

WHAT MAKES A GREAT LEGAL NEGOTIATOR?¹

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I. INTRODUCTION

Lawyers negotiate repeatedly, even when they do not appreciate the fact they are involved with bargaining interactions. They negotiate with their own partners, associates, and legal assistants, and with their own prospective and current clients. They also negotiate with others on behalf of their own clients. Most legal practitioners have had no formal training in this critical lawyering skill, and few studies have sought to determine the traits possessed by proficient legal negotiators.

Over the past thirty-five years, I have taught legal negotiating skills to several thousand law students and to over 85,000 legal practitioners. I teach a full semester three credit hour Legal Negotiation course each fall and an intensive one credit hour course each spring which meets on four consecutive Fridays from 9:30 am until 1:00 pm. Students in the three hour class are assigned readings from my *Effective Legal Negotiation* book,³ while the students in the intensive course are assigned readings from my *Skills & Values* book.⁴ In both classes, we explore the impact of different negotiator styles: the cooperative/problem-solving approach; the competitive/adversarial approach;

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³ CHARLES B. CRAVER, *EFFECTIVE LEGAL NEGOTIATION AND SETTLEMENT* (6th ed. 2009 LEXIS).

⁴ CHARLES B. CRAVER, *SKILLS & VALUES: LEGAL NEGOTIATING* (2009 LEXIS).

and the hybrid competitive/problem-solving approach. We examine the six stages of the negotiation process: preparation; the establishment of negotiator relationships and the tone for interactions; the information exchange; value claiming during the distributive stage; value maximizing during the cooperative stage; and value solidifying during the closing stage. We discuss verbal and nonverbal communication, and the different negotiation techniques lawyers are likely to employ or encounter. We focus on specific negotiation issues, such as the way to commence bargaining talks, telephone and e-mail interactions, and private sector and governmental dealings. Public and private transnational negotiations are considered. The use of mediation assistance to facilitate advocate interactions is explored. The significant ethical issues associated with bargaining transactions are thoroughly examined.

Students engage in a series of negotiation exercises designed to demonstrate the different concepts being taught and to show them how differently students evaluate and resolve identical bargaining situations. Their negotiation results do not vary by ten or fifteen percent, but by ten, fifteen, or even fifty fold! In the one credit hour intensive class, all of the students are graded on a credit/no-credit basis, thus the exercises do not affect their course grades. In the full semester three credit hour class, however, some of their bargaining results do influence final grades.

The initial three or four exercises in the full semester class are designed to introduce students to the negotiation process, while the following six affect their final course grades.⁵ Students are told in their respective Confidential Information pages

⁵ Students are assigned different opponents for each of the graded exercises. Some of these exercises are conducted on a one-on-one basis, while others are conducted on a

exactly how they will be evaluated if they reach agreements and if they fail to do so. Specific points are assigned to each issue to be addressed, reflecting client value systems. Most exercises involve several issues, some of which are valued quite differently by the two sides to demonstrate how students should employ integrative techniques to achieve efficient terms that maximize their joint returns. Other issues (*e.g.*, money) are highly desired by both sides, with the negotiators employing distributive tactics to claim as much of these items as they can.

At the conclusion of each graded exercise, the results on each side are ranked from high to low, with these rank order placement scores accounting for two-thirds of final grades.⁶ Students are also required to prepare ten to fifteen page papers analyzing their bargaining experiences during the semester, with their paper scores being added to their negotiation placement scores.

Students who feel uncomfortable with the fact their negotiation exercise results will affect their course grades are encouraged to take the class on a credit/no-credit basis. The individuals who select the pass/fail option perform substantially less well on the negotiation exercises than the students who take the course for letter grades.⁷ They are guaranteed credits if they do the assigned work, and they do not work as diligently on the exercises as the students who are concerned about their final grades.

two-on-two basis to introduce students to the reality that they may find it more difficult to negotiate with the persons on their own side than with opposing parties.

⁶ The lowest placement score for each student is discarded, with the total of the other five graded exercises being added together to affect final grades.

⁷ See Charles B. Craver, *The Impact of a Pass/Fail Option on Negotiation Course Performance*, 48 J. LEGAL EDUC. 176 (1998).

During the many years I have taught Legal Negotiation courses, I have tried to determine what factors are possessed by the more proficient negotiators. Are better students more effective negotiators? Do persons with higher emotional intelligence achieve more advantageous results than those with lower emotional intelligence? Are there differences based upon the race or gender of the negotiators?

In this article, I will initially discuss the factors that have not had an empirical impact upon negotiation performance. I will indicate why these factors are not significant. I will then explore the factors that do influence bargaining outcomes, and explain why these factors have such an impact.

II. NON-SIGNIFICANT FACTORS

A. Student Grade Point Averages and Emotional Intelligence

Are better students able to achieve better results on negotiation exercises than less successful students? Negotiators who consistently obtain above-average results are usually well prepared individuals who can forcefully advance their positions. They logically analyze the relevant factual circumstances and operative legal principles to determine the optimal results attainable through the bargaining process. They comprehend the negotiation process, they know how to read verbal and nonverbal signals, and they appreciate the different psychological factors that influence the decision-making of most persons. They know that if they begin with opening offers that are rationally defensible but which favor their own side, these positions are likely to “anchor” the discussions and induce less prepared opponents to begin to think they will

have to pay more or accept less than they initially thought.⁸ They try to frame their offers as gains to their opponents, recognizing the fact that people facing certain *gains* and the possibility of greater gains or no gains tend to be risk averse to be sure they obtain the clear gain, while persons facing sure *losses* and the possibility of greater losses or no losses tend to be risk taking, trying to avoid any losses.⁹

Since students who perform well academically are normally thought to prepare carefully, thoughtfully apply legal doctrines to stated facts, and logically articulate their thoughts, one might suspect that there would be some positive correlation between overall law school performance (*i.e.*, student GPAs) and the results they achieve on negotiation exercises. In two separate statistical analyses, however, I found absolutely no statistically significant correlation between student GPAs and the results they attained on my course exercises.¹⁰

Students who perform well on traditional law school examinations tend to possess high abstract reasoning skills. They learn the relevant legal doctrines and know how to apply those principles to hypothetical fact patterns in a purely theoretical manner.

