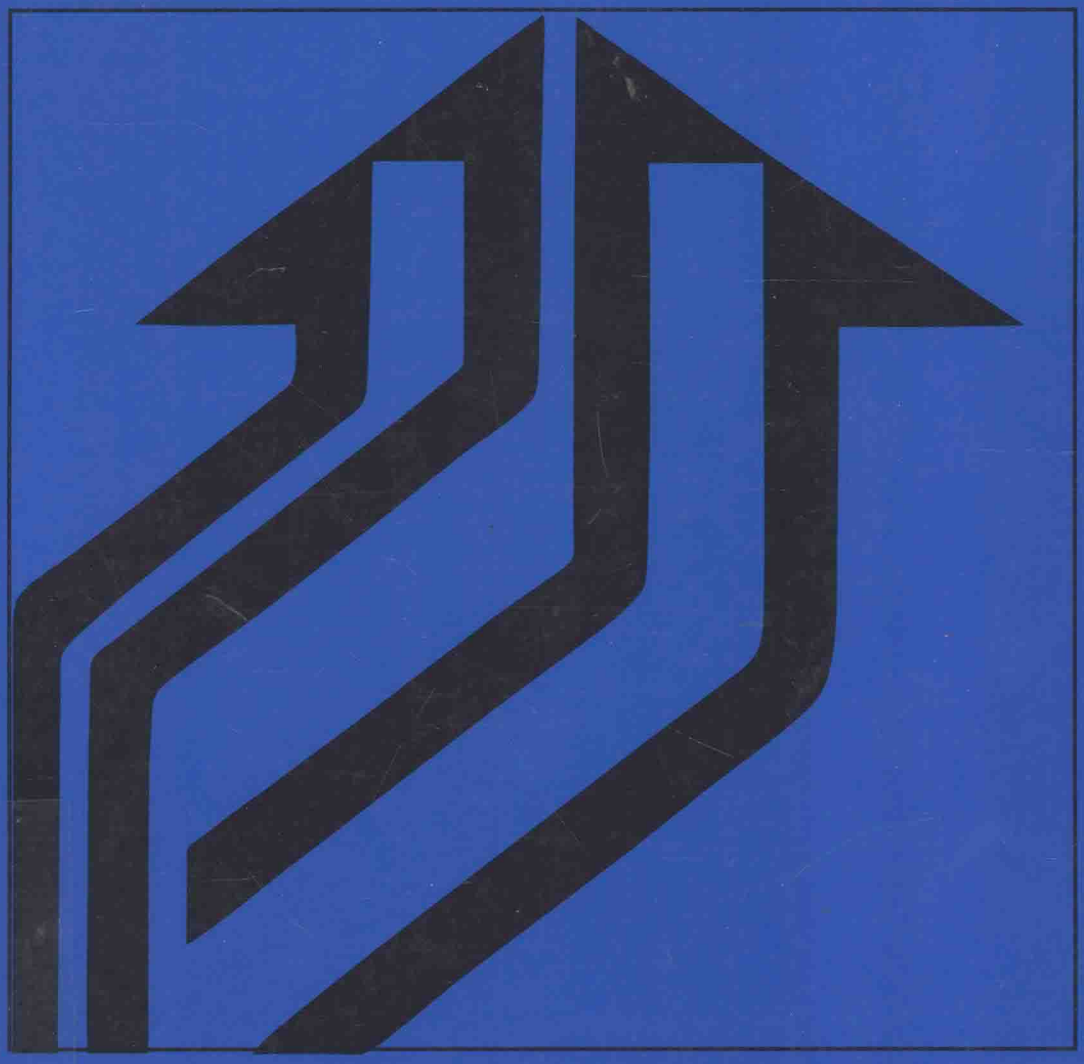
LEGAL NEGOTIATION
THEORY AND PRACTICE

Second Edition

DONALD G. GIFFORD



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Second Edition

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Preface

This book presents a comprehensive overview of legal negotiation for law students and lawyers studying their negotiating behavior. The analysis presented often is derived from the research of social scientists, but the book is specifically designed to teach the reader how to negotiate more effectively in the actual practice of law. Examples of specific negotiation techniques are included throughout the text, and theoretical models of social scientists are discussed only when the conclusions derived from them are directly relevant to legal negotiation. At the same time, the book avoids the mundane mechanics of both local negotiation practice and "pop-psychology."

