

NEGOTIATION

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I. Introduction:

John F. Kennedy said, "Let us never negotiate out of fear. But let us never fear to negotiate." Negotiation: lawyers do it all the time. Lawyers are negotiators. We negotiate with ourselves, family members, sales people, law partners, clients, opposing lawyers, unrepresented opposing parties, mediators, judges and others. "Kids play their parents off each other. Whether you're arguing with your spouse, buying a car, or selling a product or a house, you're negotiating. Yet few have ever learned the strategies and techniques of effective negotiation. Even fewer have mastered them." Martin Latz, *Gain the Edge! Negotiating to Get What You Want* (New York: St. Martin's Press, 2004). Most of the time these negotiations are haphazard, without adequate preparation.

This paper will explore concepts learned at the Program on Negotiation at Harvard Law School with special focus on three-dimensional negotiation developed by and explained exceedingly well by David A. Lax and James K. Sebenius in their 2006 book, *3-D Negotiation* (Boston, Harvard Business School Press, 2006). I encourage all to buy and seriously study *3-D Negotiation* and to attend the negotiation courses at Harvard Law School and Harvard Business School.

Future reference in this paper to the Lax and Sebenius book will simply be cited as, *3-D Negotiation*. Other references will be made at the appropriate time to other books written by leading negotiation experts.

II. 3-D Negotiation.

Three-dimensional negotiation consists of tactics, deal design and setup.

A. Tactics, the First Dimension.

Tactics are the back and forth moves made by each side at the table face-to-face. The single dimension is tactics. One-dimensional bargainers believe that negotiation is mainly what happens at the table. To them, preparation and execution are mainly about the interpersonal process and tactics at the table. *3-D Negotiation*, pp. 1, 2, & 12.

Lax and Sebenius place most one-dimensional negotiators into two broad categories, which they call "win-win" and "win-lose" negotiators. "They offer

competing seminars and do battle in academic journals." *3-D Negotiation*, p. 7.

Win-lose bargainers are from the old school, plying their trade in courtrooms, business boardrooms, mediation, arbitration, legislatures, political parties and other conflict venues. Their bookshelves bulge with books on adversarial ploys, such as Robert J. Ringer's *Winning Though Intimidation* and Jim Camp's *Start with No*. They sit down at the bargaining table to battle and scrap over the best price, the biggest share of the pie, with one party the winner and the other the loser. *3-D Negotiation*, p.8.

Win-win negotiators, by contrast, for some time now have represented the new way. They promise innovative solutions, more value, and better relationships. The win-win library consists of books that emphasize the cooperative potential of negotiation, including valuable ones like the 1991 Second Edition of *Getting to Yes* by Roger Fisher, William Ury and Bruce Patton and *Getting Past No* by William Ury, 1991. Win-win types engage in joint brainstorming sessions to come up with creative solutions that "make the pie bigger" for all. *3-D Negotiation*, p. 8.

Although the win-win and win-lose negotiators are very different, they are both one-dimensional negotiators. They both concentrate almost exclusively on the face-to-face and tactical aspects of negotiation. They view the negotiating process mainly in terms of actions at the bargaining table, which of course comprises not only the conference room, but the virtual tables (email, phone and fax, etc.). These bargainers do more than interact at the table; they also prepare before they get there. However, their main preparation focus "is planning their face-to-face approach and tactics." *3-D Negotiation*, pp. 8 & 9.

Lax and Sebenius state that after years of doing deals and analyzing negotiations, they have learned the common one-dimension approach, with its focus on tactics at the table often fails. It routinely misses the larger potential game that can really drive the outcome. It often leaves economic and noneconomic value on the table. "One-dimensional negotiators are actually playing in a 3-D world, and they often pay a steep price for their very limited approach. They, or the people whom they represent, are the losers." 3-

D negotiation is the better approach. *3-D Negotiation*, p. 9.

B. Deal Design, the Second Dimension.

Deal design is more than face-to-face negotiations. Deal designers know how to probe below the surface to uncover the sources of economic and noneconomic value. To unlock that value for the parties, they have a systematic approach to envision and structure creative agreements. *3-D Negotiation*, p. 2.

Lax and Sebenius describe deal design as follows:

“Negotiation involves the art and science of drawing up deals that create lasting value. Deal design employs a good old-fashioned tool—the drawing board—in new and productive ways. Here’s is what we mean by a systematic approach to deal design: when a proposed deal does not offer enough value to all sides, or when its structure won’t achieve its purposes, deal designers must go to work on the drawing board, sometimes on your own, sometimes with your team, and sometimes in concert with the other party. Their deal designs create value, often unexpectedly, guided by general principles and specific techniques...” *3-D Negotiation*, p. 10.

Lax and Sebenius explain that smart people working at the drawing board can sometimes discover hidden sources of economic and noneconomic value and then craft deals that unlock the value for the parties. “For example: Is it *really* a pure price deal? Does some sort of trade between sides make sense and, if so, on what terms? Can we unbundle different aspects of what looks like a single issue and give to each side what it values most?” *3-D Negotiation*, p.10.

Conventional wisdom says that parties negotiate to overcome the differences between them. “Deal design principles can systematically point to agreements that create value by dovetailing differences.” Understanding the differences and barriers to reaching an agreement is critical.

“For example, when Egypt and Israel were negotiating over the Sinai, their positions on where to draw the boundary were incompatible. When negotiators went

beyond the opposing positions, however, they uncovered a vital difference of underlying interest and priority: the Israelis cared more about security, while the Egyptians cared more about sovereignty. The solution was a demilitarized zone under the Egyptian flag. Differences of interest or priority can open the door to unbundling different elements and giving each party what it values the most at the least cost to the other (as the Egyptians and Israelis did): a core principle of deal design.” *3-D Negotiation*, p.11.

C. Setup, the Third Dimension.

“The third dimension, setup moves— often the most potent actions a 3-D Negotiator can take— complete the shift in focus.” Lax and Sebenius explain:

“These moves take place entirely away from the table. In a nutshell, here is what we mean by setup: negotiation involves moves away from the table to set up the most promising situation once you’re at the table. Before taking a seat at the table, the 3-D Negotiator has taken advantage of powerful negotiation principles.....to create the optimum conditions before the parties face each other directly. In other words, the table has been set well before the tactical interplay (the focus of the win-win and win-lose negotiators) begins.” *3-D Negotiation*, p. 12.

