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ABOUT THE ALSB JOURNAL OF BUSINESS LAW & ETHICS PEDAGOGY

The Academy of Legal Studies in Business is pleased to announce the launch of its new journal, the *ALSB Journal of Business Law & Ethics Pedagogy* (JBLEP). The objective of this double-blind, peer-reviewed journal is to offer faculty another outlet that archives the excellent research and teaching ideas of our members and other faculty, as well as to provide publishing and service opportunities.

The *ALSB Journal of Business Law & Ethics Pedagogy* is dedicated to disseminating business law and ethics pedagogical research and ideas in an online, open-access format. JBLEP welcomes contributors to share their research and innovations in business law and ethics teaching, student learning, and classroom experiences in scholarly articles.

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CONTENT & OPINIONS

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FROM THE EDITOR

Engagement, Innovation, Impact, and Value in Business Law & Ethics Education

Business law and ethics faculty set high standards for themselves and strive to excel and to serve. Impact and value of our work are of utmost importance. After recent changes, the AACSB accreditation standards require and reward proven impact of business faculty work. No longer can faculty produce work only to “check some boxes”; one must document the value, use, and application of the work. By nature of the discipline, business law faculty’s scholarship, teaching, and service have always added value to the business and legal worlds. Academia is now catching up to the business law and ethics model and practices.

The AACSB 2013 Eligibility Procedures and Accreditation Standards for Business Accreditation (revised July 1, 2018) mentions the word “impact” 104 times. The concept is the subject of the preamble, two standards, and Appendix I. This Appendix, entitled “Examples of Impact Metrics in Support of Documentation,” lists 71 examples illustrating impact of academic activity in eight categories. Clearly, AACSB leadership believes in the sharing, application, and real-world use of faculty work.

The Journal of Business Law & Ethics Pedagogy provides an additional opportunity for faculty to publish their work and ideas, as well as to be involved in engagement, to share innovation, and to show impact. The Academy of Legal Studies in Business is filled with accomplished teachers who have developed and utilized innovative teaching methods and concepts that should be shared with all. Additionally, many members research and share through publication of pedagogical topics in business law and ethics. To further engagement, sharing of innovation, and impact of that work, this particular online publication outlet is available to any who have an internet connection.

Four excellent articles are featured in this issue. First, Director Cara Biasucci and Professor Robert Prentice offer a study of the use of behavioral ethics in ethics education. They graciously share information on a host of resources offered by the Ethics Unwrapped Educational Program at no charge, as well as application ideas for those resources. Next, Professor Nanci Carr shares her approach to applying the Five Gears for Activating Learning to decision-making regarding use of technology in course design. This approach is innovative and helpful for learner-focused educators to analyze new technologies, and to resist the temptations and pressures to implement new technologies if they do not enhance learning. Following this, Professor Marc Lampe presents his classroom exercise to prepare our business law students for the realities of the adversarial legal system in both their professional and personal lives. The focus is on both law and ethics, so the exercise can be used in a variety of classes and situations, and the content is extremely valuable information for future business professionals. Lastly, Professor George Siedel advocates for the inclusion of negotiation training in business law and ethics courses, sharing his time-tested exercise in great detail. Negotiation skills are very valuable for students as they move into the business profession.

This journal exists only because of exemplary submissions by our valued authors, as well as due to a very devoted editorial board and an enthusiastic and hard-working group of reviewers. We hope you enjoy the fruits of our labor and are benefited greatly by this issue’s offerings.

Why and How to Add Negotiation to Your Introductory Law Course

George Siedel*

ABSTRACT

An introductory legal environment or business law course is the ideal setting for an exercise that illustrates the importance of business law and ethics in negotiations. This article discusses a short negotiation exercise that can easily be incorporated into an introductory course. The exercise includes a unique twist (one of the parties is a secret agent) that provides students with experience in applying legal and ethical principles. The article explains how to set up the exercise and provides a script for a debriefing session. The article also includes a link to the two negotiating party roles and PowerPoint slides that are available without charge.

KEY WORDS: NEGOTIATION, BUSINESS ETHICS, LEGAL ISSUES, ALTERNATE DISPUTE RESOLUTION, VALUE CREATION

I. Introduction

An introductory legal environment or business law course is the ideal setting in which to introduce negotiation strategy and skills to business students for two reasons. First, law and negotiation are intertwined in business, and second, negotiation brings legal and ethical concepts to life.

The first reason relates to the old and wise adage that negotiation takes place within the shadow of the law. Because there are two fundamental types of negotiation, there are actually two shadows, both of which relate to topics covered in the introductory course. The first type of negotiation is deal making, where an understanding of contract law is essential for anyone in business. The second type is dispute resolution. Here the shadow of the law takes the form of settlement negotiations and alternative dispute resolution.

Prominent management scholar Henry Mintzberg provides examples of the importance of both shadows when discussing the key roles of managers as decision makers in his classic *Harvard Business Review* article "The Manager's Job: Folklore and Fact" (March—April 1990). In his words:

Managers spend considerable time in negotiations: the president of the football team works out a contract with the holdout superstar; the corporation president leads the company's contingent to negotiate a new strike issue; the foreman argues a grievance problem to its conclusion with the shop steward.

The second reason an introductory law course should include negotiation is closely related to the first: negotiation brings to life the legal and ethical concepts covered in the course. For example, contract negotiation strategy is closely related to the law of contracts, and negotiation is a crucible that challenges one's ethical beliefs more than any other business activity.

Given the perfect fit between negotiation and law, why don't more introductory law courses include at least one negotiation exercise? When I first considered this question early in my teaching career, two reasons came to mind. First, my introductory course was already chockfull of business law subjects, making it difficult to squeeze in another topic. Second, I felt unqualified to teach negotiation.

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To overcome the second challenge, I initially asked a guest lecturer to lead a negotiation exercise in my introductory undergraduate course. This exercise was so successful that I added negotiation to my MBA course. Along the way, I decided to teach the session myself and found this to be an especially rewarding experience. I also discovered that it was easy to add the exercise to the course without diminishing coverage of other topics.

This article is designed to show how you can easily add negotiation to your introductory undergraduate and graduate law courses through a simple exercise I wrote called “The House on Elm Street.” The exercise involves a transaction that everyone can relate to—the sale of a house. The twist in the exercise is that—unknown to the seller—the buyer is a secret agent representing a large multinational company based in India. Each student receives a short (two-page) role as either the buyer or seller. They negotiate for 30 minutes, followed by an instructor-led debriefing that takes around 75 minutes.

