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# The Art of Negotiation: What the Twenty-First Century Business Student Should Know

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Civility is not a sign of weakness, and sincerity is always subject to proof. Let us never negotiate out of fear. But let us never fear to negotiate.

—President John F. Kennedy<sup>1</sup>

## I. INTRODUCTION

The art of negotiating to reach a successful conclusion is particularly critical in international conflicts such as the Cuban Missile Crisis, as referenced by President Kennedy. The importance of producing a good outcome in crises negotiations is crucial, and affirmative steps can be taken by negotiators to insure an effective process.<sup>2</sup> Negotiation skills are equally vital for

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<sup>1</sup>Inaugural Address of President John F. Kennedy, Jan. 20, 1961, available at <http://www.jfklibrary.org/Historical+Resources/Archives/Reference+Desk/Speeches/JFK/003POF03Inaugural01201961.htm>.

<sup>2</sup>See, e.g., Kevin Avruch, *Culture as Context, Culture as Communication: Considerations for Humanitarian Negotiators*, 9 HARV. NEGOT. L. REV. 391 (2004) (discussing how culture impacts humanitarian negotiations in conflict and postconflict areas for the security of noncombatants); Michael Ross Fowler, *The Relevance of Principled Negotiation to Hostage Crises*, 12 HARV. NEGOT. L. REV. 251 (2007) (suggesting a moderate problem-solving approach to freeing hostages); Marc J. Randazza, *Getting to Yes with Terrorists*, 2002 L. REV. M.S.U.-D.C.L. 823 (discussing goals and strategies for successful hostage and crises negotiations).

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concluding international treaties on subjects ranging from arms agreements,<sup>3</sup> and rights in outer space<sup>4</sup> to trade agreements.<sup>5</sup>

Yet the importance of being able to negotiate effectively is not limited to international treaties or crises situations. People negotiate every day in more innocuous circumstances such as buying or selling items, deciding where to go on vacation, and outlining behavioral expectations of children, parents, spouses, and friends. Certainly in the business world, the ability to negotiate successfully is a coveted skill.<sup>6</sup> Being able to negotiate effectively with an ethical compass is an even more desirable trait.<sup>7</sup>

It follows, then, that the subject of dispute resolution is suitable for business law courses, and predictably the utilization of negotiation exercises is recommended by commentators.<sup>8</sup> The ability to negotiate is valuable to business managers because the skills developed through practicing negotiation develop critical thinking aptitudes, analytical proficiency, and effective communication skills.<sup>9</sup> Moreover, using negotiation exercises rep-

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<sup>3</sup>See David A. Koplow, *Parsing Good Faith: Has the United States Violated Article VI of the Nuclear Non-Proliferation Treaty?* 1993 WIS. L. REV. 301 (discussing the Nuclear Non-Proliferation Treaty).

<sup>4</sup>See Brian Beck, *The Next, Small, Step For Mankind: Fixing the Inadequacies of the International Space Law Treaty Regime to Accommodate the Modern Space Flight Industry*, 19 ALB. L.J. SCI. & TECH. 1 (2009) (arguing that the current space law treaty regime is inadequate to handle the challenges of space flight in the next decade).

<sup>5</sup>Richard B. Bilder, *The International Coffee Agreement: A Case History in Negotiation*, 28 LAW & CONTEMP. PROBS. 328 (1963) (outlining the practical problems, conflicting interests, and opposing tensions in the negotiation of a coffee agreement as an example of the complex and many-faceted process of international problem solving).

<sup>6</sup>See Danny Ertel, *Turning Negotiation into a Corporate Capability*, HARV. BUS. REV., May-June 1999, at 3 (asserting that all business relationships and initiatives are established through negotiation and that organizations that coordinate and manage negotiations effectively enhance profits).

<sup>7</sup>See Anne M. Burr, *Ethics in Negotiation: Does Getting to Yes Require Candor?* DISP. RESOL. J., May-July 2001, at 8 (discussing the importance of establishing a reputation for candor and trust in business negotiations and relationships).

<sup>8</sup>Peter S. Shedd, *Let's Make a Deal: To Sign or Not to Sign a Two-Part Model for Incorporating Negotiation into a Legal Studies Course*, 14 J. LEGAL STUD. EDUC. 87, 87-89 (1996) (offering a negotiation exercise). Law schools develop alternate dispute resolution skills, and the American Bar Association standards require law students to receive instruction in other professional skills such as negotiation. Becky L. Jacobs, *Teaching and Learning Negotiation in a Simulated Environment*, 18 WIDENER L.J. 91, 93-94 (2008).

<sup>9</sup>Anna S. Rominger, *Negotiation: An Idea Whose Time Has Come*, 13 J. LEGAL STUD. EDUC. 101, 120 (1995) (arguing for the integration of negotiation into the business law curriculum).

resents a student-centered approach to teaching content through active learning, in which students assume greater responsibility for their learning than the traditional lecture method of instruction.<sup>10</sup> Additionally, negotiation exercises offer a unique opportunity to reinforce ethical principles and to introduce students to the concept of professionalism.

While business law professors are well versed in the legal subject matter underlying conflicts that form the basis of negotiation exercises (such as contract or employment law), they may or may not be well versed in principles of negotiation. There is a wealth of information on the bargaining process and techniques of negotiation.<sup>11</sup> However, most negotiation exercises are used as a part of a legal environment of business or other law course and not a stand-alone course in conflict resolution, which would permit a more in-depth instruction in bargaining skills as well as a more comprehensive examination of the literature.

This article provides business law professors with a concise guide for students that can be used as an instructional tool prior to embarking on a negotiation simulation. It also provides a negotiation exercise that uses contemplative reflection to reinforce the lessons learned.<sup>12</sup> **The authors contend that there are ten basic components that structure an effective negotiation process and consequently form a negotiation instructional module that integrates ethical thought and professionalism. These components are not separate steps, but part of a dynamic whole, which will be discussed in three sections: Beginning the Process (Section II), Becoming More Skilled (Section III), and Being Persuasive (Section IV).**

## II. BEGINNING THE PROCESS

This section directs the students' attention to the lens through which the negotiation experience may be viewed, to the predictable patterns in the negotiation process, and to the rules for telling the truth without telling everything.

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<sup>10</sup>Lucille M. Ponte, *The Case of the Unhappy Sports Fan: Embracing Student-Centered Learning and Promoting Upper-Level Cognitive Skills Through an Online Dispute Resolution Simulation*, 23 J. LEGAL STUD. EDUC. 169, 175–78 (2006).

<sup>11</sup>Judith Stilz Ogden & Mary Ellen Benedict, *What's on Your Mind? A Negotiation Role-play*, 18 J. LEGAL STUD. EDUC. 307, 313–15 (2000).

<sup>12</sup>The use of reflective, self-critique inquiry aids the learning process in negotiation. Don Peters, *Mapping, Modeling, and Critiquing: Facilitating Learning Negotiation, Mediation, Interviewing, and Counseling*, 48 FLA. L. REV. 875, 922–25 (1996).

*A. Component One: Start from Where You Are*

Perception frames reality. It is therefore imperative that a negotiator's perceptions and decision-making orientation are free from, or at least sensitive to, limiting factors such as inherent bias and pride.<sup>13</sup> Emotions play a powerful role in both the capacity to perceive and express feelings and in the ability to engage in clear thinking. It is important for negotiators to appreciate the emotional vocabulary of interaction, to monitor emotional cues, and to cultivate a wise emotional dialogue.<sup>14</sup> Positive emotions enhance relationships, which greatly increases the potential for problem solving,<sup>15</sup> so it is important to look for ways to reduce rather than enhance tensions during the session.

Negotiating style is an important element in the process and is manifest in three types: competitive, cooperative, and integrative.<sup>16</sup> The objective of an *adversarial* style is to win a zero-sum game.<sup>17</sup> This style requires a high degree of determination coupled with well-tuned aggressiveness, decisiveness, the courage to allow risks, as well as the self-confidence to curb risk taking when those risks are unwise. In contrast, the objective of a *cooperative* style, values fairness and building relationships

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<sup>13</sup>For an excellent examination of bias pitfalls in decision making during negotiations, see Robert S. Adler, *Flawed Thinking: Addressing Decision Biases in Negotiation*, 20 OHIO ST. J. DISR. RESOL. 683 (2005).

<sup>14</sup>Erin Ryan, *The Discourse Beneath: Emotional Epistemology in Legal Deliberation and Negotiation*, 10 HARV. NEGOT. L. REV. 231, 284–85 (2005).

<sup>15</sup>To this end, a negotiator should express appreciation, along with a sense of valued recognition for contributions. ROGER FISHER & DANIEL SHAPIRO, *BEYOND REASON: USING EMOTIONS AS YOU NEGOTIATE* 28–36 (2005). The negotiator also should build affiliation or a sense of connectedness with the other parties. *Id.* at 53–54. It is important for the negotiator to acknowledge social and professional status. *Id.* at 95–111. Finally, the negotiator must develop roles that are fulfilling. *Id.* at 117–33. See also Erin Ryan, *Building the Emotionally Learned Negotiator*, 22 NEGOT. J. 209, 217–20 (2006) (discussing the effect of positive emotions in the negotiation process).

<sup>16</sup>Donald G. Gifford, *A Context-Based Theory of Strategy Selection in Legal Negotiation*, 46 OHIO ST. L.J. 41, 43 (1985). These conflicting styles also may be characterized as competitive negotiation, where winning is the only goal; cooperative negotiation, where compromise is the goal; and interest-based negotiation, in which the focus is on interests rather than positions. Corey A. Ciochetti, *Employment Law, Negotiation and the Business Environment: A Cooperative Collective Bargaining Negotiation of the National Hockey League Lockout of 2004*, 25 J. LEGAL STUD. EDUC. 147–48 (2008).

