REVIEW ESSAY

Using *Bargaining for Advantage* in Law School Negotiation Courses

BARGAINING FOR ADVANTAGE: NEGOTIATION STRATEGIES FOR REASONABLE PEOPLE. By G. Richard Shell. New York: Viking, 1999. Pp. xvi, 286. $24.95.

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Options, options, options . . . .

The Negotiation literature—at least the "problem-solving" or "interest-based" or "principled" negotiation literature[1]repeats this mantra over and over and over.[2] It seems self-evident that having lots of options is a good idea because more options means more to choose from. The more options there are to choose from, however, the more difficult choosing can be. Options, in short, may increase the likelihood that one will make an optimal decision,[3] but they impose added "decision costs" on the decision maker.

Law professors now face this happy dilemma when choosing materials for their Negotiation courses. Options abound—including the negotiation chapters in dispute resolution casebooks,[4] negotiation books written for legal

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[1] *E.g.*, ROGER FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN (Bruce Patton ed., 2d ed. 1991); *see* RICHARD E. WALTON & ROBERT B. MCKERSIE, A BEHAVIORAL THEORY OF LABOR NEGOTIATIONS: AN ANALYSIS OF A SOCIAL INTERACTION SYSTEM 126–83 (1965); Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754, 758 (1984).

[2] FISHER & URY, *supra* note 1, at 56–80; WALTON & MCKERSIE, *supra* note 1, at 148–53; Menkel-Meadow, *supra* note 1, at 801–17.

[3] *Contra* Mark Kelman et al., *Context-Dependence in Legal Decision Making*, 25 J. LEGAL STUD. 287, 287 (1996) (demonstrating that the presence of additional options can impede economically rational decision making).

[4] *E.g.*, EDWARD BRUNET & CHARLES B. CRAVER, ALTERNATIVE DISPUTE RESOLUTION: THE ADVOCATE'S PERSPECTIVE: CASES AND MATERIALS 27–183 (1997); STEPHEN B. GOLDBERG ET AL., DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES 17–102 (2d ed. 1992); JOHN S. MURRAY ET AL., PROCESSES OF DISPUTE

audiences,[5] negotiation books written for non-legal audiences,[6] and a number of good articles[7]—but choosing among them is no easy matter.

Richard Shell—a Professor of Legal Studies at the Wharton School of Business—has made this task even more difficult with the publication of his important book, *Bargaining for Advantage: Negotiation Strategies for Reasonable People*.[8] Such luminaries in the negotiation field as Max Bazerman (Kellogg Graduate School of Business), Rod Kramer (Stanford Business School), Howard Raiffa (Harvard Business School), and Larry Susskind (MIT Public Policy) have enthusiastically endorsed the book.[9] Noticeably absent, however, is any commentary from the legal academy about the book's value to law students and lawyers.[10]

This review essay seeks to fill that void. My modest aim is to help law professors decide whether *Bargaining for Advantage* is worth adopting in whole or part in their Negotiation courses. In other words, I hope to play some small role in helping Negotiation teachers in law schools make optimal adoption decisions (at least with respect to this book) while minimizing the

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RESOLUTION: THE ROLE OF LAWYERS 73–292 (2d ed. 1996); LEONARD L. RISKIN & JAMES E. WESTBROOK, DISPUTE RESOLUTION AND LAWYERS 148–311 (2d ed. 1997).

[5] *E.g.*, CHARLES B. CRAVER, EFFECTIVE LEGAL NEGOTIATION AND SETTLEMENT (2d ed. 1993); DONALD G. GIFFORD, LEGAL NEGOTIATION: THEORY AND APPLICATIONS (1989); THOMAS F. GUERNSEY, A PRACTICAL GUIDE TO NEGOTIATION (1996); ROBERT H. MNOOKIN ET AL., BEYOND WINNING: HOW LAWYERS HELP CLIENTS CREATE VALUE IN NEGOTIATION (forthcoming 2000).

[6] *E.g.*, MAX H. BAZERMAN & MARGARET A. NEALE, NEGOTIATING RATIONALLY (1992); FISHER ET AL., *supra* note 1; DAVID A. LAX & JAMES K. SEBENIUS, THE MANAGER AS NEGOTIATOR: BARGAINING FOR COOPERATION AND COMPETITIVE GAIN (1986); ROY J. LEWICKI ET AL., NEGOTIATION (2d ed. 1994); HOWARD RAIFFA, THE ART AND SCIENCE OF NEGOTIATION (1982); LEIGH L. THOMPSON, THE MIND AND HEART OF THE NEGOTIATOR (1998).

[7] *E.g.*, Jennifer Gerarda Brown, *The Role of Hope in Negotiation*, 44 UCLA L. REV. 1661 (1997); Donald G. Gifford, *A Context-Based Theory of Strategy Selection in Legal Negotiation*, 46 OHIO ST. L.J. 41 (1985); Russell Korobkin, *A Positive Theory of Legal Negotiation*, 88 GEO. L.J. 1789 (2000); Gerald B. Wetlaufer, *The Limits of Integrative Bargaining*, 85 GEO. L.J. 369 (1996).

[8] G. RICHARD SHELL (1999).

[9] Bazerman, Raiffa, and Susskind provided advance commentary on *Bargaining for Advantage*, while Kramer praised its virtues in a recent *Negotiation Journal* review. Roderick M. Kramer, *Troubled Talk and Talking Cures: From 'Smart Talk' to Wise Conversations*, 16 NEGOT. J. 143, 147–49 (2000).

[10] While this review was being edited, *The Harvard Negotiation Law Review* published a short review of Shell's book. John Richardson, *A Review of Bargaining for Advantage*, 5 HARV. NEGOT. L. REV. 399 (2000). Though published in *The Harvard Negotiation Law Review*, Richardson's review is not specifically targeted at law students, law professors, or practicing lawyers.

decision costs of doing so. To that end, I provide a brief synopsis of *Bargaining for Advantage*, identify its primary pedagogical strengths (and one significant weakness), and conclude by explaining how I use the book in my Negotiation course.