“What does ‘setting the table’ mean in this context? Simply put, it means acting to ensure that the right parties have been involved, in the right sequence, to deal with the right issues that engage the right set of interests, at the right table or tables, at the right time, under the right expectations, and facing the right consequences of walking away if there is no deal. Before worrying too much about tactics, the 3-D setup architect works hard to optimize these elements—the scope, sequence, and choices about the process itself—within which interpersonal dealing will play out.” *3-D Negotiation*, p. 12.

Lax and Sebenius state:

“If the setup at the table isn’t promising, the 3-D Negotiator doesn’t merely resort to bullying (like the win-lose type) or turning up the empathy and personal charm (like the win-win negotiator). Instead, he or she takes action away from the table to *reset* the table more favorably. The 3-D Negotiator understands that a bad setup makes tactics at the table more or less irrelevant, and that a great setup, conversely, makes good tactics all the more effective. In fact, it can help the tactician achieve otherwise impossible results.” *3-D Negotiation*, p 13.

D. Staples Example.

Lax and Sebenius give an example of resetting the table with a case study of Staples trying to obtain financing. This example deals with optimizing the *scope* (the parties, interests, no-deal options) and sequence by which different parties are involved in order to create a better setup.

Thomas Stemberg, the founder of Staples, obtained a first round of financing from initial venture capital (VC) backers. Staples did well, beating early sales targets by 50 percent. Stemberg needed more financing to expand quickly because the threats of new competitors like Office Depot. Stemberg sought a new round of financing thru the same VCs. The VCs seemed unified and offered less capital while demanding a bigger piece of Staple’s equity. Despite many efforts, Stemberg could not get the VCs to change their position.

Rather than trying to bully the VCs like a win-lose negotiator or use personal charm and empathy like a win-win negotiator, Stemberg reset the table with the help of Harvard Business School consultants. Stemberg changed the parties by going directly to pension funds and insurance companies for financing and bypassing the VCs. This resetting of the table would save the pension fund the 20 percent commission it would normally pay to the VCs. By following the advice of the consultants and resetting the table, Stemberg found his funding options greatly expanded, as several limited partners of the venture funds offered to put up their own money on Stemberg’s terms. *3-D Negotiation*, pp. 13-16.

III. Value, Creating and Claiming.

An important aspect of 3-D Negotiation is creating and claiming value. “*Your negotiating objective should be to create and claim value for the long term by crafting and implementing a deal that is satisfactory for both (or all) parties.*” *3-D Negotiation*, p. 16.

A. What is Value?

Economic value can mean price points, cash flow, interest rates and other financial issues effecting financial gains or losses to the negotiating parties.

Noneconomic value can mean precedent, relationships, reputation, political appearance, fairness or even how the other side’s self-image fares in the process. *3-D Negotiation*, p. 17. In the family law context, noneconomic value is frequently more important than economic value. When there are no children, emotions can still run very high, with issues of fairness, anger, reputation and self-image. When there are children, whether minor or adult, relationships are added to fairness, reputation and self-image.

The following relationships are important to protect: between the parents, among the children, between each parent and each child, as well as between the lawyers and each lawyer and each client. Parents and children will have dealings with each other for years to come. Many family lawyers will have relationships and more cases together for years to come. These relationships are important to protect on a long term-basis.

B. Creating and Claiming Value.

“The 3-D Negotiator is a master at the kinds of cooperative, problem-solving skills that uncover joint gains, and thereby create value for all sides relative to a no deal. Value-creation falls into the ‘win-win,’ or ‘non-zero-sum’ aspect of the process, because value creation benefits all parties.” *3-D Negotiation*, p. 17. “But that’s only half the story. The 3-D Negotiator is also a master at *claiming* value. This is the competitive, win-lose part of the negotiation, in which one side seeks to claim a full share of the ‘value pie.’ Obviously, there’s an inherent tension between the cooperative moves needed to create value jointly and the competitive moves that enable you to claim value individually. Managing that tension is the very heart of the art and science of negotiation.” *3-D Negotiation*, p. 17.

In the family law and collaborative law arenas, we have all experienced this tension even though we had no name for it. We work hard to develop options and create value, but when it is time to do the deal and a party makes an offer, a frequent response is, "You aren't being collaborative," to which the other lawyer says, "Come on, we have expressed the interests of the parties, gathered the information, generated options, analyzed the merits of the options, now it is time to make an offer and reach an agreement." We have all been there and experienced this stress. The 3-D Negotiation techniques described in the Lax and Sebenius book will help us create value, claim value, and productively manage the tension between creating and claiming. This paper is no substitute for their book.

C. Long Term Approach.

Negotiators need to think in the long term when creating and claiming value and during the entire negotiating process. There are one-shot negotiations when it is unlikely that the parties and lawyers will ever bargain with each other again. However, many negotiations are not one-shot deals and the parties will deal with each other again with the same lawyers or different lawyers. The lawyers could negotiate on opposite sides with different parties in the future as frequently happens in family law cases and in other negotiations. Keeping the long term in mind in all negotiations is important for at least three reasons.

First, in family law litigation cases and collaborative law cases, the first negotiating issues (the divorce stage) are only a first chapter in a longer, ongoing relationship that could be damaged by adversarial tactics, making it harder to strike good deals in the future. This is true in all negotiations.

Second, many agreements deliver their value only when all the parties live up to their respective sides of the bargain in the intended spirit, which is certainly applicable in family law. If the parties to the agreement feel that they have been exploited or otherwise dealt with unfairly, they may live up to their side of the bargain only half-heartedly.

Third, even in the case of a true one-shot, stand-alone agreement, your approach to deal-making can affect your reputation beyond the confines of one deal. The business, legal and personal networks within which we all interact are becoming more tightly connected. People talk, especially in legal

circles. If you get a reputation for dealing unfairly, dishonestly or adversarially, it will come back to haunt you and be harmful to and be more expensive for your future clients. *3-D Negotiation*, pp. 17, 18.

