Beyond Winning is must-reading... for anyone... who is charged with resolving intractable disputes. — Senator George J. Mitchell

BEYOND WINNING

NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES

ROBERT H. MNOOKIN

Director of the Harvard Negotiation Research Project

Scott R. Peppet and Andrew S. Tulumello
Advice for Resolving Disputes

A lawyer's strategic challenge in dispute resolution is to pursue his client's interests and defend against exploitation in a negotiation context marked by great uncertainty and posturing, while simultaneously establishing a relationship with the other side that permits value-creating trades. But because the dominant reference point for settlement is usually the expected value of proceeding to trial, negotiations are often very distributive—a dollar more for one side is a dollar less for the other. As a result, litigators typically focus on dividing the pie, not enlarging it.

This creates two problems. First, the parties may end up in a rancorous contest that generates unnecessary and exorbitant transaction costs. This can occur as a result of a variety of the issues we have explored: lawyers and clients may enter negotiations with a zero-sum and adversarial mindset; attorneys may benefit from the higher fees generated by protracted litigation; lawyer-client communication and coordination may be poor; and the shifting and fluid nature of litigation may make it difficult to change the game to problem-solving.

Second, although litigation can contain value-creating opportunities, parties often overlook them. The typical negotiation process leaves no room for a broader discussion of interests and clients may be so focused on demonstration that they ignore trades—potentially final dispute—that might make the parties

This chapter suggests ways to change the efficient and satisfying dispute settlements optimists. Change is possible, but not easy. It is deeply entrenched, the strategic temptative relationships in the system of a legal midable challenges. Nevertheless, lawyers (that nothing can be done, and thus do not possibilities for changing the game while n client.

Our general advice is to try to settle legal and to construct a bargaining proc whether deal-like trades are possible. This desirable) in every case. Early on, you and yi tation strategy to your client's situation. 

First, is this the rare case where settlement the other side is willing to settle? At the outset litigation has even begun, a lawyer should interests require a complete victory, either i tion by the other side. Will a loss in cour better than a settlement? Some legal disput “crown jewels”—for example, by putting a t in this category.

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Advice for Resolving Disputes

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This chapter suggests ways to change the status quo to produce more efficient and satisfying dispute settlements. But, again, we are realistic optimists. Change is possible, but not easy. The adversarial legal culture is deeply entrenched, the strategic temptations are great, and unproductive relationships in the system of legal negotiation can present formidable challenges. Nevertheless, lawyers (and clients) too often despair that nothing can be done, and thus do nothing. Here we present some possibilities for changing the game while minimizing the risks for your client.

Our general advice is to try to settle legal disputes early rather than late and to construct a bargaining process that permits exploring whether deal-like trades are possible. This may not be feasible (or even desirable) in every case. Early on, you and your client must tailor a negotiation strategy to your client's situation. We recommend that you ask three questions.

First, is this the rare case where settlement may not make sense even if the other side is willing to settle? At the outset of a dispute, perhaps before litigation has even begun, a lawyer should consider whether his client's interests require a complete victory, either in court or through capitulation by the other side. Will a loss in court serve the client's interests better than a settlement? Some legal disputes may threaten a company's "crown jewels"—for example, by putting at risk core intellectual property. In others, it may be indispensable to create or defend a binding legal precedent. Or a client may want to deter a particular kind of litigation by demonstrating a commitment to never settling. For cases that you and your client conclude fall into this first category, a problem-solving approach to negotiation is not all that relevant. A word of caution, however, Lawyers and clients can too quickly and superficially put cases in this category.

Second, how can I create value by minimizing transaction costs and exploring trades based on differences in time or risk preferences? We offer two rules of thumb:
• *Adopt early settlement as a goal.* A problem-solving attorney will vigorously and regularly explore the possibilities of settlement—even before, and certainly after, a suit is filed.

• *Use decision analysis as a tool.* For a legal dispute, pursuing litigation is typically a client's BATNA. A rational settlement process requires that a client compare the advantages and disadvantages of a possible settlement with the opportunities and risks of litigation. It is a lawyer's responsibility to assess systematically the opportunities and risks of the litigation, and decision analysis is a tool that can help. It can also help you communicate with your client. And the same tool can sometimes be used in conjunction with the other side to facilitate settlement.

*Third, could the parties to this dispute conceivably create value by exploiting opportunities for a broader range of trades?* This question should be addressed whenever the parties have had a past—or might have a future—relationship. Many business conflicts are with customers, suppliers, partners, competitors, employees, or some government agency. Some legal conflicts are between family members, friends, or neighbors. In all such disputes, our advice, as we elaborate below, is:

• *Search for ways to turn the dispute into a deal.* In some disputes you can look for value-creating trades that are based on the parties' interests, resources, and priorities. These trades may have little if anything to do with the parties' formal legal dispute. And the settlement may be of a sort that a court could never consider imposing. As we suggest below, negotiating in this way often requires bringing new players to the table and changing substantially the roles of lawyers and clients.

We have devised a simple metaphor—the “two tables”—to explain the two basic modes of negotiation in dispute resolution. By two tables we don't necessarily mean two physical locations for negotiating, although that can sometimes be the case. We mean two frames of reference that lawyers and clients can adopt when negotiating legal disputes. We call these tables the net-expected-outcome table and the interest-based table (see Box 17).

Settling a legal dispute almost always requires evaluating the litigation alternative by spending some time at the net-expected-outcome table. Those disputes that can be turned into deals also permit discussing a broader range of opportunities for value-creating trades. In this chapter we explain our two tables metaphor to help you pursue early settlement in your client's best interest.

**NEGOTIATING AT THE NET-EXPECTED OUTCOME TABLE**

In all legal disputes, reducing transaction costs should therefore be your goal to pursue early settlement. We are confident that if settling early were easy, we are confident that
A problem-solving attorney will actively explore the possibilities of settlement—even before a case is filed.

For a legal dispute, pursuing litigation is rational if the settlement process requires that a lawyer carefully evaluate the opportunities and risks of the possible settlement process. It is a lawyer's role to evaluate the risks of litigation and to help the client. And the same tool can sometimes be used to help the other side to facilitate settlement.

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metaphor—the "two tables"—to explain negotiation in dispute resolution. By two tables we mean two frames of reference—expected-outcome table and the interest-based table. Most always requires evaluating the litigation—some time at the net-expected-outcome table turned into deals also permit discussing a broader range of opportunities for value-creating trades at the interest-based table. In this chapter we explain our approach at both tables.

NEGOTIATING AT THE NET-EXPECTED-OUTCOME TABLE

In all legal disputes, reducing transaction costs can create value. It should therefore be your goal to pursue early settlement whenever it is in your client's best interest.

Pursue Early Settlement

Lawyers are often told to settle early—by clients, judges, scholars, and books (like this one) on negotiation. It's good advice. The problem in litigation is that cases don't settle; it's that they settle late, after huge costs have been incurred in the expensive discovery process. But if settling early were easy, we are confident that lawyers would do so more of-

**Net-Expected-Outcome Table**

- Parties focus on assessing and shaping the value of litigation.
- Legal norms and arguments are central.
- Lawyers play a critical role.
- Value can be created through process design, saving transaction costs, and structuring settlements to take advantage of differences in risk and time preferences.

**Interest-Based Table**

- Parties focus on uncovering interests, whether related to the litigation or not.
- Nonlegal norms and standards apply.
- Lawyers may play a smaller role.
- Value can be created through trades unconnected to the dispute.
A PROBLEM-SOLVING APPROACH

The Problems of Settling Early

Ten and that far fewer cases would drag on through protracted litigation. Here we describe the challenges of settling early and ways in which a lawyer can work to overcome them.

The Challenges of Settling Early

Imagine that as a lawyer you have set out to help your client resolve a dispute at low cost. You'd like to settle early if possible. As we began to explore in Chapter 4, several things make this difficult.

First, early in a dispute, each side is often keenly aware of how much it doesn't know. A defendant corporation may not know if its employees actually engaged in the misconduct of which they are accused. A plaintiff may not know the extent of her injuries or whether she will be able to find proof that the defendant caused her damages. Because these issues may affect the expected value of the litigation, each party fantasizes that through discovery it will find a smoking gun to strengthen its case and weaken the other side's. But the search for the smoking gun is expensive—and elusive. And half the time what a party learns makes his case look worse. If a party waits to settle until it has almost all of the relevant information that might affect the outcome, it will have to complete discovery, consult with its experts, and do all of the legal research necessary to try the case. Most of the possible transaction cost savings of settlement will be lost.

Second, the search for information takes place in the context of intense strategic interaction. Neither side wants to signal weakness, and each wants to take advantage of the uncertainties surrounding the litigation to capture greater distributive benefits for itself. Making one more motion, filing extensive interrogatories, or taking another deposition might provide that extra edge that's needed to get the other side to concede. The dilemma is that at the margin—at each point that a lawyer or client considers whether to push forward with the litigation—it may appear to make sense to spend the extra dollar to learn more or to burden the other side. In hindsight, however, the benefits of these incremental investments will often turn out to be illusory.

Additional challenges make early settlement difficult. A litigating attorney paid by the hour has no incentive to encourage his client to settle when substantial uncertainty about the case remains, because the lawyer earns more by working to reduce that uncertainty. An organizational client may also have internal principal-agent problems one in the organization with the courage of conviction quickly. Unless the lawyer has access to set a deadline or drag on through discovery because no one wants it to happen.

It is also often difficult to settle early because the two sides are too far apart and neither has the interest in protracted litigation. The client and quite willing to bluster about revenge if litigating a lawsuit as a matter of principle. Each party to the case is on the defensive and has a strong incentive to wait as long as possible to settle. This is an extremely volatile mixture.

Finally, moves in the formal litigation attempts to settle early. There is often a first-mover advantage. When a business client receives a threatening to a supply contract, it might make more sense to accept a declaratory judgment in your home jurisdiction with your potential adversary. Grabbing the initiative initially may affect the value of the case. Sometimes, the benefits of settling early can be dramatic because the value of the case may not change much at all.

Trust Your Client

There are no easy solutions to these problems. The first thing that a lawyer-client relationship, will support the client's desire to try to settle early and great benefits will have to lead the way, first with your client.

Behind the table, you should first diagnose your lawyer-client relationship, will support the client's desire to try to resolve the matter quickly capable of making the difficult decisions. Doing so even in the face of remaining uncertainty. Is your relationship with the client strong enough for an early negotiated resolution?

Next, you should test your own assumptions about risk-taking. Often lawyers and client
A PROBLEM-SOLVING APPROACH

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ent may also have internal principal-agent problems. There may be no one in the organization with the courage or authority to settle a matter quickly. Unless the lawyer has access to senior management, a case may drag on through discovery because no one wants his name on the settle-

It is also often difficult to settle early because the relationship between the two clients is strained and neither has yet been worn down by the burdens of protracted litigation. The clients may be angry at each other and quite willing to bluster about revenge and going to court or defend-

ing a lawsuit as a matter of principle. Each may want to punish the other. This is an extremely volatile mixture.

Finally, moves in the formal litigation process can undermine at-

tems to settle early. There is often a first-move advantage in litigation. When a business client receives a threatening letter from a distant party to a supply contract, it might make more sense to sue quickly for a declaratory judgment in your home jurisdiction than to pursue negotia-

tion with your potential adversary. Grabbing jurisdictional advantage initially may affect the value of the case. Similarly, early litigation moves to change venue, remove to federal court, or add or dismiss parties at the initial stages can have dramatic consequences. The downside, of course, is that such moves can also antagonize the other side, provoke costly es-

calation, and make early settlement impossible.

TRUST YOUR CLIENT
There are no easy solutions to these problems, but there are clearly costs to not trying to settle early and great benefits if you succeed. Often you will have to lead the way, first with your client and then with the other side.

Behind the table, you should first diagnose whether your client, and your lawyer-client relationship, will support settling early. Does your cli-

t want to try to resolve the matter quickly? Is the client institutionally capable of making the difficult decisions necessary to weigh the risks of doing so even in the face of remaining uncertainties about the litigation? Is your relationship with the client strong enough to work with the client for an early negotiated resolution?

Next, you should test your own assumptions about the client and about risk-taking. Often lawyers and clients have very different attitudes
toward risk. As Richard Weise, the former General Counsel of Motorola, has written: "Lawyers, as a class, are not up for much risk. They like to get all of the facts before making a decision. If ten pre-litigation interviews are good, twenty would be better. In discovery, the more depositions, document requests and interrogatories, the better. In the courtroom, a lawyer seldom asks a question unless he knows the answer. Conversely, the client believes that he makes extremely important decisions with a small fraction of relevant facts: What technology to pursue? What R&D to do? What products to design? What factories to build? Who to hire? ... As a matter of fact, I know clients who believe that they make more important decisions every day than the most difficult legal problems they generally see. The point here is: Let the client in! The client is smart enough to be trusted with concepts of risk."

