Negotiation Strategies and Techniques

by
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I. Introduction

Divorce negotiations can be unpredictable, challenging, and emotionally charged. Since most divorce cases settle out of court, effective negotiation skills in achieving favorable outcomes for divorcing clients are critically important. In complex and high-stakes situations, the expertise of a skilled negotiator can ensure a great settlement while preserving the dignity and privacy of the parties involved.

In this article, we delve into the strategies and nuanced techniques that can transform contentious divorce negotiations into effective problem-solving sessions. From understanding the psychology of negotiation to leveraging dispute resolution strategies, we explore how lawyers can navigate the delicate balance between advocacy and compromise.

This article discusses techniques and strategies for negotiations adopted by leading experts and provides a framework for family lawyers to successfully resolve family law matters. By mastering these negotiation strategies, legal practitioners can not only enhance their effectiveness but also help clients transition to the next chapter of their lives with a sense of closure and fairness.

The article begins in Section II with a discussion of the win-win approach to negotiation, which represents mutual gains for the parties involved. Section III addresses preparing to negotiate and the elements that form the basic structure of a negotiation, which includes identifying the parties' interests, gathering information, assessing one's best alternative to a negotiated agreement (BATNA), and emotionally preparing for a negotiation. Strategies

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and techniques relating to the actual negotiation process are discussed in Section IV, including whether/when to make the first offer, making concessions and counteroffers, evaluating options, handling impasses, and managing time pressures.

Section V offers analysis 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 parties should negotiate or go directly to trial.

II. Win-Win Negotiation

The most respected method of negotiation is the win-win approach, which is advocated by leading experts in the field of negotiation. The win-win approach (also known as interest-based negotiation) is a creative way that both parties can walk away from the negotiating table feeling as though they have won.

In his book *Secrets of Power Negotiating*, negotiation expert Roger Dawson explains that the objective of negotiation is to create a win-win solution.[1] Several negotiation experts believe that effective negotiators should leave the other party thinking they have won.[2] A negotiation is a win-win if each party feels they won, even if each party feels the other lost.[3]

On the other hand, win-lose negotiations happen when one party makes all the concessions, and the other party makes excessive demands. Harvard law school professor and renowned negotiation expert, Roger Fisher, illustrates in his book, *Getting to Yes*, that one who makes all the concessions is known as the "soft" negotiator and wants to avoid personal conflict but often feels exploited, whereas the "hard" negotiator makes excessive demands and holds out longer but often ruins the relationship.[4] Win-lose negotiations create problems in situations involving long-term relationships because parties often want to get even or hold a grudge.[5]

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1 Roger Dawson, Secrets of Power Negotiating 329 (25th anniversary ed. 2021).

2 *Id.*

3 *Id.*

4 Roger Fisher & William Ury, Getting to Yes 9 (3d ed. 2011).

5 *Id.*

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.

For example, negotiation experts frequently talk about the two people who only have one orange, but both want it, and both are willing to fight for it. They agree to compromise and cut the orange in half. However, win-win negotiators would discuss their underlying needs in the negotiation and would find that one wants the orange to make juice and the other needs it for the rind to bake a cake.[6] Win-win negotiators would find the simple solution where one would get the whole peel and the other all the juice.[7] The other negotiators could have had an easy win-win, but instead they had a lose-lose because they made demands and stated their hard positions but failed to communicate their interests.[8] If they had been willing to share their goals, interests, and concerns, they might have discovered the win-win solution.

Experts advise that negotiators must recognize that often both sides want the same thing and there will not be a magical win-win.[9] It is naïve to assume that a win-win is *always* possible and the pie can always be expanded so that the goals of both sides are accomplished.[10] However, negotiators should identify the differences in the parties' interests.[11] Successful negotiating is not just a matter of what a party wants, but also being concerned about the other party getting what they want.[12] When a party gives the other party what they want, the goal is that there will be reciprocity.

There are effective strategies to use in a win-win negotiation and counterproductive strategies that should be avoided, which will be discussed further throughout this article.

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6 Dawson, *supra* note 1, at 10.
7 *See id*.
8 *Id*.
9 *Id*.
10 Robert Mnookin, Bargaining with the Devil 19 (2010).
11 *Id*.
12 *Id.*

III. Preparing to Negotiate and the Elements of Negotiation

A. *Basic Structure*

The Harvard Negotiation Project has identified seven elements that form the basic structure of a negotiation, which have been analyzed and adopted by negotiation experts around the world. These elements include relationship, communication, interests, brainstorming options, legitimacy, best alternative to a negotiated agreement (BATNA), and commitments.[13] Every negotiation is different, but the basic elements of a negotiation are the same.[14]

1. *Relationships*

A negotiation produces a better outcome if the parties can work together. Successful negotiators remember the simple fact that they are not dealing with abstract representatives of the "other side," but with human beings.[15] Behaviors determine working relationships. Trusting, relationship-building strategies in negotiation increase the probability that the other party will respond in a constructive and trusting fashion.[16] If attorneys behave in an aggressive manner, their working relationships will almost always be adversarial, and any future negotiations will be compromised.[17]

In divorce situations, a good working relationship might be difficult when betrayal or irresponsible behavior caused the divorce. However, personally knowing the other party in a negotiation puts an attorney in a better position to negotiate with something more than the "other side" if there is a separation of the emotional aspects from the substantive issues.[18] It is possible to establish trust

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13 *Id*.

14 Fisher & Ury, *supra* note 4; María Elisa Zavala Achurra, *Making Sense of the Obligation to Negotiate in International Law Through the Lens of Principled Negotiation*, 36 Ohio St. J. on Disp. Resol. 455, 465 (2020); Jonathan G. Odom, *A Modern-Day Pentagon Paper in a Post-Pentagon Papers World: A Case Study of Negotiations Between the Washington Post and the U.S. Government Regarding Publication of the* 2009 *Afghanistan Assessment*, 23 Harv. Negot. L. Rev. 215, 239 (2018).

15 Fisher & Ury, *supra* note 4, at 20.

16 *Id*.