We have all had the unpleasant experience of dealing with an opposing lawyer who cannot be trusted in litigation and sometimes in collaborative cases. I once had a lawyer on the other side with whom I had never had a case. I called a lawyer who knew this opposing counsel to see what I could learn. It was not pretty. I learned that this opposing lawyer would lie to me, to the court, would conceal evidence, and misrepresent facts and the law. This information was confirmed by other sources and certainly made the case harder, more expensive, more stressful and last way too long. People who feel wronged have a long memory. The following quote from John F. Kennedy is important to remember: "Forgive your enemies, but never forget their names."

The Texas Lawyers Creed is important. Your reputation, your word, and your spirit of fair dealing are critically important as a collaborative attorney, lawyer negotiator, litigator and as a mediator.

IV. Preparation, Preparation, Preparation.

Preparation is key to the success of any endeavor.

The Boy Scout motto is "Be Prepared." I call it TTPP: Timely, Thorough, Thoughtful Preparation. Negotiation experts all focus on the importance of preparation.

A. Latz on Preparation.

Martin Latz says the following:

"What is the most universally ignored but most effective negotiation tool? *Preparation*. I conclude every one of my seminars with this statement: 'Prepare, Prepare, Prepare. It's guaranteed to succeed. The more you prepare the better you will do.' Most people fail to sufficiently prepare. We have the best of intentions, but we lead busy lives and jump into negotiations without adequately exploring the many avenues down which negotiations may proceed. Renowned UCLA basketball coach John Wooden said: 'Failing to prepare is preparing to fail.' He's right."

Gain the Edge! Negotiating To Get What You Want, p. 5 (New York, St. Martin Press, 2004)

B. Ury on Preparation.

William Ury joins Martin Latz and says:

"The secret of effective negotiation is that simple: prepare, prepare, prepare. Most negotiations are won or lost even before the talking begins, depending on the quality of preparation. People who think they can 'wing it' without preparing often find themselves sadly mistaken. Even if they reach agreement, they may miss opportunities for joint gain they might well have come across in preparing. There is no substitute for effective preparation. The more difficult the negotiation, the more intensive your preparation needs to be." William Ury, *Getting Past No*, p. 16, (New York, Bantam, 1991).

C. Fisher and Shapiro on Preparation.

Roger Fisher and Daniel Shapiro devote an entire chapter in their book to preparation, "Prepare on Process, Substance and Emotion." They state in the introduction to chapter 9:

"There are two reasons why even experienced negotiators are often ill prepared. First, they may have no structured way to prepare for their negotiation. They assume that preparation entails reading case files and discussing when to set the meeting and how much money to demand or offer. Getting to know a case file, however, does little to prepare a negotiator for how to establish an effective negotiation process, how to learn about each side's interests, and how to deal with each side's emotions. Second, negotiators often have no routine for learning from their past negotiations. Mistakes and old habits are hard to break. With careful preparation, you can stimulate positive emotions that enhance the effectiveness of your negotiation." Roger Fisher and Daniel Shapiro, *Beyond Reason, Using Emotions as You Negotiate*, pp.169-170 (New York: Penguin, 2005).

D. Lax and Senius on Preparation.

Lax and Sebenius remind us that all the negotiating parties and their agents care deeply about the outcome of the negotiation. "Unfortunately, when it comes to negotiating success, caring deeply doesn't make the difference. Only *effective preparation and focused action make a difference.*" According to Lax and Sebenius, "...the best preparation is mastering the principles of 3-D Negotiation. The very first part of preparation is understanding what you're really up against." You must know where you want to go, your interests and your counterpart's interests and the barriers that stand between you and the deal you want. *3-D Negotiation*, pp. 18, 19. John F. Kennedy said, "Efforts and courage are not enough without purpose and direction." Lax and Sebenius instruct us to determine our destination and map backward on how to get there. William Ury also states, "Unless you know where you want to go, you're unlikely to get there." *Getting Past No*, p. 17 (New York, Bantam, 1991).

V. Barriers Audit.

A barriers audit is a systematic assessment of the situation in terms of its setup, deal design and tactics. "Without an accurate barriers assessment—what we call a *3-D barriers audit*—your strategy and tactics may address the wrong problems." What barriers stand between you and the deal you want? What barriers stand between the other party and the deal he or she wants? What are the barriers to creating value? What are the barriers to claiming value? Work backward from your understanding of those barriers to map a negotiating strategy to get the deal you want. *3-D Negotiation*, pp. 18, 19.

A. Lockstore Case Study.

The case study called LockStore is an illustration of a negotiation that didn't have the benefit of a 3-D barriers audit and suffered as a result. LockStore developed a new technology that detected leaks in underground gas tanks that was 100% more accurate and substantially cheaper than anything else on the market. However, after being shown how well the product worked, the owners of underground gas tanks would not buy it. If the product was installed, it would reveal gas leaks and show non-compliance with EPA rules that the existing leak detectors would not reveal. Thus, the owners of underground gas

tanks would have to deal with broken EPA rules and the fines and problems following those violations. The new product would give them unneeded expensive headaches.

Lax and Sebunius explain that LockStore failed to do a barriers audit. "The first, and killer, tactical barrier was LockStore's myopic focus. Stuck in their own perspective, LockStore's sales engineers did not think very hard about how 'faster, better, cheaper' would look to the *other* side. And remember, it is the *other side's* choice—to say yes or no—that you're trying to influence in your negotiations." LockStore failed to uncover a deal-related barrier: "the necessary value was simply not there for the buyer." The new hypersensitive product would have created needless costs and risks for the owners of underground gas tanks. "This represents a classic barrier, which we call an *adverse deal/no-deal balance*; it simply means that 'no-deal' looks better than 'yes' for one or more of the parties." Had Lax and Sebenius been consulted, they would have counseled LockStore to look away from the table for a solution. "The real barrier to success involved the *setup* itself, which was limited to company-customer sales negotiation. LockStore was simply negotiating with the wrong people. It should have put far more energy into persuading the government to *require* the higher level of compliance that its device could deliver. The postmortem 3-D audit suggests that LockStore faced a self-inflicted tactical barrier by keeping an inward focus and being guilty of the all-too-common failure to probe the other side's real interests." *3-D Negotiation*, pp. 21-23.

B. Assessing Setup Barriers.

A flawed setup makes it less likely that you reach the deal you desire.

