Effective Legal Negotiation and Settlement

Charles B. Craver

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PREFACE

Although most legal practitioners utilize their negotiating skills more frequently than their other lawyering talents, few have received formal education pertaining to the negotiation process. A few law schools now include legal negotiating courses in their curricula, and several states provide continuing legal education programs on this important subject. This means that the vast majority of practicing attorneys must regularly employ talents that have not been explored and developed in any organized manner.

The legal negotiating process is only indirectly affected by traditional legal doctrines. Even though the general parameters of particular problems are loosely defined by the applicable factual circumstances and legal principles, the process itself is more directly determined by reference to other disciplines. Psychological, sociological, communicational, and game theories are the primary phenomena which influence the bargaining process. This book will examine these operative fields and will provide a conceptual negotiating framework which is both theoretical and practical.

My previous practice experience and current work as a mediator and adjudicator of labor and employment disputes have convinced me that most lawyers are not interested in purely academic formulations which bear little resemblance to the real world. While esoteric models may stimulate interesting scholarly debate, they are frequently based upon assumptions which are unrelated to real situations. Nonetheless, it must be emphasized that many psychological and sociological phenomena which regularly do affect the negotiation process are ignored by practitioners who doubt the applicability of such seemingly arcane concepts.

Before readers summarily dismiss the relevance of nonlegal theories, they should consider the following exchange which occurred in my Criminal Law class at the University of Michigan. Dr. Andrew Watson, a psychiatrist on the law faculty, was asked by Professor Yale Kamisar to visit our class. During his discussion of various mens rea doctrines, Dr. Watson interjected his

view that most criminals are in prison because they consciously or subconsciously want to be there. Professor Kamisar excitedly challenged this assertion: "Come on, Andy. Three people rob a bank. One is overweight and unable to run as fast as his partners, and he is thus apprehended." The students were generally sympathetic to this view, and Dr. Watson did not pursue the matter. Pandemonium would undoubtedly have reigned had Dr. Watson replied: "But Yale, the perpetrator in question most likely overate intentionally so that he would become obese and have diminished mobility, so that he would be captured and incarcerated." As a first year law student, I would probably have questioned such a Freudian suggestion. However, my practice experiences, my teaching observations, and my review of the pertinent psychological literature over the past fifteen years have made me realize that such seemingly farfetched theories should not be rejected too hastily. While the various psychological and sociological concepts discussed in this book should not automatically be accepted as universal truths, these theories should not be summarily dismissed. They should be mentally indexed for possible future reference in recognition of the fact that they may actually influence the negotiation process.

During the years I have taught legal negotiating courses, I have frequently wondered whether there was any correlation between overall law school performance and the results obtained on my simulation exercises. I recently performed a rank-order correlation on the data I had for the past eight years at the University of Illinois and the University of California at Davis (Craver, 1986).* I found the complete absence of any statistically significant correlation between overall law school achievement and negotiation performance. This would certainly suggest that the skills being imparted in traditional law school courses have little impact upon a student's capacity to obtain favorable results on negotiation exercises. Other data, however, have indicated that the abilities developed in a legal negotiating course are

*To avoid the use of distracting footnotes, abbreviated citations appear in parentheses. Complete citations are provided in the Bibliography at the end of the book.

transferable to future settings. During 1983 and 1984, most of the students who had taken my fall semester Lawyer as Negotiator course participated in a spring term negotiation simulation conducted in a colleague's Trial Advocacy class. My research established the presence of a statistically significant positive correlation between the negotiation results achieved by the individuals who had previously received legal negotiating training vis-à-vis those Trial Advocacy participants who had not received such prior instruction. This finding would strongly suggest that negotiating skills can be effectively taught and improved through the discussion of applicable concepts and the use of practice exercises.

Two final issues should be briefly mentioned. Some individuals might question the ethical and/or moral propriety of some of the tactics explored in this book. Such approaches are not necessarily included because of their general acceptance, but because of their all too frequent utilization by at least some negotiators. Even if most people were to decide not to adopt such tactics as part of their own strategies, they will likely encounter them in some circumstances. If they are familiar with such techniques and understand their strengths and weaknesses, they will be in a better position to counter their use than they would be if they simply endeavored to ignore their existence.

