NEGOTIATING THE ETHICAL WAY

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I. Introduction.

Hopefully, you will not be frightened away by the title of this paper. It is not going to be a sermon on ethics. Rather, it is going to be a suggestion for the combination of a number of simple skills, to allow the successful negotiation of any problem, whether simple or complex.

Some Definitions. The title may seem inconsistent. The combination of the words “ethical” and “negotiate” may seem as inappropriate together as the words “oil” and “water,” (as in they don’t mix).¹ Recent developments and studies, concerning the benefits of cooperation, suggest otherwise. In fact, the simple definition of the terms indicates congruence, and not conflict. “Ethical” as used in the context of negotiation, refers to “Being in accordance with the accepted principles of right and wrong that govern the conduct of a profession.” The American Heritage Dictionary (3d Ed. 1992), page 630. To negotiate is to confer with another or others in order to come to terms or reach an agreement. . . .to arrange or settle by discussion and mutual agreement. . . . Id, page 1209. To negotiate ethically, then, is to conduct a principled negotiation.² This can be

¹ The term “ethical” should not be confused with any concept of morality, but is used here to refer to attempts to introduce clarity, substance, and precision of argument into the domain of negotiation.

² A number of different terms could be used to describe this form of negotiation. Tom Rusk, M.D., in his book The Power of Ethical Persuasion (1993) refers to it as ethical persuasion. Others refer to it as cooperative bargaining. Robert Axelrod, The Evolution of Cooperation (1984); Gerard I. Nierenberg, Fundamentals of Negotiating (1987)
contrasted with positional bargaining. Here, definitions indicate a conflict or inconsistency. To bargain is to negotiate the terms of an agreement, as to sell or exchange. \textit{Id}, page 1209. Position as used here means A point of view or attitude on a certain question . . . \textit{Id}, page 1413. To bargain from a position is, then, to bargain from one's own point of view or attitude.

Religious and/or ethical training aside, most people grow up learning positional bargaining, and if it is not learned earlier, it is learned upon entering the marketplace or legal profession. In particular, it is learned in the process of contracting and/or litigation. It is frequently said that if you don't look out for your own interests, who will? Thus, it is common to bargain in order to reach the greatest individual gain. For attorneys representing the rights of others, the gain is for the individual, and the attorney is trained to see it as a duty to gain the greatest possible benefit for the client.\(^3\)

Thus, when negotiating a contract, the negotiator or lawyer, by nature, will seek to include only clauses that benefit the self interest; they seek to win the contract. In litigation, the attorney and the client likewise seek to win. Winning, however, is a relative thing. For every winner, there is a loser. The positional bargainer aims at a win/lose conclusion.

Those advocating principled or ethical negotiation ask the simple question: Do you always benefit the most by always attempting to win? Contracts which gain an advantage at the cost of a relationship or future business, are not necessarily victories. Lawsuits that cost more in terms of defense cost than the remedy sought are not wins. Negotiations or litigation, which result in less than could be had for both sides reflect a clear loss, even though one side gains more than the other. The principled negotiator aims for a win/win

\(^3\) Simply stated, most are trained to become value claimers and not value creators. Those working with principled, cooperative, or ethical negotiating techniques attempt to accomplish the reverse: to become
situation.

Most writings on negotiation emphasize the importance of persuasion. Principled, cooperative, or ethical negotiation, however, does not address persuasion, in the sense of one person convincing another of the correction of his/her point of view. Rather the emphasis is on persuading people to treat each other

...with greater respect, understanding, caring, and fairness. This method is equally applicable to intimate relationships, friendships, families, and professional environments. Ethical Persuasion surpasses other problem-solving negotiation strategies, by helping people communicate to each other what it feels like to live in their separate, private words of experience. Tom Rusk, M.D., *The Power of Ethical Persuasion* (1993).

These are vague concepts, best explained by example.

**II. An Example To Work From:**

Neighbor Smith, bothered by neighbor Jones' dogs' aimless wandering in his yard, decided to build a chain-link fence between his house and the house of his neighbor, Jones. Smith investigated the cost, and found that a chain link fence was the most economical and effective means of restraining the dogs. Money was not a problem, but Smith was not the type to spend more than was necessary. While brick and wooden fences were the norm in the upscale neighborhood where he lived, he saw no need to keep up with the rest of the snooty neighbors.

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Note: This example is as it was first presented at an institute in 1994. No corrections or changes have been made. At the end of the paper, you will find a decision by the Texas Supreme Court, which decided on 2/13/2004. This opinion bears a striking resemblance to the problem discussed in the 1994 example. The two are presented together for your thought. LWS
Smith was a little irritated that his neighbor, Jones, did not come to meet or welcome him when he moved in ten years ago. In fact, until the incident in question, they had never done more than exchange casual waves as they went for their mail or morning paper.

Jones, likewise knew little about his neighbor. Jones did know the neighborhood and was proud of its consistently high building standards. But he knew that he did not like chain-link fences, and when the first load of construction material arrived at Smith’s house, he could see that Smith was going to build a chain-link fence. Jones had considered constructing a five-foot solid brick fence that would block the view of Smith’s messy patio, but had abandoned it when he discovered that the cost would be $5,000, as compared to $2,500 for a wooden fence and $1,500 for chain-link fence. Jones learned that, where used, brick fences have tended to increase the value of the property in their exclusive neighborhood, wooden ones have maintained the value of the property, and chain-link fences have decreased the value of the property. Jones had abandoned the fence idea when his car blew a gasket, and he decided to purchase a new car.

As he watched the supplies for the chain link fence being unloaded, he groaned and was rather sorry that he had not gone ahead with his plans. There is nothing I can do, he thought. Smith had the right to build a fence on his own property. However, when the contractor came to begin the fence, he laid out a line that Jones knew was on his property. Jones called Smith, told him of the encroachment, and demanded that the line be moved. Smith refused, stating that he was equally certain that the fence was being located well within my property lines. According to Jones, the fence does not encroach by much, but from Jones understanding (from the ground references he was shown when he bought his property), it did encroach by at least six-inches, and possibly by six-feet.
III. How Many Ways Are There To Resolve A Dispute Or Reach An Agreement?

How should this dispute be resolved? If the parties simply take positions, they will, all-too-often, each say: "I'm right." Other than filling the air with words, what good will that do? Assuming that both are financially able to do so, they may well end up in litigation. For purposes of discussion, assume that they do go to law. "Go to mattresses".

A. The Litigation Scenario. Since Smith refused to listen to reason, Jones employed an attorney to seek a temporary injunction. Smith responded by employing his own attorney. Both then had surveys done. Since the respective deeds made references to two prior surveyor's marks, each mark being different from the other, the surveys ended up in conflict. The case was set for trial. The judge, busy with an upcoming capital murder case, listened to more than he wanted to hear, and made the injunction permanent. Smith, irate at such an irrational ruling, instructed his attorney to file an interlocutory appeal to the court of appeals. The appeal was successful because of a procedural matter. The case was reversed, and the trial judge, desirous of being rid of the matter, dissolved the injunction. Jones, out of money, glumly watched the chain-link fence go up. Smith, in the meantime used up his savings, and cashed in all of his life insurance policies to pay for his expenses in constructing the fence. He hopes to recoup all losses from his title insurance company, which denied coverage.

In the process of disputing the six-inch boundary, the parties spent, jointly, in the neighborhood of $18,000 fighting over whether to build a $1,500 chain link fence. Both have made claim upon their respective title insurers. Each insurer has opened claim files, set the file for investigation, development, review, and consultation with counsel, etc. The

5 "The Godfather."
expense to the court system, by its nature, is not calculable, but involves hundreds of hours of time when the work of clerks, secretaries, bailiffs, court reporters, briefing attorneys, and judges are included.

Could they have done better? A better question would be whether they could have done worse?