"Setup problems can involve three aspects of the negotiation: scope, sequence, and basic process choices. *Scope* flaws mean the wrong parties, interests and/or no-deal options. *Sequence* flaws, by contrast, are problems with the order in which the negotiation is to unfold. Mistakes can be made, for example, as to which parties are approached first or the order in which issues are dealt with, that can stymie or kill an unfolding negotiation. And finally, *basic process* choice flaws can include problems with the way a negotiation is

organized. For example, there may be no provision for useful joint fact finding or for a third party, such as a mediator, to support the process, when such features could have been helpful. First, you should map the scope: all the parties, their interests, and their no-deal options. Second, you should check the sequence. And third, you should check basic process choices for hidden flaws." *3-D Negotiation*, p. 24.

C. Determining the Real Parties.

Determining the full set of interested parties, those now in the picture and those who may enter later, requires effort and imagination. Inexperienced negotiators are frequently too focused on the economics of the deal and forget the interests of the players who are in a position to kill the deal. *3-D Negotiation*, p. 25.

As we many times discover too late in the negotiation process in family law cases, shadow parties can influence the case. The decision makers and influencers are not only the husband and wife or ex-spouses, but their minor or adult children, their parents, their significant others or their new spouses, as well as business partners, financial advisors and accountants. Negotiations can go slowly when one party must call for advice before making decisions.

VI. Focus on Interests not Positions.

Positions are statements about what a party wants. An interest is the underlying reason, value, desire and goal that give rise to a position. Every negotiation author and book referenced in this paper tells us to focus on interests, not positions.

A. Interests Define the Problem.

"The basic problem in a negotiation lies not in conflicting positions, but in the conflict between each side's needs, desires, concerns, and fears. The parties may say: 'I am trying to stop the real estate development next door.' Or, 'We disagree. He wants \$100,000 for the house and I won't pay a penny over \$95,000.' But on a more basic level the problem is: 'He needs the cash; I want peace and quiet.' Such desires and concerns are interests. Interests motivate people; they are the silent movers behind the hubbub of positions. Your

position is something you have decided upon. Your interests are what caused you to so decide.” Roger Fisher, William Ury and Bruce Patton, *Getting to Yes: Negotiating Agreement Without Giving In* pp.40-41 (New York: Penguin, 1991).

Fisher, Ury and Patton add on page 42: “Behind opposed positions lie shared and compatible interests as well as conflicting ones.” Each side’s interest must be carefully explored to find shared interests, much like is done at the beginning of the collaborative law process. Both sides may have shared interests of stability, financial security, dependable and inexpensive transportation, and a good long term relationship.

B. Getting the Interests Right.

Returning to Lax and Sebenius, “GETTING THE SETUP RIGHT means getting the interests right. Let’s simply define *interest as whatever you care about that is potentially a stake in the negotiation*. Your interests are why you’re involved in this negotiation in the first place. The same holds true for those people on the other side of the table. Without a clear and accurate assessment of interests, you will fly blind in your deal making.” *3-D Negotiation*, p. 69. Lax and Sebenius join Fisher, Ury and Patton by emphasizing that compatible interests often underlie incompatible positions.

Although we focus on interests rather than positions in collaborative law pretty well, we often fail to do so in mediations. What do mediators ask for lawyers to give them? A position statement. Mediators should focus on interests, explain interests versus positions to uninformed lawyers in the initial letter to the lawyers and ask for the interests of the parties, not their positions. Lawyers and mediators frequently fail to sort out the truly “must-have” from the “important” and from the “desirable, but not critical.” When priorities are ignored, hours can be wasted and negotiations go bad when parties bog down on a laundry list of house contents, the total value of which is less than 3% of the total estate. I ask my clients and, in my role as a mediator, ask the parties and the attorneys, “Ordinarily in life, would you voluntarily and knowingly spend \$50.00 for a \$5.00 hamburger?” The answer is always no.

C. Evaluate Interests Early and Often.

Effective negotiators make the interest-mapping process a serious, ongoing priority. You must understand your interests and their interests and be aware as the circumstances change, interests can change. Be flexible, as conditions change, reevaluate your interests, counterpart’s interests, the barriers to reach an agreement and each side’s walk-away position. *3-D Negotiation*, p. 70. Negotiation is not a static process and must have constant review and remapping. Think of your car’s GPS, you make a wrong turn and what do you hear? “Recalculating.”

For any of you that go sailing, you know that you are always making adjustments to the tiller and sail because of wind speed, wind direction and objects (boats, land masses, shallow water) in order to reach your destination. Likewise, you should always be adjusting and remapping in negotiations.

“The best negotiators are very clear on their ultimate interests but know their trade-offs among lesser interests and are remarkably flexible and creative on the means of advancing these ultimate interests.” *3-D Negotiation*, p.71. Equally important is understanding the other party’s interests. “Since your counterparts will say yes for their reasons, not yours, you need the maximum insight possible into how well their interests would be met by a deal versus their best no-deal option.” *3-D Negotiation*, p. 71.

D. Fluffy Case Study.

Lax and Sebenius illustrate the need to get interests right by the Fluffy case study. A barrier to an agreement could be submerged interests that are not on the table, which have the potential to drastically affect the negotiations. “If there’s a difference between what people say they want (their bargaining *position*) and what they really want (their *interests*), you need to figure out what the difference might be. Remember that what they value encompasses both economic and noneconomic factors, tangibles as well as intangibles.” *3-D Negotiation*, p. 26.

The Fluffy Case Study—An English development firm had assembled most of the land to build a regional medical center near London, except for one key parcel which was owned by Ms. Jones. Her small cottage and lot was appraised for about \$123,000. However, she turned down progressively higher offers of \$138,897, \$154,330, \$185,196 and finally

\$306,660. The land development firm assumed that this was a price war based on a difference of opinion on economic value and that Ms. Jones was trying to exploit them.