17 *Id*.

18 *Id*. at 39.

in the negotiation process by demonstrating reliability, transparency, and sincerity in the process.

Successful negotiators are hard on the problem, and soft on the people.[19] This means that pushing hard on interests and the substantive issues of the negotiation increases the pressure for an effective solution, and giving support to the other side improves the relationship, resulting in an effective negotiation.[20]

2. *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, because they think that if they use force, they can intimidate and weaken the other party. However, failing to deal with others sensitively as human beings will often lead to a disastrous negotiation.[21]

3. *Interests*

Prior to negotiating, the interests of the negotiator should be identified, and it should be clear what interests would be satisfied if the negotiator received what they wanted. When people are in a dispute, they often think in terms of a "position" – what they want or demand.[22] Interests are the fundamental needs and concerns that lie underneath those positions (e.g., security, reputation, control, and financial stability).[23] In other words, a position is what is decided upon and interests are what cause the negotiator to decide.[24] The other person's goals, interests, and needs that would be satisfied if the other person were to receive what they want should be considered.[25]

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19 *Id*. at 55.

20 *Id*. at 57.

21 *Id*. at 21; Martin Schweinsberg et al., *Negotiation Impasses: Types, Causes, and Resolutions*, 48(1) J. Mgmnt. 49 (2022), https://journals.sagepub.com/doi/full/10.1177/01492063211021657.

22 Leigh Thompson, The Truth About Negotiations 24 (2d ed. 2013),

23 Fisher & Ury, *supra* note 4, at 43.

24 *Id.* at 50.

25 *Id.* at 45.

In family law disputes, it is even more important to address the interests and concerns of the other party and the children to get a party's own interests and concerns addressed, rather than focusing only on a position. The best way to do this is to ask why such positions are being taken by both parties. If the parties are looking backward and thinking about who said what, who did what, or who promised what, they are not focused on interests.[26] If a party stays focused on interests, the other party is likely to stay focused on their interests as well.[27]

For example, when discussing the amount of alimony a spouse is to receive, much more can be involved than economic well-being.[28] The spouse may want a specific amount of alimony to feel psychologically secure or to feel treated fairly and as equal, and might even be receptive to less if their need for security and recognition are met in other ways.[29]

In a divorce case, instead of arguing over who gets the house, the spouses can discuss their needs for stability, a sense of home, and financial security. They can seek to find mutually beneficial solutions that meet both parties' interests, such as one spouse staying in the house until the children finish high school, while the other receives a larger share of retirement savings. This approach fosters understanding, empathy, and creative problem-solving, ultimately leading to more sustainable and satisfactory outcomes for both parties.

Every negotiator wants to reach an agreement that satisfies their substantive interests; therefore, interests should be revealed to the other party.[30] Positional negotiating and failing to reveal information about interests can lead to lose-lose agreements, as in the case of the two people with the orange discussed above. Studies show that negotiators who provide information to the other party about their interests improve their chance of a successful negotiation.[31] Attorneys can be firm about their interests but flexible on how to achieve them.[32]

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26 Victoria H. Medvec, Negotiate Without Fear 61 (2021).

27 *Id.*

28 Fisher & Ury, *supra* note 4, at 50.

29 *Id.* at 51.

30 *Id.* at 52.

31 Medvec, *supra* note 26, at 115; Fisher & Ury, *supra* note 4, at 52.

32 Tim Castle, The Art of Negotiation 74 (I_AM Self-Publishing 2018).

When negotiators bargain solely over their positions, they tend to lock themselves into those positions, which leads to an unsuccessful negotiation.[33] Negotiators who move past positions to focus on their interests usually achieve their goals.[34]

4. *Brainstorming Options*

In preparing to negotiate, attorneys should brainstorm possible ways of meeting the legitimate interests of both parties. In other words, invent options for mutual gain.[35] For example, in a divorce deciding between who gets the house and who gets the kids is a choice between winning or losing and neither party will agree to lose.[36] Parties should explore the full range of possible solutions on which they and the other party might reach an agreement versus considering it a win or lose.[37] With regard to litigation, the best and worst possible outcomes should be considered. In brainstorming all the options, it is recommended to suspend initial judgment on a possible outcome and simply list all the options that come to mind.[38] Judgment and evaluation of whether these options are good or realistic should be reserved until later.

5. *Legitimacy*

The best agreements are those that both parties perceive as "fair." Negotiators want to persuade the other party that what they agree to is fair and reasonable. One way to determine fairness is to use objective 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, and market values.[39] The other party is more likely to accept a solution that is objectively fair and vice versa.[40] In preparing to negotiate, attorneys should make sure that all disputed issues are researched, the experts have expressed their opinions, and any valuations have been obtained.

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33 Fisher & Ury, *supra* note 4, at 4.
34 *Id*. at 43.
35 *Id*. at 58.
36 *Id*.
37 *Id*. at 67.
38 *Id*. at 62.
39 *Id*. at 84.
40 *Id*.

6. *BATNA – Best Alternative to a Negotiated Agreement*

A party's best alternative to a negotiated agreement ("BATNA") should be the standard by which an agreement should be measured.[41] Before negotiating, it is essential to know the possible outcome if an agreement is not reached, which includes going to court.

a. *BATNA Should Be the Reference Point*

A negotiating rule of thumb is that negotiators should not accept any agreement that is worse than their BATNA. A party's BATNA may not be a great alternative, but it should be the best alternative to a negotiated agreement.[42] In negotiations, a BATNA will be an important reference point for evaluating any deal that is on the table. The BATNA of a party is their biggest source of power.[43] The better the BATNA, the better the alternatives away from the table and the more bargaining power a party has at the table.[44] The same is true for the other party.[45]

When considering BATNA, the costs involved if an agreement is not reached should be considered. In family law cases, this is going to court. Although the negotiation process will involve costs regardless of whether an agreement is reached, the costs when determining BATNA beyond the negotiation should be considered.[46] These costs include transaction costs in terms of time, money, and other resources, as well as the cost of reputation or establishing precedent in future dealings with other parties.[47] Generally the legal warfare of a divorce is financially and emotionally costly, and usually hurts everyone involved.[48]