This is good advice. By trusting that your client is sophisticated enough to weigh the costs and benefits of moving quickly even in the face of uncertainty, you can solidify the lawyer-client relationship. You must, of course, work to ensure that the client has as much information as can be gathered to make such decisions as wisely as possible. But ultimately it is the client's preferences toward risk that should govern.

CHANGE THE GAME

Like the $20 Auction (see Chapter 4), there are some games that you just shouldn't play. Sometimes traditional litigation is one of them. If the other side is intent on marching through the litigation process, there may be no way to force them to settle—you have to defend your client. But often there are ways in which you can change the game for mutual advantage.

A client may want to consider using settlement counsel. Settlement counsel simply means that a client hires both a litigator and a negotiator—sometimes from different law firms. The designated negotiator—the settlement counsel—has no authority to conduct the litigation. She does not take depositions, write briefs, or argue motions. She essentially distances herself from the litigation so that she will not get carried away in the heat of battle. If the other side wants to talk settlement, they talk to her.

Settlement counsel, of course, introduces a new agent with new incentives, information, coordination, and though using settlement counsel may help introduc...
he former General Counsel of Motorola, are not up for much risk. They like to make a decision. If ten pre-litigation interrogatories are better. In discovery, the more deposition interrogatories, the better. In the court question unless he knows the answer, what he makes extremely important decision is facts: What technology to pursue? Who to design? What markets to pursue? Who to hire?... As a matter of fact, I know clients more important decisions every day problems they generally see. The point here is smart enough to be trusted with constructing that your client is sophisticated in benefits of moving quickly even in the dilapidate the lawyer-client relationship. You e that the client has as much information in decisions as wisely as possible. But utilize toward risk that should govern.

Chapter 4), there are some games that you just sitional litigation is one of them. If the king through the litigation process, there is to settle—you have to defend your client. In which you can change the game for mutual consider using settlement counsel. Settlement client hires both a litigator and a negoti at law firms. The designated negotiator— so authority to conduct the litigation. She ife, briefs, or argue motions. She essentially jation so that she will not get carried away her side wants to talk settlement, they talk urse, introduces a new agent with new in-
escrow, essentially comparing the parties' private information to see if a quick settlement is possible. And a neutral can often help the parties through the evaluation of their case and point out the costs of traditional litigation.

In addition, sometimes parties may want to refer specific issues to an arbitrator for a quick resolution. This need not mean opening up a full, complex, and costly arbitration of the entire case. Instead, you may negotiate nine out of ten issues and merely submit the tenth for a decision.

WHAT'S IN IT FOR ME?
Settling early may not always seem to be in a lawyer's best interest. There can be great short-term economic benefits of prolonged litigation. Colleagues in a law firm might raise a skeptical eyebrow if the lawyer closes down a potentially lucrative litigation matter "prematurely." And early settlement entails certain risks—further discovery might uncover evidence favorable to one's client. A lawyer considering early settlement might legitimately ask: "What's in it for me?"

The answer turns on a lawyer's goals and assumptions. If you are dedicated to serving your client's interests and trust your client's ability to make decisions, then working toward early settlement makes sense. And if you assume that clients who receive excellence reward it, either in the short- or long-term, then resolving a dispute quickly may seem more like an investment in future business than an economic loss.

Lawyers and clients, of course, can also try to build incentives for early settlement into their relationship. A client may give her lawyer a bonus for concluding litigation prior to discovery. Although the bonus obviously will not equal the fees that would be generated by prolonging the case, it may offset the principal-agent tension in this context.

Use Decision Analysis to Make a Realistic Assessment of Your Case
A primary reason that cases settle late or don't settle at all is that the parties have divergent expectations about what will happen at trial. One of a lawyer's central tasks in dispute resolution is to find ways to assess his client's case efficiently and realistically. Decision analysis can be a very useful tool for this purpose.

Advice for Resolving Disputes
To illustrate the power of decision: simple example. Two months ago, Paula was injured in an automobile accident. She was making a left-hand accident was fairly severe. Paula broke her hand and her car was badly damaged. She m through she has returned to work full-time tasks because of her thumb. Her doctor is regain total mobility in her thumb because

At the hospital after the accident, Pat officer that she began her left turn and when all on-coming traffic appeared Smith’s car seemed to come out of nowhere also told the officer that she was not wea the accident. Smith relayed basically the told the police that he sped up to make didn't see Paula until it was too late. Two officer that Smith appeared to be travel when he entered the intersection.

Paula and her lawyer assess the oppo gation systematically by identifying so quantifying legal risk. Every case contains facts, how the other side or a judge or jury has great difficulty grappling with such u through it, people typically default to int ception. Many lawyers do no more than what their case is worth. But intuition m Chapter 6, lawyers may fall prey to op what will happen at trial because they hav of legal uncertainty and assigned probabl cumb to loss aversion, partisan percept perpective's lawyer, for example, may give u able but relatively unlikely outcome, such Paula's case.

To avoid these mistakes, you need a sy certainty. We recommend a disciplined ap arate issues that bear on the net expected
he parties’ private information to see if a neutral can often help the parties in their case and point out the costs of traditional methods may want to refer specific issues to an entire case. Instead, you might merely submit the tenth for a decision. The need not mean opening up a full 1 of the entire case. Instead, you might consider early settlement as in it for me?” To illustrate the power of decision analysis, consider the following simple example. Two months ago, Paula Jackson, a teller at a local bank, was injured in an automobile accident. A car driven by Steven Smith struck her as she was making a left-hand turn at a busy intersection. The accident was fairly severe. Paula broke her right knee and right thumb, and her car was badly damaged. She missed work for three weeks. Although she has returned to work full-time, she is unable to perform some tasks because of her thumb. Her doctor is uncertain whether she will ever regain total mobility in her thumb because of the severity of her fracture.

At the hospital after the accident, Paula told the investigating police officer that she began her left turn when her traffic signal was yellow and when all on-coming traffic appeared to be slowing down, and that Smith’s car seemed to come out of nowhere and smashed into her. Paula also told the officer that she was not wearing her seat belt at the time of the accident. Smith relayed basically the same version of the events. He told the police that he sped up to make it through the yellow light and didn’t see Paula until it was too late. Two witnesses told the investigating officer that Smith appeared to be traveling well above the speed limit when he entered the intersection.

Paula and her lawyer assess the opportunities and risks of the litigation systematically by identifying sources of legal uncertainty and quantifying legal risk. Every case contains uncertainties—in the law, the facts, how the other side or a judge or jury will behave. The human mind has great difficulty grappling with such uncertainty. Rather than reason through it, people typically default to intuition only. Lawyers are no exception. Many lawyers do no more than get an overall intuitive feeling what their case is worth. But intuition may lead to errors. As we saw in Chapter 6, lawyers may fall prey to optimistic overconfidence about what will happen at trial because they have not identified crucial sources of legal uncertainty and assigned probabilities to them, or they may succumb to loss aversion, partisan perceptions, or reactive devaluation. A plaintiff’s lawyer, for example, may give undue weight to a highly favorable but relatively unlikely outcome, such as a jury verdict of $500,000 in Paula’s case.

To avoid these mistakes, you need a systematic way to deal with uncertainty. We recommend a disciplined approach that identifies the separate issues that bear on the net expected outcome of the case, estimates
in percentage terms a client's chance of prevailing on each of these issues, and isolates issues that require additional factual and legal research.

Suppose that, after conducting some legal research, Paula's lawyer learns that in the relevant jurisdiction a negligent driver is not liable for damages caused by injuries that are attributable to the plaintiff's failure to wear a seat belt. She also learns that injured plaintiffs can recover damages for pain and suffering in addition to those for medical expenses and lost wages. Finally, she learns that punitive damages are not available unless the tort was intentional. Now Paula's lawyer has a basic understanding of the issues that bear centrally on the net expected outcome of the case. These factors can be represented graphically in a dependency diagram (see Figure 8).

A dependency diagram is a tool used by litigation analysts to identify the most critical uncertainties and relationships bearing on the net expected outcome of the case. These diagrams usually make distinctions between ultimate issues (those that might be dispositive as to liability or damages) and influencing factors (those that affect the odds that an ultimate issue will be resolved in a particular way). For example, with respect to liability is an ordinary duty of care to Paula Jacks whether the two witnesses will testify that the intersection; whether the police report defendant was speeding—is admissible; and the next step is for the lawyer to judge a Paula's chances of prevailing at trial on these numbers can be only rough estimates, probabilistically will help Paula and her: the case is worth. Suppose the insurer (Without identifying the sources of legal risk), Paula's lawyer might recommend offer because her case is "extreme." Tell Paula that "if we win, we almost certainly $100,000 in medical expenses." Note he from an intuitive assessment of the net c: nating with the client in plain but high: lawyer, the advice sounds good. The odd high, and $100,000 is much better than S.

But to be systematic about the decision the relevant factors that bear on the net and assign probabilities to them. She might do so by using a decision tree. One branch of the other would represent proceeding to breaking down the choices in such an exp: clients compare the uncertain benefits of create settlement offer.

In order to value Paula's case, her lawyer would consider a decision tree as follows (Figure 9).

![Decision Tree](http://example.com/decision-tree.png)
mate issue will be resolved in a particular way). In our example, the ultimate issue with respect to liability is whether Steven Smith breached an ordinary duty of care to Paula Jackson. Influencing factors include whether the two witnesses will testify that they saw Smith speeding into the intersection; whether the police report—which concludes that the defendant was speeding—is admissible; and so on.

The next step is for the lawyer to assign percentage estimates to Paula's chances of prevailing at trial on the relevant issues. At this stage, these numbers can be only rough estimates. Nevertheless, thinking probabilistically will help Paula and her lawyer better understand what the case is worth. Suppose the insurer offers a settlement of $50,000. Without identifying the sources of legal uncertainty and quantifying legal risk, Paula's lawyer might recommend that Paula reject the settlement offer because her case is "extremely strong." She might even tell Paula that "if we win, we almost certainly will recover all of your $100,000 in medical expenses." Note here that the lawyer is working from an intuitive assessment of the net expected outcome and communicating with the client in plain but highly imprecise language. To the lawyer, the advice sounds good. The odds of recovering $100,000 seem high, and $100,000 is much better than $50,000.

But to be systematic about the decision, Paula's lawyer should identify the relevant factors that bear on the net expected outcome of the case and assign probabilities to them. She might analyze the settlement decision by using a decision tree. One branch would represent settlement; the other would represent proceeding to trial (see Figure 9). The goal of breaking down the choices in such an explicit way is to help lawyers and clients compare the uncertain benefits of proceeding to trial with a concrete settlement offer.

In order to value Paula's case, her lawyer must estimate the likelihood

![Figure 9](image-url)
of success. Assume that when she says the case is “extremely strong,” she means that there is an 80 percent chance that the jury will find Smith negligent. If this is the only uncertainty, the expected value of the case is roughly $80,000 ($100,000 × .8; see Figure 10).

But in most cases there are several sources of uncertainty. Suppose that Paula asks her lawyer to assign a probability to her prediction that Paula is “almost certain” to recover all medical expenses if she wins. Paula’s lawyer might explain that there is a small chance—10 percent—that the jury will not award damages even if Smith is negligent because the jury will conclude that all of Paula’s injuries occurred as a result of her not wearing her seat belt. This remote possibility reduces the expected value of the case to $72,000 (.8 × .9 × $100,000; see Figure 11).9

Although Paula’s case is still “extremely strong” and she is still “almost certain” to recover all economic losses, the settlement offer of $50,000 looks much more attractive than it did initially. Instead of thinking about $100,000, Paula and her lawyer are now focusing on a more realistic expected value of $72,000.

Further refinements are possible. Paula’s lawyer should factor in transaction costs and the time value of money to trial are $20,000, the value to Paula of $52,000 (see Figure 12). The time value of expected outcome still further.

The time value of money is a basic principle: Time is money. $1 today is worth more than $1 a year from now. A rational investor can invest $1 today in a corporate bond, or a share of stock and expect a certain interest from now on. Because trials take time and money until the case is concluded, Paula’s expected $52,000 into today’s dollars by discounting at 5 percent, the discounted return from litigation would be $47,273.

Finally, Paula’s lawyer should take Paula’s count. When clients are risk-averse, their smaller than the net expected outcome by premium. In many (and perhaps most) cases, involve a significant percentage of the clients may be willing to foreclose the possibility. In other cases, clients may be risk-neutral situations, a lawyer must not let his own recommendations.

The expected value can be translated
She says the case is “extremely strong,” she
perceives a 30 percent chance that the jury will find Smith
not negligent. The expected value of the case is $80,000 (.8 
× $100,000; see Figure 11).”