The CEO of the development firm intervened in the negotiations and went to the lady's cottage for a visit. He noticed many photos on the wall and elsewhere of a small dog and asked about the dog. Ms. Jones said the dog was Fluffy, who died three years earlier and was buried in her backyard. The CEO asked to see Fluffy's grave site, which Ms. Jones was thrilled to show him. Realizing that the stalemate was more about noneconomic value than economic value, the CEO asked Ms. Jones if she had ever considered what would happen to Fluffy and her grave site over the years and perhaps after Ms. Jones' death. The CEO then said, "Wouldn't a proper memorial, well-tended in perpetuity be a more fitting remembrance of Fluffy?" Ms. Jones liked the idea. The CEO offered to have Fluffy's remains removed and relocated to the grounds of a prestigious pet cemetery at the development firm's expense and then offered to pay Ms. Jones \$154,330, which was half of the highest offer she turned down. Ms. Jones accepted the offer and stated, "What use does a childless old woman like me have for more money, as long as I can rent a nice flat near Fluffy?" When the real interests behind the stated positions were discovered, the negotiation was successfully completed. *3-D Negotiation*, pp. 25-26.

In order to understand the importance of probing behind the apparently incompatible bargaining positions to understand the full set of real interests of the parties, Lax and Sebenius quote Wayne Huizenga, veteran of more than a thousand deals that went into the building of Waste Management, Inc., Auto Nation and Blockbuster: "In all my years of doing deals, a few rules and lessons have emerged. Most important, always try to put yourself in the other person's shoes. It's vital to try to understand in depth what the other side really wants out of the deal." *3-D Negotiation*, pp. 26-27.

William Ury echoes the statement by Huizenga at page 19 of *Getting Past No*, "The single most important skill in negotiation is the ability to put yourself in the other side's shoes. If you are trying to change their thinking, you need to begin by understanding what their thinking is."

E. Letting Someone Have It Your Way.

Ury, Lax and Sebenius quote the Italian diplomat, Daniele Vare, "Diplomacy is the art of letting someone else have it your way." *Getting Past No*, p. 3; *3-D Negotiation*, p. 37. Getting the parties and interests right opens possibilities of value creating trades that increase the chances for successful negotiations. You must learn and understand what the other side wants, what you can give them and not cost yourself too much and still get the deal that you want. *3-D Negotiation*, p. 27. Lax and Sebenius explain that the art of letting them have your way means "finding an agreement that meets your counterparts' real interests, as a way of meeting yours. It means shaping how the other side sees the basic choice—between yes and no—so that the 'yes' they choose for their reasons yields the deal you want for yours." *3-D Negotiation*, p. 37.

"Build your opponent a golden bridge to retreat across." Sun Tzu. When you become frustrated by the side's resistance, it is easy to be tempted to push, to insist and apply pressure. "But, pushing may actually make it more difficult for the other side to agree. Instead of pushing the other side toward an agreement, you need to do the opposite. You need to *draw* them in the direction you want them move. Your job is to *build a golden bridge* across the chasm. You need to reframe a retreat from their position as an advance toward a better solution." William Ury, *Getting Past No*, pp. 105,108 and 109.

VII. Assess No-Deal Options.

In any negotiation the parties face an option, reach an agreement or walk away. In order to make that decision, each party needs to know how well the deal would serve their respective interests. "The real question is, 'How well does it serve my interests, compared to what?' This is the deal/no deal balance. On one side of the balance, you have the proposed deal; on the other, you have your 'walk-away' option, sometimes called your *best alternative to a negotiated agreement*, or BATNA. Your alternative to cutting a deal sets the bar, in value terms, that any proposed deal has to clear. If the proposed deal is worth less to you than the alternative, you will leave the table." *3-D Negotiation*, p. 27

A. Deal/No-Deal Balance.

“Understanding the deal/no-deal balance requires a two-part assessment by each party: first, the assessment of your own position, as noted above, and second, the assessment of the *other* party’s alternatives, insofar as you can understand them. Why? Because part of a successful negotiating strategy is shaping your counterparts’ perception of *their* deal/no-deal balance in order to get them to say ‘yes’ to the deal that *you* want. They have to decide for themselves that the deal you’re offering is better than any of the alternatives, including no deal at all.” *3-D Negotiation*, p. 27.

B. Walk-Away Power.

Roger Dawson states, “Of all the negotiating pressure points, this one is the most powerful. It’s projecting to the other side that you will walk away from the negotiations if you can’t get what you want. If there’s one thing that I can impress on you that would make you a 10-times-more-powerful negotiator, it’s this: Learn to develop Walk-Away power. The danger is that there’s a mental point that you pass when you will no longer walk away.” Roger Dawson, *Secrets of Power Negotiating*, p. 194 (Pompton Plains, N, J., Career Press 2011).

William Ury emphasizes that if you cannot walk away, you cannot negotiate. “BATNA is the key to negotiating power. Your power depends less on whether you are bigger, stronger, more senior, or richer than the other person than on how good your BATNA is. If you have a viable alternative, then you have leverage in the negotiation. The better your BATNA, the more power you have.” William Ury, *Getting Past No*, p. 22.

Lax and Sebenius explain walk-away power similarly.

“So you need to smoke out the interests of the other side and understand its best walk-away option. Meanwhile, of course, you need to cultivate your own. A strong walk-away option is an important negotiation tool. The better your no-deal possibilities appear both to you and to the other party, the more credible your threat to walk away becomes, and the more these possibilities can serve as leverage to improve the deal. Our colleague Roger Fisher has dramatized this point by asking which you would prefer to have in your back pocket during a compensation

negotiation with your boss: a gun, or a terrific job offer from a desirable employer who is also one of your company’s serious competitors?” *3-D Negotiation*, p.29.

C. BATNA, ZOPA and More Alphabet Soup.

Fisher, Ury and Patton popularized the importance of best alternative to a negotiated agreement, or BATNA, in *Getting to Yes: Negotiating Agreement Without Giving In* (New York: Penguin, 1991) Other useful acronyms have come into being such as: WATNA- worst alternative to a negotiated agreement; PATNA- probable alternative to a negotiated agreement; and ZOPA- zone of possible agreement. If the parties cannot get within the ZOPA, an agreement is highly unlikely, which emphasizes the need to get the parties’ interests right.

“Your best no-deal option, again, is the most attractive course of action you could take in the event of no agreement in the current negotiation. The value you place on your best no-deal option sets the bar—in terms of the full set of your interests—that any agreement must exceed to be acceptable; this is also true for the other side. As such, no-deal options imply the existence or absence of a *Zone of Possible Agreement* (ZOPA), a bit of jargon we find useful. The ZOPA simply means the set of possible agreements that is better for each side, given its interests, than its best no-deal option.” Lax and Sebenius, *3-D Negotiation*, p. 88.