B. The Principled Negotiation Alternative.

Suppose that Smith had asked to see what Jones relied upon to support his position; or that Jones had asked to see what Smith relied upon to support his position. I.e., suppose either had looked behind the other's position?

At the heart of principled negotiation is the concept of identifying mutual interests, and searching for options that satisfy the interests of both parties. If the interests are both satisfied, there is no problem. If one interest is not satisfied as well as one party would like, that party must ask whether there is a better alternative available, before taking any other course of action. Where the interests are in conflict, and there are no mutually satisfactory options, the parties are urged to look to legitimate standards for the resolution of the conflict. In the course of the dealings, the parties are urged to pay attention to their forms of communication, particularly in listening to the interests of the other side, with the purpose of improving the interaction or relationship between the parties.

With these simple concepts in mind, how could Smith and Jones have handled their case more appropriately. There are a myriad of answers.

Interests: Interests arise out of needs, desires, concerns and fears, and define the

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6 Needs [as identified by Araham H. Maslow, *Motivation and Personality* (1954)]:

1) Physiological (homeostatic) needs. The satisfaction of biological drives and urges such as hunger, fatigue, sex, etc. These physiological needs are the most dominate of needs. E.g., hunger will cause one to forget the need for esteem.

2) Safety and security needs.

3) Love and belonging needs.

Jones has a number of interests, as does Smith. Some of these may be at odds (or opposed); others may make no difference to one, but be important to the other. Still other interests may be compatible. In principled negotiation, the effort is to find compatible interests that can be satisfied by mutual options, often with indifferent interests traded for interests of concern.

To discover interests, ask simple questions such as "Why" and Why not. Switch places with the other party, and look at their side of the issue.

**Jones' Interests:**

1) He would say that his interest was "To stop the fence from being built on my property," but this would only be a position. His real interest is to maintain the integrity of his border.

2) To stop a fence from being built, unless it is brick, or at least wood.

3) To shield himself from the annoying view of Smith's messy patio.

4) To maintain or improve the value of his home.

5) To maintain a friendly, or at least not inimical, relationship with the neighbor, Smith.

4) Esteem needs.
5) Needs for self-actualization.
6) Needs to know and to understand.
7) Aesthetic needs.

**Note:** "Maslow pictures each successive need as emerging after a prior need has been satisfied. . . . Usually the previous need is only partially satisfied before the emergence, bit by bit, of a new-felt need.

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"To sum up, an individual's existence is a constant struggle to satisfy needs; behavior is the reaction of the organism to achieve a reduction of need pressures; and behavior is direct to some desired goal. Our objective is to employ these facts about human needs in successful cooperative negotiation." Gerald I. Nierenberg, *The Art of Negotiating (1981)*, p 108.

\(^7\) Hereinafter referred to simply as *Fisher.*
6) To avoid litigation or court costs.
7) To avoid the waste of time on a non-productive dispute.

Smith's Interests.

8) He would say "To build the fence that I want on my property." 
9) To build a chain link fence; that is, a fence that is most effective for the least amount of money.
10) To keep Jones' dogs off of his property.
11) To maintain or improve the value of his home.
12) To maintain a friendly, or at least not inimical, relationship with the neighbor, Smith.
13) To avoid litigation or court costs.
14) To avoid the waste of time on a non-productive dispute.

Reconciling Interests. Once the interests of each party is identified, it is then necessary to reconcile as many of those interests as possible. (Fisher, page 40). As part of the reconciliation process, the interests should be checked, to ensure that they are truly interests, and not just positions. Further, they should be prioritized, and then placed in order of importance.

In the fact situation set out above, it should be apparent that each of the parties have identical interests. Each wants:

15) To maintain the integrity of what each considers to be their boundary.
16) To obtain a fence that will
17) Shield each from the other.
18) To improve the value of their homes.
19) To maintain, or make no worse, their relationship.
20) To avoid dispute costs.
21) To avoid the waste of time.

While some of these interests, such as the first, may appear to be opposed, it is very possible that options can be found to satisfy the interests of both parties.

**Inventing Options.** An option is a choice that can be made, which will satisfy an interest or interests. The choice is referred to as an *alternative*, if it can be accomplished without cooperation from the other party. Thus, the filing of suit is an option that will be discussed as an alternative.

**Obstacles to Invention Options.** Fisher (page 57) identifies four major obstacles that inhibit the inventing of an abundance of options:

a) premature judgment;
b) searching for the single answer;
c) the assumption of a fixed pie; and
d) thinking that solving their problem is their problem.

Smith was guilty of premature judgment in constructing a fence on a border with Jones' property, without first discussing it with Jones. Jones, in turn was guilty of premature judgment, in assuming that he, and not Smith, was right on the location of the border. In the litigation scenario described above, both searched for a single answer, assumed a fixed pie, and thought that the problem belonged to the other.

**Arriving at Options—Brainstorming.** The possible options available to satisfy most, if not all of their interests, are almost limitless. When faced with a problem, those involved should first seek to *invent* as many options to satisfy the interests as possible. This should be done without commitment. Thus, invention is possible without filtering or judging. The list of options for Jones and Smith could look something like this:
a) Both could agree on a mutual boundary.
b) Smith could buy the six inches of disputed border.
c) Smith could move the fence six inches.
d) Jones could surrender the six-inches.
e) Jones could give Smith the six inches in return for an upgraded fence.
f) Jones could volunteer to build a brick or wooden fence.
g) Both could share in the cost and effort of building a better fence, including splitting the difference on their disputed six inches.
h) Smith could buy Jones' house, and do what he pleases.
i) Jones could buy Smith's house, and do what he pleases.
j) They could select an independent surveyor to establish the true boundary line.
k) One could prove to the other the validity of their position on the boundary.

*After Brainstorming.* After brainstorming, the no-criticism rule can be relaxed, and each can identify the best options on the list, reducing the size of the list. Jones might nominate (b), (c), and (d), while Smith might nominate (e), (f), and (g). Looking at the remaining list, they, most likely will abandon (h) and (i), and reluctantly add (a) to the list for continued consideration. Each, however, will have to carefully weigh (j), use of the independent surveyor. The last possibility, (k), that of proving the validity of each boundary claim is a possibility, if definitive proof exists. Regrettably, all too often the [proof] is in conflict, or is perceived to be in conflict.

*Identify the Shared Interests.* Shared interests are present in most negotiations; they only have to be identified. They should be viewed as opportunities that must be developed. But, by stressing shared interests, the negotiation becomes friendlier and more
likely to end in success.\footnote{If an option can be found which will satisfy the interests of each side, it is generally referred to as an \textit{elegant} option.}

In the hypothetical, both Smith and Jones share an interest in building a fence, and in avoiding litigation costs. With that in mind, the options of allowing Smith to construct the fence becomes more realistic, it is only the terms of doing it.

\textit{Considering the Alternative.} The options, as refined, are also weighed against the \textit{alternatives}. Each can go to court. If the alternatives are better than the options, then the party will, in all likelihood resort to that alternative. In that instance, the party\textrsquo;s \textit{best alternative to a negotiated agreement} (BATNA) will prevail. \textit{(Fisher, page 97)}. If the option(s) are better than each party\textrsquo;s BATNA, then the option(s) should be accepted rather than the BATNA.

If each party will consider the other\textrsquo;s options and alternatives from the other\textrsquo;s perspective, they will have a greater chance of success. Knowing, for example, that the other does not have a great BATNA gives some leverage, but finding an option that will satisfy the other\textrsquo;s interest is more likely to lead to an agreement. Thus, agreeing to build the fence together, or trading the land for the upgraded fence are very possible results.

\textit{Legitimacy.} If the parties are having difficulty in compromising and reaching an agreement on one of the options, the ultimate bargaining tool is legitimacy. There are many forms of objective criteria available, depending upon the controversy, as in the market value of disputed goods, precedent, scientific judgment, professional standards, costs, etc. \textit{(Fisher, page 80)}. In this instance, if both parties insist on their version of the boundary, if both cannot agree on a compromise fence, etc., they still do not have to go to court. They can simply accept alternative option (j) and agree upon an independent surveyor to establish
the correct boundary.  