There are several sources of uncertainty. Suppose
she assigns a probability of .8 to her prediction that
Smith will not be negligent and .2 to the alternative.
This remote possibility reduces the expected
value to $72,000 (.8 × $.9 × $100,000; see Figure 11). With
these probabilities Paula recognizes that in the event
she is proven negligent and Smith is negligent, the
settlement offer of $50,000 is more than she initially
thought. Instead of thinking only about the
possible. Paula’s lawyer should factor in
transaction costs and the time value of money. If the costs of proceeding
to trial are $20,000, the value to Paula of litigating the case decreases to
$52,000 (see Figure 12). The time value of money may reduce the net
expected outcome still further.

The time value of money is a basic principle of finance that says that
$1 today is worth more than $1 a year from now. The reason is that a
rational investor can invest that $1 today in a certificate of deposit, a
corporate bond, or a share of stock and expect to receive a return one year
from now. Because trials take time and Paula will not receive her
money until the case is concluded, Paula’s lawyer should convert the
expected $52,000 into today’s dollars by discounting it. If she assumes that
payment of an adjudicated award would occur in one year, and that the
relevant discount rate was 5 percent, the present value of Paula’s
expected return from litigation would be $49,524 ($52,000 ÷ 1.05). If the
appropriate discount rate was 10 percent, then the present value would
be lower—$47,273.

Finally, Paula’s lawyer should take Paula’s risk preferences into
account. When clients are risk-averse, their reservation value will likely be
smaller than the net expected outcome by an amount known as the risk
premium. In many (and perhaps most) cases, clients will be risk-averse.
From a defendant’s point of view, for example, if the damages at stake
involve a significant percentage of the defendant’s assets, the defendant
may be willing to foreclose the possibility of a catastrophic loss at trial.
In other cases, clients may be risk-neutral or even risk-seekers. In these
situations, a lawyer must not let his own risk preferences color his settle-
ment recommendations.

The expected value can be translated into a risk-adjusted certainty
equivalent. The decision tree in Figure 12, for example, suggests that litigation requires Paula to face uncertainty about (1) whether Steven will be found negligent; and (2) if so, whether a jury would award damages. The time-discounted net present value of this gamble is $49,524. Paula could be asked: for what dollar amount would you be indifferent between taking this gamble and accepting a guaranteed payment? If Paula were risk neutral, this amount would be $49,524. But because she is risk averse, she might report that this amount is $45,000, her risk-adjusted certainty equivalent.

Note the potentially dramatic effect of litigation analysis on a lawyer and client’s perceptions of a settlement offer, even though both may still believe they have a very strong case. In this highly stylized example, it turns out that the $50,000 settlement offer is higher than the net-expected value of the case. By using systematic analysis and probability theory to incorporate counsel’s intuition about the odds of success on key issues, Paula’s lawyer has saved his client from rejecting out of hand a reasonable settlement offer.19

Decision analysis does not eliminate the potentially distorting effects of overconfidence bias, as described in Chapter 6. The analysis is only as good as the judgments informing the probabilistic assessments incorporated. The caution about “Garbage-in, garbage-out” clearly applies. But the beauty of decision analysis is that it forces lawyers and clients to be explicit about critical judgments. This can serve to improve communication and dampen the principal-agent tension between a lawyer and client. By requiring the lawyer to quantify his legal judgments, the client can more easily assess whether it is sensible to invest more in further litigation.

**Construct a Joint Decision Tree**

At the table, it can help to jointly construct a decision tree. This helps to focus the lawyers on the precise issues they think will be dispositive in the litigation, to illuminate what each side sees as the strengths and weaknesses of the case, and to highlight what steps need to be taken to produce convergent expectations about what will happen at trial.

A joint decision tree is not difficult to create. First, both parties work together to see if they can agree on the structure of the tree. What issues will the litigation turn on? Although draw the next step is more difficult. The lawyer assesses the odds of success for each issue.

Some lawyers may fear—with some justice closing their honest assessment of the case in the case of their client, especially when open rocate. We do not wish to gloss over the risks inherent in this kind of information exchange. Talkin risks of litigation implicates the first tens of bets. The process may reveal which unexpected outcomes.

Constructing a joint decision tree cannot be done—even if it cannot eliminate them. Decision tree can produce strategic benefits. The insider’s temptation to “smoke out” whether opposing counsel or her views of the opportunities and risks of, for example, might probe the insurer’s assumption is clear. She might refer the in and ask why it is unclear or unpersuasive. She, or distinguishes the cases on films continue to assert her original analysis of.

On the other hand, if the insurer arti- or cites a controlling authority, Paula’s is exactly where the insurer’s interpretation Isolating the scope of the disagreement I pose that the insurer asserts that although one of the court will most likely rule that if the belt she cannot recover, under the commo negligence. Suppose further that this is the case in which the two lawyers disagree. They efficient way to resolve this impasse—pert to render an opinion solely on that case.

Building a joint decision tree also can help cases, the governing legal standard is rel parties’ disagreement centers on how the cific facts. In Paula’s case, for example, th
Figure 12, for example, suggests that litigating uncertainty about (1) whether Steven will win a case, whether a jury would award damages, or amount would you be indifferent between accepting a guaranteed payment? If Paula would be $49,524. But because she is risk-averse, the net amount is $45,000. Her risk-adjusted valuation of the litigation analysis on a lawyer's settlement offer, even though both may still engage in the case. In this highly stylized example, settlement offer is higher than the net. Using systematic analysis and probability's intuition about the odds of success on which his client from rejecting out of hand eliminates the potentially distorting effects. The analysis is only as good as the probabilistic assessments incorpo-rbaging, garbage-out clearly applies. But what is that it forces lawyers and clients to be more. This can serve to improve communicative-ally tension between a lawyer and client to quantify his legal judgments, the client better it is sensible to invest more in further.

Tree

The decision tree can help reduce gaps in expectations— even if it cannot eliminate them. Moreover, trying to build a decision tree can produce strategic benefits. It offers lawyers an opportunity to "smoke out" whether opposing counsel has candidly disclosed his or her views of the opportunities and risks of litigation. Paula's lawyer, for example, might probe the insurer's assertion that the law is unclear. She might refer the insurer to the relevant authority and ask why it is unclear or unpersuasive. If the insurer cannot give reasons, or distinguishes the cases on flimsy grounds, Paula's lawyer may continue to assert her original analysis of the law.

On the other hand, if the insurer articulates a reasonable argument, or cites a controlling authority, Paula's lawyer may be able to pinpoint exactly where the insurer's interpretation of the law differs from hers. Isolating the scope of the disagreement in this way can be useful. Suppose that the insurer asserts that although the law is somewhat unclear, the court will most likely rule that if the plaintiff failed to wear a seat belt she cannot recover, under the common law doctrine of contributory negligence. Suppose further that this is the only relevant legal issue on which the two lawyers disagree. They can now turn to finding an efficient way to resolve this impasse—perhaps by agreeing to hire an expert to render an opinion solely on that question.

Building a joint decision tree also can identify disputed facts. In some cases, the governing legal standard is relatively straightforward, and the parties' disagreement centers on how the law will be applied to their specific facts. In Paula's case, for example, the litigants normally would put
on expert testimony regarding whether Paula's injuries were caused by her failure to wear her seat belt. Problem-solving lawyers might avoid the expense and delay of this process by finding creative ways to produce convergent expectations about how a jury would resolve that issue. For example, Paula and her lawyer might agree with the insurer to hire an independent expert to examine Paula's medical file and to make an independent assessment about the magnitude of the seat belt damages. This estimate might cause one or both sides to revise its view of what the jury might do. If the parties are inclined, they could agree to be bound by the independent expert's determination.

NEGOTIATING AT THE INTEREST-BASED TABLE

Assuming that your negotiations at the net-expected-outcome table are under way, how do you switch to the interest-based table if the situation might permit turning the dispute into a deal? And once at the interest-based table, what do you do?

Moving to the Interest-Based Table

Inviting opposing counsel to explore the opportunity for creating value at the interest-based table can feel risky. Both sides may be reluctant to share interests once they are entrenched in litigation. The interest-based table presents a new concept that may be difficult for some lawyers and clients to accept: that dispute resolution may be an opportunity to find value-creating trades as well as a time for waging war.

For this reason, we advise lawyers interested in moving to the interest-based table to deliver three explicit messages to their counterparts. First, looking for trades may be good for both sides. Moving to the interest-based table may strengthen the parties' relationship, facilitate value-creating deals, and ease distributive tensions at the net-expected-outcome table. Second, looking for trades does not require or imply a ceasefire. Litigation can continue, and a party need not disclose information at the interest-based table that he feels will undermine his position at the net-expected-outcome table. Finally, discussing interests does not signal weakness. Indeed, a willingness to broaden the scope of negotiations can be framed as a sign of strength and confidence.

Searching for Trades

If the other side is willing to try to convert your interests and come up with options you may be tempted to unveil all your ideas you really want, and I've got the solution. This is a dangerous tendency, and it is unlikely guessed right about the other side's interest you propose, either because he has not be speak for himself or because of reactive dev.

Instead, jointly explore what each side can each side hopes the lawsuit will accomplish include obvious interests related to the law on “receive fair compensation.” Also comprise of the litigation. If two businesses are invo business interests? To sell more product? A pand geographically? Specialize in some at the interests of the individuals who run th esities exist? Can one side provide the other sic advantageously way? What differences in resources, capabilities, and preferences? I differences?

In some cases, the parties may have im dollar amount of damages at issue. A defen crimination suit may worry about its sepf civil rights complaint against a police depa on an admission of wrongdoing and changing in the future. The seller in a long-term sup interest in establishing a more flexible delivery to market changes.

Also consider involving clients more at the net-expected-outcome table. Of cot tomdom to negotiations that focus on assessment of litigation, she may not be comfortable with an active role at the bargaining table. Relinquish But as we have noted, clients often understa
Searching for Trades

If the other side is willing to try to convert your dispute into a deal, you must first negotiate a process. If you have thought carefully about the other side's interests and come up with options that meet those interests, you may be tempted to unveil all your ideas at once, as in: "I know what you really want, and I've got the solution that gives you what you want." This is a dangerous tendency, and it is unlikely to work. Even if you have guessed right about the other side's interests, he is likely to reject what you propose, either because he has not been given an opportunity to speak for himself or because of reactive devaluation.

Instead, jointly explore what each side cares about and why, and what each side hopes the lawsuit will accomplish. Think broadly—don't just include obvious interests related to the lawsuit, such as "settle quickly" or "receive fair compensation." Also consider interests beyond the scope of the litigation. If two businesses are involved, what are their general business interests? To sell more product? Attract more customers? Expand geographically? Specialize in some area? Reduce costs? What are the interests of the individuals who run those businesses? What synergies exist? Can one side provide the other side with goods or services in a mutually advantageous way? What differences exist between the parties in resources, capabilities, and preferences? How can they trade on those differences?

In some cases, the parties may have important interests beyond the dollar amount of damages at issue. A defendant in an employment discrimination suit may worry about its reputation. Plaintiffs bringing a civil rights complaint against a police department may be interested in an admission of wrongdoing and changing police practices and policies in the future. The seller in a long-term supply contract may have an interest in establishing a more flexible delivery schedule in order to respond to market changes.

Also consider involving clients more at the interest-based table than at the net-expected-outcome table. Of course, if an attorney is accustomed to negotiations that focus on assessing the net expected outcome of litigation, she may not be comfortable with having her clients play an active role at the bargaining table. Relinquishing control can be difficult. But as we have noted, clients often understand their interests and the rel-
ative priorities among those interests better than their lawyers do, and they can often be very helpful at the interest-based table.

Finally, consider involving nonparties in searching for trades. The tendency in legal dispute resolution is to focus only on those people or institutions that are named parties in the litigation and to forget that each side has many other relationships that may be affected by the lawsuit. Adding some of these players at the interest-based table can be helpful. If, for example, a building owner and a general contractor are having a dispute over payment, they might bring in an official from the lending institution underwriting the project to assist with their negotiation. If they find a value-creating trade that requires additional lending, this official will be indispensable to making their creative solution possible. Similarly, in a dispute among coauthors over copyright issues, it may be helpful to bring in a representative of the publisher. As the frame of the negotiation widens, outside parties may be essential to devising sophisticated trades.

Managing Potential Conflicts between the Two Tables
Negotiations at the net-expected-outcome table do not always go smoothly. One or both parties may become hostile or be unable to sustain a problem-solving stance. In such cases, net-expected-outcome negotiations may adversely impact the relationship between the parties and prevent them from looking for trades. How can you prevent this?

First, discuss this danger early. Be explicit about the possibility that tension at the net-expected-outcome table may poison the atmosphere at the interest-based table. Repeat this discussion throughout the negotiations at the net-expected-outcome table if necessary. If things get heated, a problem-solving lawyer or client should try to confine conflicts at the net-expected-outcome table so that they do not spill over into discussions at the interest-based table.

