

IMPROVING YOUR NEGOTIATING SKILLS

INSTRUCTOR

JACK ZWICKER BA, LL.B, LL.M (ADR)

TABLE OF CONTENTS

	page
Instructor Profile	3
Learning Objectives	4
Course Overview	5
Some Key Definitions	6
Introduction	7
PART I: UNDERSTANDING NEGOTIATION	
Distinguishing between 'needs' and 'wants': 'Needs'	8
'Wants'	8
A Practical Approach to Working Out 'Needs'	9
Working Out Needs: A Key Point	10
Defining soft and hard bargaining	10
Strategies for dealing with Hard Bargainers	11
PART II: GETTING READY TO NEGOTIATE	
Preparing for negotiation	12
Fact Gathering	13
Pre-Negotiation Preparation Tip List	13
Listing Issues	15
Locating the <i>ZOPA</i>	17
Reframing 'needs'	18
PART III: GETTING AGREEMENT	
Narrowing differences	19
Finding Common Interests	20
A Case Study	20
Building Achievable Commitments	21
Testing commitments	22
Creating disincentives to break Commitments	22
PART IV: QUESTIONS TO CONSIDER	24
PART V: BIBLIOGRAPHY	27

INSTRUCTOR PROFILE

Jack Zwicker, BA, LL.B, LL.M, has been a practising lawyer since 1976. He carries on a private law practice in Markham.

Jack has specialized in residential and commercial real estate law over the past twenty eight years. More recently, Jack has obtained Certificates from the Faculty of Law of the University of Windsor, at Windsor, Ontario in Introductory and Advanced, Alternative Dispute Resolution (ADR) and in June 2003 obtained his Masters of Laws Degree in Alternative Dispute Resolution, from Osgoode Hall Law School at Toronto.

For six years, Jack was a lecturer in real estate law at Centennial and Seneca Community Colleges in Toronto.

Jack is a seasoned professional in the practice of real estate law and combines writing and teaching using a 'workshop format' geared to the needs of the groups with which he works. Jack also teaches two of RECO's courses entitled *Legal Protection, and Beyond Powers of Sale*. Jack acts as both a trainer and coach to private sector clients requiring assistance with their negotiations and also acts as a mediator and arbitrator.

With his many years of expertise as a lawyer and negotiator specializing in real estate transactions, and his active role as a facilitator and writer in this field, Jack is held in high esteem by his peers.

LEARNING OBJECTIVES

Upon completion of this course, participants will,

- ✓ understand the difference between what a client *needs* and what he *wants*
- ✓ understand the importance of learning whether another agent or his client is a *soft bargainer* or a *hard bargainer*
- ✓ understand how a *soft bargainer* should respond to a *hard bargainer*
- ✓ understand the need for detailed preparation before any formal negotiation begins
- ✓ understand how to extract clients' real needs from the things they say that they want
- ✓ understand the importance of locating a zone for possible agreement (*ZOPA*) and measure the cost of any agreement against the costs of other alternatives
- ✓ understand how to 'reframe' needs to assist clients in understanding their common interests
- ✓ improve your negotiating skills by learning how to narrow differences by emphasizing common interests
- ✓ learn how to build trust by getting clients to make achievable commitments
- ✓ learn how to test commitments
- ✓ learn how to create disincentives to break commitments

COURSE OVERVIEW

Part I: UNDERSTANDING NEGOTIATION

Needs *versus* Wants
Working Out Needs
Soft and Hard bargainers
How to respond to Hard Bargainers

Part II: GETTING READY TO NEGOTIATE

Preparing to Negotiate
Extracting needs
Locating the ZOPA
Reframing Needs
Emphasizing common interests

Part III: GETTING AGREEMENT

Narrowing Differences
Finding Common Interests
Building Commitments
Testing commitments
Creating disincentives to break
Agreements

Part IV: BIBLIOGRAPHY

SOME KEY DEFINITIONS

Issues: the matters which require resolution in order for a deal to be made.

Needs/Interests: a person's financial and/or psychological requirements.

Common Interests: financial and/or psychological requirements which are shared by parties in negotiation.

Interest-based negotiations: a negotiating process which seeks mutual gain by meeting mutual needs.

Positional bargaining: an adversarial approach which depends on the use of hard bargaining to extract advantage for one side only.