If you know the parties, their interests, and their no-deal options, you should know the ZOPA.

VIII. Emotion, Ego, Perceived Fairness.

As the Fluffy case study illustrated, a perceived price difference can potentially wreck a richer set of interests. Lax and Sebenius explain:

“Bad negotiators possess what might be called the Reverse Midas Touch; that is, they turn potential gold into lead. A common way to do so is to pay attention exclusively to price or to short-term economic issues, thereby turning potentially cooperative deals into adversarial ones. By adopting hard-bargaining, price-focused tactics, they leave potential value uncreated. Yes, price is an

important factor in most deals. But it's rarely the only factor. As Felix Rohatyn, the former managing partner of the investment banking firm Lazard Frères, observed, 'Most deals are 50 percent emotion and 50 percent economics.'" *3-D Negotiation*, p.73.

A. Research, Divide \$100.

Lax and Sebenius state that there is a large body of research supporting the effect of emotion, ego and perceived fairness on negotiations. "Consider, for example, a simplified, one-shot negotiation extensively studied in laboratory settings—involving real money. One party is given, say, \$100 to divide with another party as she likes; the second party can either agree to or disagree with the arrangement. If he agrees, the \$100 is divided according to the first party's proposal; if he doesn't, neither party gets anything." *3-D Negotiation*, p. 73. Price logic implies that the first party should offer "\$99 for me and \$1 for you." She gets as much as possible and the other party gets money he would not have otherwise received. Pure price negotiators predict the other side will agree to this unequal split because they are getting free money.

However, these experiments reveal that most people playing the role of the second party turn down proposals that don't get them \$30 to \$40. The second party will forfeit the free money because of the perceived unfairness of the deal. "When the proposed split feels too unequal to us, we are *offended* on some fundamental level. We not only reject the buck (or its equivalent); we also set out to teach our greedy counterparts a lesson." *3-D Negotiation*, p. 73.

B. Research, \$20 Auction.

Martin Latz illustrates the same phenomenon with his \$20 bill auction example. Martin announces to his seminar participants, "Here is a \$20 bill. I'm going to auction it off to the highest bidder. You are free to bid or not bid. The bidding will proceed in one-dollar increments until no further bidding occurs. At that time the highest bidder at the end of the auction will pay me the amount bid and receive the \$20 bill. But here's a catch: The second highest bidder at the end of the auction must also pay me the amount he or she bid. So, if Frank bid \$5 and Sally bid \$4 and the bidding ended, Frank would pay me \$5

and I would give Frank the \$20 bill. Frank thus 'wins' and makes a net profit of \$15. Sally, the second highest bidder, would then pay me \$4. Sally thus incurs a loss of \$4." M. Latz, *Gaining the Edge*, p. 23.

The bidding quickly gets to the \$15 range, when bidders start to think through how their goal of getting a profit interacts with the other bidders' goal of getting a profit. Then bidders think, "What if my bid is the second highest, then I lose." Each bidder's focus switches from figuring out how to make a profit, to how to avoid a loss. The bidders begin to act irrationally by bidding more than \$20. Once the \$20 bill sold for \$204, a tidy profit of \$387 for the auctioneer, who collected \$204 from the winning bidder and \$203 from the second highest bidder, after giving the \$20 bill to the highest bidder. Ego and emotions entered the picture and controlled the outcome. M. Latz, *Gaining the Edge*, pp. 22-24. As Lax and Sebenius explain, "The larger lesson, therefore, is that people tend to care about much more than the absolute level of their own economic outcome. They tend to care about—among other things—relative results, perceived fairness, self-image, and reputation." *3-D Negotiation*, p. 73. As family lawyers, we have all seen these factors undermine rational and affect the outcome of the negotiation.

C. Neglected Noneconomic Interests.

Lax and Sebenius list four nonprice interests that are often neglected in negotiations, despite their demonstrated importance. *3-D Negotiation*, pp. 73-75.

1. Relationships. An agreement has to be a win-win situation for both sides. The parties cannot feel that they have lost. This is tremendously critical if the two parties are going to continue to work together in the future, as happens in family law all the time. When minor children are involved, the cost of neglecting relationship interests becomes painfully obvious and can continue into their adult lives. Family law cases are frequently more relationship focused, than deal focused, because the depth of the relationship is driving the interest.

2. The Social Contract. The social contract is not the substance of the deal, but the spirit of the deal. The social contract of the agreement goes far beyond a

good working relationship. It governs people's expectations about the nature, extent, and duration of the agreement, about the process that will be followed, and about the way that unforeseen events will be handled. The spirit of the agreement is especially important in family law cases and more so in collaborative family law cases. This social contract and its expectations sets the tone for how changes, some expected and some not, in the lives of the parties and children will be handled.

3. The Negotiation Process Itself. Lax and Sebenius state, "Desirable and sustainable results are more often reached when all the parties perceive the process as personal, respectful, straight forward, and fair." *3-D Negotiation*, p. 75. Nearly all collaborative trainings and books teach us the same lesson, as do well respected negotiation experts. "Insist on Using Objective Criteria" is chapter 5 in *Getting to Yes*, pp. 81-95, R. Fisher, W. Ury and B. Patton. Martin Latz's "Golden Rule Three: Employ Fair Objective Criteria" is chapter 3 in *Gaining the Edge*, pp. 103-144. Latz suggests the negotiating parties use a mediator to help achieve a "fair and reasonable" result and that mediators can be particularly effective in disputes involving high emotions and potential future relationships between the parties. Latz lists the advantages of mediation as the following, many of which were described in Howard Raiffa's classic book, *The Art and Science of Negotiation: How to Resolve Conflicts and Get the Best out of Bargaining*:

- "Providing a potentially face-saving way for the parties to sit down in the first place
- Establishing the appropriate atmosphere and environment in which to negotiate
- Helping parties skillfully navigate through difficult issues that might otherwise cause an impasse, and breaking through impasses that do occur
- Efficiently helping parties explore their fundamental values and interests and how they define 'success'
- Helping determine where the parties have shared, compatible, and conflicting interests and selectively, where useful, sharing such information with the other party or parties

- Systematically exploring mutually beneficial solutions and ways to 'expand the pie' by focusing on the parties' shared, compatible, and conflicting interests
- Providing a largely independent, realistic, and possibly expert assessment of all the parties' needs and alternatives (their leverage) and assisting the parties in determining when to walk and when to fold
- Managing the offer-concession dynamic in a way that may reduce the role of the parties' egos and increase the parties' chances of reaching agreement" *Gain the Edge*, p. 136.

