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Negotiation From Strength: Advantage Derived From The Process and Strategy of Preparing For Competitive Negotiation

R. Hanson Lawton*

I. INTRODUCTION

In the literature of alternative dispute resolution, the phrase competitive negotiation normally refers to an adversarial style of negotiation whereby the negotiator makes high demands and few concessions, exaggerates, threatens, ridicules, and generally brings stress and pressure into the negotiating arena.¹ This approach is distinguished from a cooperative style of negotiation in which the parties strive for a mutually beneficial result through reciprocal concessions tendered in a manner intended to reduce tension and aggression in the negotiating room.² When I use the term competitive

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1. G. WILLIAMS, *LEGAL NEGOTIATION AND SETTLEMENT* 49 (1983). The effective use of a combative strategy of negotiation is designed to intimidate the opponent, cause the opponent to lose confidence in his position, diminish the opponent's expectation as to value, and occasion the acceptance of greater loss in the settlement amount than was initially anticipated. "Ineffective competitive negotiators are rated as unprepared on the facts and the law, which means they lack sufficient information with which to negotiate." *Id.*

2. R. FISHER & W. URY, *GETTING TO YES—NEGOTIATING AGREEMENT WITHOUT GIVING IN* 8 (1981). Cooperative negotiation style should not be translated into being nice or engaging in soft negotiations because "pursuing a soft and friendly form of positional bargaining makes you vulnerable to someone who plays a hard game of positional bargaining." *Id.* at 8-9. Gerald R. Williams observes that the cooperative negotiators induce trust, cooperate with, and make concessions to achieve a fair negotiated settlement. G. WILLIAMS, *supra* note 1, at 53. The cooperative strategy is more

negotiation, I am referring to a process promulgated by the American Bar Association Law Student Division establishing a formal competition for law students.³ The competition provides a forum for the demonstration of skills in both the technical strategy of negotiation and the intuitive characteristics of negotiation denominated by salesmanship,⁴ as well as the ability to convince others that their position is correct. In the competition, each team of two law students receives a fact pattern⁵ and is given four weeks to prepare for their meeting with another team of two law students, in which they will formally compete in negotiation. It is competitive in the sense that a panel of judges, generally composed of experienced trial lawyers, will observe the two teams throughout the entire negotiation process.

The two-hour simulation commences with a twenty minute negotiation session which is followed by a ten minute break. Following the break is a fifty-minute negotiation session, after which there is a fifteen-minute break in which the teams privately critique their performance. The sequence ends with a five-minute period in which each team explains to the judges how they advanced the negotiation⁶

effective by producing more favorable outcomes and resulting in fewer ultimate breakdowns in bargaining. *Id.*

3. Letter from Sherry L. Van Donk to Law School Deans (September, 1985) (transmitting 1985-1986 Negotiation Competition Rules and Standards for Judging) (transcript on file at South Texas College of Law Library). The American Bar Association Law Student Division sponsors regional and national negotiation competitions and provides an intra-school competition simulation prior to the annual regional competition. A host law school is designated for each region with the regional competition occurring in November and the National Competition occurring in February in conjunction with the mid-year meeting of the ABA.

4. P. HERMANN, BETTER SETTLEMENTS? THROUGH LEVERAGE 148 (1965). Philip Hermann expounds that few people realize the value of salesmanship in reaching advantageous settlements. *Id.* Instead, negotiation is perceived as an exchange of information and evaluation thereof, or, a bargaining process followed by settlement. See C. KARRASS, GIVE AND TAKE: THE COMPLETE GUIDE TO NEGOTIATING STRATEGIES AND TACTICS 188-89 (1974) which indicates that the salesman is a negotiator who must remember eight points to convince a buyer:

- (1) Talk less and listen more . . .
- (2) Don't interrupt . . .
- (3) Don't be belligerent . . .
- (4) Don't be in a hurry to bring up your points . . .
- (5) Restate the other person's position and objectives as soon as you understand them . . .
- (6) Identify the key point and stick to it . . .
- (7) Don't digress from the key point, and keep the other person from digressing . . .
- (8) Be "for" and not "against" a point.

Id.

5. A "simulation" by definition is "the imitative representation of the functioning of one system or process . . ." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 1099 (1983). For example, the morning round simulation for the 1985 regional negotiation competition was captioned, "*Herman Staub v. Ashlawn Mortuary and Memorial Park Inc.*," and included: (1) general background information for both parties; (2) citations to cases as research leads; and (3) deposition's of defendant's employees. In addition, there was confidential information given to plaintiff's attorneys different from the confidential information given to defendant's attorneys.

6. See AMERICAN BAR ASSOCIATION: LAW STUDENT DIVISION, 1985-1986, NEGOTI-

and what they learned from the negotiating experience.⁷ The teams present these five-minute self-critiques to the judges outside the presence of their opponents.

Throughout the entire process the judges are mute. They sit as silent observers while the two teams of roleplaying lawyers try to resolve a legal problem in the best interests of their fictional clients, reaching either a settled agreement or a non-agreement postured for trial.⁸ Following each team's self-critique, the judges will privately deliberate to determine which team was more effective in the negotiation process.⁹ Once the judges conclude their deliberations, both teams are called into the negotiating arena to receive an oral critique of their competency in the art of negotiation. The teams are not advised of numerical results. Only the judges know how many points each team received or who won the simulation. Ordinarily, there are four judges, three of whom must be lawyers. Their individual scoring sheets are averaged¹⁰ to obtain the team score for that simulation.

ATION COMPETITION RULES AND STANDARDS FOR JUDGING (1985) [hereinafter 1985-86 RULES & STANDARDS].

This self-critique, while within the discretion of the team members, should address the strengths and weaknesses of the team in the negotiation. The team should also be prepared to respond to questions from the judges concerning the team's performance. The team might also take this as an opportunity to explain why it chose a particular approach or even a specific tactic. The judges may take into consideration for grading purposes anything said during this session.

Id. at 2.

7. THE AMERICAN BAR ASSOCIATION: LAW STUDENT DIVISION, 1986-1987 NEGOTIATION COMPETITION RULES AND STANDARDS FOR JUDGING (1986) [hereinafter 1986-87 RULES & STANDARDS] included the following standard for self-critique:

Students will begin this five (5) minute period [of self-critique] before the judges, by answering the following question: "In reflecting on the entire negotiation what would you do differently if you faced a similar situation tomorrow?" The team should also be prepared to respond to questions from the judges concerning the team's performance. The team might also take this as an opportunity to explain why it chose a particular approach or even a specific tactic. The judges may take into consideration for grading purposes anything said during this session.

Id. at 2.

8. The non-agreement category for judging the negotiator's performance contemplates that the simulated legal dispute may not be resolved or settled after the expiration of the fixed time for negotiation. Even without agreeing, the simulated client's best interest—both short and long range—may have been served. *See* 1986-87 RULES & STANDARDS, *supra* note 7.