**Communication.** The key to most negotiations rests in the form of communication between the parties. Had Smith gone to Jones before beginning the fence, and asked Jones to point out his understanding of the boundary, there probably would have been no dispute. Obviously good early communication is the best form of negotiation that there is. But, when people lock themselves into a position, as Smith did in laying out the fence line alone, and as Jones did when he saw what he considered to be an invasion of his land, communication becomes more difficult. Positions have been assumed, and they are difficult to abandon.

Once into the controversy, as Jones was, upon seeing the encroachment, communication can make all the difference. If Jones goes to Smith's house, bangs on the door, and screams obscenities, one result is likely. If he knocks, and asks if Smith might come over for a drink to discuss a common problem, and then calmly asks Smith to show him how he arrived at the fence line, another result is probable. Asking why Smith wants the fence, what his goals and objectives (interests) are, before doing anything, will yield even greater gain. Simply finding out that his dogs have given Smith a problem, and offering an apology, may be all that is necessary for Jones to start Smith on the road to an agreement.

To be an effective communicator, one must listen, and listen actively. One must be open to persuasion. In talking, precision is required. Speak to be heard, and then make sure that you are heard. Ask what the other person understands from what you have said. Miscommunication can be as disastrous as no communication.

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9 This can be carried as far as the parties want to and can afford. For example, each could appoint a surveyor, and let the two surveyors select a third to settle any disputes between them. It might be
It is important to recognize the role of feelings in every step of the negotiation process, for feelings are facts that must be dealt with. It is in the communication process, listening and relating, that we can learn of, and tell of, feelings. In all probability, it will be feelings that drive Jones and Smith to the litigation process, more than the stake involved.

**Relationship.** Something that is too easily overlooked in negotiation, whether adversarial or cooperative, is the future relationship of the parties. The relationship that remains after the negotiation may be more important than anything, particularly where people must live side-by-side, continue to work together, or even to be in contact. Can you imaging the problems that Smith and Jones will have if they go through the litigation process described at the beginning of this paper?

Every effort should be made to improve the interaction of the parties. It is important to be hard on the problem, and respectful of the people involved; that is to separate the people from the problem.

**Commitment.** If the parties do reach an agreement, whether it is to build the fence together, or to hire an independent surveyor, they should make clear what each is committing. They should be sure that the commitments are subject to being fulfilled. For example, does Jones have the money to contribute to the construction of the fence; is there an independent surveyor available? They should reduce the agreement to writing, making it operational and compliance prone.

**Conclusion**

There is not one word in this paper that is not a simple statement of common sense. The idea of looking at each of the components of cooperative or principled negotiation (Communication, Interests, Options, Alternatives, Legitimacy, Relationship, and expensive, but not as expensive as litigation.)
Commitments) is hardly controversial. The concepts of communications, including purposeful listening and careful speaking, involve simple acts of common courtesy. This being true, why are there so many disputes that could be resolved by the application of these principles? Possibly the mere act of reciting these common ideas will aid in avoiding disputes and resolving those that come despite best efforts.

Those writing about these subjects, and teaching these principles, have uncovered a simple way of dispute resolution. Try it, and if it works, help spread the word.
Supreme Court of Texas.
Kirk E. Martin and Suzanne K. Martin, Petitioners,
v.
William M. Amerman and Carolyn Frances Amerman, Respondents.

133 S.W.3d 262
(Tex. 2004)

*263 Cathy J. Sheehan, Plunkett & Gibson, Inc., San Antonio, for Amicus Curiae.
Walter D. Snider, Snider & Morgan, L.L.P., Beaumont, for Petitioner.

Justice O'NEILL delivered the opinion of the Court.
In this case we must decide whether a trespass-to-try-title action is the exclusive means to resolve a dispute between neighbors over the proper location of a boundary line separating their properties, or whether a declaratory judgment action is also an appropriate way. We hold that the Texas trespass-to-try-title statute governs the parties' substantive rights in this boundary dispute and that they may not proceed under the Texas Declaratory Judgments Act to recover attorney's fees. Accordingly, we affirm the court of appeals' judgment. 83 S.W.3d 858.

I
This dispute involves locating the proper boundary line between two residential properties in Beaumont, Texas. In 1987, Kirk and Suzanne Martin purchased a home located on a 2.005-acre tract of land. Some six years later, the Martins erected a chain-link fence along what they believed to be their property's eastern boundary next to a wooded area. In 1997, William and Carolyn Amerman purchased their home on a 1.255-acre tract located to the east and around the corner from the Martins. The disputed boundary line forms the eastern edge of the Martin tract and the western edge of the Amerman tract. In 1998, the Amermans tore down the Martins' fence, believing that it illegally encroached on their property.

Although unable to agree on the boundary's location, the parties do agree that their respective chains of title do not conflict. All of the Martin acreage derives from the Crowell/Nelson grant and all of the Amerman acreage derives from the DeVoss/Pye grant. The dispute in this case arises from two conflicting surveys. The Martins' surveyor, Mark Whiteley, surveyed the Martin property in 1993 and set the northeast corner at a one-and-one-half-inch pipe identified in previous surveys as the proper corner location. Gilbert Johnston, the Amerman's surveyor, conducted his survey of the Amerman tract three years later and placed its northwest corner at a five-eighth-inch rod. The surveyors' differing placement of these corners causes the thirty-foot overlap at issue in this case.

The Martins filed suit seeking a judgment declaring the proper boundary line and granting permanent injunctive relief. They also alleged trespass and wrongful encroachment, adverse possession, trespass to try title, boundary by recognition and acquiescence, and an action to quiet title, but ultimately nonsuited all claims except those for declaratory judgment and to remove the cloud on their title caused by the recorded Johnston survey. The Amermans filed a counterclaim for trespass to try title and also sought injunctive relief. Because the parties agreed that ownership of the disputed thirty-foot strip of land depended upon determining the boundary's proper location on the ground, the case was submitted to the jury solely as a boundary dispute.

After hearing testimony about survey methods and the priority placed on different monuments, the jury found that the Martins' surveyor properly placed the boundary and that the Amermans' recorded survey placed a cloud on the Martins' title. The trial court rendered judgment on the jury's verdict and awarded the Martins' attorney's fees pursuant to the Texas Declaratory Judgments Act. See Tex. Civ. Prac. & Rem. Code § 37.009.

The court of appeals affirmed the trial court's judgment in part, but held that, because
the boundary dispute involved title to a strip of land, it was in the nature of a trespass-to-try-title action and must be treated as such. 83 S.W.3d at 664. Because the trespass-to-try-title statute does not provide for the recovery of attorney's fees, the court of appeals reversed the Martins' fee award. Id. This holding directly conflicts with Goebel v. Brandley, 75 S.W.3d 652 (Tex.App. Houston [14th Dist.] 2002, no pet.), in which the court held that a suit to declare a boundary's location may properly be brought as a declaratory judgment action. We granted the Martins' petition for review to resolve this conflict among our courts of appeals.

II

The Texas Property Code provides that "[a] trespass to try title action is the method of determining title to lands, tenements, or other real property." Tex. Prop.Code § 22.001. The Texas Declaratory Judgments Act provides that "[a] person interested under a deed ... may have determined any question of construction or validity arising under the instrument ... and obtain a declaration of rights, status, or other legal relations thereunder." Tex. Civ. Prac. & Rem.Code § 37.004(a). The parties disagree about these statutes' application when the sole question before the court involves determining the proper boundary line between adjoining properties.

