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DEALMAKING

FREE REPORT

SECRETS OF SUCCESSFUL DEALMAKING IN BUSINESS NEGOTIATIONS

Dealmaking advice from Guhan Subramanian

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Dealmaking advice from Guhan Subramanian

Contracts 101: What Every Negotiator Should Know About Contract and Agency Law

Executives often leave the legal issues surrounding their deals to their attorneys. While this division of labor is often appropriate, negotiators can run into trouble without an awareness of the governing legal rules. Consider the following negotiations in which unfamiliarity with contract law led to major problems:

- Jane was negotiating a multiyear supply agreement with Kevin, who eventually faxed a proposed contract to Jane. They discussed it over the phone and then Jane crossed out several provisions, signed it, and faxed it back to Kevin. After the fact, Kevin claimed he never agreed to Jane's final edits and refused to deliver the goods on her terms. Did Kevin break the contract, or was there no contract to break?
- While hammering out an agreement, a midlevel manager offered a customer a significant price discount. When the discount failed to materialize, the customer sued. In response, company representatives argued that the manager did not have the authority to offer the discount. Who is right?
- Representatives of the hypothetical companies Acme Construction and Industrial Inc. sat down to renegotiate their existing deal to expand Industrial's manufacturing facilities. Industrial granted Acme a unilateral concession in writing—a price increase—but later refused to follow through. Acme claimed that Industrial reneged on their modified deal, while Industrial claimed that Acme reneged on their original deal. Who should win the case?

Clearly, these negotiators would have benefited from a basic understanding of certain legal rules. This article introduces you to some key "rules of the road": the mirror-image rule, offer revocation, negotiator authority, negotiator intention, and the consideration requirement. To ensure that your deals don't later collapse on technical grounds, you need to be aware of these principles throughout the negotiation process.

The mirror-image rule

Under basic principles of contract law, every deal must have an offer, an acceptance, and consideration. The first two terms are self-explanatory, at least conceptually; I describe the third term in more detail below. The mirror-image rule further states that the deal that the offeree accepts must be a mirror image of what the offeror has offered. Clearly, if Jane unilaterally edited terms and faxed the contract back to Kevin, no contract yet has been formed.

But Jane and Kevin discussed her proposed changes over the phone, and Jane made edits that she thought reflected their conversation. Can Kevin rightfully claim that he never agreed to the edits? Here the outcome is likely to be based on the evidence regarding their phone conversation. If Kevin and Jane both have notes indicating the same understanding of the modified terms and an "intent to be bound" to the contract, a court might decide that the faxed edits merely formalized a contract that already had been formed. But if written notes were ambiguous and if Kevin insists that Jane misunderstood their conversation, a court might find that there was no "meeting of the minds" and, therefore, no contract.

The implication for negotiators is that first, and most obviously, both parties should sign the contract to formally indicate their intention to be bound. When this can't happen for logistical reasons, try to reduce ambiguity. At the end of their phone call, Jane might have said to Kevin: "We've got a deal, right? Let me change the contract to reflect our discussion and fax it back to you. Then your assistant can enter the changes, OK?" Without excellent documentation, you may be left without a deal.

Offer revocation

As noted above, every deal requires an offer followed by an acceptance. Therefore, negotiators need to be aware of when they are making an offer and when it can be accepted. One important rule of contract law holds that an offeror can revoke the offer at any time before the offeree accepts it. In addition, an offer is terminated if the offeree rejects it.

Suppose that Bob hears about a condo that soon will be going on the market. Bob contacts the owner, looks at the property, and begins negotiations without a broker. The owner makes a first offer of $450,000. Although it's an attractive price, one that Bob is willing to pay, he counters at $400,000. Insulted, the owner retaliates by increasing his original offer: "$500,000! Take it or leave it!" Bob retreats, stating that he'll accept the $450,000 offer. "Too late," says the owner. "I've decided to put the property on the market."

Assuming that these facts can be proven in court, can Bob rightfully claim a deal to buy the condo at $450,000? No. Why? Because he implicitly rejected the $450,000 offer by making a counteroffer of $400,000. Even without the $400,000 counteroffer, the condo owner implicitly revoked his $450,000 offer by offering $500,000. Bob can't accept an offer that no longer exists.

Think twice before making a counteroffer that effectively rejects an attractive offer. Instead, frame a counteroffer in a way that is more likely to leave the initial offer on the table—and less likely to offend the other party. In response to the $450,000 offer, Bob might have said, "Any room to move here?" or, "Interesting offer. How would you feel about $400,000?" This approach might keep a decent offer on the table, and it's also a good negotiating strategy.

Negotiator authority

Many negotiation experts, including Roger Fisher, William Ury, and Bruce Patton in their seminal book *Getting to Yes: Negotiating Agreement Without Giving In* (2nd ed., Penguin, 1991), recommend clarifying your counterpart's authority to make a commitment before negotiating the substance of the deal. This strategy heads off a common tactic: your counterpart reveals at the end of talks that she needs approval from "upstairs" and then returns to demand additional concessions. Clarifying your counterpart's authority makes good legal sense, too. Without necessary assurances, you may find yourself negotiating with someone who cannot "bind" the party she represents to a contract.

A court often will consider the authority that an organization has given to its agent as a key factor in determining whether the agent can bind the organization to the deal. Specifically, basic contract law states that an agent—for our purposes, someone who negotiates on behalf of an organization—is able to bind the organization to a contract when the organization actually bestowed such authority or if the subject matter of the deal is "incidental to transactions which the agent is authorized to conduct" and "the other party reasonably believes that the agent is authorized to do them."

Suppose that Dan, manager of truck-stop marketing fora major U.S. oil company, agreed to provide the owners of a truck stop with a one-cent-per-gallon discount on the cost of gasoline in perpetuity and a $100,000 loan if they agreed to build a motel next to the truck stop. The owners received the loan and built the motel, but the gasoline discount never materialized. They sued the oil company, which claimed that Dan didn't have authority to offer any type of discount.