9. Cooperative style reflects more effectively in a limited time frame negotiation of a simulation. *See* R. FISHER & W. URY, *supra* note 2, at 8; G. WILLIAMS, *supra* note 1, at 53. Effective negotiation as observed may require a combination of strategy and tactics, and creative alternatives to meet the needs of the simulated parties. G. NIERENBERG, *FUNDAMENTALS OF NEGOTIATING* 147, 178 (1973).

10. The scoring procedure for 1985-86 was as follows:

Prior to the competition, each judge receives copies of the simulation, standards for judging, and scoring sheets. Normally, two simulations are scheduled for each day, one in the morning and one in the afternoon. Judges do not view the same team twice nor do they know which school a team represents.

II. CRITERIA FOR JUDGING COMPETITIVE NEGOTIATION

The standards for judging¹¹ emphasize that the style of negotiation may not be determinative of effectiveness and that judges should be attentive to the long-term effect of a settlement, the credibility of the negotiators, and the likelihood of any settlement's workability. The judges are counseled that a dynamic process like negotiation is difficult to evaluate. Consequently, they are cautioned not to be overly influenced by first or last impressions, but are instead advised to reflect on the process as a whole.

The scores of all four judges for each given team shall be averaged. That judge which deviates the most shall be dropped. The remaining three (3) scores will then be averaged and shall comprise that team's score for the round being judged. . . . Should the scoring procedure . . . result in a tie, the winner shall be determined from among those tied by choosing the team achieving the highest average score in the *Tentative Agreement and Break-Down* category. . . . Should a tie remain, the winner shall be determined by the team achieving the highest score in the overall category

1985-86 RULES & STANDARDS, *supra* note 6, at 5. The scoring procedure for 1986-87 also used a process of averaging which discounted the most deviant score and moderated high and low deviant scores from judges. Tie breaking continued to be based on the *Tentative Agreement and Non-Agreement Category and Overall Evaluation*. 1986-87 RULES & STANDARDS, *supra* note 7, at 5.

11. 1986-87 RULES & STANDARDS, *supra* note 7, at 2a sets forth judging standards as follows:

[A]ny attempt to categorize a dynamic process, such as negotiation, has certain inherent difficulties. Each of the items in the following criteria are not going to be found in every negotiation. A team should not be penalized simply because it did not, for example, under the Middle Phase, "creatively formulate options for unilateral gain." The team should be penalized or rewarded according to the need for such action in the particular negotiation. Likewise, you should not expect the negotiation to proceed in a strict chronological order as described in these criteria. For example, in the Beginning Phase the first criterion is to set the stage for an effective working relationship. This relationship may in fact not be developed until well into the negotiation round. You should judge this criterion on the effectiveness in this particular round, whenever it occurred, and not penalize or reward the team simply because it was, or was not, done in the "beginning portions." In other words, you should not score any of the categories until the round is complete.

The standards for the second year of competition include the basic terminology of 1985-86 and add that it is:

important to take more than short range monetary outcomes into account, regardless of the style of negotiation selected. For example, has the negotiation threatened a continuing relationship of the parties; would the lawyers have lost credibility in future negotiation with the opposing attorneys; is the settlement likely to be overturned in court; is it likely to prove unworkable in the long run . . . ?

Id. at 1a.

Each judge uses a judging and scoring sheet¹² to evaluate the competitors. Each team receives a numerical grade based on the following categories: (1) Preparation for Negotiation; (2) Beginning Phase of Negotiation; (3) Middle Phase of Negotiation; (4) Agreement or Non-Agreement; (5) Teamwork Between Negotiators; (6) Relationship Between the Negotiation Teams; (7) Observance of Legal Ethics; (8) Self-Critique; and (9) Overall Effectiveness. The judging sheets for the 1985-86 competition had key phrases for each area of evalua-

12. The rules for scoring in 1985-86 included a range of five possible scores, one through five, with qualitative designations for each of the scoring categories. For 1986-87 there was a range of seven possible scores with the standard for scoring tailored to the category for which it was applicable. The following chart sets forth the scoring ranges for the two ABA competitions to date.

1985-86

Unacceptable	/ Below / Average	/ Average	/ Above / Average	/ Excellent
1	2	3	4	5

1986-87: For Category I

1	2	3	4	5	6	7
Very Unprepared	Unprepared	Somewhat Unprepared	Neutral	Somewhat Prepared	Prepared	Highly Prepared

For Categories II, III, V & IX

1	2	3	4	5	6	7
Very Ineffective	Ineffective	Somewhat Ineffective	Neutral	Somewhat Effective	Effective	Highly Effective

For Category IV

1	2	3	4	5	6	7
Very Poorly Served	Poorly Served	Somewhat Poorly	Neutral	Somewhat Served	Served	Fully Served

For Category VI

1	2	3	4	5	6	7
Strongly Detracted	Detracted	Detracted Somewhat	Neutral	Contributed Somewhat	Contributed	Strongly Contributed

For Category VII

1	2	3	4	5	6	7
Strongly Violated	Violated	Violated Somewhat	Neutral	Observed Somewhat	Observed	Strongly Observed

For Category VIII

1	2	3	4	5	6	7
Very Inadequately	Inadequately	Somewhat Inadequately	Neutral	Somewhat Adequately	Adequately	Very Adequately

1985-86 RULES & STANDARDS, *supra* note 6, at 7; 1986-87 RULES & STANDARDS, *supra* note 7, at 4a-6a.

tion, while the judging sheets for 1986-87 asked a question for each category.

A. Scoring Form 1985-1986

Outline of Judging Sheets 1985-86¹³

- I. Preparation and Planning
 - A. Recognized the factual and legal weakness of the case.
 - B. Recognized the factual and legal strengths of the case.
 - C. Recognized what they needed to learn from the other side.
 - D. Anticipated their strategy and tactics.
 - E. Anticipated the underlying goals and interest of the parties.
 - F. Anticipated or formulated options or solutions that could work for the benefit of both parties.
 - G. Anticipated or formulated options or solutions that were acceptable to both parties.
 - H. Showed flexibility in their planning.
- II. Beginning Phase of Negotiation
 - A. Set the stage for an effective working relationship considering negotiating style adopted.
 - B. Probed for the other party's initial position, goals, interests, facts, etc.
 - C. Responded to the other party's initial position or offer.
 - D. Clarified own party's position in an advantageous way.
 - E. Defined the problem in a way that was mutually or unilaterally advantageous.
 - F. Exhibited ability to instill doubt or uncertainty in opposing party.
- III. Middle Phase
 - A. Advanced own position.
 - B. Dealt with the other party's probes, offers and counter offers.
 - C. Probed the weaknesses of the other party's position.
 - D. Dealt with the weaknesses of the other party's positions.
 - E. Creatively formulated options for enlarging the pie for mutual gain.
 - F. Creatively formulated options for unilateral gain.
 - G. Dealt with other party's probes of their position.
 - H. Modified initial tactics when appropriate.
 - I. Organization and presentation of position.
 - J. Influenced other party's willingness to settle.
 - K. Presented arguments in persuasive manner.
 - L. Instilled doubt in other side concerning likely success in this and other forums.
 - M. Accurately assessed probability of own and other side's success in this and other forums.
 - N. Appreciated and undertook or avoided appropriate risks to own position.
 - O. Appreciated underlying economic consequences of own and other side's actions.
 - P. Use of mandatory break to increase effectiveness of negotiation tactics, strategy, organization or materials.
 - Q. Learned from results of first session.
 - R. Dealt with crises and/or deadlines.
- IV. Agreement or Non-Agreement
 - A. Tentative Agreement.
 - 1. Achieved settlement likely to last.
 - 2. Achieved settlement largely benefiting own party.
 - 3. Achieved settlement within party's authority.
 - 4. Achieved settlement benefiting both parties.
 - 5. Achieved settlement while minimizing the creation of new problems.

