NEGOTIATION PRINCIPLES, TECHNIQUES AND STRATEGIES

Kathryn J. Murphy
Goranson Bain Ausley, PLLC
Dallas, Plano and Austin, Texas
kmurphy@gbfamilylaw.com
214.473.9696

KATHRYN J. MURPHY

GORANSON BAIN AUSLEY, PLLC
Dallas, Plano and Austin, Texas
(214) 473.9696
Email: kmurphy@gbafamilylaw.com
Website: www.gbafamilylaw.com

EDUCATION:

J.D.	1989	Southern Methodist University, Dallas, Texas
B.A.	1986	University of Texas at Tyler, Tyler, Texas, with Honors

PROFESSIONAL ACTIVITIES AND AFFILIATIONS:

Partner - Goranson Bain Ausley, PLLC
Board Certified Family Law - Texas Board of Legal Specialization (since 1995)

Fellow	-	American Academy of Matrimonial Lawyers (2004 - Present)
Board Member	-	American Academy of Matrimonial Lawyers (2015-2017)
Fellow	-	International Academy of Family Lawyers
Fellow	-	Texas Chapter of the Academy of Matrimonial Lawyers (Executive Committee (2006 - 2010; Past President)
Member	-	Texas Academy of Family Law Specialists (1995 - Present)
Member/Chair	-	Family Law Council, State Bar of Texas (2005 - Present)(Executive Committee, Chair 2016-2017)
Diplomate	-	American College of Trial Lawyers – Fellowship is extended by invitation only to those experienced trial lawyers who have mastered the art of advocacy and whose professional careers have been marked by the highest standards of ethical conduct, professionalism, civility, and collegiality.
Member	-	State Bar of Texas Board of Directors (3-year elected term beginning 2019)
Member	-	Collaborative Divorce Texas
Member	-	State Bar of Texas (Family Law Section)
Member	-	American Bar Association (Family Law Section)
Member	-	College of the State Bar of Texas
Member	-	Dallas Bar Association (Family Law Section)
Member	-	Collin County Bar Association (Family Law Section)
Member	-	Denton County Bar Association
Member	-	Plano Bar Association
Co-Chair	-	DAYL People's Law School (1995 & 1996)
Instructor	-	Southeastern Paralegal Institute (1993-1996)
Member	-	Fee Dispute Committee - Dallas Bar Association (1998 - 2000)
Fellow	-	Collin County Bench Bar Foundation
Lifetime Fellow		Texas Family Law Foundation (State Bar of Texas)
Fellow	-	Texas Bar Foundation – Nominating Committee Member
Chair	-	Program Committee, Collin County Bench Bar Conference, 2000
Board Member	-	Past Board Member of the Advisory Board in CASA of Collin County
Member/Chair	-	Grievance Committee, District 1A (2002 - 2007); (Chair – 2006-2007)
Certificate	-	Advanced Mediation - Family Law (1995)
Member	-	Annette Stewart Inn of Court (Board Member 2005-2012)

AWARDS AND HONORS:

Named the "Best Lawyers in America" 2015, 2017 and 2019 Family Law "Lawyer of the Year" in Dallas – only a single lawyer in each practice area within a community is honored with this distinction.

Recipient of the Dan Price Award from the State Bar of Texas in 2018 – this award is presented to a lawyer who has had a significant impact on the Family Law Section for the past year – teaching, writing, and advancing the practice of family law.

Recipient of the Annette Stewart Inn of Court, Serjeant of the Inn Award in 2013 (awarded to an attorney who has significantly contributed to the profession and the community through his or her career).

Recipient of the University of Texas at Tyler, Alumni Association Distinguished Alumni Award (2016).

Best Family Law CLE Article, State Bar of Texas, 2004.

Named "Best Lawyers in Dallas" Family Law by D Magazine (2001, 2005, 2006, 2007, 2008, 2009, 2010, 2017, 2018, 2019, 2020).
Named "Best Female Lawyers in Dallas" by D Magazine (2010).
Named "Best Personal Lawyers in Dallas" by D Magazine (2009).
Named "The Best Lawyers in America" – Woodward and White Press (2003 - 2020).
Named "Top 50 Women Texas Super Lawyers" by Texas Monthly (2003 - 2020).
Named "Top 100 Texas Super Lawyers" by Texas Monthly (2004 - 2009; 2011; 2013-2020).
Named "Top 100 Dallas/Fort Worth Super Lawyers" by Texas Monthly (2003-2009; 2011-2020).
Named "Texas Super Lawyer" in the area of Family Law by Texas Monthly (2003 - 2020).

PUBLICATIONS:

Co-Author, ***Thomson Reuters Publishing Company, TEXAS FAMILY LAW PRACTICE GUIDE*** (published March 2000, supplemented each year to the present) – This 3-volume set is written for lawyers and judges, and contains the substantive law regarding family law matters, including marital property (characterization, tracing, valuation), children and divorce. The treatise is updated each year to contain the current law on each topic.

Primary Author, ***PROTECTING YOUR ASSETS FROM A TEXAS DIVORCE,*** Professional Solutions Group (2005).

Co-Author, ***Protecting Children From Incompetent Forensic Evaluations and Expert Testimony,*** Journal of the American Academy of Matrimonial Lawyers (2006).

Author, ***Family Law at Your Fingertips – Property***, Family Law Section, State Bar of Texas, 2015, 2016, 2019.

Author, ***Family Law at Your Fingertips – Children***, Family Law Section, State Bar of Texas, 2018, 2019.

Author, ***Family Law at Your Fingertips – Evidence***, Family Law Section, State Bar of Texas, 2019.

PUBLICATIONS AND PRESENTATIONS:

CHARACTERIZING & VALUING ASSETS TO CREATE AN INVENTORY AND APPRAISEMENT THAT WORKS FOR YOUR CLIENT, Advanced Family Law Course, State Bar of Texas (August 2020)

DIRECT AND CROSS EXAMINATION OF A TRACING EXPERT, Advanced Family Law Course, State Bar of Texas (August 2019)

REIMBURSEMENT, FRAUD, WASTE AND THE RECONSTITUTED ESTATE, Marriage Dissolution Institute, State Bar of Texas (April 2019)

COLLABORATIVE LAW**,** State Bar of Texas (March 2019)

TRIAL OF A CUSTODY CASE, Innovations – Breaking Boundaries in Child Custody Litigation, State Bar of Texas (January 2019)

DRAFTING: ARE YOUR PLEADINGS AND DISCOVERY READY FOR TRIAL**,** State Bar of Texas (December 2018)

PROFESSIONALISM AND CIVILITY, American Academy of Matrimonial Lawyers (November 2018)

MARITAL AGREEMENTS, New Frontiers in Marital Property Law, State Bar of Texas (October 2018)

PREMARITAL AND POSTMARITAL AGREEMENTS*,* Advanced Family Law Course, State Bar of Texas (August 2018)

TRIAL PRESENTATION OF A CUSTODY CASE, Annual TAFLS Trial Institute, Texas Academy of Family Law Specialists (February 2018)

MARITAL PROPERTY AGREEMENTS, Advanced Family Law Course, State Bar of Texas (August 2017)

PROPERTY CASE LAW UPDATE, Marriage Dissolution Institute, State Bar of Texas (April 2017)

CHARACTERIZATION OF PROPERTY, Advanced Family Law Course, State Bar of Texas (August 2016)

PROFESSIONALISM – THE KEY TO A SATISFYING CAREER, Marriage Dissolution 101, State Bar of Texas (April 2016)

NEGOTIATION TECHNIQUES AND STRATEGIES, Advanced Family Law Course, State Bar of Texas (August 2015)

JUDGES PANEL, Innovations – Breaking Boundaries in Child Custody Litigation, State Bar of Texas (June 2015)

PROTECTIVE ORDERS AND FAMILY VIOLENCE, Southern Methodist University School of Law (October 2014)

NEGOTIATION TECHNIQUES AND STRATEGIES, 40th Annual Advanced Family Law Course, State Bar of Texas (August 2014)