Included within this single book are analyses of both competitive negotiation tactics and more collaborative approaches, such as problem-solving and cooperative tactics. No single negotiation strategy works best in all negotiations. Accordingly, the lawyer should be able to employ a variety of approaches and know when each tactic is most appropriate.

Most lawyers not only change their tactics from one negotiation to another, but also use a combination of varying tactics—for example, problem-solving and competitive tactics—within a single negotiation. For this reason, this text divides the negotiation process into six components or subprocesses: negotiation planning, initial orientation, initial proposals, information bargaining, narrowing of differences, and closure. This organization allows discussion in a single chapter of how the different approaches to negotiation—competitive, cooperative and problem solving—address each of these components of the negotiation process.

When the first edition of this book was published in 1989, the idea that the negotiator might employ both problem-solving and competitive tactics within a single negotiation was new within the legal literature. Today the recognition that both "value creation" and "value claiming" are inherent within the negotiation process is widely accepted. In this regard, as well as in many others, this new edition draws upon the excellent recent scholarship about bargaining from our colleagues in the business school world.

At the same time, legal negotiation is a form of client representation. The lawyer's role as an advocate changes the negotiation process in a number of ways that often are not considered in general negotiation texts written by social scientists or business school professors. This book includes separate chapters on Negotiation Planning and Negotiation Counseling, and the impact of the client on the bargaining process is stressed throughout the text.

It also includes a chapter addressing alternative dispute resolution, a topic that at last is deservedly receiving far more attention than it has in

the past in the law school curriculum. Yet the centrality of the negotiation process to ADR is not always appreciated. Most forms of ADR serve as means of facilitating bargaining. To understand ADR processes and how they work, the student first must have a firm grounding in the negotiation process itself and appreciate why bargaining sometimes fails in the absence of mediation and other ADR processes.

This second edition has been enriched by the years I spent as Dean of the University of Maryland School of Law and earlier at the West Virginia University College of Law. Most of what I did as a dean was to negotiate with one constituency or another. When I returned to the classroom teaching of Negotiation, Steven Schwinn, my former colleague and team-teacher, taught me important lessons about how to teach negotiation to students more effectively. My colleague Rena Steinzor generously has contributed a superb environmental enforcement negotiation simulation that enriches the Teacher's Manual.

I also want to express my appreciation to Dean Karen H. Rothenberg of the University of Maryland School of Law, who generously has supported my scholarly endeavors, and to Professor Barbara Gontrum, who directs the Thurgood Marshall Law Library. Research librarian Maxine Grosshans was particularly helpful in locating new publications about negotiation, regardless of whether they were from the legal, social science, or business literature. I also thank my diligent and superbly capable student research assistants, Leslie Harrelson (Class of 2009), Jennifer BenEliyahu (Class of 2009), Rachel Hirsch (J.D., 2006) and, particularly, Tom Prevas (Class of 2008), for their wonderful help with research, editing, and proofreading, as well as my daughter Caroline Gifford for her assistance with proofreading. Finally, I express my gratitude to Marie Schwartz who assisted me with document preparation.

DONALD G. GIFFORD

Columbia, Maryland
August 2007

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Chapter One

NEGOTIATION STRATEGY FOR LAWYERS

A. INTRODUCTION

1. LEARNING NEGOTIATION SKILLS

Early in the practice of law, the lawyer is sure to be asked, "Do you think we could settle this thing?" or "Could our clients work out a deal here?" Away from judicial chambers and the courtroom, the lawyer is thus initiated into the negotiation process, the single most prevalent and important legal decision-making system.

How can you prepare yourself for this moment? Certainly, knowledge of the substantive law affecting your client's situation will be important, as will be your ability to analyze the legal issues. And nothing is more important to your success as a negotiator than preparation—your understanding of the relevant facts and law and of your client's interests. Additional factors—your personality or your past relationship with the other lawyer—also play a role.

How well you serve your client's interests when you respond to that inquiry depends upon at least one other factor. Practicing attorneys know that a few among them are always able to get a good deal for their clients through skillful negotiation. They also know that skilled negotiators are not born. The ability to negotiate competently is not a trait like blue eyes, quick reflexes or the ability to roll one's tongue. All individuals "learn" to negotiate from infancy as they develop their abilities to influence Mom or Dad, classmates or teachers, to do what they want them to do. Beginning lawyers learn about "legal" negotiation by watching more experienced attorneys negotiate with them or against them. Eventually negotiating techniques are acquired—but often slowly and erratically. Some novice lawyers are fortunate enough to be working with capable negotiators; others are not.