13. 1985-86 RULES & STANDARDS, *supra* note 6.

- 6. Achieved settlement of benefit to the larger community or other constituencies.
- 7. Reached efficient settlement.
- 8. Reached achievable settlement.
- 9. Reached enforceable settlement.
- 10. Reached fair settlement.*

*Pending approval of client or working out of fine details.

- B. Non-Agreement.
 - 1. Avoided disadvantageous settlement.
 - 2. Made every reasonable effort to reach agreement.
 - 3. Avoided locking self into unacceptable position.
 - 4. Allocated time appropriately.
 - 5. Imaginative and creative.
 - 6. Realistic.
 - 7. Flexible.
 - 8. Avoided strategic or tactical errors.
 - 9. Receptive to reasonable offers.

V. Relationships Among and Between Negotiators

- A. Kept "personality issues" from getting in the way of the negotiation.
- B. Neutralized potentially disruptive characteristics or behaviors of the other attorney.
- C. Contributed to an effective working atmosphere.
- D. Showed appropriate courtesy and sensitivity in working with the other attorneys.
- E. Showed an appropriate awareness of the other party's needs.
- F. Displayed professional poise and demeanor.
- G. Shared time and participation with attorney colleague.
- H. Avoided unnecessary provocation.

VI. Ethical Constraints

- A. Anticipated ethical issues inherent in the problem.
- B. Recognized and dealt appropriately with ethical issues which arose during the course of the negotiation simulation.
- C. Appropriately balanced competing demands involving ethical overtones (e.g., truthfulness vs. client confidentiality).
- D. Substantive and procedural legal constraints:
 - a. Provisions governing negotiations in general;
 - b. Provisions governing the specific topics at issue.
- E. Conformity to the Code of Professional Responsibility or the ABA Model Rules as a minimum standard of conduct.

VII. Self-Critique

- A. Recognized their strengths and limitations.
- B. Recognized their subjective responses and their probable effect on the other negotiators.
- C. Recognized what they did to advance the negotiation.
- D. Recognized what they did that got in the way of their goals.
- E. Recognized their limitations in handling factual and legal aspects of the problem.
- F. Recognized degree of observance of Code of Professional Responsibility or the ABA Model Rules.

VIII. Overall Evaluation

Circle one ranking:

Unacceptable	Below Average	Average	Above Average	Excellent
1	2	3	4	5

(For additional comment(s) use back of page.)

B. Scoring Form 1986-1987

Outline of Judging Sheets 1986-87¹⁴

- I. Preparation, Planning and Reflection
Judging from its performance, how well prepared did this team appear to be?
- II. Beginning Phase of the Negotiation
How effectively did these negotiators set the stage for the best use of their style: competitive, cooperative or mixed?
- III. Middle Phase
How effective were the negotiators in using their preferred style during this phase; if competitive, to advance and defend their position or attack the other party's; if cooperative, to explore mutual interests and develop alternatives; if combined, to make effective use of both approaches?
- IV. Agreement or Non-Agreement
(Rate only A or B).
 - A. Tentative Agreement
To what extent did the negotiating team reach an agreement that served its client's best interests, both short and long range?
 - B. Non-Agreement
Under the circumstances, to what extent did not reaching an agreement serve their client's best interests, both short and long range?
- V. Teamwork
How effective were the negotiators in working together as a team, in sharing responsibility and providing mutual backup?
- VI. Relationship Between the Negotiating Teams
Did the way they managed their relationship with the other team contribute or detract from achieving their client's best interest?
- VII. Negotiating Ethics
To what extent did the negotiating team observe or violate the ethical requirements of the legal profession?
- VIII. Learning From Experience
Based on the team's self-critique during the review session, how adequately have they learned from today's negotiation, so that they would be more effective if they faced a similar situation tomorrow?
- IX. Overall Evaluation
Overall, how effective was this negotiating team in today's session?

In both the 1985-86 and 1986-87 competitions, judges were encouraged to add comments on the face or back of the judging sheets. They were asked to rate the teams independently and not to discuss their scoring of teams with each other until the scoring sheets have been collected for tabulation.

C. Judges' Orientation

In addition to complete simulation information and judging sheets, each judge is provided with orientation prior to the competition. Ideally, the orientation takes one hour and consists of two parts: first, all of the judges meet together and discuss the rules, schedule, judging criteria, and administrative matters affiliated with formal competition. Second, each four-judge panel meets together to share its philosophies of judging and scoring.¹⁵ Once the round begins, the

14. 1986-87 RULES & STANDARDS, *supra* note 7.

15. One of the questions within the instructions for briefing the judges was specifi-

panel may not discuss the scoring procedure and each independently arrives at the teams' numerical score and compiles his own comments.

When moving from law school simulations to the practice of law, the "judge" is replaced by the client. The lawyer preparing to negotiate must know the client's expectations about the process and result. If there are "multiple" clients involved in a matter to be negotiated, each one stands to gain if he is oriented toward a reasonable expectation. The summary jury trial is another proving ground. Although it is a world apart from competitive negotiation, it is nevertheless similar because the lawyers must perform in a fixed period of time in the fish bowl of a judge's observation. The clients, who have the vested interest in the legal dispute, are placed in the unenviable position of nervously having to observe their lawyer's forays while in full view of jurors who are also judging the informal dispute.

By experiencing the role of the negotiator before judges, and being critiqued at the end of a fixed period of time, law students learn one of the premises of alternative dispute resolution: to quickly and efficiently seek to resolve a legal dispute without using the "[c]ourt as a pawn in . . . a waste of judicial resources."¹⁶

III. PREPARATION

Once the teams have received their simulations, the preparation format is very similar to the preparation of any legal case for trial.¹⁷ There must be an investigation and determination of the facts, as well as issue identification, issue evaluation, and an exploration of the needs and interests of the parties. The teams must analyze their ability to make concessions against the parameters of their fictional client's expectations, assigning values to such parameters. The students must design alternative settlement packages and develop a

cally, what is "average?" The briefing of the judges contemplates that students are presumed to be average when they walk into the room. There should be neither a positive nor a negative presumption about their performance and to get a below average score, a team must do something that registers in a negative; and to get a positive score, the team must do something that generates a sense of effectiveness. 1985-86 RULES & STANDARDS, *supra* note 6, at 21.