EXPERTS, EXAMINATIONS AND ETHICS – A GUIDE TO MENTAL HEALTH EXPERTS – DIRECT AND CROSS, ATTACKING AND DEFENDING RECOMMENDATIONS, DAUBERT CHALLENGES AND PRACTICAL APPROACHES, Innovations – Breaking Boundaries in Child Custody Litigation, The University of Texas School of Law (June 2014)

USING A COMPUTER FORENSIC EXPERT, Family Law Technology Course, State Bar of Texas (December 2012)

PROPERTY UPDATE, Advanced Family Law Course, State Bar of Texas (August 2012)

TURBO CHARGE YOUR COLLABORATIVE PRACTICE, Advanced Family Law Course, State Bar of Texas (August 2012)

ATTORNEY'S FEES AGREEMENTS, Advanced Family Law Course, State Bar of Texas (August 2011)

CHARACTERIZATION OF PROPERTY, Family Law on the Front Lines, The University of Texas School of Law (June 2011)

ELECTRONIC EVIDENCE WORKSHOP, Advanced Family Law Course, State Bar of Texas (August 2009)

THE ELECTRONIC EVIDENCE BIBLE, University of Texas School of Law (June 2009)

CHARACTERIZATION, Marriage Dissolution Institute, State Bar of Texas (April 2009)

PREMARITAL AGREEMENTS, Collin County Bar Association (February 2009)

ELECTRONIC EVIDENCE – CIVIL AND ETHICAL IMPLICATIONS, University of Texas School of Law, Parent-Child Relationships; Critical Thinking for Critical Issues (January 2009)

PREMARITAL AGREEMENTS, Collin County Bar Association, Estate Planning Section (September 2008)

RELOCATION, Advanced Family Law Course, State Bar of Texas (August 2006)

TEMPORARY SUPPORT, MAINTENANCE AND ALIMONY, Marriage Dissolution Institute, State Bar of Texas (April 2006)

CHILD SUPPORT UPDATE: WITHIN AND OUTSIDE THE GUIDELINES, Marriage Dissolution Institute (April 2006)

RELOCATION, American Bar Association, Section of Family Law, Spring CLE Conference, Washington D.C. (May 2006)

COLLABORATIVE LAW, "A Panel of Texas Authors on Texas Collaborative Law" (April 2006)

MARITAL PROPERTY 101, State Bar College "Spring Training" 2006, State Bar College (March 2006)

HIGH TECH EVIDENCE, Collin County Bar Association, Family Law Section (December 2006)

HIGH TECH EVIDENCE, WEBSITES, HARDDRIVES, E-MAILS, ETC., Advanced Family Law Drafting Course (December 2006)

CHILD SUPPORT, 31st Annual Advanced Family Law Course, State Bar of Texas (August 2005)

PSYCHOLOGICAL TESTING, American Academy of Matrimonial Lawyers (March 2005)

RELOCATION, Dallas Volunteer Attorney Program and Family Law Section, "Nuts and Bolts" Family Law Training (February 2005)

OPENING STATEMENTS AND CLOSING ARGUMENTS, Ultimate Trial Notebook – Family Law, State Bar of Texas (December 2004)

HIGH TECH EVIDENCE, WEBSITES, HARDDRIVES, E-MAILS, ETC., Williamson County (October 2004)

RELOCATION DEBATE, 30th Annual Advanced Family Law Course, State Bar of Texas (August 2004)

COLLABORATIVE LAW PANEL, Collaborative Law Spring Retreat (March 2004)

HIGH TECH EVIDENCE, WEBSITES, HARDDRIVES, E-MAILS, ETC.**,** 29th Annual Advanced Family Law Course, State Bar of Texas (August 2003)

FAMILY LAW EVIDENCE, Collin County Bench Bar Conference (May 2003)

FAMILY LAW EVIDENTIARY ISSUES**,** 16th Annual Advanced Evidence & Discovery Course, State Bar of Texas (March 2003)

PARENTAGE: ESTABLISHING, ATTACKING & UNDOING, Texas Academy of Family Law Specialists (January 2003)

PARENTAGE: CURRENT ISSUES, University of Houston Law Center (October 2002)

OBJECTIONS AT TRIAL, American Bar Association, Section of Family Law, Fall CLE Conference, Orlando, FL (November 2002)

DIVISION OF PROPERTY AND DIVIDING SPECIFIC ASSETS, University of Houston Law Foundation (June 2002)

FAMILY LAW FOR THE NON-SPECIALIST, J. Reuben Clark Law Society (April 2002)

DIVISION OF PROPERTY ON DIVORCE, University of Houston Law Foundation (September 2001 and September 2002)

FAMILY LAW UPDATE, Ten Hot Topics in Family Law, Collin County Bench/Bar Conference (June 2000)

FAMILY LAW UPDATE, J. Reuben Clark Law Society (June 2000)

DIVISION OF PROPERTY ON DIVORCE, University of Houston Law Foundation (April 2000)

FAMILY LAW DISCUSSION, J. Reuben Clark Law Society (October 1999)

BUSINESS VALUATIONS IN DIVORCE AND CROSS-EXAMINATION OF A VALUATION EXPERT, American Bar Association, Family Law Section, San Diego (October 1999)

OPENING STATEMENT - JURY OR NONJURY, 25th Annual Advanced Family Law Course, State Bar of Texas (August, 1999)

UPDATE ON FAMILY LAW, Dallas Women's Lawyers Association (December 1998)

FAMILY LAW FOR THE NON-SPECIALIST, Dallas Bar Association (December 1998)

OBTAINING RECORDS FROM NON-PARTIES, 24th Annual Advanced Family Law Course, State Bar of Texas (August 1998)

DISCOVERY UPDATE, Dallas Bar Association Friday Clinic (December 1996 and July 1998)

OPENING AND CLOSING THE FILE, Family Law Conference for the General Practitioner and Legal Assistant, South Texas College of Law (February 1998 and February 1999)

DISCOVERY UPDATE, 23rd Annual Advanced Family Law Course, State Bar of Texas (August 1997)

DISCOVERY UPDATE, 22nd Annual Advanced Family Law Course, State Bar of Texas (August 1996)

BUSINESS VALUATION IN DIVORCE, Dallas Chapter Texas Society of Certified Public Accountants Fifth Annual Divorce Conference (September 1996, September 1998)

DISCOVERY, Dallas Bar Association Family Law Training Seminar (October 1996)

ATTORNEY'S FEES, Family Law Practice Institute, University of Houston (September 1996)

CONTINUING LEGAL EDUCATION LEADERSHIP

CO-COURSE DIRECTOR, 39th Annual Advanced Family Law Course, State Bar of Texas (August 2013)

CO-COURSE DIRECTOR, INNOVATIONS – BREAKING BOUNDARIES IN CUSTODY LITIGATION, The University of Texas School of Law (January 2012)

COURSE DIRECTOR, Collaborative Law Course, State Bar of Texas (March 2011)

CO-COURSE DIRECTOR, New Frontiers in Marital Property Law, State Bar of Texas (October 2010)

ASSISTANT COURSE DIRECTOR, Collaborative Law Course, State Bar of Texas (2010)

MODERATOR**,** Collin County Bench/Bar Conference (2000)

CO-CHAIR*,* Collin County Bench/Bar Conference (2001)

NEGOTIATION PRINCIPLES, TECHNIQUES AND STRATEGIES

I. INTRODUCTION

There are many excellent articles and books on negotiation written by the leading experts in the country. This article discusses basic models for negotiation analysis adopted by the experts and provides a framework to use in resolving family law matters.

The article begins with a discussion of the win-win approach to negotiation which represents mutual gains for the parties involved. The next section addresses preparing to negotiate and the elements that form the basic structure of a negotiation, which includes identifying your interests, gathering information, assessing your best alternative to a negotiated agreement (BATNA) and emotionally preparing for a negotiation. Strategies and techniques relating to the actual negotiation process are discussed, including whether/when you should make the first offer, making concessions and counteroffers, evaluating options, handling impasses and managing time pressures.

There is a comprehensive section on dealing with emotions in the negotiation process – using positive emotions to help reach wise agreements and addressing strong negative emotions. Finally, the last section of the article addresses the question as to whether you should negotiate or go directly to trial as analyzed by Robert Mnookin in his book *Bargaining with the Devil.*

II. WIN-WIN NEGOTIATION

The most respected method of negotiation is the win-win approach which is advocated by the leading experts in the field of negotiation. Roger Fisher is probably the best-known negotiation guru in the world, and he is a proponent of the interest-based or win-win negotiation as discussed in his seminal book, *Getting to Yes* published in 1983. The win-win approach is a creative way that both parties can walk away from the negotiating table feeling they have won.