If attorneys are looking at the options based on what might happen at the courthouse, they should consider whether the likely result from the judge or jury would be worse or better, the financial costs, including attorneys' fees, expert fees and costs in time lost from work, the emotional costs of going to court, the effects on

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41 *Id*. at 102.
42 Mnookin, *supra* note 10, at 30.
43 Medvec, *supra* note 26.
44 Mnookin, *supra* note 10.
45 *Id*.
46 *Id*.
47 *Id*.
48 *Id*. at 213.

the client, the other party, and the children if there was a trial, and whether the client is willing to take a risk not knowing the outcome of the case. Confidentiality is another advantage of settling a case out of court. Generally, the result from a negotiated agreement is better than the result that would be obtained by going to court.

b. *Research the Other Party's BATNA*

In addition to assessing a party's own BATNA, they should research the other party's BATNA in order to fully understand the implications of their negotiation strategy.[49] The more a party knows about the other party's BATNA, the more accurately they can estimate their reservation value or bottom line.[50] If the potential deal doesn't meet the other party's interests better than their BATNA, why should they agree to it?[51]

c. *Revealing BATNA*

Although parties should reveal their interests to the other party, several experts say that it is not a good idea to reveal their BATNA. Professor Leigh Thompson argues that once a party reveals their BATNA, the other party has no incentive to offer more.[52] Negotiators do not want the other party to simply meet their BATNA, they want them to think it is more attractive than it really is so they will make a better offer.[53] However, there are two situations where it may be advisable for a party to reveal their BATNA. In one case, they may have been negotiating all day and things are at a standstill.[54] Before they leave the negotiation, they might consider revealing their BATNA in hopes of the other party meeting it or even doing better. Another situation would be if a party has a fantastic BATNA and they would be happy simply to have the other party match or improve upon it.[55] But if a party reveals their BATNA, they will probably not get an offer significantly more attractive from any rational other party.[56]

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49 Thompson, *supra* note 22, at 54.
50 Medvec, *supra* note 26, at 3.
51 Mnookin, *supra* note 10, at 30.
52 Thompson, *supra* note 22, at 42.
53 *Id.*
54 *Id.*
55 *Id.*
56 *Id.*

d. *Reservation Point*

Several experts agree that a party's BATNA also determines their reservation value or reservation point. The reservation value is the worst outcome that a party would be willing to accept, and it should reflect a party's BATNA.[57] The reservation value has nothing to do with what a party hopes to settle for, what they "should" settle for, or what is "fair" in the negotiation, but it simply reflects the point at which they are creating value *in* the deal versus *away* from the table in their best alternative to a deal.[58] Knowing the reservation point provides clarity in determining whether a deal is worse than walking away.[59] If the reservation value is unknown, a party may agree to a deal that is worse than if they just walked away.[60] In family law matters, a party's reservation point should generally not be the outcome of their worst day in court.

e. *Zone of Possible Agreement*

Leading negotiation expert Guhan Subramanian addresses another basic concept in negotiation analysis called ZOPA, which stands for "zone of possible agreement."[61] The bargaining zone is established by the range between the parties' reservation points.[62] Given a party's assessment of their own BATNA and their reservation value, and (equally important) the other side's BATNA and reservation value, a party can determine whether a ZOPA exists.[63] In some cases, one or both parties have very attractive BATNAs and no ZOPA, and in other cases, the question of whether a ZOPA exists is unclear, and the initial challenge in the negotiation process is to figure out whether it does exist.[64] It is recommended to negotiate across the entire bargaining zone, including negotiating not just immediately around the party's reservation point, but also the other party's estimated reservation

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57 Medvec, *supra* note 26, at 63; Guhan Subramanian, Negotiauctions: New Dealmaking Strategies for a Competitive Marketplace 8 (2010).

58 Subramanian, *supra* note 57.

59 Medvec, *supra* note 26.

60 *Id*.

61 Subramanian, *supra* note 57, at 9.

62 Medvec, *supra* note 26 at 81.

63 Subramanian, *supra* note 57 at 9.

64 *Id.*

point.[65] Negotiating around a party's goals is advisable, rather than what they will settle with.

7. *Terms of the Agreement*

Preparation for the negotiation should include identification of all the implementation issues to be included in the agreement to ensure there are no post-agreement surprises. It is important to prepare an opening offer in writing even if the decision is made not to present it to the other party first. The opening offer should clearly articulate interests and goals, and attorneys should refer to it throughout the negotiation discussions. For example, it is often a good idea to prepare an initial draft of the mediated settlement agreement, with the proposed terms, prior to mediation so that the client's objectives are clear, the client 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.

B. *Gathering Information*

Good information gathering is essential to successful negotiating and a good outcome. To better prepare and organize for the negotiation process, it is important to have all the information needed to negotiate an agreement. This includes all financial, legal, and other information necessary to make informed choices.

In a divorce case, attorneys should have a spreadsheet listing assets and debts, budget statements documenting monthly expenses and income if relevant, and copies of all necessary financial documents, such as bank statements, tax returns, and business documents. Prior to the negotiation, attorneys should have accomplished all necessary discovery, such as exchanging sworn asset summaries and reviewing all relevant documents. The collected information should reflect the value of all property, including closely held business interests, real estate, and employee benefits, as well as the character of the assets and copies of documents to support the character of assets. Attorneys should know all debts and liabilities as well as the tax liabilities or tax ramifications of the division of assets and should have researched any applicable legal issues.

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65 Medvec, *supra* note 26 at 81.

