The Importance of Post-Negotiation Evaluations

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Lawyers and business people negotiate with others every day. They interact with colleagues within their own firms, they deal with prospective and current clients, and they negotiate on behalf of their companies and clients with outside parties. This is one of the most critical skills employed by such persons. They assume that they must be doing all right, and they never stop to ask themselves how they are actually doing and whether they could be doing better. If individuals hope to enhance their negotiation skills, they need to take the time after their more significant interactions to ask themselves how they did. How did the different stages of the negotiation process develop? Were they thoroughly prepared? Did they use the Preliminary Stage to establish rapport with the other side and the beginning of their interaction to create a positive bargaining environment? Was there an efficient Information Stage during which the parties articulated their different positions and explored the interests underlying those demands and offers? Did they listen carefully for verbal leaks which undermined what the other side seemed to be saying and watch for relevant nonverbal signals? How did the parties close the deal? Did they resort to the Cooperative Stage to maximize their joint returns?

What bargaining tactics did they employ, and how did the other side counter them? What techniques did the opposing party use, and how did they work to counteract those tactics? Were their initial aspirations too high, appropriate, or too low? There is a direct correlation between initial aspirations and final terms, with persons with higher goals achieving better terms than people with lower goals. Were their opening offers too high, appropriate, or too low? Did they begin with “principled” offers they could logically explain to the other side? It is critical to recognize the impact of “anchoring” on bargaining interactions. Individuals who begin with offers that are generous to the other side actually induce those persons to move away from them psychologically due to the fact they begin to believe that they will obtain better terms than they initially anticipated. On the other hand, negotiators who begin with offers that are less generous

to their opponents induce those people to move closer to them psychologically due to the fact they think they will not do as well as they hoped.

Did they encounter any deceitful tactics that went beyond mere puffing or embellishment? It is clear that under the Model Rules of Professional Responsibility, lawyers may not knowingly misrepresent *material* law or fact. A similar restriction is imposed upon business persons under common law rules of fraud. Nonetheless, under both the Model Rules and doctrines governing fraud, certain representations are not considered statements of *material* fact. Representations concerning one's settlement intentions – how low or high one side is willing to go – and statements about the manner in which one values the different items being exchanged are considered *non-material* information. It is thus acceptable for negotiators to over- or under-state the value items for strategic purposes and to indicate that they have to have more or can only offer less than their true positions. Beyond these two areas, however, it is entirely improper for negotiators to misrepresent other matters that are material to their interaction. If they do so, they or their clients may be sued for fraud, and they may be professionally disciplined. Even more importantly, they may injure their reputations in a manner that will make it difficult for them to interact with others in the future. So much of what we do when we negotiate is based upon the belief that we can trust our opponents with respect to the items we expect them to discuss honestly. If we ever catch someone misrepresenting such issues, we are unlikely to trust them again – and we will tell others about their lack of integrity.

What did you do during your bargaining interaction that you wished you *had not done*? This question generally concerns mistakes we think we may have made. When our opponent does something we did not anticipate, we react quickly to counteract their behavior. In hindsight, we may picture something else we should have done that we should remember when we encounter such behavior in the future. What did you *not do* that you wished you had done? This question often concerns something the other side did that we did not feel we handled effectively. Studies show that this is the most important question negotiators should ask when they evaluate prior bargaining interactions. Although it is beneficial to eliminate mistakes we may have made in the past, it is especially helpful to think about what we should do differently in our future interactions. If we anticipate similar issues in our future situations and carefully plan how to deal with those specific issues or tactics, we are much more likely to behave in effective ways when such circumstances arise.

Lawyers and business persons who wish to conduct post-negotiation assessments should use the following Evaluation Checklist to help them review their bargaining behavior.

POST NEGOTIATION EVALUATION CHECKLIST

1. Was your **pre-negotiation preparation** sufficiently thorough? Were you completely familiar with the operative facts and legal issues? Did you fully understand your own side's value system?

2. Did you carefully determine your **own side's bottom line**? Did you also endeavor to place yourself in the shoes of the **opposing side** and attempt to estimate their bottom line?

3. Was your **initial aspiration level** high enough? Did you have a firm goal for **each item** to be addressed? If you obtained everything you sought, was this due to the fact you did not establish sufficiently elevated objectives? Was your aspiration level so unrealistic that it provided no meaningful guidance to you?

4. Did you prepare a **principled opening offer** that logically explained the basis for the position you were taking?

5. Did your **pre-bargaining prognostications** prove to be accurate? If not, what caused your miscalculations?

6. Which party dictated the **contextual factors** such as the time and location for your discussions? Did these factors influence the negotiations?

7. Did you use the **Preliminary Stage** to establish rapport with your opponent and to create a positive negotiating environment? Did you employ **attitudinal bargaining** [see William Ury, *Getting Past No* (1991) & *The Power of a Positive No* (2007)] to modify inappropriate opponent behavior?

8. Did the **Information Stage** develop sufficiently to provide the participants with the knowledge they needed to understand their respective needs and interests to enable them to consummate an optimal agreement? Did you ask **broad, open-ended questions** to get the other side talking and use **"what" and "why" questions** to determine what the other side wanted and the interests underlying those positions?

9. Were any unintended **verbal leaks** or **nonverbal disclosures** made? What precipitated such revelations? Were you able to use **Blocking Techniques** to prevent the disclosure of sensitive information?

10. Who made the **first offer**? The first **"real"** offer? Was a **"principled" initial offer** made by you? By your opponent? How did your **opponent react** to **your initial proposal**? How did **you react** to your **opponent's opening offer**?

11. Were **consecutive opening offers** made by one party before the other side disclosed its initial position?

12. What specific **bargaining techniques** were employed by your **opponent**, and how were these tactics countered by you? What else might you have done to counteract these tactics?

13. What particular **negotiation techniques** were employed **by you** to advance your position? Did the opponent appear to recognize the various negotiating techniques you

used, and, if so, how did he/she endeavor to minimize their impact? What **other tactics** might you have used to advance your position?

14. Which party made the **first concession**, and how was it precipitated? Were **subsequent concessions** made on an alternating basis? You should keep track of each concession made by you and your opponent throughout the transaction to be sure you do not bid against yourself by making unreciprocated consecutive concessions.

15. Were **"principled" concessions** articulated by you? By your opponent? Did **successive position changes** involve decreasing increments, and were those increments relatively reciprocal to the other side's concomitant movement?

16. How did the parties **close the deal** once they realized that they had overlapping needs and interests? Did either side appear to make greater concessions during the closing phase?

17. Did the parties resort to **cooperative/integrative bargaining** to maximize their joint returns?

18. How close to the **mid-point** between the initial real offers articulated by the parties was the final settlement?

19. How did **time pressures** influence the parties and their respective concession patterns? Try not to ignore the time pressures that affected your opponent.

20. Did either party resort to **deceitful tactics** or deliberate misrepresentations to enhance its situation? Did these pertain to **material** factual or legal issues, or only to their side's values or settlement intentions?

21. What finally induced you **to accept** the terms agreed upon or **to reject** the final offer made by the other side?

22. Did either party appear to obtain **more favorable terms** than the other side? If so, how was this result accomplished? What could the **less successful** participant have **done differently** to improve this situation?

23. If **no settlement** was achieved, what might have been done differently to have generated a mutual accord?

24. What did you do that you **wish** you had **not done**? Do you think your opponent was aware of your mistake? How could you avoid such a mistake in the future?

25. What did you **not do** that you **wish you had done**? If you encountered a new technique or approach, how could you most effectively counter such an approach in the future?

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November 2011