Hard bargainer: a person who is unwilling to consider another persons' needs and who is concerned primarily with his own gains.

Soft bargainer: a person who is willing to consider the other persons' needs and who is concerned with achieving mutual gain.

Preparation: the fact gathering that needs to be done before undertaking formal negotiations.

ZOPA: The 'zone for possible agreement' or middle ground where common Interests line up allowing for commitments based on mutual gain.

Reframing: a questioning process which assists negotiators in extracting a person's real needs and in determining the extent to which common interests exist.

BATNA: better alternatives to a negotiated agreement.

Workable Options: the terms and conditions which are most likely to work.

Introduction

From the time we are small, we negotiate. Whether our negotiations are with our parents, siblings, friends, teachers or co-workers, we constantly seek to have others meet our needs by offering to do things for them. Whether we consciously realize it or not, every time that we engage in a discussion or in behaviours which are calculated to get our needs met, we are negotiating!

The purpose of this course is assist you in sharpening your negotiating skills. In preparing these materials special care has been taken *not* to provide you with examples of negotiations involving real estate agents. And there are two reasons for this. The first is that the very nature of the relationship between agent and client, whether seller, buyer, lessor or lessee, is governed by the Ontario Real Estate and Business Brokers Act, [REBBA] and applicable regulations and also by the RECO Code of Ethics and agency codes. It is not the purpose of this course to provide you with any guidance regarding REBBA or with respect to the RECO Code of Ethics or any other agency codes which may apply to you. The second reason for not providing you with examples of negotiations involving real estate agents is that the nature of the relationship between and agent and client at times is dependent upon the receipt of client instructions which may narrow or even eliminate the opportunity for traditional negotiation.

The sole purpose of this course is to help you better understand the human dynamics involved in negotiation. Because successful negotiation is a life skill, it takes understanding, practice and reflection about the approaches which work best for you. It is up to each of you to determine the extent to which the skills taught in this course apply to your practice as a real estate professional.

PART I: Understanding Negotiation

Distinguishing Between 'Needs' and 'Wants' : Needs

In any set of negotiations, the parties to the negotiation have needs. All too often, we do not fully appreciate our needs. More often than not our needs are financial. However, they may also be psychological. For example, the need for respect, recognition, or status can be central to a particular negotiation apart from the need for money or property.

Whenever we do not take the time to examine our real needs, or to discover other's needs, we risk entering into negotiations based upon the exchange of *positions*. And positions express only what we want, and not what we really need. Every successful negotiation depends upon two things happening at the same time. Each person who negotiates must make an unselfish, reasoned attempt to work out the things which are important to him. He must also make an unselfish, reasoned attempt to work out the things which he believes are important to the other party.

The trick then is to engage in a critical analysis of what is really important to all of the negotiating parties.

Wants

When clients undertake negotiations, one of the initial matters they must confront involves the difference between 'needs' and 'wants'. For reasons which reflect modern life, all too often we confuse the things we need with the things we would like or 'want'. For example, If I were to buy a brand new photocopier together with on-site service, it would be wrong on my part to assume that on-site service necessarily means same morning, same afternoon or same day service without asking the seller for its service policy. It would also be an error not to

make enquiries about the extent and location of the seller's service network to see whether same day service is even possible. In other words, my overall need for service although legitimate, may not be able to be satisfied if my expectations are unreasonable given the capacity of the seller's service network.

In other words, my 'wants' may well exceed my 'needs' to the point where my relationship with the seller will be poor. Without the fact checking that is an essential part of any negotiation, there is a strong probability that a deal may be made which unravels later because of one party's unrealistic assumptions about the other's capacity to perform. The difference between what we 'want' and what we 'need' is realism. It is realism that separates fact from fantasy and helps us define the broad middle ground that yields good results.

A Practical Approach to Working out Needs

Working out the needs of all of the parties to a negotiation may or may not require a complex, fact checking process. It stands to reason that the less complex the subject matter, the less fact checking will be required. However complex a set of negotiations may be, two approaches are vital. The first involves a discussion between the negotiating parties, using *open ended questions* that are intended to probe for needed information. An *open ended* question is one which probes for information without suggesting any desired response. A question which suggests the desired response is known as a *closed question*. And closed questions are more likely to put others under pressure resulting in hostility.