Attorneys should not only gather information and research their own case, but also the other party's case. In *Beyond Reason*, Roger Fisher and Daniel Shapiro 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.[66] He asked them to take a week in the library, study the precedents, and outline the arguments that he could make on behalf of the plaintiff.[67] The following week, the young lawyers optimistically went to the senior attorney and told him it was a great case, the plaintiff had strong arguments, and they would surely win.[68] After the senior attorney heard the strong arguments on behalf of the plaintiff, he told the younger lawyers the truth – the firm was actually hired by the defendant.[69] The young lawyers screamed in disbelief, protesting that the defendant had a terrible case.[70] The senior attorney told them not to worry because 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.[71] With that understanding, the young lawyers went to work on the defendant's side of the case eventually leading the defendant to win the case, because the arguments for the defendant were enhanced by their knowledge and full understanding of the strengths of the plaintiff's case.[72]

C. *Emotional Preparation*

As part of the preparation for the negotiation, attorneys should emotionally prepare themselves and their clients for the negotiation. With careful emotional preparation, attorneys can stimulate positive emotions that will enhance the effectiveness of the negotiation.[73] 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 during the negotiation. Being emotionally prepared is what sets great negotiators apart from good negotiators.

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66 Roger Fisher & Daniel Shapiro, Beyond Reason – Using Emotions as You Negotiate 173 (2006).

67 *Id.*

68 *Id.*

69 *Id.*

70 *Id.*

71 *Id.*

72 *Id.*

73 *Id.* at 174.

Emotional preparation involves thinking about how to face one's own emotions, preparing to deal with the emotions of the other party, and taking steps to calm one's concerns and anxiety. To emotionally prepare for the negotiation, attorneys should have a clear understanding of the substantive issues, each party's interests, and how to satisfy them. Attorneys should feel calm and confident enough to maintain a clear focus during the negotiation.

The success of the negotiation will be impaired if a party's anxiety, fears, frustrations, or other strong emotions overwhelm their ability to think clearly and focus on their interests and goals.[74] Immediately before a negotiation, parties should recognize if they have strong emotions and take steps to come into the negotiation calmer and more confident.[75] During the negotiation, attorneys can model a calm, confident mood – by sitting up in their chair, talking with confidence, and fully participating in the negotiation process. How to handle the emotions and relationship issues that come up during the negotiation process is addressed more fully in Section V below.

IV. At the Negotiation Table

A. *Making the First Offer*

Although some negotiation experts believe attorneys should *never* make a first offer,[76] research has shown that negotiators who make the first offer uniformly do better than those who do not. Many studies support the wisdom of making the first offer since it acts as a powerful psychological "anchor" in negotiation.[77] In *Negotiate Without Fear*, Kellogg professor of management and organization Victoria Medvec explains that people get anchored on numbers and ideas and insufficiently adjust from the initial starting point.[78] Making the first offer also allows a party to define the issues that are being discussed ensuring that all issues are on the table and avoiding the other party coming in with just one

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74 *Id.* at 176.
75 *Id.*
76 *See infra* text at notes 100 – 103.
77 *See* Medvec, *supra* note 26, at 105.
78 *Id.*

contentious issue.[79] Finally, the side making the first offer is in a relationship-enhancing position that requires the other party to respond to say what they do not like about this offer.[80]

Harvard law school professor Guhan Subramanian believes that if one has a good sense of the ZOPA, they should be the one to make the first offer to favorably anchor the negotiation.[81] Anchoring works by influencing perceptions of where the ZOPA lies. Subramanian provides a simple example of a sale/purchase situation – assume a buyer thinks the ZOPA is between $30 and $60 (their reservation point).[82] But when the seller makes a first offer of $75, the buyer shifts their expectations without even realizing it and wonder if the seller's bottom line isn't really $50, and the buyer feels fortunate when they get a deal at $55.[83] Subramanian adds a caveat about the anchoring effect – it works best when the other party is uncertain about where the ZOPA is.[84] If the other party knows the bargaining range with certainty, then one's first offer is less likely to influence the other party's perception of it.[85]

Subramanian says there are two risks in making a first offer.[86] One risk is that the opening offer is drastically outside the ZOPA and it loses its anchoring power.[87] This may cause a chilling effect in the other party, and they may even make an equally ridiculous counteroffer.[88] It is generally not realistic to believe that one can make an outrageous offer and expect the other party to accept it. Rather, the first offer should be ambitious, not outrageous.[89] The other risk is if the first offer is too conservative, one might unknowingly give away a substantial piece of the ZOPA in the first move.[90] To avoid these risks, it is important to analyze the weakness of the

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79 *Id.*
80 *Id.*
81 Subramanian, *supra* note 57, at 17.
82 *Id.* at 16.
83 *Id.*
84 *Id.*
85 *Id.*
86 *Id.*
87 *Id.*
88 *Id.*
89 Medvec, *supra* note 26, at 4.
90 Subramanian, *supra* note 57.

other party's BATNA and establish ambitious goals and specific interests before making the first offer.[91]

If the attorney does not know the bargaining range, it is best to listen, learn more, and maybe even let the other party make a first offer. Parties should resist the tendency to change their perception of the ZOPA unless the other side's first offer contains real information.[92] If a party wants to make a first offer, they might consider making a "soft" anchor by saying they are thinking about a certain offer.[93] Although they have not actually made the offer, they floated an option that may be agreeable if it is in the ZOPA or close to it.[94]

If a party thinks they should make a first offer after going through the analysis, Subramanian believes that their offer should be the highest (or lowest) they can justify or "tell a story" around.[95] The ideal offer should be close to the other party's barely acceptable terms so that they are in the area of the other party's acceptability range.[96] If there is a belief that the opening offer will not be well-received by the other party, it can be presented in such a way that is not demanding by letting them know that the offer contains terms that are acceptable to the party making the offer and meets their interests, but it is understood that the other party may have different ideas that there is an openness to hearing.[97]

Medvec provides another strategy to mitigate the chances that the opening offer will not be well-received and that is to make multiple offers simultaneously, rather than making a single offer.[98] This choice of options can pull the other party into the discussion by giving them a say in the conversation and it can appear to be a cooperative and flexible first move. Additionally, providing multiple offers still allows one to anchor an attractive starting point, but makes the first offer seem more reasonable.[99]

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91 Medvec, *supra* note 26.
92 Subramanian, *supra* note 57, at 17.
93 *Id*.
94 *Id*.
95 *Id.* at 19.
96 *Id*.
97 *Id.*; Thompson, *supra* note 22, at 66.
98 Medvec, *supra* note 26, at 133.
99 *Id*.