⁸ See Russell Korobkin & Joseph Doherty, *Who Wins in Settlement Negotiations?* 11 AMER. L. & ECON. REV. 162, 177-78 (2009); DAVID A. LAX & JAMES K. SEBENIUS, 3-D NEGOTIATION 187-89 (2006); Adam Galinsky & Thomas Mussweiler, *First Offers as Anchors: The Role of Perspective Taking and Negotiator Focus*, 83 J. PERSONALITY & SOC. PSYCH. 657 (2001).

⁹ See Russell Korobkin, *Psychological Impediments to Mediation Success: Theory and Practice*, 21 OHIO ST. J. DISP. RES. 281, 308-312 (2006); Christopher Guthrie, *Prospect Theory, Risk Preference, and the Law*, 97 NW. U. L. REV. 1115, 1117-1127 (2003).

¹⁰ See Charles B. Craver, *The Impact of Student GPAs and a Pass/Fail Option on Clinical Negotiation Course Performance*, 15 OHIO ST. J. DISP. RES. 373, 380-384 (2000); Charles B. Craver, *Clinical Negotiating Achievement as a Function of Traditional Law School Success and as a Predictor of Future Negotiating Performance*, 1986 MO. J. DISP. RES. 63, 65-67 (1986).

Proficient negotiators, on the other hand, possess good interpersonal skills. They know how to “read” other people and how to persuade others to give them what they want to achieve. These particular attributes concern what Daniel Goleman has characterized as “emotional intelligence.”¹¹

Over the past several years, I have been working with Dr. Allison Abbe, a social psychologist, to study the impact of emotional intelligence on the negotiation performance. Although our study is not complete, our preliminary analyses have found no significant correlation between student emotional intelligence scores and their negotiation performance. These findings would suggest that far more than the ability to understand and express our own emotions and to discern and respond effectively to the emotional states of others is critical when we negotiate with other persons.

B. Race & Gender

Individuals from different ethnic backgrounds bring certain stereotypical baggage into their interactions with others. It is amazing how many common characteristics – positive, negative, and neutral – are attributed by many persons to individuals of a particular race. Andrea Rich’s study of the perceptions of UCLA students in the early 1970s graphically demonstrated the similarities between Caucasian and Chicano stereotypes of African-Americans, between Caucasian and African-American stereotypes of Chicanos, and between African-American and Chicano stereotypes of Caucasians.¹²

¹¹ See DANEIL GOLEMAN, *EMOTIONAL INTELLIGENCE* (1995). See generally JOSEPH CIARROCHI, JOSEPH P. FORGAS & JOHN D. MAYER, eds., *EMOTIONAL INTELLIGENCE IN EVERYDAY LIFE* (2d ed. 2006); REUVEN BARON & JAMES D.A. PARKER, eds., *THE HANDBOOK OF EMOTIONAL INTELLIGENCE* (2000).

¹² See ANDREA L. RICH, *INTERRACIAL COMMUNICATION* 51-62 (1974).

Students I have taught over the past thirty-five years have often allowed their stereotypical beliefs to influence their bargaining encounters. Many of my students, regardless of their ethnicity, think that Caucasian males are the most Machiavellian and competitive negotiators. They expect these men to employ adversarial and manipulative tactics to obtain optimal results for themselves. On the other hand, many students expect African-American, Asian-American, and Hispanic-American negotiators to be more accommodating and less competitive. Even members of one race often stereotype other members of the same race.

I recall one time when four African-American students were randomly assigned to negotiate against each other in a two-on-two interaction. They initially put their opening offers on the table, but got no further during their first meeting. They met again, but neither side was willing to move from its original position. They met a third time without any movement, resulting in a nonsettlement. When we discussed the situation in class, they tried to articulate different reasons for their impasse. At one point, I asked one of the students if they thought the other side should have made the first concession. He responded affirmatively, indicating that as African-Americans they should have been less competitive and more flexible!

Despite the unreliability of many stereotypical beliefs regarding race and the absence of more recent explorations of this topic, several empirical studies have found a few relevant differences between Black and White interactants. African-Americans tend to be higher in terms of Interpersonal Orientation (IO).¹³ High IO individuals are more

¹³ See JEFFREY Z. RUBIN & BERT R. BROWN, *THE SOCIAL PSYCHOLOGY OF BARGAINING AND NEGOTIATION* 164 (1975).

sensitive and responsive to the interpersonal aspects of their relationships with others.¹⁴ Since bargaining outcomes are directly affected by the interpersonal skills of the participants, high IO persons should be able to achieve better results than their lower IO cohorts.

During verbal exchanges, Blacks tend to speak more forcefully and with greater verbal aggressiveness than Whites.¹⁵ In competitive settings, this trait might enhance the bargaining effectiveness of individuals possessing these traits, while in cooperative situations it might undermine their ability to achieve mutual accords. When they interact with others, Blacks tend to make less eye contact while listening to others than do Whites, which may be perceived by speakers as an indication of indifference to what is being said or of disrespect toward the speaker.¹⁶ Such behavior might undermine the ability of the persons with minimal eye contact to establish the kind of rapport that can advance bargaining discussions.

In my study, I compared the negotiation results achieved over a nine year period by Black and White students in my Legal Negotiation class. I did not find a statistically significant difference for a single year or for the combined data. These results indicate that participant race does not affect negotiator performance.

¹⁴ *See id.* at 158.

¹⁵ *See* Martin N. Davidson & Leonard Greenhalgh, *The Role of Emotion in Negotiation: The Impact of Anger and Race*, 7 RESEARCH ON NEGOTIATION IN ORGANIZATIONS 3, 22 (1999).

¹⁶ *See* ROBERT G. HARPER, ARTHUR N. WEINS & JOSEPH D. MATARAZZO, NONVERBAL COMMUNICATION: THE STATE OF THE ART 188 (1978).

Some attorneys allow gender-based stereotypes to influence their bargaining interactions with lawyers of the opposite sex.¹⁷ Men frequently expect women to behave like “ladies.” As a result, overt aggressiveness that would be characterized as vigorous advocacy if engaged in by men may be characterized as offensive if carried out by females.¹⁸ Males who would quickly counter aggressive tactics by male opponents with their own tough responses may find it difficult to employ retaliatory responses to “ladies.” When they modify their usual negotiating behavior in this manner due to the gender of their opponents, they provide such persons with an inherent bargaining advantage.

