# The Last Gap in Negotiations. Why is it Important ? How can it be Crossed?

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**Introduction**

The aim of this paper is threefold. First, to summarise some basic principles concerning negotiation; secondly, to reflect on the reasons why the last gap in negotiations is difficult to cross; and thirdly, to set out in problem solving fashion a number of methods or options to anticipate and cross the last gap.

Readers familiar with the basic principles of negotiation may wish to turn directly to the second part of the paper.

**Basic Negotiation Principles**

There is a vast and growing literature on negotiation[1].

This phenomenon is very helpful to the legal profession, as like a number of other professions (eg. architecture, engineering), we do not have the tradition, skills or training in self reflection and theory development[2] to encourage a range of outstanding professionals to reflect upon their "intuitive" excellence.

Important negotiation concepts include:

* Preparation for Negotiation
* Styles
* Opening Offers
* Stages of Negotiation
* Strategies and Ethics

These topics will be very briefly discussed in what follows.

**Preparation**

There are only three things which matter in negotiation - preparation, preparation and preparation. In summary, here is a framework of questions which skilled negotiators ask:

* What are the hypothesised causes of conflict?
* What range of interventions may be helpful?

<u>Needs, Concerns and Goals</u>

* What are each parties needs, concerns and goals?
* Which of these need urgent attention?

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[1] For example see reading list at the end of the paper. See (1995) 6 *Aust D R Journal* 92-112

[2] See generally D. Schon, *The Reflective Practitioner* (San Francisco: Jossey Bass, 1983); *Educating the Reflective Practitioner: Toward a New Design for Teaching and Learning in the Professions* (San Francisco: Jossey Bass, 1987)

* Rank needs, concerns and goals from "vital" to "desirable"
* What needs, concerns, and goals are apparently shared; independent; or in conflict?
* What is WATNA; BATNA and PATNA for each party?

Facts

* What are the alleged facts?
* What is the evidence supposedly supporting the alleged facts?
* What facts are agreed upon?
* What degree of clarity on agreed, disputed and missing facts is necessary for advice/negotiations to begin?
* What precise history of offers to settle have been made? When? With what response?

Rules and Objective Criteria

* What range of rules and precedents may apply to this situation?
* What are the standard arguments to and fro arising from these precedents?

Outcomes

* What range of outcomes are possible - best to worst? Lateral thinking?
* What is client's TARGETED or PREFERRED outcome?
* What outcomes will be resisted? (the RESISTANCE point)

Dynamics

* Who should engage in preliminary meetings? (eg. lawyers, parties, experts?)
* Who should be present; who should not be present?
* What is known about the preferred negotiation style of all parties involved?
* What authority to settle does each party have? What influential people exist in the background?
* What are past patterns of interaction? What fears exist about a negotiation meeting?
* What documents need to be prepared/submitted/read by whom? By what deadlines?
* To what extent can complex alleged facts, evidence, arguments pro and con, precedents, interests and needs and agreements be SUMMARISED VISUALLY?

**Styles of Negotiation**

In negotiations, there are many different styles. For example, the following page sets out five different styles:

(adapted from *Thomas-Kilmann Conflict Mode Instrument* by Kenneth W Thomas Ralph H Kilmann, XICOM, Inc 1974.)

# STYLES OF CONFLICT MANAGEMENT

***Win/Lose (Forcing)***
"We're doing it *my* way..."
***Strategies****:* Discourage disagreement, persuade, be firm, set limits and consequences, cite policy, insist, repeat, control be inaccessible.
***Source of Power***: From position
***Benefits****:* Speed, decisiveness, protection of innocents, preservation of important values, stability.
***Costs When Over-used***: Destroyed or hierarchical relationships, loss of co-operation, a trophy of gifts in others; anger, depression, and diminished self-respect in others; stagnation.