Second, it may help to separate the two tables in both time and space. You might first engage in a thorough net-expected-outcome negotiation, take a break, and then proceed to the interest-based table. If the break is long enough, hot tempers at the net-expected-outcome table may cool, making interest-based negotiation possible; the two types of negotiation occur in different ways in each side’s thinking.

Third, try dividing responsibility for the negotiation between lawyers and clients: the lawyers work with the clients at the interest-based table and the clients at the interest-based table and the clients at the interest-based table and the clients at the interest-based table. This clear division of labor, the negotiators could simultaneously.

Fourth, consider rules for information sharing. These rules should be designed to keep different types of players separate. This technique works best when the players are involved in different aspects of the litigation at each table. In such instances, a screen ensures that one team of negotiators does not know the other team is even negotiating until the process is fully completed.

Advice for Resolving Disputes

An Example: Digital v. Intel
The October 1997 settlement of a patent infringement case against Digital Equipment Corporation against the maker of Intel’s Pentium processor digital computer raised many issues. Intel had a key supplier of chip computers and had a reputation for vigorous law suits. Digital alleged that Intel, in developing the Pentium processor, had appropriated technology of the company, Advanced Micro Devices. The Pentium chips were better than those of Intel’s competitors in terms of performance. Intel and Digital reached a settlement agreement in 1997, which included a release of all claims and a payment of $120 million to Digital. The settlement agreement also included a provision for joint development of future microprocessors.

The dispute between the two companies was referred to Robert B. Palmer, then chairman of Digital, who later said during his testimony in the antitrust case that Digital’s claims, if meritorious, could be resolved by negotiation. Palmer later said that Digital’s claims, if meritorious, could be resolved by negotiation.
making interest-based negotiation possible. Or you may want to have the two types of negotiation occur in different rooms, to help distance them in each side's thinking.

Third, try dividing responsibility for negotiating at the two tables between lawyers and clients: the lawyers work at the net-expected-outcome table and the clients at the interest-based table. Where there is such a clear division of labor, the negotiations can proceed along both tracks simultaneously.

Fourth, consider rules for information exchange between the tables. These rules should be designed to keep information learned at the two tables separate. This technique works best in complex cases in which many players are involved and in which different players are negotiating at each table. In such instances, a screen can be set up between the different teams of negotiators so that neither table is aware of what the other is doing until the process is virtually complete.

An Example: Digital v. Intel

The October 1997 settlement of a patent infringement suit brought by Digital Equipment Corporation against Intel illustrates how a dispute can sometimes turn into a deal-making opportunity through interest-based negotiations. The dispute is noteworthy both for the substantial sums at stake and for the creativity shown—principally by the clients—in resolving the lawsuit.

In May 1997, to the surprise of industry analysts, Digital filed a patent infringement suit against Intel, the world's leading computer chip maker. Intel was a key supplier of chips for Digital's line of personal computers and had a reputation for vigorously defending its intellectual property. Digital alleged that Intel, in developing its Pentium microprocessors, had misappropriated technology related to Digital's Alpha microprocessor. The Pentium chips were bringing Intel nearly $20 billion in sales per year. In two days, Intel's stock price fell, as analysts estimated that Digital's claims, if meritorious, could be worth billions of dollars.

The dispute between the two companies escalated rapidly. As Digital chairman Robert B. Palmer later said dryly, speaking of his firm's decision to sue, "I didn't expect it to improve our relationship." Just over
two week later, Intel filed its own lawsuit seeking the return of documents provided to Digital under nondisclosure agreements that contained information that Digital needed to produce computers running Intel's newest microprocessor. The new Digital computers were due to be shipped in early 1998, but without those documents Digital's assembly line would screech to a halt. Intel also informed Digital that it would not renew the company's long-term supply contract for Intel's Pentium, Pentium Pro, and Pentium II processors once the contract expired in the third quarter of 1997 and that Intel would terminate all informal technological cooperation between the two firms. This was highly distressing news to Digital, which depended heavily on access to Pentium chips. In fiscal year 1997, Digital sold $2.2 billion of personal computers wired for Intel chips, more than a quarter of its total product sales for that year.

Within a month of the original suit, Intel retaliated by claiming that Digital's Alpha microprocessor had misappropriated Intel technology. In turn, Digital claimed that Intel was using monopoly power to demand return of technical information about its chips, a not-so-veiled accusation that Intel was possibly violating antitrust laws.

Most industry and legal analysts believed that, no matter how strong Digital's initial claim was, no court would ever grant its request for an injunction prohibiting Intel from selling Pentium chips. As to the merits of Digital's claims, there was widespread disagreement. Digital's legal and technical teams both concluded that Intel had violated the patents. These teams also suggested that a suit would bring pressure on Intel from the Federal Trade Commission, which had previously investigated Intel for possible antitrust violations. In addition, at least in the eyes of some industry analysts, the fact that one of the nation's leading patent attorneys, Herbert Schwartz, had agreed to represent Digital signaled that Digital's case had some merit. Moreover, according to press accounts, Digital president Ronald Palmer firmly believed that Intel patent infringement was the main reason for the commercial failure of the Alpha chip, the development of which he had presided over and which he had championed for years. In the end, Digital's board of directors, though worried about Intel's reaction, decided the case had enough merit to pursue.

On Intel's side, The Wall Street Journal

\textbf{Box 18}

\textbf{Advice for Resolving Disputes}

\begin{itemize}
  \item Digital
    \begin{itemize}
      \item Some chance (10–40%) to recover $\text{ hundreds} in damages
      \item The FTC might take another look at Intel's market
      \item Unlikely to win injunction prohibiting Pentium chips
      \item Any damages would be awarded many years from now
      \item Pentium chip technology might be obsolete by then
      \item The uncertainty caused by litigation is high
      \item Intel will terminate most-favored-national arrangements
    \end{itemize}
  \item Intel
    \begin{itemize}
      \item Outside chance of having to pay huge damages in billions of dollars
      \item Bad publicity
    \end{itemize}
  \item Small chance of prevailing on counts
\end{itemize}
own lawsuit seeking the return of documents under nondisclosure agreements that contained trade secrets. Intel also informed Digital that it would not supply any Pentium processors once the contract expired in the fall. Intel would terminate all informal technical relationships with Digital and the two firms, which was highly distressing to Intel. Intel had invested heavily in access to Pentium chips. A $2.2 billion of personal computers wired quarter of its total product sales for that year. Intel retaliated by claiming that Digital was using monopoly power to defame about its chips, a not-so-veiled act of violating antitrust laws. Analysts believed that, no matter how strong the case against Digital, Intel would prevail. As to the merits of the case, Intel had violated the patents. What Intel wanted was a suit to bring pressure on Intel to have its case dismissed, which had previously investigated Intel's芯片. In addition, at least in the eyes of other nations, it was clear that one of the nation's leading patents had been violated. Moreover, according to press accounts, Intel had sought the commercial failure of the AI-1, which had pre-sold over a million units. In the end, Digital's board of directors, responding to Intel's reaction, decided the case had enough merit. On Intel's side, The Wall Street Journal reported that "some in the Intel camp feared Digital's claims might have some merit." Most legal and industry analysts dismissed Intel's counterclaims as groundless but noted that they would prolong the litigation. At the very least, Intel knew it was facing a real possibility that a court would find infringement and impose damages in the hundreds of millions of dollars. That said, however, any money judgment ordered by a court was a long way off. The Pentium chip might be obsolete by that time, which would cap Digital's damages; the value of any payment would be reduced by the time value of money; and an antagonistic relationship with Digital would very much hurt Digital's personal computer sales in the future. The risks and opportunities of litigation, taken all together, are shown in Box 18.
Digital's Interests
- Improve the profitability of Alpha sales
- Acquire discounts on all Intel chips
- Minimize legal fees
- Eliminate losses at production plant

Intel's Interests
- Avoid liability and minimize legal fees
- Secure buyer for the Merced chip for high-end computers
- Acquire new technology for non-PC portable processors
- Acquire a new semiconductor facility cheaply

Box 19

The parties had other important interests at stake. Digital was concerned about direct competition from a new high-end chip designed in a joint venture between Intel and Hewlett-Packard. This new chip—codenamed the Merced—was scheduled for release in 1998 and would compete with Digital's Alpha chip. The Alpha chip had garnered only modest sales since its inception; indeed, for the past several years, the semiconductor processing plant at which the Alpha chip was manufactured had lost $100 million, and Digital had to spend roughly $250 million per year to upgrade the facility, which ran at between one-half and two-thirds capacity. Digital also was interested in receiving priority discounts on all Intel chips in order to boost the competitiveness of its PC sales.

Intel, of course, was eager to limit the distractions of litigation and to eliminate possible future competition between the Alpha and Merced. Intel also wanted to boost its performance in the non-PC portable markets, where it had been historically weak because its chips tended to generate too much heat. The parties' interests outside the scope of their litigation are shown in Box 19.

This is where things stood when a settlement that Intel's chief operating officer described as "win-win" was announced in October 1997. The agreement capitalized on both sides' interests. Intel agreed to purchase the plant at which the Alpha chip was censured the Alpha chip from Digital for 10 years, and to produce the chip for Digital Intel agreed to provide Digital with discounts to the StrongARM, a well-hand-held computers and cellular phones, that it would work with Intel to make Digital compatible with the Merced chip, which dorsemen of Merced. Although Alpha was more years, in the long run the Merced cl competitor.

CONCLUSION

What can we learn from this settlement? down at the interest-based table, both part better than the net expected outcome at $500 million, it would have vorted nation status from Intel or been ab1. And it would most likely have lost atd went on because of Intel's decision to cut Pentium chips. As for Intel, it eliminated risk of liability in the hundreds of million time acquired a new plant and new techni discounts on the full range of Pentium ch had already struck with a few other PC ma

Second, the parties' innovative settlement could have ordered. The only issues in play table were whether Intel had violated Dig ages would be awarded if liability were fe the interest-based table, the parties address met by focusing merely on the net expecte
**Intel's Interests**

- Avoid liability and minimize legal fees
- Secure buyer for the Merced chip for high-end computers
- Acquire new technology for non-PC portable processors
- Acquire a new semiconductor facility cheaply

Important interests at stake. Digital was concerned from a new high-end chip designed in xel and Hewlett-Packard. This new chip—scheduled for release in 1998 and would a chip. The Alpha chip had garnered only a rush; indeed, for the past several years, the lant at which the Alpha chip was manufactured and Digital had to spend roughly $250 million facility, which ran at between one-half and also was interested in receiving priority disorder to boost the competitiveness of its PC

Another limitation of the distractions of litigation and to competition between the Alpha and Merced. its performance in the non-PC portable mar- keting was so weak because its chips tended to gen- erate the interests outside the scope of their li- tigation. when a settlement that Intel’s chief operating officer was announced in October 1997, on both sides’ interests. Intel agreed to pur- chase the plant at which the Alpha chip was made for $700 million, to license the Alpha chip from Digital for roughly $200 million over four years, and to produce the chip for Digital for seven years. In addition, Intel agreed to provide Digital with discounts on all Intel chips, which analysts estimated to be worth $100 million over seven years.

On the other side, Intel acquired a state-of-the-art semiconductor facility for less than half the $1.5 billion it would cost to purchase a new facility, and it also acquired all of Digital’s non-Alpha chips business, including rights to the StrongARM, a well-regarded processor used in hand-held computers and cellular phones. Moreover, Digital announced that it would work with Intel to make Digital’s Unix operating system compatible with the Merced chip, which amounted to an implicit endorsement of Merced. Although Alpha would still be produced for seven more years, in the long run the Merced chip would not have a serious competitor.

**CONCLUSION**

What can we learn from this settlement? First, by being willing to sit down at the interest-based table, both parties obtained results that were better than the net expected outcome at trial. Even had Digital won a money judgment for $500 million, it would not have received most-favored-nation status from Intel or been able to sell its Alpha chip plant. And it would most likely have lost additional money as the litigation went on because of Intel’s decision to cut Digital off from future use of Pentium chips. As for Intel, it eliminated a small but not insubstantial risk of liability in the hundreds of millions of dollars and at the same time acquired a new plant and new technology, while offering Digital discounts on the full range of Pentium chips—the same kind of deal it had already struck with a few other PC makers.

Second, the parties’ innovative settlement was not something a court could have ordered. The only issues in play at the net-expected-outcome table were whether Intel had violated Digital’s patents and what damages would be awarded if liability were found. Thus, by negotiating at the interest-based table, the parties addressed concerns that could not be met by focusing merely on the net expected outcome of litigation.
Third, the example illustrates that value creation at the interest-based table can occur alongside highly assertive behavior in net-expected-outcome negotiations. From the beginning, both parties waged war at the net-expected-outcome table, no holds barred. For example, The Wall Street Journal reported that Digital had spent many months "figuring out how to surprise Intel [and had] calculated that by filing suit in federal court in Worcester, [Massachusetts,] not . . . far from [Digital's] headquarters, it might get a sympathetic jury as well as a court with a relatively small caseload." Intel, for its part, filed a countersuit in California, far from Digital's base of operations, and another suit in Oregon. Digital moved to strike some of Intel's claims as untimely; Intel moved for summary judgment on its California claims; and both sides hired leading patent attorneys and made public statements reflecting their intent to fight the case to the end.