Empirical studies have found that male and female subjects do not actually behave the same way in competitive situations. Women tend to be initially more trusting and trustworthy than men, but they are less willing to forgive violations of their trust than males.¹⁹ Men tend to establish higher aspirations than women in identical bargaining situations, often enabling the men to obtain more beneficial results.²⁰

It has been suggested that women are more likely than men to avoid overtly competitive situations. Females are apprehensive regarding the negative consequences they associate with competitive achievement, because they believe that competitive

¹⁷ See generally DEBORAH M. KOLB & JUDITH WILLIAMS, *EVERYDAY NEGOTIATION* (2003); DEBORAH M. KOLB & JUDITH WILLIAMS, *THE SHADOW NEGOTIATION* (2000).

¹⁸ See LINDA BABCOCK & SARA LASCHEVER, *ASK FOR IT* 256-58 (2008).

¹⁹ See LEE E. MILLER & JESSICA MILLER, *A WOMAN’S GUIDE TO SUCCESSFUL NEGOTIATING* 42-45 (2002).

²⁰ See Laura Kray & Linda Babcock, *Gender in Negotiations: A Motivated Social Cognitive Analysis* in *NEGOTIATION THEORY AND RESEARCH* 203, 205 (L. Thompson, ed., 2006).

success will alienate them from others.²¹ Males in my Legal Negotiation course have occasionally indicated that they are so fearful of being embarrassed by women opponents that they would prefer nonsettlements to agreements clearly favoring their female opponents.²²

Men tend to exhibit more confidence than women in performance-oriented settings.²³ Even when minimally prepared, men think they can “wing it” and get through successfully, while thoroughly prepared women tend to feel unprepared.²⁴ I often observe this distinction among my Legal Negotiation students. Successful males think they can achieve beneficial results in any setting, while successful females continue to express doubts about their own capabilities.

Male confidence may explain why men like to negotiate more than women,²⁵ and why they tend to seek more beneficial results than their female cohorts.²⁶ When men bargain, they tend to use more forceful language and exhibit more dominant nonverbal

²¹ See BABCOCK & LASCHEVER, *supra* note 18, at 32; LINDA BABCOCK & SARA LASCHEVER, *WOMEN DON'T ASK* 102-103 (2003).

²² See MILLER & MILLER, *supra* note 19, at 132.

²³ See Muriel Niederle & Lise Vesterlund, *Gender Differences in Competition*, 24 *NEGOT. J.* 447, 450-456 (2008).

²⁴ See GAIL EVANS, *PLAY LIKE A MAN, WIN LIKE A WOMAN* 84-85, 90-91 (2000); Peggy McIntosh, *Feeling like a Fraud* (Wellesley Centers for Women 1985, 1989 & (2000).

²⁵ See Deborah Small, Michele Gelfand, Linda Babcock & Hilary Gettman, *Who Goes to the Bargaining Table? Understanding Gender Variation in the Initiation of Negotiation*, 93 *J. PERSONALITY & SOCIAL PSYCH.* 600 (2007).

²⁶ See BABCOCK & LASCHEVER, *supra* note 18, 146-47; BABCOCK & LASCHEVER, *supra* note 21, at 130-35, 140-41.

signals (*e.g.*, intense eye contact and louder voices) than females.²⁷ These gender differences may explain why women experience greater anxiety when they negotiate than males.²⁸

During bargaining interactions, men tend to use “highly intensive language” to persuade others, and they are more effective employing this approach.²⁹ Women are more likely to employ less intensive language, and are more effective using this approach.³⁰ On the other hand, women tend to be more sensitive to verbal leaks and to nonverbal signals than their male cohorts, which can be highly beneficial when people negotiate.³¹

Men and women differ with respect to their views of appropriate bargaining outcomes. Women tend to favor “equal” exchanges, while men tend to favor “equitable” distributions.³² These predispositional differences might induce female negotiators to accept equal results despite their possession of greater bargaining strength than their opponents, while male bargainers seek results that reflect the relevant power imbalances. On the other hand, when women are asked to negotiate on behalf of others, instead of for

²⁷ See BABCOCK & LASCHEVER, *supra* note 21, at 105.

²⁸ See *id.* at 113-14.

²⁹ See Michael Burgoon, James P. Dillard & Noel Doran, *Friendly or Unfriendly Persuasion: The Effects of Violations of Expectations by Males and Females*, 10 HUMAN COMMUNICATION RESEARCH 283, 284, 292 (1983).

³⁰ See L.L. Carli, *Gender and Social Influence*, 57 J. SOCIAL ISSUES 725, 732-36 (2001).

³¹ See ALLAN PEASE & BARBARA PEASE, *THE DEFINITIVE BOOK OF BODY LANGUAGE* 13-14 (2006); LEIGH THOMPSON, *THE MIND AND HEART OF THE NEGOTIATOR* 341 (3d ed. 2005).

³² See Catherine C. Eckel, Angela C.M. de Oliveira & Philip Grossman, *Gender and Negotiation in the Small: Are Women (Perceived to Be) More Cooperative Than Men?* 24 NEGOT. J. 429, 441 (2008).

themselves, they work more diligently to obtain optimal results for the persons they represent.³³

When they interact with others, men are expected to be more rational and objective than women, while women are expected to focus more on relationships than men.³⁴ Men tend to define themselves by their achievements, while women tend to define themselves by their relationships.³⁵ This factor could beneficially affect women when they interact regularly with the same persons, because those opponents may look forward to repeat exchanges due to the relationships that have been established and maintained. This factor might also induce women to focus more on the process of bargaining exchanges than their male cohorts, inducing their adversaries to enjoy interacting with them.

Professor Kay Deaux previously warned that predictions about performance based upon stereotypical beliefs pertaining to males and females are likely to be of limited validity in most settings.

[D]espite the persistence of stereotypes, the studies of social behavior suggest that there are relatively few characteristics in which men and women consistently differ. Men and women both seem to be capable of being aggressive, helpful, and alternatively cooperative and competitive. In other words, there is little evidence that the nature of women and men is so inherently different that we are justified in

³³ See Hannah Riles Bowles, Linda Babcock & Kathleen McGinn, *Constraints and Triggers: Situational Mechanics of Gender in Negotiation*, 89 J. PERSONALITY & SOCIAL PSYCH. 951, 958-962 (2005).