We have said that boundary disputes may be tried as trespass-to-try-title actions, but not that they must. Hunt v. Heaton, 643 S.W.2d 677, 679 (Tex.1982); Plumb v. Stuessy, 617 S.W.2d 667, 669 (Tex.1981). We have never considered whether a boundary dispute may also be tried as a declaratory judgment action. These two statutory avenues differ significantly in both their proof elements and the relief they afford.

1 [1] [2] The Declaratory Judgments Act provides an efficient vehicle for parties to seek a declaration of rights under certain instruments, while trespass-to-try-title actions involve detailed pleading and proof requirements. See Tex.R. Civ. P. 783-809. To prevail in a trespass-to-try-title action, a plaintiff must usually (1) prove a regular chain of conveyances from the sovereign, (2) establish superior title out of a common source, (3) prove title by limitations, or (4) prove title by prior possession coupled with proof that possession was not abandoned. Plumb, 617 S.W.2d at 668 (citing Land v. Turner, 377 S.W.2d 181, 183 (Tex.1964)). The pleading rules are detailed and formal, and require a plaintiff to prevail on the superiority of his title, not on the weakness of a defendant's title. Land, 377 S.W.2d at 183.

The trespass-to-try-title statute was originally enacted in 1840 to provide a remedy for resolving title issues. Tex. Prop.Code 22.001(a) ("A trespass to try title action is the method of determining title to lands...."). It also eliminated ejectment actions in Texas, which had traditionally been used to restore possession of property to a person legally entitled to it. See Tex. Prop.Code 22.001; see generally 2 Powell on Real Property 246[3] (1991). The statute is typically used to clear problems in chains of title or to recover possession of land unlawfully withheld from a rightful owner. See Standard Oil Co. of Tex. v. Marshall, 265 F.2d 46, 50 (5th Cir.1959); City of El Paso v. Long, 209 S.W.2d 950, 954 (Tex.Civ.App.El Paso 1947, writ ref'd n.r.e.).

The strict pleading and proof requirements applicable to trespass-to-try-title actions have sometimes produced harsh results. See, e.g., Hunt, 643 S.W.2d at 679 (holding that Hunt's failure to timely file his abstract showing chain of title was fatal to the trespass-to-try-title action he pled whether or not the case turned factually on the question of boundary), Id. at 680 (SONDOCK, J., concurring) (noting the "unnecessary technicalities" of trespass-to-try-title actions). To lessen these harsh effects, the Court has relaxed the trespass-to-try-title actions formal proof requirements when the sole dispute between the parties involves a boundary's location. See Plumb, 617 S.W.2d at 669. In Plumb, we recognized that a boundary dispute may be tried by a statutory action of trespass to try title. Id. (citing Schiele v. Kimball, 113 Tex. 1, 194 S.W. 944 (1917)). In such a case, a recorded deed is sufficient to show an interest in the disputed property without having to prove a formal chain of superior title. See Plumb, 617 S.W.2d at 669; see also Brownlee v. Sexton, 703 S.W.2d 797, 800 (Tex.App. Dallas 1986, writ ref'd n.r.e.); Rocha v. Sexton, 574 S.W.2d 233, 235-36 (Tex.Civ.App. Corpus Christi, 1978,
We articulated a test to determine if a case is one of boundary: "If there would have been no case but for the question of boundary, then the case is necessarily a boundary case even though it may involve questions of title." *Plumb*, 617 S.W.2d at 669. We have never indicated, though, that by lessening the trespass-to-try-title actions more formal proof requirements we intended to make boundary disputes a distinct cause of action. It is over this point that the parties disagree.

The Martins argue that this case does not involve a title dispute as contemplated by the trespass-to-try-title statute because the parties stipulated that their respective chains of title do not overlap. The Martins contend that the court is not determining substantive title rights but is merely declaring the boundary's location between adjoining properties. See *Goebel*, 76 S.W.3d at 656. The Amermans, on the other hand, contend this case is necessarily about title because both parties assert competing claims of ownership to the same thirty-foot strip of land. See *Vanzandt v. Holmes*, 689 S.W.2d 259, 261-62 (Tex.App.Waco 1985, no writ); *Rocha*, 574 S.W.2d at 235. To answer this question, we first examine how the distinction between title and boundary disputes arose.

The distinction between formal trespass-to-try-title actions and disputes involving only a boundary determination was initially drawn as a means to determine whether this Court had subject matter jurisdiction over the case. Before 1929, we had no jurisdiction over appeals involving boundary determinations, but did have jurisdiction over appeals that involved questions of title. Act of Apr. 13, 1892, 22nd Leg., 1st C.S., ch. 15, 1892 Tex. Gen. Laws 25, amended by Act of Mar. 2, 1929, 41st Leg., R.S., ch. 33 § 1, 1929 Tex. Gen. Laws 68. [FN1] In determining the parameters of our jurisdiction, we explained that "[e]very action to try title to land may involve a question of boundary, but ... this did not of itself make a boundary case." *Cox v. Finks*, 91 Tex. 318, 43 S.W. 1, 1 (1897). We concluded that a case was one of boundary if the "whole litigation ... grew out of a question of boundary...." *Id.* at 2. Thus, we initially defined a "boundary case" not for the purpose of creating a separate cause of action but to respect the Legislature's statutory constraints on our jurisdiction. These constraints were abolished in 1929, and the jurisdictional underpinnings of the title/boundary distinction disappeared.

[FN1] The judgment of the courts of civil appeals shall be conclusive in all cases on the facts of the case and a judgment of such courts shall be conclusive on facts and law in the following cases; nor shall a writ of error be allowed thereto from the supreme court, to-wit: ... (2) All cases of boundary. Act of Apr. 13, 1892, 22nd Leg., 1st C.S., ch. 15, 1892 Tex. Gen. Laws 25, amended by Act of Mar. 2, 1929, 41st Leg., R.S., ch. 33 § 1, 1929 Tex. Gen. Laws 68.

The distinction between a title action and a boundary dispute came before the Court in a different context in *Permian Oil Co. v. Smith*, 129 Tex. 413, 107 S.W.2d 564 (1937). There, we were asked to distinguish between title cases and boundary disputes for res judicata purposes. *Permian* concerned two suits between different parties involving the same piece of property. *Id.* at 566. The first suit resolved a boundary question. The parties to the later action claimed that the former boundary suit did not operate as a muniment of title and thus did not bar their subsequent title suit. *Id.* We recognized the longstanding jurisdictional distinction between title actions and boundary disputes, but concluded that this distinction was immaterial for purposes of determining the substantive res judicata question. *Id.* at 568 (noting that previous cases "were undoubtedly influenced by the fact that they were construing the effect of the [jurisdictional] statute"). Without the jurisdictional limitation guiding our analysis, we were unwilling to recognize a distinction between statutory trespass-to-try-title actions and boundary disputes simply because they turned on different evidentiary facts. *Id.* That location of a boundary was the sole issue in the first suit, we held, did not mean that title was not also at issue: The fact that on the trial boundary was the sole controversy controlling title does not keep the former judgment, which disposed of title, from binding the parties and their privies. In trespass to try title determination of the outcome of the suit through the fact

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The fact that on the trial boundary was the sole controversy controlling title does not keep the former judgment, which disposed of title, from binding the parties and their privies. In trespass to try title determination of the outcome of the suit through the fact
of boundary does not alter the cause of action plead [sic] and disposed of by the judgment.