Fourth, the example reaffirms the importance of getting clients involved in interest-based negotiations. In fact, it is unclear whether the lawyers in charge of the litigation were involved substantively in any of the interest-based talks. Settlement was initially broached at a dinner among a number of directors from both companies. When Intel directors learned that Digital might be interested in selling the Alpha chip, the discussions were referred to Digital president Robert Palmer and to Intel's chief operating officer, Craig Barrett. In June 1997 Palmer and Barrett met to discuss settlement and hammered out preliminary terms; the final agreement was negotiated by the two men and their chief financial officers. The lawyers were kept apprised of the process, but the clients basically took matters into their own hands at the interest-based table.

Finally, the example illustrates how litigants can create value by exploring options that are totally unrelated to the issues involved in their legal dispute. As we have said, there is no guarantee that an interest-based negotiation will prove fruitful. But the parties may leave a great deal of value on the table if they fail to try it.
A PROBLEM-SOLVING APPROACH

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settlements, and another suit in Oregon.
ne of Intel’s claims as untimely; Intel moved
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made public statements reflecting their in-
end.30

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10

Advice for
Making
Deals

Peter French, age 42, is a vice presi-
dent of the agrochemical division of a large national company. He has
just been offered a new job as executive vice president and chief operat-
ing officer (COO) of Montero West Corporation, a moderately sized and
publicly traded bioengineering and life sciences company based in Den-
ver, Colorado. Montero West produces agrochemicals, including pesti-
cides and herbicides, as well as genetically engineered seeds, specialty
crops, and some pharmaceuticals.

Three months ago Peter was contacted by a headhunter who arranged
for him to meet the president and chief executive officer at Montero
West, Henry Phillips, and a search committee of Montero board mem-
ers. The Phillips family controls a majority of the outstanding shares of
Montero West, which was founded by Henry’s grandfather. Peter is being
considered for second-in-command, with broad day-to-day operating
responsibilities. Henry, who is now 60 years old, expects to retire at age
65. Although Peter has been told that there can be no guarantees, Henry
and the board have suggested to Peter that when Henry retires Peter
would be the prime candidate for CEO.
Henry and Peter have negotiated the key financial terms of Montero’s offer. On behalf of the corporation, Henry sent Peter a “nonbinding letter of intent” outlining their understanding, which included the following:

- “You will be Executive Vice President and Chief Operating Officer, reporting directly to the CEO and the Board of Directors.”
- “You will be paid a yearly base salary of $475,000, with an additional discretionary annual incentive bonus to be determined by the Board’s Compensation Committee.”
- “Upon signing, you will receive options to purchase 100,000 shares of Montero West’s stock at the current price of $30 per share. Twenty percent of these shares will vest each year over a five-year period.”
- “In the discretion of the Board’s Compensation Committee, you may also be awarded additional options in the future on an annual basis.”
- “You will also receive the company’s standard executive benefits package, including disability, life and health insurance, and retirement benefits. The firm also agrees to pay your reasonable relocation expenses.”
- “Our agreement will be documented in a written employment contract with a five-year term.”

Peter hired Janice Dobson, a partner at a mid-sized Denver law firm, to represent him in negotiating his employment contract. The company referred the matter to Bill Stodds, a partner in the Denver law firm that is Montero West’s outside counsel, to handle the contract for Montero West.

**REVISITING THE OPPORTUNITIES AND CHALLENGES IN DEAL-MAKING**

Our focus in this chapter is on how lawyers can best take a problem-solving approach in negotiating the legal language used to implement deals. In many transactions, as in our example, the clients have already negotiated a preliminary understanding of the basic terms without the direct involvement of lawyers. Clients bring in to create the written documents to formalize the

**Why Deals May Be Easier to Negotiate than Expected**

To some extent, problem-solving should be easy in dispute resolution. In deal-making, the parties’ joint gains and value creation almost by definition because they each see themselves as better off than not. They want the deal to go through, so the value of their proposed transaction. Thus deals-making is often oriented toward value creation.

Second, in deal-making the principals have about the distributive dimensions of many issues are even brought into the negotiation. People settlement of the most conspicuous basic terms, length of the contract, and so on or have a great many remaining issues to address see those issues as secondary to the substantive issues already been tackled.

Third, in deal-making the parties often anticipate the future working relationship. Peter and Henry need to work together for the next five years. Neither of Peter’s employment agreement to understand. In cases like this where the shadow of may be less tempted to behave opportunistically could be perceived as unreasonable distributive to collaborate to resolve their differences amicably.

Finally, problem-solving can be easier in deals because attorneys often have an economic incentive to Transact deals attorneys, even if generally paid by significantly discount their fees if a deal falls apart. Transact premium if the deal goes forward. The reality is that paid only when and if the deal goes through, paid by the hour and will earn less if there is an
direct involvement of lawyers. Clients bring lawyers into the transaction to create the written documents to formalize the deal.

Why Deals May Be Easier to Negotiate than Disputes
To some extent, problem-solving should be easier in deal-making than in dispute resolution. In deal-making, the parties see the possibility of joint gains and value creation almost by definition. Parties enter deals because they each see themselves as better off doing business together than not. They want the deal to go through, and they want to capture the value of their proposed transaction. Thus, the whole enterprise of deal-making is often oriented toward value creation.

Second, in deal-making the principals have often reached agreement about the distributive dimensions of many important issues before lawyers are even brought into the negotiation. Peter and Henry, for example, have settled the most conspicuous basic terms of their deal: the salary amount, length of the contract, and so on. Although their lawyers have a great many remaining issues to address, the parties are likely to see those issues as secondary to the substantive core terms that have already been tackled.

Third, in deal-making the parties often anticipate that they will have a future working relationship. Peter and Henry, for example, expect to work together for the next five years. Neither wants the negotiations over Peter’s employment agreement to undermine that budding relationship. In cases like this where the shadow of the future is long, clients may be less tempted to behave opportunistically or to push for what could be perceived as unreasonable distributive gain. They are more likely to collaborate to resolve their differences amicably, fairly, and efficiently.

Finally, problem-solving can be easier in deals than in disputes because attorneys often have an economic incentive to get deals done. Transactional lawyers, even if generally paid by the hour, often must significantly discount their fees if a deal falls apart, and they may earn a premium if the deal goes forward. The reality is that some lawyers will be paid only when and if the deal goes through. Unlike a litigator who is paid by the hour and will earn less if there is an early settlement, trans-
actional lawyers often have a strong incentive to reach a negotiated agreement.

**The Challenges for Lawyers in Deal-Making**

Despite these advantages of deal-making over dispute resolution, negotiating the language of documents that will implement a deal is often difficult. Lawyers face two basic challenges. First, they must communicate with their clients clearly about the risks that might affect the client down the road. Second, they must manage the strategic challenge inherent in all negotiations: what we have called the first tension.

**LAWYER-CLIENT COMMUNICATION**

Transactional lawyers are experts at thinking about what might possibly go wrong with a deal and how to protect their clients from avoidable risks and unwise commitments. The hard question is what level of risk a client should accept—which risks are important and which less so.

To make wise decisions, a lawyer must learn his client’s priorities and preferences, and the client must learn how different legal arrangements may shift risk and affect the value of the transaction. But this kind of learning requires that the lawyer and client communicate effectively and efficiently as the negotiation with the other side unfolds.

Many lawyers and clients don’t manage their communication very well. Often lawyers don’t probe for their clients’ interests deeply enough. Sometimes clients are unsure about their interests and have difficulty setting clear priorities. Moreover, lawyers often find it trying to explain to clients how different legal provisions would affect the probable outcomes should a particular contingency arise in the future. Some subjects and risks may be hard to discuss because they may trigger an emotional reaction in the client. For example, a client may be reluctant to focus on provisions that relate to his being fired for incompetence or to his being terminated in the event of disability. Particularly when a client sees certain risks as remote, lawyers and clients can become frustrated with each other. The lawyer may feel that the client does not take a given risk seriously enough. And the lawyer may fear that even if a client agrees to forgo protective language today, he will still blame the lawyer later if the contingency in fact arises. On the other hand, clients sometimes feel that their lawyer is making a mountain out of cover his own tail.”

**THE STRATEGIC CHALLENGE**

In addition to managing this communicative, lawyers face a strategic challenge across terms. After reaching an agreement in prior or both clients may wonder “What greater tension from the other side had I pushed him to use the legal phase of negotiations to on secondary terms. One or both sides proposing secondary terms that are highly other side obviously wants this deal—they than walk away.” For example, Montero eager to come work for us—we might have for less than $475,000. Even if we insist relating to stock options and terminatio tract.”

The dilemma is compounded because willing to make concessions if pushed. I thus begin with one or both lawyers tryin smart, and aggressive the other side is in or sure to apply. If the other side looks like a to do the deal, pushing for concessions m dynamic, each lawyer may assume a high to appear weak or unsure.

As a consequence, negotiations over leg any negotiation—can become highly adv one-sided demands into their initial dra about but hope to concede away later as b that they do care about, each side may o and concede very slowly in hopes of wea negotiation may become a game of chic characterized as deal-breakers or “not suf may try to create the impression that it ha go through. Each may believe that the oth side learns much about the other's true i
Deciding in Deal-Making

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their lawyer is making a mountain out of a molehill or simply trying “to cover his own tail.”

THE STRATEGIC CHALLENGE

In addition to managing this communication challenge behind the table, lawyers face a strategic challenge across the table in negotiating deal terms. After reaching an agreement in principle on the major terms, one or both clients may wonder “What greater concessions might I have gotten from the other side had I pushed harder?” Some clients are tempted to use the legal phase of negotiations to seek further distributive gains on secondary terms. One or both sides may believe, “Even if my lawyer proposes secondary terms that are highly favorable to my interests, the other side obviously wants this deal—they will ultimately concede rather than walk away.” For example, Montero West may think, “Peter is very eager to come work for us—we might have been able to get him to work for less than $475,000. Even if we insist on rather one-sided provisions relating to stock options and termination, he’ll still agree to the contract.”

The dilemma is compounded because some lawyers—or clients—are willing to make concessions if pushed. Deal-making negotiations may thus begin with one or both lawyers trying to assess how sophisticated, smart, and aggressive the other side is in order to decide how much pressure to apply. If the other side looks like a “sucker,” or seems overly eager to do the deal, pushing for concessions might make sense. To avoid this dynamic, each lawyer may assume a highly aggressive posture so as not to appear weak or unsure.

As a consequence, negotiations over legal terms in deal-making—like any negotiation—can become highly adversarial. The parties may build one-sided demands into their initial drafts that they really don’t care about but hope to concede away later as bargaining chips. On provisions that they do care about, each side may open with an extreme position and concede very slowly in hopes of wearing down the other side. The negotiation may become a game of chicken, where various terms are characterized as deal-breakers or “not subject to negotiation.” Each side may try to create the impression that it has less to lose if the deal doesn’t go through. Each may believe that the other side will blink first. Neither side learns much about the other’s true interests or concerns, and cre-
ative trades to resolve their differences go unexplored. In the end, the lawyers may deadlock, with each side unwilling to back down and yet unsure just how far the other side can be pushed before they walk away from the deal. The clients may need to get involved—often to their annoyance—to get the deal moving again and save the transaction. And sometimes deals still blow up, even when any number of arrangements would have made both sides better off than no deal at all.

PREPARING TO PROBLEM-SOLVE

In deal-making, the challenges behind the table and across the table are clearly related. To minimize the risk of stalemate, lawyers must work with their clients to identify key risks, learn their clients’ interests, and draft contractual language to bring to the negotiation table.

Identify Issues and Risks

Lawyers are involved in a variety of kinds of deals, including complex leases, real estate sales, loan agreements, mergers and acquisitions, corporate financing, compensation contracts, partnership agreements, and licensing of intellectual property and patents. Each context has its special risks and opportunities. How can a lawyer best identify the critical issues and risks in a particular transaction?

Probably the most important way that attorneys come to understand these risks is through past experience—working a particular kind of deal repeatedly, perhaps initially with more senior colleagues who can identify typical problems. Experience with a given type of deal can help a lawyer know what the distributive issues are in that context and what value-creating trades are often found. Similarly, experience will help the lawyer identify which risks his client should worry about most.

In addition to calling on their experience, lawyers often identify a transaction’s risks by using check lists, form books, and drafts of similar agreements used in the past. By looking at examples of similar deal terms—including the “boilerplate”—a lawyer can usually uncover the risks and concerns that the parties were trying to address through contractual language. And of course there’s no point in reinventing the wheel. Often, looking at forms will give an attorney an idea of how various risks in a deal can be constrained.