I. OVERVIEW OF *BARGAINING FOR ADVANTAGE*

Negotiation is an inherently interdisciplinary enterprise.[11] No negotiation teacher can teach the course without relying, even if only implicitly, on such disciplines as Economics and Psychology. Given the interdisciplinary nature of the subject, Richard Shell is the ideal author of a book on negotiation because he is a lawyer with expertise in social psychology who teaches in a leading business school. As a member of the Legal Studies Department of the Wharton School, Shell has developed a reputation as a "star teacher" of undergraduates, MBA students, and business executives and he has written a number of important articles on negotiation and related topics.[12]

Consistent with his background, Shell has written an overtly interdisciplinary negotiation text that bridges the gap between the popular "how to" negotiation books on the one hand and the rich, but largely inaccessible, body of negotiation scholarship on the other.[13] Using the common sense that informs the former and the theoretical and empirical insights which inform the latter, Shell proposes a "situational" approach to negotiation[14] which he labels "information-based bargaining" (IBB).[15] Shell devotes the first half of his book to the six "foundations" of IBB and the latter half to the negotiation process.

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[11] Robert H. Mnookin & Lee Ross, *Introduction* to BARRIERS TO CONFLICT RESOLUTION 24 (Kenneth Arrow et al. eds., 1995) (noting the "inherently interdisciplinary nature of the field of dispute resolution").

[12] *E.g.*, Arvind Rangaswamy & G. Richard Shell, *Using Computers to Achieve Joint Gains in Negotiation: Toward an "Electronic Bargaining Table"*, 43 MGMT. SCI. 1147 (1997); G. Richard Shell, *Contracts in the Modern Supreme Court*, 81 CAL. L. REV. 431 (1993) [hereinafter *Contracts*]; G. Richard Shell, *Opportunism and Trust in the Negotiation of Commercial Contracts. Toward a New Cause of Action*, 44 VAND. L. REV. 221 (1991) [hereinafter *Opportunism*]; G. Richard Shell, *When is it Legal to Lie in Negotiations?*, 32 SLOAN MGMT. REV. 93 (1991) [hereinafter *Legal to Lie*].

[13] SHELL, *supra* note 8, at xiii.

[14] *Id.* at xii.

[15] *Id.* at xv.

A. *Part I—The Six Foundations of Information-Based Bargaining*

In contrast to books that prescribe the "one best way" to negotiate, Shell's information-based bargaining approach "emphasizes 'situational strategies' tailored to the facts of each case . . . ."[16] Shell contends that the six most important factors to consider are as follows: (1) bargaining style; (2) goals and expectations; (3) standards and norms; (4) relationships; (5) the other party's interests; and (6) leverage. Shell addresses each of these, in turn, in the first six chapters of *Bargaining for Advantage.*

1. *Foundation #1—Bargaining Style*

The first foundation of IBB is one's negotiation or conflict style. "Your personal negotiation style," Shell argues, "is a critical variable in bargaining. If you don't know what your instincts and intuition will tell you to do under different conditions, you will have a great deal of trouble planning effective strategies and responses."[17] Shell provides a succinct introduction to the five familiar conflict styles—competitive, accommodating, avoiding, compromising, and collaborative[18]—and invites the reader to perform a thought experiment to assess her own default style(s). Shell is not optimistic about a negotiator's ability to depart from her preferred conflict style(s),[19] but he does believe that all negotiators, regardless of their default style(s), can develop into more effective negotiators if they prepare more intelligently, develop high expectations, concentrate on listening in negotiation, and maintain a commitment to personal integrity.[20]

2. *Foundation #2—Goals and Expectations*

Goals are the second foundation of IBB. "You cannot know when to say 'yes' and when to say 'no' without first knowing what you are trying to achieve."[21] Shell argues that negotiators should set the most optimistic, yet

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[16] *Id.* at xv.

[17] *Id.* at 8.

[18] *See* Ralph H. Kilmann & Kenneth W. Thomas, *Developing a Forced-Choice Measure of Conflict-Handling Behavior: The 'Mode' Instrument*, 37 EDUC. & PSYCHOL. MEASUREMENT 309 (1977) (introducing their five conflict styles); *see also* SHELL, *supra* note 8, at 243.

[19] SHELL, *supra* note 8, at 9.

[20] *Id.* at 15–18.

[21] *Id.* at 24.

justifiable, goals possible,[22] and that negotiators should commit themselves to their goals by writing them down and speaking to colleagues about them.[23] "[R]esearch on setting goals discloses a simple but powerful fact: The more specific your vision of what you want and the more committed you are to that vision, the more likely you are to obtain it."[24]

3. *Foundation #3—Norms and Standards*

Authoritative norms and standards constitute the third foundation of IBB. "[T]he need to maintain consistency with established standards influences virtually all negotiations."[25] Shell explains that negotiators feel a psychological need to adhere to authoritative norms and standards.[26] Thus, negotiators who appeal to authoritative norms and standards acquire what Shell calls "normative leverage," particularly "when the standards, norms, and themes . . . are ones *the other party views as legitimate and relevant to the resolution of your differences.*"[27]

4. *Foundation #4—Relationships*

The fourth foundation of IBB is the "ability to form and manage personal associations at the bargaining table" because such associations "create a level of trust and confidence between people that eases anxiety and facilitates communication."[28] To develop productive working relationships at the bargaining table, negotiators need to build trust, and trust is based on reciprocity.[29] Reciprocity is thus the psychological key that opens the door to trust in relationships. Shell urges negotiators to use this psychological key in three ways: First, "[y]ou should always be trustworthy and reliable yourself" because "[y]ou have no right to ask of others what you cannot be yourself."[30] Second, you should also "be fair to those who are fair to you."[31] Finally, "you should let others know about it when you think they have

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[22] *Id.* at 31.
[23] *Id.* at 34–35.
[24] *Id.* at 24.
[25] *Id.* at 15.
[26] *Id.* at 42–55.
[27] *Id.* at 43.
[28] *Id.* at 58.
[29] *Id.* at 70.
[30] *Id.* at 61.
[31] *Id.*

treated you unfairly."[32]

