Effective Legal Negotiation and Settlement

FIFTH EDITION

Charles B. Craver

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Fifth Edition

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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 especially 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 clinical negotiating courses. I must thank the hundreds of law students who have taken my Legal Negotiating course and the thousands of practicing lawyers who have participated in my Effective Legal Negotiation and Settlement programs 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 (Condlin, 1992; Condlin, 1985). My former colleague Nancy Schultz and my ADR book coauthor Edward Brunet have provided both encouragement and valuable insights. I must finally thank Thomas Colosi, James Freund, Joseph Harbaugh, Laurence Sweeney, and Gerald Williams who have greatly enhanced my understanding of the negotiation process during jointly conducted continuing legal education programs.

ABOUT THE AUTHOR

Charles B. Craver is the Freda H. Alverson Professsor of Law at the George Washington University Law School where he regularly teaches a course on Legal Negotiating. He 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 and on alternative dispute resolution procedures to thousands of practitioners throughout the United States and in Canada, Mexico, England, Puerto Rico, and the People's Republic of China. He has frequently 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 employment and litigation practice. Professor Craver is a member of the American Law Institute, the National Academy of Arbitrators, Association for Conflict Resolution, the Dispute Resolution, Criminal Law, and Labor and Employment Law Sections of the American Bar Association, the International Society for Labor and Social Security Law, and the American Arbitration Association. He has published numerous law review articles pertaining to dispute resolution and labor and employment law. He is the author of *The Intelligent Negotiator* (Prima/Crown 2002) and *Can Unions Survive? The Rejuvenation of the American Labor Movement* (N.Y.U. Press, 1993), and he is co-author of *Alternative Dispute Resolution: The Advocate's Perspective* (Lexis, 2nd ed. 2001), *Employment Law Treatise* (2 vol.)(West, 3rd ed. 2004), *Employment Law Hornbook* (West, 3rd ed. 2004), *Labor Relations Law* (Lexis, 11th ed. 2005), *Employment Discrimination Law* (Michie, 4th ed. 1994), *Human Resources and the Law* (B.N.A. 1994), *Labor Relations Law in the Public Sector* (Michie, 4th ed. 1991), and *Collective Bargaining and Labor Arbitration* (Michie, 3rd ed. 1988). 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.

PREFACE

Most legal practitioners use their negotiating skills more frequently than their other lawyering talents. They negotiate when they don't even realize they are negotiating. They do so when they interact with their partners, associates, legal assistants, secretaries, prospective clients, and current clients, yet they only think they are negotiating when they deal with other lawyers on behalf of current clients. Despite the critical nature of bargaining skills, few attorneys have received formal education pertaining to the negotiation process. Most law schools now include limited-enrollment legal negotiating courses in their curricula, and many states provide continuing legal education programs on this important subject. Nonetheless, the vast majority of practicing attorneys must regularly employ talents that have not been explored or developed in any organized manner.

During law school, students focus primarily on substantive and theoretical legal doctrines. Once they enter the legal profession, attorneys tend to continue this focus. They spend hours each week reading advance sheets and related materials pertaining to the substantive areas they practice. When they prepare for bargaining encounters, they spend substantial amounts of time on the legal, factual, economic, and political issues involved, but no more than ten to fifteen minutes formulating their negotiating strategies. In fact, when most attorneys begin a negotiation, they have only three things in mind that directly relate to their bargaining strategy: (1) their bottom line; (2) their ultimate objectives; and (3) their planned opening offer. After they articulate their opening offer, they "wing it" — viewing each bargaining encounter as a wholly unstructured event. Few take the time to read books and articles concerning the negotiation process. When I teach courses to practitioners, I tell them that the results of most legal interactions are determined more by negotiating skill than by pure substantive knowledge. While proficient negotiators must become thoroughly familiar with the operative legal principles to be effective advocates, they do not have to learn the entire field. Carefully prepared negotiation experts generally prevail over substantive experts who lack negotiating expertise. It thus behooves lawyers to continually enhance their knowledge of both substantive law *and* dispute resolution skills if they wish to maximize their professional effectiveness.

The legal negotiating process is only indirectly affected by traditional legal doctrines. Even though the general parameters of particular interactions are loosely defined by the operative factual circumstances and the relevant legal principles, the process itself is more directly determined by reference to other disciplines. This is due to the fact that negotiations involve interpersonal, rather than abstract, transactions. As a result, psychological, sociological, communicational, and game theories are the primary phenomena that influence the bargaining process. This book

examines these pertinent fields and provides a conceptual negotiating framework that 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 that bear little resemblance to the real world. While esoteric models may stimulate interesting scholarly debate, they are frequently based upon assumptions that are unrelated to real-world situations. Nonetheless, it must be emphasized that many psychological and sociological phenomena that regularly affect the negotiation process are ignored by practitioners who doubt the applicability of those seemingly arcane concepts.