The CEO or marketing VP of Dan's company probably had the authority to offer the truck-stop owners the gasoline discount. Whether Dan could make such a deal is a closer call. (In the actual case, Nogales Service Center v. Atlantic Richfield, the question was dismissed on a procedural point.)

Clarifying your counterpart's authority in advance not only makes you less susceptible to the "Let me get back to you" ploy but also ensures you won't reach a deal that your counterpart has no authority to make. There's a further implication for organizations. Clearly delineating the authority of those in your organization, perhaps through their official titles, will help prevent "loose cannon" employees from negotiating contracts outside their purview.

Negotiator intention

What about cases in which it appears that parties reached a deal, but one party believes he didn't? Rather than trying to discern negotiators' innermost thoughts, most courts have adopted the objective theory of assent, which requires an examination of only the outward manifestations of conduct.

Imagine that two farmers, Gordon and Hank, meet for a drink at a local bar and begin negotiating the sale of some of Hank's cattle to Gordon. After a bit of haggling, they agree on a price. Hank documents the terms on a napkin; they both sign it to seal the deal. The next day, Gordon appears at Hank's door to pay for and collect the cattle. Hank claims the deal was just for fun and refuses to accept payment. Does Gordon, armed with the napkin, have a legally binding claim?

Because Hank signed a document that memorializes the sale, even if written spontaneously on a napkin, most courts would find that Hank sold his cattle to Gordon fair and square.

In *Getting to Yes*, the authors offer the useful metaphor of "going to the balcony" as a way of assessing how a third party might view your negotiation: "step back, collect your wits, and see the situation objectively." Hank would have been well advised to go to the balcony when negotiating cattle at the bar with Gordon. Even if your own intention seems crystal clear, and you're certain that no deal has being struck, it's crucial to make sure that your counterpart understands this as well.

In the business world, complex deals are negotiated over the course of weeks and months, with parties gradually reaching closure on various issues. At a certain point, parties enter a legally binding contract—or, in contract terms, they indicate their intent to be bound. After the fact, the courts will look at the concreteness of the deal's terms and, conversely, the extent to which important issues are still unresolved, to determine whether the parties intended to be bound.

The consideration requirement

A core feature of contract law is that each party must provide something of value to reach a deal. In a business negotiation, this consideration requirement is typically not a problem. After all, why would one side provide something of value without getting something of presumably equal value in exchange?

Yet in some circumstances, the consideration requirement can invalidate contracts. Returning to the deal between Acme and Industrial, Acme cannot collect on its negotiated price increase because no consideration existed. Acme had already committed to build the facility for a specified price and gave Industrial nothing of value in exchange for the price increase. To make the renegotiated price enforceable, Acme should have made a concession, such as a promise to complete the project ahead of schedule.

Renegotiated deals are common in the real world, often for valid business reasons. To take a well-publicized recent example, Disney was forced to renegotiate then-President Michael Ovitz's employment contract because of adverse tax consequences created for the company by the initial agreement. The renegotiation led to a complex series of adjustments that famously resulted in a $140 million payment to Ovitz for a little more than a year of service at Disney.

To make the new terms of a deal enforceable, it's critical that both parties understand the need for consideration. An unreciprocated, "good faith" concession by one party runs the risk of being unenforceable. Even "peppercorn" consideration—that is, a trivial amount—generally provides sufficient value to make a renegotiated deal enforceable.

Of course, an unreciprocated concession can be a useful move when you're seeking to build a long-term relationship. And contract law doesn't prevent you from fulfilling the terms of an agreement that did not include consideration. But, as a negotiator, it pays to be aware of what the law requires of you.

The concepts introduced in this article only scratch the surface of the contract and agency law principles that shape the negotiation process. Yet a general familiarity with these ideas will greatly enhance your deal-making sophistication and allow you to avoid the pitfalls that would otherwise land you in court.

By Guhan Subramanian.

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Is Small Talk Really Necessary?

QUESTION

A senior colleague in my organization spends significant time at the beginning of every negotiation session engaging in small talk. He claims that small talk builds rapport and gets our side a better deal in the end. However, I sometimes sense that our clients are merely tolerating his casual conversation and would rather get down to business quickly. Who's right?

ANSWER

Your colleague's view certainly reflects the conventional wisdom in negotiation.

Some experimental evidence also supports this view. But in my opinion, your colleague's prescription and these research results are somewhat simplistic. The question of whether to engage in small talk can be highly context-specific. In my own research, I've found that New York City investment bankers generally are far less likely than Texas oil executives to engage in small talk at the outset of a negotiation.

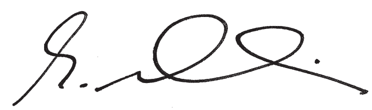
So, rather than adopting a blanket rule for this important question, I would advise you to be responsive to the context. Consider the location of the interaction—your office, their office, or somewhere else? Because you have more control over the pace and substance when meeting on your turf, you should be more willing to use small talk to build rapport. If you're meeting in their territory instead, look for context clues:

Does your counterpart ask whether you'd like some coffee or immediately direct you to your chair? The former situation is clearly more conducive to small talk than the latter; in fact, trying to engage in small talk may irritate your counterpart in the second scenario. Also consider body language: Are you sitting together on a couch, or is your counterpart sitting at his desk with you across from him? Again, the former scenario invites small talk; the latter does not.

The substance of small talk matters as well. Suppose that you are waiting for your counterpart in her office, and the diplomas hanging on the wall tell you that you both graduated from the same small college in New England, three years apart. In fact, you dropped your son off at the same school two weeks ago. This coincidence is likely to forge a connection, even if other factors argue against small talk. Yet complimenting your counterpart on her beautiful family based on some framed photos might be a mistake if the context does not otherwise invite small talk.

One last point: Even when you skip small talk at the outset, always remain open to opportunities for making connections with the other party. Take the recent example of a diplomat who was negotiating a high-stakes treaty with representatives from another country. After more than a week of slow progress, the diplomat noted on a Wednesday that he would need to return home on Friday afternoon for an evening at the opera with his wife.