³⁴ See Laura Kray & Linda Babcock, *Gender in Negotiations: A Motivated Social Cognitive Analysis* in NEGOTIATION THEORY AND RESEARCH 203, 206-07 (Leigh L. Thompson, ed., 2006).

³⁵ See Deborah Kolb & L. Putnam, *Negotiation Through a Gender Lens* in THE HANDBOOK OF DISPUTE RESOLUTION 135, 137 (M. Moffitt & R. Bordone, eds., 2005); BABCOCK & LASCHEVER, *supra* note 21, at 117 (2003).

making stereotyped generalizations.³⁶

A number of years ago, I compared the negotiation results achieved over fifteen years by male and female students in my Legal Negotiation classes. There was not a single year for which the average results achieved by men were statistically different from the results obtained by women at the 0.05 level of significance.³⁷ In 1999, David Barnes and I made the same statistical comparison covering the thirteen years I had been teaching at George Washington University, and we again found no statistically meaningful differences with respect to the negotiation results achieved by male and female students.³⁸

III. RELEVANT FACTORS

A. Negotiator Styles

Most Negotiation courses and negotiation books describe two basic negotiation styles: Cooperative/Problem-Solving and Competitive/Adversarial.³⁹ The Cooperative/Problem-Solving style is generally characterized as “win-win,” while the Competitive/Adversarial style is described as “win-lose.” The vast majority of academics believe that the Cooperative/Problem-Solving approach represents the optimal way to negotiate. They maintain that this style preserves bargainer relationships while generating

³⁶ See KAY DEAUX, *THE BEHAVIOR OF WOMEN AND MEN* 144 (1976).

³⁷ See Charles B. Craver, *The Impact of Gender on Clinical Negotiating Achievement*, 6 OHIO ST. J. DISP. RES. 1, 12-16 & Table 1 (1990).

³⁸ See Charles B. Craver & David W. Barnes, *Gender, Risk Taking, and Negotiation Performance*, 5 MICH. J. GENDER & LAW 299, 339-344 (1999).

³⁹ See Keith Allred, *Distinguishing Best and Strategic Practices: A Framework for Managing the Dilemma Between Creating and Claiming Value*, 16 NEG. J. 387 (2000).

mutually efficient agreements. Many teachers assign higher course grades to students who appear to employ this approach.

The two most extensive studies of lawyer negotiating styles were conducted among Phoenix lawyers by Gerald Williams in 1976⁴⁰ and among lawyers in Milwaukee and Chicago by Andrea Schneider in 1999.⁴¹ Professors Williams and Schneider asked attorneys to describe the style of lawyers with whom they had recently interacted, and to indicate whether they considered those persons to be “effective,” “average,” or “ineffective” negotiators. Both found that far more Cooperative/ Problem-Solvers are considered by their peers to be effective negotiators than are Competitive/Adversarial. When the responses of effective Cooperative/ Problem-Solvers and effective Competitive/Adversarial are compared, however, it appears that many effective negotiators who are characterized as Cooperative/Problem-Solvers are really wolves in sheepskin. They effectively combine the optimal characteristics associated with both styles.

Cooperative/ Problem-Solvers are negotiators who: move psychologically *toward* their opponents; try to maximize the *joint returns* achieved; behave in a courteous and professional manner; begin with reasonable opening positions; seek reasonable and fair results; maximize the disclosure of information; use objective criteria to guide the discussions; and are open, trusting, and try to reason with their opponents.⁴²

⁴⁰ See GERALD R. WILLIAMS, *LEGAL NEGOTIATION AND SETTLEMENT* (1983).

⁴¹ See Andrea Kupfer Schneider, *Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Styles*, 7 HARV. NEG. L. REV. 143 (2002).

⁴² See WILLIAMS, *supra* note 40, at 53.

Competitive/Adversarial negotiators are persons who: move psychologically *against* their opponents; try to maximize their *own side* returns; behave in an adversarial manner; begin with more extreme positions; seek one-sided results favoring their *own side*; focus on their own positions rather than neutral standards; and are less open, less trusting, and manipulative.⁴³

Williams and Schneider found that about two-thirds of attorneys are considered by their peers to be Cooperative/Problem-Solvers, while about one-third are considered to be Competitive/Adversarial. Although they both found over half of Cooperative/Problem-Solvers to be effective negotiators, they found from ten to twenty-five percent of Competitive/Adversarial to be effective.⁴⁴ At the other end, while only three to four percent of Cooperative/Problem-Solvers are considered to be ineffective negotiators, from one-third to over one-half of Competitive/Adversarial are placed in this category.⁴⁵

Williams and Schneider asked the effective negotiators from both groups to indicate the factors they consider important to their success. Proficient Competitive-Adversarial and Cooperative/Problem-Solver negotiators are thoroughly prepared and are good readers of other people.⁴⁶ The effective negotiators from both groups shared another critical trait: the desire to maximize their *own side's* returns. This is the quintessential attribute of competitive negotiators, and it was cited as the primary objective of effective

⁴³ See *id.* at 48-49.

⁴⁴ See *id.* at 19; Schneider, *supra* note 41, at 167.

⁴⁵ See WILLIAMS, *supra* note 40, at 19; Schneider, *supra* note 41, at 167.

⁴⁶ See WILLIAMS, *supra* note 40, at 20-30; Schneider, *supra* note 41, at 188.

Competitive/Adversarial.⁴⁷ Surprisingly, lawyers characterized as effective Cooperative/Problem-Solvers indicated that their second objective – following ethical conduct – was the maximization of their *own side's* returns.⁴⁸ This factor would suggest that many effective negotiators who are considered to be Cooperative/Problem-Solvers are actually hybrids – they are Competitive/Problem-Solvers. Their primary objective is the maximization of their *own side's* returns, but their secondary goal is the maximization of the *joint returns* achieved by the parties. This negotiation approach is what Ronald Shapiro and Mark Jankowski describe as “**WIN-win**: big win for your side, little win for theirs.”⁴⁹

Competitive/Problem-Solving negotiators appreciate the fact the overtly “win-lose” style employed by Competitive/Adversarial interactors is often ineffective. The imposition of poor terms on their opponents does not necessarily benefit their own side. These negotiators recognize that by maximizing the joint returns achieved by bargaining parties they are more likely to obtain the best terms for their own clients. Although they work to manipulate opponent perceptions by over- or under-stating the actual values associated with specific items (*i.e.*, they puff and embellish), they rarely resort to truly deceitful tactics.⁵⁰ They appreciate the fact that the loss of credibility that might result

⁴⁷ See WILLAIMS, *supra* note 40, at 23; Schneider, *supra* note 41, at 188.