The second approach involves discussion with other persons who may be willing and able to share valuable, relevant information. Once again, the use of open ended questions tends to make those from whom information is being sought, more comfortable and more co-operative. The extent to which

information is sought from persons who are not involved in the negotiation reflects the presence or absence of trust in the other parties to the negotiation.

For example, let's assume that an equipment manufacturer sells a high-tech product that includes a service package. Let's also assume that the service portion of this product sale requires a certain level of technical expertise on the buyer's part without which the latter will be unable to resolve any servicing problems. A critical part of the buyer's fact gathering before committing to the purchase of this equipment would involve discussions with the manufacturer concerning the extent of the technical expertise of its own staff. While engaging in this kind of fact checking may seem like common sense, it is may come as a surprise how often parties commit to deals without preparing themselves. By pursuing a fact-based negotiating strategy, the chances of reaching a deal increase as both sides stress realism by separating fact from fantasy. The added benefit of this kind of preparation which I will return to in more detail later involves both parties continued commitment to the contract. Agreements that are made without a strong factual foundation tend to have a short shelf life as one side is disappointed and blames the other.

Working Out Needs : A Key Point

The most important point to remember about working out needs is that deals are made when *the parties mutual, reasonable needs are met*. What this means is that each part to a negotiation must concern himself as much with satisfying the other party's needs as with satisfying his own. In other words, to quote US networking guru, Dr. Ivan Misener, "givers gain".

Defining Soft and Hard Bargaining

At some point, you are bound to have to deal with someone who is as tough as nails. We all know the type. That person is invariably loud, aggressive,

does not give any one else a chance to get a word in edgewise and is a know-it-all. He tends to drown out everyone else in order to get his own way. More often than not, he is also plays fast and loose with facts because he believes in his own superiority and takes pride in making quick deals. Conflict resolution literature labels this kind of individual an "aggressive personality" and a "hard bargainer". It may interest you to know that approximately 93% of individuals who are surveyed regarding their negotiating style describe themselves as "co-operative personalities".

Strategies for Dealing with a Hard Bargainer

When confronted by an aggressive personality, who is a 'hard bargainer', there are a number of things to understand before you map out your negotiating strategy. The first thing to understand is that if you, like 93% of those surveyed, have a co-operative personality, you don't need to imitate the other person. Conflict resolution studies involving negotiation between opposite personality types suggest that you are generally better off using a strategy which allows you to be yourself! It takes too much psychic energy to be something you are not and at the end of the day, good deals are based upon satisfying mutual needs. All the negotiating heat in the world is no substitute for light.

Eventually, the 'hard bargainer' has to come down to earth and deal with reality because no negotiation can succeed unless both sides are realistic. Without realism, no deal can provide an exchange of value that the parties perceive as fair.

Rather than being put off by a classic hard bargainer, try the following strategies. Allow him to voice as much as wants until he runs out of energy. Opera singers aside, most of us simply do not have the physical stamina to shout for very long. As he tires his volume will decrease to a more manageable level. When this happens, it's your turn to talk. Try moving to a neutral topic for a short

while which may help to distract him. As he settles down, begin to deal with your issues. If you really want to take him by surprise, ask him what he needs before you deal with your own needs. By doing so you show empathy, and by showing empathy, even the crustiest negotiator will know that you are trying to meet his needs.

Be direct and tell him that you intend to verify any information he provides before you are in a position to commit to a possible agreement. And remember that in most markets there are usually alternatives. Before making any deal, shop the market and determine what alternatives are available so as to ensure that you are likely to make the best possible deal. Making the best deal when there are known alternatives is more than good common sense. It is evidence of solid preparation [fact checking] before making commitments.

As a matter of strategy, whenever you negotiate, you have two opposite choices. The first is to keep your cards close to your vest and not discuss your alternatives with the other party. The second, however, is to discuss those alternatives with the other party when circumstances dictate that that is the proper course. You will know from the context of your negotiations when to discuss your alternatives with the other party. And that will happen if the alternatives so favour you, that you feel empowered to use them as a bargaining lever with the other side. But remember, an alternative empowers you in negotiation only if the facts that support it have been verified. An alternative is of no value if it is not factually verifiable.

PART II: Getting Ready to Negotiate

Preparing for Negotiation

As I suggested at the outset, we often take negotiation for granted largely because we begin to negotiate, subconsciously, from the time we learn to talk.