This simulation is designed to achieve several learning goals that lie at the intersection of negotiation, law and ethics. Specifically, students learn how to:

1. prepare for negotiations;
2. recognize and decide ethical issues, using law-based standards (fraud, fiduciary duty, and unconscionability) and general ethical guidelines;
3. develop and use their negotiating power;
4. apply contract and agency law to negotiation; and
5. create value in a manner that benefits both sides.

Over the years, I have developed and tested “The House on Elm Street” exercise in undergraduate and MBA courses and in executive seminars in North America, South America, Asia and Europe. The courses and seminars have been developed for (or have included) a wide range of participants, such as athletic directors, attorneys, engineers, entrepreneurs, managers, and physicians. In addition, organizations in the public and private sectors (for example, the World Bank and one of the five largest U.S. companies) have used the exercise for negotiation training led by their in-house staff.

Section I below explains how to set up the negotiation exercise. Section II provides a script for debriefing the exercise. The script includes copies of PowerPoint slides that I use in class during my own debriefing of the exercise. You can obtain my complete set of slides, along with the two negotiation roles, at <https://umich.box.com/s/nqvns21dbnd14jlddqcb6jjwcve1kwzb>. Section III discusses a document titled “Self-Assessment and Feedback for the Other Side” that students may use to evaluate their negotiation skills and develop a plan for skill improvement. This plan could be used as a course assignment. The negotiation, debriefing, and assessments combine to provide a powerful learning experience. As one student commented:

What a great learning experience! [I had] the chance to test and evaluate myself outside the work environment. I find myself in business negotiations and discussions on a daily basis. Yet the ability to get feedback and actually debrief a negotiation is really powerful! I considered myself rather self-actualized, but some interesting things came to light in the class discussions. I know that if I make a concerted effort to work on [my areas for improvement] it will certainly serve me well in my career—both now and in the future.

II. Setting-up the Negotiation Exercise

Here are the steps to follow when setting up and running the negotiation exercise.

- A. Assign background reading; duplicate and distribute the roles.
 1. There are many negotiation books available for the assigned reading. Currently available (Summer 2018) are two negotiation books written by business law professors that are concise, inexpensive and obtainable from Amazon, so students can easily order copies on their own.¹ The

¹ See GEORGE SIEDEL, *NEGOTIATION FOR SUCCESS: ESSENTIAL STRATEGIES AND SKILLS* (2014) [hereinafter SIEDEL, *NEGOTIATION FOR SUCCESS*]; and RICHARD SHELL, *BARGAINING FOR ADVANTAGE: NEGOTIATION STRATEGIES FOR*

assigned readings should cover the different types of negotiations (for example, deal making and dispute resolution) and should explain how to (1) prepare for negotiation, (2) address ethical issues in a negotiation, and (3) develop and use negotiating power.

2. Duplicate and assign the Tracy and Pat roles. Here is the recommended sequence:
 - a. Tracy represents the seller, an uncle who owns a beautiful old Victorian house. Pat is a secret agent who represents a multinational company based in India. Descriptions of both roles are available at no charge at <https://umich.box.com/s/nqvns21dbnd14jlddqcb6jjwcve1kwzb>. Print the Tracy roles on yellow paper, and the Pat roles on blue paper. When you debrief the negotiation, the colored paper will help you identify students holding the Tracy and Pat roles.
 - b. Distribute the roles before the session in which the negotiation takes place. I recommend passing out one role to students on one side of the classroom, and the other role to students on the other side. This will make it easier for you to identify the Tracys and Pats during the debriefing. There are no gender concerns in distributing the roles, as the names are unisex. Tracy is a male and female name (think Tracy Morgan and Tracy Chapman) and Pat is a nickname for Patricia or Patrick.
 - c. Ask students to read the roles and complete their preparation to negotiate before arriving in class. Although the roles are only two pages each, they are filled with important facts.
 - d. An alternative approach is to distribute the roles in class immediately before the negotiation and to give students around 30 minutes to read and prepare for the negotiation. I have used this approach in management seminars where assigning homework is unrealistic.
- B. Run the negotiation.
 1. Before students begin negotiating, at your option (taking into account time constraints), you could meet separately with the Tracys and Pats to find out whether they have any questions about their roles. This will take around 10 minutes per side.
 2. Give students 30 minutes to negotiate. Ask them to select someone they don't know well as their negotiation counterpart. If you have an odd number of students in class, there will be one two-on-one negotiation.

I encourage my students to move to any location in the building (or outside, weather permitting) for the negotiation. Remind them that (as noted in the instructions at the beginning of their roles) they must return after 30 minutes whether or not they are successful in reaching agreement.

As an alternative (especially if your time is constrained), you could ask students to complete the negotiation before arriving in class. I prefer the in-class approach because the negotiation is fresh in mind when we begin the debriefing and I can control the time for the exercise.

There will be some stragglers who become so involved in the negotiation that they will return late. Therefore plan to begin the debriefing around 40 minutes after the negotiation begins.

III. A Script for Debriefing the Negotiation

Debriefing "The House on Elm Street" will take around 75 minutes. Here is a recommended script for the debriefing. The **boldface lettering** prompts you to ask questions. The class discussion that follows these questions is noted in italics. The "boxed" information is available as a PowerPoint deck at <https://umich.box.com/s/nqvns21dbnd14jlddqcb6jjwcve1kwzb>.

REASONABLE PEOPLE (2006). Students can acquire e-books or used copies of these books for under \$10 at Amazon (as of summer 2018). I recommend assigning pages 8-54 from the Siedel book.

A. The debriefing begins with a review of the facts and feedback from students about their negotiation results.

1. Start with a quick review of the common information. The review is optional because this information is already included in both roles. Here is a short summary of the information available to both sides (A reminder that Tracy represents the seller and Pat is a secret agent for the buyer.):

Common Information

This situation involves negotiations between Tracy and Pat for the sale of a beautiful, old Victorian house on a large lot in a residential neighborhood.

The house needs expensive repairs.

The seller and neighbors have a strong interest in preserving the house and the neighborhood.

The last sale in the neighborhood was six years ago when a similar (but well-maintained) house sold for \$135,000. Property values have appreciated considerably since then.

Property has a tax assessment of \$140,000, but tax assessments are usually well below actual market value.