Roger Dawson is another one of the country's top experts on the art of negotiating. In his book *Secrets of Power Negotiating* published in 2011, Dawson affirms that the objective of negotiation is to create a win-win solution. He believes you should always leave the other side thinking they have won.

Win-lose negotiations happen when one party makes all the concessions, and the other party makes excessive demands. Win-lose negotiators create problems in long-term relationships because parties often want to get even or hold a grudge.

In family law matters, parties will often have interests that they share as well as competing interests. There will have to be some compromise. Developing and understanding the goals, interests and concerns of both parties can often lead to a creative win-win agreement – or at least a settlement that each party will find to be acceptable, given the reality of the situation. *The Collaborative Law Institute of Texas' Negotiation Workbook* (Austin: Collaborative Law Institute of Texas 2006).

Win-win negotiators frequently talk about the two people who have only one orange but both want it and they are willing to fight for it. They agree to compromise and decide to cut the orange in half. It is "fair," but as they discuss their underlying needs in the negotiation, they find that one wants the orange to make juice and the other needs it for the rind to bake a cake. In the heat of the argument, they overlooked a simple win-win solution where one would get the whole peel and the other all the juice. They could have had an easy win-win and instead they had a lose-lose because they made demands and stated positions but failed to communicate their interests. If they had been willing to share their goals, interests and intentions, they may have discovered the win-win solution.

According to Dawson, this could happen in the real world, but it doesn't happen enough to make it meaningful. When you are sitting down in a negotiation, chances are the other side wants the same thing you do and there won't be a magical win-win. There are effective strategies to use in a win-win negotiation and there are also counterproductive strategies that should be avoided which will be discussed further throughout this paper. Dawson notes key points of a win-win negotiation, which include the following:

- A negotiation is a win-win as long as each side feels they won, even if each side feels the other lost.
- Win-win doesn't mean that both sides conceded equally or that both sides gained equally.
- You can get what you want in negotiations and still have the other side feeling they have won.
- Don't narrow the negotiation down to one issue or someone has to win and lose.
- Keep enough issues open so that both sides can feel they have won, and if you are down to one issue, determine if you can expand the pie and add other issues to the discussion.
- Understand that people don't want the same things in negotiation – successful negotiating is not just a matter of what you want, but also being concerned about the other person getting what he or she wants. When you give the other side what he or she wants, the goal is they will give you what you want. Dawson, Roger, *Secrets of Power Negotiating*. Updated for the 21st Century 15th Ed. (Career Press 2011).

III. PREPARING TO NEGOTIATE AND THE ELEMENTS OF NEGOTIATION

The Harvard Negotiation Project has identified seven elements that form the basic structure of a negotiation, including interest-based negotiation, the method described in *Getting to Yes: Negotiation Agreement without Giving in (1983)*, by Robert Fisher and Bruce Patton: relationship, communication, interests, brainstorm options, legitimacy, best alternative to a

negotiated agreement (BATNA) and commitments. Guhan Subramanian, in his book *Negotiauctions – New Dealmaking Strategies for a competitive Marketplace (2010)*, refers to four essential elements of preparation: the parties, their interests, alternatives to agreement on all sides and incentives of the people at the table. These elements will be discussed further in the following sections.

The Collaborative Law Institute of Texas published a Negotiation Workbook to help parties and their attorneys effectively prepare for negotiating. It is centered around the concept of interest-based negotiation where the focus of the settlement discussion is on the interests behind the positions of both parties. In family law disputes, it is even more important to address the interests and concerns of the other party and the children in order to get your own interests and concerns addressed.

A. Relationship

A negotiation produces a better outcome if you and the other party have the ability to work together. Your behavior will determine your working relationship. If you use a trusting, relationship-building strategy in negotiation, you will increase the probability that the other party will respond in a constructive and trusting fashion. If you behave in an aggressive manner, your working relationship will be adversarial.

In divorce situations, a good working relationship might be difficult when betrayal or irresponsible behavior caused the divorce. However, it is possible for trust to be established in the negotiation process by demonstrating reliability, transparency, and sincerity in the process. The challenge of emotions in negotiations is more fully addressed in Section VI in this article.

B. Communication

Efficient negotiation requires effective two-way communication. Each party should express themselves in a way that encourages others to listen and listen in a way that encourages others to speak. Some people believe they can behave aggressively in a negotiation and wonder why the other party chooses to escalate instead of back down. They think that if they use force, they can intimidate and weaken the other party. However, doing so will most definitely increase the probability that the other party will respond in kind. Thompson, Leigh, *The Truth About Negotiations 2nd Ed.* (FT Press 2013).

C. Interests

Your goals and interests should be identified and what needs would be satisfied if you receive what you say you want. When people are in a dispute, they often think in terms of "positions" – what they want or demand. Interests are the fundamental needs and concerns that lie underneath those positions. There is only one way to meet a position, but often many ways to serve an interest. Mnookin, Robert H., *Bargaining with the Devil: When to Negotiate, When to Fight* (Simon and Schuster 2010). You should also use your best efforts to predict what you believe the other person will want and the needs that would be satisfied if the other person receives what he or she wants.

An agreement is better to the extent that it meets the interests of both parties. Your interests should be revealed to the other side. Failure to reveal information about interests can lead to lose-lose agreements, as in the case of the two people with the orange discussed above who failed to discover the win-win solution. There are studies that have been done that show that negotiators who provide information to the other party about their interests improve their outcomes. You can be firm about your interests but flexible on how to achieve them. Fisher, Roger and Ury, William, *Getting to Yes: Negotiating Agreement Without Giving In*. (New York: Penguin Books 1983).

Negotiators who move past positions to focus on their interests usually achieve their goals. A real goal reflects a negotiator's interests and answers the "why" question. People's demands may be incompatible, but their goals might be compatible or at least complementary. *The Collaborative Law Institute of Texas' Negotiation Workbook* (Austin: Collaborative Law Institute of Texas 2006).

D. Gathering Information

Good information gathering is essential to successful negotiating and a good outcome. In order to better prepare and organize for the negotiation process, make sure that you have all of the information that you need in order to negotiate an agreement. You should be fully aware of all financial, legal, and other factual information necessary to make informed choices.

In a divorce case, you should have a spreadsheet listing your assets and debts, budget statements documenting monthly expenses and income if relevant, and copies of all relevant financial documents, such as bank statements, tax returns and business documents. All necessary discovery should have been accomplished, such as exchanging sworn asset summaries and reviewing all relevant documents. The value of all property should be determined, including closely-held business interests, real estate and employee benefits. The character of the assets should be determined, and copies of documents to support the character of assets should be available. All debts and liabilities should be known, and a determination of tax liabilities or tax ramifications of the division of assets should be discussed. Further, any legal issues should be researched. *The Collaborative Law Institute of Texas' Negotiation Workbook* (Austin: Collaborative Law Institute of Texas 2006).

You should not only gather information and research your own case, but also the other party's case. In his book, *Beyond Reason*, Roger Fisher told the story of a senior attorney who told his younger associates that the firm had just been hired by the plaintiff in a big case. He asked them to take a week in the library, study the precedents and outline the arguments that the firm could make on behalf of the plaintiff. The following week, the young lawyers came to the senior attorney happy and optimistic. They told their boss it was a great case, the plaintiff had strong arguments and they would surely win. After the senior attorney heard a summary of the strong arguments on behalf of the plaintiff, he told the younger lawyers the truth – the firm was actually hired by the defendant. The young lawyers screamed in disbelief, protesting that the defendant had a terrible case. The senior attorney told them not to worry, they would soon talk themselves into believing that the defendant had a wonderful case, but he wanted them first to

understand the strength of the plaintiff's case. With that understanding, the young lawyers went to work on the defendant's side of the case. The defendant eventually won – the arguments for the defendant were enhanced by their knowledge and full understanding of the strengths of the plaintiff's case. Fisher, Roger and Shapiro, Daniel, *Beyond Reason – Using Emotions as You Negotiate,* (New York: Penguin Books 2005).