⁴⁸ See WILLAIMS, *supra* note 40, at 20; Schneider, *supra* note 41, at 188.

⁴⁹ RONALD M. SHAPIRO & MARK A. JANKOWSKI, THE POWER OF NICE 5 (2001) (emphasis in original).

⁵⁰ Although Model Rule 4.1 proscribes the knowing misrepresentation of material law or fact by lawyers, Comment 2 specifically recognizes that in the negotiation context different expectations are involved. As a result, statements concerning client values and settlement intentions do not constitute “material” fact within the meaning of Rule 4.1 See

from overt misrepresentations would significantly undermine their ability to achieve the beneficial results they desire.

Competitive/Problem-Solvers recognize the importance of the negotiation *process*. Individuals who think that the bargaining process has been fair and that they have been treated respectfully are more satisfied with objectively less beneficial terms than they are with objectively more beneficial terms achieved through a process they found to be less fair and less respectful.⁵¹ It is thus important for Competitive/Problem-Solvers to always treat their opponents with respect and professionalism, and to leave those persons with the feeling at the conclusion of their interactions that they obtained “fair” terms.

Effective negotiators do not seek to maximize opponent returns for purely altruistic reasons, rather, they appreciate the fact that this approach is most likely to enable them to advance their own interests. First, they have to provide their opponents with sufficiently generous terms to induce them to accept proposed agreements. Second, they want to be certain their opponents will actually honor the deals agreed upon. If opposing parties experience post-agreement “buyer’s remorse,” they may endeavor to void the agreement. Finally, these skilled negotiators appreciate the likelihood they will encounter their current adversaries in the future. If those individuals remember them as courteous, professional, and seemingly cooperative negotiators, their future bargaining interactions are more likely to be successful.

THOMAS D. MORGAN & RONALD D. ROTUNDA, 2008 SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY 92-93 (2008).

⁵¹ See Rebecca Hollander-Blumoff & Tom Tyler, *Procedural Justice in Negotiation: Procedural Fairness, Outcome Acceptance, and Integrative Potential*, 33 LAW & SOCIAL INQUIRY 473 (2008).

Competitive/Problem-Solvers appreciate the fact that negotiators who strive to advance their own interests are more likely to achieve jointly efficient results than bargainers who behave in a purely cooperative manner.⁵² I observe this phenomenon in my own Negotiation class. The students who wish to obtain good results for themselves quickly learn to expand the overall pie and maximize the joint returns achieved. They appreciate the fact that if client satisfaction is left on the bargaining table, both sides suffer. If they can explore the underlying interests of the bargaining parties and provide their opponents with the items those persons most value, they will be more likely to obtain beneficial terms for themselves.

Effective Cooperative/Problem-Solvers and effective Competitive/Problem-Solvers recognize the crucial fact that persons work most diligently to satisfy the needs of opponents they like personally. Openly Competitive/Adversarial bargainers are rarely perceived as likeable. They exude competitiveness and manipulation, and often behave in a rude manner. Seemingly cooperative bargainers, however, appear to seek results beneficial to both sides. Since others enjoy interacting with these pleasant and professional persons, these subtly manipulative persons are able to induce unsuspecting opponents to lower their guard and make greater concessions. They also generate positive moods that promote cooperative behavior and the attainment of more efficient joint agreements.⁵³

⁵² See Kathleen O'Connor & Peter Carnevale, *A Nasty But Effective Negotiation Strategy: Misrepresentation of a Common-Value Issue*, 25 PERSONALITY AND SOCIAL PSYCH. BULLETIN 504, 512 (1997).

⁵³ See Catherine Tinsley, Kathleen O'Connor & Brandon Sullivan, *Tough Guys Finish Last: The Perils of a Distributive Reputation*, 88 ORGANIZATIONAL BEHAVIOR AND HUMAN DECISION PROCESSES 621 (2002).

Competitive/Problem-Solvers seek competitive results (maximum client returns), but work to accomplish those objectives through seemingly Cooperative/Problem-Solving behavior. This explains why Professors Williams and Schneider found far more effective Cooperative/Problem-Solvers than Competitive/Adversarial. It is very likely that many effective “competitive” negotiators were so successful in their use of “problem-solving” tactics, that they induced their unsuspecting adversaries to characterize them as “cooperative” instead of “competitive.”

Naively cooperative negotiators try to generate agreements through the open sharing of important information and the making of unilateral concessions. During the initial stages of their interactions, they often concede items without obtaining reciprocal concessions. This approach actually emboldens competitive opponents who begin to believe they will do better than they originally anticipated. It may also induce the accommodating persons to adopt a concessionary frame of mind that may cause them to make additional unreciprocated concessions throughout the entire interaction.

To avoid exploitation by Competitive/Problem-Solvers, naturally cooperative negotiators should carefully disclose their important information. They should share some pieces of information and see if their openness is being reciprocated by their opponents. If it is, both sides can continue to disclose their information in a reciprocal fashion. On the other hand, if the openness of these persons is not being reciprocated, they should cease being so forthcoming, recognizing that continued unilateral disclosures will enable manipulative opponents to exploit them.

When Cooperative/Problem-Solvers initially contemplate position changes, they should make sure their concessions are being reciprocated. If their adversaries do not

make similar concessions, they should adopt the “IF . . . THEN . . . “ approach in which they suggest that IF the other side is willing to accommodate their needs in a specific manner, THEN they would be willing to provide those persons with something those individuals value. If their adversaries are unreceptive to such a quid pro quo approach, these Cooperative/Problem-Solvers should stand firm and not bid against themselves through unreciprocated concessions.

Over the past several decades, Americans in general and lawyers in particular have become less polite toward one another. We have become more “win-lose” oriented. We seem to fear that if others get what they want, we will not be able to attain our own objectives. These changing attitudes are adversely affecting legal practice and negatively influencing bargaining interactions. Experienced attorneys often complain about the decreasing civility encountered in daily practice. Lawyers who encounter such incivility should recognize that inappropriate behavior is a substitute for bargaining proficiency. Skilled negotiators appreciate the fact that rude and unprofessional conduct is the least effective way to induce others to give them what they wish to obtain.