16. *Endless Trial: Dioxin Damage Suit Ties Up Courthouse and Angers Judiciary*, Wall Street J., Jan. 13, 1987, at 24, col. 2. Illinois Supreme Court Justice William G. Clark is credited with this statement when expressing his opinion about the waste of judicial resources when there is a lengthy trial of this nature. *Id.*

17. I. GOLDSTEIN, TRIAL TECHNIQUE (1935). This historic treatise on preparing for trial is held out by some trial lawyers as the premier background for preparing for trial.

practice format for actual negotiation sessions. The development of a practice format requires the negotiation team to anticipate the confidential facts of the opposing negotiators, to prepare to neutralize any competitive advantage that might arise in its opponents, and structure a negotiation plan that is shockproof—impervious to unexpected occurrences or tactics.

IV. DOCUMENTS OF PREPARATION

The documents of negotiation preparation are: (1) a negotiation file or notebook; (2) a one-page outline of the negotiation; (3) a legal pad for decision making; (4) visual aids; (5) settlement structures; and (6) settlement agreement.

The negotiation file or notebook has subtabs captioned: "Statement of the Facts, Issues, Statutes, Precedents, and Secondary Authority." The negotiation notebook is the repository of all relevant research for the resolution of the dispute, all background information, and all notations of counsel.¹⁸

The one-page outline of the negotiation is a key word reference that will be in front of the student negotiator during the negotiation. One-half of this outline focuses on the key words found on the judging sheets or on the key words of the client's expectations. The other half is a chronological outline of the particular negotiation being conducted. An example of a typical outline is as follows:¹⁹

18. *Id.* at 49. In preparing the trial file, "the final step should be the arranging and tabulating of all documentary evidence in the order in which you expect to introduce them in evidence. . . . This is also true in the preparation of arguments on the law." *Id.*

19. This outline was used for the 1985-86 regional competition by the team from South Texas College of Law. The negotiation's simulated case was "*Staub v. Ashlawn Mortuary and Memorial Park, Inc.*," wherein the plaintiff widower had been given the wrong urn, an urn not containing the ashes of Mrs. Staub. Before the error could be rectified, he became distraught and suffered a stroke.

<i>Key Words From the Judging Sheets:</i>	<i>Outline of the Negotiation:</i>
I. Preparation, Planning, Reflection facts, mutual benefit, law, analogy, meet needs, creative options	1. Demand
II. Beginning Phase demand offer clarify raise doubt	2. Denial
III. Middle Phase use technical language authority develop strengths probe weaknesses	3. Reasons We're Here -benefit P -meet P's needs -make no precedent -D not bad, just made a mistake -mistake for legal liability
IV. Tentative Agreement settlement will last efficient enforceable fair mutual benefit made every reasonable effort dealt with ethical problem	4. Argue Liability -assume risk -contributory -informed consent -insurance
<i>Outline for Self-Critique Session:</i> strengths and limitations How did you advance negotiation? How did opponents hurt themselves? limitations of fact and law observing code and model rules	5. Equities of Situation -blind, old -bereavement -rude
	6. Offer
	7. Scope of Agreement
	8. Work to Agreement

Visual aids are another helpful element in the negotiation process: the selection and development of visual aids clarifies the negotiator's preparation and presentation. Examples of visual aids include anatomical models,²⁰ settlement brochures,²¹ and short videotape pro-

20. For example, the afternoon round simulation for the 1985 Regional Negotiation Competition was "*Peter Pruitt v. Donald Darnsted, M.D. and Physicians' Insurance Co.*" In this simulated case, plaintiff became legally blind following a radial keratotomy performed by Dr. Darnsted for treatment of myopia. Consideration was given to using the anatomical model of an eyeball during the negotiation session as background for the injury.

21. W. FISHER, EFFECTIVE NEGOTIATION AND SETTLEMENT TECHNIQUES (Aug. 1986) (paper presented at the Texas College of Trial Advocacy, Houston, Texas). Fisher cautioned that while preparation of settlement brochures are expensive and time consuming, "If the case will bear the expense of a settlement brochure, such as a day-in-the-life documentary, it can be very cost-effective, because the value of the case is increased far past the point of offsetting the expenses for producing the brochure." *Id.* at 15.

ductions.²² Underlying the use of any visual aid is the risk that your opponent will steal your thunder by using the visual aid to demonstrate his side of the case better than you used it to demonstrate yours. This risk of visual aid usage is more likely to occur when the aid is a type that lends itself to reconfiguration. Chalk boards, easel pads, or paste-ups on poster board are all fodder for abuse by adverse negotiators who can easily erase, mark-over, or explain the chart from a different perspective. It is essential to anticipate and prepare for the opponent's use of a visual aid.

There are many advantages to be gained from visual aids, however. They provide a heightened quality of presentation which frequently will far outweigh any added expense of its employment, because the observer of the negotiation process will often equate visual aid quality with preparation quality. The quality visual aid also has intimidation weight for the adverse negotiator because it suggests a preparedness for trial at the time of negotiation. There is some authority for the proposition that the magnitude and likelihood of settlement correlates directly to the fear of trial on the part of the opposing negotiator.²³

The examination of settlement structure is critical in negotiation preparation. The settlement brochure often contains a formal explanation of the optimum settlement agreement that embodies the high end of what is reasonable from the viewpoint of plaintiff's counsel, or the low end of what is reasonable from the viewpoint of defendant's counsel.²⁴ While the brochure has been previously characterized as a visual aid, the settlement structures it contains need to be examined separately and fit into a value ladder within the outer limits of the legal dispute's value. For example, if counsel has concluded from his research that the low end of reasonable settlement is \$600,000 for a particular legal dispute and that the high end of reasonable settlement is \$2,400,000, he may want to formulate alternative settlement structures at increments of approximately \$300,000 within the outer limits of negotiation. This process will further delineate the roster of concessions at the negotiation table and the value for each. The client's authorization to accept any amount above a floor amount or to

22. *Id.* "A video-tape . . . can be a very persuasive tool designed to convince the opponent that a jury will react favorably and strongly to your client's case." *Id.* at 14. It was also stated that "in most instances, the video-tape should be only 15-20 minutes in length." *Id.* at 13. The objective of the video presentation is to "show in advance, with absolute precision, what the jury will see . . ." *Id.* at 15.

23. G. BELLOW & B. MOULTON, *THE LAWYERING PROCESS: NEGOTIATION* 34 (1981). "If trial is seen to involve a greater risk than was anticipated, an opponent will pay more to avoid it." *Id.*

24. See G. WILLIAMS, *supra* note 1, at 7. Empirical research has suggested that a higher plaintiff's opening demand will result in a higher settlement for plaintiff and a lower defendant's opening offer will mitigate in favor of a lower settlement. *Id.*

pay any amount up to the ceiling of settlement can be arrived at only after the client's expectations have been measured against the lawyer's expectations of trial, with both of these being weighed against the cost of trial and the range of possible results from trial.

In the two-hour simulation setting, the fully prepared settlement agreement is a structure that the negotiator is prepared to conclude and settle when he enters the room. As a teaching tool, attention to the formal settlement agreement sets the foundation on which to premise practice, tactics, and strategy.