E. Brainstorm Options

In preparing to negotiate, you should brainstorm possible ways of meeting legitimate interests of both parties. The full range of possible solutions on which you and the other party might reach an agreement should be explored. In brainstorming all of the options, you should suspend initial judgment and simply list all the options that come to mind. Judgment and evaluation should be reserved until later. Different options can be combined. *The Collaborative Law Institute of Texas' Negotiation Workbook* (Austin: Collaborative Law Institute of Texas 2006).

F. Legitimacy

The best agreements are those that both parties perceive as "fair." One way to determine fairness is to use external standards to bring legitimacy to a particular option that will be persuasive to both parties, such as legal precedent, third party appraisals, expert opinions, research findings, market prices. Fisher, Roger and Ury, William, *Getting to Yes: Negotiating Agreement Without Giving In*. (New York: Penguin Books 1983). In preparing to negotiate, you should make sure that all disputed issues are researched, experts have expressed their opinions and valuations have been obtained.

G. BATNA – Best Alternative to a Negotiated Agreement

The term BATNA was coined in the book *Getting to Yes*, by Roger Fisher, Bill Ury and Bruce Patton in 1983. It stands for "best alternative to a negotiated agreement." Whenever you negotiate, it is essential to know what you will do if you don't reach an agreement, which includes going to court.

1. Your BATNA Should be the Reference Point

A negotiating rule of thumb is that you should not accept any agreement that is worse than your BATNA. Your BATNA may not be a great alternative but it should be the best alternative to a negotiated agreement. Mnookin, Robert H., *Bargaining with the Devil: When to Negotiate, When to Fight* (Simon and Schuster 2010). In negotiations, your BATNA will be an important reference point for evaluating any deal that is on the table. The better your BATNA, the better your alternatives away from the table and the more bargaining power you have at the table. The same is true for the other party.

2. Research the Other Party's BATNA

In addition to assessing your own BATNA, you should research the other side's BATNA

in order to fully understand the implications of your negotiation strategy.

3. Don't Reveal your BATNA

Several experts say that it is not a good idea to reveal your BATNA. Once you reveal it, the other party has no incentive to offer you more. You don't want the other party to simply meet your BATNA, you want him to think it's more attractive than it really is so he will make a better offer. There may be two rare situations where you would reveal your BATNA:

a. You have been negotiating all day and things are at a standstill. Before you leave the negotiation, you might consider revealing your BATNA in hopes of the other party meeting it or even doing better.

b. You have a fantastic BATNA and would be happy simply to have the other party match or improve upon it. But if you choose to reveal your BATNA, you will probably not get an offer significantly more attractive from any rational other party. Thompson, Leigh, *The Truth About Negotiations 2nd Ed.* (FT Press 2013).

4. Reservation Value

In his book *Negotiauctions: New Dealmaking Strategies for a Competitive Marketplace*, Guhan Subramanian discusses that the BATNA analysis for both sides leads to another important concept in negotiation analysis: reservation value. Your reservation value is your walk-away number or position, and it should reflect your BATNA. The reservation value has nothing to do with what you hope to settle for, what you "should" settle for, or what is "fair" in the negotiation. It simply reflects the point at which you are creating value *in* the deal versus *away* from the table in your best alternative to a deal. Subramanian, Guhan, *Negotiauctions: New Dealmaking Strategies for a Competitive Marketplace* (W. W. Norton & Company, Ltd. 2010).

5. Zone of Possible Agreement

Subramanian addresses another basic concept in negotiation analysis called ZOPA, which stands for "zone of possible agreement." Given your assessment of your own BATNA and your reservation value, and (equally important) the other side's BATNA and reservation value, you can determine whether a ZOPA exists. The ZOPA analysis tells you whether there is value to be created in the negotiation. In some cases, one or both parties have very attractive BATNAs, and there is simply no ZOPA. In many other cases, the question of whether a ZOPA exists is unclear, and the initial challenge in the negotiation process is to figure out whether there does. Subramanian, Guhan, *Negotiauctions: New Dealmaking Strategies for a Competitive Marketplace* (W. W. Norton & Company, Ltd. 2010).

H. Commitments and Terms of the Agreement

In preparing for the negotiation, it is important to prepare an opening offer in writing even

if you decide not to present it to the other party first. Your opening offer should clearly articulate your goals, and you can refer to it throughout the negotiation discussions. Some attorneys also think it is a good idea to prepare an initial draft of the Mediated Settlement Agreement prior to mediation so that the client's objectives are clear, he or she has an opportunity to carefully consider the terms, and the draft can be compared to the final agreement to make sure that all issues and terms have been included.

You should keep precise notes during the negotiation so you can make sure to include everything in the final agreement. Everyone on your side of the negotiation should review the agreement to make sure nothing is left out and all terms are clearly and accurately reflected. Dawson, Roger, *Secrets of Power Negotiating*. Updated for the 21st Century 15th Ed. (Career Press 2011).

I. Emotional Preparation

In their book *Beyond Reason – Using Emotions as You Negotiate*, Roger Fisher and Daniel Shapiro assert that in addition to preparing for the process and substance, you should emotionally prepare for the negotiation. They believe that with careful emotional preparation, you can stimulate positive emotions that will enhance the effectiveness of the negotiation. Being well prepared on the substantive issues that will be addressed in a negotiation and on the process of dealing with them will do a great deal to reduce emotional anxiety.

Emotional preparation involves thinking carefully about how to face your own emotions, getting ready to deal with the emotions of the other party, determining how to build rapport and taking steps to calm your anxiety. To emotionally prepare for the negotiation, you should have a clear understanding of the substantive issues, each party's concerns and how to satisfy them, and feel calm and confident enough that you will be able to maintain a clear focus during the negotiation.

The success of the negotiation will be impaired if your anxiety, fears, frustrations, or other strong emotions overwhelm your ability to think clearly. Immediately before a negotiation, if you have strong emotions, you should recognize that fact and take steps to come into the mediation more calm and confident. Some people find relaxation techniques helpful to calm their nerves, such as breathing and muscle relaxation exercises. If you are in a bad mood, you can make a decision to improve it. Simple things like making sure to get adequate sleep and a good meal can be helpful. Before going into the negotiation, you might take a few minutes to recall pleasant memories, walk outside, or talk with a friend who can elevate your mood. During the negotiation, you can model a calm, confident mood – by sitting up in your chair, talking with confidence, and fully participating in the negotiation process. Fisher, Roger and Shapiro, Daniel, *Beyond Reason – Using Emotions as You Negotiate* (New York: Penguin Books 2005). How to handle the emotions and relationship issues that come up during the negotiation process is addressed more fully in Section VI below.

V. AT THE NEGOTIATION TABLE

A. Making the First Offer

Although some negotiation experts people believe you should *never* make a first offer (see Roger Dawson's view below), there are many studies that support the wisdom of making the first offer as it acts as a powerful psychological "anchor" in negotiation. Research has shown that negotiators who make the first offer uniformly do better than those who don't. Guhan Subramanian believes that if you have a good sense of the ZOPA, you should be the one to make the first offer in order to anchor the negotiation in your favor. Research has shown that people fail to adjust adequately from a starting point once a number has been thrown out. Subramanian, Guhan, *Negotiauctions: New Dealmaking Strategies for a Competitive Marketplace* (W. W. Norton & Company, Ltd. 2010).

Anchoring works by influencing perceptions of where the ZOPA lies. Subramanian provides a simple example of a sale/purchase situation – assume that you are a buyer and you think the ZOPA is between $30 and $60 (your reservation value). But when the seller makes a first offer of $75, you shift your expectations without even realizing it. You wonder if the seller's bottom line isn't really $50, and you feel fortunate when you get a deal at $55. Subramanian adds a caveat about the anchoring effect – it only works when the other side is uncertain about where the ZOPA is. If the other side knows the bargaining range with certainty, then your first offer is unlikely to influence the other party's perception of it. The more the other side knows about ZOPA, the less effective anchoring becomes.