Immediately, a connection was formed on two fronts: a shared dislike of opera and a shared interest in keeping spouses happy. This casual exchange altered the tone of the negotiation. The pace picked up, and the diplomat went home as scheduled on Friday afternoon—with a signed agreement in hand.



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By Guhan Subramanian.
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Pull Ahead of the Pack with a "Negotiauction"

Robert Barnett, a corporate attorney based in Washington, D.C., moonlights as a book agent for celebrity politicians—including Barack Obama, Laura Bush, and Bill and Hillary Clinton. New York editors line up to sign Barnett's clients and, they hope, rake in blockbuster profits. .

Barnett's technique is to introduce his latest superstar to the major publishing houses and then hold a multiround auction, writes Guhan Subramanian, a

Harvard University professor and *Negotiation*'s academic editor, in his new book, *Negotiauctions: New Dealmaking Strategies for a Competitive Marketplace* (Norton, 2010). After the first round of bidding, Barnett gives low bidders a chance to top the high bid, until an unbeatable offer emerges.

Back in 1993, Barnett's auction format took a new turn when he was shopping James Carville and Mary Matalin's joint memoir of the 1992 presidential campaign. As you'll recall, the two improbably fell in love while fighting each other as lead political operatives for Bill Clinton (Carville) and George H. W. Bush (Matalin).

After a few rounds of bidding, the auction reached a fever pitch. Then things got interesting. At a party, Richard Snyder, the chairman of Simon & Schuster, bumped into Harold Evans, the head of Random House's adult trade division. Both were competing in the Carville-Matalin auction. Snyder suggested a novel strategy: Why not team up and submit a joint bid?

Soon the announcement came that rivals Simon & Schuster and Random House would be copublishing Carville and Matalin's memoir for an impressive (but undisclosed) sum. The two firms would make decisions on the book together and split its profits and losses equally. "It's like the Hatfields and the McCoys publishing the Montagues and the Capulets," a delighted Barnett told the *New York Times*. Carville and Matalin's book, *All's Fair: Love, War, and Running for President*, was a bestseller, thanks in part to the free publicity surrounding the unorthodox business arrangement.

Was the deal a negotiation or an auction? Clearly, it was both. A number of parties bid in an auction; two of them negotiated with each other and then jointly with Barnett. The deal was what Subramanian terms a *negotiauction*—a transaction in which both auction-style bidding and one-on-one negotiation occur in the course of a single deal.

In fact, many (if not most) complex deals between buyers and sellers—from home sales to purchasing auctions to corporate mergers—qualify as negotiauctions. Yet because negotiation and auction advice tend to come from two different camps, real-world dealmakers have had to navigate this rocky terrain intuitively. Here we review Subramanian's guidance on thriving in this challenging yet potentially rewarding environment.

What's a "negotiauction"?

A negotiauction has the following features, according to Subramanian:

1. One-on-one negotiations. At some stage during a negotiauction, the seller engages one or more buyers in private discussions about the asset on the table.

2. One or more rounds of bidding. At a certain point during a negotiauction, the seller pits potential buyers against one another in an auction.

3. Several, but not too many, potential buyers. Typically, between three and 10 potential buyers are needed for a negotiauction—enough parties to spark an auction but not so many that one-on-one negotiation would be difficult for the seller to manage.

4. Information disparity. In a negotiauction, the seller usually knows more about the situation and the asset at stake than potential buyers do. Buyers face the challenge of overcoming this information asymmetry.

5. Process ambiguity. In a traditional auction, the seller determines the process (whether there will be a single round of bidding or multiple rounds, for instance), and buyers are passive participants. In a negotiauction, by contrast, the process is up for grabs. Canny buyers seize opportunities to change the process to their advantage, as the two publishers did in our opening example.

A negotiauction often begins as an auction that narrows the field, followed by one-on-one negotiations with the highest bidders. But that's not always the case. Someone shopping for a new car could hold an Internet auction and then try to negotiate better terms with the lowest bidder. Alternatively, she could first meet with dealers individually to discuss options and only later encourage them to engage in auction-style competition for her business. As this example illustrates, perhaps the key trait of negotiauctions is flexibility.

The seller's perspective: Setting the process

Imagine that as the seller of an asset, you're in charge of setting up a negotiauction. How should you determine when to negotiate and when to hold an auction? In *Negotiauctions*, Subramanian presents a comprehensive framework to help you decide. Here and in the table on the previous page, we review four key points:

1. Profile of potential bidders. Don't assume that you should automatically negotiate if you have few potential buyers and hold an auction if you have many. Although the number of bidders is important, other bidder characteristics matter, too. In general, if the bidders are well known to you, if they have strong alternatives to negotiating with you, and if they value your asset very differently, negotiation makes more sense than an auction.

2. Asset characteristics. Three key features of your asset can guide you toward the right process: (1) if you can clearly specify the asset you're selling (whether boxes of paper or an heirloom necklace), it's time to auction, but if an asset is hard to pin down (such as business services or "toxic assets"), focus on negotiation; (2) if issues other than price are at stake (such as delivery time and new business), use negotiation to add value to the deal; (3) if you want to build a long-term relationship with the winning buyer, lean toward negotiation.

3. Seller profile. Next, examine your profile as the seller. If you're in a hurry, an auction might seem like a natural choice, as auctions are generally quicker than negotiations. But note that with speed comes risk. If no bidders or only one bidder shows up to your auction, you've doomed yourself to a bad deal. So if risk is a concern, lean toward negotiation.

4. The broader context. If it's important to you to keep your potential deal a secret, as might be the case if you're selling your business, the privacy of negotiation may be a better fit than the more public nature of an auction. By contrast, if transparency is important, hold an auction. Governments, for example, often choose to auction off contracts to avoid accusations of corruption or bias.