2. Review the confidential information for both sides. This review is important because you will return to it at the end of the debriefing. If students in the Pat role did not disclose it during their negotiations, students in the Tracy role will be surprised and upset to learn that Pat's company intends to demolish the house that the uncle (seller) wanted to preserve. Confidential information includes:

Seller's (Tracy's) Confidential Information

Seller is elderly; has health problems.

Needs at least \$150,000 for a senior apartment.

Tracy, the seller's agent, wants house but can't afford it.

Seller wants to keep possession for 3 months.

No other purchasers.

Seller wants at least 15% down payment, tile artwork, and a promise not to install plastic siding.

Buyer's (Pat's) Confidential Information

Buyer is an India-based company that is building US headquarters.

Will pay up to \$250,000; cash sale.

Pat is secret agent for the company; wants job offer.

Company needs possession in one month.

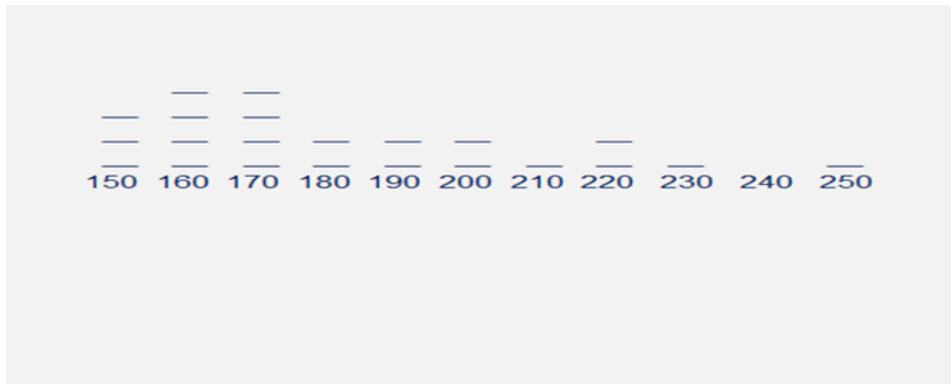
If unsuccessful, company will buy another house (well-maintained, on Main Street) for \$265,000.

Needs 1/3 of lot for parking lot; will tear down house and add attractive landscaping.

Company builds senior apartments; sales are Slow.

3. **Ask the students in the Tracy role about their results.** (You can easily identify them because their roles are printed in yellow and they are sitting on one side of the room; see II-A-2-a above.)
 - a. **Did you reach an agreement?**
 - b. **If so, what was the purchase price?**

Note the results on the board, with each dash representing a result (please see slide diagram below). For example, the following typical pattern from a class with 44 students (22 pairings) indicates that three "Tracys" received \$150,000 for the property.



- c. **Did you successfully negotiate the four specific issues that are described in the Tracy role?**

Typically the Tracys will be successful in negotiating issues 2-4 (Pat's promise not to install siding on the exterior of the house, the receipt of at least a 15% down payment, and the ability to remove a piece of tile artwork from the house), but not successful with issue 1 (transferring possession at least three months after the contract is signed).

B. Discussion items 4-13 of this debriefing focus on how students should prepare for negotiation by considering the type of negotiation and conducting a negotiation analysis.²

4. Review the two basic types of negotiation: dividing the pie and enlarging the pie. Note to the class that different wording is used to describe each of the two types, as depicted in the following slide. Academics tend to use the first terms on the list: distributive vs. integrative negotiation. Distributive negotiation refers to distributing pieces of a fixed pie, while integrative negotiation involves expanding the pie by integrating each side's interests (please see slide below).

TYPES OF NEGOTIATIONS (<i>Negotiating for Success</i> , Chapter 2, pages 8-11)	
Divide the "Pizza"	Enlarge the "Pizza"
Distributive	Integrative
Competitive	Cooperative
Win / Lose	Win / Win
Zero Sum	Non-Zero Sum
Adversarial	Problem-solving
Position-based	Interest-based
Claiming Value	Creating Value

5. Note to the class that the buyer brings to this negotiation a bag of money containing \$250,000 and the basic question is: how much money goes to the seller and how much does the buyer get to keep?



² For background information, see SIEDEL, *NEGOTIATION FOR SUCCESS*, *supra* note 1, at 8-11 and 21-36.

Ask for a show of hands: What type of negotiation is this—dividing the pie or enlarging the pie?

Most students will conclude it is a dividing-the-pie negotiation. At the end of the debriefing you can explain why this is actually an enlarging-the-pie negotiation. Section II-D below will guide you through this powerful learning experience.

6. While not necessary, you could ask students to complete a negotiating style assessment that is especially useful when preparing to negotiate with someone from another culture.³
7. Conducting a Negotiation Analysis.⁴ **To start, ask a volunteer Tracy to share his/her negotiation strategy**—that is, how he/she planned for negotiation, not what happened after the negotiation started. (A reminder that Tracy represents the uncle who owns the house.)

Often Tracy will respond with vague strategies, such as “I wanted to get to find out what Pat would pay” or “I wanted to ask Pat as many questions as possible.” While there is nothing wrong with these approaches, point out that Tracy needs a benchmark to evaluate the information received from Pat. Try to nudge students toward thinking about the reservation price,⁵ most likely outcome (the target) and stretch goal.⁶ If nudging doesn’t work, ask them directly. Then sketch the results on the board (please see example diagram below). (The reservation price will be the same for all Tracys, but the most likely and stretch goals will vary.)



³ See, SIEDEL, NEGOTIATION FOR SUCCESS, *supra* note 1, at 17-20, 152-53 (providing an example of a negotiation style assessment and an explanation).

⁴ *Id.* at 21-26.

⁵ The reservation price is commonly known as the bottom line. For example, it is the most that a buyer will pay and the least that a seller will accept.

⁶ The stretch goal is the first number offered by the seller or the buyer. For example, when making a first offer, sellers typically “stretch” their most likely price into a larger number.

8. **Emphasize that BATNA** (Best Alternative to a Negotiated Agreement) is an especially important concept (for reasons relating to power, to be discussed shortly). Because of BATNA's importance, the first question that a negotiator should ask when preparing for any negotiation is: What is my best alternative if we cannot reach agreement? **Now ask the Tracys: What is your BATNA?**

You will probably notice many "deer in the headlights" blank looks. Some students will say there is no BATNA. (This is not true—there always is an alternative.) Or they might say that they will negotiate with another buyer. (This is not a BATNA because they currently have no other buyers.) Lead them to the realization that the BATNA is that Tracy's elderly uncle will remain in the run-down house. This is not an attractive BATNA and, for this reason, Tracy and the uncle should be happy with the \$150,000 needed to purchase a senior apartment.