5. *Foundation #5—Other Party's Interests*

Having addressed one side of the "interests" equation in chapter two,[33] Shell examines the other side of the equation in chapter five. The other party's interests constitute the fifth foundation of IBB. "Effective negotiators," Shell explains, "exhibit a very important trait: the ability to see the world from the other party's point of view. To succeed at negotiation, you must learn to ask how it might be in the other party's interests to help you achieve your goals."[34] Shell recognizes, of course, that this is easier said than done, so he proposes that negotiators follow four steps to identify and meet the other side's interests. First, negotiators should identify the relevant decision maker(s) on the other side.[35] Second, negotiators should search for common ground.[36] Third, negotiators should try to identify interests that might interfere with agreement.[37] Fourth, negotiators should search for low-cost options that advance their own goals while addressing the other party's interests.[38] In contrast to scholars who believe that *different* interests are the key to success in negotiation,[39] Shell contends that "*[s]hared* interests are the 'elixir of negotiation,' the salve that can smooth the way over the issues which you and the other party genuinely disagree about."[40]

6. *Foundation #6—Leverage*

The sixth foundation of IBB is leverage, which Shell contends is "the most important factor for high-stakes bargaining."[41] Leverage "is your

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[32] *Id.*

[33] *See supra* Part I.A.2.

[34] SHELL, *supra* note 8, at 76–77.

[35] *Id.* at 78.

[36] *Id.* at 79.

[37] *Id.*

[38] *Id.* at 81.

[39] Ronald J. Gilson & Robert H. Mnookin, *Foreword: Business Lawyers and Value Creation for Clients*, 74 OR. L. REV. 1, 8 (1995) ("Students in negotiation courses often erroneously believe that win-win negotiations somehow depend on finding similarities–common interests shared by both sides. In fact, it is characteristically *differences* in preferences, relative valuations, predictions about the future, and risk preferences that fuel value-creating opportunities.").

[40] *Id.* at 84–85 (emphasis added).

[41] *Id.* at 89–90.

power not just to reach agreement, but to obtain an agreement *on your own terms*. Research has shown that, with leverage, even an average negotiator will do pretty well while without leverage only highly-skilled bargainers achieve their goals."[42] To ascertain which party possesses leverage in a negotiation, Shell encourages negotiators to give themselves the following test:

> Ask yourself, as of the moment when you make the assessment, which party has the *most* to lose from no deal. The party with the most to lose has the *least* leverage; the party with the least to lose has the most leverage; and both parties have roughly equal leverage when they both stand to lose equivalent amounts should the deal fall through.[43]

B. *Part II—Negotiation Process*

Having explained the six foundations of information-based bargaining in Part I of *Bargaining for Advantage*, Shell moves on in Part II to describe "the predictable path that negotiations follow."[44] Shell contends that "[n]egotiation is a dance that moves through four stages or steps":[45] (1) preparation; (2) information exchange; (3) opening and making concessions; and (4) commitment.[46] Shell also devotes a chapter to ethical issues, which "suffuse every aspect and stage of the negotiation process."[47]

1. *Stage #1—Preparation*

Shell recommends that negotiators prepare for negotiation situationally.[48] Although no two negotiations are exactly alike, Shell contends that negotiations fall generally into one of four categories based on

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[42] *Id.* at 90.

[43] *Id.* at 105.

[44] *Id.* at xv.

[45] *Id.* at 119.

[46] For example, for different categorizations of the stages of negotiation, see GUERNSEY, *supra* note 5, at 12, identifying the ten stages of negotiation as (1) preparation and planning, (2) ice breaking, (3) agenda control, (4) information bargaining, (5) proposals, offers, demands, (6) persuasion/justification, (7) concessions/reformulation, (8) crisis: resolution or deadlock, (9) closing, and (10) memorialization; and see GERALD R. WILLIAMS, LEGAL NEGOTIATION AND SETTLEMENT 70–86 (1983),identifying the four stages of negotiation as (1) orientation and positioning, (2) argumentation, (3) emergence and crisis, and (4) agreement or final breakdown.

[47] SHELL, *supra* note 8, at 201.

[48] *Id.* at 119.

two variables: the perceived conflict over stakes ("stakes conflict") and the perceived importance of any future relationship between the parties ("relationship concerns").[49]

Using these two variables, Shell constructs a "situational matrix" comprised of four categories, each of which reflects a different combination of conflict over stakes and concerns about the relationship: (1) "Tacit Coordination"—intersection over which one proceeds first characterized by both low stakes conflict and low relationship concerns (*e.g.*, a "negotiation" between two drivers at a four-way) ; (2) "Transactions"—characterized by high stakes conflict and low relationship concerns (*e.g.*, purchase and sale of a home); (3) "Relationships"—characterized by relatively low stakes conflict and high relationship concerns (*e.g.*, working within a team); and (4) "Balanced Concerns"—characterized by both high stakes conflict and high relationship concerns (*e.g.*, negotiations over a joint venture or other business partnership) .[50]

Once a negotiator has determined the category into which her negotiation falls, she should then attempt to select the optimal negotiation approach for that category. Shell contends, for instance, that negotiators should strive to avoid conflict in "Tacit Coordination" negotiations.[51] In "Balanced Concerns" negotiations, by contrast, negotiators should plan to collaborate or problem-solve with their counterparts.[52]

2. *Stage #2—Information Exchange*

Following preparation, negotiators engage in what Shell calls the "information exchange" stage of negotiation, which is "often the most overlooked part of the process."[53] During this stage of the negotiation, negotiators engage in three distinct activities. First, negotiators attempt to establish rapport with one another. Here, Shell describes the so-called "liking rule,"[54] which posits that negotiators are more likely to get what they want from their counterparts when their counterparts like them.[55] Second, negotiators attempt to elicit information from one another regarding each

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[49] *Id.* at 120.

[50] *Id.* at 120–27.

[51] *Id.* at 121.

[52] *Id.* at 127.

[53] *Id.* at 134.

[54] *Id.* at 136–37. For more on this phenomenon, see ROBERT B. CIALDINI, INFLUENCE: THE PSYCHOLOGY OF PERSUASION 167–207 (2d ed. 1993).