V. PRINCIPLES OF COMPETITIVE NEGOTIATION

President Eisenhower and General DeGaulle, while touring Gettysburg, reflected that most military victories were occasioned by a mistake on the part of the loser rather than by brilliant strategy or planning on the part of the winner.²⁵ Peter Drucker has discussed the difference between efficient and effective negotiation from a business management perspective.²⁶ The objective of negotiating from strength is to be effective; that is, to get the best result the legal problem will allow within the parameters of client satisfaction. The efficient use of tactics and strategy may lead to an effective result if the negotiator does not make a mistake. A mistake may stem the tide of victory in the eyes of the observer of the negotiation. As in many competitive endeavors, the fewest mistakes of the least magnitude of damage will lead to victory.

Use of certain principles of competitive negotiation will mitigate in favor of an effective negotiated result. Students may observe the effectiveness of the principles by viewing videotapes of negotiation simulations that exhibit these principles. The following is a discussion of those principles of particular significance to law students preparing to negotiate a legal dispute.

A negotiating team initially must establish the *authority to settle*.²⁷

25. Schoenbrun, *The Battle of Gettysburg*, PARADE MAGAZINE, Feb. 2, 1986, at 9.

26. P. DRUCKER, MANAGEMENT: TASK, RESPONSIBILITIES, PRACTICES 45 (1973). "Efficiency is concerned with doing things right. Effectiveness is doing the right things." *Id.*

27. The authority to settle has both ethical and business implications with regard to negotiating a legal dispute. Under the Model Code of Professional Responsibility it is provided that "[a] lawyer shall not intentionally: (1) Fail to seek the lawful objectives of his client through reasonably available means . . . (2) Fail to carry out a contract of employment entered into with a client for professional services . . . (3) Prejudice or damage a client during the course of the professional relationship." *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-101 (1980). The comment to

They must have the authority to settle and they may want to challenge their opponent's authority to settle. In an effort to convincingly resolve the dispute, it must be apparent that a decision maker is present. It is possible for a team of two negotiators to talk for two hours and still make no headway toward reaching a resolution of the dispute. This is the principle of conversation as opposed to negotiation, and much negotiation is preceded by a great deal of conversation. The challenge of preparing for competitive negotiation is to bring the individual into a mode of advancing the negotiation as opposed to just conversing with the other side. A party who has been placed into a defensive posture as a result of being given the weaker set of facts may, however, employ conversation as a means of mitigating away from a settlement that is not in his client's best interest.

A second principle of negotiation that must be dealt with early in the preparation is *valuation*²⁸ of the dispute. It must be established that there is a *range of reasonableness*²⁹ for this dispute. Counsel should additionally determine, in light of the client's expectations, the extent of the client's downside risk. To do this, the lawyer can bring to the client's attention the elements of a worst case scenario. In a simulated situation, the client is fictional. Therefore, the student does not need to deal with the risk of losing the client as a result of the negative inferences generated in establishing the *downside risk*³⁰ of the legal dispute.

A third principle of competitive negotiation is the need for a *single*

Model Rules of Professional Conduct Rule 1.2 states: "The client has ultimate authority to determine the purposes to be served by legal representation . . ." MODEL RULES OF PROFESSIONAL CONDUCT Rule 12 comment (1984). On the business side, it is recommended that the lawyer have a Fee and Representation Letter signed by the client setting forth, among other things, authority regarding the legal dispute. See J. FOONBERG, HOW TO START AND BUILD A LAW PRACTICE 57 (1976); M. ALTMAN & WEIL, INTRODUCTION TO LAW PRACTICE MANAGEMENT 4-29 (1981). One of the postulates of management is authority and its corollary responsibility. K. STRONG & A. CLARK, LAW OFFICE MANAGEMENT 4 (1974).

28. The items of objective case evaluation include: "(1) actual costs or losses to the plaintiff; (2) future losses to the plaintiff that are certain; (3) future losses to the plaintiff that are contingent or variable; (4) relevant costs or losses to the defendant; (5) economic effects of time/money relationships; and (6) tax effects." G. WILLIAMS, *supra* note 1, at 120. Subjective factors such as pain and suffering or mental anguish can be added after objective evaluation. *Id.* at 119.

29. G. WILLIAMS, *supra* note 1, at 76. "Until both sides come forward with reasonable opening positions, Bartos considers the case unready for serious negotiation. It is not ripe." *Id.* See H. EDWARDS & J. WHITE, THE LAWYER AS A NEGOTIATOR 186 (1977) (referring to the range of reasonableness in terms of expectations and resistance points).

30. In establishing the value of the case for the client, you must explain the downside risk, the worst case scenario and the results of losing on all aspects. In as much as clients have unrealistic expectations regarding *their* lawsuit, this may result in a downside risk for lawyers—losing the opportunity to represent the client. The downside risk of the simulation should be formulated and shown to the judges if it is in the simulated client's interest.

*decision maker*³¹ for each side of the negotiating table. In the simulation situation a coach can simply decide who will be the decision maker for the multiple negotiators. Real-life negotiation situations are often more complex, in that the decision maker may be the senior partner who is responsible for retaining the client, while another member of the firm might bear the prime burden of negotiation. To handle this in an actual negotiation, a note pad may be placed between the two negotiators, by which they can communicate in writing. This arrangement will not cloud the clear understanding that one of the negotiators speaks with absolute authority and with the ability to be the decision maker for the side.

A fourth principle of competitive negotiation is the assumption that all participants *desire to resolve the dispute*.³² Obfuscation, muddling, and slow deliberate talking all cause delay. In the real world of legal negotiation, delay normally favors someone. Repetition, fishing expeditions, and other types of tactics that occasion delay, however, constitute unacceptable conduct in the simulated negotiation arena.

The fifth principle of negotiating strategy that denominates a principle of competitive negotiation is the concept of *probing*.³³ Each negotiating side must be prepared to probe the other's unique facts, confidential facts, and those matters that are not within the purview of the statement of facts.

Probing, to be effective, should not be repetitious. When a negotia-

31. In the literature of sales, the salesman is always seeking the "decision maker" for the buyer. When there has been no resolution of who will be the decision maker for a side of the table, there is the risk that the two negotiators will deadlock on a difference during the process of negotiation and give the appearance of unpreparedness. While the ABA rules for negotiation allow the participants to caucus outside the hearing of opponents at any time, the appearance of disorganization, disruption, and unpreparedness occasioned by leaving the negotiation table should moderate against doing so unless it will result in a positive change in the dynamics of the negotiation.

32. "Efforts to settle disputes may not be productive if the parties have not . . . concluded that compromise is in their best interests. Disputes must be ripe for resolution before they can be settled satisfactorily." L. KANOWITZ, *ALTERNATIVE DISPUTE RESOLUTION CASES AND MATERIALS* 13 (1986). The judiciary may lead the parties toward the path of settlement to avoid litigation after the lawsuit is filed. *Id.* at 157. The heat of judicial scrutiny may ripen the suit for settlement at an earlier time than otherwise possible.