Advocating the opposing view, Roger Dawson advises that one should never make the first offer and always get the other party to make the opening offer.[100] He asserts that the opening offer from the other party may be better than expected, it gives information before one has to say anything, and it enables one to bracket their proposal.[101]

Under this view, if a party does make the first offer, they must ask the other party for more than they expect to get, because it gives them negotiating room and a chance they might just get it.[102] He believes this strategy further increases the perceived value of what the party is offering, prevents the negotiation from deadlocking, and creates a climate in which the other party feels they won.[103] However, experts warn that an outrageous offer can provoke an extreme reaction from the other party making it more likely to result in an impasse and cause a loss of credibility and trust.[104] As discussed earlier, it is important to maintain a trustworthy and respectful relationship in family law negotiations.

B. *Reacting to the First Offer*

Some believe that a party should never say yes to the first offer or counteroffer from the other side, because the other party will believe something is wrong and they could have asked for more.[105] Although this seems manipulative, the belief is that the appropriate reaction should be shock and surprise at the other side's proposal and then a follow up with a concession.[106] The other party may not expect to get what they are asking for, however, if they do not show surprise, they are communicating it is a possibility.[107] Remember to not let the other party's offer anchor the negotiation table.

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100 Dawson, *supra* note 1, at 26.
101 *Id.*
102 *Id.* at 16.
103 *Id.* at 18-19.
104 Medvec, *supra* note 26, at 4.
105 *Id*.
106 *Id*.
107 *Id*.

C. *Concessions, Counteroffers, and Managing Patterns of Concessions*

1. *Plan Concessions*

Negotiators should approach the negotiation with a plan to concede and create a plan on how they will do so.[108] Few negotiations end after round one – the parties participate in back and forth with one another 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 bargaining ground, or make concessions that are too large.[109] It is also a mistake to make concessions when the other party is not moving.[110]

As a general principle, negotiators should make concessions on issues that are the least important to them. Concessions should be announced – reminding the other party of the opening offer, drawing attention to their willingness to make a concession on that issue, document the new offer, and invite the other party to respond. Making concessions makes a party look flexible and increases the likelihood an agreement will be reached.[111] Further concessions should not be made until the other party has made a concession. The best negotiation practice is for a party to offer the other party something valuable to them in exchange for something valuable to the offering party, then go back and forth until either an agreement or impasse is reached.

The way concessions are made can create a pattern of expectations in the other person's mind.[112] Parties should generally not make equal-sized concessions because the other party will keep pushing.[113] Win-win negotiating does not mean that both parties need to concede equally, nor does it mean that both parties will gain equally.[114] The concessions should taper toward the end to communicate that the other party is getting the best possible deal,

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108 *Id*. at 192.
109 Thompson, *supra* note 22, at 70.
110 *Id*.
111 Medvec, *supra* note 26.
112 Dawson, *supra* note 1, at 93.
113 *Id*.
114 *Id*.

and one is nearing their reservation point.[115] Smaller and smaller concessions will indicate that one side is reaching its limit.[116]

It is important to keep a detailed record of the negotiations so that one 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 for one side to give up, but valuable for the other party.[117] 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.[118] Parties should be firm about the issues most important to them but flexible on things that are not as important.[119] If the other party has different preferences and values, this will give negotiations more potential for win-win outcomes.

In general, differences in expectations about the future often create value in negotiations because they align the incentives of the parties, allow the parties to diagnose the honesty of the other side, and enable the parties to share the risk.[120] However, a party should watch for situations where the other party is not bargaining in good faith by not expressing their true interests.[121] For example, the other party may declare an issue as important, but they may be creating a decoy that they will try to trade off later for something they really care about.[122] In the event this happens, parties should stay focused on their true interests and the issues at hand.

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.[123] The emotional

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115 *Id* at 95.
116 *Id*.
117 Thompson, *supra* note 22, at 86.
118 *Id*.
119 *Id*.
120 Subramanian, *supra* note 57, at 23.
121 Dawson, *supra* note 1, at 105.
122 *Id.* at 107.
123 Thompson, *supra* note 22, at 75.

appeal of this is attractive to most negotiators, to the point that it is hard to refuse. For example, in a rush to wrap up negotiations and show good faith, one party may make concessions that are too steep and quick, and then the other party suggests splitting the difference as if the past never occurred.[124] The "soft" negotiator is more likely to offer to split the difference to maintain the relationship.

Sometimes splitting the difference can be a trap because it is not necessarily fair. It depends on the opening negotiating positions that each side took.[125] Such simple-minded strategy could leave everyone worse off than necessary.[126] Simply put, it can be a lose-lose negotiation. Some experts say that one should never offer to split the difference, but they should encourage the other person to offer to split the difference.[127] If the other party offers to split the difference, they will be in the position of suggesting the compromise and then the party can "reluctantly" agree to their proposal making them feel they have won.[128]

D. *Negotiate Issues Simultaneously, Not Sequentially*

Research has shown that it is generally better 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.[129] Negotiators are more likely to adopt a demanding, positional approach on each issue and lose perspective about what is ultimately the most important issue.[130] Handling several parts of the deal at the same time has several advantages because it prevents negotiators from being completely positional, it forces them to prioritize their values and preferences across several issues, and it may trigger considering packages or combinations of agreement terms.[131] Additionally, narrowing the negotiation to one issue creates a situation where one party wins, and the other party has to lose.[132]

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124 *Id*.
125 Dawson, *supra* note 1, at 64.
126 Richard Shell, Bargaining for Advantage 190 (1999).
127 Dawson, *supra* note 1, at 65.
128 *Id.* at 66.
129 Thompson, *supra* note 22, at 82.
130 *Id*.
131 *Id*.
132 Dawson, *supra* note 1, at 330.