[55] SHELL, *supra* note 8, at 136.

others' interests, the issues subject to discussion, and each others' perceptions regarding these issues.[56] Skilled negotiators, Shell reports, "focus more than average negotiators *on receiving*, as opposed to delivering, information."[57] Relying on empirical studies,[58] Shell reports that highly-skilled negotiators ask twice as many questions as average negotiators, listen better, test their understanding of the other sides' perspectives more often, and frequently summarize what they have heard.[59] Thus, Shell contends, negotiators should "*probe first, disclose later.*"[60] Third, and finally, negotiators signal their expectations and posture a bit regarding their leverage.[61]

3. *Stage #3—Opening and Making Concessions*

Once parties have prepared for the negotiation and have exchanged information with one another, "it is time to bargain."[62] At this stage, negotiators must confront two key decisions in virtually every negotiation: how to open and how to concede. Consistent with his situational approach, Shell offers different bargaining strategies depending upon the situation.[63]

With respect to opening offers, Shell contends that negotiators should open if they think they have a better understanding of the value of the negotiation than their counterparts.[64] Opening allows negotiators to "anchor" their counterparts' expectations.[65] Shell further contends that negotiators in many instances should open "optimistically" rather than "reasonably."[66] For Shell, an optimistic opening is "*the highest (or lowest) number for which there is a supporting standard or argument enabling you to make a presentable case.*"[67]

With respect to concession making, Shell again approaches the question situationally. Shell notes, for example, that empirical research supports a

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[56] *Id.* at 137.

[57] *Id.* at 144.

[58] *E.g.*, Neil Rackham & John Carlisle, *The Effective Negotiator–Part 1: The Behavior of Successful Negotiators*, 2 J. EUROPEAN INDUS. TRAINING 6 (1978).

[59] SHELL, *supra* note 8, at 145.

[60] *Id.* at 144.

[61] *Id.* at 148–49.

[62] *Id.* at 156.

[63] *See id.* at 132–55.

[64] *Id.* at 57.

[65] *Id.* at 159–60.

[66] *Id.* at 160–61.

[67] *Id.* at 161.

"start high, then concede gradually" strategy in most transactional negotiations involving the division of limited resources.[68] If, however, a transaction involves many issues, parties should seek to implement an integrative bargaining strategy by making *"big moves on your 'little' (less important) issues and little moves on your 'big' (most important) issues."*[69]

4. *Stage #4—Commitment*

Following information exchange and the give-and-take of bargaining, negotiators move toward closing and commitment. Negotiators can, and should, use a variety of tactics to conclude deals, including deadlines, "take it or leave it" ultimatums, final offers, and "split the difference" proposals.[70] In their haste to close, however, negotiators need to be wary of a phenomenon psychologists have labeled "overcommitment."[71] Psychologists have found that people are reluctant to admit failure or accept loss once they have invested heavily in a particular course of action. Thus, "[a]s we invest increasingly significant amounts of time, energy, and other resources *in the actual negotiation process*, we become more and more committed to closing"[72] This phenomenon may lead negotiators to make undesirable last minute concessions. In short, "[t]he final stage of negotiation, closing and gaining commitment, poses some significant challenges."[73]

5. *Ethics*

Finally, Shell addresses negotiation ethics, a topic he has thoughtfully examined in prior published work.[74] In *Bargaining for Advantage*, Shell describes three different approaches to, or schools of, ethics: (1) The Poker School (*i.e.*, "it's a game"); (2) The Idealist School (*i.e.*, "do the right thing even if it hurts"); and (3) The Pragmatist School (*i.e.*, "what goes around, comes around").[75] He hopes negotiators will aspire to the idealist approach but acknowledges that reasonable people will have different views of ethical

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[68] *Id.* at 165.

[69] *Id.* at 170.

[70] *Id.* at 181–91.

[71] *Id.* at 186.

[72] *Id.* at 187.

[73] *Id.* at 199.

[74] See generally *Contracts*, *supra* note 12; *Opportunism*, *supra* note 12; *Legal to Lie*, *supra* note 12.

[75] SHELL, *supra* note 8, at 215.

questions in negotiation. Whatever school or approach one adopts, Shell argues that negotiators should be able to explain and defend their particular ethical choices in negotiation. "Reasonable people will differ on ethical questions," Shell acknowledges, "but you will have personal integrity in my estimation if you can pass my 'explain and defend' test after making a considered, ethical choice."[76]

II. EVALUATING *BARGAINING FOR ADVANTAGE* AS A LAW SCHOOL TEXT

There is surprising uniformity among the Negotiation courses taught in schools of law, business, public policy, and international relations on our nation's campuses.[77] Researchers have found, for instance, the use of "a common vocabulary for teaching negotiation," the "widespread use of cases and simulations," and "widespread attention to ethics."[78]

Despite this uniformity, I suspect that most of us who teach Negotiation (or any other course for that matter) feel that we do so in our own, unique way. From the development of a syllabus at the beginning of a class to the evaluation of student work at the end (and *especially* everything in between), teaching is a very personal endeavor. Thus, rather than urge Negotiation teachers to run out and adopt *Bargaining for Advantage*, I intend to identify below what I have found to be its primary strengths and lone weakness as an assigned text in my Negotiation course. Although I believe its considerable pedagogical strengths outweigh its one significant weakness, each Negotiation teacher can draw her own conclusions about its pedagogical value.

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[76] *Id.* at 206.

[77] Harvard's Program on Negotiation (PON) recently conducted a survey of faculty teaching Negotiation in law, business, public policy, and international relations schools at a variety of universities around the country. Researchers for the survey found "considerable redundancy within and across the professors interviewed." Sara Cobb, *An Overview of a Research Survey*, NEGOTIATION PEDAGOGY (PON, Harvard Law School) at 3 (on file with author).

[78] *Id.* at 6.

A. *Strengths*

Like the *Getting to Yes* series of books,[79] *Bargaining for Advantage* is an engaging read. As one of my students put it, *Bargaining for Advantage* is "one of those books that when you start reading the first page, you can't let the book go out of your hands before the last page."[80] *Bargaining for Advantage* is engaging because its prose is clear and crisp, making liberal use of anecdotes to illuminate abstract propositions about negotiation. It also includes a number of charts, tables, and matrices to break up the text, summarize key points, and present the material in varying ways.