33. The objective of probing is to obtain maximum information about the other side's interests or facts. Knowledge of otherwise confidential information, effectively used, increases the negotiator's bargaining power. See D. LEWIS, *POWER NEGOTIATING TACTICS AND TECHNIQUES* 27 (1981); H. COHEN, *YOU CAN NEGOTIATE ANYTHING* 67, 102 (1986); R. WENKE, *THE ART OF NEGOTIATION FOR LAWYERS* 12 (1985). "The use of questions is a powerful negotiating tool." G. NIERENBERG, *supra* note 9, at 119.

tor simply reiterates what he has thought to be the crux of the case, a judge looking upon the negotiation process will likely find him annoying, nonproductive and noncontributing to the resolution of the dispute. Thus, the fourth principle, assuming a desire to resolve the dispute, and the fifth principle, probing, must be considered together. Probing should not be adversarial in style, but should be competitive in terms of rewording and restating things in a different framework in which to further the negotiation process.

The sixth negotiating principle involves preparing the *exhibit*³⁴ for the negotiation room. The process of preparing visual aids and the use of videotape and structured settlement brochures are kinds of activities that help the parties prepare to negotiate, and add a unique additional component to the negotiating arena that can impress an observing judge or client. Any negotiation format and process should take into account beginning, conducting, and concluding phases. The settlement brochure, with a fully developed settlement agreement that meets the requirements of the client, need be the only visual aid brought to the negotiation table. The opposing negotiators do not need to know in the beginning, or even in the middle phase, that it exists. However, by having the fully developed settlement agreement, counsel is more apt to follow a course of negotiation that leads to the desired result without deviating from chartered waters.

The seventh principle of competitive negotiation is the notion of *historic perspective*.³⁵ Every legal dispute in the common law tradition has a historic perspective based on precedent. Throughout preparation, counsel must fit the dispute being negotiated into a historic context. Some law professors and students would say that this is simply reviewing the precedent and trying to place the instant case within the scheme of precedents. Rather, it is a process of fitting the case into a continuum of that area of the law's development, so that it is properly valued while operating within the constraints of the client's desires and needs.

The eighth principle of negotiation involves getting the *terms to the table*.³⁶ The designers of the competitive negotiation format for the American Bar Association Law Student Division wisely made each competition two hours long. With proper preparation and the ability

34. The intent of the settlement presentation or other demonstrative settlement aid should focus on honest attempts to accurately portray changes brought about by specific damages suffered. W. FISHER, *supra* note 21, at 14.

35. See generally G. NEUSTADT & MAY, *THINKING IN TIME: THE USES OF HISTORY FOR DECISION MAKERS* (1986).

36. See J. WINKLER, *BARGAINING FOR RESULTS* 9-24 (1984). Often, deals are won or lost in the first 15 minutes of negotiation because one party named the terms, and as a result of research, preparation, and the opponent's unrealistic expectations, those terms need not be bargained away. *Id.* at 10.

to bring terms to the table, two hours is plenty of time for competitive negotiation.

Closely allied with bringing the terms to the table is the concept of *leaving no money on the table*.³⁷ If the negotiation simulation or problem to be resolved involves a money settlement, the attorney should work to assure that the client receives all of the dollars that he possibly can. The opponent should strive for the opposite result: that his client does not pay a single dollar more than necessary to resolve the dispute. To operate otherwise would be leaving money on the table. Leaving money on the table should be avoided, and a team which does so will certainly lower its score.

A tenth goal of competitive negotiation is to *make the unusual sound normal*.³⁸ It might be imagined that a negotiator should express outrage and indignation, and utilize all of the emotional tactics that are used to influence juries. While the use of emotion in negotiating is not undesirable, if emotion is used, it should seem normal. It should come off neither forced nor awkward. It must appear as though the use of emotion is totally appropriate and necessary to the situation at hand.

The eleventh principle of competitive negotiation involves having *one black hat and one white hat*³⁹ on the team of negotiators. It is best to have at the table the full range of personality skills available. White hat indicates a cooperative individual who appears almost as though he is working for the other side. A black hat signifies an adversarial individual who can be cutting and biting and can frame questions and respond to issues in a manner that clearly lets all observers know that he is adversarial to the core.

37. Shelton Smith, in rendering oral critique of two teams having concluded their negotiation of "*Pruitt v. Darnstead*," commented that a plaintiff in a medical malpractice suit should *not* jump at the first offer because to do so will result in leaving money on the table. To extract the last possible dollar from the legal dispute from plaintiff's standpoint, you must argue, "we want to take this to the courthouse," rather than, "we want to settle this today."

38. Nothing gives a person so much advantage as maintaining emotional control, exerting confidence in his position or demand. Cohen, *How You Can Get What You Want by Negotiation*, 69 NATION'S BUS., May 1981, at 89-90.

39. There is discussion of objectivity occasioned by the introduction of an affiliate in the nature of a lawyer to the negotiation process. S. GOLDBERG, E. GREEN & F. SANDER, DISPUTE RESOLUTION 82-83 (1985), excerpting Eisenberg, *Private Ordering Through Negotiation: Dispute-Settlement and Rulemaking*, 89 HARV. L. REV. 637 (1976). It is submitted that objectivity will be extended by having two lawyer negotiators on the same side with differing negotiating styles, one cooperative and one competitive.

In the process of viewing oneself on *videotape*⁴⁰ as a matter of self-critique, posture becomes a very important visual symbol of one's success in negotiations. Leaning forward into the opponent or sitting absolutely straight at the table gives all onlookers the clear impression that one is postured for effectiveness.⁴¹ The relaxed, self-satisfied appearance of confidence, on the other hand, does not serve one well when being observed from the sidelines of the negotiation arena. All of what one says at the negotiation table should be focused toward *self-critique*,⁴² and re-enforcing the game plan brought to the table. At the point of competition, when counsel must appear before the judges, within five minutes he should be able to outline all that he did in two hours to advance the negotiation toward a particular result.

A fifteenth principle of competitive negotiation involves *dominating the talking time*.⁴³ If there are two people on each side of a table for two hours, from the standpoint of a person looking in from the outside, the team that controls more than fifty percent of the talking time will most often be viewed as having dominated the table. Within a single side of negotiators, there should be an effort to determine *equality of position*.⁴⁴ Taking one weak negotiator and one strong negotiator into a competitive negotiation arena does not totally advance the client's cause, for the simple reason that the judge and client will view the weak negotiator as a negative.

40. The use of videotape allows you to see yourself and hear yourself as others do. "An astonishing fifty-five percent of meaning is conveyed by facial expressions and body language alone. . . . Your voice—not including your actual words—may transmit as much as thirty-eight percent of the meaning in face to face conversations . . ." ELSEA, *THE FOUR MINUTE SELL* 10 (1984) [footnote omitted].

41. Positioning or posturing may be referred to as the opening gambit of the discussion stage. E. LEVIN, *NEGOTIATION TACTICS: BARGAIN YOUR WAY TO WINNING* 54 (1980).