When planning a negotiauction, determine which factors are most important to you and plan your process around them, giving yourself flexibility to adapt the process as it unfolds. Consider allowing your potential buyers to innovate as well. As Robert Barnett learned in his auction of the Carville-Matalin memoir, bidders may make moves that not only improve their own fortunes but also the seller's.

The buyer's perspective: Changing the game

"The relentless pursuit of game-changing moves" is what sets great negotiators apart from very good negotiators in negotiauctions, writes Subramanian. As a buyer, rather than assuming that you must abide by the seller's dealmaking process, consider whether you can implement one or more of these three moves and pull ahead of the competition:

1. Setup moves. Imagine that you've conducted one-on-one negotiations with a customer for many years. Out of the blue, the customer informs you that your contract is being put up for bid. You and a host of other suppliers are being invited to participate in a single-round online auction in which the lowest bidder will walk away with the contract.

Should you accept the customer's terms without comment? Absolutely not. "It is very rare for the rules of an auction to actually be rules," the late dealmaking legend Bruce Wasserstein told one of Subramanian's Harvard classes. "When there are rules, you always have to think of the way you want to play it and what degree of hand you want to show."

With this advice in mind, you might schedule a meeting with your longtime customer and deliver this

How do you sell a toxic asset?

The conventional wisdom that an auction is the best way to get a good price doesn't always hold up, the U.S. Treasury Department recently discovered.

During the financial crisis of late 2008, the hastily enacted Troubled Asset Relief Program (TARP) allowed then–U.S. Treasury Secretary Henry Paulson to spend $700 billion to buy up so-called toxic assets from troubled U.S. financial institutions. Paulson and his staff were faced with the question of whether to negotiate deals with banks individually or hold a "reverse auction." In a reverse auction, the Treasury Department would specify a class of security to be purchased; then the banks would compete in the auction to sell qualified securities to the government.

The government has had success auctioning its Treasury securities in this manner, Subramanian writes in *Negotiauctions*, but treasuries are a homogeneous asset with many potential buyers. By contrast, the banks' toxic assets represented at least 100,000 different mortgage-related securities with widely different interest rates, geographic locations, payment histories, and so on.

The government was in a bind. The more it specified an asset, the more auctions it would have to run and the fewer sellers it would face. But if it didn't specify the assets, then the seller with the most toxic assets would win any given auction, and the government would get a raw deal. Moreover, banks that participated in the government's reverse auctions would have to mark down their unsold assets to bargain-basement prices.

What about negotiation? As we've noted, assets that are hard to specify lend themselves to negotiations rather than auctions. But the sheer volume of toxic assets made one-on-one negotiations unappealing.

To get out of this trap, Paulson ditched the TARP plan in November 2008 and switched to injecting TARP funds directly into banks. When this plan failed to spur lending, the Treasury Department, now led by Timothy Geithner, tried to revert to the original auction idea. But in June 2009, it was dropped again due to lack of participation from banks, which were unwilling to mark down their assets. By this point, the banks were clamoring to repay TARP funds and reduce their dealings with the government.

message: "My company may not be participating in your new auction format. You've depended on us for a quality product for many years, but we predict that whoever wins your auction will have to sacrifice quality to deliver on price. I propose that instead of haggling, we discuss new ways of improving our contract to our mutual benefit."

This type of setup move establishes your terms of entry into the negotiauction. Remember that your participation in a deal can have value. Rather than giving that value away, extract concessions for it.

2. Rearranging moves. Either at the outset of a negotiauction or as the process unfolds, you can try to rearrange the assets, the parties, or both in a way that adds value to the deal. That's what Simon & Schuster and Random House did when they teamed up in Robert Barnett's book auction. Note that this move benefited all parties in the deal (except for the losing bidders).

Forming alliances with other bidders is one way to gain leverage in a negotiauction. Another way is to solicit help from outsiders. In *Negotiauctions*, Subramanian tells the story of a group of women enrolled in one of his Harvard Business School MBA classes who teamed up to try to beat a group of their male classmates for a coveted prize—dinner at the home of a well-connected professor—in a charity auction. Knowing the men would bid high, the women asked Subramanian (and presumably others) for a donation to their cause. Though ultimately the women were outbid by the men, the point is that this type of creative thinking can transform you from an underdog into a front-runner.

3. Shutdown moves. A shutdown move prematurely cuts off competition on the same side of the table. A last-minute stealth bid in a traditional auction that allows the bidder to negotiate exclusively with the seller is one example.

When Primedia put *New York* magazine up for sale in 2003, Bruce Wasserstein initially disavowed interest in bidding—yet he submitted a stealth bid just minutes before the deadline and won the prize. Wasserstein's shutdown move succeeded because of his edge in the negotiauction: a long-standing relationship with the indirect owner of the magazine and a background in journalism. Two of Wasserstein's chief competitors for New York, billionaire media mogul Mort Zuckerman and American Media, later said they were prepared to outbid

Wasserstein, but the seller wouldn't give them the opportunity.

To carry out a shutdown move, first figure out if you have an edge—unique expertise that allows you to evaluate the asset's value better than your competitors. Second, make sure your offer improves on the seller's perceived alternatives—or worsens them. For example, threatening to withdraw from an auction if your final offer is turned down might inspire a seller to accept it if she'd be left with a much less appealing option. Finally, time your move carefully, lest it backfire. A shutdown bid delivered at the start of an auction, for instance, could inspire a bidding frenzy that drives you out of the race.

Which process should you choose?	
Auction	Negotiation
Profile of potential bidders	
Larger number of bidders	Bidders are well known Bidders have good alternatives to agreement Bidders value the asset very differently
Asset characteristics	
The asset is well specified	Large potential for value creation Relationship and service are important
Speed is important	
Speed is important	Low tolerance for risk
The broader context	
Transparency is important	Secrecy is important

3 negotiauction takeaways

1. Most complex deals can be transformed into value-creating negotiauctions.
2. Sellers should carefully analyze when to negotiate versus hold an auction.
3. Buyers can secure advance concessions by negotiating their terms of entry.