Bargaining for Advantage's engaging style is more than matched by its substance. Three substantive strengths, in particular, stand out. First, *Bargaining for Advantage* carefully balances several significant tensions that confront the Negotiation teacher: the academic versus the practical, the descriptive versus the prescriptive, the actuarial versus the anecdotal, and self-interest versus other-interest. Second, *Bargaining for Advantage* skillfully integrates theoretical and empirical scholarship drawn from a variety of disciplines. Third, *Bargaining for Advantage* supplements and extends in important respects the preferred model of negotiation teaching and training: the problem-solving or principled model of negotiation.

1. *Balanced Approach*

Every Negotiation teacher faces certain tensions. How much of my course should be theoretical and how much practical? Should I emphasize descriptive accounts of the negotiation process, or should I focus on providing negotiation prescriptions to help students maximize their outcomes? Should I base the prescriptions I provide on actuarial information, which is generally more reliable than anecdotal information,[81] or should I

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[79] *See generally* FISHER & URY, ROGER FISHER ET AL., BEYOND MACHIAVELLI (1994); ROGER FISHER & SCOTT BROWN, GETTING TOGETHER: BUILDING RELATIONSHIPS AS WE NEGOTIATE (1989); WILLIAM URY, GETTING PAST NO: NEGOTIATING YOUR WAY FROM CONFRONTATION TO COOPERATION (1993).

[80] E-mail from Hossam Fahmy, LL.M., Washington University School of Law, to Chris Guthrie, Associate Professor of Law, University of Missouri School of Law (April 19, 2000) (on file with author); *see also* E-mail from Daniel Rubin, J.D., Washington University School of Law to Chris Guthrie, Associate Professor Law, University of Missouri School of Law (May 4, 2000) (on file with author) ("Overall, I thought the book was very well-written and insightful and would definitely tell students to approach it with higher expectations than they would the typical teaching tool.").

[81] Robyn M. Dawes et al., *Clinical Versus Actuarial Judgment*, 243 SCI. 1668, 1671 (1989).

rely more heavily on anecdotal information, which is generally more compelling and memorable than actuarial information?[82] What obligation do I have to encourage self-interest (and client-interest) on the one hand versus concern for others on the other hand?

Although each teacher must decide how to resolve these issues for herself, Shell does all of us a service by deftly balancing them in *Bargaining for Advantage.* Shell provides a rich theoretical account of negotiation, drawing explicitly upon research from social science disciplines, but also provides practical insights into the negotiation process.[83] He uses existing research, both to *describe* how negotiators typically negotiate, and to *prescribe* how they should negotiate.[84] He bases his prescriptions on data drawn from numerous empirical and experimental investigations, but he also relies quite heavily on vivid anecdotal accounts of negotiations. For example, he includes anecdotes about Andrew Carnegie,[85] Albert Einstein,[86] Benjamin Franklin,[87] Mahatma Gandhi,[88] Donald Trump,[89] and Ted Turner[90]. Finally, Shell provides advice aimed at helping negotiators obtain optimal outcomes for themselves but is also attentive to the impact one's negotiation behavior may have on others. Whatever their view of these competing perspectives, most Negotiation teachers will feel comfortable with the balanced approach Shell takes.

2. *Interdisciplinary*

Negotiation teachers will also appreciate the way Shell skillfully integrates social science scholarship into the text of *Bargaining for Advantage.* Negotiation is an interdisciplinary subject, yet few Negotiation teachers have rich backgrounds in more than one or two of the many disciplines that shed light on the negotiation process. Shell's book goes a long way toward helping us use other disciplines to teach Negotiation.

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[82] People are "much more influenced by vivid, concrete information than by pallid and abstract propositions of substantially greater probative and evidential value." RICHARD NISBETT & LEE ROSS, HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT 44 (1980).

[83] SHELL, *supra* note 8, at Part II.

[84] *Id.* ch. 12, at 235–42.

[85] *Id.* at 60–63.

[86] *Id.* at 124–25.

[87] *Id.* at 125–27.

[88] *Id.* at 47–49.

[89] *Id.* at 103.

[90] *Id.* at 8–9.

Drawing from social psychology, cognitive psychology, behavioral economics, and empirical research on negotiation effectiveness,[91] *Bargaining for Advantage* explores, among other phenomena, anchoring and adjustment effects, attribution bias, the consistency principle, the liking rule, loss aversion, the reciprocity norm, reference points, the scarcity effect, the similarity principle, and the ultimatum game.

Throughout, Shell explains how negotiators can exploit, and be exploited by, these phenomena. In other words, Shell teaches both negotiation "offense" and "defense." For example, Shell uses the scarcity effect to explain the efficacy of deadlines. Scholars have long observed that deadlines can have a galvanizing effect on negotiation.[92] Shell explains why. Deadlines are effective, Shell contends, because of the scarcity effect, which "refers to our human tendency to want things more when we think the supply is running out."[93] When forecasters predict a heavy snowstorm, for example, "it is the scarcity effect that sends people racing to grocery stores to buy up all the milk and other perishable necessities."[94] In much the same way, when one negotiator imposes a deadline on the other, she "create[s] the sense that time is running out on the opportunity."[95] The imposition of the deadline, in short, triggers the scarcity effect, which urges the recipient of the deadline to make concessions.

Similarly, Shell uses two phenomena—"contrast effects" and "the reciprocity norm"—to support his contention that negotiators should make optimistic, rather than moderate, opening offers in many negotiations.[96] Psychologists have discovered that people tend to evaluate an option more favorably when it is compared to an inferior option than when it is evaluated in the absence of such options.[97] People's evaluations, in other words, are influenced by "contrast effects." Thus, Shell explains:

> [I]f I want you to pay me $50 for something and I open with a demand of $75 . . . my final $50 offer looks reasonable by comparison with my opening. If I had opened at $55 instead of $75, and moved down only five dollars before I stopped, you would be less likely to think you had gotten a

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91 Although *Bargaining for Advantage* does draw from many disciplines, its primary contribution is to use social psychology — particularly the phenomena described in Robert Cialdini's book—*Influence*. CIALDINI, *supra* note 54.