By the time we are adults we assume that we know what we are doing when we negotiate simply because we have been at it for so long!

The problem we face is that the kinds of simple, straight forward social or financial negotiations we embark upon often do not require any great degree of prior preparation before negotiation begins. And so it is that when the subject matter becomes more complex, we are unprepared for the process.

Fact Gathering

I suggested earlier why it is that fact gathering is vital to successful negotiations. The following is a list of practical tips for you to consider when preparing for a formal negotiation involving some degree of complexity. When reviewing this list remember that effective negotiators engage in *interactive dialogue*. This means that one talks and the other listens. And then they reverse roles. If only one side has engaged in pre-negotiation preparation, one of two things is likely to happen. Either a lop-sided deal will result which may not stand the test of time. Or the unprepared party will feel so overwhelmed that he cannot participate in the process. In other words, the probable outcome of poor advance preparation is either a bad deal, or no deal at all.

Pre-Negotiation Preparation Tip List

- 1) If the subject matter involves high technology, obtain as much technical information as you can so as to better informed before beginning your negotiations;

- 2) If the subject of the negotiations is regulated and depends upon legal compliance with statutes, regulations or governmental administrative policy, obtain legal advice, and advice from any relevant government departments to ensure that your objectives cannot be met without breaking the law.

- 3) If the subject matter is economic obtain reports from public or private forecasters so as to ensure that any economic assumptions you are making going into negotiations are verifiable.
- 4) If the subject matter involves some form of taxation, whether at the federal, provincial or municipal levels, seek advice from an accountant to ensure that you are aware of your taxation obligations;
- 5) If the subject matter involves bank financing, seek advice from banks, and from qualified individuals whose expertise lies in securing bank, private, and/or government-insured financing;
- 6) Speak to any competitors who you know have done business with your negotiating counterpart. Generally people who operate respectable businesses are well thought of by their competition. Competitors may be willing to provide information about character and about personality which is valuable to know before going into negotiations;
- 7) Read as much printed material as you can access regarding the subject matter whether in the form of newspapers, general news magazines, trade publications and technical reports available from universities or from private sector research houses;
- 8) Use the internet to quickly research the names and locations of information providers whose materials may be valuable to you.
- 9) Read a text explaining the principles of successful negotiation. One of the best short books written is Roger Fisher and William Ury's national bestseller entitled *Getting to Yes* published by Penguin Books. Professors Fisher and Ury

are considered the gurus in the field of negotiation and mediation. Copies of this softcover are available at any major bookstore.

10) If your comfort level going into negotiations is not high enough seek professional advise from trained conflict resolution experts who regularly train and coach clients in the art of negotiation. If necessary, retain such an expert to act as your negotiator.

Listing Issues

Once you have obtained as much factual and technical information as you can about the subject matter, your next step is to make two lists of all of the issues you expect to arise during negotiations. Opposite each issue, set out your needs. In other words, ask yourself what you 'need' regarding each particular issue in order to make a deal. Again be realistic and remember successful negotiation is about meeting *reasonable and verifiable needs* and not about attacking the other side with a perfect wish list.

One you complete your list of issues and needs, put yourself in the shoes of the other party and make up two similar lists as though he were preparing those lists himself. Be warned that this is probably the most difficult single exercise in preparing for a negotiation. Understanding the other party's reasonable needs is the springboard to your cobbling a deal together that allows both of you to satisfy mutual needs.

Measuring Needs Through Body Language

Advance preparation before beginning to negotiate will move you part of the way to a potentially successful result. However, pre-negotiation preparation is only part of the negotiating process. Studies suggest that only 30% of human communication is verbal. Body language accounts for the remainder. What this

means is that the exercise of working out the other party's needs necessarily continues once negotiations begin. This being the case, it is important to understand that even when people appear to be communicating their needs and concerns, sometimes their words do not match their body language. It is vital then to pay close attention not merely to the words spoken but also to the other party's gestures so as to ensure that you understand what he is really trying to tell you. There is no easy way of making absolutely sure that you are not misreading the other party short of studying *paralinguistics*, which is the study of body language. Since most of us do not have expert knowledge in this field, the best thing you can do is to train yourself to pay close attention to physical gestures and to the sound of voice whether face to face or over the telephone, so that both body language and voice tones appear consistent with spoken words.