<sup>17</sup>For a discussion of this style, see Alex J. Hurder, *The Lawyer's Dilemma: To Be or Not To Be a Problem-Solving Negotiator*, 14 CLINICAL L. REV. 253, 261–66 (2007).

while seeking mutually satisfactory solutions through gathering and sharing information.<sup>18</sup> This style requires determination and some aggressiveness in order to hold high aspirations and stay sufficiently focused to achieve them. An *integrative* style attempts to resolve the conflict by focusing on satisfying the interests of both parties and exercising problem-solving techniques.<sup>19</sup> An appropriate combination of distinctive styles may enhance the negotiation strategy.<sup>20</sup>

These negotiating styles are manifested in two distinct approaches to negotiation. *Principled negotiation* involves identifying the underlying interests and needs of the parties, creating a range of alternatives and options, and focusing on improving the working relationship between the parties.<sup>21</sup> Sometimes the pie to be divided is enlarged, benefiting both parties. *Positional negotiation*, on the other hand, centers upon how much one party will win and the other will lose, and agreement is through a series of limited concessions offered by both parties.<sup>22</sup> The pie is viewed as being only so big and incapable of being divided such that one person receives more without the other receiving less. Since no single style or approach works best in all negotiations, the successful negotiator should be able to use a variety of methods and know when to choose each. Competitive tactics early in the

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<sup>18</sup>Renee A. Pistone, *Case Studies: The Ways to Achieve More Effective Negotiations*, 7 PEPP. DISP. RESOL. L.J. 425, 434–35 (2007).

<sup>19</sup>See Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754, 794–829 (1984) (proposing a problem-solving approach that identifies the parties' underlying needs and objectives and crafts solutions by attempting to meet those needs directly or expanding the resources available). Such an interest-based style is utilized by mediators and is explored *infra* notes 108–13 and accompanying text.

<sup>20</sup>Melissa L. Nelken, *The Myth of the Gladiator and Law Students' Negotiation Styles*, 7 CARDOZO J. CONFLICT RESOL. 1, 7 (2005). Other categories of styles include competing, collaborating, compromising, avoiding, and accommodating. *Id.* at 4–6 (applying the Thomas-Kilmann Conflict Mode Instrument to negotiation).

<sup>21</sup>The method of principled negotiation is to decide issues on their merits rather than through a haggling process focused on what each side says it will and will not do. Parties learn to look for mutual gains wherever possible and, where interests conflict, to insist that the result be based on some fair standards independent of the will of either side. This method of principled negotiation is hard on the merits, soft on the people. ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* 10–12 (2d ed. 1992); see also Mindy Barry, Note, *Principled Negotiating: Breeding Success and Protecting Public Interests Behind Closed Doors*, 1 GEO. J.L. & PUB. POL'Y 431 (2003) (discussing the concept of principled negotiations which explores the interests behind positions to create options for mutual gain).

<sup>22</sup>Hurder, *supra* note 17, at 261–64.

negotiation sometimes increase the prospects for successful use of cooperative or problem-solving tactics later in the negotiation.<sup>23</sup>

Attitude, nevertheless, always remains within the total control of each negotiator and characterizes in part the role of a professional.<sup>24</sup> Therefore, it is important to develop qualities of mind that people value the most in professionals: common sense; creativity; good judgment; and a sense of competency and control, not to control others, but to be able to accomplish successfully the task at hand. Such a *negotiator mindset*, involves subconscious concentration through the *informed intuition* and encourages an inquisitive approach in which the negotiator explores why things may not be what they first seem.<sup>25</sup> It liberates the conscious mind so it can fully and innovatively zero in on the hard analytic skills of critical thinking and logical reasoning, skills that are still necessary for success in business and law.<sup>26</sup>

Learning to control instinctive judgments and first impressions dramatically increases a person's power of knowing what to do in the first two seconds or in the "blink of an eye."<sup>27</sup> It follows that just as negotiators can learn to think logically and deliberately, they also can learn to make quick, accurate, and intuitive decisions. Understanding principles for which one stands as an individual is useful in evaluating the values of other individuals since contrasting values can influence a negotiation.<sup>28</sup> The lenses a negotiator uses, as well as the particular style or approach the negotiator chooses, form patterns that are important to decipher and understand.

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<sup>23</sup>DONALD G. GIFFORD, *GIFFORD'S LEGAL NEGOTIATION THEORY AND APPLICATIONS* 133 (2001).

<sup>24</sup>Attitude determines what persons stand for as individuals, such as the commitment the duty to be competent, to be loyal, to maintain confidentiality of information, to act as a responsible citizen, to uphold the morals of both community and country, as well as the duties owed to religion, family and friends, associates, and even to oneself.

<sup>25</sup>See STEVEN D. LEWITT & STEPHEN J. DUBNER, *FREAKONOMICS: A ROGUE ECONOMIST EXPLORES THE HIDDEN SIDE OF EVERYTHING* (2005) (relating a series of unique explanations for economic questions that are not self-evident).

<sup>26</sup>See Robert M. Lloyd, *Hard Law Firm and Soft Law Schools*, 83 N.C. L. REV. 667 (2005) (arguing that the failure of law schools today to develop analytical skills could cause them to slide into insignificance as an institution).

<sup>27</sup>See MALCOLM GLADWELL, *BLINK: THE POWER OF THINKING WITHOUT THINKING* 15–16 (2005).

<sup>28</sup>See Roy Stuckey, *Understanding Casablanca: A Values-Based Approach to Legal Negotiations*, 5 CLINICAL L. REV. 211 (1998) (discussing the important role that values play in the negotiation process).

### B. Component Two: Recognize Patterns

Examples of symmetry and uniform proportions, routed in the timeless laws of mathematics, exist throughout the world.<sup>29</sup> Similarly, patterns exist for life's experiences, as well, and this concept is no less true for negotiations. Practitioners can profit by contrasting negotiations in their own field of practice with those in other areas, and they can profit by reflecting about what pattern lies within the common core.<sup>30</sup> Looking for recurring patterns allows a negotiator to predict and plan the progression of the session. Further, the experiences of negotiators typically will fit into a pattern by which a particular sequence, when followed, always yields the best results.<sup>31</sup> As a result, it is important to study and read broadly to create a store of ideas to enhance alternatives and ideas for solving negotiation problems. Equally important is the need to seek an understanding of the opponent's reasoning and the patterns that exist in that logic, so as to anticipate the next move. Finally, patterns also tend to emerge in the confrontation of moral issues and ethical dilemmas, the subject of the next section.

### C. Component Three: Follow the Rules

Practicing good ethical decision making is characteristic of professionalism.<sup>32</sup> Negotiation often involves inexact, disputed reconstruction of past events and perceptions as being a primary basis for decisions. Ethical philosophy, however, does have a place in negotiation ethics because the ideal of *justice* is real even if in practice, it may be unattainable, and the ideal of

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<sup>29</sup>Repeating proportions, like the *Divine Proportion* (or *Golden Section*), exist throughout nature: for example, in sunflowers, pineapples, and sea shells, as well as the Milky Way galaxy. See, e.g., H.E. HUNTLEY, *THE DIVINE PROPORTION: A STUDY IN MATHEMATICAL BEAUTY* (1970); MARIO LIVIO, *THE GOLDEN RATIO: THE STORY OF PHI, THE WORLD'S MOST ASTOUNDING NUMBER* (2002); SCOTT OLSEN, *THE GOLDEN SECTION: NATURE'S GREATEST SECRET* (2006).

<sup>30</sup>See DOUGLAS R. HOFSTADTER, *GODEL, ESCHER, BACH: AN ETERNAL GOLDEN BRAID* 674 (1999) (postulating that humans inherit an elusive sense for patterns involving all the mechanisms of representation of knowledge).

<sup>31</sup>MAUREEN BERMAN & I. WILLIAM ZARTMAN, *THE PRACTICAL NEGOTIATOR* xiii (1983).

<sup>32</sup>In addition to the recognition of ethical obligations, professionals are characterized by a trained expertise. Anthony C. Infanti, *Eyes Wide Shut: Surveying Erosion in the Professionalism of the Tax Bar*, 22 VA. TAX REV. 589, 599–600 (2003); Thomas D. Morgan, *The Evolving Concept of Professional Responsibility*, 90 HARV. L. REV. 702, 704–05 (1977). Professionals also may be characterized as being engaged in “a common calling in the spirit of public service.” ROSCOE POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES* 5 (1953).

*truth* is real even if in practice, its realization is incomplete.<sup>33</sup> Virtue, loyalty, courage, and other timeless values all remain worthy goals.<sup>34</sup> The most serious ethical failing is not attempting to affirm such timeless values.<sup>35</sup>

**Integrity should be a crucial value to a negotiator.** Integrity involves discerning right from wrong and requires action based upon what is distinguished as right and wrong even in the face of adversity. Integrity requires a degree of moral reflection; moreover, a person of integrity is steadfast, trustworthy, and honors commitments.<sup>36</sup> **Trust and integrity are precious resources, easily squandered and hard to regain.** They can thrive only on a foundation of respect for veracity.<sup>37</sup>

**For negotiators to get past *no*, they must understand what lies behind the *no* and overcome barriers to cooperation: negative emotions, certain negotiating habits, skepticism about the benefits of agreement, perceived power, and some reactions.**<sup>38</sup> To make this journey to *yes* using a moral compass, it is helpful for the negotiator to recognize two stages of ethical decision making. The first stage is to distinguish the clearly unethical decisions from the ethical ones, while the second stage involves choosing between ethical values, such as truth and fairness, or truth and loyalty, in circumstances in which no single answer is absolutely right or wrong. While it is acceptable to sacrifice truth for fairness, it is unacceptable in most circumstances to sacrifice truth for success; in

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<sup>33</sup>See Kevin Gibson, *The New Canon of Negotiation Ethics*, 87 MARQ. L. REV. 747 (2004) (asserting that negotiations present a myriad of ethical concerns should be considered against the backdrop of universal moral principles).

<sup>34</sup>For a discussion of an ethical framework for decision making, see KENNETH BLANCHARD & NORMAN VINCENT PEALE, *THE POWER OF ETHICAL MANAGEMENT* (1988) (identifying five principles of ethical power: Purpose, Pride, Patience, Persistence, and Perspective).

<sup>35</sup>GEOFFREY C. HAZARD JR. & ANGELO DONDI, *LEGAL ETHICS: A COMPARATIVE STUDY* 7 (2004). For a discussion of the importance of timeless values, see *infra* notes 137–48 and accompanying text.

<sup>36</sup>Stephen L. Carter, *The Insufficiency of Honesty*, ATLANTIC MONTHLY, Feb. 1996, at 74.

<sup>37</sup>SISSELA BOK, *LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE* 24 (1999). Consider lying. Lying requires a justification, while truth telling requires no justification. Liars usually weigh only the immediate harm to others from the lie against the benefits desired. The flaw in this analysis is that it underestimates two additional kinds of harm: the harm that lying does to the liars and the harm done to the general level of trust and social cooperation. Both are cumulative and hard to reverse. *Id.* at 24.