9. Remind students that the stretch goal (goals that appear unattainable given current practices, skills, and knowledge) is an especially important concept because negotiators with the most ambitious stretch goals are the most successful.⁷ **Ask the class: If this is true, why shouldn't Tracy select \$1 million as a stretch goal?**

They will usually respond, correctly, that Tracy would risk losing credibility. Here is a slide illustrating what happened to Mike Tyson after he started with a very ambitious stretch goal of \$22 million for his Connecticut house when he decided to sell:

Mike Tyson House – Farmington, Connecticut

- 56,000 square feet, 18 bedrooms, 38 bathrooms, 1,500 square-foot health club, indoor pool
- 1997 - Purchased for \$2.7 million
 - Adds 3,000 square-foot nightclub with 2-tier dance floor, a wall of 200 TV screens, a DJ station and smoke machine
- 1998 - House on market for \$22 million
- 1999 - Lowers price to \$12.9 million
- 2000 - Lowers price to \$5 million
- 2002 - Takes house off the market

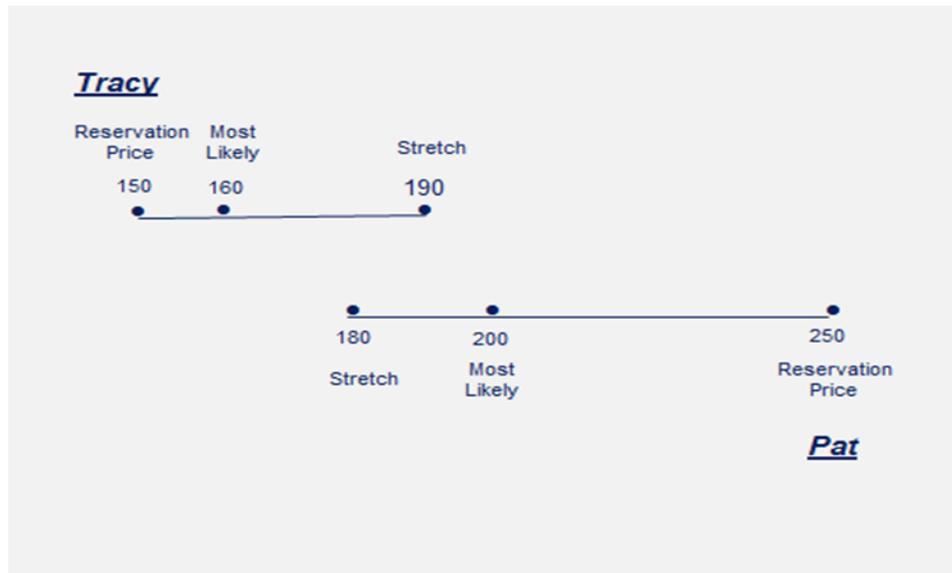
"No Bites on Tyson House," Wall Street Journal, January 25, 2002

10. **Ask the class: Who should offer the first price? What is the conventional wisdom?**

*The students will probably state correctly that the conventional wisdom is that you should let the other side offer the first price. To illustrate why, **ask the class whether any of the Tracys opened with a price that was lower than what their Pat expected to pay.** For example, one of the Tracys might have opened with an asking price of \$170,000 when Pat expected to pay at least \$180,000.*

⁷ SIEDEL, NEGOTIATION FOR SUCCESS, *supra* note 1, at 23.

11. Now ask for a volunteer Pat (who represents the company that wants to purchase the property) to describe his/her strategy. If the volunteer doesn't discuss them, ask specifically about the three key numbers (reservation price, most likely outcome, and stretch goal) and the BATNA. Add the results to your diagram on the board. Here is an example:

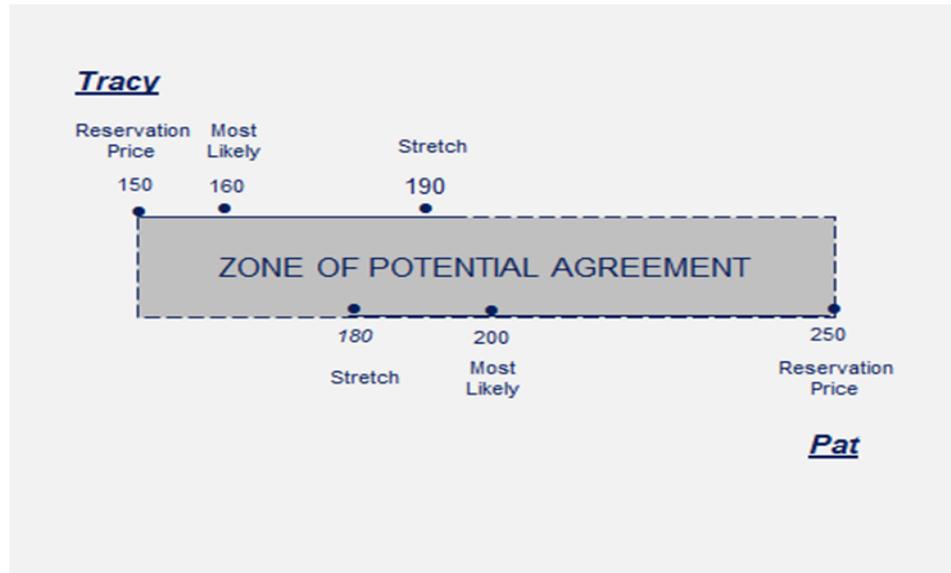


The reservation prices will be the same for all Pats, but the most likely outcomes and stretch goals will vary. The Pats will usually state correctly that their BATNA is to acquire Lot C, which is more expensive because it is better maintained and is on Main Street.

12. Note to the class that a key factor that distinguishes a great negotiator from a good one is the ability to look at the deal from the other side's perspective.⁸ It is easy for negotiators to identify their own reservation prices, most likely outcomes, stretch goals and BATNAs, but they usually must guess what the analysis looks like from the other side.

⁸ SIEDEL, NEGOTIATION FOR SUCCESS, *supra* note 1, at 76-78.