Subramanian says there are two risks in making a first offer. One risk is that your opening offer is drastically outside the ZOPA and it loses its anchoring power. This may cause a chilling effect in the other party, and they may even make an equally ridiculous counteroffer. You then have a choice of either making big concessions to get into the ZOPA or walking away from the deal even though a ZOPA exists. The other risk is that your first offer is too conservative, so you unknowingly give away a substantial piece of the ZOPA in your first move. Many negotiators fear that the other party will immediately and happily accept their first offer. It is generally not realistic to believe that you can make an outrageous offer and expect that the other party will accept it.

When you don't know the bargaining range, Subramanian believes it is best to listen, learn more and maybe even let the other party make a first offer. You should resist the tendency to change your perception of the ZOPA unless the other side's first offer contains real information. If you want to make a first offer, you might consider making a "soft" anchor by saying you are thinking about a certain offer. Although you haven't actually made the offer, you floated an option that may be agreeable if it is in the ZOPA or close to it.

If you think you should make a first offer after going through the analysis, Subramanian believes that your offer should be the highest (or lowest) that you can justify or "tell a story" around. The ideal offer should be close to the other party's barely acceptable terms so that you are in the area of the other party's acceptability range. If you believe your opening offer will not be well-received by the other party, you can present it in such a way that is not demanding by letting them know that your offer contains terms that are acceptable to you and meet your interests, but you understand that they may have some different ideas that you are open to hearing. Subramanian, Guhan, *Negotiauctions: New Dealmaking Strategies for a Competitive*

Marketplace (W. W. Norton & Company, Ltd. 2010); Thompson, Leigh, *The Truth About Negotiations 2nd Ed.* (FT Press 2013).

Advocating the opposing view, Roger Dawson believes you should never make the first offer and always get the other side to make the opening offer. He asserts that the opening offer from the other side may be better than you expected, it gives you information before you have to say anything, and it enables you to bracket their proposal. Dawson, Roger, *Secrets of Power Negotiating*. Updated for the 21st Century 15th Ed. (Career Press 2011). When you do make an offer, Dawson asserts that one of the cardinal rules of negotiating is you should ask the other side for more than you expect to get. There is a chance that you will get it and it gives you negotiating room. It further increases the perceived value of what you are offering, prevents the negotiation from deadlocking and creates a climate in which the other side feels they won.

B. Reacting to the First Offer

Dawson believes that you should never say yes to the first offer or counteroffer from the other side. It will cause the other party to believe something must be wrong and they will be upset that they could have done better. Although this seems manipulative, Dawson believes you should react with shock and surprise at the other side's proposals. They may not expect to get what they are asking for, however, if you do not show surprise, you're communicating that it is a possibility. You should then follow with a concession. Dawson, Roger, *Secrets of Power Negotiating*. Updated for the 21st Century 15th Ed. (Career Press 2011).

C. Concessions, Counteroffers, and Managing Patterns of Concessions

1. Plan Your Concessions

Few negotiations end after round one – there is a back and forth with the parties making offers and counteroffers to see if they can bridge the gap. Sometimes people get carried away by the momentum of the negotiation and fail to think about the pattern of concessions. Negotiation experts assert that it is a mistake to make concessions too quickly, which gives up all of your bargaining ground, or make concessions that are too large. It is also a mistake to make concessions when the other party is not moving. Thompson, Leigh, *The Truth About Negotiations 2nd Ed.* (FT Press 2013).

As a general principle, negotiators should make concessions on issues that are the least important to them, however, the other side will probably not give you credit for making the concession. You should announce your concessions – remind the other party of the opening offer, draw attention to your willingness to make a concession on that issue, document the new offer, and invite the other party to respond. It is advised not to make further concessions on any of the issues until the counterparty has made a concession. Negotiating is a trading process, and the norm is reciprocity. You offer the other party something valuable to him or her in exchange for something valuable to you. The parties go back and forth until they either reach an agreement or an impasse.

Dawson asserts that the way you make concessions can create a pattern of expectations in

the other person's mind. He believes that you shouldn't make equal-sized concessions because the other side will keep pushing. The final concession should not be big because it can create hostility. The concessions should taper toward the end to communicate that the other side is getting the best possible deal and you are nearing your reservation point. Smaller and smaller concessions will indicate that you are reaching your limit. Dawson, Roger, *Secrets of Power Negotiating*. Updated for the 21st Century 15th Ed. (Career Press 2011).

It is important to keep a record of the negotiations so that you can point out concessions, keep track of the proposals and avoid miscommunication.

2. Searching for Value-Creating Moves

The challenge in negotiations is to identify *value-creating moves* – things that are easy to give up and valuable for the other party. To make mutually beneficial trade-offs, parties in a negotiation must identify more than one issue under negotiation, have different preferences concerning the issues, and be able to look at different alternatives for each issue. Parties should be firm about the issues most important to them but flexible on things that are not as important. If the other party has preferences and values different from ours, this will give negotiations more potential for win-win outcomes. Thompson, Leigh, *The Truth About Negotiations 2nd Ed.* (FT Press 2013).

In general, differences in expectations about the future often create value in negotiations. They align the incentives of the parties; they allow the parties to diagnose the honesty of the other side; and they enable the parties to share the risk. Subramanian, Guhan, *Negotiauctions: New Dealmaking Strategies for a Competitive Marketplace* (W. W. Norton & Company, Ltd. 2010).

Dawson says that you should watch for situations where the other party is not bargaining in good faith by not expressing his or her true interests. You should watch for issues that the other side declares important, as they may be creating a decoy that they will try to trade off later for something they really care about. In the event this happens, you should stay focused on the issues at hand. Dawson, Roger, *Secrets of Power Negotiating*. Updated for the 21st Century 15th Ed. (Career Press 2011).

3. Never Offer to Split the Difference

It is almost inevitable in negotiations that one party will suggest "splitting the difference" to close the gap. The emotional appeal of this is attractive to most negotiators, to the point that it seems they can't refuse. One party may make very deep concessions, and then when the other party suggests splitting the difference, it is as if the past never occurred. Negotiators are advised to carefully plan their concessions. In a rush to wrap up negotiations and show good faith, we often make concessions that are too steep and quick. Thompson, Leigh, *The Truth About Negotiations 2nd Ed.* (FT Press 2013).

Dawson cautions that you should not fall into the trap of splitting the difference as it is not necessarily fair. It depends on the opening negotiating positions that each side took. Splitting the difference doesn't mean down the middle, because you can do it more than once. Dawson

says that you should never offer to split the difference yourself, but always encourage the other person to offer to split the difference. If you can get the other side to offer to split the difference, they will be in the position of suggesting the compromise. Then you can "reluctantly" agree to their proposal, making them feel they have won. Dawson, Roger, *Secrets of Power Negotiating*. Updated for the 21st Century 15th Ed. (Career Press 2011).

D. Negotiate Issues Simultaneously, Not Sequentially

Research has shown that it is a better approach to negotiation to discuss issues as packages and combine them. Negotiating each issue independently is not only time-consuming, but it increases the likelihood of lose-lose agreements. Negotiators are more likely to adopt a demanding, positional approach on each issue and lose perspective about what is ultimately the most important issue.

Handling several parts of the deal at the same time has several advantages. It prevents negotiators from being completely positional, it forces them to prioritize their values and preferences across several issues, and it may trigger good ideas of considering packages or combinations of agreement terms. Thompson, Leigh, *The Truth About Negotiations 2nd Ed.* (FT Press 2013).

E. Evaluating Options

Evaluate the expected outcomes of choosing each possible option from emotional, financial, and legal perspectives. You will want to consider your BATNA which may be to proceed to litigation. If you did not settle the matter through negotiations, you should determine what would be the best-case scenario you could achieve in the courtroom and what would be the worst-case scenario. Whether or not you want to assess your choices based on what might or might not happen in court, you will still need to evaluate all your choices from the viewpoint of whether the option is realistic, whether you will be satisfied or have regrets based on the choices you make, and whether it will affect your relationships. *The Collaborative Law Institute of Texas' Negotiation Workbook* (Austin: Collaborative Law Institute of Texas 2006).