By Guhan Subramanian.
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Dealing with a Crowded Table

QUESTION

My company is involved in a contentious and high-stakes intellectual-property dispute with a longtime competitor in our industry. We have been engaged in mediation for several months, thus far without success. In each session, there are dozens of people on each side, perhaps reflecting the high stakes and complex issues of law and technology that are relevant for a full understanding of the matter. For our final session with the mediator, we are considering proposing to the other side (and to the mediator) that we leave the external advisers (primarily outside counsel and technical experts) out of the room. Is this a good idea?

ANSWER

I can see three reasons to exclude outside counsel and technical experts from the final round of your mediation.

First, it sounds as though you have spent a lot of time thus far arguing about who is right and who is wrong. Keeping the lawyers and technical experts out of the room for this final effort at mediation will allow you to focus on a problem-solving approach instead. From your description of the process to this point, it seems as if the legal arguments on both sides have been fully fleshed out, and yet you are still at an impasse. The only way to unlock the situation may be to take a creative, interest-based approach. Excluding the outside lawyers and experts will increase the odds that this kind of conversation will occur.

Second, keeping third parties away will allow you to limit the mediation to the key decision makers. Right now, you have "dozens of people on each side," which is far too many. When the room gets crowded, the conversation tends to be less productive because people may be posturing, speaking to their own constituencies, trying to impress their clients, just plain grandstanding, or all of the above. Once you've got only the key decision makers (ideally, three to five people on each side), the conversation can be more candid, direct, and productive. Among other benefits to this approach, trust is more likely among smaller groups than larger groups. As a result, negotiators can float proposals without the kind of spectator effect that exists when the room has more than 20 people in it.

Third, assuming that you are paying your outside counsel and technical experts on an hourly basis, keeping them out of this final session will help minimize the costs of the mediation. I suspect this is a relatively small consideration given that your situation involves "high stakes," but it is worth noting nonetheless. You might keep experts out of the room but "on call" in case legal or technical questions arise.

For these reasons, then, your proposal to ban outside counsel and technical experts from the final mediation session sounds like a good one. However, there is a risk that the other side will interpret your suggestion as a sign that you feel your legal or technical arguments are weak. Ideally, try floating the idea through a back channel such that it's "mutually agreed upon" rather than formally proposed by your side. Failing that, be sure to explain your proposal in terms of the factors above (particularly the first two) rather than just throwing it "over the fence" without explanation.

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Taking BATNA to the Next Level

If your current negotiation reaches an impasse, what's your best outside option? Most seasoned negotiators understand the value of evaluating their BATNA, or *best alternative to a negotiated agreement*, a concept that Roger Fisher, William Ury, and Bruce Patton introduced in their seminal book, *Getting to Yes: Negotiating Agreement Without Giving In* (Penguin, 1991, second edition). Even those who don't know the term probably think through their BATNA instinctively as they prepare for a negotiation. An awareness of your BATNA—particularly if it's a strong one—can give you the confidence you need to walk away from a subpar agreement.

In his article "Five Tactics for Increasing Your Bargaining Power" in last month's issue of *Negotiation*, Russell Korobkin provided strategies that focused largely on BATNAs. Although BATNA is a commonsense concept in the negotiation world, achieving "best practice" in this arena is not easy. Here, I'll offer four strategies to help you take the BATNA concept to the next level and gain a critical advantage in upcoming deals.

1. Translate your BATNA to the current deal

Here's a classic illustration of the BATNA concept: while haggling over a rug in a bazaar, you're aware that you can purchase an identical rug at a nearby stall for $100. Assuming that you want only one rug, you won't pay more than $100 in the negotiation at hand. Such clear-cut BATNAs tend to exist more in theory than in reality. In truth, your best alternative to agreement is rarely, if ever, apples-to-apples comparable with the deal at hand.

The implication? When negotiating, take time out for an explicit translation process to ensure that you aren't giving up a good deal in hand for a BATNA in the bush. Recently, for example, as the renewal deadline for his homeowner's insurance policy approached, Larry decided to do a "market check" to compare prices. His existing insurer—let's call it Acme—had been raising its rates by 7% to 10% annually for the past three years, and Larry wasn't sure he was getting the best deal. He then found a carrier that offered a policy for 30% less than Acme's renewal rate.

Delighted, Larry came very close to switching to the new insurer. But after doing some digging (and receiving some self-interested guidance from Acme), Larry identified important coverages and term definitions buried deep in the legalese of the two policies. After going through a translation process to make the prices comparable, Larry realized that Acme, his current insurer, was offering him a better deal. The lesson: Rather than assuming that the deal on the table matches your BATNA point by point, translate your BATNA to fully understand what it means for the current negotiation.

2. Manage probabilistic BATNAs

Negotiators often complain that their best alternative away from the table is rarely a sure thing. As a consequence, some focus instead on their *worst* alternative to a negotiated agreement (WATNA).

A wise strategy? Probably not. Imagine that you're a procurement manager trying to renegotiate a contract with a supplier, for instance. If talks reach an impasse, the worst thing that could happen is that you won't find an alternative supplier, and your supply chain will temporarily break down. If you negotiate on this basis, you will almost certainly get a bad deal. And if your odds of not finding an alternative supplier are only 5%, it would be silly to negotiate on the basis of your WATNA.

Instead, try to calculate your *probabilistic* BATNA—the full range of possibilities if the negotiation fails and the probabilities associated with each. Decision-tree analysis, which lawyers often use to assess the BATNA of going to court if settlement talks fail, can be just as helpful in the business world. For those unfamiliar with decision trees, the sidebar "The Poison Pill: Showstopper or Bargaining Chip?" on page 8 offers an illustration.

Decision-tree analysis has three benefits. First, it illuminates aspects of your BATNA that you can—and should—shore up before you negotiate. When facing talks with an existing supplier, identifying another ready supplier of the product under discussion beforehand would eliminate concerns about your WATNA and might even transform your BATNA into a sure thing.