13. The final step in the negotiation analysis is to **ask the class to identify the Zone of Potential Agreement (ZOPA), the zone in which the deal can take place.**⁹ Initially some students might select the zone between the two stretch goals or the zone between the two most likely outcomes. But eventually someone will state the correct answer: the ZOPA is the zone between the two reservation prices. In other words, the zone will go no lower than what the seller is willing to accept and no higher than the buyer is willing to pay. Add the ZOPA to your diagram on the board (please see slide below):



- C. Discussion items 14—25 of this debriefing focus on elements that arise during negotiations (although negotiators should also consider them when preparing for negotiations). These elements fall within three categories: ethical issues (discussion items 14—17), power (discussion items 18—23) and legal issues (discussion items 24—25).

⁹ SIEDEL, NEGOTIATION FOR SUCCESS, *supra* note 1, at 25.

14. Ethical Issues. Begin the discussion of ethics by **asking the class whether there are any ethical issues embedded in their roles.**¹⁰

Students usually will focus on Pat's devious role as a secret agent. Many Pats will feel guilty playing this role. Ask the Pats: Would you accept this role in real life? Remind the class that this is an especially difficult scenario because Pat and Tracy attended school together.

In focusing on the secret agency, students often overlook two ethical issues embedded in Tracy's role. Tracy realizes that there might be a leak in the basement of the house and has heard rumors that a fast food restaurant might be built on neighboring property. This slide summarizes the ethical issues faced by Tracy (representing the seller) and Pat (representing the buyer):

Ethical Issues

Seller:

- Tell buyer that the basement might have a leak?
- Tell buyer that there are rumors that a fast food restaurant or convenience store might move next door?

Buyer:

- Disclose that you are a secret agent?

15. **Ask the Tracys: Would you disclose the leak and the rumors to Pat?** During this discussion remind the students that some ethical standards are law-based¹¹ and **ask the class: Would Tracy's failure to disclose violate any of these legal standards?** The following slide summarizes some key law-based standards:

Law-Based Ethical Standards

Fraud: False representation of a material fact that is relied on by the other side.

Fiduciary Duty: A high duty of trust and loyalty.

Unconscionability: Violates principles of good conscience.

Negotiating for Success, Chapter 4, pages 34-39

¹⁰ SIEDEL, NEGOTIATION FOR SUCCESS, *supra* note 1, at 34-44 (covering an ethical framework for negotiation).

¹¹ *Id.* at 34-39.

Here are the conclusions:

- a. Fraud? No, because Tracy has not made a “false representation of a material fact.” However, there might be state or local laws that require disclosure of defects during real estate transactions (and Tracy’s omission of this information may therefore violate a disclosure law).
- b. Fiduciary Duty? No. This is an arms-length transaction and there is no special relationship between Tracy and Pat.
- c. Unconscionability? No. There is no inequality of bargaining power.¹²

16. Moving beyond the law, ask students: Would Tracy’s or Pat’s conduct violate any general ethical standards? The following slide summarizes these standards:¹³

General Ethical Standards

- Organizational Standards
- Mentor: Someone you admire
- Personal Standards
 - ✓ Gut Test
 - ✓ Newspaper Test
 - ✓ Family Test
 - ✓ Golden Rule

Negotiating for Success, Chapter 4, pages 39-43

Encourage students to select one or more of these standards now, while they are in the relatively safe harbor of school, rather than waiting until they are confronted with ethical issues later during real-life negotiations. Remind them that they can blend the standards, as in the following Warren Buffet quote that blends the newspaper and family tests (please see first slide on page 51).¹⁴

¹² SIEDEL, NEGOTIATION FOR SUCCESS, *supra* note 1, at 38.

¹³ *Id.* at 39-41 (summarizing these standards).

¹⁴ *Id.* at 41.

Combined Family and Newspaper

“I want employees to ask themselves whether they are willing to have any contemplated act appear the next day on the front page of their local paper, to be read by their spouses, children, and friends....”

Warren Buffett

- 17. Ask students: What could you do in the future to find out whether the other side is a secret agent or otherwise engaged in unethical conduct?**

During this discussion, note that rigorous questioning of the other side is an especially useful tactic.¹⁵

- 18. Power Issues.** Now move on to a discussion of power. **Ask the class: What is the source of negotiating power in the “House” exercise, or in any other negotiation?**

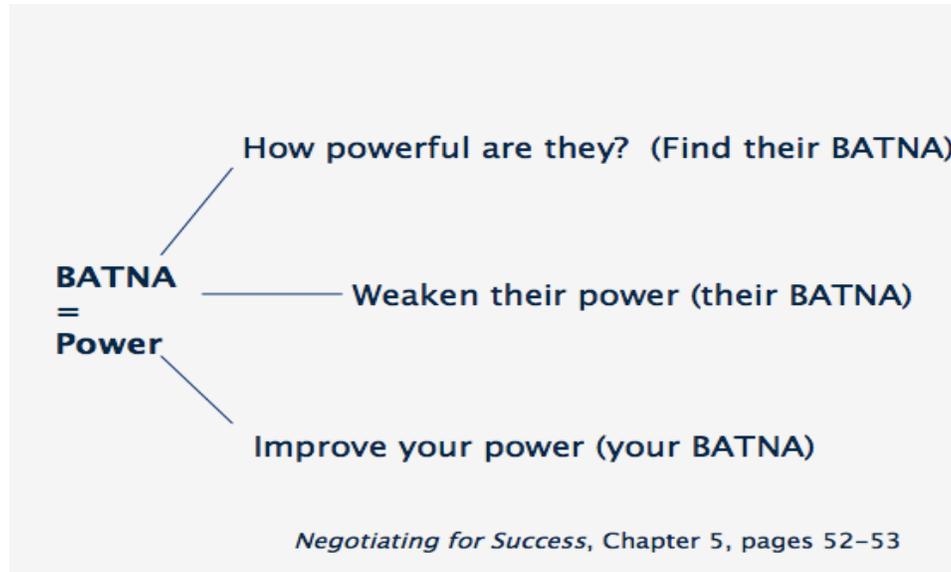
While a number of elements are important, BATNA (your “Best Alternative to a Negotiated Agreement”) is a key source of power because it provides you the ability to walk away when your alternatives are better than the other side’s offer.¹⁶

¹⁵ SIEDEL, NEGOTIATION FOR SUCCESS, *supra* note 1, at 43-44.

¹⁶ For a global perspective on BATNA strategy, see Gregory J. Marsden and George J. Siedel, *The Duty to Negotiate in Good Faith: Are BATNA Strategies Legal?* 14 BERKELEY BUS. L. J. 127 (2017). Although probably too sophisticated to address in debriefing an introductory negotiation exercise, this article calls into question the use of BATNA strategies in civil law countries.