It has recently become fashionable for some academics to suggest that all negotiations should be conducted on a "win-win," rather than a "win-lose," basis. It should be obvious that certain negotiations must be undertaken on a "win-win" basis if they are to achieve their desired objectives. For example, on-going negotiations between family members, close friends, and others in such symbiotic relationships must, at least minimally, produce results which satisfy the basic needs of both participants if they are to be truly successful for either. Both parties must feel that they "won" something from their interaction, or their relationship will be in trouble. On the other hand, legal practitioners frequently encounter situations which do not involve on-going relationships and which are highly competitive. In such circumstances, a few negotiators may only feel that they have "won" if they think that the other party has "lost." Although no negotiator should ever

enter a negotiation with the intent to simply defeat or injure the opposing party, since no rational benefit would be achieved from such an approach, it must be recognized that in most bargaining transactions one side will usually obtain more favorable results than the other side (Karrass, 1970, at 144). In such settings, I believe that advocates have the ethical obligation to endeavor to procure the most beneficial agreements for their respective clients which they can attain without resorting to unconscionable or disreputable tactics. I would be most reluctant to suggest that advocates contemplate the rejection of offers which might seem overly generous to their clients based upon their initial assessment of the underlying circumstances. It is quite possible in such situations that their adversaries possess important information which they do not have. When opponents evaluate clients' cases more generously than their attorneys anticipated, I believe that their representatives are obliged to defer to the opponents' assessments. Their lawyers might otherwise place themselves in the awkward position of having to explain to their clients that they could have obtained better settlements had they not concluded that it was more important to ensure a greater degree of success to their opponents. Until we are willing to adopt a system which requires adjudicators to issue decisions which guarantee "win-win" results in all cases ("We feel very strongly both ways!"), I will continue to suggest that negotiators amicably and ethically seek to attain bargained results with the same commitment they would exhibit if the matter were being litigated.

This book should provide readers with a thorough knowledge regarding the psychological, sociological, and communicational factors which meaningfully influence the negotiation process. The various negotiation phases will be explained, and the different bargaining techniques which practitioners are likely to encounter will be discussed. The impact of negotiations involving persons from different cultures or of different genders will be explored, and certain specific bargaining issues will be covered. Ethical considerations will be examined, and the mediative function of judges and other adjudicators will be reviewed. This approach will provide readers with a greater understanding of the overall process and is intended to enhance their confidence. As

they recognize the various tactics they observe and improve their reading of nonverbal signals, they will feel more capable of responding effectively to diverse approaches. Since the negotiation process involves interpersonal interactions where more confident advocates generally achieve more favorable results than their less certain cohorts, such an advantage can produce tangible rewards.

ACKNOWLEDGMENTS

It would be impossible to prepare a book on the negotiation process without relying substantially upon the theories and concepts articulated by many diverse scholars. During the years I have been a negotiator and a legal negotiating teacher, I have benefited greatly from the literature cited in the bibliography listed at the end of this book. I wish to express my appreciation to those writers and to acknowledge the fact that many of their ideas have influenced my understanding of the negotiation process. I must also cite Professors Cornelius Peck and Robert Fletcher of the University of Washington (Peck & Fletcher, 1968) and Professor James J. White of the University of Michigan (White, 1967), who initially conceived and developed the concept of a clinical course on legal negotiating. I should finally thank the many law students who have taken my Lawyer as Negotiator course and the thousands of continuing legal education participants who have attended my Effective Legal Negotiation and Settlement presentations who have provided me with new insights and interesting examples. Many of their thoughts have found expression in this book. I am also indebted to Professor Robert Condlin of the University of Maryland who has generously shared his cogent thoughts with me both in a joint teaching setting and through his writings. I must finally thank Ms. Linda Payne and Ms. Norma Roberts who patiently provided flawless word processing assistance.

ABOUT THE AUTHOR

Charles B. Craver is Professor of Law at The George Washington University National Law Center where he regularly teaches a course on legal negotiating. He has previously taught at the University of Illinois, the University of California at Davis, the University of Virginia, and the University of Florida. He has taught continuing legal education courses on the negotiation process to thousands of practitioners throughout the United States. He has lectured to judicial organizations on the mediation function. He was formerly associated with the law firm of Morrison & Foerster in San Francisco, where he specialized in labor and litigation practice. Professor Craver is a member of the American Law Institute, the Criminal Law and Labor and Employment Law Sections of the American Bar Association, the International Society for Labor Law and Social Security, and the American Arbitration Association. He has published numerous law review articles and is co-author of *Labor Relations Law in the Public Sector* (Michie, 3d ed. 1985), *Labor Relations Law* (Michie, 7th ed. 1984), and *Employment Discrimination Law* (Michie, 2d ed. 1982). He received his B.S. from Cornell University in 1967, his Master's Degree in Labor Law and Collective Bargaining from the Cornell University School of Industrial and Labor Relations in 1968, and his J.D. from the University of Michigan in 1971.

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