42. Aspirations and expectations have much in common. A lawyer with high aspirations and a client with high expectations are placed in a position to show client benefit at the end of the negotiation and thus produce a positive self-critique process. The aspirational level normally is a reasonable distance from the bottom line of client expectation. H. RAIFFA, *THE ART & SCIENCE OF NEGOTIATION* 126-30 (1982).

43. While more is not always better, the presumption will be that those who have something to say, as opposed to those who contribute little, will be presumed to receive a higher grade in the absence of mistake in a case of balanced merits. In fact, if you dominate the table, you simply have more communicative time with which to persuade the onlooker as to the correctness of your position. See G. KARRASS, *NEGOTIATE TO CLOSE: HOW TO MAKE MORE SUCCESSFUL DEALS* 117 (1985). The process of repetition and reinforcement when presenting a case to the jury is a favorable alternative to brevity and conciseness. Effectiveness is a perception of the onlooker.

44. The team of negotiators should show balance, be complimentary in their skills, and share responsibility for negotiation with parity, in order that one of the team members does not appear weak, which can allow doubt to creep into the judge's evaluation. This equality of position between negotiating team members falls within the parameters of the centrality of credibility. See G. BELLOW & B. MOULTON, *supra* note 23, at 45.

*Eye contact*⁴⁵ is another very important consideration in the process of negotiation. The negotiators should look clearly at the opposition and have strong eye contact. By so doing, counsel is much more convincing.

In every negotiation simulation, team members should prepare an *opening statement*.⁴⁶ The opening statement should indicate the facts supporting the team's position. It should take the form of a declaratory statement as opposed to an interrogative statement. It should be clearly stated in the traditional legal format of a statement of the facts, a statement of the law, and the conclusion that should be derived from those facts. Depending upon individual strategy, the statement may or may not include an opening demand.

The nineteenth principle of negotiation competition is that the plaintiff's demand be at the *high end of reasonable*.⁴⁷ Conversely, if the defendant advances the demand, then it should be at the *low end of reasonable*.⁴⁸ The plaintiff in the negotiation process has the obligation to advance the demand.

Relative to dominating the table is the concept of *dominating the intensity*⁴⁹ of the negotiation process. In the trial, the intensity is demonstrated when the lawyer gets to the key issues or to the key testimony, or when he gets to the point of turning the case in his client's favor. At the negotiation table, counsel may not necessarily reach such a high level of emotion, but there are heightened levels of

45. See M. HANAN, J. CRIBBIN & H. BERIAN, SALES NEGOTIATION STRATEGIES 36-40 (1977). *Contra* C. KARRASS, *supra* note 4, at 16-17. Chester Karrass commented about the importance of body language noting that:

Anyone who watched Clifford Irving tell bold-faced lies about Howard Hughes knows how cocksure he appeared, how directly he looked into people's eyes, how relaxed he was. . . . Body language gave us no insight whatever. Body language is a kind of homebrewed mishmash consisting of 90 percent common sense and baloney and 10 percent science.

Id. at 16-17.

46. J. JEANS, TRIAL ADVOCACY 199 (1975); J. APPLEMAN, PREPARATION AND TRIAL 189 (1967). *Contra* G. NIERENBERG, *supra* note 9, at 55. "There are no strict rules on opening [a negotiation]. . . . Some experienced negotiators advise that a completely irrelevant topic start off the meeting. Others suggest that a humorous story can lighten the tensions. Still others propose that the introductory remarks set forth some of the general principles of negotiation." *Id.* See also M. MCCORMACK, WHAT THEY DON'T TEACH YOU AT HARVARD BUSINESS SCHOOL 145 (1984).

47. See S. GOLDBERG, E. GREEN, & F. SANDER, *supra* note 39, at 41-45, discussing H. RAIFFA, *supra* note 42, at 33-49, 126-30.

48. See EDWARDS & WHITE, *supra* note 29, at 185-87.

49. If you view the negotiation process as a continuum of conversation, leading to discussion, which in turn leads to decision making, the questions that stimulate decision will be viewed by the knowledgeable observer as the intense time of the process. C. KARRASS, *supra* note 4, at 171-72.

intensity, depending upon the type of matter being resolved. The team of negotiators that can dominate the intensity periods, in the eyes of the judges or in the eyes of their clients, will have a better chance of prevailing. One of the ways of dominating the intensity is by letting *personality*⁵⁰ show through. The personality of the individual negotiator will be that characteristic that will make a *neutral observer want that participant to win*.⁵¹

50. "Distinction or excellence of personal and social traits; magnetic personal quality." WEBSTER'S SECOND NEW COLLEGIATE DICTIONARY 628 (1958); C. KARRASS, *supra* note 4, at 86-87 sets forth the most important traits of the "Ideal Negotiator."

1. An ability to negotiate effectively with members of his own organization and win their confidence.
2. A willingness and commitment to plan carefully, know the product, the rules and the alternatives. The courage to probe and check information.
3. Good business judgment. An ability to discern the real bottom-line issues.
4. An ability to tolerate conflict and ambiguity.
5. The courage to commit oneself to higher targets and take the risks that go with it.
6. The wisdom to be patient and thereby to wait for the story to unfold.
7. A willingness to get involved with the opponent and the people in his organization; that is, to deal in personal and business depth with them.
8. A commitment to integrity and mutual satisfaction.
9. An ability to listen open-mindedly.
10. The insight to view the negotiation from a personal standpoint; that is, to see the hidden personal issues that affect outcome.
11. Self-confidence based on knowledge, planning and good intraorganizational negotiation.
12. A willingness to use team experts.
13. A stable person; one who has learned to negotiate with himself and laugh a little. One who doesn't have too strong a need to be liked because he likes himself.

Id.

51. Persuasion represents in a word the concept of third party's adopting and approving your side of the negotiation. C. KARRASS, *supra* note 4, at 146-47 provides 13 tips on persuasion:

1. It is better to start talks with easy-to-settle issues than highly controversial ones.
2. Agreement on controversial issues is improved if they are tied to issues on which agreement can easily be reached.
3. A message that asks for a greater amount of opinion change is likely to produce more change. Here, as in other aspects of life, aspiration level is related to achievement.
4. When two messages must be sent, one of which is desirable and the other undesirable, the most desirable to the audience should be sent first.
5. Learning and acceptance are improved if stress is placed on similarities of position rather than differences.
6. Agreement is facilitated when the desirability of agreement is stressed.
7. A message that first arouses a need and then provides information to satisfy it is remembered best. However, when a need-arousal message is severely threatening, the listener tends to reject it.
8. It is more effective to present both sides of an issue than one side.
9. When pros and cons of an issue are being discussed, it is better to present the communicator's favored viewpoint last.
10. Listeners remember the beginning and end of a presentation more than the middle.
11. Listeners remember the end better than the beginning, particularly when they are unfamiliar with the arguments.

Negotiators should wear the *trappings of success*.⁵² For instance, a dark chalk stripe suit, a Rolex watch, or tasteful jewelry may be worn to suggest past success and will help any negotiator as well as any trial lawyer to prevail.