Most legal practitioners are inherently suspicious of social science theories regarding the factors that influence human behavior. These abstract concepts do not appear to have discernible bases. This phenomenon is typified by an example from my first-year 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 is apprehended." The students were generally sympathetic to this perspective, 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 to become obsese and develop 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. Nonetheless, my practice experiences, my teaching observations, and my review of the pertinent psychological literature over the past thirty years have made me realize that such seemingly farfetched theories should not be rejected too hastily. I continue to be amazed by how frequently inadvertent "verbal leaks" and unintended nonverbal signals disclose critical information during bargaining interactions. While 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 future reference in recognition of the fact 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 — measured by final student GPAs — and the results obtained on my simulation exercises. In 1986, I performed a rank-order correlation on the data I had for the previous eight years at the

University of Illinois and the University of California at Davis (Craver, 1986).* In 1999, I replicated this study for the thirteen years of data I had amassed at George Washington University (Craver, 2000). In both studies, I found the complete absence of any statistically significant correlation between overall law school achievement and negotiation exercise performance. This would certainly suggest that the skills imparted in traditional law school courses have little impact upon a student's capacity to obtain favorable results on negotiation exercises.

I was initially surprised by the lack of any significant correlation between overall student performance and negotiation exercise results, because I had thought that the qualities likely to make one a good student (intelligence, hard work, etc.) would contribute to negotiation success. As I sought an explanation for the unexpected results, I realized that I was comparing unrelated skills. Individuals who do well on law school exams have high abstract reasoning capabilities, measured by SAT, LSAT, and IQ scores. They possess the ability to learn rules, to discern issues, and to apply abstract legal principles to hypothetical fact patterns. People who are successful on negotiation exercises, however, possess the interpersonal skills (*i.e.*, "emotional intelligence") necessary to interact well with other persons (Goleman, 1995). They are good readers of other people, and they know what arguments are most likely to influence different opponents.

At George Washington University, my Legal Negotiating students can take my course for a traditional letter grade or on a pass/fail basis. In 1998, I compared the negotiation exercise results achieved by graded students with the outcomes attained by pass/fail students (Craver, 1998). Although my students had often suggested that the pass/fail students had an inherent bargaining advantage since they could be more risk-taking when deciding whether to risk nonsettlements, I found that the graded students had achieved significantly higher results. This reflects the fact that successful negotiators generally work harder than their less successful cohorts. If students have to decide whether to spend an additional thirty minutes preparing for bargaining encounters or spend an extra hour trying to induce their opponent to give them what they want, the students receiving a letter grade is more likely to make this commitment than the students guaranteed a "pass" if they do the required work. Practitioners who wish to obtain optimal results for their clients must be willing to make the extra effort it takes to generate consistently beneficial outcomes.

In 1986, I also sought to determine whether the abilities developed in legal negotiating courses are transferrable to future settings. During 1983 and 1984, most of the students who had taken my fall semester Legal

* 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.

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Negotiating 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-a-vis those Trial Advocacy participants who had not received such prior instruction (Craver, 1986). This finding strongly suggests that negotiating skills can be effectively taught and improved through the discussion of applicable concepts and the use of simulation exercises.

Some individuals might question the ethical and/or moral propriety of several of the tactics explored in this book. These approaches are not included because of their general acceptance, but because of their occasional use by at least some negotiators. Even if most people were to decide not to employ these tactics as part of their own strategies, they would be likely to encounter them in some circumstances. If they are familiar with these techniques and understand their strengths and weaknesses, they will be in a better position to counter their use than they would if they ignored their existence.

It has become fashionable for some academics to suggest that all negotiations should be conducted on a "win-win" basis designed to generate "fair" results that provide both sides with relatively equal returns. 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, business partners, and others in symbiotic relationships must be designed to produce results that 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 would be jeopardized. Even in these settings, however, attorneys should not ignore the fact that their clients expect them to obtain better terms than they give to their opponents if this can be achieved amicably (Shapiro & Jankowski, 2001, at 5; Mnookin, Peppet & Tulumello, 2000, at 9).