<sup>38</sup>WILLIAM URY, *GETTING PAST NO: NEGOTIATING WITH DIFFICULT PEOPLE* 7–9 (1993).

other words, an ethical principle should be sacrificed only for another ethical principle.

**The most difficult ethical dilemma for a negotiator usually concerns misrepresentation.**<sup>39</sup> Negotiator misrepresentation is difficult to define because it is intertwined with the subtleties of communication and subject to a variety of substantive situations that are fact-specific.<sup>40</sup> The Model Rules of Professional Conduct admonish attorneys not to “knowingly make a false statement of material fact or law.”<sup>41</sup> The official comments to the rule note that under “generally accepted conventions in negotiations, certain types of statements ordinarily are not taken as statements of material fact . . . a party’s intention as to an acceptable settlement of a claim are in this category.”<sup>42</sup> Further, another rule states that it is “professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation.”<sup>43</sup> Again, the comments clarify that as a negotiator, “a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others.”<sup>44</sup> Such principles and their caveats regarding misrepresentations are instructive to nonattorney negotiators as well.

**Nevertheless, deception is at the core of some negotiation tactics and strategies, with a certain amount of embellishment and withholding of information almost expected.**<sup>45</sup> So does one negotiate ethically and bluff

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<sup>39</sup>Other foreseeable ethical issues for negotiators can include inquiries such as whether or not the negotiator should believe that morality is relative or that one’s notion of goodness is something entirely personal to each negotiator or, if rhetoric, logic and advocacy are all one needs to insure success.

<sup>40</sup>“The rules and ethics requirements surrounding truthfulness in negotiation . . . are far from crystal clear and appear to yield different interpretations and results depending on the circumstances of the negotiation and the person doing the interpreting.” Peter Reilly, *Was Machiavelli Right? Lying in Negotiation and the Art of Defensive Self-Help*, 24 OHIO ST. J. DISP. RESOL. 481, 533 (2009).

<sup>41</sup>MODEL RULES OF PROFESSIONAL CONDUCT R. 4.1(a) (2009), available at [http://www.abanet.org/cpr/mrpc/rule\\_4\\_1.html](http://www.abanet.org/cpr/mrpc/rule_4_1.html).

<sup>42</sup>*Id.* at cmt. 2, available at [http://www.abanet.org/cpr/mrpc/rule\\_4\\_1\\_comm.html](http://www.abanet.org/cpr/mrpc/rule_4_1_comm.html).

<sup>43</sup>*Id.* at R. 8.4(c), available at [http://www.abanet.org/cpr/mrpc/rule\\_8\\_4.html](http://www.abanet.org/cpr/mrpc/rule_8_4.html).

<sup>44</sup>*Id.* at PREAMBLE AND SCOPE (2), available at <http://www.abanet.org/cpr/mrpc/preamble.html>.

<sup>45</sup>Van M. Pounds, *Promoting Truthfulness in Negotiation: A Mindful Approach*, 40 WILLAMETTE L. REV. 181, 184–86 (2004).

about the bottom line while remaining truthful?<sup>46</sup> The best approach, the right approach, and the smart approach is simply to avoid, at all costs, making any false factual statement such as “I am not authorized to go below \$50,000” (when the authority is actually \$40,000). An alternative non-deceptive approach would be “In my opinion, this case is worth at least \$50,000 and I’m not going to recommend a lower figure at this time,” followed with an explanation justifying the position. A negotiator, nevertheless, should be guided by personal conscience and the approbation of professional peers.<sup>47</sup>

The best practical advice on exercising good judgment involving ethics is to anticipate what situation is likely to arise and what type of moral dilemmas are likely to be presented. This advance planning not only simplifies the decisions, but also reduces the necessity of making on-the-spot calls in the heat of the moment. Judgment decisions are often rendered more difficult because of the failure to anticipate and prepare for what was looming clearly on the horizon.<sup>48</sup> The contemplation in advance of likely dilemmas will assist the negotiator in steering a sound ethical course as the process unfolds.

In sum, it is important to review one’s moral maps before starting a negotiation, to use them as a guide, and to accept the principle that good ethics is good business. A negotiator also should practice anticipating and resolving morally complex issues before they arise and avoid unethical misrepresentation. In addition to a sound ethical grounding, the ability to decipher patterns, and to follow ethical rules, the successful negotiator must possess relevant skills.

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<sup>46</sup>For a thought-provoking examination of this issue, see Gerald B. Wetlaufer, *The Ethics of Lying in Negotiations*, 75 IOWA L. REV. 1219 (1990).

<sup>47</sup>See Robert B. Gordon, Note, *Private Settlement As Alternative Adjudication: A Rationale for Negotiation Ethics*, 18 U. MICH. J.L. REFORM 503, 506 (1985) (arguing for an ethical obligation of truthfulness in negotiations). For an example of aspirational code that recognizes ethical obligations of attorneys in other roles, see Carrie Menkel-Meadow, *Ethics and Professionalism in Non-Adversarial Lawyering*, 27 FLA. ST. U.L. REV. 153, 167–69 (1999).

<sup>48</sup>To practice, for example, consider the following ethical questions that could arise: Is there an affirmative duty to inform the opponent of relevant facts? Of material facts? Hidden assets? What is my duty to inform my opponent of my opponent’s drafting error? To correct my opponent’s erroneous factual or legal assumptions? Which representations are of fact? Of opinion? What constitutes mere puffing? How can I ethically avoid disclosing certain information? How can pertinent information be partially disclosed?

### III. BECOMING MORE SKILLED

This section emphasizes four critical components of effective negotiating: active listening with four ears; strategic planning; tactical maneuvers; and the use of open-ended questions, which is also utilized in mediation, as a negotiation tactic.

#### *A. Component Four: Listening with Four Ears*

A failure to listen effectively can derail every other negotiating skill developed, including the best strategies, the sharpest tactics, and the most honed mediation techniques. What a negotiator often encounters is not a problem to be solved, but rather an idea to be heard, a different view to be understood, or a new person with whom to become acquainted. Negotiating, like the process of teaching and learning, involves an encounter with the unexpected, along with and the elements of suspense and surprise. When listening, a negotiator must wait patiently for insight to emerge and must trust in the outcome of the process.<sup>49</sup> Few individuals are good conversationalists because they think about what they intend to say, rather than about what the other person is saying.<sup>50</sup> Therefore, the focus of a good conversationalist, as well as a good negotiator, should be not just to hear, but to listen. Hearing is mostly physical; listening is mostly psychological. The key to improving listening skills can be accomplished in four steps (through the *four ears* of listening): (1) listen to what is clearly stated, (2) listen to what is clearly not stated, (3) listen for what the other person is attempting to say but does not say, and (4) listen to what is being said to oneself.

#### 1. Listen to What Is Clearly Being Said

The first ear involves listening actively (participating, concentrating) to gain insight into the thoughts, needs, and feelings of others. By listening actively and not mentally preparing an immediate reply, one is less likely to convey unintended nonverbal signals. Remember, one hears only the

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<sup>49</sup>See PARKER J. PALMER, *THE ACTIVE LIFE: A SPIRITUALITY OF WORK, CREATIVITY, AND CARING* 74 (1999) (describing authentic teaching and learning).

<sup>50</sup>“Few are agreeable in conversation, because each thinks more of what he intends to say than of what others are saying, and listens no more when he himself has a chance to speak.” Francois de La Rochefoucauld, Quotation #29463 from *Classic Quotes*, available at <http://www.quotationspage.com/quote/29463.html> (last visited June 23, 2010).

sounds to which one listens.<sup>51</sup> Further, feelings and motives are critical to listening effectively, as is demonstrated by the fact that when they are absent in electronic communication, much of what otherwise would be clearly understood is lost. People are not computers, programmed to respond to impulses from others. Human beings have feelings generated by the negotiation process—feelings of mistrust, fear, and anger. In addition, it is sometimes the very smallest of subtleties, repeated over and over, which form a predictable pattern and send a clear message.<sup>52</sup>

Active listening is a process of thoroughly hearing what the other person has said, and responding with a reflective statement that mirrors what has been heard.<sup>53</sup> Active listening requires expertise in discussing and conferring with, as opposed to bargaining against, in order to hear what the other person is really saying. The negotiator must listen to understand rather than attempt to achieve an agreement or produce some kind of change in the other person.<sup>54</sup>

## 2. Listen for What Obviously Is Not Being Said

The second ear involves recognizing what speech conceals and what silence reveals. “Listening is the ability to hear what people are saying or not saying as distinguished from the words they enunciate.”<sup>55</sup> If one listens between the words, one will be able to discern a message and hear more than just the words.<sup>56</sup> It is important to look not only for the reaction that the other person has to what you have just said, but also for what the other person ob-

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<sup>51</sup>In the words of a folk ballad, “How many ears does a man have to have to hear someone crying?” Bob Dylan, *Blowin’ in the Wind*, on THE FREEWHEELIN’ BOB DYLAN (Sony Records 1963).

<sup>52</sup>MALCOLM GLADWELL, *THE TIPPING POINT: HOW LITTLE THINGS CAN MAKE A BIG DIFFERENCE* 74–80 (2000).

<sup>53</sup>John Barkai, *Teaching Negotiation and ADR: The Savvy Samurai Meets the Devil*, 75 NEB. L. REV. 704 737–43 (1996); see also DONALD G. GIFFORD, *GIFFORD’S LEGAL NEGOTIATION THEORY AND APPLICATIONS* 90 (2001).

<sup>54</sup>Terry Royce, *The Negotiator and the Bomber: Analyzing the Critical Role of Active Listening in Crisis Negotiations*, 21 NEGOT. J. 5, 9–10 (2005).

<sup>55</sup>GERRY SPENCE, *HOW TO ARGUE & WIN EVERY TIME: AT HOME, AT WORK, IN COURT, EVERYWHERE, EVERYDAY* 67 (1996).