A third way to identify risks is simply to look back. Now, looking back, you realize that this deal—a real mess—it was an unmitigated disaster for you and you were victimized by the other side’s opportunism. You’ve always been better off if she had never done the deal in the first place. What caused this reversal of fortune, given the deal—the terms of the contract seem attractive.

Finally, and related, is to consider the incentive of the other party in various contexts. How to take advantage of your client if they set up the deal strategically? In any deal, each party should ask its incentive to be acting strategically by withholding quality of the goods to be traded (the lemons problem) to the future by taking advantage of it in the deal (the moral hazard problem). By looking from the other side’s perspective—by asking whether to sign—a lawyer can often spot risks that no one else sees.

In Peter French’s negotiation with Montero V yer will realize that a critical set of risks relate: Peter works for Montero West for fewer than circumstances, and with what consequences, cetera? What happens if Peter resigns? If an employee explicitly address these issues, background legal one side or the other with a breach of contract parties could litigate such claims, but there was uncertainty about liability and the amount of compensation contracts usually spelling out the consequences of contract.

With top executives, most corporations insinuate the employment relationship early, not just breach the contract but also without cause; then wants to make a change. What remains to be seen is that consequences will flow from a dismissal. The co
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**LEM-SOLVE**

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A third way to identify risks is simply to imagine that a year from
now, looking back, you realize that this deal—and the contract that for-
malized it—was an unmitigated disaster for your client. She lost money,
she was victimized by the other side’s opportunism, and she would have
been better off if she had never done the deal at all. How did this hap-
ren? What caused this reversal of fortune, given that today—going into
the deal—the terms of the contract seem attractive?

A final, and related, way is to consider the incentives that might oper-
ate on the other party in various contexts. How might the other side try
to take advantage of your client if they set out to be unscrupulous and


tal? In any deal, each party should ask itself how the other might
already be acting strategically by withholding information about the
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from the other side’s perspective—by asking why the other side is so ea-
ger to sign—a lawyer can often spot risks that need to be addressed.¹

In Peter French’s negotiation with Montero West, an experienced law-
yer will realize that a critical set of risks relates to what will happen if
Peter works for Montero West for fewer than five years. Under what
circumstances, and with what consequences, can the company dismiss
Peter? What happens if Peter resigns? If an employment contract doesn’t
explicitly address these issues, background legal standards might provide
one side or the other with a breach of contract claim for damages. The
parties could litigate such claims, but there would often be a great deal
of uncertainty about liability and the amount of damages. For this rea-
son, executive compensation contracts usually contain explicit provi-
sions spelling out the consequences of contract termination by either
party.

With top executives, most corporations insist on the right to termi-
nate the employment relationship early, not just for cause if the execu-
tive breaches the contract but also without cause if the corporation sim-
ply wants to make a change. What remains to be negotiated is what
consequences will flow from a dismissal. The convention is that if a cor-
poration terminates an employee for cause, the employee receives little or no severance pay or additional compensation. Executive contracts also provide, however, that if the employer dismisses the executive without cause, then the executive will receive severance compensation—spelled out in the contract—in lieu of damages or other claims.

An analogous set of distinctions governs resignation by the employee. Typically, if an executive voluntarily quits, she forfeits her severance package and has no claim against the corporation for future compensation. On the other hand, many executive employment agreements provide that if the executive quits her employment for what constitutes "good reason," she will be entitled to a predefined severance package, which may be the same or may differ from the without-cause termination package.

Not surprisingly, Peter and Henry did not discuss these issues of early termination when they hammered out the basic deal terms. Just as a couple about to marry rarely wants to think about the terms of a potential divorce, businesspeople about to work together rarely enjoy discussing provisions for termination or for allocation of risks if a deal fails.

Nevertheless, Peter's lawyer understands that defining what constitutes "for cause" and "good reason" and the amount of these severance packages is often at the heart of a lawyer's negotiation in such deals. The scope of these definitions will have serious distributive consequences in the event of eventual termination. If Peter is terminated without cause, how long will his salary continue after he's no longer working for Montero? For one year? Two years? Until the end of the five year term? And what happens to his unexercised stock options? Does he keep only those that are already vested? Or does he also keep those that have been awarded but are not yet vested? Peter's lawyer expects that these issues will be central to negotiations with Montero West.

Understand and Prioritize Your Client's Interests

With these issues in mind, Jan Dobson has her first meeting with Peter. Peter explains that he's excited about the prospect of working at Montero West, that he expects the company to do very well, that he's quite happy with the salary he's been offered, and that he's entirely satis-

fied with the company's fringe benefits package and probes for any concerns Peter may have about the next step. "That's always been my concern," Peter says, "is that the company will change before the CEO." Peter explains that in hiring him, clear that he is being groomed to be the next CEO. "Jan asks Peter about what he would do if someone else becomes CEO. "I'll go somewhere else, I'll go somewhere else, I'll go somewhere else," Jan says. "I don't want to stay at Montero" Peter wants the freedom to leave Montero West and go elsewhere.

Peter describes a second concern. Montauk biotechnology, and therefore it may be a concern for a larger chemical company. Phillips family controls a majority of the board's directors. They control the family's stock: "At the end of the day, Peter is concerned that he's out a position or in a position he would like to be CEO of an independent company," Jan says. "The criticism: I end up running a division of a larger company."

Jan then raises the issue of the board's decision. "It's not going to be an easy decision," Jan says, "but I think we're going to make a decision. Peter's optimism, Jan explains, is based on the distinct possibility that the definition of "cause" may seem dry and abstract. Even though Peter's relations will be very friendly, there is a possibility that he could turn it over. Relationships could future the company wanted to get rid of
ployee for cause, the employee receives little additional compensation. Executive contracts if the employer dismisses the executive with- tive will receive severance compensation—-in lieu of damages or other claims.
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nd Henry did not discuss these issues of early unmerred out the basic deal terms. Just as a child wants to think about the terms of a potential to work together rarely enjoy discussion or for allocation of risks if a deal fails. lawyer understands that defining what consti- traction in such deals. The amount will have serious distributive consequences of a lawyer’s negotiation. If Peter is terminated without cause, he’s no longer working for two years? Until the end of the five-year term? Unexercised stock options? Does he keep only what he is vested? Peter’s lawyer expects that these issues grow with Montero West.

**Tize Your Client’s Interests**

Jan Dobson has her first meeting with Peter. She’s excited about the prospect of working at the company to do very well, that he’s been offered, and that he’s entirely satis- fied with the company’s fringe benefits package. As he talks, Jan listens and probes for any concerns Peter may have about the transaction. She learns two things of considerable importance. First, a primary reason Peter is taking this job is that he hopes to become the CEO of a publicly-traded company. “That’s always been my ambition,” Peter says. “If I stayed in my present job, I’d eventually run a division, but I’d never be CEO.” Peter explains that in hiring him, Montero’s board has made it clear that he is being groomed to be the next CEO. “No promises, but it’s mine to lose.” Jan asks Peter about what he would do if Montero brought in someone else to become CEO when Henry retires. “If it starts to look like I won’t become CEO, I’ll go somewhere else,” Peter says. “I can’t imagine that I’d want to stay at Montero in the number two spot. I’d want the freedom to leave Montero West before the five years are up if someone else is brought in.”

Peter describes a second concern. Montero West is a leader in agricultural biotechnology, and therefore it may be a prime target for acquisition by a larger chemical company sometime in the next five years. The Phillips family controls a majority of the outstanding stock shares, and so the board of directors can prevent a hostile takeover. But if in the future the family decided it wanted out, the family could use its control to implement a sale. Peter is concerned that he would then be left either without a position or in a position he wouldn’t want. “Rather than being CEO of an independent Montero West,” Peter explains, “at best I could end up running a division of a larger chemical company. I don’t want that.”

Jan then raises the issue of the board’s firing Peter before the end of his five-year term. “It’s not going to happen,” Peter says. “I trust Henry Phillips completely, and I know we’re going to work together well.” Notwithstanding Peter’s optimism, Jan emphasizes the need to plan for this contingency. She explains the distinction between for-cause and without-cause termination, and she points out that while negotiations over the definition of “cause” may seem dry and technical, there’s a great deal at stake. Even though Peter’s relations with Henry and the board are now all very friendly, things could change. Henry could die. Board membership could turn over. Relationships could deteriorate. If sometime in the future the company wanted to get rid of Peter, the board might seek to
cut its costs by claiming there was cause for termination. Jan says, “Once the company decides that you’re not working out, then there’s no more future relationship to worry about. It can be very tempting to play hardball and save a few dollars when the employment relationship is basically over.”

Jan explains that most for-cause provisions include language to allow the company to terminate an employee without severance if the employee commits a serious crime, breaches fiduciary duties, or willfully does something that materially harms the company’s interests. “I doubt these provisions will cause much trouble,” Jan explains. “There are pretty standard clauses we can rely on. The hardest part of these negotiations will be defining whether and when the company can terminate you for not performing well. The question is always what counts as inadequate performance. They’ll want a broad provision that allows them to terminate you for cause very easily, and we’ll have to push to narrow the language to protect you.”

Set Realistic Expectations
Throughout their discussion, Jan tries to help Peter set realistic expectations about the upcoming negotiation. In deal-making, this is a crucial part of the communication challenge behind the table. Rather than avoiding these tough conversations or promising the moon, a lawyer needs to talk straight to her client about what the client can expect and what course of action the lawyer recommends. Clients appreciate candor, and the best way for lawyers to ensure that clients have realistic expectations is to be straightforward, clear, and truthful.

For example, Jan and Peter talk about what severance pay Peter should expect if he was terminated without cause. “If they just fired me without cause,” Peter says, “I’d want my whole salary for the rest of the five-year term, and all my options. We should make it expensive for them to fire me without cause.” Jan agrees that Peter should get more severance if he’s terminated without cause than if he quits. She points out that it’s common to award a terminated executive one or two years’ salary, but that paying salary through the end of the five-year term (if

Advice for Making Deals

more than two years remained) would be unusual in a company of Montero’s size. “We could “But I’d recommend against it—I think you should a two-year salary severance. Montero isn’t going you a salary long after you’ve started working in the standard with respect to options are not press for all of your options vesting immediately without cause or you resign for good reason.”

Understand Your Client’s Priorities
Jan understands that some terms in Peter’s agreement are more important to him than others. Although on every term in a contract, Jan knows that sex terms is the key to creating value in deal-making with Peter to understand the trade-offs Peter is willing to make between various terms. “You seem pretty strong on severance package if they terminate you without cause; I’d feel that way too.” Jan asks. Peter explains that it could be nice, but he would be most concerned about 100,000 options. “This company has wonderful options could turn out to be worth millions.”

Jan and Peter also talk about the possibility of resist giving Peter a severance package if he resign CEO. She digs to find out what he cares about that she may not be able to get everything he’s trying, and will continue to try, to understand trade-offs they might make as the negotiation.

Peter and Jan talk through a variety of options. Peter is concerned about signing a noncompete agreement. Jan advises him to try to negotiate a limited noncompete clause or a noncompete that expires after a certain period of time.
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\section{Understand Your Client's Priorities}

Jan understands that some terms in Peter's employment contract are
more important to him than others. Although lawyers sometimes dig in
on every term in a contract, Jan knows that searching for trades between
terms is the key to creating value in deal-making. She therefore works
with Peter to understand the trade-offs Peter would be willing to make
between various terms. "You seem pretty concerned about getting a high
severance package if they terminate you without cause," she says. "I un-
derstand that; I'd feel that way too." Jan and Peter then discuss what Pe-
ter's interests are concerning a severance package. Will he be short of
cash? How long does he expect that he would have to look for a job? Pe-
ter believes he could get a new job fairly quickly. "Which is more im-
portant to you—an additional year of severance pay or keeping all of your
options?" Jan asks. Peter explains that continuation of his salary would
be nice, but he would be most concerned about keeping all of the
100,000 options. "This company has wonderful growth prospects: those
options could turn out to be worth millions."

Jan and Peter also talk about the possibility that Montero West may
resist giving Peter a severance package if he resigns because he isn't made
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that she may not be able to get everything he wants—which is why she's
trying, and will continue to try, to understand how he views the various
trade-offs they might make as the negotiations progress.

Peter and Jan talk through a variety of other less central issues as
well. Peter is concerned about signing a noncompete clause that would

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level in a company of Montero's size. "We could push for that," Jan says.
"But I'd recommend against it—I think you should expect no more than
a two-year salary severance. Montero isn't going to be happy about pay-
ing you a salary long after you've started working for a competitor. In-
dustry standards with respect to options are not so clear. I will certainly
press for all of your options vesting immediately if there is termination
without cause or you resign for good reason."
make it difficult for him to assume an executive position in the same industry later. "I'm obviously not going to do anything wrong like steal the company's trade secrets," Peter says, "but I don't want to sign something ridiculous. Some of the agreements out there are just too broad." Jan assures him that she'll consider this term carefully. Peter also wants to be sure that he receives excellent health insurance coverage for his family—his wife has a hereditary kidney disease and may need dialysis in the future. In the event of termination for any reason, he needs that coverage to continue uninterrupted until he secures a new job.