If the observations you make of the other party during negotiations, suggest that there is a mismatch between words and body language, deal with the problem immediately. Your instincts in these kinds of situations are your only guide and ignoring them is likely to expose you to error. Where you sense such a mismatch, tell the other person that you are getting a mixed message. Review the issue at hand and proceed to recapitulate your perception of any facts which are relevant. It may well be that by giving you mixed messages, the other party is subconsciously telling you that he is unsure of himself on a particular issue. He may feel resigned to agree out of some sense of obligation, when in fact he has reservations about making a commitment.

Remember that in all negotiations, success is measured by both sides making what they perceive as a fair exchange. People who make deals to which they are not really committed are more likely to break those deals once overwhelmed by their own doubts. Apart from the importance of both sides sensing fairness in the deal they have made, it is improbable that any deal will be made if the parties are not interactively listening to one another. Without that

interactive listening, needs will not be satisfied and mutual gain becomes less likely.

Locating the ZOPA

In every negotiation there is a *zone for possible agreement*. Conflict resolution literature refers to this concept by the acronym ZOPA. For example, if a used car lot has a classic 1955 Ford Thunderbird for sale at a hypothetical price of \$50,000.00 and no other car dealers in the community have any similar inventory, the car dealer is in the position to move the ZOPA to its high end. Naturally, if the potential buyer does not have or cannot obtain \$50,000.00 [assuming this to be at the high end of the range for the vehicle], and if sales are slow and no other customers are lining up to buy this car, the ZOPA will likely drop to a price range below \$50,000.00 and the difference between the buyers available funds and the low end of market value for that car.

Assuming that other cars of a similar vintage are available for sale in this particular community, and that there is no line up of customers, the ZOPA will drop reflecting a decline at both the low end and high end of market.

The ZOPA need not be in the middle of the range between low end and high end. In a perfect world where the financial ability of the customer to pay and the need of the car dealer to sell are evenly matched, in the absence of any other inventory or other potential customers, price should saw off down the middle. Since we do not live in a perfect world, the final price which the parties agree upon will reflect the extent to which one party's needs exceed the other's. In any negotiation, sawing price off down the middle, otherwise known as *splitting the difference* is not a rational basis for working out price. Disparity in economic need especially where one party senses it about another will directly influence the terms of any agreement.

Reframing Needs

At times parties who seem to be at loggerheads may not be as far apart as they believe. Or they may share some common interests without necessarily realizing it. For example, let's assume that Jim, the seller, and Rob, the buyer, are negotiating the price of a valuable antique. Also assume that market price is known and accepted by both sides. Let's also assume that the seller has dealt with the buyer previously and knows that he has a good reputation in the community. Assume as well that Jim is unaware that Rob is unable to pay the purchase price in full.

However, Rob does not want to discuss his personal finances and skirts around the issue of payment in full. Rob really wants to buy this antique but is ready to walk away because he does not have the cash he needs. Jim does not understand the problem and is becoming upset.

Dialogue before Reframing

Jim

" We seem to agree on price. From the look on your face, I know you like the antique. But you're shaking your head and I get the feeling that you're annoyed with me and that you're ready to walk away. You're making me feel that somehow I'm being unfair with you and I really resent that. You know that I've always been fair with you in the past! "

Rob

"Well, Jim, don't get me wrong. I just don't know how I can afford to deal with this right now. I'm not suggesting that you're being unfair".

Reframing by Jim

" If I understand you correctly, you want to buy, my price isn't a problem, but I sense that maybe you have other expenses that are getting in the way and you're looking for a way to finance this. What if we were to work out some payment terms? Would that work for you?"

Rob

" Yes that would make all the difference".

The purpose of 'reframing' is to eliminate any possible misunderstanding which results from poor communication, while encouraging the parties to recognize through the use of neutral, factual language that they do actually share common interests.

Reframing is one of the most valuable tools that professional negotiators and mediators use to move parties closer to agreement when they share common interests without realizing it. Reframing is an especially useful tool when parties are frustrated in their negotiations and begin to use strong language that may be offensive.

PART III: GETTING AGREEMENT

Narrowing Differences

As I suggested earlier successful negotiation requires mutual gain without which parties do not each make the best possible deal. The concept of mutual gain is based upon two elements. The first is that parties are less likely to come to agreement about anything unless there is something of value in the transaction for all sides. The second element is that having come to agreement, parties are less likely to look for reasons to break their commitments if they continue to feel that the deal they have made is fair for everyone. By its very nature, negotiation involves give and take and no side gets everything it wants.