The role of *intimidation*⁵³ in the negotiating room is minimal. However, the successful negotiator should be able to present a reason the opposition will not want to try this case. Counsel may suggest to the opponent why it will be intimidating to proceed to the courtroom, and may allude to all factors of the legal dispute mitigating against the opposition taking the dispute to court. At the same time, counsel must clearly demonstrate willingness to try the case, that he will be successful in the trial of it, and that as a part of the negotiation he is willing to indicate which of the elements of his research will make him a clear winner in the courtroom.

In preparing for negotiation, every participant should *practice in terms of the judges' criteria*.⁵⁴ The phases are the beginning phase, middle phase, agreement and non-agreement, all of which entail certain principles that judges consider while viewing the negotiation process. Counsel may learn to recognize the strengths and weaknesses of cases, recognize what they needed to learn from the other side's anticipated strategies and tactics, calculate how well they anticipated the underlying goals of the parties, and identify anticipated or formulated options that could operate for and be acceptable to both parties. The competitive negotiator may need to instill doubt while advancing his position. A demonstration of flexibility in terms is also

12. Conclusions should be explicitly stated rather than left for the audience to decide.
13. Repetition of a message leads to learning and acceptance.

Id.

52. "The appearance of success is as crucial to many people as the reality." J. WAREHAM, *SECRETS OF A CORPORATE HEADHUNTER* 155 (1980).

53. G. WILLIAMS, *supra* note 1, at 10. The intimidation of absolute confidence at trial has little value in simulated negotiation. In the practice of law, intimidation distorts the real issues of the client.

54. By rehearsing for negotiation in terms of the judges' criteria of stages, skills, and settlement, the student or lawyer will be reviewing the taxonomy of negotiation principles necessary for adequate preparation. *See e.g.*, S. GOLDBERG, E. GREEN & F. SANDER, *supra* note 39. *See also* G. WILLIAMS, *supra* note 1, at 110-11. The ABA Task Force defined lawyer competency as the ability to: "(1) analyze legal problems; (2) perform legal research; (3) collect and sort facts; (4) write effectively . . . ; (5) communicate orally with effectiveness in a variety of settings; (6) perform important lawyer tasks calling on both communication and interpersonal skills; (i) interviewing, (ii) counseling, (iii) negotiation; and (7) organize and manage legal work." *Id.* (citing ABA Section on Legal Education and Admission to the Bar, Report and Recommendation of the Task Force on Lawyer Competency 9, 10 (1979)).

necessary so that counsel may move from one game plan to another. A caveat: flexibility should be used with great care. Moreover, one striking similarity between the negotiation arena and the trial court is the necessity to go into either forum armed with an *outline of the course of action*⁵⁵ and the capability of picking it up after being interrupted. This is most commonly observed in the appellate court where judges interrupt counsel frequently, dissuading them from their course with penetrating questions requiring a great deal of thought. It is imperative that counsel be able to retrack, pick up the course of argument at any time, and proceed with confidence to reach the intended destination.

Another principle of competitive negotiation that is beneficial in many endeavors is the need for *preparation beyond rigidity*.⁵⁶ The negotiating attorney must prepare so thoroughly, and have the common facts and the client's expectations so well in mind, that he is free from rigidity throughout the entire presentation. Empirical research has repeatedly demonstrated that the *best negotiators are the best trial lawyers*,⁵⁷ because their preparation and their expectation are premised on their belief that if they do not win in the negotiation room, they will win in the courtroom. The nature of competitive negotiation is such that even if one utilizes a cooperative style, there will still be a winner and probably a loser as well. As a part of the negotiation process, the negotiator must *pique the imagination of the casual observer*.⁵⁸ The negotiator must also *build the case on obvious*

55. By organizing your negotiation file in the chronological order that you intend to follow in introducing the facts of the client's case, you are following a pattern consistent with good trial preparation. See I. GOLDSTEIN, *supra* note 17, at 49.

56. G. NIERENBERG, *supra* note 9, at 60.

Research should be objective—objective not in the quality of the evidence you gather but in your attitude toward such evidence. There is a positive reason for amassing information. It amasses a wealth of material in your mind so that you may take advantage of any new development in the negotiation.

You should be prepared with every possible kind of information about the people with whom you are going to negotiate.

Id. "In researching a situation always examine and reexamine the rules." *Id.* at 64.

Research supplies information to help anticipate the strategy of the impending negotiation. Such preparation should help answer questions like the following:

1. Are there any penalties involved in this negotiation, such as a penalty for bluffing, or a penalty for giving false information?
2. Have you recognized all of the interested parties to the negotiation?
3. Has anyone placed a time limit on the negotiation, or is there a natural time limit?
4. Who would like to maintain the status quo and who would like to change it?
5. What would be the cost of a stalemate?
6. In this negotiation, what will be the means of communication between the parties?
7. Can many items be introduced into the negotiation simultaneously?

Id. at 65.

57. G. WILLIAMS, *supra* note 1, at 30, 79.

58. Wareham discusses "Psychic Enticements: The magical inducements that

truth.⁵⁹

VI. CONCLUSION

The self-critique phase of competitive negotiation, comparable to review of the process with the client, is the most important element of the negotiation process. The self-critique of the 1985-86 negotiation competition included the elements of how well students recognized their strengths and limitations, their subjective responses, and their probable effect on other negotiators. The self-critique also inquired as to what they did to advance the negotiations and what inhibited their goals. Students were called on to recognize the limitations involved in handling the facts and legal aspects of the problems and to recognize a degree of observance of the code of professional responsibility. In short, they were asked what they did to advance the negotiation to their anticipated results.

The self-critique format of the 1986-87 competition was couched in different terms. The single question relating to self-critique on the judge's form questioned how adequately had the students learned from the day's negotiation, so that they would be more effective if faced with a similar situation tomorrow.

Negotiation is a dynamic process. Ideally, it should not be a learning process at the expense of a client. It is a process that favors success in a format with the client's result as the objective. So long as the ABA competitive negotiation format focuses on the positive aspects of the intuitive, as well as the legalistic and preparational aspects required to be successful in negotiation, participation in the competition will be a valuable experience that students can take with them into the practice of law.

make a candidate want to switch rather than fight." J. WAREHAM, *supra* note 52, at 154. While he is talking about those things of "glitter" that an executive "cannot either acquire for himself or obtain from his current employer," to induce him to change jobs, it is suggested that if you use a unique exhibit, develop the repetitious use of a unique phrase, or introduce some argument that is creative for this case, you have added a dimension which mitigates in favor of settlement on your terms. *Id.*

59. S. GOLDBERG, E. GREEN, & F. SANDER, *supra* note 39, at 32 (*excerpting* Fisher, *Negotiation Power*, 27 AM. BEHAV. SCI. 149 (1983)) indicates that "[l]egitimacy depends upon both process and substance . . . [and] . . . depends in part on my having fully heard your views, your suggestions, and your notions of what is fair before committing myself." *Id.*

