MS. JONES: Thanks again. We know that we did the right thing for our children.

Analysis

In conclusion, the mediation seemed to go very well. It was timed just right in their divorce because they were separated for six months and emotions were not running as high if it were sooner. They were both emotionally ready to deal with the tough issues. They both sincerely loved their children and that is what made everything come together. The parties both bended at just the right times and neither party allowed themselves to be controlled by their lawyers who wanted to litigate every issue. The outcome was satisfactory to each party for very different reasons.

PART IV: CONCLUSION

In sum, the tensions that stem from the conflicts in a negotiation can be effectively managed with the proper utilization of a particular negotiation strategy.¹¹² This implementation of this appropriate strategy is not something that can be done as a standard textbook application because every negotiation is different.¹¹³ The first hypothetical problem demonstrates that anything can happen and the attorney negotiator needs to be prepared to expect the unexpected for that reason.¹¹⁴ On the one hand, the first hypothetical indicates that the successful strategy can actually be a combination of more than one strategy that is implemented at different stages in the negotiation.¹¹⁵

On the other hand, the mediation hypothetical taught us that people need to take breaks during the mediation sessions so that they are given adequate time to process the proposals made within the mediation context.¹¹⁶ The breaks are required for this cognitive process to take hold in each party as

112. See generally LAX & SEBENIUS, *THE MANAGER AS NEGOTIATOR: BARGAINING FOR COOPERATION AND COMPETITIVE GAIN* (1986).

113. WILLIAMS, *LEGAL NEGOTIATION & SETTLEMENT* (1983). This work painstakingly sets forth the stages of legal negotiation and calls it a process. *Id.*

114. MNOOKIN, *supra* note 4, at 50.

115. *Id.* at 53-56.

116. See generally ROGERS & MCEWEN, *MEDIATION: LAW & POLICY PRACTICE SECTION* (2d ed. 1994).

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they carefully weigh each option.¹¹⁷ This cognitive learning process is an essential step for each party to undertake on the road to reaching a resolution to the conflict.¹¹⁸ The client's participation leads them to own the decision so that they can better cope with how the conflict was resolved.¹¹⁹ The client's ownership of the decision is the most important lesson to be learned, as it is our clients and not us, that have to ultimately live with the outcome.¹²⁰

The fundamental nature of mediation is that the client does the talking and the decision-making with the ethical attorney negotiator (being one who strives to follow the Model Standards) merely serving the client as a navigator of the law.¹²¹ Similarly, the ethical attorney mediator plays a complementing role in that she guides each party to help them form decisions to resolve their conflict.¹²² The ethical attorney mediator is one that remains completely neutral in the dispute because it will not work if one side senses any bias.¹²³ Therefore, within the mediation context, as opposed to the litigation context, an attorney's challenge, whether she is serving in the role, as a mediator or as a negotiator, is to achieve settlement while working in compliance with the ethical standards outlined by the ABA for lawyers.¹²⁴

117. Experts have suggested that there is a framework distinguishing between evaluative and facilitative approaches to mediation. See generally Leonard Riskin, *Mediator Orientations, Strategies & Techniques*, 12 *ALT. TO THE HIGH COST OF LIT.* 111 (1984).

118. See KOLB & KRESSEL, *WHEN TALK WORKS: PROFILES OF MEDIATORS* (1994) for the examination of another style.

119. *Id.* at 179, 229.

120. *Id.* at 201-03.

121. See, e.g., BUSH & FOLGER, *THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT & RECOGNITION* (1994).

122. Robert H. Mnookin, General Comments, "Save the Last Dance: Mediation through Understanding" Video: The Harvard Negotiation Project.

123. BUSH & FOLGER, *supra* note 121, at 100.

124. *Id.* at 277-81.