During the negotiating process, the Collaborative Law Institute of Texas Negotiation Workbook outlines steps, including the following, that can be helpful in evaluating whether or not to accept, modify or reject options:

- How well do the probable emotional, relational, financial, and legal outcomes of this option address my goals, concerns and interests?
- How well does this option address the other person's goals, concerns and interests?
- Which option(s) can be eliminated as having outcomes that don't sufficiently meet important goals of either of us?
- Which option(s) would have best chance of being acceptable to both of us and meet the important goals of both parties?

If you are looking at the options based on what might happen at the courthouse, then the following additional questions could be asked:

- Is the likely result from a judge or jury better or worse than the option on the table?
- What are the financial costs, including attorneys' fees, expert fees and costs in time lost from work?
- What are the emotional costs of going to court?
- What are the effects on you, the other party, and the children if there was a trial?
- After considering all of the consequences of going to court, are the benefits of having the judge or jury make the decision better than an agreement that can be reached?
- How important is it to have certainty instead of risk about the outcome of the case?

Solutions must be realistic, and the agreements reached in the negotiation process must be achievable according to the facts of the case. For example, if a spouse needs at least $20,000 per month in support to feel secure and pay her monthly bills but the other spouse's job and the assets of the estate can only produce $10,000 per month, the spouse's expectation of $20,000 a month in support is not a viable solution. *The Collaborative Law Institute of Texas' Negotiation Workbook* (Austin: Collaborative Law Institute of Texas 2006).

F. Walking Away from the Table

Take-it-or-leave it attitudes should be avoided. Only use ultimatums when you are prepared to do what you have threatened to do because most people who issue ultimatums are essentially bluffing. These types of negotiators often dig their own graves because once they have made a take-it-or-leave-if-offer, it is difficult to return to the negotiating table. You can respond to an ultimatum of the other party by calling their bluff and find a face-saving way for the other party to continue the negotiations. Thompson, Leigh, *The Truth About Negotiations 2nd Ed.* (FT Press 2013).

Dawson believes that you should always project that you are prepared to walk away. Once you project that you won't walk away, you are indicating you have no options and you have lost all of your power. He says the objective is not to walk away but to get concessions from the other party because they think you will walk away. Dawson, Roger, *Secrets of Power Negotiating*. Updated for the 21st Century 15th Ed. (Career Press 2011).

G. Handling Impasses

1. Create Momentum

An impasse can be handled by setting aside the major problem issues and talking about some of the smaller issues to gain momentum. Momentum can be created by resolving minor issues first, but you should avoid narrowing the negotiation down to only one issue – with only one issue there will have to be a winner and a loser. Dawson, Roger, *Secrets of Power Negotiating*. Updated for the 21st Century 15th Ed. (Career Press 2011).

The dynamics of the negotiation can be changed to create momentum, such as:

- Change the people in the negotiating team.
- Change the venue.
- Remove a member who may be an obstacle to resolution.
- Find ways to ease the tension.
- Explore the possibility of changing or restructuring the deal.
- Change the style of the negotiations – either from a low-key approach with an emphasis on win-win to becoming more competitive, or the reverse. Dawson, Roger, *Secrets of Power Negotiating*. Updated for the 21st Century 15th Ed. (Career Press 2011).

2. Use the Creative Problem-Solving Model

The Collaborative Institute of Texas' suggestion for breaking an impasse are to use the creative problem-solving model:

- Identify the problem.
- Brainstorm all options for solving the problem.
- Discuss and evaluate the likely outcomes of each option.
- Select the most acceptable option.

Parties are cautioned to replace the word "fair" with the word "acceptable" since perspectives and viewpoints are different. The goal is not to reach a "fair" settlement, but to reach a settlement that each person, from his or her own unique perspective, can deem acceptable. *The Collaborative Law Institute of Texas' Negotiation Workbook* (Austin: Collaborative Law Institute of Texas 2006).

3. Suggest Solutions and Ask Questions

Good questions to assist with an impasse include the following:

- What would happen if we did this?
- Is this something that might work?
- What do you see as our options right now?
- What do you see happening as the likely outcome of your preferred option and the other options being considered?
- What is the most effective thing we can do right now?
- How do you see that happening?
- What would you want if you knew for sure that you were going to lose a certain position in court? *The Collaborative Law Institute of Texas' Negotiation Workbook* (Austin: Collaborative Law Institute of Texas 2006).

H. Time Frames and Time Pressures

Negotiating and reaching complete agreements in a family law case take time. Many times one or both of the parties want to "get the case over" at the beginning. However, to negotiate effectively, all information must be gathered, the character of assets should be determined, assets should be valued, and experts should be consulted. Additionally, family law disputes often take longer to resolve than other kinds of lawsuits because emotions run high and there are several issues at stake. The process often takes longer than one person wants (and may go too quickly for the other). *The Collaborative Law Institute of Texas' Negotiation Workbook* (Austin: Collaborative Law Institute of Texas 2006).

Dawson asserts that the rule in negotiating is that 80 percent of the concessions occur in the last 20 percent of the time available for the negotiation. If demands are presented early in a negotiation, neither side may want to make concessions. On the other hand, more problems surface in the last 20 percent of the time available to negotiate and both sides are more flexible and willing to make concessions. All details should be tied up at the beginning – don't leave anything to "we can work that out later." A matter that appears to be of little importance up front can become a very big problem under time pressure.

Research has been done about time pressures in negotiations. Dawson says that when you are negotiating, you should never reveal that you have a deadline. If the other side knows you are under time pressure, they could push the negotiations until the last possible minute. The longer you can keep the other side involved in the negotiation, the more likely the other side is to move around to your point of view. This also works both ways – the longer you spend in a negotiation, the more likely you are to make concessions. Dawson, Roger, *Secrets of Power Negotiating*. Updated for the 21st Century 15th Ed. (Career Press 2011).

VI. EMOTIONS IN NEGOTIATION

A. Emotions Have an Impact on Negotiations

Emotions almost always have an impact on negotiations – they can be distracting, painful or cause the negotiation to fail. They affect your body, your thinking and your behavior. Emotions can be positive or negative. In their book, *Beyond Reason – Using Emotions as You Negotiate* (2005), Roger Fisher and Daniel Shapiro discuss strategies on dealing with emotions and relationship issues in negotiations. They discuss how you can use positive emotions to help reach wise agreements and deal with negative emotions so that negotiations are more comfortable and effective.

In a negotiation, a positive emotion toward the other person is likely to build rapport and a feeling of being on the same page. Negative emotions such as anger or frustration feel personally distressing and they are less likely to build rapport. Strong emotions can be obstacles to negotiation in several ways – they divert attention from substantive matters, they can overshadow your thinking, they can damage relationships, and they can be used to the advantage of the other party.

B. Positive Emotions Can be a Great Asset

Although emotions are often thought of as obstacles to a negotiation, they can also be a great asset and help achieve our goals. Positive emotions feel personally uplifting, and they can make it easier to meet your interests. With positive emotions you are more open to listening and more open to learning about the other party's interests, making it possible for a mutually satisfying outcome. Positive emotions can also enhance a relationship and you can talk comfortably without the fear of getting sidetracked by a personal attack. Fisher, Roger and Shapiro, Daniel, *Beyond Reason – Using Emotions as You Negotiate,* (New York: Penguin Books 2005).

C. Suggestions for Stimulating Positive Emotions

Fisher and Shapiro suggest ways to stimulate positive emotions. One of these ways is to show appreciation. If people feel understood, valued, and appreciated, they feel better and are more open to listening and more likely to reach agreements. We can appreciate others by (1) understanding their point of view; (2) finding merit in their acts and thoughts; and (3) communicating our understanding through words or action. To appreciate does not mean to give in or agree with the other party's point of view, but you can still let them know that you have heard their viewpoint and that you understand it.

D. Strong Negative Emotions

Sometimes strong negative emotions such as anger, fear or frustration may affect your behavior and drive the behavior of others. If the emotions are unaddressed, there is a good likelihood that they will escalate and prevent you from making a wise agreement. Further, negative emotions may cause others to stop listening to you, stop talking or terminate the

negotiation. Emotions feed off one another, and your anger can stimulate the other party's anger.