19. Then ask: Given that BATNA is your source of power, what is your BATNA strategy during a negotiation?

This leads to a discussion of the three key strategies summarized in the slide that follows and covered at discussion items 20—22.



20. The first strategy is to try to find the other side's BATNA—that is, try to find out how powerful they are. Emphasize that negotiators should ask questions and listen carefully to the answers when attempting to find the counterpart's BATNA or any other information.

For example, Tracy's uncle is the seller. Pat should ask questions about the uncle's age and health, the condition of the property and his reasons for selling. Through these questions, Pat will realize that the uncle is old, has health problems, and is living in a run-down house. In other words, the uncle needs to sell quickly. Pat might also learn that the uncle is looking for a senior apartment, an important piece of information that (as discussed later) will enable the parties to expand the pie in a manner that benefits everyone.

Then ask the class a related question: Would you disclose your BATNA to the other side?

Initially, some students might state that they would not disclose their BATNA. But eventually the discussion will move toward recommending disclosure if one has a strong BATNA.

21. The second strategy is to try to weaken the other side's BATNA. Ask how Tracy can weaken the BATNA of Pat's company (which is to purchase another house located on Main Street).

Tracy should point out that, because the house on Main Street is well-maintained and in a prominent location in a residential neighborhood, the company's plans to demolish the house to build a parking lot will result in bad publicity, community outrage, and protests against the company. As a result, this BATNA will be less attractive to the company.

22. The third strategy is to try to improve your own BATNA. Ask how Tracy and the uncle can improve their BATNA.

It appears that the uncle hasn't done much to generate interest in the property from other buyers. Why not touch up the property with some paint? How about advertising the property as "for sale by owner" or hiring a real estate agent to find other potential buyers? When business executives mention finding other parties with whom to negotiate, they are really talking about improving their BATNAs. As an AOL executive put it, "You would never do a deal without talking to anyone else. Never."¹⁷

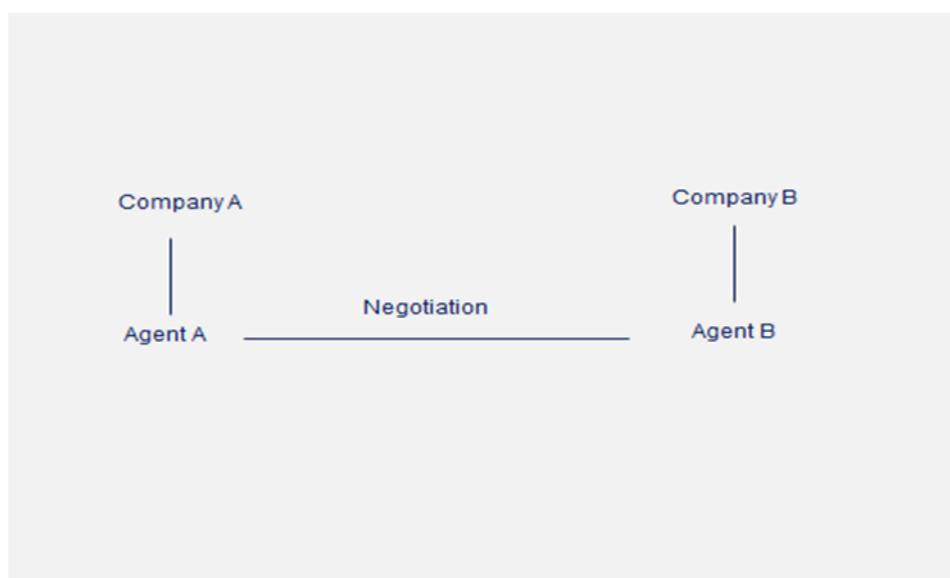
23. Although not related specifically to BATNA, at this point you might mention that reciprocity can be a powerful tool during negotiations. Reciprocity is the basic human need to repay someone who has done something for us. Reciprocity is especially useful when making concessions. For example, Tracy's uncle, the seller, wants the glazed tile artwork from the kitchen. Pat's company has no interest in the tile because the kitchen will be destroyed along with the rest of the house. So by giving the tile to the uncle, Pat loses nothing and this concession might cause Tracy to reciprocate by giving up something that is important to Pat, such as taking possession at an earlier date.

24. Legal Issues. Now move to a discussion of legal issues that relate to contracting. If you have not yet covered contract and agency law in class, you could call this a "legal aptitude test." If these topics have already been covered, you could frame this discussion as a review.

To start, **ask the class: In the U.S. (and many other countries), does the law require real estate contracts to be in writing and signed?** Then ask whether they concluded the negotiation by signing a contract.

Although the law generally requires a signed writing for real estate deals, it is unlikely that any of the students prepared and signed this document. As a result, they have no contract. (This will be a relief to students who feel that they negotiated a bad deal.)

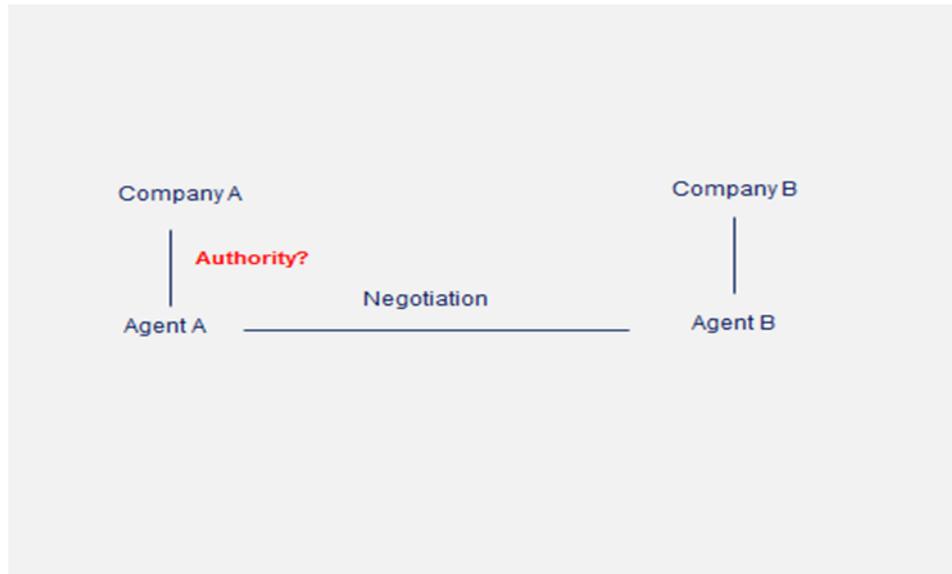
25. Then discuss the question of authority. "The House on Elm Street" negotiation illustrates the classic structure for business negotiations, illustrated below, where deals are negotiated by agents.