This book provides both the necessary theoretical background and the specific techniques to make you a better negotiator. The prospect of *learning* to become a more effective negotiator should not be a startling

one. Few law students and lawyers today would quarrel with the assertion that trial practice courses and texts can teach effective cross-examination skills, however novel that idea may have been a generation or two ago. Part of what is taught as the "art" of cross-examination depends upon the law of evidence, but the most important underpinnings of cross-examination skills lie in the behavioral reactions of the witness and the jurors to the type (leading!) and the pacing of questions. The art and science of negotiation similarly depend upon predictions as to how the other lawyer will respond to your strategic moves as a negotiator—your demands or proposals, arguments and questions. While the interactions of negotiators are less stylized than those of attorney and witness in the courtroom, they can be analyzed and understood in a manner that enables you to become a more capable negotiator.

This is a practical text, designed to assist the law student or lawyer in becoming a better negotiator. It is not merely a theoretical overview of the social psychology of negotiation or of game theory. On the other hand, it is not a cookbook or a mechanic's manual. To be sure, it describes a number of specific negotiating techniques, but the effective legal negotiator cannot be programmed in advance like a computer or trained like a seal. For the lawyer to know when to choose a particular technique, when to extrapolate from a described tactic or when to improvise totally, she[1] needs a fuller understanding of the psychology of legal negotiation. Therefore, the knowledge and theories of social psychologists and others who have studied negotiation will be described and analyzed when they provide helpful insights for the negotiating lawyer.

2. WHAT IS NEGOTIATION?

Everyone knows what negotiation is. Two parties face each other and haggle, whether over the price of an automobile, the terms of a commercial lease, or the control of a corporation. Adjudication, on the other hand, appears to be its polar opposite. Opposing advocates present evidence and arguments to a third party, either judge or jury, and await a binding decision.

The demarcation between these two processes, however, sometimes is obscure. If the prosecutor, in plea bargaining, makes the defendant a "take it or leave it offer" in a case in which the defendant otherwise faces certain conviction on higher charges, is that negotiation or is the prosecutor in reality functioning as a judge? If the parties in a complicated business dispute agree to participate in a "mini-trial,"[2] a formalized presentation of evidence to a third party, and they ask the third party to render a decision but stipulate that it is non-binding, is that an adjudication, a part of the negotiation process, or both?

1. Anyone writing about negotiation or other multiple-party human interactions in a modern context realizes the difficulty of pronoun selection. I refer to the principal negotiator as "she" throughout this text; her client and her negotiating counterpart typically are referred to as "he."

2. For a discussion of mini-trials, *see infra* Chapter 12, "Alternative Dispute Resolution and Negotiation," at 234–35.

For the purposes of this book, *negotiation* can be defined as a process in which two or more participants attempt to reach a joint decision on matters of common concern in situations where they are in actual or potential disagreement or conflict.[3] The factor distinguishing negotiation from adjudication is that the parties themselves—not someone else—determine the result, and they must consent to the outcome for it to be operative. Even when the prosecutor possesses overwhelming bargaining power, the plea bargain still requires the defendant's consent. Plea bargaining, therefore, remains negotiation. The "mini-trial" too is a negotiation technique. Although it looks like adjudication, the parties remain free to accept or reject the results of the "mini-trial" and decide the outcome.

Throughout this book the term "bargaining" will be used interchangeably with "negotiation," although many social scientists use it in a more restrictive sense to refer to the presentation and exchange of proposals for the terms of agreement on specific issues.[4]

3. THE CLIENT AND NEGOTIATION

If everyone negotiates constantly, what makes legal negotiation different? The most important distinction is that while the lawyer sometimes negotiates on her own behalf, such as when she negotiates her own salary or her office lease, the essence of legal negotiation is the lawyer's role as a representative of her client. Legal negotiations involve not only a relationship between the two negotiating attorneys, but also relationships between each lawyer and her respective client. The interactions between lawyer and client as a part of the negotiation process will be explored in a comprehensive manner in Chapter 10, "Negotiation Counseling," and the effects of the client on the negotiation process will be considered throughout this book. For now, three differences between legal negotiation and other negotiation are highlighted.