Second, decision trees help you assess your risk tolerance. Would you prefer a sure thing at the table to a chance at a better outside option? Start with a risk-neutral assessment of your BATNA, and then adjust your willingness to close the current deal based on the fact that your BATNA is not a sure thing. For example, in a recent high-stakes real-estate negotiation, an adviser asked the bidder's principal decision maker, "How would you feel about a deal at $240 million today compared to a 90% chance for a deal at $200 million in six months?" The bidder—who clearly did not like the risk inherent in her probabilistic BATNA—jumped at the chance to pay $240 million with certainty.

Finally, when you are assessing your BATNA, decision trees facilitate the familiar negotiation advice "Look forward and reason back." At each node in the tree, ask yourself "And then what?" Even if you cannot attach probabilities all the way down the tree, you'll gain a better understanding of possible moves and countermoves.

3. Assess their BATNA with care

It may seem an obvious step, but even the most sophisticated negotiators often fail to think through the other party's BATNA as carefully and objectively

The Poison Pill: Showstopper or Bargaining Chip?

Decision trees enable you to think through what will *really* happen if you resort to your BATNA. In enterprise software company Oracle's 2003 bid for PeopleSoft, for example, my own decision-tree analysis suggests that

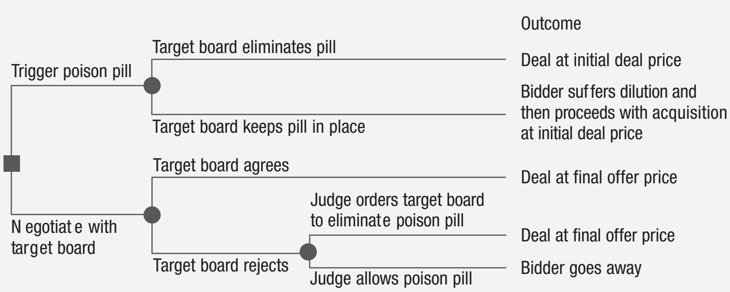
Oracle could have paid as much as $1.4 billion less for its competitor if it had more rigorously thought through its BATNA.

Here's one example of how decision trees can help bidders in M&A deals. Consider that if the target has a "poison pill" takeover defense, the bidder's share ownership in the target will be massively diluted if the bidder crosses a certain trigger threshold. As a result, most experts view a poison pill as a "showstopper" against a hostile bid.

Yet it's a little-known fact that many poison pills give the target's board of directors 10 business days to decide whether to dilute the bidder's stake. During these 10 days, I've found that the target board will face intense pressure from its shareholders and outside directors to eliminate the pill and let the acquisition proceed.

As the bidder in this situation, should you continue to negotiate with the target board or resort to the BATNA of triggering the poison pill? The decision tree here examines this question. In this illustration, the circles represent *chance nodes*—events beyond your direct control, and the square represents a *decision node*—a choice you must make. The critical insight to emerge: Triggering the poison pill does not necessarily lead to dilution; rather, the target board must then decide whether to eliminate the poison pill.

If your BATNA is complicated or probabilistic, decision trees can help you gain an advantage.



as they think through their own. Although you can't assess someone else's BATNA as precisely as you can your own, asking "What will he do without a deal?" provides valuable insight.

Consider the case of a Mississippi farmer in the early 1990s. The state legislature had just legalized riverboat gambling, and the farmer owned land along the Mississippi River that was very attractive for the development of hotels, restaurants, and other businesses. Sure enough, an entrepreneur approached the farmer about buying his land. Before meeting to negotiate a purchase price, the farmer hired a professor of agriculture to estimate the land's value. After conducting soil tests and estimating cash flows, the professor concluded that the land was worth approximately $3 million.

As the negotiation began, the farmer kept quiet and let the entrepreneur frame the discussion. His opening offer: $7 million. Though ecstatic, the farmer kept his composure and made a counteroffer of $9.5 million. Eventually they reached a deal of $8.5 million.

When I present this tale in the classroom, some students believe it to be a success story for the farmer; after all, he got $8.5 million when he was only expecting $3 million. But what if the farmer had considered the entrepreneur's perspective, perhaps retaining an expert in the gaming industry to assess the land? He might have learned just how profitable casinos can be and that the benefit to the entrepreneur of securing the optimal location rather than a second-best BATNA was worth much more than $8.5 million.

4. Think through two-level BATNAs

In most business negotiations, you face two counterparts: the individual across the table and the organization he represents. This means you're facing two BATNAs as well. Sophisticated deal makers think through *both* BATNAs—the organization's and the individual's.

In one real-world case, a vacation resort was seeking to have certain equipment installed on its property. The equipment manufacturer sent Frank, the CEO's newly hired lieutenant, to negotiate this major contract. The resulting deal was extremely successful for both sides.

A few years later, the manufacturer held its annual meeting of top managers at the resort to show off its installations and celebrate the deal. The two organizations held a panel discussion to reflect on the dynamics of their negotiation. At one point, the moderator asked Frank to reveal his BATNA. He responded with a textbook analysis: "Our BATNA was to look around for some other major contract in which to powerfully demonstrate our capability." When pressed, he continued, "Well, *my* BATNA, as a new hire, was probably to look around for another job if I didn't get the deal."

Most meaningful negotiations occur between organizations, not individuals—yet individuals, not organizations, negotiate deals. Thus, it's crucial to consider the incentives of the individual across the table: How is she compensated? How long has she worked for the company? What are her long-term aspirations? Only by examining both pieces of the BATNA will you gain a complete picture of the other side's walkaway alternatives.

By Guhan Subramanian.
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When to "Kick It Upstairs"

QUESTION

I am about to begin a negotiation whose subject matter is squarely within my area of responsibility at my company. However, the dollar amounts at stake are so large that I'm tempted to kick it upstairs to my boss, or at least involve my boss directly in the negotiation. What are the pros and cons of doing so?

ANSWER

There are, of course, some times when the boss ought to be brought into a negotiation, but you should consider two important risks before doing so.