¹⁷ SIEDEL, NEGOTIATION FOR SUCCESS, *supra* note 1, at 53.

Ask the class: If you are, say, Agent B, what question should you ask at the beginning of any negotiation?

Eventually some students will suggest that Agent B should find out whether Agent A has authority to negotiate a deal. This issue is especially important because, if Agent A does not have authority, the negotiation is a waste of time.



Then ask: If Tracy is Agent A, did he/she have authority to negotiate a deal in this case?

The answer: probably no. The second paragraph in Tracy's role states that the "uncle has asked you [Tracy] to help him find a buyer." It does not state that Tracy has authority to negotiate and conclude a deal with a buyer. So this is another reason why the students have no deal.

D. You are now ready to finish the debriefing with what will probably be an "aha" moment for the class, as you show the students (through final discussion items 26-29) how they can convert a negotiation that appears to be a "dividing the pie" situation into an "enlarging the pie" scenario that benefits both sides.

26. Begin with this common result: Tracy negotiates a payment of \$170,000 for the property. In the real world, Tracy and the uncle (seller) would be pleased with this result, as the uncle can now afford the \$150,000 senior apartment and has an additional \$20,000 in cash. And Pat and the company (buyer) would also be pleased. They obtained the property and Pat saved \$80,000 for the company (because the company would have paid as much as \$250,000).

Then ask: Why should both sides be displeased with this result? Or more specifically, how can Pat and Tracy restructure the deal so that the uncle receives \$200,000 and the company keeps \$200,000 from the \$250,000 it could have paid?

To illustrate this challenge, ask everyone to stand, face another person, and reach out to shake hands. Then ask them to try to pull the other student's hand to their side and tell them that they will receive one point for every time they can do so within 10 seconds. (You are the timekeeper.) Tell them that they should try to score as many points as possible.

Once they start, you will observe that most students view this as a competition, straining to pull the other student's hand to their side. But some other pairings will view this as a cooperative exercise, moving their hands rapidly back and forth from one side to the other.

After they are seated, **ask for results from a couple of the competitive pairings (the results will usually be something like 2-1 or 3-3) and from a couple of the cooperative pairings (typical results will be in, say, the 20-20 range).** Then ask why some pairs did so much better than others. Students will immediately note the difference between the competitive and cooperative approaches to the exercise. Which type of scenario is this arm-pull exercise? Cooperative, because you didn't ask them to try to score more points than the other side; instead, you asked them to try to score as many points as possible.

27. The arm-pull exercise illustrates what negotiation researchers call the "mythical fixed pie assumption." We live in a competitive world and we bring to negotiations the competitive instincts illustrated by the exercise. According to leading negotiation researchers Bazerman and Moore, "When individuals approach negotiations with a fixed-pie mentality, they assume that their interests conflict directly with the interests of the other side."¹⁸

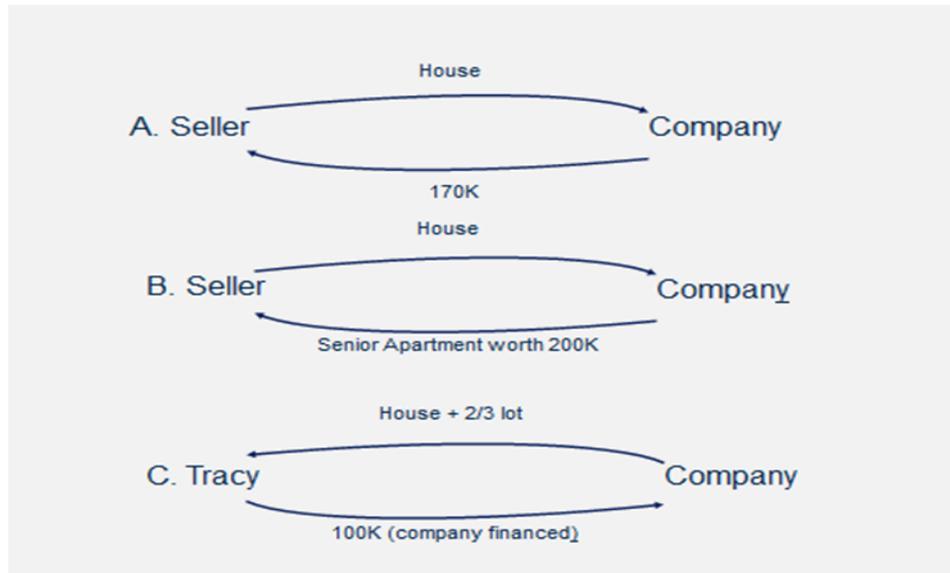
Because of this fixed-pie assumption, we miss opportunities to enlarge the pie. For example, return to the introductory slide at II-A-2 above that lists the seller's and buyer's confidential information. **Ask whether the interests of one side "conflict directly with the interests of the other side"?**

Students will quickly observe that the answer is "no." They can "connect the dots" by linking the seller's main interest, which is to obtain a senior apartment, with the buyer's interest in reducing its inventory of senior apartments.

<u>Seller's (Tracy's) Confidential Information</u>	<u>Buyer's (Pat's) Confidential Information</u>
Seller is elderly; has health problems.	Buyer is India-based company that is building US headquarters.
Needs at least \$150,000 for a senior apartment.	Will pay up to \$250,000; cash sale.
Tracy, the seller's agent, wants house but can't afford it.	Pat is secret agent for the company; wants job offer.
Seller wants to keep possession for 3 months.	Company needs possession in one month.
No other purchasers.	If unsuccessful, co. will buy another house (well-maintained, on Main Street) for \$265,000.
Seller wants at least 15% down payment, tile artwork, and a promise not to install plastic siding.	Needs 1/3 of lot for parking lot; will tear down house and add attractive landscaping.
	Company builds senior apartments; sales are Slow.

¹⁸ MAX H. BAZERMAN & DON MOORE, JUDGMENT IN MANAGERIAL DECISION MAKING 168 (7th ed. 2008).