Legal practitioners frequently encounter highly competitive situations that do not involve on-going relationships. In these circumstances, a few negotiators may only believe that they have "won" if they think the other party has "lost." No negotiator should enter a negotiation with a "win-lose" desire to defeat or injure the opposing party, because no rational benefit would be achieved from this approach. All other factors being equal, negotiators should strive to maximize *opponent* returns if this does not diminish the value obtained for their own clients. This practice increases the likelihood of agreements and the ultimate honoring of those accords. On the other hand, it must be recognized that in most bargaining

transactions, the parties rarely possess equal bargaining power and equal negotiation skill. One party may be more risk-averse than the other, and the overly anxious participant may be willing to accept less generous terms. As a result, one side usually obtains more favorable terms than the other (Karrass, 1970, at 144).

In these "distributive" settings in which both sides wish to obtain many of the same items, some degree of competitive bargaining is inevitable (Korobkin, 2000, at 1791; Wetlaufer, 1996). I believe that advocates have an ethical obligation to seek the most beneficial agreements for their clients they can obtain without resorting to unconscionable or unethical tactics (Kramer, 2001, at 342; Bastress & Harbaugh, 1990, at 345). I would be reluctant to suggest that advocates contemplate the rejection of offers that seem overly generous to their own clients based upon their initial assessments of the underlying circumstances. It is quite possible in these situations that their adversaries possess important information they have not discovered. When opponents evaluate client situations more generously than their own attorneys anticipated, I believe that their legal representatives are obliged to defer to the assessments of opposing counsel. These 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 for their opponents. Until we adopt a system that requires adjudicators to issue decisions guaranteeing "win-win" results in all cases ("we feel strongly both ways!"), I believe that negotiators should amicably and ethically seek to attain bargaining results with the same commitment they would exhibit if the matter were being litigated — what Ron Shapiro and Mark Jankowski have characterized as "WIN-win" results, with the "WIN" share on their own client's side (Shapiro & Jankowski, 2001, at 45).

When people suggest that only "fair" deals should be accepted, they usually intimate that outcomes near the mid-point between the parties respective positions would be proper. If one spouse is physically abusing the other four times per week, would two times per week be "fair"? If a thief were to demand all of the money in our pockets, should we feel obliged to offer that person half of what we possess? While it is clear that ethical practitioners should avoid unconscionably one-sided arrangements that would not be legally enforceable, we should not expect advocates to fully protect the interests of less proficient opponents. If negotiators are able to obtain highly beneficial results through the use of entirely appropriate tactics, they should be respected, not criticized.

Some academics believe that the outcomes of most bargaining encounters can be accurately predicted through the application of economic

theory. They suggest detailed formulas including such factors as participant preference curves and degree of risk aversion to determine the "rational" outcomes. They fail to appreciate the highly subjective nature of bargaining interactions. How much does one party wish to resolve the current dispute? How much does someone want to buy or sell a particular firm or license new technology? It is difficult to believe that one could combine an inexact science — law — with another inexact science — human behavior — and quantify the resulting aggregation. So much of what influences negotiation outcomes is based upon subjective considerations. This explains why experienced attorneys negotiating the identical exercises in my continuing legal education courses achieve results that vary widely — by factors of five or even ten fold. Even students who have been trained in law and economic analysis allow subjective factors to influence their decision-making (Houston & Sunstein, 1998).

This book provides readers with a thorough understanding of the psychological, sociological, and communicational factors that meaningfully influence bargaining interactions. The various negotiation stages are explained, and the different bargaining techniques that practitioners are likely to encounter are discussed. Certain specific bargaining issues are covered, and the impact of ethnic or gender differences on negotiation encounters is explored. Public and private international bargaining transactions are discussed, in recognition of the increased relevance of such transnational interactions. The use of neutral mediators to assist negotiating parties is reviewed, and the ethical aspects of the negotiation process are examined. This comprehensive approach provides readers with a greater appreciation of the negotiation process and is designed to enhance their bargaining confidence. They will understand the different stages and the objectives to be achieved in each. They will recognize the various tactics they observe and feel more capable of responding effectively to diverse approaches. Since the negotiation process involves interpersonal transactions in which more confident advocates generally achieve more favorable results than their less certain cohorts, such a psychological advantage is likely to produce tangible rewards.

The First Edition of this book provided a basic framework pertaining to the negotiation process. The Second Edition greatly expanded upon the topics covered in every chapter. The Third Edition constituted a refinement of the prior editions. I added new concepts — particularly with respect to nonverbal communication and negotiating techniques. Because of the growth of transnational interactions, I included a new chapter on international negotiating. At the urging of several book users, I replaced the previous chapter on judicial mediation with a broader chapter covering general mediation concepts and other voluntary dispute resolution techniques used to assist negotiating parties. In the Fourth and Fifth Editions,

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I have retained the existing organizational structure. Every chapter has been refined to reflect recent scholarly developments, with the most significant changes occurring in the chapters on international negotiating, mediation, and negotiation ethics.

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