<sup>56</sup>The Greek approach of focusing first on Ethos (culture, background, disposition, character), second on Pathos (feelings, emotions), and only later on Logos (philosophy, reason) can enhance the discernment of that message.

viously is not voicing. A reluctance to discuss one aspect of the problem is, in a sense, a hidden offer to discuss another.<sup>57</sup> One should package conclusions by giving reasons first and proposals second, so as to help the other person to listen.<sup>58</sup> To listen effectively, the negotiator should use small talk to warm up; should tune into the other person's communicative manner (fast/slow, loud/soft); and should communicate through those senses (seeing, listening, feeling, touching, reasoning) to which the other is more apt to respond.<sup>59</sup>

Does gender influence conversation, listening, or negotiation? While some commentators argue it does not,<sup>60</sup> some gender differences could be significant. Females typically have a greater capacity to listen patiently to all of the nuances in conversation, while males tend to be more focused on the core meaning of the message.<sup>61</sup> Moreover, there are innate differences in hearing, as well as seeing, between males and females.<sup>62</sup> Not only is information processed differently,<sup>63</sup> but females actually hear clearer than males because female hearing is more sensitive in ranges that are important in speech discrimination.<sup>64</sup> Being sensitive to such nuances can assist effective communication.

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<sup>57</sup>Lakshmi Balachandra et al., *Improvisation and Teaching Negotiation: Developing Three Essential Skills*, 21 *NEGOT. J.* 435, 439 (2005).

<sup>58</sup>If instead the reverse is done, the adversary will be busy thinking about a response and may not hear one word of explanation.

<sup>59</sup>Examples of communication senses are as follows: "You have a point there" (reason); "I hear you" (ears); "I know exactly what you mean" (reason); "I would feel the same way, too" (feelings); "I'm comfortable with that" (feelings).

<sup>60</sup>See Amy Cohen, *Gender: An (Un)Useful Category of Prescriptive Negotiation Analysis*, 13 *TEX. J. WOMEN & L.* 169 (2003) (discounting the alleged role that gender plays in negotiation communication, style or success); see also Charles B. Craver, *The Impact of Gender on Clinical Negotiating Achievement*, 6 *OHIO ST. J. ON DISP. RESOL.* 1 (1990) (concluding that there were no statistically significant differences in negotiation performance between male and female law students).

<sup>61</sup>DEBORAH TANNEN, *YOU JUST DON'T UNDERSTAND: WOMEN AND MEN IN CONVERSATION* 142 (2001).

<sup>62</sup>LEONARD SAX, *WHY GENDER MATTERS: WHAT PARENTS AND TEACHERS NEED TO KNOW ABOUT THE EMERGING SCIENCE OF SEX DIFFERENCES* 17 (2006).

<sup>63</sup>*Id.* at 20.

<sup>64</sup>*Id.* at 17. One example given is that of a forty-three-year-old man talking to his seventeen-year-old daughter. He thinks he is talking in a normal tone, but she feels he is yelling at her because she experiences his voice as being about ten times louder than what the man is

It is unwise to attempt to negotiate with someone who is angry, as that emotion may shape their perception of information.<sup>65</sup> Instead, acknowledge feelings of anger first and allow emotional dialogue to precede intellectual discussion so that both parties may listen effectively. Other practical tips for affirming the listening process included using your opponent's name as you make eye contact; focusing on issues on which you already agree to build momentum; using the word *yes* for unity, not dichotomy of thought; and speaking only for oneself, thereby acknowledging the other person, his or her authority, and his or her competence.

### 3. Listen for What the Other Person Really Wants to Say, But Doesn't

The third ear involves listening for the essence of things. A useful reminder is to use the "e" and "a" and "r" of "ear": *explore* what is not clear, *acknowledge* what is understood, then *respond*.<sup>66</sup>

A useful listening tool is to capitalize on pauses to enhance communication. Pauses can provide a better idea of what other people are planning to do but are hesitant to express. The negotiator should encourage the expression of what the speaker is hesitant to articulate. Such encouragement is beneficial in two aspects: (1) logically, the negotiator gains a better insight to what the opponent is expressing and (2) emotionally, the negotiator posts a friendly gesture even before the intellectual analysis begins, which usually leads to an agreeable discussion.

Further, often what a person states is usually an imperfect representation of what that person is thinking or trying to articulate. As a result, one listens to what is said, and then makes inferences about what that person is thinking in order to penetrate the thought process behind the words. Communications in negotiations need to cover all important concerns, reveal all issues and interests, and explore likely avenues of mutual gain. Therefore, negotiators must skillfully translate what is being said into what

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hearing. *Id.* at 18. Females see differently than males and are able to read facial expressions better as well. *Id.*

<sup>65</sup>See Clark Freshman et al., *The Lawyer-Negotiator as Mood Scientist: What We Know and Don't Know About How Mood Relates To Successful Negotiation*, 2002 J. DISP. RESOL. 1 (discussing how moods may play a role negotiating).

<sup>66</sup>See JACK CAREW, YOU'LL NEVER GET NO FOR AN ANSWER 51-52 (1987) (describing a selling strategy that involves the communicator to listen, explore, acknowledge and respond "LAER").

the speaker intends to say.<sup>67</sup> To this end, it is sometimes helpful to use a metaphor to describe an indirect meaning.<sup>68</sup>

Real listening involves being receptive to the thoughts, ideas, and emotions of the other, particularly those that are not specifically decided. Negotiators must open the lines of communication and relax.<sup>69</sup> Negotiators may be hired to talk, but first, as professionals, they must listen and listen well.<sup>70</sup> To listen well with the third ear, the mind of the listener must be open, nonjudgmental, and actively concentrated on understanding the other person's message. One of the primary tasks of the listener is to stay out of the speaker's way so the listener can discover how the speaker views the situation. "The true spirit of conversation consists in building on another man's observation, not overturning it."<sup>71</sup>

#### 4. Listen to What You Are Saying to Yourself

The fourth ear involves perhaps the most important part of listening: listening to one's perceptions and the voices from within oneself, the *soul's ear*.<sup>72</sup> This process often involves subconscious concentration with one's informed intuition acting as a coach. Asking questions results in opening an inner space to receive the reply.<sup>73</sup> It is helpful to visualize the space created to process the reply as being similar to the scientific concept of space-time as a large web-like mat. Any large celestial body (a strong preconceived thought or feeling about the subject) exerts such a strong gravitational force that the mat (the space created to process a reply) is greatly warped.<sup>74</sup> A keen observer who

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<sup>67</sup>Mark A. Sargent, *What Does It Take? Hallmarks of the Business Lawyer*, BUS. L. TODAY (July/Aug., 1996), at 11–14 (discussing eight skills that business lawyers need to succeed).

<sup>68</sup>Thomas H. Smith, *Metaphors for Navigating Negotiations*, 21 NEGOT. J. 343, 343–44 (2005).

<sup>69</sup>KEVIN J. MURPHY, EFFECTIVE LISTENING: HOW TO PROFIT BY TUNING INTO THE IDEAS AND SUGGESTIONS OF OTHERS (1992).

<sup>70</sup>Milton W. Zwicker, *What Clients Really Want from their Lawyers*, L. PRACT. MGT, Sept. 1994, at 24.

<sup>71</sup>EDWARD BULWER LYTTON, *THE DUCHESS DE LA VALLIÈRE: A PLAY IN FIVE ACTS* 156 (A.W. Galignani ed., 1836).

<sup>72</sup>SPENCE, *supra* note 55, at 70–71.

<sup>73</sup>PARKER J. PALMER, *THE COURAGE TO TEACH: EXPLORING THE INNER LANDSCAPE OF A TEACHER'S LIFE* 159 (1998).

<sup>74</sup>*See generally* STEPHEN W. HAWKING, *THE UNIVERSE IN A NUTSHELL* (2001) (discussing the theory of relativity).

finds himself steadily repelled by some apparently trifling thing in negotiations is right to give it great weight, as it may provide a clue to the mystery. Remember, “a hair or two will show where a lion is hidden; a very little key will open a very heavy door.”<sup>75</sup>

Typically people seek first to be understood and tend to project their own home movies onto other people’s behavior. They prescribe their own glasses for everyone with whom they interact.<sup>76</sup> Emotion can act as a filter as it hunts for evidence to prove one person wrong and another person right. To counter this tendency, negotiators should hunt for ideas that might prove their own assumptions wrong (as well as those that may prove them right) and experiment with helping an opponent to listen.<sup>77</sup>

Sometimes, while listening, people send strong unintended signals, which can overpower the meaning of what they have just enunciated such as the sighs made by presidential candidate Al Gore in the first debates of the 2000 presidential election.<sup>78</sup> Like the professional interviewer (the listener), who rarely sends any signals except those that are neutral or positive, the successful negotiator must be mindful and control unintended signals, while reading those sent by the adversary.

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<sup>75</sup>CHARLES DICKENS, HUNTED DOWN: A SHORT DETECTIVE STORY, available at <http://www.free-short-stories.org.uk/charles-dickens-hunted%20down-2.htm>.

<sup>76</sup>STEPHEN R. COVEY, SEVEN HABITS OF HIGHLY EFFECTIVE PEOPLE: POWERFUL LESSONS IN PERSONAL CHANGE 239 (1989).

<sup>77</sup>This truism applies outside the negotiation process as well, including doctor–patient communications. A professor at Harvard Medical School acknowledged the critical mistake many doctors make when speaking with patients: “We want to be listened to and in a high-tech age, the key to accurate diagnosis and the best insightful thinking comes from listening and language. The errors that we make in our thinking often come about because we cut off the dialogue. Most physicians interrupt a patient 18 seconds after they start talking.” Nancy Shute, *How Doctors Think*, U.S. NEWS & WORLD REP., Apr. 2, 2007, at 14.

<sup>78</sup>Al Gore explains the effect of the overriding power of his sigh while Bush was speaking:

As a college student, I wrote my senior thesis on the impact of television on the balance of power among the three branches of government. In the study, I pointed out the growing importance of visual rhetoric and body language over logic and reason. There are countless examples of this, but perhaps understandably, the first one that comes to mind is from the 2000 campaign, long before the Supreme Court decision and the hanging chads, when the controversy over my sighs in the first debate with George W. Bush created an impression on television that for many viewers outweighed whatever positive benefits I might have otherwise gained in the verbal combat of ideas and substance. A lot of good that senior thesis did me.

AL GORE, *THE ASSAULT ON REASON* 9 (2007).