Strong negative emotions can cause your focus to be so narrowed that all of your attention is focused on your strong emotions. As a result, your ability to think clearly and creatively gets sidetracked and you risk acting in ways that you will regret. Strong emotions can also make you vulnerable to the point that your emotions take control of your behavior and you may not be able to think about the consequences of your behavior. Fisher, Roger and Shapiro, Daniel, *Beyond Reason – Using Emotions as You Negotiate,* (New York: Penguin Books 2005).

Whatever the source of strong emotions, you need to become aware of them to avoid escalation and be prepared to deal with them. Preparation involves having a plan before negative emotions arise. There are ways to calm strong negative emotions, such as slowly counting backward from 10, breathing deeply three times in though nose and out through mouth and taking a short break to relax.

Emotions are usually contagious. Even if your emotions change from anger and frustration to active interest, the other person is likely to be reacting still to your prior negative behavior. The impact of a negative emotion can linger long after it has passed. Thompson, Leigh, *The Truth About Negotiations 2nd Ed.* (FT Press 2013).

E. Expecting Something for Strong Emotions

Often people going through divorce are in pain, they are angry, and they feel betrayed. Sometimes they expect compensation for their emotions, but unfortunately there is no numerical translation for feeling hurt or betrayed. They may also attempt to "equalize" their suffering. For example, "this divorce has hurt me so much you need to pay me extra, see the kids less, sell the house, etc., so you will feel some pain too." Rather than adopt this behavior, the best possible settlement under the circumstances should be negotiated and both parties should move on with their lives. *The Collaborative Law Institute of Texas' Negotiation Workbook* (Austin: Collaborative Law Institute of Texas 2006).

F. Responding to Temper Tantrums

If someone is unable to deal with their emotions effectively, childish behavior may show up. They may lash out, make demands, and throw temper tantrums. Studies have shown that those who have temper tantrums are the least effective negotiators. Many temper tantrums are not genuine. Rather they are carefully planned displays of emotion designed to evoke a response in the other party.

If the other party is throwing a temper tantrum, whether staged or authentic, there are a few strategies that could be used. Taking a break may be helpful, especially if you feel you are going to say something you might regret. You can also empathize with their emotions by acknowledging the significance of the matter and expressing understanding. Finally, rather than responding in kind, it may be helpful to write down your thoughts and review and summarize the negotiation points to create a point of focus. Thompson, Leigh, *The Truth About Negotiations 2nd Ed.* (FT Press 2013).

G. Negotiating with Someone You Hate

The last section of this article discusses whether or not you should even get to the negotiation table with someone that you hate and that you perceive is evil. A framework is provided as to how you should make the decision. You will almost certainly have to negotiate with people who have true personality disorders or cause you anxiety for a variety of reasons, and you have to find a way to deal with them. If you become consumed by feelings of hate for the other party, you are not going to be able to negotiate effectively. If you decide to negotiate with the person you hate, one way that you can deal with the person is to change your behavior in how you deal with him or her, but not your feelings about them. You can also take more responsibility for your feelings and focus on the terms of the negotiations rather than the other party.

H. Repairing Trust – Venting and Apology

When trust is broken in a relationship, negotiations are more difficult. Consider letting the other party vent to get rid of strong emotions. Letting them vent does not mean you have to agree with them; you just have to listen.

Fisher and Shapiro assert that there may be some purposes for expressing strong negative emotions – to get the emotions off your chest; to let others know about the impact of their behavior on you in hopes that they will appreciate your emotional experience; and to influence the other person by expressing the importance of your interests. Caution should be exercised however as sometimes venting can make a bad situation worse. Venting can be helpful if someone is there to moderate and the communications are on topic without the venting party going on extensively with a list of past grievances. Fisher, Roger and Shapiro, Daniel, *Beyond Reason – Using Emotions as You Negotiate,* (New York: Penguin Books 2005).

An apology can be very powerful, but only if you mean it. If you did something that caused the other party to develop strong negative feelings, an apology can diffuse the anger. Make sure the other person hears you apologize. A well-timed, sincere apology can repair a tremendous amount of damage in a relationship. If you don't think you have done anything that would require an apology, you can still apologize that the situation has caused the other party sadness and stress. An apology should express empathy for the other person's feelings and express regret. Otis, Mark, *Negotiation Workshop*, 2nd Annual Collaborative Law Spring Retreat (Austin 2005).

VII. MAKING THE DECISION TO NEGOTIATE OR FIGHT

A. Bargaining with the Devil, Robert Mnookin (2010)

Robert Mnookin is a leading scholar in the field of negotiation and conflict resolution at Harvard Law School, and he has helped in resolving many business and family disputes over the years. In his book *Bargaining with the Devil: When to Negotiate, When to Fight* (2010), he poses the question whether you should negotiate the "Devil" or have a fight. He describes the

"Devil" as someone who has deeply harmed you in the past or appears willing to harm you in the future. He or she is someone you don't trust or whose behavior you may even see as evil.

Mnookin acknowledges there are times when you want to proceed directly to litigation or have the fight when someone has wronged you so they are not rewarded for their bad behavior. You want your rights vindicated and the thought of negotiation seems wrong. It is important to note that a party involved in a conflict may perceive the other party as *evil*, but it may just be their perception – a detached observer might disagree. These types of conflicts are challenging and feeling this way about someone can get in the way of clear thinking. Mnookin acknowledges that some people are truly evil – intentionally inflicting horrific harm on human beings without a compelling justification is evil – such as the Nazis' persecution of the Jews.

In his book, Mnookin describes his involvement in a public debate at Harvard. Shortly after the September 11, 2011 attacks in New York, Harvard Law School's Program on Negotiation sponsored a public debate on whether President Bush should negotiate with the Taliban. At the time of the debate, President Bush had just issued an ultimatum to the Taliban government in Afghanistan to shut down Al-Qaeda's training camps and turn over Osama bin Laden and his lieutenants or the United States will invade. The Taliban responded by inviting President Bush to negotiate and he refused. The Taliban refused to turn over bin Laden and did not agree to shut down the training camps. After receiving both congressional and U.N. authorization, Bush launched war in Afghanistan and crushed the Taliban government. On the facts known at the time, Mnookin believes President Bush's decision was wise.

Roger Fisher and Robert Mnookin where invited to discuss how President Bush should respond to the Taliban's offer to negotiate. Fisher and Mnookin did not share similar views. Fisher took the position that President Bush was wrong to issue an ultimatum and the United States should accept the Taliban's invitation to negotiate. Mnookin pointed out that Fisher's argument was consistent with his view, expressed in many of his books, that one should always try to resolve conflict through a problem-solving approach to negotiation based on the interests of the parties. Fisher supports the categorical notion that is prevalent in the field of dispute resolution that you should *always* be willing to negotiate and resolve the problem. To negotiate doesn't mean you must give up all that is important to you. It only requires that you be willing to sit down with your adversary and see whether you can make a deal that serves your interests better than your best alternative does.

The other side is that you should *never* negotiate with the Devil, no matter how great the possible benefits, as negotiating with evil is simply wrong and it would violate your integrity.

Mnookin discusses two of the greatest political heroes of the twentieth century, Winston Churchill and Nelson Mandela, where each had to decide whether to negotiate with an oppressive and evil enemy. Churchill refused to negotiate with Adolf Hitler, even though Nazi forces had overrun Europe and were about to attack a weakened Britain. Nelson Mandela, on the other hand, chose to initiate negotiations with a white government that had erected a racist regime. Mnookin pointed out that people use the Churchill and Mandela stories as a convenient rationale for decisions they have already made – when they don't want to negotiate, they tell the story of Churchill, and when they want to negotiate, they tell the Mandela story.

Mnookin's book explores the challenge of how you should decide whether you should bargain with the Devil or refuse. He discusses eight real cases in which a someone had to decide whether to negotiate or resist. The cases cover a broad range of situations, including international conflicts and others involving business and family conflicts, including divorce. In all of them, at least one party is enraged by the other side's behavior. Mnookin evaluates the decision based on what the decision-maker knew at the time.

Although the cases are different, they all involve demonization of the other party and distorted thinking. Mnookin examines how people in intense conflict decide whether to negotiate, what role emotions play, what is the relationship between analysis and intuition, whether there are common traps that interfere with decision-making, and whether there is an approach that can increase the likelihood of making wise decisions.