However, sometimes a party may want to get their most important issue and package the rest of the issues in the negotiation if they are absolutely confident that they can get their most important issue from the other party.[133] If this high-risk, high-reward strategy works, parties get what they want on their most important issue.[134] However, they risk being left in a difficult position trying to bundle the issues together if it does not work.[135]

E. *Evaluating Options*

Negotiators should evaluate the expected outcomes of choosing each possible option from emotional, financial, and legal perspectives. During the negotiation, they should reevaluate their BATNA and whether it is best to proceed to litigation. If the matter is not settled through negotiations, the best-case scenario and the worst-case scenario in the courtroom should be reconsidered. Whether or not to assess choices based on what might or might not happen in court, it is necessary to evaluate all choices from the viewpoint of whether the option is realistic, whether a party will be satisfied or have regrets based on the choices made, and whether it will affect their relationships.

F. *Time Frames and Time Pressures*

Negotiating and reaching complete agreements in a family law case takes time. Frequently, one or both of the parties want to get the case over at the beginning. However, as discussed above, 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 several issues are at stake. The process often takes longer than one person wants, and it may go too quickly for the other.

When parties are negotiating, they should never reveal they have a deadline, because if the other party knows there is a time pressure, they could push the negotiations until the last possible

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133 Medvec, *supra* note 26, at 196.

134 *Id*.

135 *Id*.

minute.[136] The longer one can keep the other party involved in the negotiation, the more likely the other party is to move to their point of view.[137] This also works both ways – the longer a party spends in a negotiation, the more likely they are to make concessions.[138]

Additionally, if time is a factor in the negotiation process, a party should make sure it is a factor for the other side so they do not lose power.[139] If time is an issue, Victoria Medvec advises to include some element of the offer to the other party that is time bound, which would neutralize the time pressure by making it matter to the other party as well.[140] Additionally, if the other party's BATNA would improve over time, one would want to have a shorter negotiation process, and if the other party's BATNA would become weaker over time they should aim for a longer negotiation.[141]

G. *Take It or Leave It*

Take-it-or-leave it attitudes should be avoided in negotiations. Parties should only use ultimatums when they are prepared to do what has been threatened because most people who issue ultimatums are essentially bluffing.[142] Once a take-it-or-leave-if-offer is made, it is difficult for these negotiators to return to the negotiating table.[143] To continue the negotiation, one can respond to an ultimatum of the other party by calling their bluff and find a face-saving way for them to continue.[144]

For example, one spouse may threaten to take the case to court to gain leverage. The other spouse could acknowledge the seriousness of the situation while expressing a willingness to explore alternative solutions collaboratively. A new issue that has not yet been discussed can also be offered to try to add to the negotiation.[145]

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136 *Id*.
137 *Id*.
138 *Id*.
139 *Id*. at 61.
140 *Id*.
141 *Id*.
142 Thompson, *supra* note 22, at 21.
143 *Id*.
144 *Id*.
145 Medvec, *supra* note 26, at 196.

On the other hand, another theory is that one should always project that they are prepared to walk away.[146] If a party projects they will not walk away, they are indicating that they have no options and they have lost their power.[147] The objective is not to walk away but to get concessions from the other party because they think the negotiation may end.[148]

H. *Handling Impasses*

An impasse can be handled by setting aside the major problem issues and talking about some of the smaller issues to gain momentum.[149] Momentum can be created by resolving minor issues first, but negotiators should avoid narrowing the negotiation down to only one issue – with only one issue there will have to be a winner and a loser.[150]

The dynamics of the negotiation can also be changed to create momentum, such as changing the people in the negotiating team, changing the venue, removing a member who may be an obstacle to resolution, finding ways to ease the tension, exploring the possibility of changing or restructuring the deal, and changing the style of the negotiation – either from a low-key approach with an emphasis on win-win to becoming more competitive, or the reverse.[151] However, it is important to remember that sometimes an impasse is the right answer.[152]

Another way to create momentum is engaging in the "one small step" approach. One side needs to make a very small, visible move in the other party's direction, then wait for reciprocation.[153] If the other party responds, the parties can repeat the cycle until a settlement is reached.[154] If one is in a position where their BATNA is worse than what's on the table, they need to make a move.

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146 Dawson, *supra* note 1, at 198.
147 *Id*.
148 *Id*.
149 Castle, *supra* note 32, at 21.
150 Dawson, *supra* note 1, at 168.
151 *Id.* at 169.
152 Shell, s*upra* note 126, at 192.
153 *Id*.
154 *Id*.

I. *Commitments and Binding Agreement*

The goal of all negotiations is not merely agreement, but to secure commitment and binding agreements.[155] An agreement to do something merely signals that a person is willing to do something as promised, for the moment at least.[156] A commitment goes one step further than the agreement, making it costly for the promisors to back out.[157] The negotiation is not over until the parties have secured commitments to perform.[158] In family law matters, agreements should be memorialized in the form of a binding mediated settlement agreement or final agreed order. The form of the agreement should be legally enforceable in the event one party does not comply in the future.

As mentioned above, parties should keep precise notes during the negotiation to make sure to include everything in the final agreement. The agreement should be carefully reviewed to make sure nothing is left out and all terms are clearly and accurately reflected.[159]

V. Emotions in Negotiation

A. *Emotions Have an Impact on Negotiations*

Emotions almost always have an impact on negotiations – they affect a person's body, thinking and behavior, and they can be distracting, painful, or cause the negotiation to fail. Emotions can be positive or negative. In *Beyond Reason*, Roger Fisher and Daniel Shapiro discuss strategies on dealing with emotions and relationship issues in negotiations.[160] They discuss how to use positive emotions to help reach wise agreements and deal with negative emotions so that negotiations are more comfortable and effective.[161]

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155 *Id*. at 196.
156 *Id*.
157 *Id*.
158 *Id*.
159 Dawson, *supra* note 1, at 131.
160 Fisher & Shapiro, *supra* note 66, at 4.
161 *Id*. at 176.