92 *E.g.*, Gary Goodpaster, *Lawsuits as Negotiations*, 8 NEGOT. J. 221 (1992).

93 SHELL, *supra* note 8, at 180.

94 *Id.* at 180.

95 *Id.* at 181.

96 *Id.* at 160–61.

97 *E.g.*, Kelman et al., *supra* note 3, at 288.

bargain.[98]

In short, "[a]n optimistic (but not outrageous) opening sets the other party up to feel both relief and satisfaction (and thus be more willing to say 'yes') when the realistic settlement range comes into view."[99]

Starting optimistically also permits the party making the opening offer to capitalize on the reciprocity norm, an informal social rule that says "we should try to repay, in kind, what another person has provided us."[100] In negotiation, Shell explains, "[P]erson A makes an optimistic opening; person B rejects it. Person A then moderates his demand by making a significant concession. Person B then feels pressure imposed by the norm of reciprocity to make a reasonable response, or even to say 'yes.'"[101] In short, "[t]he norm of reciprocity induces people to say 'yes' much more frequently after they have rejected your first demand than when you open with your modest request."[102]

Throughout *Bargaining for Advantage*, Shell expertly explains phenomena drawn from various disciplines and describes how they can shape negotiators' behavior. By integrating theoretical concepts (*e.g.*, contrasts effects and the reciprocity norm) with conventional wisdom about the negotiation process (*e.g.*, optimistic opening offers), Shell provides a persuasive account of negotiation behavior, both descriptively and prescriptively.

3. *Complement to the Problem—Solving Model of Negotiation*

Perhaps most importantly, Negotiation teachers will appreciate the manner in which *Bargaining for Advantage* complements the problem-solving, or principled, negotiation model promulgated in *Getting to Yes*. It does so in three distinct ways: first, it addresses topics *Getting to Yes* and other leading works ignore; second, it explains some of the problem-solving model's core principles; and third, it expands upon some of the model's core principles.

The first way *Bargaining for Advantage* complements *Getting to Yes* is by addressing some topics it neglects. For example, Shell begins *Bargaining*

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98 SHELL, *supra* note 8, at 161.

99 *Id.* at 161–62.

100 CIALDINI, *supra* note 54, at 17.

101 SHELL, *supra* note 8, at 162.

102 *Id.* For another argument in support of optimistic opening offers, see Russell Korobkin & Chris Guthrie, *Opening Offers and Out-of-Court Settlement: A Little Moderation May Not Go a Long Way*, 10 OHIO ST. J. ON DISP. RESOL. 1, 3–5 (1994).

for Advantage by focusing on conflict style, an important component of successful negotiation that *Getting to Yes* ignores.[103] Although there are some worthy articles on conflict style,[104] the first chapter of *Bargaining for Advantage* addresses the topic with uncommon clarity (even if I am more optimistic than Shell about people's ability to modify their default conflict styles). *Getting to Yes* also ignores negotiation ethics, a topic of particular relevance to the law school-based Negotiation course. Fortunately, Shell's book provides a particularly thought-provoking analysis of ethical issues (although it does not attend to some ethical mandates of peculiar concern to *lawyer*-negotiators). The second way *Bargaining for Advantage* complements *Getting to Yes* is by providing empirically-grounded explanations of some of the problem-solving model's central tenets. Consider, for example, *Getting to Yes*'s advice to develop and use objective standards or criteria in negotiation. Although *Getting to Yes* is probably best known for advising negotiators to engage in *interest*-based rather than *position*-based negotiation, I think its most valuable contribution to *lawyer*-negotiators is to urge them to develop and use objective criteria to support their arguments (especially for those *lawyer*-negotiators who are not particularly assertive).[105] Negotiators who attempt to resolve differences, not through hard bargaining tactics, but rather by advocating for outcomes based on objective criteria, are likely to convert arbitrary battles of will into relatively more civil discussions aimed at finding a legitimate basis for reaching agreement.[106]

But "[w]hy are standards and norms," like market value, scientific judgment, professional standards, custom, precedent, and the like, "such an important part of bargaining?"[107] *Getting to Yes* does not provide an answer, but *Bargaining for Advantage* does. Shell explains that standards have persuasive power in negotiation because of two phenomena that often interact with one another: the "consistency principle"[108] and "deference to authority."[109]

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[103] Although *Getting to Yes* does not address conflict style, it does make claims about how "hard" and "soft" positional bargainers negotiate. FISHER & URY, *supra* note 1, at 9.

[104] *See generally* Roderick W. Gilkey & Leonard Greenhalgh, *The Role of Personality in Successful Negotiating*, 2 NEGOT. J. 245 (1986); Robert H. Mnookin, et al., *The Tension Between Empathy and Assertiveness*, 12 NEGOT. J. 217 (1996).

[105] FISHER & URY, *supra* note 1, at 81–94.

[106] *Id.* at 81–83.

[107] SHELL, *supra* note 8, at 42.

[108] *Id.* at 42–45.

[109] *Id.* at 52–55.

The consistency principle refers to the empirical observation that people have a deep need to "be seen as consistent and rational in the way they make decisions."[110] We prefer, in other words, to "avoid the disjointed, erratic, and uncomfortable psychological states that [can] arise when our actions are manifestly inconsistent with previously expressed, long-held, or widely shared standards and beliefs."[111] This tendency influences negotiation behavior. As Shell explains as follows:

> Whether we are aware of it or not, we sometimes feel a tug to agree with the other party when the standards or norms he or she articulates are consistent with prior statements and positions we ourselves have taken. We also feel uncomfortable (though we may keep this to ourselves) when the other side correctly points out that we have been inconsistent in one of our positions or arguments. In short, standards and norms . . . can be strong, motivating factors in the way negotiations proceed.[112]

Widely-used standards or objective criteria are also persuasive in negotiation because people have a tendency to defer to authority.[113] "Psychologists have discovered a firm fact about human nature," Shell writes. "We are inclined to defer to authority. Some cultures emphasize obedience to authority more than others, but even Americans, who tend to be highly individualistic, defer to authority in many situations."[114] This means that "[s]tandards and norms have power in negotiation in part because they carry an authoritative message about what the market, the experts, or society has determined to be a fair and reasonable price or practice."[115] In short, Shell provides a persuasive, empirically grounded explanation for why objective criteria are potent in negotiation.