First, "kicking it upstairs" clearly signals to the other side that there are limits to your ability or authority to get things done. Even worse, this move might suggest that you perceive a problem with the relationship across the table at your level and you need "Mom" or "Dad" in the room to get things back on track.

These signals can have negative repercussions down the road. For example, once your counterpart has dealt directly with your boss, he might start bringing your boss in more frequently for future negotiations. This would reduce your credibility and blur previously clear-cut channels of communication. This puts your boss in a difficult position, too: either she accepts the invitation to stay involved or risks insulting a potentially important customer or supplier. In sum, once you've let this genie out of the bottle, it's virtually impossible to get it back in, so be aware of the risks!

A second, more subtle problem is that bringing in the boss signals vulnerability in the current negotiation. The instant the other side sees your boss in the room, he'll say to himself: This deal must be so important to them that they had to bring in the big guns! Suddenly the perceived bargaining range has widened, and not in a way that favors you. The negotiation may be important, even vital, for your organization, but there is usually little to gain from confirming this fact in the other side's mind from the outset.

As a counterpoint to these concerns, some bosses will push hard to get in on high-stakes negotiations, believing they should be leading the negotiation team for the company's most important deals. Your challenge is to resist this easy way out. For example, in a recent high-stakes negotiation, the boss, Steve, wanted to come to the table and "finish the job." The team's lead negotiator argued against this idea: "Steve, the moment you walk in the room, the other side adds $50 million to their aspiration price." After an hour of discussion, Steve agreed to stay away, at least for the next round of negotiating. "This has been a good discussion," he added. "Now I've learned how much I'm worth to our organization!"

Instead of involving your boss directly, use her strategically. For example, when the boss in charge of a particular product visits your region, it makes sense to have her visit your major customers with you. But the goal is to make personal connections at multiple levels between your organizations, not to try to negotiate the terms of a specific deal.

In general, the better approach is to negotiate at your level as much as possible. Keep your boss in the loop and seek her guidance on specific negotiation points. If you reach an impasse, consider threatening to invoke bosses on both sides, rather than just on yours. For example: "It feels like we're stuck. Do you think it would be worthwhile to kick this upstairs to our respective bosses to sort out?" This threat alone might get talks back on track at your level.

If all else fails, bring your boss in to help you reach the finish line, but play that card only after you have exhausted all other options. Good luck!

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A Contingent Contract? Weigh the Costs and Benefits of Making a "Bet"

Negotiators on opposite sides of the table often have different visions of the future. When it's time to hammer out an agreement, these differences can actually work to your benefit—as long as you consider them thoroughly.

Suppose that you're a recycling-equipment manufacturer negotiating with a prospective buyer. You state that your equipment provides a 95% recycle rate. The buyer thinks that the recycle rate will be closer to 80%, which would impose additional cleanup costs. Your beliefs are sincere, and it seems that the potential buyer's are as well.

Under these conditions, you may not reach a deal. The buyer will have to reduce the price he's willing to pay to cope with the waste he expects to have to clean up down the road. Meanwhile, you won't accept a price that reflects less than a 95% recycle rate. Your different expectations narrow—or perhaps even eliminate—*the zone of possible agreement* (ZOPA).

Negotiation theorists offer a way around this impasse: a *contingent contract*. Instead of debating the recycle rate, you and the buyer can "bet" on your different predictions. The deal might require the buyer to pay you an additional amount if in fact the recycle rate turns out to be 95%, or you could pay the buyer for the cost of any cleanup caused by a recycle rate below 95%. Either arrangement should be cheap to give and valuable to receive. The powerful "if" that lies at the core of all contingent contracts expands the ZOPA.

Contingent contracts are a well-known means of coping with uncertainty and expanding the pie in negotiation. Less understood are the limits of contingent contracts. Here I describe four such limits: asymmetric information, the moral-hazard problem, "kinks" in incentives, and complexity costs. Contingent contracts can indeed create value but only if you have thought through these issues first.

1. Overcome asymmetric information

Before crafting a contingent contract, ask yourself this important question: "What does the other party know that I don't?" The answer may be nothing—that is, you and your counterpart may be equally informed (or equally in the dark) about what will happen in the future. In this case, you can factor in my additional caveats and proceed with your contingent contract with confidence.

In many cases, however, one party—in buyer-seller negotiations, it's usually the seller—knows more about the issues under discussion than the other. When a so-called *information asymmetry* exists, the better negotiation approach is to update beliefs rather than immediately trade on differences in expectations.

Returning to our recycling-equipment story, as the seller, you have access to laboratory tests and experiences from other installations, both of which confirm the validity of your 95% recycle rate. Before committing to his 80% recycle rate assumption, the prospective buyer should seek access to this important data. (For reasons described below, the seller may not necessarily be forthcoming with this data.) Assuming the data does indeed back up your predictions, the buyer likely will update his beliefs.

Of course, with ambiguous data, you and the buyer may still have different predictions of the actual recycle rate. In this case, you can create value through a contingent contract. But by asking an important threshold question—"What does the seller know that I don't?"—the buyer at least levels the playing field and allows for an *informed* contingent contract.

Why is it so critical to level the playing field? Consider what happens when the buyer and seller don't have access to the same data. Imagine that you know that field data from all other installations indicates that the recycle rate will be exactly 95%. The buyer does not seek out this data and agrees to pay more if the recycle rate is 95%.

Because of information asymmetry, the buyer in effect unknowingly agrees to a higher purchase price. If the buyer had sought access to the existing data, he would have understood that a 95% recycle rate was certain. Maybe he would have paid more for the recycling equipment as a result, but at least he would have done so with full knowledge.

2. Identify moral-hazard problems

A second issue to think through before crafting a contingent contract is the *moral-hazard problem*—a distortion in behavior caused by the agreement itself. As an illustration, assume that the prospective buyer's actual recycle rate depends partially on how the company uses the equipment.