B. Making a Wise Decision to Negotiate Not Based Solely on Emotion

The question in each case is should you negotiate with the enemy and how you make a wise decision that is not based solely on emotion. In helping clients through conflicts, Mnookin found that wise decision-making poses three different challenges:

1. Avoid emotional traps that can lead to quick decisions;
2. Analyze the costs and benefits of alternative courses of action; and
3. Address the ethical and moral issues that often arise when trying to decide whether to negotiate with an enemy.

C. Avoiding Common Traps

Mnookin sets out two opposing sets of traps that can stand in the way of a wise decision – negative traps and positive traps. The negative traps encourage us to exaggerate the costs of negotiation and underestimate the benefits, and the positive traps may tempt us to negotiate when maybe we shouldn't. To avoid these traps, Mnookin says that a critical first step is to recognize them and be aware of our strong emotions. He also suggests that you expose yourself to different perspectives to slow you down and prevent you from making a hasty decision.

These traps include the following:

1. **Demonization** is the negative trap, and it is the tendency to view the other side as evil – not just guilty of bad acts, but fundamentally bad to the core. The opposite extreme is the positive trap – **contextual rationalization and forgiveness** – the behavior of the other side is the product of external pressures and thus can be easily forgiven.

2. **Moralism and self-righteousness** is the negative trap and creates a tendency to see the other side as entirely at fault and you are innocent and worthy. The opposite trap is the tendency to assume that in every conflict there is **fault on all sides** and that the burden of responsibility should be

shared.

3. The **zero-sum** trap is a negative trap that involves seeing the world in terms of a competition – what one side wins, the other side must lose. In divorce disputes, spouses often argue over the division of property or time spent with the kids, as if more for one spouse can't possibly be good for the other. The opposite trap is the naive assumption that **win-win** is *always* possible, that the pie can always to expanded so that the goals of both sides are accomplished.

D. Analyze the Costs and Benefits

Mnookin discusses five basic points that were discussed previously in this article that are useful to provide a framework for analyzing the benefits and costs:

1. Interests – what are my interests? What are the other party's interests?

When people are in conflict, they often think in terms of "positions" – what they want or demand. As discussed earlier, interests are the fundamental needs and concerns that lie underneath those positions. There is only one way to meet a position, but often many ways to serve an interest. For anyone in a dispute, the analysis begins with asking what are your basic goals and what is important? Some interests are tangible, such as property or money, or some not tangible such as upholding your reputation and being treated with self-respect.

2. Alternatives – what are my alternatives to negotiation? What are the other party's alternatives?

Alternatives to negotiation look at the choices away from the negotiating table including litigation. For each alternative, consider the full range of possible outcomes. With regard to litigation, you have to consider not just the best possible outcome, but also the worst possible outcome. What are your odds of winning or losing? If you win, are there any negative consequences? Once you have evaluated your alternatives, identify the best alternative (BATNA).

The better your BATNA, the better your alternatives away from the table and the more bargaining power you have at the table. The same is true for the other party. Therefore, before you decide whether to negotiate, you should work hard to create the best possible alternatives for yourself and to diminish, if possible, you opponent's perception of his own BATNA.

3. Potential Negotiated Outcomes – Is there a potential deal that could satisfy both parties' interests better than our alternatives to negotiation?

This requires you to imagine a range of potential deals and evaluate them in light of each party's interests – what are the benefits and risks to each side. Then compare those deals with each party's BATNA and ask which is better. If the potential deal doesn't meet your adversary's interest better than his BATNA, why should he agree to it? If you can envision

negotiated deals that could be better than both sides' BATNAs, you may decide to negotiate.

4. Costs – What will it cost to negotiate?

The negotiation process will involve costs regardless of whether an agreement is reached. There will be transaction costs in terms of time, money, and other resources. The negotiation process may adversely affect you in future dealings with other parties, such as reputation, or the costs of establishing a precedent. Although settling a frivolous lawsuit for a small amount might make sense in light of immediate costs savings, a defendant might worry that his willingness to negotiate at all might invite a flood of similar claims.

5. Implementation – If an agreement is reached, is there a reasonable prospect that it will be carried out?

Even if an agreement is reached, there may be a risk that it may not be honored. In some cases, there is no effective formal enforcement mechanism. In a divorce agreement, language can be included to make the agreements as enforceable as possible, but the situation may be such that there is no enforcement remedy.

D. Moral Issues

The harder cases are when logical and moral demands conflict, which is the focus of Mnookin's book. Although you may agree with a pragmatic assessment of benefits and costs, your principles suggest that negotiating would be wrong. Mnookin believes that moral judgments may be traps if you use them as an excuse for not going through the five questions above in analyzing the situation. Mnookin says that moral values should be factored into the decision-making process.

Mnookin provided an example of a divorce situation where the wife refused to negotiate with her husband and determined she would go directly to trial. Mnookin's opinion was that the wife's refusal to negotiate was not wise. Although she thought her husband's motives were evil – threatening a custody fight to force her to accept less than what she thought was a fair division of the marital estate – the decision to go to court when her attorney advised her to participate in negotiations was not a good decision. By choosing to negotiate, the wife did not have to agree or compromise her core interests. She may have received a better deal in court from a financial perspective, but the trial was not worth it from the perspective of the children all things considered.

X. SUMMARY AND CONCLUSION

Most cases contain potential for win-win agreements. Following are some of the key points presented in this article for a successful negotiation:

- Look for ways and use effective strategies for a win-win negotiation.
- You can get what you want in negotiations and still have the other side

feeling they have won.

- Identify your goals and interests and use best efforts to predict the goals and interests of the other party.
- Prepare for the negotiation process by making sure you have all of the information you need in order to negotiate, including financial, legal and other factual information.
- Prepare emotionally for the negotiation.
- Brainstorm all issues under consideration.
- Know your best alternative to a negotiated agreement.
- Know the other party's best alternative to a negotiated agreement.
- Prepare an opening offer.
- Don't jump at the first offer.
- Ask for more than you expect to get.
- Evaluate options from emotional, financial and legal perspectives.
- Learn ways to handle impasses.
- Plan your concessions which should taper toward the end.
- Stimulate positive emotions.
- Be aware of strong negative emotions and prepare to deal with them.

Being an effective negotiator takes skill, practice, and preparation. When you negotiate in ways that work you will have a significantly better outcome.

REFERENCES

The Collaborative Law Institute of Texas' Negotiation Workbook (Austin: Collaborative Law Institute of Texas 2006).

Dawson, Roger, *Secrets of Power Negotiating*. Updated for the 21st Century 15th Ed. (Career Press 2011).

Fisher, Roger; Ury, William. and Patton, Bruce, *Getting to Yes* (Boston: Houghton Mifflin 1981).

Fisher, Roger and Shapiro, Daniel, *Beyond Reason – Using Emotions as You Negotiate,* (New York: Penguin Books 2005).

Fisher, Roger and Ury, William, *Getting to Yes: Negotiating Agreement Without Giving In*. (New York: Penguin Books 1983).

Lax, David A., and James K. Sebenius, *3-D Negotiation: Powerful Tools to Change the Game in Your Most Important Deals* (Boston, MA: Harvard Business School 2006).

Mnookin, Robert H., *Bargaining with the Devil: When to Negotiate, When to Fight* (Simon and Schuster 2010).

Mnookin, Robert H.; Pepped, Scott R. and Tulumello, Andrew S., *Beyond Winning: Negotiating to Create Value in Deals and Disputes* (The Belknap Press of Harvard University Press 2000).

Otis, Mark, *Negotiation Workshop*, 2nd Annual Collaborative Law Spring Retreat (Austin 2005).

Subramanian, Guhan, *Negotiauctions: New Dealmaking Strategies for a Competitive Marketplace* (W. W. Norton & Company, Ltd. 2010).

Pinet, Angelique and Sander, Peter, *The Only Negotiation Book You'll Ever Need* (Adams Media 2013).

Stark, Peter B. And Flaherty, Jane, *The Only Negotiating Guide You'll Ever Need* (Broadway Books 2003).

Thompson, Leigh, *The Truth About Negotiations 2nd Ed.* (FT Press 2013).

Ury, William, *Getting Past No* (Bantam Books 1991).

Ury, William, *The Power of a Positive No* (Bantam Books 2007).