_The same principle was earlier stated in Freeman v. McAninch, where the Court held: [T]he fact that the determination of [title] may have depended on a question of boundary could not change the character of the vital issue in the case, for that was but a question of fact, to be considered like any other fact in determining whether the issue of title to the land should be decided in favor of the one party or the other.... The issue presented by the pleadings, and determined by the judgment, was one of title; and that ... this depended on the fact of true locality of the boundary between the surveys, could not change the character of that issue._

87 Tex. 132, 27 S.W. 97, 98-100 (1894).

Thus, although we have recognized a procedural distinction between trespass-to-try-title actions and boundary disputes for jurisdictional and evidentiary purposes, we have declined to draw a substantive distinction for purposes of determining claim preclusion. As we said in _Freeman_, "[q]uestions of boundary are never the subjects of litigation within themselves, but become so only when some right or title is thought to depend on their determination...._" _Id_. at 98. A boundary determination necessarily involves the question of title, else the parties would gain nothing by the judgment. _Id_. at 99 (stating that "if the issue of title ... was not determined ... it [would be] wholly unimportant where the boundary between the surveys was").

3. For the foregoing reasons, we again decline to recognize a substantive distinction between title and boundary issues, this time for the purpose of allowing alternative relief under the Declaratory Judgments Act. We conclude, as did the court of appeals, that the trespass-to-try-title statute governs the parties' substantive claims in this case. The statute expressly provides that it is _the_ method for determining title to ... real property._ Tex. Prop.Code 22.001(a) (emphasis added); see _Ely v. Briley_, 959 S.W.2d 723, 727 (Tex.App.Austin 1998, no pet.); _Kennesaw Life & Accid. Ins. Co. v. Goss_, 694 S.W.2d 115, 118 (Tex.App. Houston [14th Dist.] 1985, writ ref'd n.r.e.). Accordingly, the Martins may not proceed alternatively under the Declaratory Judgments Act to recover their attorney's fees.

The Martins rely on language in _Brainard v. State_, 12 S.W.3d 6 (Tex.1999), to support their argument that a declaratory judgment action is a viable method to resolve a boundary dispute. In _Brainard_, we were called upon to determine a boundary line as described by conflicting surveys. _Id_. at 12. We held that an award of attorneys fees was not appropriate because the suit arose out of a specific legislative resolution granting permission to sue the State, and that permission did not provide for a fee award. _Id_. at 29. We noted, however, that "a [declaratory judgment] is certainly one way to resolve a *268 boundary dispute...." _Id_. This statement, which was clearly dicta, has understandably generated confusion among our courts of appeals. Compare _Goebel_, 76 S.W.3d at 655-56 with _Amerman_, 83 S.W.3d at 863-64. More recently, in a case involving determination of a shoreline boundary, we properly termed the issue one of title and rejected the notion that declaratory relief was also available under the Declaratory Judgments Act:

[T]he dispute in the present case is over title, not an enactment, and the Foundation's claim for declaratory relief [locating the shoreline boundary] is merely incidental to the title issues. In such circumstances, the Act does not authorize an award of attorney fees against the State.

_John G. & Marie Stella Kenedy Mem'l Found. v. Dewhurst_, 90 S.W.3d 268, 289 (Tex.2002). We disapprove our statement to the contrary, albeit dicta, in _Brainard_, 12 S.W.3d at 29. To the extent our courts of appeals have expressed a different view, we disapprove of those decisions. See _Goebel_, 76 S.W.3d 652; see also _Tarrant County v. Denton County_, 87 S.W.3d 159 (Tex.App. Fort Worth 2002, pet. denied) (allowing boundary suits to be tried as declaratory-judgment actions without deciding the issue);
III

[6] The Amermans, as cross-petitioners, contend that the trial court erred by failing to submit the case to the jury in the formal manner that traditional trespass-to-try-title claims require. The court of appeals concluded that the Amermans waived this point, and we agree. 83 S.W.3d at 861. Moreover, as we have said, the trespass-to-try-title action's more formal proof requirements do not apply in boundary disputes when there would have been no case but for the question of boundary. Plumb, 617 S.W.2d at 669. The Amermans further contend that the evidence is legally insufficient to support the jury's determination that the proper boundary line was that set by the Martins surveyor. We disagree, for the reasons the court of appeals expressed. 83 S.W.3d at 862-63.

IV

For the foregoing reasons, we affirm the court of appeals' judgment. 83 S.W.3d 858. Tex.,2004.

Martin v. Amerman

133 S.W.3d 262, 47 Tex. Sup. Ct. J. 285
Negotiation and Mediation Reading List
Complied by Prof. L. Wayne Scott

Negotiation Skills

Frank L. Acuff, *Shake Hands With the Devil: How To Master Life’s Negotiations From Hell* (2001)

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The date given for each book is the date of the book that I have. Later, or revised editions, of the same book are acceptable.

**International Negotiation**

Roger Fisher, Andrea Kupfer Schneider, Elizabeth Borgwardt, and Brian Ganson, *COPING WITH INTERNATIONAL CONFLICT (A SYSTEMATIC APPROACH TO INFLUENCE IN INTERNATIONAL NEGOTIATION)* (1997).


**People Skills**

Phyllis Bernard and Bryant Garth (Editors), *DISPUTE RESOLUTION ETHICS, A COMPREHENSIVE GUIDE* (2002).
Lucy Gill, *HOW TO WORK WITH JUST ABOUT ANYBODY: A 3-STEP SOLUTION FOR GETTING PEOPLE TO CHANGE* (1999).
Sam Horn, *Tongue Fu! How to Deflect, Disarm, and Defuse Any Verbal Conflict* (1996).

23

**Conflict Resolution Theory**

David A. Anderson (Editor), *Dispute Resolution: Bridging the Settlement Gap* (1996)

Steven J. Brams and Alan D. Taylor, *Fair Division from Cake-Cutting to Dispute Resolution* (1996).


James Miller, *Game Theory at Work—How to Use Game Theory to Outthink and Outmaneuver Your Competition* (2003).


Lawrence Susskind, Jeffrey Cruikshank, *Breaking the Impasse, Consensual Approaches*
TO RESOLVING PUBLIC DISPUTES (1987).

Mediation Skills

Ken Cloke, Mediation - REVENGE AND THE MAGIC OF FORGIVENESS.
Dwight Golann and Jay Folberg, MEDIATION (2006).
Freya Ottem Hanson and Terje C. Hausken, MEDIATION FOR TROUBLED MARRIAGES (1989).
Deborah M. Kolb and Associates, WHEN TALK WORKS, PROFILES OF MEDIATORS.
Dr. Beverly Potter, FROM CONFLICT TO COOPERATION; HOW TO MEDIATE A DISPUTE (1994).
Karl A. Slaikeu, WHEN PUSH COMES TO SHOVE (1996).
Lawrence Susskind and Jeffrey Cruikshank, BREAKING THE IMPASSE (1987).
E. Wendy Trachte-Huber and Stephen K. Huber, MEDIATION AND NEGOTIATION: REACHING IN LAW AND BUSINESS (2001). [Counts as two books.]

Conflict Resolution Systems


Miscellaneous

Brad Blanton, PRACTICING RADICAL HONESTY (2000).
Susan Bixler and Lisa Scherrer Dugan, 5 STEPS TO PROFESSIONAL PRESENCE (2001).
Donald G Brennan, ARMS CONTROL, DISARMAMENT, AND NATIONAL SECURITY (1961).


Stephen M. R. Covey, with Rebecca R. Merrill, *The Speed Of Trust: The One Thing That Changes Everything* (2006).


Joshua Cooper Ramo, *The Age Of The Unthinkable* (2009).

Roger von Oech, *Expect the Unexpected (Or You Won't Find It)* (2001).
The Ethics of Conflict
Hints for the Peaceful Resolution of Disputes
Prof. L. Wayne Scott
Director of Conflict Resolution Studies
St. Mary's University School of Law

Introduction
• Don't be frightened by the title!
• This is not going to be a sermon on ethics, but a series of suggestions for the combination of a number of simple skills to allow for the successful negotiation of any problem, whether simple or complex.