Competitive/Problem-Solvers appreciate these considerations, and they work to advance their own interests in a courteous and professional manner. They share important information, but are not completely open. While they would not distort material information recognizing that such behavior would be unethical, they strategically withhold information they are not obliged to disclose. They work to induce unsuspecting cooperative opponents to make more and larger concessions than they make. Once they obtain their basic objectives, they then work to maximize the returns obtained by their opponents. They do this to induce those individuals to feel they have been treated fairly,

and they hope that by expanding the overall pie and enhancing opponent interests they may simultaneously obtain further gains for themselves.

B. Thorough Preparation

Individuals who carefully prepare for bargaining interactions tend to achieve more beneficial results than persons who do not.⁵⁴ They ascertain the relevant factual, legal, economic, political, and cultural issues in recognition of the fact that knowledge is power. They work with their clients to determine the true underlying needs and interests of those persons. They try to develop different options that could effectively satisfy those underlying needs and interests, to enable them to explore different alternatives when they meet with opposing parties.

As attorneys evaluate the underlying needs and interests of their clients, they must try to determine the relative values of the different issues to be negotiated. Most lawyers formally or informally divide client objectives into three basic categories: (1) essential; (2) important; and (3) desirable.⁵⁵ “Essential” terms include items the clients must obtain if agreements are to be achieved. “Important” goals concern things the clients really wish to obtain, but which they would forego if the “essential” terms were satisfactorily resolved. “Desirable” needs involve items of secondary value the clients would be happy to obtain, but which they would be perfectly willing to exchange for more important terms.

⁵⁴ See ROY J. LEWICKI & ALEXANDER HIAM, *MASTERING BUSINESS NEGOTIATION* 41-70 (2006); KATHLEEN KELLEY REARDON, *THE SKILLED NEGOTIATOR* 32-60 (2004).

⁵⁵ See REARDON, *supra* note 54, at 61-64.

Once attorneys have become thoroughly familiar with the relevant matters affecting their own side, they must determine what Roger Fisher and William Ury call their BATNA: their Best Alternative to Negotiated Agreements.⁵⁶ What are the best circumstances they could achieve through external channels if the negotiations did not generate mutual accords? The answers to these questions should enable the parties to establish their *bottom lines*. Negotiating parties should not enter into agreements that are worse than what they would obtain if no accords were attained, since poor settlements are worse than more advantageous nonsettlements.

Negotiators who initially find it difficult to evaluate their nonsettlement alternatives must take the time to develop other options.⁵⁷ If their clients are thinking of purchasing or leasing particular buildings, would other buildings suit their underlying needs? If they are involved in litigation, what are the likely trial outcomes and the expected transaction costs? Most proficient legal negotiators carefully explore the options that might satisfy the underlying needs of their clients. What they frequently fail to do, however, is put themselves in the shoes of their opponents to estimate and evaluate their nonsettlement alternatives.

It is critical for lawyers to try to determine what will happen to *opposing parties* if they fail to achieve negotiated agreements.⁵⁸ They have to understand the underlying needs and interests of their adversaries, to enable them to formulate proposals that will be

⁵⁶ See ROGER FISHER & WILLIAM URY, GETTING TO YES 101-111 (1981).

⁵⁷ See RONALD M. SHAPIRO, DARE TO PREPARE 91-96 (2008).

⁵⁸ See REARDON, *supra* note 54, at 46-51.

beneficial to both sides.⁵⁹ An appreciation of opponent needs will also allow them to determine the relative bargaining power possessed by the parties. If one side's options are preferable to those possessed by their adversaries, that side has the advantage. On the other hand, if the opposing parties have more advantageous alternatives, those persons are in the preferable position since the cost of nonsettlement to them is less than it is to the other side.

1. Importance of Elevated, But Realistic Aspirations

There is a direct correlation between negotiator aspirations and bargaining outcomes – individuals who hope to obtain more advantageous results generally achieve better final terms than persons with modest expectations.⁶⁰ This phenomenon is graphically demonstrated by my students each semester. I give them a practice exercise where I ask the individuals on each side how much they hope to obtain or how little they hope to pay. The students who hope to obtain a lot achieve results that are far more advantageous than the students with lower expectations. The students who hope to pay less end up paying far less than the students who expect to pay more. I also ask them to indicate, once they have achieved agreements, whether they think their results are “well above average,” “above average,” “average,” “below average,” or “well below average.” The students who obtain the most beneficial results tend to indicate that their terms are “average” or “below average,” while the individuals who achieve the least beneficial

⁵⁹ See DEEPAK MALHOTRA & MAX H. BAZERMAN, *NEGOTIATION GENIUS* 19-23 (2007).

⁶⁰ See Russell Korobkin & Joseph Doherty, *Who Wins in Settlement Negotiations?* 11 *AMER. L. & ECON. REV.* 162, 175, 182 (2009); LEIGH L. THOMPSON, *THE MIND AND HEART OF THE NEGOTIATOR* 47-48 (3d ed. 2005).

results report that they are “above average.” They did not hope to achieve much, and they are pleased that they obtained what they hoped to get!

If aspiration levels are to significantly influence bargaining interactions, negotiator goals must be minimally realistic. Negotiators who formulate entirely unreasonable objectives are not likely to obtain their desired terms. Opposing parties will find their demands wholly unrealistic and move toward their nonsettlement alternatives. It is thus crucial for bargainers to develop elevated expectations they can rationally defend. This does not mean, however, that their goals must be reasonable to all persons. One of the most effective students I ever had would evaluate his side’s negotiation exercise information and try to determine the most beneficial terms he thought he could possibly obtain. He would then increase his goals until they seemed somewhat unrealistic. He would then develop arguments to support his elevated objectives until he felt comfortable with them. Only then would he begin to interact with his opponents. Week after week he obtained extraordinary results for his own side. At the conclusion of the semester when we were discussing the most successful negotiators in the class, several of his former opponents suggested that they did not think he was such a great negotiator. They instead indicated that “when we got near the end, he seemed so sure he was right, we thought we were wrong!” They failed to appreciate his ability to use the confidence he had developed in support of his own goals to induce them to reevaluate their situations to his advantage.