In a negotiation, a positive emotion toward the other person is likely to build rapport and a feeling of being on the same page.[162] Strong, negative emotions can be obstacles to negotiation in several ways – they divert attention from substantive matters, they can overshadow thinking, they can damage relationships, and they can be used to the advantage of the other party.[163]

B. *Positive Emotions Can Be a Great Asset*

Although emotions are often thought of as obstacles to a negotiation, positive emotions can be a great asset and help achieve goals. Positive emotions feel personally uplifting, and they can make it easier to meet interests. With positive emotions, parties are more open to listening and more open to learning about the other party's interests, making it possible for a win-win outcome. Positive emotions can also enhance a relationship and parties can talk comfortably without the fear of getting sidetracked by a personal attack.[164]

C. *Suggestions for Stimulating Positive Emotions*

Fisher and Shapiro suggest ways to stimulate positive emotions, one of which is to show appreciation.[165] If people feel understood, valued, and appreciated, they feel important and are more open to listening and more likely to reach agreements.[166] People can appreciate others by understanding their point of view, finding merit in their acts and thoughts, and communicating these understandings through words or action.[167] To appreciate does not mean to give in or agree with the other party's point of view, but one can still let the other party know that their viewpoint has been heard and understood.

D. *Strong Negative Emotions*

Strong negative emotions such as anger, fear, or frustration may affect one's behavior and drive the behavior of others. If

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162 *Id*. at 4.
163 Castle, *supra* note 32, at 144.
164 Fisher & Shapiro, *supra* note 66, at 8.
165 *Id*. at 27.
166 Castle, *supra* note 32, at 84.
167 Fisher & Shapiro, *supra* note 66, at 28.

the emotions are unaddressed, it is likely that they will escalate and prevent a successful negotiation. Further, negative emotions may cause others to stop listening or terminate the negotiation. Emotions feed off one another, and displayed anger can stimulate the other party's anger.

Strong negative emotions can cause a party's focus to be so narrowed that all attention is focused on strong emotions.[168] As a result, the ability to think clearly and creatively gets sidetracked and there is a risk of acting in ways that will be regretted.[169] Strong negative emotions can also make one vulnerable to the point that emotions take control of their behavior, causing the inability to think about the consequences of their behavior.[170] Whatever the source of strong emotions, negotiators should be aware of them and be prepared to deal with them to avoid escalation. Preparation involves having a plan before negative emotions arise.

Emotions are usually contagious. Even if emotions change from anger and frustration to active interest, the other person is likely to still be reacting to prior negative behavior.[171] The impact of a negative emotion can linger long after it has passed.[172]

E. *Responding to Temper Tantrums*

If someone is unable to deal with their emotions effectively, childish behavior may surface. The person may lash out, make demands, and throw temper tantrums. Those who have temper tantrums are generally not very effective negotiators. Many temper tantrums are not genuine – 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, one can employ strategies to avoid damaging the negotiations.[173] Taking a break may be helpful, especially if there is a feeling something will be said that is regretted. Parties can empathize with the emotions of the other party by acknowledging the significance of the matter and expressing understanding.[174] Finally,

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168 *Id*. at 146.
169 *Id*. at 147.
170 *Id*.
171 *Id*. at 13.
172 *Id*.
173 Thompson, *supra* note 22, at 127.
174 *Id*.

rather than responding in kind, it may be helpful for parties to write down their thoughts and review and summarize their negotiation points to create a point of focus.[175]

F. *Negotiating with Someone You Hate*

The last section of this article discusses whether one should even go to the negotiation table with someone they hate and perceive as evil. A framework is provided as to how this decision should be made. People will almost certainly have to negotiate with those who have true personality disorders or cause anxiety for a variety of reasons, and one must find a way to deal with them. If a party becomes consumed by feelings of hate for the other party, they will lose sight of the issues at hand and not be able to effectively negotiate. If one decides to negotiate with the person they hate, one way to deal with this is to change their own behavior in dealing with the other party, but not their feelings about them. They can also take more responsibility for their feelings and focus on their true interests and the terms of the negotiations rather than the other party. Successful negotiators separate the people from the problem and attack the problem together versus attacking each other.[176]

G. *Repairing Trust – Venting and Apologizing*

When trust is broken in a relationship, negotiations are more difficult. Parties should consider letting the other party vent to get rid of strong emotions. Letting them vent does not mean they must agree with them; they just need to listen.

Fisher and Shapiro assert that there may be some purposes for parties to express strong negative emotions – to get the emotions off their chest; to let the other party know about the impact of their behavior in hopes that they will appreciate the emotional experience of the party; and to influence the other person by expressing the importance of the party's interests.[177] Caution should be exercised because venting can sometimes make a bad situation worse. Venting can be helpful if someone is there to moderate the

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175 *Id*.

176 Fisher & Ury, *supra* note 4, at 19.

177 Fisher & Shapiro, *supra* note 66, at 156.

conversation and the communications are on topic without the venting party going on extensively with a list of past grievances.[178]

Additionally, when a negotiation seems to be hitting an impasse, sometimes an apology may be enough to get the parties back on track.[179]

VI. Whether to Negotiate or Fight

A. *Bargaining with the Devil*

In *Bargaining with the Devil*, Robert Mnookin poses the question whether one should negotiate with the "Devil" or have a fight.[180] He describes the "Devil" as someone who has deeply harmed a person and poses a serious threat to their well-being – someone one may even see as evil.[181] An act is evil when it involves the "repeated intentional infliction of grievous harm on another human being in circumstances where there is no adequate justification."[182] Often, people want to proceed directly to litigation or have the fight with someone they perceive as evil so that person is not rewarded for their bad behavior. It is important to note that a party involved in a conflict may have a subjective view that the other party is "evil," whereas a detached observer might disagree.[183] These types of conflicts are challenging and feeling this way about someone can get in the way of clear thinking and successful negotiations.