1 2 3 4
Low Concern Relationship

**Avoiding:**
***Lose/Lose***
"Let's not make a big deal out of this."
***Strategies***: Withdraw, delay or avoid response, divert attention, suppress personal emotions, be inaccessible, be inscrutable.
***Source of Power***: From calmness, silence, non-cooperation; being above it all.
***Benefits***: Freedom from entanglement in trivial issues or insignificant relationships; stability; preservation of status quo; ability to influence others without doing anything.
***Costs When Over-used****:* Periodic explosions of pent-up anger; freeze-out - slow death of relationships; residue of negative feelings; stagnation and dullness; loss of accountability; sapped energy.
Concern Personal Goals
HIGH

9
8
7
6

**Compromising:**
***Win some/Lose some***
"I'll meet you halfway."
***Strategies*****:** Urge moderation, bargain, split the difference, find a little something for everyone, meet them halfway.
***Source of Power****:* From moderation and reasonableness.
***Benefits*****:** Relatively fast, enables the show to go on; provides a way out of stalemate; readily understood by most people; builds atmosphere of calmness and reason.
***Costs When Over-used*****:** Mediocrity and blandness; possibly unprincipled agreements; likelihood of patching *symptoms* and ignoring *causes*.

4
3
2
1

Low Concern
Personal Goals

***Win/Win* (*Collaborating)***
"My preference is ... I'm also interested in your views."
***Strategies***: Assert self while also inviting other views; welcome differences; jointly list strengths and weaknesses of all views; cooperate in seeking additional information.
***Source of Power****:* From trust, skill, ability, goodwill, creativity.
***Benefits****:* Trust and mutuality in relationships; high cooperation; creativity and growth; others blossom and develop new gifts; energy and joy.
***Costs When Over-used****:* Fatigue and time-loss; distraction from more important tasks, analysis paralysis.

6 7 8 9
High Concern Relationship

**Accommodating:**
***Lose/Win***
"OK, whatever you say..."
***Strategies****:* Agree, support, acknowledge error, give in, convince self it's no big deal, placate.
***Source of Power***: From relationships or approval of others.
***Benefits*****:** Approval/appreciation of others; freedom from hassle, in the short run at least; self-discipline of ego.
***Costs When Over-Used*****:** Frustration for others who wish to collaborate; resentment and depression; stunted growth of personal gifts; over-dependence on others; denies others benefit of healthy confrontation.

However, most negotiation systematisers suggest that there are two basis models - namely "interest based integrative" or "positional" - which can be used to classify most negotiations. The positional bargaining style tends to exhibit some of the following features:

* Suggests a numbered solution early in the negotiations.
* The solution is clearly favourable to his/her side and unfavourable to the "opposition".
* The posed solution is offered as an alternative to a threatened decision imposed by a judge. Many positional bargainers demonstrate poor listening skills and constantly repeat the perceived strengths of their own arguments.
* Predictable incremental concessions to the initially proposed solution are usually made over a period of time until settlement occurs at the last minute before a time deadline (eg. at the door of the court).
* The process of making gradual concessions is often marked by stand-offs, threats, bluffs and feelings of hostility.

Positional bargaining is sometimes very successful in that it can produce a high or low dollar figure. It also required no particular skills and any untrained person can engage in the process. However, it is only one method of negotiating. Some lawyers have been criticised for their monochrome, predictable style of positional bargaining, and for lacking the flexibility and skill to switch to other more suitable styles when diagnosis of a client conflict suggests that another style may be more useful.

**Opening Offers**

Two vital and interrelated questions for practising lawyers in the trenches (and for researchers attempting to systematise and measure lawyer behaviour) are:

* Who should make the first offer?
* What form should the first offer take?

Anecdotely, many lawyers predictably try to avoid making the first offer; or begin with offers or respond to offers with an exaggerated ambit claim.

**What form should the first offer take?**

There are three classic ways to open negotiations - (1) soft high (the "maximalist" opening); (2) firm reasonable (the "equitable" opening); and (3) problem solving.

Each opening has a number of predictable and well documented advantages and disadvantages[3].

It is essential that skilled negotiators:

(1) Know how to open by any one of these three methods.
(2) Even though they may have a preferred style, are able to use all three openings with confidence.
(3) Practise in damage-free simulations using alternative methods.
(4) Negotiate with the "opposition", before the first offers are made, about which of the three forms of opening is most appropriate. (This may require considerable education of "the opposition").

[3] eg. L Teply *Legal Negotiation* (St Paul: West, 1992) pp 114-121

(5) Be able to articulate openly the well-known advantages and disadvantages of each form of opening.

(6) Openly or by known coded messages identify to the other side which of the three openings appears to have been used. For example, lawyers use a number of codes to indicate a high soft opening:

* "On the current facts, our client would be prepared to settle for....."
* "Our client is claiming....."
* "Our advice is that the husband is entitled to ....."