Definitions
• Some definitions:
  – "Ethical," as used in the context of negotiation, refers to "Being in accordance with the accepted principles of right and wrong that govern the conduct of a profession." To "negotiate" is "to confer with another or others in order to come to terms or reach an agreement. . . . to arrange or settle by discussion and mutual agreement. . . ."
Definitions

• To negotiate ethically, then, is to conduct a principled negotiation. This can be contrasted with "positional bargaining." To "bargain" is to negotiate the terms of an agreement, as to sell or exchange. "Position", as used here, means "A point of view or attitude on a certain question ...." To bargain from a position is then, to bargain from one's own point of view or attitude.

Think Win/Win

• Those advocating principled or ethical negotiation ask the simple question: Do you always benefit the most by always attempting to win?
• The principled negotiator aims for a win/win situation.

Persuasion v. Cooperation

• Most writings on negotiation emphasize the importance of persuasion. Principled, cooperative, or ethical negotiation, however, does not address persuasion, in the sense of one person convincing another of the correction of his/her point of view. Rather the emphasis is on persuading people to treat each other "...with greater respect, understanding, caring, and fairness."
Alternative to Cooperation

- The alternative to an ethical approach – as it was and, often, is:
  - Naming; blaming; claiming.
  - Stating and restating positions until an agreement is reached – or not.
  - Don’t worry about the other side – protect yourself.
  - The goal is to win as much as possible! Win/lose is preferred.

An Example

- AN EXAMPLE to work from:
  - The fence line dispute.
- How Many Ways Are There To Resolve A Dispute Or Reach An Agreement?
  - A. The Litigation Scenario.
  - B. The Principled Negotiation Alternative.

A Simple Negotiation Formula

- A better way can be found by studying the entire concept of negotiations from the beginning.
- At the beginning, consider the following formula:
  - Prepare - The key to success!
  - Discuss- listen - The overlooked skill.
  - Propose - Anchor.
  - Bargain – “If, then…”
  - Think in terms of value to the other side.
A. Negotiation.

- The basic purpose of negotiation is to reach an agreement, which will avoid or settle a conflict.

- This goal cannot be accomplished without recognizing that to reach an agreement, all parties to the negotiation must agree to the resulting agreement.

B. All Interests Must Be Satisfied.

• One cannot reach an agreement without satisfying the interests of all others to the agreement.

• Mistreatment, belittlement, chastisement, or embarrassment of the opponent will not, usually, aid in reaching a negotiated settlement.

C. Be Proactive.

• Negotiators must realize that the only person that they can control is themselves.

• They must learn to be proactive and not reactive.
D. Begin with the End in Mind.

- Have a negotiation plan in mind, and stick to it, unless new information requires an adjustment.

E. Think Win-Win.

- 1. Win/Win
- 2. Win/Lose
- 3. Lose/Win
- 4. Lose/Lose
- 5. Win
- 6. Win/Win or No Deal

F. Prepare Your Side and Theirs

- The negotiator must consider
  - Interests
  - Options
  - Alternatives
  - Standards
  - Relationships
  - Communications
  - Commitment
G. Prepare Your Side and Theirs

- Additionally, the negotiator must prioritize the interest and options for themselves and for all other parties, in case "horse trading" is required.

Styles of Negotiation.

- A. The Value Claimer,
  - also known as the competitive bargainer,
  - the distributive bargainer,
  - or the adversarial bargainer
- seeks to gain the most possible for himself/herself, at the expense of others involved in the negotiation.

Styles of Negotiation.

- B. The Cooperative Bargainer,
  - also known as the problem-solving or ethical bargainer,
  - attempts to meet the needs of both parties, and looks for ways to expand the bargaining zone.
Styles of Negotiation.

- The Cooperative Bargainer:
  1. Cooperative bargaining is most beneficial in commercial, family, and general negotiations, particularly where the establishment or continuation of on-going relations is important.
  2. Dangerous when used blindly with a value claimer.

- The Cautious Cooperative Negotiator is a cooperative bargainer, fully trained as a value claimer, but recognizes that cooperation is a better way to negotiate.

- Once a surplus has been created, the cautious cooperative negotiator will:
  1. use standards of legitimacy to distribute the surplus. This is the ideal or ethical method employed to continue or establish relationships.
  2. use value claiming tactics to claim a larger share of the surplus created through cooperation. These are frequently known as very good "horse traders."
Styles of Negotiation.

• D. Understanding the Contentiousness Negotiation.
  - Self-Perception. We have a population of tit-for-tat negotiators. Each cooperates until the other side defects and then retaliates.
  - Echoes. (When a single defection can set off a long string of recriminations and counter-recriminations, both sides suffer.)
  - Noise. Negotiation is "noisy."

Negotiation Goals.

• A. Establishing the Possibility of a Settlement.
  • 1. The exchange of information.
  • 2. Creating an atmosphere for negotiation

Negotiation Goals.

• B. Seek to satisfy your interests well, and the interests of the other party adequately.
Negotiation Strategies.

1. Don’t Assume That Because “They” Win, “You Lose.”
   a. A distributive bargaining situation may be an exception.
   b. Integrative bargaining. There are usually ways to structure solutions that benefit all negotiators.

Negotiation Strategies.

2. Don’t commit to anything until a complete agreement has been reached.

   - Use a “single-text” approach to negotiation.

Negotiation Strategies.

3. Look for Essential Differences.
   b. Search for interests. Ask “what” and “why” questions. If those don’t work, ask “why not” questions. Then ask questions that cause the other party to prioritize their interests with questions such as “what if” “where” or “when.”
Negotiation Strategies.

- 3. Look for essential differences:
  - c. Differences in risk preference.
  - d. Differences in time preferences.
  - e. Differences in capabilities can be combined.
  - f. Reveal your own interests and preferences.
  - g. Take advantage of the reciprocity norm.

Negotiation Goals.

- Avoid Adverse Selection. The problem of adverse selection stems from the fact that sellers usually have more information about the quality of their wares than do potential buyers. **Solution:** add an issue that will have great value to the buyer, because it limits the buyer's adverse selection risk, but will have a minimal cost to the seller, because the warranty will not likely be invoked.

Negotiation Goals.

- Moral Hazard. The problem of moral hazard arises when the seller's actions, after an agreement has been reached, can affect the value of the subject of the negotiation. The solution: structure an agreement that makes compensation dependent upon performance.
  - Don't assume you are finished when you have an agreement.
### Negotiation Techniques - People Skills

**A. Fundamental techniques in handling people.**

1. Don’t criticize, condemn or complain.
2. Give honest, sincere appreciation.
3. Talk about what they want and show them how to get it. Build a “golden bridge.”

### V. Negotiation Techniques - People Skills

**B. Six Ways To Make People Like You**

1. Become *genuinely interested* in other people.
2. *Smile.*
3. Remember the other person’s *name.*

### V. Negotiation Techniques - People Skills

4. Be a *good listener.* *Seek First to Understand, Then to be Understood.*

5. Talk in terms of the *other person’s interests.*

6. Make the *other person feel important*—and do it sincerely.
V. Negotiation Techniques – People Skills

- C. How To Win People To Your Way of Thinking
  - Avoid Arguments.
  - 1. Show respect for the other person’s opinions. Never say, "You’re wrong."
  - 2. If you are wrong, admit it quickly and emphatically.

- 4. Get the other person saying “yes, yes” immediately.
- 5. Let the other person feel that the idea is his or hers.
- 6. Try honestly to see things from the other person’s point of view.
- 7. “Be sympathetic with the other person’s ideas and desires.”

- 8. Appeal to the nobler motives.
- 9. Dramatize your ideas.
- 10. Throw down a challenge.
Attempt to Make Mutually Beneficial Agreements.

- Use standards and "what is right" as the basis of reaching an agreement.

Establishing Your Opening Offer.
- 1. Who should make the opening offer?
  - a. The advantages of you making the opening offer.
    - 1) Setting the tone.
    - 2) Goals vs. Bottom Lines and Reservation Prices.
    - 3) BATNA/WATNA.
    - 4) Standards.
    - 5) Anchoring.