The third way *Bargaining for Advantage* complements the *Getting to Yes* approach to negotiation is by elaborating upon, or enriching, some of the problem-solving model's central tenets. For example, *Getting to Yes* encourages negotiators to focus on relationships in negotiation by "separating the people from the problem."[116] Skillful negotiators should know both how to develop productive working relationships in negotiation

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110 *Id.* at 42. *See generally* LEON FESTINGER, A THEORY OF COGNITIVE DISSONANCE (1957) (explaining cognitive dissonance theory).

111 SHELL, *supra* note 8, at 42.

112 *Id.* at 43.

113 *Id.* at 52–53.

114 *Id.* at 53; *see also* CIALDINI, *supra* note 54, at 208–36.

115 SHELL, *supra* note 8, at 53.

116 FISHER & URY, *supra* note 1, at 17–39.

and how to deal with relationship problems likely to arise in negotiation. *Getting to Yes* focuses on relationship *problems*, identifying common perception, emotion, and communication difficulties that may threaten the negotiation.[117] *Bargaining for Advantage*, by contrast, focuses on relationship *formation*, explaining how negotiators can develop productive working relationships by taking advantage of the similarity principle, offering gifts, volunteering to do favors, and importantly, cultivating trust.[118]

Consider also how *Getting to Yes* and *Bargaining for Advantage* treat leverage, a component of negotiation that both books deem critical to negotiation success.[119] Both begin by articulating the view that a negotiator's leverage is inversely related to her need to reach agreement in negotiation.[120] As *Getting to Yes* explains, "the relative negotiating power of two parties depends primarily upon how attractive to each is the option of not reaching agreement."[121] To increase leverage for oneself, *Getting to Yes* contends that negotiators should develop alternatives away from the bargaining table. Negotiators should, to use the well-known acronym, improve their "BATNA" or "best alternative to a negotiated agreement," because the better their best alternative away from the negotiating table, the easier it will be to walk away.[122]

Shell concedes that "[t]here is wisdom in the BATNA conception of leverage," and that developing a stronger BATNA can often provide a negotiator with some leverage.[123] But from Shell's perspective, the analysis is much more complicated. Negotiators should try not only to increase the desirability of their alternatives away from the table, but should also attempt to maximize what he contends are three distinct types of leverage.[124] First, negotiators may be able to develop "positive" leverage.[125] A negotiator acquires positive leverage whenever she learns she can provide something that the other side wants.[126] "Every time the other party says 'I want' in a negotiation, you should hear the pleasant sound of a weight dropping on

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[117] *Id.* at 22–36.

[118] SHELL, *supra* note 8, at 68–72.

[119] *Id.* at xv (referring to leverage as "the most important of all bargaining assets"); FISHER & URY, *supra* note 1, at 97 (noting that no negotiating method "can guarantee success if all the leverage lies on the other side.").

[120] *See* sources cited *supra* note 1.

[121] FISHER & URY, *supra* note 1, at 102.

[122] *Id.*

[123] SHELL, *supra* note 8, at 101.

[124] *Id.* at 102.

[125] *Id.*

[126] *Id.*

your side of the leverage scales."[127] Second, a negotiator can create "negative" leverage by successfully threatening the other side with a potential loss.[128] "Threat leverage gets people's attention because, as astute negotiators have known for centuries and psychologists have repeatedly proven, *potential losses loom larger in the human mind than do equivalent gains*."[129] Third, a negotiator can develop "normative" leverage by framing proposals within the other party's expressed interests and standards.[130] Normative leverage is a product of the human desire to appear consistent, fair, and reasonable.[131] By manipulating these three forms of leverage, the negotiator can create the perception that she possesses leverage that the other side lacks, *i.e.*, that she has less to lose from impasse than from agreeing to the other side's proposal. In short, Shell's careful exploration of leverage, much like his exploration of working relationships, enriches the negotiation approach advanced in *Getting to Yes*.

B. *Weakness*

For all its strengths as a law school Negotiation text, *Bargaining for Advantage* does suffer from one significant weakness. Like *Getting to Yes*, *Getting Past No*, and other popular negotiation texts *not* targeted at law students and lawyers, *Bargaining for Advantage* neglects what we might call "legal negotiations." Shell's book, in other words, ignores some important negotiation issues of particular relevance to *lawyer*-negotiators.

Lawyers, for example, conduct most of their professional negotiations on behalf of clients. Clients are principals, endowed with substantive decision-making authority, while lawyers function as agents charged with carrying out their clients' wishes. Shell's book largely ignores the important principal-agent tensions that can affect *lawyer*-negotiators and their clients.[132] Additionally, many lawyers are litigators who conduct most of their professional negotiations in "the shadow of the law" and the legal system.[133]

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[127] *Id.* at 102.

[128] *Id.* at 103.

[129] *Id.* at 104; *see also* Daniel Kahneman et al., *The Endowment Effect, Loss Aversion, and Status Quo Bias*, 5 J. ECON. PERSPECTIVES 193, 197–98 (1991); Amos Tversky & Daniel Kahneman, *Loss Aversion in Riskless Choice: A Reference-Dependent Model*, 106 Q.J. ECON. 1039, 1039 (1991).

[130] SHELL, *supra* note 8, at 104.

[131] *Id.*

[132] For a discussion of these tensions, see MNOOKIN ET AL., *supra* note 5.

[133] Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 997 (1979).

Shell does not address any of the important issues that arise as a consequence, including the impact of such factors as legal endowments, procedural rules, litigation costs, and the threat of impending trial. Finally, Shell uses anecdotes to illuminate many of his observations and claims about negotiation. Seldom, however, does he allude to negotiation anecdotes directly relevant to the professional lives of most practicing lawyers. As one of my students put it, "The examples were good, but not always helpful – situations we weren't likely to find ourselves in."[134]

III. HOW I USE THE BOOK

There is obviously no single way to use *Bargaining for Advantage* in a law school Negotiation course. While some may choose to adopt *Bargaining for Advantage* as the primary text around which they organize their courses, others are likely to find that *Bargaining for Advantage* works better as a supplemental text. For those in this latter group, I briefly explain below how I have used the book to enrich my own Negotiation course.