First, the client, and not the negotiator herself, should make the important substantive decisions in negotiation, such as whether to make or accept specific offers. The American Bar Association's *Model Rule of Professional Conduct 1.2* provides that "a lawyer shall abide by a client's decision whether to settle a matter."[5] The rule requires that the lawyer "abide by a client's decisions concerning the objectives of representation" and "consult with the client as to the means by which they are to be pursued."[6] Caselaw[7] and commentators[8] frequently refer explicitly to the lawyer as "an agent" for the client in negotiations.

3. *See* PETER H. GULLIVER, DISPUTES AND NEGOTIATIONS: A CROSS-CULTURAL PERSPECTIVE xiii (1979).

4. *E.g., id.* at 71.

5. MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2006).

6. *Id.*

7. *See, e.g.*, Sarkes Tarzian, Inc. v. U.S. Trust Co. of Fla. Sav. Bank, 397 F.3d 577, 587 (7th Cir. 2005) (using agency principles to conclude that attorney lacked authority to bind client in contract negotiations); Panzino v. City of Phoenix, 999 P.2d 198, 203 (Ariz. 2000) (stating that "the attorney-client relationship is governed by principles of agency law"); *In re* Silicone Breast Implant Litig., 761 N.Y.S.2d 640, 643 (N.Y. App. Div. 2003) (upholding settlement agreement entered into by attorney on the

The quality of a negotiated agreement is measured by the extent to which it meets the client's interests, both long term and short term. If the lawyer is to achieve better negotiation results, therefore, she must be able to ascertain the client's true interests and priorities and to counsel the client effectively regarding the alternatives available to him and the consequences of each option.

A negotiated agreement is never any better than the extent to which it serves the client's interests. The lawyer may believe that if she continues her hard-nosed, aggressive bargaining she will be able to extract a better compensation package for her client—a physician hoping to join an existing medical practice. Only her client can decide, however, if the additional compensation is sufficiently important to him to risk the potential jealousy and resentment of his new partners. Similarly, a plaintiff's personal injury attorney may believe that her client has an excellent chance of receiving a verdict in excess of $1.6 million if the case proceeds to trial. But only the paraplegic client can choose between a certain settlement offer of $600,000 and the riskier, albeit more lucrative, prospects at trial. Some of us play the lottery; some of us do not. Because each individual has his own level of risk-tolerance, the client should decide for himself whether the settlement is a "good deal."

On the other hand, the client's decision to accept or reject a negotiated agreement should be a fully informed one. *Model Rule of Professional Conduct 1.4(a)* requires the lawyer to "keep the client reasonably informed about the status of a matter."[9] Thus, the lawyer should continually update the client as the negotiations progress. Further, *Model Rule 1.4(b)* specifically directs the lawyer to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions."[10] The comment to the rule indicates that the lawyer shall promptly inform her client of settlement offers, inform the client of communications from the other attorney during negotiation, and provide the facts relevant to the matter being negotiated.[11]

The lawyer's proper professional role as counselor involves more than merely keeping the client informed, however. *Model Rule of Professional Conduct 2.1* requires the lawyer to "exercise independent profes-

basis of apparent authority in the absence of actual authority).

8. *See, e.g.*, Ronald J. Gilson & Robert H. Mnookin, *Disputing through Agents: Cooperation and Conflict between Lawyers in Litigation*, 94 COLUM. L. REV. 509, 513 (1994) (discussing the tension between game theory and agency theory in legal negotiations by noting that the client-principal's desires, and those of his lawyer-agent, often diverge, discouraging the use of efficient problem-solving tactics); Michael L. Katz, *Game-Playing Agents: Unobservable Contracts as Precommitments*, 22 RAND J. ECON. 307, 311 (1991) (considering the lawyer-agent's effect on game theory).

9. MODEL RULES OF PROF'L CONDUCT R. 1.4(a) (2006); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 20(1) (2000); *see* Susan Martyn, *Informed Consent in the Practice of Law*, 48 GEO. WASH. L. REV. 307, 310 (1980) (arguing that lawyers have a duty to inform clients of all relevant facts and possible consequences of proposed legal solutions).

10. MODEL RULES OF PROF'L CONDUCT R. 1.4(b) (2006).

11. *Id.* R. 1.4 cmt. 2.