**Stages of Negotiation**

Empirical studies of negotiation behaviour suggest that there are predictable stages through which most negotiations pass. Obviously, there are many variables which affect the timing of each stage.[4]

These four stages (described by different terminology by different researchers) are:[5]

(1) orientation and positioning;
(2) argumentation, compromise, and search for alternative solutions;
(3) emergence and crisis;
(4) agreement or final breakdown

| STAGE ONE | STAGE TWO | STAGE THREE | STAGE FOUR |
|---|---|---|---|
| 1. Working relationship established | 1. Argument and persuasion | 1. Pressure for agreement or deadlock builds | 1. Deadlock or basic agreement occurs |
| 2. Initial negotiating positions adopted | 2. Search for alternative solutions | 2. Crisis occurs | 2. Wrap up details |
| | 3. Concession making | | |

These four observed stages are worthy of extensive observation and empirical research:

* What factors speed up or slow down the stages?
* How can the third (crisis) stage be managed?
* What management styles appear to be more or less effective?

**Strategies and Ethics**

[4] See G. Williams, *Legal Negotiation and Settlement*; H T Edwards and J J White, *The Lawyer as Negotiator* (St Paul: West 1977)

[5] L L Teply, *Legal Negotiation* St Paul: West, 1992, pp 112-113.

The current interest in studies of negotiation and systematisation of negotiation behaviours arise partly out of the realisation that "knowledge is power". And where there is access to power, there is abuse of power.

Accordingly, there is considerable complementary interest in most professions in ethical standards and discipline in reaction to negotiating behaviours such as:[6]

* lying and exaggeration
* bluffs and threats
* stonewalling
* stalling
* non-disclosure

While ethical standards will continue to be debated, some professional negotiators (including lawyers) and researchers have attempted to systematise a range of strategies to use in anticipation or response to:[7]

* lying an exaggeration
* bluffs and threats
* stonewalling
* stalling
* non-disclosure
* add ons
* obscurantist behaviour about facts or precedents

Other important strategic questions include:

* Who should "open" the negotiations?
* What style of negotiation is appropriate to the transaction or conflict?
* When should negotiation styles be changed?
* When and how should litigation be run parallel to negotiations?
* When should negotiation be (temporarily) terminated?

The four basic rules of thumb for legal negotiators developed by the Centre for Dispute Resolution at Pepperdine University are:

(1) Begin reasonably

(2) Retaliate whenever the other party is unreasonable

(3) Communicate clearly and constantly

(4) Forgive, but never forget

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[6] eg. W Pengilley, "But You Can't Do that Anymore!" - The Effect of Section s52 on Common Negotiating Techniques", (1993) 1 *Trade Practices J* 113

[7] eg. W Fisher and W Ury, *Getting to Yes* (London: Century, 1981); W Ury,*Getting Past No* (London: Century, 1991).

Having taken a helicopter overview of some basic issues in negotiation, this paper now turns to a more specific topic.

**The Last Gap**

What is the last gap in a negotiation? It is the last step necessary to reach an agreement between the negotiating parties. Often that last gap or last increment emerges after long and exhausting negotiations which have led to agreement on all issues but one. For example, that one issue may be - Who gets the grandfather clock? How should the last 10% of the pool of assets be divided? How should the outstanding credit card debt be paid? How to cross the difference of $ 600 or $ 1 million in the parties' "final" offers?

Most lawyers and business people can relate horror stories with humour and/or anguish about clients becoming stuck on the last issue of a lengthy negotiation. Some lawyers can tell how they themselves have offered to write a cheque to cover the last gap in order to help the disputants end the drawn out negotiations and almost invariably the disputants refuse the offer "as a matter of principle".

**The Importance of the Last Gap**

Why does the last increment or last issue assume such importance and so often anecdotally provide a stumbling block to a negotiated settlement? There are a number of possible explanations:

* The Last Dance - final loss of the conflict or the relationship.
* Unfinished Emotional Business.
* The last straw - "I have given up so much already".
* Sense of having been Tricked.
* Skilled helpers attempt to prove "worth".
* Recriminations for Lost Time and Money.
* Latent request for a symbolic apology.

***The Last Dance***

Negotiations have often been compared to a dance, where one or both parties circle one another apparently reluctant to end the process.[8] Particularly in family, succession and employment disputes, a settlement represents the final loss of the relationship and is therefore often avoided.

The avoider may need to be challenged privately by a trusted adviser about his/her apparent need to avoid that final loss of the relationship. Some patience and new strategies are needed as the avoider weaves and ducks around the resolution of the last issue with a series of "oh but...." statements.