Using all four ears to listen to what is being communicated is a powerful strategy.<sup>79</sup> Good listening not only creates relationships, which help the other person listen more intently, but it also allows the negotiator to gather more information before speaking. In addition, good listening skills allow negotiators to detect unspoken feelings and interests that are hidden behind the façade of stated positions. In sum, the negotiator must learn to listen intently when another person is speaking; to uncover what the other person is trying to say or really means; to be receptive to the thoughts, ideas, and emotions of the person speaking; to interpret the message through well-honed instincts; and to avoid sending unintentional signals while listening.

### *B. Component Five: Plan Strategy*

Planning strategy involves focusing on a specific goal as the negotiator uses the power of purpose to prepare, plan, and practice.<sup>80</sup> All three endeavors involve a great paradox. On one hand, they are highly rational and capable of study; yet, on the other hand, all three are driven by nonrational dynamics. In preparing, planning, and practicing, a negotiator should use imagination to anticipate and predict what is needed and set justifiable, yet optimistic, aspirations regarding the outcome.<sup>81</sup> People are usually far more concerned with what is likely to happen in the near and distant future than with what is actually happening in the present. To this end, the negotiator must exclude some alternatives in advance or run the risk of becoming overwhelmed with possibilities.<sup>82</sup> Although planning for the negotiation requires research, it is the process of creating the plan that often is more important than the actual plan. Creating the plan prepares the negotiator to expect the unexpected and to look for patterns in the process. While preparing a strategy involves programming one's set of inner

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<sup>79</sup>See *infra* notes 80–94 and accompanying text for a discussion of strategy planning in general.

<sup>80</sup>See Rodney J. Uphoff, *The Criminal Defense Lawyer as Effective Negotiator: A Systemic Approach*, 2 CLINICAL L. REV. 73 (1995) (discussing the importance of planning, strategizing and reflecting on the process in negotiating plea bargains for criminal defendants).

<sup>81</sup>Andrea Kupfer Schneider, *Aspirations in Negotiation*, 87 MARQ. L. REV. 675, 680 (2004).

<sup>82</sup>In other words, predict what is needed at each point, otherwise there will be far too many alternatives from which to choose. FRANK SMITH, UNDERSTANDING READING: A PSYCHOLINGUISTIC ANALYSIS OF READING AND LEARNING TO READ 24, 58–59 (6th ed. 2004).

signals and prioritizing goals, certain characteristics of effective preparation and practice for negotiation are universal.

First, a key element in planning strategy is to assess the balance of power.<sup>83</sup> This assessment involves not only the actual balance of power between the parties, but, more importantly, each party's perception of that power balance. Power, like beauty, is largely a state of mind. In negotiation, perception is the reality. Sources of strength contribute to the overall balance of power. These include the balance of rewards, balance of punishment for nonreward, balance of legitimacy, balance of commitment, balance of knowledge, balance of competition, balance of uncertainty and courage, balance of time and effort, and balance of bargaining skills.<sup>84</sup>

Second, the element of surprise, while effective in warfare, is not always a good technique in a negotiation. It is important for the other side to recognize a rational pattern to the negotiator's offers and talking points. While it is advisable to have an alternative strategy that will unleash an unexpected fact or higher/lower than anticipated offer on the opposing team, a negotiator's main ally is a reputation for being reasonable. Sometimes negotiators will have good facts on their side, and it will be tempting to use those facts as a nuclear explosion to turn around a negotiation that is not going as planned or to kick start a negotiation that has grown stagnant. This strategy is advisable in certain circumstances, but a negotiator must not fall for this temptation routinely. Using one's best shot only when needed is the most effective tactic.

Third, all information, internal or external, should, whenever possible, be verified.<sup>85</sup> Beware of *selective perception* or the tendency to evaluate information in a way that supports one's own beliefs, assumptions, and self-image. It also is tempting to discount what is not known in favor of what is known, leading to an optimistic overconfidence in one's chances for success. Overvaluing things that are certain, while undervaluing probable or speculative outcomes, can be dangerous.<sup>86</sup> As an information gatherer, the negotiator's focus should be to get the facts straight.

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<sup>83</sup>For an informative on assessing and dealing effectively with imbalances of power in negotiations, see Robert S. Adler & Elliot M. Silverstein, *When David Meets Goliath: Dealing with Power Differentials in Negotiations*, 5 HARV. NEGOT. L. REV. 1 (2000).

<sup>84</sup>GARY BELLOW, LAWYERING PROCESS: NEGOTIATION 22-25 (1981).

<sup>85</sup>HENRY S. KRAMER, GAME, SET, MATCH: WINNING THE NEGOTIATION GAME 33 (2001).

<sup>86</sup>JOHN S. MURRAY ET AL., NEGOTIATION 9, 52 (1996).

Fourth, avoid attacking the opponent's position; instead, try presenting differing interests. An opponent's confidence is largely determined by that opponent's own perception of tolerance for risk. Faced with this situation, one's first response tends to be to adopt a position. However, an opponent may feel less threatened if the conflict is not identity based.<sup>87</sup> Moreover, an opponent wants to feel capable of influencing behavior and is therefore more likely to make concessions when feeling competent. By acknowledging an opponent as being a tough and worthy negotiator, perhaps by coordinating a few concessions on relatively minor issues, it may become possible to induce even greater concessions.<sup>88</sup>

Fifth, never rush the process.<sup>89</sup> Unskilled negotiators place a dysfunctional premium on speed and harbor a psychological uneasiness about wasting time. Certainly time is valuable, and sometimes it is necessary to trade money against time. Some people, however, are far too impatient and do not allow enough time to consummate a deal or to allow the process to work.<sup>90</sup> The trick is not to force a quick answer, but rather to wait patiently for a well-reasoned solution to emerge. A premature decision closes thinking to other alternatives and changes the focus from exploring options to justifying decisions. The negotiator should prepare several alternatives to present—three at a minimum. Only presenting two options could be perceived as an ultimatum. Negotiators should pause before making a proposal (presenting a price change or nonmonetary concession) package it carefully, explain the facts supporting that interpretation of the situation, and finally confidently state the proposition.

At its essence, a negotiation seeks the resolution of a conflict through making and evaluating offers for settlement. The first real offer in adversarial negotiations is often not as important as the first concession because

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<sup>87</sup>Tim Hicks, *Another Look at Identity-Based Conflict: The Roots of Conflict in the Psychology of Consciousness*, 17 *NEGOT. J.* 35, 40 (2001).

<sup>88</sup>MURRAY ET AL., *supra* note 86, at 7, 81, 112. Minor concessions in the beginning can signal a spirit of cooperation. For a discussion of signals, see *infra* notes 114–25.

<sup>89</sup>The negotiation should proceed as necessary, without pressuring for a quick settlement for settlement's sake alone. However, it is often wise to set a time for concluding the discussion as a means of effectively bringing the discussion to an end. If a train leaves at midnight, the passengers must be onboard, yet that reality does not necessarily dictate how preparation for the trip proceeds, nor rush that preparation.

<sup>90</sup>HOWARD RAIFFA ET AL., *NEGOTIATION ANALYSIS: THE SCIENCE AND ART OF COLLABORATIVE DECISION MAKING* 150 (2003).

it indicates who has the least leverage.<sup>91</sup> Sometimes making the first offer can be of tactical advantage because it affords an opportunity to evaluate closely the other side's response. In problem-solving negotiations, competitive or cooperative, making the first offer may influence the adversarial opponent to adopt a joint problem-solving approach.<sup>92</sup> First offers have a powerful effect on the negotiation environment because they pull judgments toward themselves, producing a strong anchoring effect, even among very experienced negotiators.<sup>93</sup> Furthermore, the satisfaction of the adversary often depends on the number and size of concessions extracted. Caution in making the first offer, however, is needed when the adversary has the most information about the subject of the negotiation or relevant market.<sup>94</sup>

The effectiveness of the strategy planned for the negotiation should be examined at the conclusion of the process, when the negotiator reflects on what transpired.<sup>95</sup> Sound strategy planning must be implemented through well-chosen tactics, the subject of the next component.

### *C. Component Six: Anticipate Tactics*

Just as strategy deals with the overall plan of the negotiation, tactics focus on the details, and implement the strategy.<sup>96</sup> The same ingredients are present: time, power, information, and credibility. Experienced negotiators

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<sup>91</sup>Charles Thensted, *Litigation and Less: The Negotiation Alternative*, 59 TUL. L. REV. 76, 127 (1984).

<sup>92</sup>ROBERT M. BASTRESS & JOSEPH D. HARBAUGH, INTERVIEWING, COUNSELING AND NEGOTIATING SKILLS FOR EFFECTIVE REPRESENTATION 493–97 (1990).

<sup>93</sup>For an examination of this anchoring effect, by which the initial value influences the item or claim's worth, see Dan Orr & Chris Guthrie, *Anchoring, Expertise, and Negotiation: New Insights from Meta-Analysis*, 21 OHIO ST. J. DIS. RESOL. 597 (2006).

<sup>94</sup>See Adam D. Galinsky, *Should You Make the First Offer?* NEGOTIATION, July 2004, at 2.

<sup>95</sup>Asking questions such as, “how did the plan compare with what actually transpired during the negotiations?” and “how accurately did the plan anticipate flow of information exchange, pattern of offers and concessions, and final result?” helps to evaluate the session.

<sup>96</sup>There are three strategic dimensions in play concurrently during negotiations: (1) Tactics, which build communication and trust; (2) Deal Design, which creates greater value by dovetailing differences among the parties in a creative way so as to offer value to all sides; and (3) Setup, which involves taking the proper steps before coming to the table, before tactical interplay begins, to insure that the right parties, sequences, issues, and expectations are present at the right time. DAVID A. LAX & JAMES K. SEBENIUS, 3-D NEGOTIATION: POWERFUL TOOLS TO CHANGE THE GAME IN YOUR MOST IMPORTANT DEALS 9–13 (2006).

use tactics to explore the possible existence of, and move toward, a mutually beneficial settlement that all can accept.<sup>97</sup> Negotiations have a sequence: *before, beginning, during, closing, and after.*<sup>98</sup> Different tactics are suitable for these separate stages.

### 1. Before

Before negotiations, plan for the future, look ahead, and anticipate what is likely to happen. Before starting, it is critical to understand the priorities, goals, and values of the persons being represented at the negotiating table. For example, what is their view about short-term economic gain, long-term economic security, and risk taking? Do they share the analysis of a realistic goal for settlement? Then identify the issues and develop an agenda, including the anticipated first offer and possible trade-offs. Next, analyze the position of the other side, their underlying needs, and probable tactics, and develop a strategy to present the position, not to prove its correctness, but to persuade. Finally, determine the timing of initial proposals and concessions, deadlines, ultimatums, consolidation, and closure.