For example, shortly after the September 11, 2011 attacks in New York, President Bush 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.[184] The Taliban responded by inviting President Bush to negotiate, but he refused.[185] The Taliban refused to turn over bin Laden and did not agree to shut down the training

178 *Id*. at 159.
179 Shell, s*upra* note 126, at 193.
180 Mnookin, *supra* note 10, at 1.
181 *Id*. at 15.
182 *Id*.
183 *Id*. at 1.
184 *Id*. at 2.
185 *Id*.

camps.[186] After receiving both congressional and U.N. authorization, President Bush launched war in Afghanistan.

As another example, Winston Churchill refused to negotiate with Adolf Hitler, even though Nazi forces had overrun Europe and were about to attack a weakened Britain.[187] On the other hand, Nelson Mandela chose to initiate negotiations with a white government that had erected a racist regime.[188] How did Churchill and Mandela decide whether to negotiate or not when the issues were unfolding? As history reveals, it is a challenging answer whether one should negotiate with the "Devil" or not.

In family law cases, the issues generally involve money and relationships where the consequences are significantly different than those in the international cases mentioned above. However, there is a framework that can assist in deciding whether to negotiate or fight, which involves making a wise decision not based solely on emotion.[189]

B. *Assess the Pragmatic Negotiation Framework*

A negotiator should use the framework discussed above when deciding whether to negotiate with the "Devil" or fight.[190] A negotiator should determine (1) the interests of both parties, (2), the BATNA of both parties, (3) the likely potential negotiated outcomes that would meet the interests of both parties, (4) the costs of choosing to negotiate, and (5) whether the alternative is legitimate and morally justifiable.[191]

After using this framework, Mnookin concluded that President Bush's decision to not negotiate with the Taliban in 2001 was correct.[192] However, Roger Fisher took the position that President Bush was wrong to issue an ultimatum, and the United States should have accepted the Taliban's invitation to negotiate.[193] Instead of walking through the pragmatic negotiation analysis, Fisher supports the categorical notion that parties should *always*

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186 *Id*. at 6.
187 *Id*.
188 *Id*.
189 *Id*. at 5.
190 *Id*. at 6.
191 *Id*.
192 Fisher & Shapiro, *supra* note 66, at 163.
193 *Id.* at 166.

be willing to negotiate and resolve the problem based on the interests of the parties, even if they are negotiating with someone such as a terrorist.[194] To negotiate does not mean a party must give up all that is important to them, but it only requires that they be willing to sit down with their adversary and see whether they can make a deal that serves their interests better than their best alternative.[195] Fisher's approach would be ignored by negotiators who want to use their moral judgment to avoid negotiating, which is discussed below.

C. *Avoid Common Traps*

Negative and positive traps that lead to a knee-jerk decision can stand in the way of wise decision making.[196] The common negative traps encourage people to exaggerate the costs of negotiation and underestimate the benefits, and the positive traps may tempt people to negotiate when maybe they shouldn't.[197] To avoid these traps, a critical first step is to recognize them and be aware of strong emotions.[198]

Demonization is a negative trap, and it is the tendency to view the other party as evil – not just guilty of bad acts, but fundamentally bad to the core.[199] The opposite extreme is the positive trap – contextual rationalization and forgiveness – the behavior of the other party is the product of external pressures and thus can be easily forgiven.[200]

Moralism and self-righteousness are other negative traps and create a tendency to see the other party as entirely at fault and one's own side as innocent and worthy.[201] The opposite trap is the tendency to assume **fault on all sides** in every conflict and the burden of responsibility should be shared.[202]

The **zero-sum** trap is a negative trap that involves seeing the world in terms of a competition – what one side wins, the other

194 Mnookin, *supra* note 10, at 2.
195 *Id*. at 3.
196 *Id*. at 6.
197 *Id*. at 21.
198 *Id*.
199 *Id*. at 19.
200 *Id*.
201 *Id*.
202 *Id*.

side must lose.[203] In family disputes, spouses often argue over the division of property or time spent with the kids, as if more for one spouse cannot possibly be good for the other. The opposite trap is the naive assumption that **win-win** is *always* possible, and the pie can always be expanded so that the goals of both sides are accomplished.[204]

D. *Considering Moral Compass*

In deciding whether to negotiate, although a pragmatic assessment of negotiation supports negotiating, sometimes a person's moral compass suggests that negotiating with the "Devil" would be wrong.[205] Moral judgments may be traps if they are used as an excuse for not going through the basic negotiation framework in analyzing the situation.[206] Moral values should be factored into the decision-making process but should not be masked as an excuse to not negotiate.[207]

For example, Mnookin's moral intuition agreed with President Bush in not negotiating with the Taliban, because the Taliban should be punished and further attacks should be deterred.[208] However, Mnookin continued to analyze the negotiation framework in deciding whether he agreed with President Bush's decision or not. In this case, Mnookin's moral intuition and pragmatic analysis led to the same conclusion of "no negotiation."[209]

Mnookin further provides an example of a divorce case where the wife refused to negotiate with her husband and demanded to go directly to trial where the outcome was worse for her than any negotiated settlement would have been.[210] 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

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203 *Id*.
204 *Id*.
205 *Id*. at 6.
206 *Id*. at 35.
207 *Id*. at 36.
208 *Id*. at 7.
209 *Id*.
210 *Id.* at 229.

decision.[211] By choosing to negotiate, the wife would not have had to agree or compromise her core interests.[212] Although she may have received a better deal in court from a financial perspective, the trial ruling was worse from the perspective of the children.[213] In this situation, if the wife would have assessed the pragmatic framework, she may have decided to negotiate with the "Devil," her husband.

VII. Summary and Conclusion

Most cases contain potential for win-win negotiation, and several key points have been presented in this article for a successful negotiation. These include looking for ways and using effective strategies for a win-win negotiation, identifying goals and interests, and preparing for the negotiation by making sure all financial, legal, and necessary information is obtained.

In conclusion, being a successful negotiator requires preparation, skill, and practice. By developing the skills necessary to negotiate with confidence, achieving a favorable outcome at the negotiation table will be significantly enhanced.

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211 *Id.* at 230.
212 *Id.*
213 *Id.*