4. Ethics. The potential for self-interested behavior in negotiation raises ethical issues that give cause for attention and concern.

"Ethical issues include questionable tactics such as lying and coercion, as well as issues of distributional fairness and representation in negotiation. Ethical interests in negotiation have at least two dimensions, both of which can be shaped by context and culture. First, there is the dimension of what is *intrinsically* right or wrong about an action, regardless of its effect on outcomes. (Lying and coercion, most would agree, are intrinsically wrong, even if they're ultimately unsuccessful or irrelevant.) Second, there are the *instrumental* dimensions of different ethical or unethical behaviors. For instance: does the full disclosure of my bottom line invite the other party to squeeze me right up to that point? Are the consequences of unethical behavior—which may in fact be advantageous in the short run—disadvantageous in the longer term, if enemies are made or reputations are damaged?" *3-D Negotiation*, p. 75.

These issues are critically important in the collaborative law process and the commitment to voluntarily disclose and provide all relevant information, and for all parties to be given full disclosure.

IX. Avoid Psychological Traps.

Lax and Sebenius explore three psychological traps that often get in the way of effective negotiations because when parties view the process

through a distorted psychological lens, they will have a hard time getting the interests right. "Three of the most dangerous traps are: the mythical 'fixed pie', self-serving role biases, and partisan perceptions." *3-D Negotiations*, pp.79-81.

A. The Mythical "Fixed Pie".

There are times when there is in fact a fixed pie, where one side's gain is the other side's loss. But in most cases, the pie is not fixed, especially when the parties creatively obtain all the needed facts and explore all the options and interests. Remember the Fluffy case study mentioned earlier in this paper.

B. Self-Serving Role Biases.

Many negotiators seem almost hardwired to interpret information in strongly self-serving ways. Lax and Sebenius explain that in the Harvard senior executive program, they give the group identical financial information about company A negotiating to buy company B. The group of executives is then randomly assigned to the roles of "buyer" or "seller." After being given time to study the materials, the sellers and buyers were asked to value company B, the company being sold. Those assigned the role of sellers gave median valuations more than twice as high as those given by the buyers. The valuation gaps had no factual basis. The sellers and buyers simply had self-serving biases based on the roles they were given. This phenomenon extends to assessing your chances in court and other types of conflict.

C. Partisan Perceptions.

"So the evidence suggests that we humans systematically err in processing facts. We are even worse at assessing the other side, especially in adversarial situations. As viewed by an outsider, those caught up in disintegrating partnerships or marriages often appear to hold exaggerated, negative views of each other. Extensive research has documented an unconscious mechanism in our human psychology that leads us to see our own side as 'more talented, honest, and morally upright,' while at the same time disparaging or even vilifying the opposition. This often leads to inflated perceptions of the other side's position and overestimates of the actual conflict.

"Partisan perceptions can easily become self-fulfilling prophecies. If you're seated at the negotiating table in the absolute, unshakable conviction that your counterpart is a stubborn and difficult character, *you are likely to act in ways that will trigger and worsen those very behaviors.*" *3-D Negotiation*, p. 81.

Lax and Sebenius ask: "How to counteract these powerful biases? Keep in mind the useful admonition from *Getting to Yes*: 'don't deduce their intentions from your fears.' Or, in a more cold-blooded vein, recall the advice from *The Godfather, Part III*: 'Don't hate your enemies. It only clouds your judgment.'" *3-D Negotiation*, p. 81.

X. Turning Adversaries into Partners.

"Turning Adversaries into Partners" is Part III of William Ury's book, *Getting Past No: Negotiating in Difficult Situations*, pp. 157-171 and is supported and echoed by Chapter 13, "Solve Joint Problems to Create and Claim Value", of *3-D Negotiation*, pp.205-224. These aspects of negotiation have very high applicability to the collaborative law process.

A. Treat Your Opponent with Respect.

Ury says the theme throughout your negotiation is to "...treat your opponent with respect—not as an object to be pushed, but as a person to be persuaded. Rather than trying to change the other side's thinking by direct pressure, you change the environment in which they make decisions. You let them draw their own conclusions and choose for themselves. *Your goal is not to win over them, but to win them over.*" Ury further explains that in order to accomplish this goal, "...you need to resist normal human temptations and do the opposite of what you naturally feel like doing. You need to suspend your reaction when you feel like striking back, to listen when you feel like talking back, to ask questions when you feel like telling your opponent the answers, to bridge your differences when you feel like pushing for your way, and to educate when you feel like escalating." *Getting Past No*, p. 160. Achieving these aspirations presents a great challenge to most lawyers, especially litigators. Ury provides five steps to accomplish these goals and have successful negotiations:

1. Go to the Balcony. “The first step is not to control the other person’s behavior. It is to control your own. When the other person says no or launches an attack, you may be stunned into giving in or counterattacking.” Try to suspend your normal reaction, buy yourself some time and reflect on your interests and BATNA and those of the other party. “Instead of getting mad or getting even, focus on getting what you want. Don’t react: Go to the balcony.” *Getting Past No*, p. 169. Ury quotes Ambrose Bierce, “Speak when you are angry and you will make the best speech you will ever regret.” *Getting Past No*, p. 31.

2. Step to Their Side. Create a favorable climate, by defusing the anger, fear and suspicion on the other side. “They expect you to attack or to resist. So do the opposite. Listen to them, acknowledge their points, and agree with them wherever you can. Acknowledge their authority and competence too. Don’t argue: Step to their side.” *Getting Past No*, p. 169.

3. Reframe. When the other side takes a hard-line position, “direct their attention to the challenges of meeting each side’s interests.” Reframe what they say and ask questions such as, “Why is it that you want that?” or “What would you do if you were in my shoes?” “Rather than trying to teach the other side yourself, let the problem be their teacher. Don’t reject: Reframe.” *Getting Past No*, p. 170.