Calculating Your RP

- CALCULATING RESERVATION PRICES: A PRESCRIPTIVE APPROACH.
  - 1. Alternatives,
  - 2. Preferences
  - 3. Probabilities of Future Events.
  - 5. Transaction Costs.
  - 7. Effect on Future Opportunities.

Attempt to Make Mutually Beneficial Agreements.

- 1. Who should make the opening offer?
  - b. The risk of making the opening offer.
    - 1) Lack of information.
    - 2) Danger of over-informing the opponent.
    - 3) The self-serving bias.
    - 4) Reactive devaluation.
    - 5) Spite.
Negotiation Techniques – Strategies.

• A. THE COMPETITIVE PHASE
  – 3. Threats and Promises.

Negotiation Techniques – Strategies.

• A. THE COMPETITIVE PHASE
  – 10. Settlement Brochures and Video Presentations.

Negotiation Techniques – Strategies.

• A. THE COMPETITIVE PHASE
  • 11. Avoid Boulwareism. F. F. F. O.
    – a. First, it is paternalistic.
    – b. Second, it denies the parties the opportunity to participate.
    – c. Third, it denies the opponent the opportunity to feel that they have had any input.
    – d. Fourth, it may give the opponent an expectation of greater gain.
    – e. Evaluate such a proposal on its merits. See if it satisfies your interests.
Negotiation Techniques - Strategies.

A. THE COMPETITIVE PHASE
- 12. Salami.
- 14. Mutt and Jeff.
- 17. "Logrolling."

B. Power Negotiation.
- 1. Never Say "Yes" to the First Offer.
- 2. Flinch.
- 3. Avoid Confrontation.
- 4. Play the Reluctant Buyer or Seller.
- 5. Don't Worry about Price.
- 6. Don't Split the Difference.
- 7. Set It Aside.
- 8. The Art of Concession.
Negotiation Techniques – Strategies.

B. Power Negotiation.

11. The Most Dangerous Moment. When you think you have an agreement, watch out for the “nibble technique.”

12. Your Most Powerful Weapons. “Learn to develop walk-away power.”
   a. Preparation.
   b. Cooperation:

Negotiation Ethics.

A. Questions Concerning the Ethical Floor for the Conduct of Responsible Negotiator.

- What acts or omissions amount to fraud and are therefore illegal?

B. Questions a Conscientious Negotiator Will Also Ask

- 1. Even if my behavior is above this floor, is the conduct worth the risk, in light of my reputation and other pragmatic interests?

- 2. Is this conduct consistent with my own moral aspirations?
Negotiation Ethics.

- **C. The Disclosure Continuum**
  - Full, open truthful disclosure of all information.
  - Nondisclosure of material information.
  - Nondisclosure when the other side has erroneous assumptions
  - Misleading statements about material issues.
  - Intentional false statements about material facts or law.

Negotiation Ethics.

- **D. Hypothetical Question:** You have a car that runs, but is beginning to burn a quart of oil every five hundred miles. You have not had the engine checked, and do not know the cost of repairing any problem that might exist. You want to sell the car.
  1. What should you, or must you, disclose to a prospective buyer?
  2. Voluntarily Disclose the Oil Problem to the Buyer?
  3. What if you say nothing?
  4. What if you say nothing and the buyer says: "Gee, the car runs great and doesn't seem to have any problems at all. I'm looking for something that's trouble-free."

Negotiation Ethics.

2. Can you say any of the following?
- "I love this car."
- "It's been a great car. Except for ordinary maintenance, I have never had to spend a dollar on repairs. These Toyotas are really built to last, and this car has only 95,000 miles."
- **3. What if the buyer asks: "Is there anything wrong with this car?"** Can you reply: **"Nope. Absolutely nothing wrong. Runs like a charm. And there are no signs of trouble.**
Negotiation Ethics.

• Nondisclosure when the other side has erroneous assumptions
• Misleading statements about material issues.
• Intentional false statements about material facts or law.

Negotiation Ethics For Attorneys.

• 2. Lying [4.01(a)]
  - Lying is not allowed about material facts.
  - What is a material fact?
  - Is an opinion a material fact?
  - Is a lie about an alternative a material fact?
  - There are two exceptions about non-material statements recognized by the comments to 4.01:
    - Estimates of price or value placed on the subject of a transaction.
    - A party’s intentions as to an acceptable settlement of a claim.

Negotiation Ethics For Attorneys.

• 3. Nondisclosure [4.01(b)]:
  - 1. Buyer Beware
  - 2. Fiduciary Duty
  - 3. Partial Disclosure
  - 4. Fraud law
  - 5. Duty to Withdraw.
4. **Rule 1.02 Scope and Objectives of Representation**
   - (a) Subject to paragraphs (b), (c), (d), and (e), a lawyer shall abide by a client's decisions.
   - (b) Whether to accept an offer of settlement of a matter, except as otherwise authorized by law.

5. **Rule 1.03 Communication**
   - (a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.
   - (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

6. **Misrepresentation**
   - a. Restatement (Second of Torts) (1977):
     - §525. Liability for Fraudulent Misrepresentation:
       - One who fraudulently makes a misrepresentation of fact, opinion, intention or law for the purpose of inducing another to act or to refrain from action in reliance upon it, is subject to liability to the other in deceit for pecuniary loss caused to him by his justifiable reliance upon the misrepresentation.
Negotiation Ethics For Attorneys.

- Restatement (Second) of Contracts (1981):
  - b. § 164. When A Misrepresentation Makes A Contract Voidable:
    - 1. If a party's manifestation of assent is induced by either a fraudulent or a material misrepresentation by the other party upon which the recipient is justified in relying, the contract is voidable by the recipient.

Negotiation Ethics For Attorneys.

- 7. HOW MUCH DO I HAVE TO TELL MY CLIENT?
  - a. Must I communicate an offer?
    - Written – Definitely
      - Oral – Do it!
  - b. Must I communicate strategy or tactics?
    - No Questions – Maybe not.
      - Questions – Definitely.

Negotiation Ethics For Attorneys.

- Misrepresentation
  - 1. Restatement (Second of Torts) (1977):
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      - One who fraudulently makes a misrepresentation of fact, opinion, intention or law for the purpose of inducing another to act or to refrain from action in reliance upon it, is subject to liability to the other in deceit for pecuniary loss caused to him by his justifiable reliance upon the misrepresentation.
Negotiation Ethics for Attorneys

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  - b. § 164. When a Misrepresentation Makes a Contract Voidable:
    - 1. If a party's manifestation of assent is induced by either a fraudulent or a material misrepresentation by the other party upon which the recipient is justified in relying, the contract is voidable by the recipient.

Negotiation Ethics For Attorneys.

- Restatement (Second) of Agency (1958):
  - An agent who fraudulently makes representations, uses duress, or knowingly assists in the commission of tortious fraud or duress by his principal or by others is subject to liability in tort to the injured person although the fraud or duress occurs in a transaction on behalf of the principal.

Negotiation Ethics For Attorneys.

- ABA, Model Rules of Professional Conduct (2001):
  - 1. Rule 4.1 - Truthfulness in Statements to Others
    - In the course of representing a client a lawyer shall not knowingly:
      - (a) make a false statement of material fact or law to a third person....
Negotiation Ethics For Attorneys.

• Comment

• Misrepresentation

There is no affirmative duty to inform an opposing party of relevant facts.

Misrepresentation is a misrepresentation if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by failure to act.

• Statement of Facts

• Estimates of price or value placed on the subject of a transaction and a party’s intentions as to an acceptable settlement of a claim are ordinarily not taken as statement of material fact.

• The existence of an undisclosed principle is not ordinarily taken as a statement of material fact, except where nondisclosure of the principle would constitute fraud.

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Negotiation Ethics For Attorneys.

• When Nondisclosure Constitutes Misrepresentation.