### 2. Beginning

In beginning negotiations, the negotiator must separate exploring alternatives from deciding outcomes.<sup>99</sup> The negotiator should invent options and brainstorm without committing.<sup>100</sup> At the outset, effective negotiating in complex cases requires separating people from the substantive interests. Often negotiators make the mistake of letting personal animosities influence their bargaining.<sup>101</sup> Consider using the start of the session as a fact-

<sup>97</sup>DAVID CHURCHMAN, *NEGOTIATION: PROCESS, TACTICS, THEORY* 6 (1995).

<sup>98</sup>The notion of these five steps in a sequence is not the only way to characterize the progression. Some experts have identified between four and ten steps. Ciochetti, *supra* note 16, at 144–45.

<sup>99</sup>To this end, questions such as “Have you considered?” or “Would you consider?” or “What if . . . .” are helpful in keeping both the conversation and multiple options open.

<sup>100</sup>While generating options may reveal creative solutions such as brainstorming arguably can precipitate less than optimum decision making. See Chris Guthrie, *Panacea or Pandora’s Box?: The Costs of Options in Negotiation*, 88 IOWA L. REV. 60 (2003) (discussing adverse effects of option generation on a negotiator’s decision-making abilities).

<sup>101</sup>Richard Reuben, *Baseball Strike Teaches Legal Lessons*, ABA J., June 1995, at 42 (discussing the need to separate people from the substantive issues in a negotiation).

finding mission in which bits and pieces of information are exchanged casually.<sup>102</sup> The beginning is the time to listen and observe, and not the time for debate; a well-worded question is probably the most effective tool at this stage. It is also important to clarify the capacity of one person to act on behalf of another at the beginning<sup>103</sup> and to discuss each other's perceptions explicitly in a frank, honest manner. Communicating convincingly and willingly assertions, which the adversary would like to hear, can be one of the best tactics available.<sup>104</sup> As the negotiation matures, identify areas less critical and use these issues to begin making concessions.

### 3. During

During the negotiation, one moves with more focus. While the beginning phase involves sparring for advantage and the closing is heavily influenced by time pressures, this middle phase is a time primarily for measured movement, exploring interests behind positions, and developing a reasoned approach. Package concessions with good reasons first so that the opponent will listen carefully, and avoid sizeable concessions early in the negotiation as such a maneuver might falsely raise an opponent's expectations. Listen carefully for offers and hints of offers. Emotions are very effective in negotiating, but keep them under control. Remember also that patience creates a calming, cooperative environment for the resolution of differences and the emergence of successful conclusions. Patience is not a sign of weakness; rather it is leverage that can be used to think critically

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<sup>102</sup>See Janice Nadler, *Rapport in Legal Negotiation: How Small Talk Can Facilitate E-mail Dealmaking*, 9 HARV. NEGOT. L. REV. 223, 250 (2004) (establishing a rapport can engender cooperation and trust).

<sup>103</sup>For example, check the language in the power of attorney or the company resolutions passed by its board of directors to determine extent of an agent's authority to act. See William H. McClendon III, *Louisiana's New Matrimonial Regime Law: Some Aspects of the Effect on Real Estate Practice*, 39 LA. L. REV. 441, 472-73 (1979) (discussing the authority needed for representatives executing property transfers).

<sup>104</sup>In addition to effective two-way communication, Fisher and Ury identified nine other essential elements in a negotiation: interests (positions/needs of the parties); options (range of possibilities); legitimacy (external criteria); relationship (working rapport); commitments (workable and reliable plans); alternatives (including each side's BATNA [Best Alternative to a Negotiated Agreement]); listening, observing (to develop strategy); and framing (the issues). FISHER & URY, *supra* note 21.

about the adversary's position and gain insight into the best resolution for both sides.<sup>105</sup>

#### 4. Closing

Toward the close of the negotiation is the appropriate time to give alternatives, set deadlines for offers to expire, and make the last concession small and conditioned upon agreement. Be conscious of the end of the negotiation approaching because there is less time to correct mistakes. Delay giving monetary figures prematurely and also avoid using rounded numbers; instead, use exact numbers based on calculations. Consider referring to outside criteria to determine amounts, and continue to focus on covering all the details. A negotiator should give reasons for the final offer, be specific, and condition it on settlement. Also, proficient negotiators provide adversaries with sufficiently generous terms in order to insure a sincere acceptance of those terms and a commitment to honor them, since they are cognizant of the natural tendency for persons to experience *buyer's remorse*, about a major decision just after committing it.<sup>106</sup>

#### 5. After

After the negotiation process, it is wise to reflect and to plan how to proceed differently next time. For example, the negotiator should review what factors were most influencing during the negotiation, what were the surprises, what the opponents did that enhanced or weakened their position, and what induced the parties to reach an agreement. The negotiator should contemplate how the little things, repeated over time, form a pattern and make a difference. The debriefing process is a catalyst to accelerate learning and gives the negotiator an opportunity to transform undesirable experiences into a successful educational process. It is also important to recognize that in reality, settlement is less a climatic end to a

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<sup>105</sup>As John Quincy Adams once said, "Patience and perseverance have a magical effect before which difficulties disappear and obstacles vanish." Madison O'Sullivan, *Magical Effect of Perseverance and Patience*, available at <http://ezinearticles.com/?Magical-Effect-of-Perseverance-and-Patience&id=3092137> (last visited June 23, 2010).

<sup>106</sup>Charles Craver, *Impact of Negotiator Styles on Bargaining Interactions*, NEGOTIATOR MAG. (2004), available at <http://www.negotiator magazine.com/showarticle.php?file=article127&page=1>; see also DWIGHT GOLANN, *MEDIATING LEGAL DISPUTES: EFFECTIVE STRATEGIES FOR LAWYERS AND MEDIATORS* (1996) (discussing obstacles to settlement and proposing multiple strategies and tactics for addressing them).

conflict, but rather part of a continuing process in which the agreement must be implemented.<sup>107</sup>

#### *D. Component Seven: Apply Mediation Principles*

Mediation involves the intervention of a third party in the negotiation process. The principles of mediation, nevertheless, can be used very effectively in negotiation involving two parties. Mediation values collaborative, interest-based, or problem-solving skills and is designed to solve a problem rather than to conquer and win, as sometimes characterizes adversarial negotiations.<sup>108</sup> Often the conflict has muddied the lens through which the parties view their problems; therefore, a good mediator wades through the conflicting facts and feelings, unravels the problem, poses alternatives, and leads the parties through all the uncertainty and conflict to a solution. Another goal of mediation, which is valuable in most negotiations as well, is the preservation of relationships. Disputants in business often wish to continue the relationship subsequent to the resolution of their dispute, as an ongoing relationship will further the business interests of both parties.<sup>109</sup> Mediation is more likely than an adversarial proceeding to produce this desirable result.<sup>110</sup>

A mediator is a negotiation facilitator who suspends judgment and helps the parties recognize the value of a mutually satisfactory settlement.<sup>111</sup> Mediation works because of the process, not because of the peo-

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<sup>107</sup>Christopher Honeyman, *The Wrong Mental Image of Settlement*, 17 NEGOT. J. 7, 8, 12 (2001); see also Gerald R. Williams, *Negotiation as a Healing Process*, 1996 J. DISP. RESOL. 1, 42–56 (postulating five steps involved in getting out of a conflict).

<sup>108</sup>See generally Robert Rubinson, *Client Counseling, Mediation, and Alternative Narratives of Dispute Resolution*, 10 CLINICAL L. REV. 833 (2004) (discussing traits of mediation and litigation).

<sup>109</sup>In the event of a breach of contract, “the existence of a valuable relationship between the parties is more likely to facilitate a negotiated resolution of their dispute than if no such relationship exists.” The nonbreaching party may view the relationship with the offending party as being more valuable than the individual claim arising out of the technical failure to honor the contractual provision. See Jeswald W. Salacuse, *Renegotiating Existing Agreements: How to Deal with “Life Struggling Against Form,”* 17 NEGOT. J. 311, 324 (2001).

<sup>110</sup>See John Leo Wagner, *Aggressive ADR?* BUS. L. TODAY, May/June 1999, available at <http://www.abanet.org/buslaw/blt/8-5adr.html> (discussing zealous advocacy, aggressive alternative dispute resolution, and new techniques to deal with problems in reaching a settlement).

<sup>111</sup>For a description of the process and the role of a mediator, see John Burwell Garvey, “*Mediator*” *Is an Action Noun Action Steps for Conducting an Effective Mediation*, 46 N.H.B.J. 7 (2005).

ple involved. The mediator's focus, therefore, is on the process, and on allowing time for the parties to determine the discussion. There are several techniques that assist the mediator in this process, and these skills can assist a negotiator as well.

The mediator uses open-ended, nonthreatening questions that expose facts and feelings, which is the information needed to resolve the conflict. Questions such as "How do you feel about what happened?" open points for discussion and resolution. Moreover, such nonthreatening questions can be very effective to show a willingness to cooperate. Mediators also help the parties to distinguish between positions and interests. Questions can be used to probe the posturing of positions in order to discover true interests and needs.<sup>112</sup>

Bargaining positions may be expressions of hurt, anger, or a desire to punish, as well as hopes for concessions. Usually parties cannot settle a dispute without modifying either the form or content of their original demands. The mediator helps the parties to distinguish their true underlying needs and interests—those things that must take place for the dispute to be settled—from their original desires and to modify their bargaining positions accordingly. As an agreement nears, the mediator, as an agent of reality, increases both party's awareness of the other's needs, and builds a realistic framework within which both parties can assess the costs and benefits of either continuing or resolving the conflict.

To accomplish this objective, mediators reaffirm and clarify the statements made by the parties. Negotiators, like mediators, should reframe, repackage, or restate what the parties assert by saying, "Let me be sure I understand your argument" and then restating the argument as accurately as possible so that assertions are reflected back to the parties for clarification and comprehension. Like mediators, negotiators also should harness the seething passion among the parties to motivate the parties to start building anew. Conflicting passions can be a positive magnetic force, which the negotiator must identify, normalize, and then harness to produce a productive conclusion.<sup>113</sup>

In sum, negotiators benefit from practicing the skills of a mediator, that is, being patient and allowing time for the process to work, using open-ended questions, and probing beneath the surface of ideas ex-

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<sup>112</sup>Questions should be neutral, eliciting information, and nonconfrontational: "When you say you need X, what does it do for you?"