4. Build Them a Golden Bridge. If the other party stalls, do not push and resist, thus causing them to harden their stance. “Instead, do the opposite—draw them in the direction you would like them to go. Think of yourself as a mediator whose job is to make it easy for them to say yes. Involve them in the process, incorporating their ideas. Try to identify and satisfy their unmet interests, particularly their basic human needs. Help them save face and make the outcome appear as victory for them. Don’t push: Build them a golden bridge.” *Getting Past No*, p. 170.

5. Use Power to Educate. “If the other side still resists and thinks they can win without negotiating, you need to educate them to the contrary. ...educate them about the costs of not agreeing. Ask reality-testing questions, warn rather than threaten,

and demonstrate your BATNA. Make sure they know the golden bridge is always open. Don’t escalate: Use power to educate.” *Getting Past No*, pp. 170, 171.

B. Turn Adversary into a Partner.

Ury says next to turn the other party from an adversary to a partner. His advice sounds much like the collaborative law process. “It takes two to tangle, but it takes only one to begin to untangle a knotty situation. It is within your power to transform even your most difficult relationships. Your greatest power is the power to change the game—from face-to-face confrontation to side-by-side joint problem-solving.” *Getting Past No*, p. 171. As we have learned in collaborative law, change the table and seating arrangement to more of a team approach with both sides facing the white board on which the interests, options and problem-solving solutions appear.

Ury uses an Abraham Lincoln quote to summarize this section on turning adversaries into partners. During the American Civil War, Lincoln made a speech in which he referred sympathetically to Southern Rebels. An elderly lady and staunch Unionist fussed at Lincoln for speaking kindly of his enemies when he should have been thinking of destroying them. Lincoln’s reply was classic: “Why, madam, do I not destroy my enemies when I make them my friends.” Ury concludes, “The breakthrough strategy is designed to do precisely that—to destroy your adversaries by turning them into your negotiating partners.” *Getting Past no*, p. 171.

C. Jointly Solving Problems to Create Value.

Chapter 13 of *3-D Negotiation* is about solving joint problems to create and claim value and encompasses our familiar collaborative law process. Both parties should try to create and claim value on a long-term basis. You want to create all the possible value jointly, claim an acceptable share of it and avoid being exploited by the other side. The essence of the joint problem that 3-D tactics must solve is as follows:

“Creating value requires cooperation to elicit information—about interests, views, capabilities and so on—and use that information to generate mutually beneficial options. This takes communication, trust, openness, and creativity. Yet those very qualities can open you up to exploitation by a

determined value claimer. If you put all your cards on the table, while others play theirs close to the vest, you're likely to get nailed. And yet if everyone hides his or her cards, revealing little, and searching for openings to exploit, it becomes nearly impossible to come up with joint gains. You and your counterparts are likely to have a battle royal over a small pie.

"Put otherwise, information in negotiation is a two-edged sword: essential to solve the joint problem and to create value, but also a source of vulnerability to a value-claimer on the other side. You can't easily separate the creating and claiming processes. It turns out that the way you create value affects how it gets divided. And the battle over dividing the pie often affects how much, if at all, it gets expanded. Managing this creating-claiming tension productively is the essence of successful negotiation. Problem-solving tactics, undertaken with a full understanding of the value-claiming aspect of negotiation, offer the best route to great outcomes." *3-D Negotiation*, pp. 205-206.

Constructive negotiation processes, where value is created and claimed, stress the following:

- * Reconciling the parties' real interests, rather than fighting over positions.
- * Focusing on the future and mutual possibilities, rather than on the past and who was right, wrong or to blame what for happened before. Look forward, not backward. Stop shaming and blaming.
- * Focusing on factual discussions, not broad generalizations.
- * Focusing on joint problem solving, not adversarial posturing. *3-D Negotiation*, p. 206.

In other words, try to transform the negotiating process from one that is "face-to-face against each other" to "side-by-side against the problem." "Don't think of the other side as 'them,' or your adversaries; seek to align both your efforts against the problem of jointly crafting agreements that meet each side's interests on a lasting basis, rather than glare at each other across the table." *3-D Negotiation*, p. 212.

XI. Summary

Negotiators, as well as mediators, who emphasize the outcomes and behaviors they want to promote, as opposed to those they want to avoid, tend to have successful negotiations. Utilizing TTTP—Timely, Thorough, Thoughtful Preparation; 3-D Negotiation Skills; focusing on interests not positions; doing barriers audits; determining the deal/no-deal options of each side; and focusing on creating and claiming value on a long-term basis should cause you to obtain and sustain attractive agreements in your negotiations.

For a list of books on negotiation, please see Appendix A. For a list of books on mediation, please see Appendix B.

APPENDIX A
List of Negotiation Books

- Camp, Jim, *Start with No: the Negotiating Tools That the Pros Don't Want You to Know* (New York: Crown Business, 2002).
- Dawson, Roger, *Secrets of Power Negotiating: inside Secrets from a Master Negotiator: Updated for the 21st Century* 15th ed, (Pompton Plains, NJ: Career, 2011).
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- Menkel-Meadow, Carrie and Michael Wheeler, *What's Fair: Ethics for Negotiators* (San Francisco: Jossey-Bass, 2004).
- Mnookin, Robert H, *Bargaining with the Devil* (New York: Simon & Schuster, 2010).
- Mnookin, Robert H., Lawrence Susskind, and Pacey C. Foster, *Negotiating on Behalf of Others: Advice to Lawyers, Business Executives, Sports Agents, Diplomats, Politicians, and Everybody Else* (Thousand Oaks, CA: Sage Publications, 1999).
- Mnookin, Robert H., Scott R. Peppet, and Andrew S. Tulumello, *Beyond Winning: Negotiating to Create Value in Deals and Disputes* (Cambridge, MA: Belknap of Harvard UP, 2000).
- Nierenberg, Gerard I, *The Complete Negotiator* (New York: Berkley, 1991).
- Raiffa, Howard, *The Art and Science of Negotiation: How to Resolve Conflicts and Get the Best out of Bargaining* (Cambridge, MA: Belknap Press of Harvard University Press, 1982).
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APPENDIX B
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