Furthermore, assume that the buyer has negotiated a payback from you in the event the equipment does not perform at a 95% recycle rate that's far greater than the company's actual cleanup costs. Now the buyer has a strong incentive not to use the equipment efficiently. A big payoff from the seller will more than compensate for additional cleanup costs.

Note the distortion caused by the contingent contract. In the absence of the contingency, the buyer would have had a financial incentive to operate the equipment in a way that would yield a 95% recycle rate. With the contract in place, the buyer has an incentive *not* to achieve a 95% recycle rate, even when it is possible. The contingent contract actually shrinks, rather than expands, the overall value created by the contract.

Once you've identified the moral-hazard problem by thoroughly examining the incentives created by a potential contingent contract, solutions are often readily available. For example, as the seller, you might require the buyer to agree to certain equipment maintenance, upkeep, and usage standards before paying a rebate for a less-than-95% recycle rate. In addition, you should avoid overcompensating the buyer for a low recycle rate, as it's overcompensation that distorts his incentives. If the buyer balks at an offer of modest compensation for a low recycle rate, point out that a larger bet would actually shrink the pie after the deal is signed.

3. Beware kinks

Now imagine a contingent contract in which you pay the buyer $100,000 if the recycle rate is less than 95%—an amount that exactly compensates the buyer for the cost of cleaning up the additional waste that he expects.

Sounds good, at least at first glance. Yet notice the "kink" that this contingent contract creates. If the recycle rate is 95.00%, you won't pay the buyer a dime. But if the recycle rate is 94.99%, you will pay the buyer $100,000.

Therefore, the buyer's best approach is to manage the recycle rate down to 94.99%, get a big payoff from you, and spend a very small amount to clean up the additional waste. Such kinks in incentives can magnify the moral-hazard problem. (The sidebar "The New England Patriots: Betting on a Better Player" shows how these two phenomena can interact in the real world.)

Contracting parties should be vigilant for kinks and try to smooth them over whenever possible. In our recycling story, the seller could try to eliminate the kink by agreeing to compensate the buyer for any out-of-pocket costs incurred in cleaning up waste resulting from a less-than-95% recycle rate. This clause avoids overcompensating or undercompensating the buyer for costs incurred by additional cleanup, as it automatically adjusts for the size of the miss.

4. Avoid complexity costs

A contingent contract requires an ongoing relationship between the parties to determine what payoffs, if any, are required down the road. This lack of a "clean break" may create costs on one or both sides.

The added complexity of contingent contracts can also create additional costs beyond

The New England Patriots: Betting on a Better Player

Contracts in professional sports are often chock-full of contingencies, and Corey Dillon's deal with the New England Patriots was no exception. In 2004, Dillon left a guaranteed $3.3 million salary from the Cincinnati Bengals to join the Patriots for a guarantee of just $1.75 million per year. But in addition to his base salary, Dillon received stepladder bonuses from the Patriots based on the number of yards that he "rushed" (ran with the ball) during the regular season: $100,000 for 700 yards, $150,000 more for 850 yards, another $375,000 for 1,000 yards, another $375,000 for 1,200 yards, and a final $375,000 for 1,600 yards.

At first glance, the deal was contingent contracting at its best. The Patriots paid Dillon only if he performed well, and Dillon had a strong incentive to do so. Dillon demonstrated confidence in his abilities by taking a big cut in his guaranteed income.

A closer look reveals a potential moral-hazard problem fueled by a kink in Dillon's incentive function. The stepladder incentives were motivated by a desire to avoid NFL salary-cap limits, but they also created a potentially perverse incentive.

By the final game of the 2004–05 regular season, the Patriots had already secured a spot in the play-offs, and Dillon was 81 yards short of achieving the final $375,000 bonus in his contingent contract. Some sports commentators argued that the Patriots should have rested their star running back, who had been plagued by injuries. Instead, the Patriots left Dillon in for most of the game. He ran for 116 yards, securing the final piece of his bonus, and the Patriots beat the San Francisco 49ers in an insignificant game. Some in the press suggested that coach Bill Belichick left Dillon in to collect the last piece of his bonus. (Belichick didn't personally pay Dillon's salary and had a strong incentive to keep his player happy.)

"The whole week all the talk was about the incentives," Dillon told the *Boston Globe* in a January 2005 article. "I didn't want to focus on that. I didn't care if I did get it, and I didn't care if I didn't get it." That may be true. But the Patriots and Dillon did not benefit from suggestions in the press that the contract contingencies influenced Belichick's decision making.

What can less famous negotiators learn from this story? To avoid fueling moral-hazard problems, smooth out deal incentives in advance.

the costs of maintaining an ongoing relationship. Consider a recent on-again, off-again deal between Johnson & Johnson and medical-device maker Guidant. In December 2004, J&J agreed to buy Guidant at a price of $76 per share. Six months later, while the two companies were waiting for the regulatory approvals needed to close the deal, Guidant announced government recalls for its heart defibrillators. Guidant claimed that the recall was not a serious threat to the ongoing value of its business and demanded that J&J close the deal at the agreed-upon price. Insisting that the recall would be disastrous for its business, J&J demanded a significant reduction in the deal price. No one knew with any confidence which side was correct.

A classic negotiation move would have been to bet on the difference in expectations. According to insiders to the deal, however, this possibility was rejected due to complexity costs. A *contingent value right* (CVR) could have been constructed to track the value of the recalled medical devices, but the CVR would have had to be registered with the Securities and Exchange Commission and traded on a market exchange—far more complexity than either J&J or Guidant wanted, despite the billions of dollars at stake. In the end, J&J and Guidant agreed to a new deal at $63 per share, more than a $4 billion reduction in the deal price. (As is now well known, this move invited competition from Boston Scientific, which eventually won Guidant in a bidding war with J&J.)

Before proposing a contingency in a negotiation, consider potential informational asymmetries and differing incentives that should be resolved first, as well as kinks and complexity costs that might arise. Without looking forward and reasoning back, a move that you think will expand the pie might actually do the opposite.

By Guhan Subramanian.

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