Skilled negotiators focus on their *aspirations* when they interact with opponents, instead of their *bottom lines*.⁶¹ They work hard until they approach their elevated expectations. They only consider their bottom lines when they have to decide whether to continue interactions that do not seem to be going well. Less proficient negotiators tend to focus excessively on their bottom lines from the outset of their interactions. Once they obtain their minimal objectives, they relax knowing that final accords will almost certainly be achieved, and they do not work to achieve more beneficial terms.⁶²

When a number of different issues have to be resolved, negotiators have to develop beneficial aspirations for *each meaningful term* to be discussed. If they fail to do so and only establish goals for some of the terms, they are likely to obtain good results for those items but forego advantageous results for the other issues involved. It is thus imperative for lawyers to consult with their clients during the preparation stage to ascertain the different issues involved and the relative values of those items to their clients. They then must establish goals for each such term and try not to conclude bargaining interactions until they approach their objectives for the different items involved.

2. Planning Elevated, but Principled, Opening Offers

Some persons like to commence bargaining interactions with the expression of modest proposals hoping to generate reciprocal behavior from their opponents. Initial offers that are overly generous to adversaries are likely to have the opposite effect due to

⁶¹ See MALHOTRA & BAZERMAN, *supra* note 59, at 48; G. RICHARD SHELL, BARGAINING FOR ADVANTAGE 28-29 (1999).

⁶² See BABCOCK & LASCHEVER, *supra* note 18, at 268-69.

the impact of “anchoring.”⁶³ When individuals receive better offers than they anticipated, they generally question their own preliminary assessments and *increase* their aspirations. The unexpected opponent generosity convinces them that they should be able to obtain better terms than they initially thought. This anchoring impact significantly disadvantages advocates who make excessively generous opening offers.

Negotiators who commence their interactions with parsimonious preliminary offers have the opposite anchoring impact. Their actions cause opponents to think they will not be able to do as well as they hoped, causing those persons to lower their expectations.⁶⁴ As adversaries decrease their expectation levels, they expand the parties’ zone of possible agreement and increase the probability of agreement. The lowering of opponent goals simultaneously enhances the likelihood that the parties who made the less generous opening offers will obtain final terms favorable to their own side.

Each semester, I pass out a one page statement describing the circumstances underlying a tort action and tell the students they represent the defendant insurance carrier. I ask each student to answer two questions. First, how much would they include in their initial offer? Second, how much do they think they will have to pay to resolve this law suit? Although the students all receive the identical factual information, one critical factor is different. Half are told that the plaintiff counsel has just demanded \$100,000 and half are told counsel has just demanded \$50,000. The students facing the \$100,000 demand plan higher opening offers than the students facing the \$50,000 demand. The

⁶³ See Korobkin & Doherty, *supra* note 60, at 177-78, DAVID A. LAX & JAMES K. SEBENIUS, 3 D NEGOTIATION 187-88 (2006).

⁶⁴ See Dan Orr & Chris Guthrie, *Anchoring, Information, Expertise, and Negotiation: New Insights from Meta-Analysis*, 21 OHIO ST. J. DISP. RES. 597, 611 (2006).

students facing the \$100,000 demand also indicate that they expect to pay more to resolve the matter than the students facing the \$50,000 demand. This exercise graphically demonstrates to them the importance of anchoring.

3. Importance of Developing Confidence in Own Positions

Skilled negotiators appreciate the importance of establishing confidence in their own positions before they interact with opponents. As they determine their objectives and generate elevated, but realistic, aspirations for those goals, they begin to develop confidence in the positions they plan to take. Once they begin to work with their opponents, they exude an inner confidence that induces less certain adversaries to begin to question their own positions.

How do successful negotiators enhance their own confidence? They develop cogent arguments supporting each position they plan to take. When they articulate their demands, they carefully provide arguments supporting each objective. If opponents ask them how they could possibly expect to obtain what they are seeking, they reiterate the rationales underlying each term being sought. If they do this in a seemingly objective manner, there is a good chance they will begin to undermine the confidence less prepared adversaries have in their own positions. Once their opponents begin to question the validity of their own situations, those individuals are likely to move toward the more confident bargainers.

C. Ability to Establish Rapport and Positive Negotiating Environments

When negotiators begin to interact, they should take the time to establish rapport with each other and positive bargaining settings. At the outset, they should look for

common interests they can share with each other.⁶⁵ They may have attended the same college or law school, enjoy the same sports or music, etc. Persons who can identify and share such common interests enhance the likelihood they will like each other and develop mutually beneficial relationships.⁶⁶ Such circumstances contribute to the establishment of rapport and increase the likelihood the participants will employ cooperative behavior during their discussions.⁶⁷

The initial portions of bargaining interactions are also critical, because it is when the parties create the atmosphere that will influence their entire encounter. If their discussions begin on an unpleasant or distrusting note, subsequent talks are likely to be less open and more adversarial than if the process had begun in a congenial and cooperative manner. Negotiators who induce their adversaries to like them, and who treat their opponents respectfully and professionally, are more likely to obtain beneficial results than bargainers who do not generate such sympathetic feelings.⁶⁸

Studies have found that persons who commence bargaining interactions in positive moods negotiate more cooperatively, reach more agreements, and achieve more efficient item distributions, while individuals who begin in negative moods behave more

⁶⁵ See ROGER FISHER & DANIEL SHAPIRO, *BEYOND REASON: USING EMOTIONS AS YOU NEGOTIATE* 55-56 (2005).

⁶⁶ See Chris Guthrie, *Principles of Influence in Negotiation*, 87 *MARQUETTE L. REV.* 829, 831 (2004).

⁶⁷ See ROBERT MAYER, *HOW TO WIN ANY NEGOTIATION* 19-23 (2006).

⁶⁸ See Hollander-Blumoff & Tyler, *supra* note 51, at 484; MARTIN LATZ, *GAIN THE EDGE* 52-54 (2004).

adversarially, reach fewer accords, and generate less efficient term distributions.⁶⁹ It is thus beneficial for lawyers commencing bargaining encounters to take a few minutes to create supportive environments designed to generate positive moods that should make their interactions more pleasant and enhance the probability they will achieve agreements that maximize their joint returns.