<sup>113</sup>Susan L. Podziba, *The Human Side of Complex Public Policy Mediation*, 19 *NEGOTIATION J.* 285, 288 (2003).

changed to decipher true interests, needs, and solutions, as opposed to attempting to alter a person's position.

#### IV. BEING PERSUASIVE

This section focuses on the last three components: the subtlety of signals in communication, the classical art of persuasion, and on timeless values, the key ingredients of professionalism.

##### *A. Component Eight: Communicate Through Signals*

People see themselves primarily in the light of their intentions, which are invisible to others; on the other hand, they see others mainly in the light of their actions, which are visible, creating a situation in which misunderstanding is the order of the day.<sup>114</sup> Signals sent to other people within the first seven seconds of meeting them often reveal one's hidden agenda.<sup>115</sup> The first two or three minutes of negotiating sets the tone, and gives initial clues to the other side about not only where the negotiator plans to go, but also the way in which the negotiator plans to get there. Remember also that much of communication is nonverbal, and nonverbal mannerisms contribute the impression a person makes.<sup>116</sup> For example, nervousness may indicate the person is not secure in what is being said or that the person is hiding something.<sup>117</sup>

Negotiators should maintain flexibility by communicating through the subtlety of signals and be tuned to signals of the need for emotional distance and perceive warnings not to overstep the other person's personal boundaries.<sup>118</sup> Listen intently to the nuances in words, particularly those

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<sup>114</sup>E.F. SCHUMACHER, *A GUIDE FOR THE PERPLEXED* 84 (1978).

<sup>115</sup>ROGER AILES, *YOU ARE THE MESSAGE* 3–4 (1988).

<sup>116</sup>See ALBERT MEHRABIAN, *SILENT MESSAGES: IMPLICIT COMMUNICATION OF EMOTIONS AND ATTITUDES* 8–39 (1980) (postulating that, instead of speech, metaphors and body language are used to explain actions and convey feelings). Making eye contact is an example of nonverbal communication, and may be appropriate for short intervals, but can be interpreting as being either threatening or attempting to show romantic interest if prolonged. Michael B. McCaskey, *The Hidden Messages Managers Send*, in *HARVARD BUSINESS REVIEW ON EFFECTIVE COMMUNICATION* 136–37 (1999).

<sup>117</sup>Alain Burrese, *Negotiation Theory and Practice: Listen Up*, *MONTANA LAW*, Sept. 2006, at 22.

<sup>118</sup>ROGER FISHER & DANIEL SHAPIRO, *BEYOND REASON: USING EMOTIONS AS YOU NEGOTIATE* 64 (2005).

that are very carefully drafted. For example, the size of each concession, as distinguished from what each side is saying in words, often signals what is to come.

People talk in rhythmic patterns, which is important to the art of persuasion. People demonstrate micromovements, which are gestures, or shifts of the body and face that are harmonized and exhibit a conversational rhythm. Also, when two people talk, their volume and pitch fall into balance, and their speech rate—the number of speech sounds per second—equalizes, as does the period of time that lapses between the moment one speaker stops talking and the moment the other speaker begins. And, like all specialized human traits, some people have much more mastery over this reflex than others; powerful or persuasive personalities can draw others into their rhythms,<sup>119</sup> a talent useful in mediation and negotiations.

Fear can be a signal that is communicated during negotiations. Fear in negotiations arises in a variety of circumstances. If a negotiator faces an aggressive opponent, bargains without adequate preparation, senses that an opponent has superior bargaining power, or feels insecure about ability, it is normal to experience moderate to extreme levels of fear.<sup>120</sup> In controlling emotions, think about metaemotions (the emotion a person has about emotions) because the metaemotion often influences the primary emotion being experienced; for example, a person may be happy, ashamed, or angry about being angry.<sup>121</sup> To communicate more effectively and diffuse negative emotions such as fear and anger, it is useful to consider using a sketch, charts, or drawings to tell the story that must be told. When the brain is weary of its verbal chatter, making a drawing or graph is a way to increase perception of how things are seen and felt.<sup>122</sup>

Also, the use of *constructive ambiguity* can send positive signals when agreement on all details is not possible. By avoiding discussion of specifics, a signal is still sent that a general agreement can be reached. While clarity

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<sup>119</sup>MALCOLM GLADWELL, *THE TIPPING POINT: HOW LITTLE THINGS CAN MAKE A BIG DIFFERENCE* 82–83 (2000).

<sup>120</sup>Robert S. Adler et al., *Emotions in Negotiation: How to Manage Fear and Anger*, 14 *NEGOTIATION J.* 161, 174 (1998).

<sup>121</sup>Tricia S. Jones & Andrea Bodtker, *Mediating with Heart in Mind: Addressing Emotion in Mediation*, 17 *NEGOTIATION J.* 207, 239 (2001).

<sup>122</sup>See BETTY EDWARDS, *DRAWING ON THE RIGHT SIDE OF THE BRAIN* 21–24 (1999) (discussing the expression of oneself through the nonverbal language of art).

and precision in communicating are often good traits, there is a time and place for ambiguity. Ambiguous statements can be used to keep talks going simply because further clarification is needed. In addition, ambiguous demands make face-saving concessions easier, because clarifying an imprecise statement is usually better than having to equivocate after making one that is too precise.<sup>123</sup> Finally, a timeline with an impending deadline is one of the most powerful forces in negotiations.<sup>124</sup> It sends a signal that the force of time and the expectation of a beneficial outcome are in tension. If the negotiation is not time critical, consider trying to reach a mutual agreement to establish an artificial deadline.<sup>125</sup>

### *B. Component Nine: Adopt the Art of Persuasion*

Establishing trust at the beginning of a negotiation builds a relationship, which is critical because it is difficult to negotiate without trust, and trust is essential to successful persuasion.<sup>126</sup> Professionals need trust and must be able to rely on others acting as they say they will act, and vice versa.<sup>127</sup> **The developing of relationships is critical to the art of persuasion in negotiating. That development requires that adversaries be treated with respect, not as an object to be pushed, but rather as a person to be persuaded.**<sup>128</sup> To this end, a negotiator should use a story-telling technique that depends on facts and careful organization, not judgments and opinions; grouping key facts (with the big ideas first) into a series of verbal pictures

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<sup>123</sup>DAVID CHURCHMAN, *NEGOTIATION: PROCESS, TACTICS, THEORY* 48–49 (1995).

<sup>124</sup>While a timeline is not intended to rush the process, it is intended to intensify the immediate effort and the incentive to reach closure.

<sup>125</sup>HENRY S. KRAMER, *GAME, SET, MATCH: WINNING THE NEGOTIATION GAME* 323 (2001).

<sup>126</sup>Aristotle asserts that a speaker's character may be the most effective means of persuasion. "Persuasion is achieved by the speaker's personal character when the speech is so spoken as to make us think him credible. We believe good men more fully and more readily than other: this is true generally whatever the question is, and absolutely true where exact certainty is impossible and opinions are divided." 2 ARISTOTLE, *RHETORIC: COMPLETE WORKS: THE REVISED OXFORD TRANSLATION* 2155 (Jonathan Barnes ed., 1984) (W. Rhys Roberts, trans.).

<sup>127</sup>Onora O'Neill, *Lecture 1: Spreading Suspicion*, The BBC Lecture Series 2002, available at <http://www.bbc.co.uk/radio4/reith2002/lecture1.shtml>.

<sup>128</sup>Respecting the other party as human beings, who are deserving of fundamental dignity, should be an ethical imperative as well. Jonathan R. Cohen, *When People Are the Means: Negotiating with Respect*, 14 *GEO. J. LEGAL ETHICS* 739, 802 (2001).

(word snapshots) allows a negotiator to persuade by showing rather than by telling.<sup>129</sup>

Dialogue is a unique form of discussion because it is a type of conversation in which there is equality, and, in the absence of coercive influences, participants respond with unreserved empathy, and it examines underlying assumptions in the open.<sup>130</sup> It seeks a genuine openness of each party to the concerns of the other, as one person listens and responds to the other person with an authenticity that forges a bond, as distinguished from a negotiating device that seeks to overcome conflict and reach an agreement leading to action.<sup>131</sup> These traits create a powerful potential to persuade. While dialogue creates mutual understanding and a climate conducive to decision making, nothing ruins promising dialogue and undermines decisions more than the failure to keep the two processes separate.<sup>132</sup>

In employing tactics of persuasion, negotiators are wise to consider that reactions to negative and positive consequences are not always equal. People will risk more to avoid loss than to achieve gain. This loss aversion concept explains why people tend to disfavor a loss more than they favor an equivalent gain.<sup>133</sup> People are often unwilling to gamble for an extra margin of safety but demanded huge sums to accept added risk, a behavioral pattern that is not necessarily rational.<sup>134</sup> The art of persuasion often involves more than shaping the other person's perceptions; it also involves

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<sup>129</sup>See James W. McElhaney, *Persuasive Organization*, ABA J., Dec. 2006, available at [http://www.abajournal.com/magazine/article/persuasive\\_organization/](http://www.abajournal.com/magazine/article/persuasive_organization/) (relating an attorney's description of how to present a case logically to the jury); see also SPENCE, *supra* note 55, at 113–34 (discussing story-telling as a strategy for persuasion).

<sup>130</sup>DANIEL YANKOLOVICH, *THE MAGIC OF DIALOGUE: TRANSFORMING CONFLICT INTO COOPERATION* 12 (2001).

<sup>131</sup>*Id.* at 14–15.

<sup>132</sup>*Id.* at 15.

<sup>133</sup>When negotiating a major league baseball contract for a gifted pitcher, the agent chooses not to stress the benefits to be derived from this player but, instead, points out simply that the loss of this player's skill will be "outcome-determinative" to the interested team. Tyler Kepner, *In Bidding for Ace, The Cards Are Held Close to the Vest*, N.Y. TIMES, Nov. 5, 2006, at sec. 8–1.