NEGOITIATING ACROSS THE TABLE

Jan is now nearly ready to complete her preparations and to begin negotiations with the other side. She expects that there may be serious disagreements about a few key provisions in the contract—what constitutes "for cause," for example—but she hopes that they'll be able to resolve these disagreements amicably and efficiently. She also knows that certain value-creating opportunities are commonly exploited in executive compensation agreements. For example, sometimes by deferring compensation—having the corporation pay the employee certain sums after retirement rather than while the employee is actually working—the employee can reduce income tax because presumably he'll be in a lower income tax bracket at a later date. Similarly, sometimes the corporation can save taxes by structuring compensation carefully. For example, although a corporation can deduct from its expenses only $1 million a year in salary for any one employee, it can deduct additional compensation if the money is paid out as bonuses contingent on performance. Jan's goal is to try to tailor the contract to meet the interests of both sides, and in the process create value for her client.

Lead the Way toward Problem-Solving

When the other side in a deal starts a legal negotiation with moves that suggest they intend to be strategic, there's no reason to be confused, surprised, or offended—this is the way the game is often played, and the other side hopes to gain distributive advantages by playing that game better than you can. You have to be prepared to defend against the other side's distributive moves while leading the positive approach.

THE FIRST-DRAFT PROBLEM

Often, the first question for deal-making is who will write the initial draft of the contract, and why. It confers obvious advantages, because it gives the party to make the draft the opportunity to create the first draft. Jan, for example, knows that there is a who for-cause provision to favor the employer: stack executive compensation agreements, and she pulls several for-cause provisions

PROVISION A: The Company may terminate the employment of Executive for just cause in form the material duties of Executive's management manner and failure of the Executive's performance within 30 days of receiving specific notice of failure from the Company.

PROVISION B: Termination for “Cause” shall require a showing that substantial performance has not, with due notice, cured such cause.

PROVISION C: The term “Cause” shall include any act of gross misconduct which is material. For purposes of this paragraph, any act of executive's part shall be considered "willful" unless the executive takes reasonable belief that such action or omission is in the Company's best interest.

The agreements set different standards of conduct. Provision A is skewed heavily in favor of the executive. It has more mod
Assume an executive position in the sameily not going to do anything wrong like steal
Peter says, "but I don't want to sign some-agreements out there are just too broad." Consider this term carefully. Peter also wants excellent health insurance coverage for hiseditary kidney disease and may need dialysis of termination for any reason, he needs that interrupted until he secures a new job.

SS THE TABLE

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Problem-Solving

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THE FIRST-DRAFT PROBLEM

Often, the first question for deal-making lawyers to negotiate over is who will write the initial draft of the contract. Creating the first draft confers obvious advantages, because it gives the drafter many opportunities to shade the contract language and frame the negotiation in favor of her own client. Each side knows this, and therefore both may jockey for the opportunity to create the first draft.

Jan, for example, knows that there is a wide range of ways to draft a for-cause provision to favor the employer or the employee. She has a stack of executive compensation agreements in her files from past clients, and she pulls several for-cause provisions from them:

**PROVISION A:** The Company may terminate this Agreement in the event of repeated and demonstrable failure on the part of the Executive to perform the material duties of Executive's management position... in a competent manner and failure of the Executive to substantially remedy such failure within 30 days of receiving specific written notice of such failure from the Company.

**PROVISION B:** Termination for "Cause" shall mean willful and continued failure to substantially perform his duties hereunder, provided, however, that if such cause is reasonably curable, the Company shall not terminate Executive's employment unless the Board first gives notice of its intention to terminate and Executive has not, within 30 days following receipt of such notice, cured such cause.

**PROVISION C:** The term "Cause" shall include the willful engaging by Executive in gross misconduct which is materially injurious to the Company. For purposes of this paragraph, no act or failure to act on Executive's part shall be considered "willful" unless done in bad faith and without reasonable belief that such action or omission was in the best interest of the Company.

The agreements set different standards of basic performance for their executives. Provision A is skewed heavily in the executive's favor. It combines strong contract language (such as "repeated and demonstrable failure") with a 30-day notification and cure period. Provision B is also favorable to an executive. It has more moderate language but the same
notification period. Provision C eliminates the notification period but strengthens the basic contractual language by requiring that the executive act in bad faith and without belief that his act was in the best interests of the company.

HOW MUCH TO ASK FOR?
Given the range of possible approaches to this key term (and others) in Peter’s contract, Jan sees several problem-solving ways to address the first-draft problem. First, all things being equal, Jan would like to create the first draft. If she does, in order to point the way toward problem-solving she won’t just use her draft to stake out a position but will send Montero West a letter accompanying her draft explaining Peter’s interests and how Jan designed each of her proposed draft provisions to meet those interests. She may also want to explain what she hypothesized Montero West’s interests to be, and how she tried to accommodate those interests in her draft. By linking her draft language to these interests, she can underscore that ultimately both sides are going to have to take the other’s concerns into consideration. And she can show that her draft is not merely taken from a form book but is tailored to satisfy her client’s specific needs.

The second approach is to negotiate a process with the other side that circumvents the first-draft problem by having an initial discussion with the other side before drafts are even exchanged. If the parties discuss their concerns about the various issues involved in a deal, often they can hammer out a framework agreement that identifies the key issues and resolves many of them quite handily. They can then work together to come up with draft language for the more important terms and avoid the duel of drafts that can develop when one side rejects the other’s contractual language and advocates for its own.

If Jan does send the first draft, how hard should she push the other side? Should she start with language that is extremely favorable to Peter? Or try to start out with a reasonable solution and stick to it? Our advice is for Jan to produce a document that serves Peter’s interests extremely well, can be justified with good reasons, but is not unreasonably one-sided. Deal-makers often expect to bargain, to haggle, to make concessions, to reach an agreement somewhere in between the two opening offers. This is a pervasive ethic in the culture of legal negotiation. Therefore, Jan would be wise to ask for more with. At the same time, it is a mistake to b that even the offeror thinks is draconian. tion set the tone for subsequent rounds. drafter sends an implicit message that th out fight over each and every term.

WHAT IF THE OTHER SIDE STARTS WITH
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Advice for Making Deals

fore, Jan would be wise to ask for more than she thinks she could live with. At the same time, it is a mistake to begin negotiations with an offer that even the offeror thinks is draconian. The first rounds of a negotiation set the tone for subsequent rounds. By asking for too much, the drafter sends an implicit message that this will be a knock-down-drag-out fight over each and every term.

WHAT IF THE OTHER SIDE STARTS WITH AN EXTREME DRAFT?

Although Jan proposes that she write the first draft, Montero West's lawyer insists that they use the company's "standard" employment agreement as the basis of their negotiations. Jan alerts the other lawyer that her client has special concerns about the termination and severance provisions but says she would be glad to evaluate the company's draft as a starting point.

When Jan receives the draft agreement from Montero West, she reviews it, keeping Peter's concerns in mind. The agreement provides that 20,000 options vest at the end of each year of the five-year contract. The company's draft does not contain a good-reason clause but instead provides that Peter receives no severance package at all should he terminate his employment for any reason. The draft did contain an extremely broad termination-for-cause provision that would give the company broad discretion to fire Peter:

**TERMINATION FOR CAUSE:** Executive's employment with the Company may be terminated for cause if Executive is determined to have (1) acted incompetently or dishonestly or engaged in deliberate misconduct; (2) breached a fiduciary trust for the purpose of gaining personal profit; (3) neglected to perform or inadequately performed assigned duties; or (4) violated any law, rule, or regulation.¹

This is a common situation for deal-making lawyers. Often the other side will begin the negotiation process with an extremely partisan draft. How should Jan respond? Jan wants to give the company basic information about her client's interests and priorities. She will want to indicate that Peter recognizes that the company should be able to terminate his employment for any reason, but that the termination should be "for cause" only if Peter has done something seriously wrong. She will want to explain her concerns about the breadth and vagueness of Montero's
termination-for-cause provision. For example, what does “acted incompetently” mean? What if Peter makes a business decision that seems sound at the time but ultimately goes awry? Chief operating officers make a huge number of such decisions every day—and many don’t work out well. Is that incompetence and cause for dismissal without severance? And what is “inadequately performed assigned duties”? Does that include trivial matters like filing an expense report on time or showing up for a meeting? Similarly, the “violated any law, rule, or regulation” language is very broad. Does this include getting a speeding ticket? Montero’s draft seems extreme.

Jan will certainly want to send a revised draft that (a) contains a good-reason clause; (b) narrows the grounds for termination; and (c) explains why these provisions are important to Peter. With respect to the termination-for-cause provision, Jan must make a judgment about how one-sided her proposed revision should be. Should she use Montero’s provision as a base and narrow its language by, for example, adding a requirement that misconduct must have a “material effect” on the company’s fortunes? Or should she send an entirely new provision, and if so, how extreme should her counterproposals be? Should she send a termination-for-cause provision that requires “repeated failures,” written notice, and an opportunity to cure, as in Provision A above? These are matters of judgment.

The key is to respond to an extreme draft in a way that signals an ability to defend yourself but does not provoke further escalation. You want to assert your client’s interests but continually demonstrate understanding of the other side’s interests as well. And you want to keep pointing the way toward a collaborative process for resolving disagreements.

Explore Value-Creating Trades

Because of the way that Peter prioritizes his concerns, Jan decides to send a new termination-for-cause provision that she thinks is reasonable while at the same time underlining the critical importance of adding a good-reason provision. Jan sends the following language, along with a letter explaining her client’s interests and proposing that she and the company’s attorney meet:

**TERMINATION FOR CAUSE:** Executive’s employer may be terminated for cause if the Executive is (1) willfully engaged in fraud, misrepresentation, or other illegal conduct that is materially detrimental to the purpose or (2) repeatedly failed to perform material duties under this agreement.

This protects Peter, but also gives the company what it wants—insurance that if Peter does anything to terminate Peter.

Jan also sends the following good-reason provision:

**TERMINATION BY OFFICER:** (a) If, during the term of the Executive’s employment, the Executive is considered to be the Chief Executive Officer, the Executive shall resign from the Company and shall receive the severance compensation provided for in Section above.

(b) If the company becomes a party to a merger or consolidation, or if the Company sells all or substantially all of its assets, or if there should occur a change in control through a change in the ownership of the shareholders, then the Executive shall have the right to resign from the Company within 90 days of receiving notice of the severance compensation provided for.

She explains why this provision addresses Peter’s concerns:

When Jan and Montero’s attorney sit down, they easily agree that in the event of termination only his already vested options and stock should be able to agree on Jan’s definitive

The severance package poses more difficu

Peter deserves two years’ salary and all of vested, if Montero terminates him without options are a signing bonus—something he,. minimized for cause. Bill Stodds, the lawyer for

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**TERMINATION FOR CAUSE.** Executive's employment with the Company may be terminated for cause if the Executive is determined to have (1) willfully engaged in fraud, misrepresentation, embezzlement, or other illegal conduct that is materially detrimental to the Company; (2) breached a fiduciary trust for the purpose of gaining personal profit, or (3) repeatedly and demonstrably failed, after adequate written notice, to perform material duties under this agreement.

This protects Peter, but also gives the company what it most likely wants—insurance that if Peter does anything really serious, Montero can terminate Peter.

Jan also sends the following good-cause provision:

**TERMINATION BY OFFICER.** (a) If, during the term of this agreement, the Company's Board newly elects a person other than the Executive to the position of Chief Executive Officer, the Executive shall have the right to resign from the Company and shall receive the severance compensation provided for in Section __ above.

(b) If the company becomes a party to a merger in which it is not the surviving company, or if the Company sells all or substantially all of its assets, or if there should occur a change in control of the Company by virtue of a change or changes in the ownership of its outstanding voting securities, then the Executive shall have the right to resign from the Company within 90 days of receiving notice of such event and shall receive the severance compensation provided for in Section __ above.

She explains why this provision addresses Peter's concerns.

When Jan and Montero's attorney sit down to negotiate, the two lawyers easily agree that in the event of termination for cause Peter will keep only his already vested options and should receive no severance pay. They are also able to agree on Jan's definition of cause.