Having shown that a key interest is not in conflict, you can now provide an example of how students can use this information to enlarge the pie. Here is one possibility, which shows how an initial sale of the house for \$170,000 ("A" in the slide below) can be transformed into a deal where both sides receive a \$200,000 benefit.



Explain that, instead of paying the seller \$170,000 for the house (A), the company can transfer one of its senior apartments to the seller (B). These units are on the market for \$200,000, so the seller ends up with a \$200,000 asset instead of receiving \$170,000 in cash. The apartments only cost the company \$150,000 to build, so the company has reduced its cost by \$20,000 (that is, the \$150,000 cost is \$20,000 less than what it originally agreed to pay for the property in transaction "A").

The company only needs one-third of the lot, so it can sell the remaining two-thirds to Tracy (who always wanted the house but could not afford it) for, say, \$100,000 (C). Because Tracy's financing is a problem, the company could finance the purchase. The sale to Tracy reduces the company's price to a net \$50,000, with the result that the company keeps \$200,000 from its "bag" of money.¹⁹

¹⁹ Some sophisticated students might ask: for this to work, wouldn't the Pats have to disclose that they are acting as secret agents for the company? After finding out (through questioning) that the uncle's real interest is to obtain a senior apartment, Pat could work around this issue by telling Tracy that one of the customers at the bank where Pat works has a number of empty senior apartments and he could obtain one for the uncle at a reasonable price.

The solution depicted in the previous slide (page 56) expands the pie from \$250,000 to \$400,000 and benefits both the seller (uncle) and buyer (company). And a side benefit is that Tracy can acquire a house that previously was unaffordable, as illustrated below:



28. Close the debriefing by mentioning that negotiators should maintain a big-picture perspective and avoid focusing too much on the details. To illustrate this point, show the “Monkey Business Illusion” video. Because some students might have seen this video, use the version at the following link to find out how many of them notice the curtain changing color and the player walking off the court.²⁰

https://www.youtube.com/watch?v=IGQmdoK_ZfY

Just as most students who have not seen the video focus on the number of passes and miss the gorilla pounding its chest in the middle of the court, negotiators in an exercise like “The House on Elm Street” become so focused on the details of price, date of transfer, etc. that they miss the “big gorilla,” which is the fact that the uncle’s primary interest is obtaining a senior apartment and the company has a large inventory of unsold senior apartments.

29. The hilarious video at the following link shows someone who is so focused on details that he misses the big picture.²¹ **Ask the class whether they think this incident was staged.** (Hint: the man on the phone is wearing a Celtics sweatshirt at a Bulls’ game!)

<https://www.youtube.com/watch?v=SSSBXPda50w>

²⁰ Simons, *The Monkey Business Illusion*, YOUTUBE (April 28, 2010).

²¹ Bertolucci, *Benny the Bull Kiss Cam Steals Celtic’s Fan Girlfriend*, YOUTUBE (Jan. 5, 2015).

IV. After the Debriefing: Self-Assessment and Feedback

One of the most important and unique features of the “House on Elm Street” exercise is the student’s ability to complete a self-assessment and to receive honest, candid feedback from the other side about what went well during the negotiation and opportunities for improvement. In the real world, negotiators never receive this feedback from the other side.

A participant in one of my executive seminars, as the head of labor relations for one of the ten largest companies on the Fortune 500 list, liked this approach so much that he used it when preparing for difficult union contract negotiations. He later reported that the negotiations were the most successful that the company had ever experienced. Here are the questions that your students should address in completing the assessment.

Negotiation Performance Review

Self-assessment:

- What did you do well?
- How can you improve?

Assessment for the other side:

- What did they do well?
- How can they improve?

The document at Appendix A, titled “Self-Assessment and Feedback for the Other Side,” includes a list of factors that students should consider when completing their assessments. You could give them time in class to provide feedback to the other side, or they could provide the feedback outside of class.

At your option, you could also ask students to submit a course assignment in which they list the top three areas they want to focus on for improvement in future negotiations. You could instruct them that their lists should include a thoughtful explanation that refers to (1) their self-assessment, (2) feedback from the other side, and (3) concepts discussed during this debriefing.

V. Conclusion

As noted at the outset of this article, the negotiation, debriefing, and assessments provide a powerful learning experience. This combination enables you to achieve the five key learning goals listed in the Introduction. These goals combine to link negotiation, law and ethics in a manner that is enjoyable and rewarding to teach.

Teaching negotiation through “The House on Elm Street” is also satisfying because of the positive and immediate impact on your students. I have received many messages from former students thanking me for this learning experience and, in many cases, providing examples of their success. Here is one example in which a former student refers to a planning checklist that included concepts from the debriefing:

I received a quote from a key supplier a few weeks back that was very good and I was just going to accept it as is. I decided to [complete a] planning checklist and called in the supplier. We had a great meeting, expanded the pie, learned tons about what each other wanted. In the end we renegotiated everything Win-Win. The projected savings over the next 5 years is over \$4M....

To preempt an inevitable question, no, I do not receive a commission on negotiation success stories like this one. Teaching negotiation in an introductory law course is its own reward.

Appendix A

Self-Assessment and Feedback for the Other Side

Complete the following assessment after negotiating "*The House on Elm Street.*"

Self-Assessment

1. What did you do well?
2. How can you improve?

Feedback for the Other Side

1. What did the other side do well?
2. How can the other side improve?

Be as honest and candid as possible. This is a rare opportunity to learn about and evaluate your negotiation strategy and skills. Please make the most of this opportunity. Use the results to prepare a plan for improving your negotiation skills in the future.

Here is a list of possible factors, among others, to consider when you complete your self-assessment and provide feedback to the other side. The references are to chapters in the reading, *Negotiating for Success: Essential Strategies and Skills*.

- Understood the two basic types of negotiation? (Chapter 2)
- Prepared for the negotiation by conducting a negotiation analysis? (Chapter 3)
- Acted in an ethical manner? (Chapter 4)
- Asked questions and listened carefully to the answers? (Chapter 5)
- Developed and used power (BATNA strategy) during the negotiation? (Chapter 5)
- Found out whether the other side had authority? (Chapter 6)
- Searched for underlying interests and identified interests that are not in conflict in an attempt to build a larger pie that benefits both sides? (Chapter 7)
- Used an effective "first price" strategy? (Chapter 7)
- Looked at negotiation from the other side's perspective? (Chapter 7)
- Kept a big picture perspective? (Chapter 7)