<sup>134</sup>Justin Fox, *Is the Market Rational? No, Say the Experts. But Neither Are You—So Don't Go Thinking You Can Outsmart It*, FORTUNE, Dec. 9, 2002, available at [http://money.cnn.com/magazines/fortune/fortune\\_archive/2002/12/09/333473/index.htm](http://money.cnn.com/magazines/fortune/fortune_archive/2002/12/09/333473/index.htm) (referencing research by University of Chicago behaviorist Richard Thaler on irrational decision making).

shaping a perception of the available alternatives, for example, with respect to wins and losses.<sup>135</sup> In other words, “Diplomacy is the art of letting someone else have your way.”<sup>136</sup>

### C. Component Ten: Affirm Timeless Values

The last component of effective negotiating supports all prior components and is the critical ingredient found in professionalism: timeless values.<sup>137</sup> These values include courage, loyalty, fair play, tolerance, truthfulness, persistence, and integrity. Timeless values in negotiations determine relationships; create power; and form the very basis for the most important quality, which is trust.

What constitutes a profession is difficult to define comprehensively, but all attempts include reference to a store of special training, knowledge, skills, and to the adoption of ethical standards governing the manner in which these should be employed . . . professionals can be expected to observe something more than the morality of the marketplace. . . . This duty of fairness is one owed to the profession and to society.<sup>138</sup>

Predictably in their professional life, people will be confronted with a request to do something morally wrong, and while they may not get caught, they will sacrifice their self-respect if they choose the immoral path.<sup>139</sup> Many people fail because they are not aware when they have reached the point in which they are still free to act according to reason and core values, and they become aware of this choice only after it is too late for a good outcome.<sup>140</sup>

<sup>135</sup>A psychologist identified six principles of influence that can be used to persuade an adversary to agree to requests, which can be adapted to the negotiation process: liking, social proof, commitment and consistency, reciprocity, authority, and scarcity. Chris Guthrie, *Principles of Influence in Negotiation*, 87 MARQ. L. REV. 829, 830–36 (2004).

<sup>136</sup>Daniel Vare, Italian Diplomat, *quoted in Positive Influence and Effective Negotiation*, Positive Coaching Group, available at <http://www.positivecoach.com/portal/Positive-Influence-and-Effective-Negotiation.html> (last visited June 23, 2010).

<sup>137</sup>“The only thing truly worth envying is peace of mind that comes as a result of having values and adhering to them.” HARRY STEIN, ETHICS [AND OTHER LIABILITIES]: TRYING TO LIVE RIGHT IN AN AMORAL WORLD 75 (1983).

<sup>138</sup>Alvin B. Rubin, *Causerie on Lawyers’ Ethics in Negotiation*, 35 LA. L. REV. 577, 578–79 (1975).

<sup>139</sup>*Professionalism in Practice*, ABA J., Aug. 1998, at 48, 54 (quoting William M. Hoeveler, senior judge of the U.S. District Court in Miami who presided over the Noriega trial).

<sup>140</sup>See ERICH FROMM, THE HEART OF MAN: ITS GENIUS FOR GOOD AND EVIL 133–43 (1964) (discussing how an awareness of good and evil is different from a theoretical knowledge of the

In order to make responsible choices, individuals must seek an inner freedom so as not to be overly influenced by subconscious motivations that unknowingly could direct decisions. A sound value system is the best defense against this possibility.<sup>141</sup> Values must control emotional reactions. Frequently one's reasoning tends to support (and not challenge) goals that spring from emotions, and emotions and feelings tend to override one's reason.<sup>142</sup> Unless emotions commit to the goals set by one's intellect, it is unlikely they will be accomplished; therefore, the best intellectual strategy for counteracting a possible veto by emotions is to couple a strong emotional desire to one's intellectual desire through a strong commitment to timeless values.<sup>143</sup>

At its essence the true goal is not just to be a good negotiator who is trying to be a moral person, but to be a moral person who is trying to be a good negotiator. The root of the word professionalism means to profess, to affirm, to validate, to confirm.<sup>144</sup> The primary role of a professional, therefore, is to care and to find a way to communicate that feeling.<sup>145</sup> A famous psychologist postulates that networks of individual nodes are connected via complex but understandable relationships and that any two people are connected in a social network within six degrees of separation.<sup>146</sup> It follows, therefore, that the reputation of negotiators will precede them with amazing speed, and caution must be taken with respect to that

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difference, and how freedom lies in choosing between alternatives based upon an awareness of alternatives and their consequences). Consider the recent imprisonment of the prosecutor in the Medgar Evers' murder trial in Mississippi for obstruction of justice. Wayne Drash, *Civil Rights Hero Caught in Corruption Probe to Begin Serving Sentence*, available at <http://www.cnn.com/2010/CRIME/01/04/mississippi.medgar.evers.prosecutor/index.html> (last visited June 23, 2010).

<sup>141</sup>PIERRE WOLFF, *DISCERNMENT: THE ART OF CHOOSING WELL* 6, 15 (2000).

<sup>142</sup>WILLIAM B. IRVINE, *ON DESIRE: WHY WE WANT WHAT WE WANT* 240–41, 284–85 (2006).

<sup>143</sup>*Id.* at 73–76, 116. Arguably, strong emotional desires are the result of the evolutionary process of natural selection, which preserves traits needed for survival, such that reasoning has a tendency to support (rather than question, contradict, or challenge) the goals set by emotional desires. This effect can result in misjudgment because the mind and reason operate behind a distorting and accommodating lens of emotion. People think they are making good, sound decisions based on a well-reasoned process, but the truth often is that people have fooled themselves. *Id.* at 104. See also WOLFF, *supra* note 141, at 62.

<sup>144</sup>Merrilyn Astin Tarlton, *10 Ways to Build Productive Relationships with Your Clients*, L. PRACT. MGMT., July/Aug. 1997, at 44.

<sup>145</sup>*Id.*

<sup>146</sup>ALBERT-LÁSZLÓ BARABÁSI, *LINKED: THE NEW SCIENCE OF NETWORKS* 27–30 (2002) (describing Professor Milgram's experiment).

fact.<sup>147</sup> This last component of effective negotiating requires the affirmation of timeless values, a critical ingredient needed to withstand successfully professional challenges. As President Obama declared, “Our challenges may be new. The instruments with which we meet them may be new. But those values upon which our success depends—honesty and hard work, courage and fair play, tolerance and curiosity, loyalty and patriotism—these things are old. These things are true.”<sup>148</sup>

## V. CONCLUSION

In the midst of the Cold War President Kennedy suggested that negotiation, not confrontation, was a wise course and that civil resolution was not a sign of weakness, but must be characterized by sincerity of effort, that is, by professionalism. President Obama in his inaugural address admonished that timeless values be treasured and kept sacred. Negotiation, a routine method of reaching settlement of disputes, can be simulated in undergraduate and graduate law courses to teach ethical practices and principles.<sup>149</sup> Negotiation exercises also develop a deeper level of understanding of the actual law involved in the conflict and introduce students to a set of life skills, which can be employed in countless business and personal situations.<sup>150</sup>

This article presents an instructional module for professors to share with students and to assist them in understanding the negotiation process.

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<sup>147</sup>A reputation for questionable behavior would make it difficult, if not impossible, to transact future business with their adversaries and jeopardize long-term professional relationships. Charles B. Craver, *Negotiation Ethics: How to Be Deceptive Without Being Dishonest/How to Be Assertive Without Being Offensive*, 38 S. TEX. L. REV. 713, 733 (1997).

<sup>148</sup>Inaugural Address of President Barack H. Obama, *All This We Will Do*, N.Y. TIMES, Jan. 21, 2009, available at <http://www.nytimes.com/2009/01/20/us/politics/20text-obama.html?page-wanted=3>.

<sup>149</sup>“[T]he task of learning and experimenting with negotiating techniques provides fertile ground for moral discourse.” Marjorie L. Girth, *Facing Ethical Issues with Law Students in an Adversary Context*, 21 GA. ST. U.L. REV. 593, 599 (2005).

<sup>150</sup>By negotiating one or more terms of a contract, students become aware of the complexity of substantive legal concepts and the professor creates an active learning environment, where students learn by doing rather than by thinking and talking abstractly. Carol Chomsky & Maury Landsend, *Using Contracts to Teach Practical Skills: Introducing Negotiation and Drafting into the Contracts Classroom*, 44 ST. LOUIS L.J. 1545, 1546 (2000).

It describes effective negotiation as the coalescence of two forces. One force is focused upon a disciplined toughness, a determined will and a skill set that permits the negotiator to assess the situation and to outthink the adversary. The other force is focused on the timeless values of integrity, civility, loyalty, truthfulness, and compassion. Together these forces illustrate the dynamic tension that exists between the ethical force of professionalism and the competitive force of the negotiator mindset. The subsequent appendix provides a sample negotiation with validation exercises that lead the student to practice and to reflect on this dynamic tension and the ten basic components of negotiation proposed in this paper.

## APPENDIX: NEGOTIATION EXERCISE

### **Endorsement Contracts and Morals Clauses**

#### I. OVERVIEW

A negotiation exercise provides students with the opportunity to experience and to practice developing negotiation skills and to reflect on the process. While role plays are an excellent way to get students involved in the learning process, it is important for instructors to clearly articulate their expectations of the students and the procedures to be followed. This particular exercise focuses on the negotiation of various clauses in an endorsement contract, including a morals clause and an early exit clause. Instructors also may include an assignment that requires students to research morals and early exit clauses and to find examples in preparation for the exercise so that it serves not only to develop a skill set, but also to reinforce substantive principles of contract law.

Contractual provisions that focus on the behavior of celebrity spokespersons or professional athletes are an integral component in endorsement and sport contracts.<sup>151</sup> Such clauses are important because revelations that an endorser has drug or alcohol issues, domestic violence concerns, or is engaged in criminal activity can have far-reaching financial impacts on a com-

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<sup>151</sup>Daniel Auerbach, *Morals Clauses as Corporate Protection in Athlete Endorsement Contracts*, available at [http://www.law.depaul.edu/students/organizations\\_journals/student\\_orgs/lawslj/Volume%203,%20Issue%201/Auerbach%20Morals%20Clause.pdf](http://www.law.depaul.edu/students/organizations_journals/student_orgs/lawslj/Volume%203,%20Issue%201/Auerbach%20Morals%20Clause.pdf) (last visited June 23, 2010).