The severance package poses more difficult problems. Jan asserts that Peter deserves two years' salary and all of his options, vested and non-vested, if Montero terminates him without cause. In Peter's mind, the options are a signing bonus—something he's entitled to unless he is terminated for cause. Bill Stodds, the lawyer for Montero West, disagrees. "It's not a signing bonus," he insists. "It's an incentive plan. The 20 percent each year is designed to keep him at the company and motivate him to perform." He also insists that severance pay be limited to one year: "After all, Peter gets this pay even if he has a new job."
Jan and Bill obviously have different frames on what these shares represent—a signing bonus or an incentive plan. Jan tries to address the difference. “Clearly the company is concerned about aligning Peter’s incentives correctly, and treating the options as an incentive plan makes sense for that purpose.” But she argues that this reasoning only goes so far. If the company terminates Peter without cause, it’s the company’s decision to end his employment, through no fault of Peter’s. In that scenario, he should receive all the options as part of his severance package. Jan concedes that if Peter leaves without good reason, then he should receive no severance package. But if he leaves with good reason, Peter and Montero West then share responsibility for his termination. “He wouldn’t be leaving on a whim,” she says. “He’d be leaving because of a turn of events the board can control: either a new CEO has been brought in or there has been a change in control.”

In talking further, the two lawyers explore the possibility of having different severance packages: (1) if Peter is terminated without cause; (2) if he leaves because there is a change in control; and (3) if he leaves because he is not made CEO. Jan suggests that Peter might be willing to accept a shorter period of salary continuation (say, one year) in circumstance 3. Bill accepts this principle and suggests the following compromise: all options vest in each of these situations, with eighteen months’ severance pay if Peter is terminated without cause, one year’s severance if Peter leaves because of a change in control, but no severance pay if someone else is brought in as CEO. The company is concerned about setting a bad precedent for future employees by paying severance because an executive did not get a promotion. Jan agrees to discuss this proposal with Peter, who indicates that it is acceptable.

RELY ON NORMS
Jan and Montero West also are able to rely on norms—precedents, rules, or generally accepted ways of doing things—to resolve some of their distributive issues. Legal domains vary in the extent to which there are well-structured norms that make it easy to document deals. In some contexts, such as the sale of residential real estate, standardized contracts are widely used and make documentation very quick and easy. In others, the same kind of deal is done over and over—such as a merger and acquisition agreement or a loan agreement. A trum, some domains are largely norm-free. ample, there might not yet be a generally ac risks or for correcting particular information.

All of this suggests the importance of lean lar context. A lawyer should find out how before. Better yet, she should find out how loble has negotiated such agreements befor- unique aspects, but a business lawyer can’t particular term when in an identical trans asked for and received the same term hims reluctant to extend a representation that is an adept bargainer may demand recompen ture from the norm is likely to unsettle fifiency.

In Peter’s case, Jan turns to norms to res issues. Jan and the company’s lawyer disag lated to termination in the event of disal if Peter is unable to perform his duties months—then Montero West can terminate wants 90 consecutive days or any 120 d Montero West also proposes that Peter shot due him under the company’s disability p to approximately 60 percent of his regular that the company should make up the diff plan and Peter’s regular salary. They also c should accrue options and bonuses while c

Eventually Jan turns to norms to resol isn’t that important to Peter in the overall f one way we could resolve this,” she says. term, Peter would be comfortable acceptin provision is in Henry’s contract. What CEO seems good enough for the COO as that we’ll ask the company to forward ea from Henry’s executive compensation agree uage on that?”
A PROBLEM-SOLVING APPROACH

Advice for Making Deals

Jan often finds himself in the role of mediator, navigating through the different frames on what these shares represent. He tries to address the difficulty of whether the option's exercise date aligns with Peter's incentives. This reasoning suggests that the decision-making process is not straightforward. If a decision is made without cause, it's the company's decision, not Peter's. In this scenario, the company's severance package is part of his severance package. Jan is without good reason, then he should receive it. But if he leaves with good reason, Peter bears responsibility for his termination. "He didn't do it on purpose," she says. "He'd be leaving because of unforeseen circumstances."

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0 are able to rely on norms—precedents, rules, and doing things—to resolve some of their domains. In some situations, standardized contracts—documentations—are very quick and easy. In others, done over and over—such as a merger and acquisition agreement or a loan agreement. At the other end of the spectrum, some domains are largely norm-free. In new types of deals, for example, there might not yet be a generally accepted method for allocating risks or for correcting particular information asymmetries.

All of this suggests the importance of learning the norms in a particular context. A lawyer should find out how similar deals have been done before. Better yet, she should find out how her counterpart across the table has negotiated such agreements before. Every transaction has its unique aspects, but a business lawyer can't really proclaim outrage at a particular term when in an identical transaction two months prior he asked for and received the same term himself. Moreover, if one party is reluctant to extend a representation that is common in the marketplace, an adept bargainer may demand recompense, contending that a departure from the norm is likely to unsettle expectations or create inefficiency.

In Peter's case, Jan turns to norms to resolve a variety of distributive issues. Jan and the company's lawyer disagree about the provisions related to termination in the event of disability. Jan has proposed that if Peter is unable to perform his duties for 180 straight days—six months—then Montero West can terminate him. The company's lawyer wants 90 consecutive days or any 120 days in an 18-month period. Montero West also proposes that Peter should receive only the payments due him under the company's disability policy—which would amount to approximately 60 percent of his regular salary. Jan disagrees, arguing that the company should make up the difference between the disability plan and Peter's regular salary. They also disagree about whether Peter should accrue options and bonuses while on disability leave.

Eventually Jan turns to norms to resolve this disagreement, which isn't that important to Peter in the overall framework of the deal. "Here's one way we could resolve this," she says. "I'm pretty sure that on this term, Peter would be comfortable accepting whatever disability termination provision is in Henry's contract. Whatever the company's giving its CEO seems good enough for the COO as well. Why don't we just agree that we'll ask the company to forward each of us a copy of this term from Henry's executive compensation agreement, and we'll base our language on that?"
UNDERSTAND THE LIMITS OF NORMS

Norms will not dispose of every distributive issue. Often there will be competing norms in the marketplace and parties will have to negotiated over which norm applies. And sometimes one side will dislike the dominant norm and seek to use another norm more favorable to that side. Norms won’t end negotiations by any means. Nevertheless, being prepared to give reasons for what you ask for—to try to persuade the other side through norm-centered argument rather than with pressure tactics—can be helpful.

A second note of caution about norms: just because a norm exists doesn’t mean that it is efficient and offers the best solution to your particular problem. Like default rules, some but not all norms may be efficient. But in a world full of strategic interaction and imperfect information, the use of standardized deal terms may have more to do with copy-catting than with efficiency.

Consider a story told to us by an experienced real estate lawyer representing a company that was selling a business in South America. The potential buyer—a large enterprise that frequently buys businesses in Latin America—expressed concern about the possible costs of environmental clean-up. The seller’s lawyer proposed that each side procure an environmental report from an independent expert indicating how much it would cost, if anything, to clean up any environmental hazards. Instead of the seller providing an indemnity to the buyer, the parties could simply reduce the purchase price by the average of the two estimates. If the estimates were more than $100,000 apart, the two experts would pick a third expert, whose determination would be binding. The buyer, however, insisted on getting an indemnity, because “that’s the way things are always done.” The seller’s lawyer even pointed out the risks for the buyer of indemnification—surely if a hazard were later discovered, the seller would have an incentive to defend vigorously against a lawsuit on the indemnity provision, driving up transaction costs for both sides. But the buyer was adamant—and the transaction went through with the indemnity.

It’s hard to see an efficiency argument for the structure of this transaction, provided the buyer could get detailed and complete information about any possible environmental problems through a report. But the norm prevailed in the end. This story suggests instances in which norms might leave value on the table and that, for a distribution, negotiating within the framework of our basic preferences in relative valuations—when a norm is more efficient—is often the way to go.

Advice for Making Deals

Change the Players to Break an Impasse

In addition to using norms, deal-making lawyers can break a distributive impasse. Since ultimate agreements, in which lawyers often appear, are generally fungible, we would expect various risks, the price term would fluctuate, and the deal changes for each of the parties.

But it is easy to understand why price terms may not have the authority to revisit the terms or to call for uncomfortable approaches in which the client is sophisticated and the lawyer is not. Especially in which the client is sophisticated and the lawyer is not. This is especially so where the principal does not know how important it is to allocate partici
OF NORMS
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more efficient customized exchange, the lawyers should consider depart-
ing from the norm.

Change the Players to Break an Impasse
In addition to using norms, deal-making lawyers often change the play-
ers to break a distributive impasse. Since ultimately the clients must live
with whatever arrangements their attorneys draft, when the going gets
tough deal-making lawyers often turn to their clients for help.

One possible advantage of involving the clients is that it can permit
reopening the price term, and this may help resolve distributive issues.
Price terms change infrequently in deals because the principals reach an
agreement and then turn only the legal matters over to their lawyers. To
an economist, this is a puzzle, because the subsequent negotiation be-
tween the lawyers often involves the allocation of risks that can sig-
ificantly impact the overall value of the transaction. Because money
terms are generally fungible, we would expect that as the lawyers allocate
various risks, the price term would fluctuate as the net present value of
the deal changes for each of the parties.

But it is easy to understand why price terms stay fixed. First, a lawyer
may not have the authority to revisit the basic deal terms. Second, the
lawyer may feel uncomfortable approaching the client to request that the
price term be put back in play. Especially in lawyer-client relationships
in which the client is sophisticated and views the lawyer as a scribe
rather than advisor, the negotiability of the price term may be difficult
to raise.

Third, revisiting key deal terms can be highly destabilizing to the cli-
ents. The principals may both feel that the deal is done, and when one
hears through her attorney that the other side wants to reduce the price
term, it may feel as though the other side is trying to renege on its word.
This is especially so where the principal doesn’t have a good understand-
ing of how important it is to allocate particular risks. The other side may
think you are trying to use a nit-picky clause to squeeze more money out of the deal.

And this can, of course, be true. Still, there are sometimes good reasons to revisit the price term. Doing so can open up a range of trades that might not otherwise be possible if the parties bargained term by term. The price term is a kind of safety valve in the transaction—opening it permits one party to give in on a particular clause in exchange for money when no other kind of trade is feasible.

**Look to the Future: Dispute Resolution Provisions**

No contract covers every issue, risk, or contingency. In joint ventures, leases, partnerships, and custody arrangements, secondary deals are struck at a later date, as unanticipated circumstances arise. In Peter's case, as in many deals where an on-going relationship is being created, further issues to negotiate will develop over the course of the employment relationship. Against what backdrop will these future negotiations take place? Will the parties be bargaining in the shadow of litigating their disagreements? Or can they create some other dispute resolution mechanism now, in their contract, that will lower the transaction costs of resolving disagreements in these future negotiations?

Contractual dispute resolution provisions are increasingly common. Often, alternative dispute resolution clauses provide for arbitration under the auspices of a sponsoring agency, such as the American Arbitration Association. The contract might provide this clause, for example:

**ARBITRATION PROVISION:** Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association in accordance with its Commercial Arbitration Rules and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.

This provision leaves many issues unanswered. A better provision might make clear that the controversy will be submitted to one arbitrator or to a three-arbitrator panel. In the latter case, each of the parties traditionally chooses one of the arbitrators, and they then select a third neutral to serve as the chair of the panel. If they cannot agree on a third, the AAA might pick that person. In addition, an arbitration clause will

**Advice for Making Deals**

provide for notice to the parties, choice of law, ciphers to make any future use of arbitration as do contracts provide for a tiered dispute resolution mediation and advances to arbitration. The parties' creativity.

**CONCLUSION**

The key thing for attorneys to remember as the lawyers are only one part of a larger equation the clients share responsibility for making the most important provisions are dealt with by the attorneys. From the clients' perspective, the attorneys may have relatively remote contingencies that have for the deal today. The clients, in short, may not be the lawyers' work as the lawyers do.

This is not to say that lawyers should demand the importance of various legal points play down their own input into the deal. Simply be helpful to remember that if you can tive issue or risk, the world probably won't come most likely go through, and your client will risk may never materialize, and even if it does made an informed choice about it, you have c
provide for notice to the parties, choice of law, and other technical specifics to make any future use of arbitration as smooth as possible. Some contracts provide for a tiered dispute resolution process that begins with mediation and advances to arbitration. The parties are limited only by their creativity.\textsuperscript{11}

**CONCLUSION**

The key thing for attorneys to remember as they try to close deals is that lawyers are only one part of a larger equation. In most complex deals, the clients share responsibility for making the deal work. Many of the most important provisions are dealt with by the clients, not the lawyers. From the clients' perspective, the attorneys may appear to be negotiating over relatively remote contingencies that have little practical relevance for the deal today. The clients, in short, may not care half as much about the lawyers' work as the lawyers do.

This is not to say that lawyers should defer to their clients' understanding of the importance of various legal provisions nor that lawyers should downplay their own input into the deal-making process. It can simply be helpful to remember that if you can't win on a given distributive issue or risk, the world probably won't come to an end. The deal will most likely go through, and your client will most likely be happy. The risk may never materialize, and even if it does, as long as your client has made an informed choice about it, you have done the best you can.