I divide my course into four parts: (1) conflict style; (2) negotiation theory; (3) negotiation planning; and (4) the role of negotiation in the legal system. In addition to a number of exercises and simulations, I assign *Getting to Yes*, *Getting Past No*, *Bargaining for Advantage*, and several supplemental readings taken primarily from law reviews and books.

A. *Conflict Style*

I open my Negotiation course by focusing on conflict style. Ideally, students learn about the five basic conflict styles, gain insight into their own conflict styles, and develop at least some ability to discern the conflict styles of those with whom they will negotiate. To accomplish these goals, the students and I engage in various in-class activities and read the first chapter of *Bargaining for Advantage*[135] as well as some supplemental reading on conflict style.[136] Shell's treatment of this topic works well.

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[134] Letter from Anonymous, J.D. student, Washington University School of Law (on file with author).

[135] SHELL, *supra* note 8, ch. 1, at 3–21.

[136] For example of supplemental readings typically used, see sources cited in note 1.

B. *Negotiation Theory*

I devote the bulk of the course to what I call "negotiation theory." Although I introduce students to positional negotiation and a hybrid approach I call "advanced negotiation," we spend most of our time focusing on the problem-solving model of negotiation and the strategies, tactics, and skills that accompany it.

Relying on *Getting to Yes*, I explain that the problem-solving or principled model views negotiation as a collaborative exercise in which the parties work together to try to devise optimal agreements.[137] This view, in turn, suggests that negotiators should make four primary moves in negotiation: (1) separate the people from the problem; (2) focus on interests rather than positions; (3) generate options; and (4) link outcomes to objective criteria.[138] Finally, each move or tactic calls for negotiators to use one primary negotiation skill that my students and I try to develop and refine through a variety of exercises and simulations including the following: (1) listening; (2) asking; (3) inventing; and (4) referencing.[139] I supplement *Getting to Yes* with the remaining chapters in Part I of *Bargaining for Advantage*, as noted below.[140]

C. *Negotiation Planning*

Ideally, negotiation planning precedes negotiation. Nevertheless, it is easier to teach negotiation planning after introducing students to negotiation theory and practice. Hence, after teaching negotiation theory, I turn to planning. In doing so, I assign Shell's chapter on planning[141] as well as some supplemental reading, and the students and I work through a couple of different planning approaches.

D. *Negotiation in the Legal System*

Finally, although it has been implicit (and often explicit) throughout, I devote the last segment of the course to the unique role that negotiation plays

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[137] FISHER & URY, *supra* note 1, at 13.

[138] *Id.*

[139] To be clear, *Getting to Yes* does not link each tactic to the development and use of a particular negotiation skill. Rather, I have made this link in my Negotiation course for pedagogical reasons.

[140] SHELL, *supra* note 8, ch. 2–6, at 22–89.

[141] *Id.* ch. 7, at 117–31.

in the legal system. During this part of the course, the students and I spend several class hours focusing on, among other things, the lawyer-client relationship, client interviewing, client counseling, negotiation ethics, and the role of the lawyer as dispute resolver and deal maker. Here, I use Shell's outstanding chapter on ethics to supplement other readings.[142]

E. *Sample Syllabus*

The following sample syllabus identifies the topics my students and I address and the readings I assign: *Getting to Yes (GTY)*, *Getting Past No (GPN)*, *Bargaining for Advantage (BFA)*, and supplemental readings:

Week 1–2: TOPIC: CONFLICT STYLE
BFA Ch. 1 "The First Foundation: Your Bargaining Style"
Supplemental Readings

Week 3: TOPIC: POSITIONAL NEGOTIATION
Supplemental Readings

Week 4: TOPIC: PROBLEM-SOLVING NEGOTIATION—SEPARATE PEOPLE FROM PROBLEM
GTY Ch. 1 "Don't Bargain Over Positions"
GTY Ch. 2 "Separate the PEOPLE from the Problem"
BFA Ch. 4 "Relationships"

Week 5: TOPIC: PROBLEM-SOLVING NEGOTIATION—FOCUS ON INTERESTS
GTY Ch. 3 "Focus on INTERESTS, Not Positions"
BFA Ch. 2 "Your Goals and Expectations"
BFA Ch. 5 "The Other Party's Interests"

Week 6: TOPIC: PROBLEM-SOLVING NEGOTIATION—GENERATE OPTIONS
GTY Ch. 4 "Invent OPTIONS for Mutual Gain"

Week 7: TOPIC: PROBLEM-SOLVING NEGOTIATION—USE OF OBJECTIVE CRITERIA
GTY Ch. 5 "Insist on Using Objective CRITERIA"
BFA Ch. 3 "Authoritative Standards and Norms"

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[142] *Id.* ch. 11, at 201–34.

Week 8: TOPIC: PROBLEM-SOLVING NEGOTIATION—LEVERAGE
GTY Ch. 6 "What If They Are More Powerful?"
BFA Ch. 6 "Leverage"

Week 9: TOPIC: ADVANCED NEGOTIATION
GPN Entire Text
Supplemental Readings

Week 10: TOPIC: NEGOTIATION PLANNING
BFA Ch. 7 "Preparing Your Strategy"
Supplemental Readings

Week 11: TOPIC: NEGOTIATION IN THE LEGAL SYSTEM—LAWYER/CLIENT RELATIONSHIP
Supplemental Readings

Week 12: TOPIC: NEGOTIATION IN THE LEGAL SYSTEM—ETHICS
BFA Ch.11 "Bargaining with the Devil Without Losing Your Soul"
Supplemental Readings

IV. CONCLUSION

Bargaining for Advantage is a terrific book. Like few other Negotiation texts, it makes a significant contribution to both the scholarly and popular literature on the topic and serves as a valuable pedagogical tool. For law professors who teach Negotiation courses, *Bargaining for Advantage* is an option well worth considering.