• a. Concealment. Nondisclosure is treated as misrepresentation when the nondisclosing party actively conceals a material fact from a negotiating opponent or tells a partial truth that implies a falsehood.

• b. Silence. When a negotiator is merely silent as to the existence of a material fact that, if know, would weaken his/her bargaining position, however, there is no bright-line rule that can reliably divide actionable from nonactionable nondisclosure.

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Negotiation Ethics For Attorneys.

• Disclosure. Disclosure of material facts is required when the negotiator has a fiduciary-type relationship of trust with the opponent, or when disclosure is necessary to prevent a previous statement from being false (for example, when a lawyer acquires new information inconsistent with a previous assertion) and also in the apparently broad set of circumstances in which standards of fair dealing require disclosure.
Negotiation Ethics For Attorneys.

- **Unilateral Mistake.** Under contract law, a contract can be rescinded if one party is mistaken as to a basic assumption that has a material effect on the transaction, if the other party knows of the mistake and the first party does not bear the risk of such a mistake. A party is considered to bear the risk of a mistake if he agrees to bear the risk or if he enters the agreement knowing that his knowledge is incomplete or uncertain.

Glossary of Terms

- **Glossary**

Preparation

- **Preparation.**
  - a. **Internal Preparation.** Look for interests/needs, options, and alternative (including BATNA) of the negotiator.
  - b. **External Preparation.** Look for interests/needs, options, and alternative (including BATNA) of the other negotiator.
  - c. **Synthesis.** Look for common ground, and strategize. Remember that the interests/needs of the other party must be satisfied, before an agreement can be reached.
Strategic Barriers

- Strategic Barriers.

- Information asymmetry: the possession by each negotiator of some information that the other does not have. This allows the parties to bluff and lie about their interests and preferences.

- Strategic behavior aimed at maximizing the size of the party's own "slice" of the "pie." These are claiming tactics, and may result in claiming tactics by the other side, thus pushing up the cost of the agreement.

Cognitive Barriers

- Cognitive Barriers.

- Risk Aversion: Most people will take a sure thing over a gamble, even where the gamble may have a somewhat higher "expected" payoff. The proportion of people who will gamble to avoid a loss is much greater than those who would gamble to realize a gain.

- Loss aversion: In order to avoid what would otherwise be a sure loss, many people will gamble, even if the expected loss from the gamble is larger.

Reservation Price and Zones

- Reservation point/price: In any negotiation, the maximum amount that a buyer will pay (or the seller will take) for a good, service, or other legal entitlement is called his/her "reservation point" or, if the deal being negotiated is a monetary transaction, his/her "reservation price" (RP).

- Bargaining zone: If the buyer's RP is higher than the seller's RP, the distance between the two points is called the "bargaining zone." (An agreement for an amount within the zone is superior to no agreement.) It is sometimes referred to as the ZOPA (Zone of Possible Agreement).
Power of Aspirations

- **ASPIRATIONS**: Individuals usually obtain better bargaining outcomes if they begin an endeavor with a specific, concrete aspiration rather than a more ambiguous “do your best” aspiration.
- **How Should Negotiators Determine Their Aspirations?** One approach is to set the aspiration level at the estimate of the opponent’s reservation point.

Self-Serving Bias

- **Self-Serving Bias**: Evidence of the “self-serving bias” (or egocentric bias) suggests that, on average, decision makers will make optimistic predictions about the likelihood of future events. In other words, people tend to make judgments skewed in favor of their own self-interest.

Anchoring

- **Anchoring**: Negotiators are often unduly influenced by the initial figure they encounter when estimating the value of an item. Opening offers anchor the expectations and willingness of the other negotiator(s) expectations and willingness to accept a final settlement offer. Additionally, the opening offer serves to frame the negotiation.
Reactive Devaluation

- Reactive Devaluation. A negotiated agreement may be of less value to a negotiator than it would otherwise be merely because his opponent proposed it.

Loss Aversion

- Prospect Theory And Reference Point Effects.
- Loss aversion: In order to avoid what would otherwise be a sure loss, many people will gamble, even if the expected loss from the gamble is larger. Both sides may fight on in a dispute in the hope that they may avoid any losses, even though the continuation of the dispute involves a gamble in which the loss may end up being far greater.

Economic & Prospect Theories

- Economic theory predicts that rational negotiators will be risk adverse.
- Prospect theory predicts that in the usual case decision makers will exhibit risk seeking tendencies when choosing between certain and probabilistic losses—they will prefer a probabilistic loss to a certain loss when the two have the same expected value.
Framing Effect

- The framing effect: This prediction of prospect theory—that individuals will prefer certain alternatives to risky ones in the realm of gains, but will prefer risky alternatives to certain ones in the realm of losses—is often known as the "framing" effect.
- The framing effect implies that when a negotiated agreement would lead to a certain outcome, but the negotiator's BATNA will lead to a probabilistic outcome (or vice versa), the negotiator's reservation price will depend on whether he/she views the alternatives as "gains" or as "losses."

Framing – Another Version

- Framing (another way of looking at it): How we ask a question may effect the answer to the question: E.g. "May I smoke while I pray?" vs. "May I pray while I smoke?"

Status Quo Bias

- Status Quo Bias: All other things equal, individuals on average tend to prefer an option if it is consistent with the status quo than if it requires a change from the status quo.
- Selective perception: Thoreau: "We see only the world we look for."
Bias/Consensus Error

• Confirmation bias: We give credit to information that agrees with our already formed beliefs and desires.

• Consensus error: We tend to think that others think as we do, and have the same values that we have.

Naïve Realism

• Naïve realism: We see the word in the way it really is, and anyone seeing it differently is naïve.

Log Rolling

• "Logrolling" is a term often used to describe the practice of two or more legislators trading votes on bills that are of little importance to them in return for votes on bills that are very important to them. [Example: Public transportation bill and farm subsidy bill.] Conceptually, logrolling is just a slightly different perspective on the strategy of adding and subtracting issues.
Adverse Selection

- Adverse Selection. The problem of adverse selection stems from the fact that sellers usually have more information about the quality of their wares than do potential buyers. If the goods are high-quality, value can be created by the seller insuring the quality of the goods in some way, often by providing a warranty. This expands the bargaining zone by adding an issue that typically will have great value to the buyer, because it limits the buyer's adverse selection risk, but will usually have only a minimal cost to the seller, because he/she knows the goods are high quality and the warranty will not likely be invoked.

Moral Hazard

- Moral Hazard. The problem of moral hazard arises when the seller's actions after an agreement has been reached can affect the value of the subject of the negotiation. The solution is to structure an agreement that compensation is dependent upon performance.

Reciprocity Norm

- The Reciprocity Norm: Why doesn't a buyer usually begin negotiations by stating his best offer or the seller the lowest demand? Social convention demands reciprocity. If one person gives something of value to another, we usually expect that the recipient will reciprocate in some way. When people demonstrate reciprocity, they satisfy social convention.
  - Corollary Rule — The effect of concessions. Another consequence of the rule is an obligation to make a concession to someone who has made a concession to us.
Reciprocity Norm Explained

- How the reciprocation rule works: The reciprocation rule brings about mutual concession in two ways:
  - 1. It pressures the recipient of an already-made concession to respond in kind.
  - 2. Because of a recipient's obligation to reciprocate, people are freed to make the initial concession and, thereby, to begin the beneficial process of exchange.

Boulwarism

*Boulwarism*: The concept of a first, firm, fair, final offer made by the offer, who then refuses to negotiate further. This is the negotiation tactic of refusing to revisit an initial offer. While it may work in consumer transactions, if reciprocity is expected, it can prevent a successful negotiation.
The Disclosure Continuum

| Full, open truthful disclosure of all information. | Nondisclosure of material information. | Nondisclosure when the other side has erroneous assumptions | Misleading statements about material issues. | Intentional false statements about material facts or law. |