D. Effective and Persuasive Communicators

Once the serious discussions begin, negotiators must initially try to ascertain the items the parties can share with each other – “value creation.” They have to determine the terms desired by their opponents and the amount of each they have to give up if they hope to induce those persons to enter into mutual accords. The most effective way for individuals to elicit such information from their adversaries is to *ask questions*.⁷⁰ Many negotiators make the mistake of issuing declarative sentences that simply disclose their own information. Proficient negotiators appreciate this fact, and they spend twice as much time asking questions as their less capable cohorts.⁷¹

Negotiators should begin with open-ended questions that are likely to induce opponents to talk for a minute or two. If the inquiries are too focused, the questioners are unlikely to discover unsuspected information. When more expansive inquiries are

⁶⁹ See Erin Ryan, *The Discourse Beneath: Emotional Epistemology in Legal Deliberation and Negotiation*, 10 HARV. NEGOT. L. REV. 231, 269-270 (2005); Joseph Forgas, *On Feeling Good and Getting Your Way: Mood Effects on Negotiator Cognition and Bargaining Strategies*, 74 J. PERSONALITY & SOCIAL PSYCH. 565, 566-574 (1998).

⁷⁰ See SHAPIRO, *supra* note 57, at 113-120; MALHOTRA & BAZERMAN, *supra* note 59, at 40-41.

⁷¹ See Hal Movius, *The Effectiveness of Negotiation Training*, 24 NEGOT. J. 509, 513-14 (2008).

employed, adversaries frequently disclose far more than the questioners anticipated. This is due to the fact the individuals answering the questions tend to assume that the questioners actually know more about their particular circumstances than they actually know. As they respond to the broad inquiries, they thus disclose more than they realize they are disclosing.

During this information exchange, the focus should be upon the knowledge and wishes of the *opponents*. Negotiators should ask their adversaries *what* they want and *why* they wish to obtain those items. The “*what*” inquiries are designed to identify the terms preferred by their adversaries, while the “*why*” questions are used to appreciate the underlying interests associated with those terms.

When negotiators propound questions to their adversaries, they must listen intently and observe carefully the responses being provided.⁷² They should maintain supportive eye contact to encourage further opponent disclosures, listen for verbal leaks, and look for nonverbal signals that disclose crucial information. Smiles and occasional head nods tend to generate more open responses from persons who think they are being heard. Occasional “um hums” and “I see” can encourage additional disclosures. Even when speakers seem to have completed their answers, it can be beneficial for questioners to remain silent as if they expect further responses. If they do this adroitly, the responders will often feel the need to provide additional information.

Proficient questioners can obtain thorough appreciations of opponent needs and interests. This enables them to formulate proposals that satisfy those opponent needs while simultaneously advancing their own objectives. There may be terms that both sides

⁷² See LATZ, *supra* note 68, at 58-59.

hope to obtain, such as confidentiality provisions. There may be other terms adversaries want that the other side is perfectly willing to give up. This might include a non-admission clause or an apology. Such concessions can enhance the likelihood the parties will achieve final accords.

E. Patience and Perseverance

When attorneys commence bargaining interactions, they often do so with elevated client expectations. They meet with their opponents and quickly discover that the parties are far apart. The participants may try to generate meaningful position changes, but are often unable to do so. They give up and accept their nonsettlement alternatives. As a result, they may forego mutually beneficial business deals or expend substantial sums on protracted litigation that could have been avoided.

When I mediate, I learn a lot about the negotiation process, due to the fact I am a detached observer. At the outset of the mediation sessions, the parties are far apart. They frequently see no hope for negotiated resolutions. As the mediation process unfolds and the participants are induced to explore their underlying needs and interests, they begin to see ways to generate mutual gains. They tentatively say “yes” to less controverted issues and begin to experience negotiation success. They slowly become psychologically committed to settlements and become more malleable. They make reciprocal concessions that usually lead to final accords.

In some cases, the negotiating parties alter their existing positions fairly quickly, but in other circumstances they do so reluctantly and slowly. If they are rushed, they dig in and refuse to move. On the other hand, if they are provided with the time they require to reassess their underlying assumptions and objectives, they begin to appreciate the fact

that the negotiation process is preferable to their nonsettlement options. I have had some mediations that have continued for six months or more, yet ended up where I had the sense the parties would end when we initially met. Had they been pushed toward those terms at the beginning, they would have rejected those possibilities. As weeks and months lapsed, they began to appreciate the fact that negotiated agreements were actually preferable to what they could obtain elsewhere.

These mediation phenomena have convinced me of the need for negotiating parties to be *patient* and *persistent*. They should not try to rush the process. When they begin the negotiation process, they should try to ascertain opponent needs and interests and begin to look for ways to generate joint gains. As they begin to focus on the distributive terms desired by both sides, they should not be shocked if they discover what seem to be insurmountable barriers to mutual accords. They should patiently and persistently continue their interactions and look for ways to encourage joint movement.

Negotiators should not allow temporary impasses to cause parties to give up prematurely. They should patiently give themselves and their opponents the time often needed for parties to appreciate the gains that may still be generated through continued discussions. If possible, they should focus on the less contested items where tentative trades could be made. The more they resolve these terms, the more likely they are to become committed to overall agreements and become more flexible with respect to the remaining issues. They must carefully reexamine their own nonsettlement alternatives to be certain they will not terminate their interactions prematurely and end up with less beneficial circumstances than they could have achieved if they had continued the negotiation process.

Negotiating parties still experiencing difficulties after prolonged and meaningful bargaining should not hesitate to seek the assistance of neutral facilitators who may be able to help them reopen blocked communication channels and induce them to reconsider their current positions. If mediators can provide parties with face-saving ways to move toward final terms together, the probability of mutual accords will increase appreciably. This explains why many disputes which parties initially claimed could not possibly be resolved through the negotiation process are amicably settled with professional mediation assistance.

IV. CONCLUSION

It is not always easy to determine the factors that significantly influence negotiator performance. Student GPAs and emotional intelligence scores do not affect bargaining exercise outcomes. Nor does student race or gender. Individuals who employ a competitive/problem-solving style are more likely to be obtain beneficial results than persons who behave in a cooperative/problem-solving or competitive/adversarial style.

Thoroughly prepared bargainers generate better results than their less prepared cohorts. They establish elevated, but realistic, aspirations for each significant item to be exchanged. They plan raised, but “principled” opening offers to help them anchor the initial discussions, and they develop confidence in their own positions. They are able to establish rapport with their opponents and positive bargaining environments. They are persuasive and effective communicators and have the patience and perseverance needed to achieve mutual accords under seemingly difficult circumstances.