Since fairness is a relative concept which has nothing to do with perfection, it means that each side believes that its needs have been *reasonably* satisfied.

Finding Common Interests

I suggested in the material dealing with *reframing* that it is important to point out to clients the extent to which they share needs. Shared needs are often referred to as *common interests*. As valuable a tool as reframing is to make parties realize that not as much separates them as they might otherwise believe, it is not a substitute for effective, needs-based bargaining.

A Case Study

Let's assume that John wants to sell a controlling interest in his company over time to Bill, his senior manager upon whom he depends. Also assume that Bill is risk adverse and is very nervous about applying for a bank loan in order to fund the purchase of these shares. John who is 67 travels six months per year and would like to retire in three years. Bill is prepared to take over this company. Bill is prepared to pay for his shares but unless he applies for a bank loan will be unable to save enough of his after tax income to pay the purchase price for a controlling interest.

John retains the services of a trained negotiator who suggests that he and Bill discuss entering into a shareholders agreement which would obligate Bill to acquire the percentage of shares which he can afford to pay for over the next three years. In the event that a buyer offers to buy this business, Bill would have a first right of refusal and failing his purchase of a controlling interest at that time, the business would be sold to an outside buyer. Bill agrees to these terms.

This case study points out the importance of parties looking for common interests. Negotiation very much like politics is the art of the possible. It follows

that no agreement will be made if either party in this scenario pursues the impossible. The impossible given Bill's aversion to borrowing money would have been to insist upon going to the bank. Insisting upon the very thing that Bill could not accept might well have resulted in Bill's resignation as senior manager which is the last thing John needed or wanted.

Building Achievable Commitments

The case study we just looked at is a good example of what conflict resolution theory calls *brainstorming*. And the central purpose of brainstorming is to devise practical means of meeting mutual needs. The first task of a good negotiator is to detect and map out all the common interests which the parties share. In this hypothetical case, the key, common interests are:

- 1) the seller's need to sell a controlling interest in his company to a trusted employee;
- 2) the buyer's interest in acquiring control by paying for out of yearly after tax income;
- 3) the sellers need for closure given his desire to give up control in three years;
- 4) the buyers desire to take control in three years;
- 5) the buyer's fear of obtaining a large bank loan;
- 6) the seller's interest in giving the buyer an opportunity to take a controlling position in three years time by giving him a first right of refusal.

Once the parties come to understand that they share common interests, their next task is to think about the mechanics of satisfying those interests. It is at this point that both sides need to 'think out loud' and suggest any practical means of meeting their mutual needs.

Because the exercise of brainstorming involves 'thinking out loud', by definition no suggestion binds anyone or is to be considered foolish. Often

parties who are stuck in a negotiating rut feel reluctant to voice ideas. And sometimes an idea that one side thinks may sound off the wall, seems inspired to the other, and breaks the log jam!

The key to successful negotiation at this stage is never to be afraid of creative thought.

Testing Commitments

Once the parties complete the 'brainstorming' stage, the next task of a good negotiator is to encourage them to critically examine all of their proposals to determine whether or not each is workable. Again, it is never the purpose of interest-based negotiation for one side to insult or ridicule the other. Satisfying mutual needs or interests is more likely to be achieved when each side respects the other despite any disagreements along the way.

The best advice that I can give you at this stage is to constantly double check any practical approach to which you are willing to commit. For example, if you want to lease some space to operate a small business, you need to make sure that the landlord will have the space ready in time for the start date of the proposed lease.

Creating Disincentives to Break Commitments

During the brainstorming stage, one of the issues which may arise depending upon the level of trust the parties build during their negotiations is how to create deterrents sufficient to discourage either side from breaking their deal. Once again, the exercise of 'brainstorming' provides the answer. In more complex agreements calling for the parties to continue to do or to refrain from doing various things, they generally provide for conditions which allow a party who can establish a breach to exit from the contract before closing and claim

damages. Where the breach occurs after closing, the party suffering damage can terminate the agreement, and sue for any losses incurred up to the date the agreement is terminated.

In addition, often parties insert what the Law of Contract calls, 'liquidated damages' provisions into complex contracts. The purpose of these clauses is to cause one side to forfeit money so as to compensate the other, where such a breach occurs.

The deterrent value of these kinds of provisions lies in the mutual understanding of both sides that neither can take his obligations lightly.

Lastly, as frustration grows with the expense and back log in our courts, parties increasingly make contractual provision for mediation or arbitration as a means of resolving their conflicts more quickly and less expensively.

PART IV : QUESTIONS TO CONSIDER

- 1) Ron is a close friend. He is tired of being an employee. He is thinking of buying a pizza franchise. The franchisor has only two franchised locations and a one year track record. Ron has met only once with the franchisor. The 'Offer to Purchase' sets out price and terms of payment but does not commit to a start date for the franchise. Nor does the 'Offer' mention the franchise territory or set out the term of the lease to be taken and the rent payable. Ron is in rush to sign up. What advice would you give Ron about preparing for negotiation?

- 2) Simon is a work colleague. He is looking at leasing a brand new car. He has never leased a vehicle before. The car dealer is a high pressure type who does not like to answer a lot of questions. Simon has never leased a vehicle before. The dealer does not want to give Simon time to read the vehicle lease. Simon calls you from the dealership and asks for your help. What would you tell him before he commits to this lease?

- 3) Mary is looking at opening a small bakery. She is an excellent baker. Her resources are limited. She has located a small shop which is for rent. This shop has been vacant for close to one year. The landlord is pressuring her to sign a lease. Mary is unaware that the local by-laws have certain restrictions regarding wood burning, open-fire ovens. If she comes to you for advice, what would you tell her about the need to prepare before finalizing arrangements with the landlord?

- 4) Beverly is an old friend. She owns a small mould-making shop. She has decided to buy a piece of high-tech, mould-making equipment. She has no

technical knowledge of the workings of this particular equipment but knows that it will help her increase efficiency and net profit. Her technicians have limited knowledge of the workings of this particular piece of equipment. She is desperate to make a deal and replace her old, worn-out, low-tech equipment. Beverly has not shopped the market and has no idea what other similar machines are available, their prices, and their technical specifications. What would you tell her about the need to prepare for negotiations?

- 5) James and Stan are not doing well in their negotiations concerning James' intention to sell a large part of his inventory of glass and brass fireplaces and accessories. The sticking points involve financing terms. James and Stan are beginning to insult each other because James, who is overextended at the bank, needs to clear excess inventory quickly and is not getting his way. Stan is looking for substantial, long term financing from James at below bank prime. What would you say to each of them regarding the difference between 'needs' and 'wants' and about 'mutual gain'?

- 6) Elsie and Mabel are thinking of going into business with each other on a 50/50 basis. They have known each other for years and trust each other. Elsie does not know that Mabel does not want to guarantee payment of the rent for a store lease, or a small bank loan, but wants an equal interest in the partnership. Elsie has already leased space in her own name alone. The business is about to open. You are aware of these problems and would like to warn Elsie who is your friend. What negotiating strategy might Elsie follow to improve her position once she finds out about Mabel's reluctance to guarantee the rent and a bank loan?

- 7) Chad has just invented a new book binding machine. Ted, who is a born marketer, has offered to market this machine for Chad and his company. Behind Chad's back, Ted is claiming credit for the invention. Chad finds out and is furious. Ted has lined up some very lucrative contracts which could

benefit both of them substantially. Chad is hesitant to sue and risk losing these customers. Chad, who is an old school friend, approaches you for advice as to the negotiating strategy he should follow. What would you suggest?

PART V: BIBLIOGRAPHY

Cloke, Kenneth, *Mediating Dangerously*, 2001

Deutsch, Coleman, *The Handbook of Conflict Resolution*, 2000

Fisher, Roger and Ury William, *Getting to Yes*, 1991

MacFarlane, Julie, *Dispute Resolution*, 1999

MacFarlane, Julie, *Rethinking Disputes*, 1997

Mayer, Bernard, *The Dynamics of Conflict Escalation*, 2000

Stitt, Alan J., *Mediating Commercial Disputes*, 2003

Ury, William L., Brett, Jeanne M.
and Goldberg, Stephen B., *Getting Disputes Resolved*, 1988

Wheeler, Michael, *Teaching Negotiation: Ideas and Innovations*, 2000

For additional articles by Jack Zwickler go the publications page at
www.zwicklerdispute-resolutions.com