[8] eg. K. Kressel *The Process of Divorce - How Professionals and Couples Negotiate Settlements* (New York: Basic Books 1985)

The most clinging form of the last dance has been described by Isolina Ricci as "negative intimacy"[9]. This occurs where one or both parties are finding meaning to life by being a martyr, or by being in constant conflict. A settlement represents loss of meaning.

Thus the last gap will never be crossed but will be preserved. Even if the other party concedes the last gap, the "negatively intimate" negotiator will create a new last gap - known as an "add on"[10]

For example, just as agreement is apparently reached:

- "There's something else I want to raise....."
- "There's one more thing that has to be done - I want an apology".
- "Of course, before I sign anything I want all the photograph albums delivered to me".

***Unfinished Emotional Business***

The last gap may represent a cry by one or both parties that there are some unfinished emotional issues between the disputants. Commercial reality or common sense "does not prevail for good reasons". We cannot allow this dispute to be nominally "finished" when one major issue has not even been discussed, let alone resolved - namely my sense of anger, devastation, guilt or powerlessness. I will hang on to these negotiations and to your presence in this room until my feelings are acknowledged, expressed or healed, or diminished to a tolerable level of pain".

Thus once again, jamming on the last gap may have nothing to do with the substance of the last gap. Rather it may be a cry for help.

If this is a correctly hypothesised diagnosis in a particular case it represents a challenge to skilled helpers (lawyers, counsellors or mediators) to develop a number of strategies to respond to the cry. These strategies need to extend beyond the ubiquitous platitude "perhaps you need to work through this with the help of a counsellor".

***The last straw - "I have given up so much already".***

The dominant method of negotiation in Western cultures appears to be positional bargaining. Each party makes an extreme claim and by gradual increments moves towards a resolution point somewhere between those extremes. Repeat players such as corporations are experienced in playing this game.

However, one-off or less experienced disputants tend to go through disappointment and anger as they see their original claim whittled away by one concession after another. This is particularly so where they believe that their original offer was reasonable, or at least not unrealistic.

At the end of several rounds of mutual concessions, both ( now angry) disputants may have a strong sense that each has conceded so much already - so much has already been "lost" - without losing yet again on the last issue. Accordingly, each

[9] I. Ricci *Mum's House, Dad's House* (New York: Maemillian, 1980)

[10] eg. W Ury, *Getting Past No* (London: Century, 1991) p.23.

disappointed disputant digs in and insists that the other concede on the last issue. "I want you to give something today as I have already gone way past my bottom line. Be reasonable!" - each disputant echoes to the other.

Some disputants may feel intensely that this last impasse is the last straw - they have been steamrolled all day and are finally putting up a stop sign to preserve some sense of integrity. A dramatic walkout may also be staged or threatened.

The walkout relieves the pressure of the negotiation room, avoids the last concession, demonstrates to all how intensive the pain is, and may inflict some pain on the other side for his/her "unreasonableness".

Professional helpers should be able to anticipate the walkout and normally have a variety of strategies ready to prevent or delay its occurrence. This is because a walkout enables each side to characterise the other as "unreasonable" - one for unreasonably "causing" the termination of the meeting, the other for immaturely exiting. Each party is stereotyped and a new cause for a relationship conflict is founded [11] . Additionally, after a walkout it is difficult to muster enthusiasm, cash and timetables for another face-to-face meeting.

***Sense of having been Tricked***

Some negotiators sense that they have been tricked when the negotiations reach the last gap, and someone predictably suggests "split the difference". This is because they believe that their first offer was "reasonable", whereas the other parties' first offer was wildly exaggerated. The standard process of incremental concessions has left the range of offers biased towards the "exaggerated" opening offer.

The person who perceives that they opened reasonably will often be fuming for being "punished" for his/her reasonable behaviour. This pattern of behaviour of course encourages some experienced negotiators to avoid opening with reasonable offers.

Even more experienced negotiations/mediators will tend to discuss how negotiations should open - firm reasonable or soft extreme - before the process commences[12] .

***Skilled Helpers attempt to prove "worth".***

The last five, ten, twenty or fifty thousand dollar gap is sometimes a sticking point as the lawyers want to "win" that gap to both establish their negotiation skills, and to pay their own fees. A client will face triple disappointment if they "lose" their expected outcome, "lose" the last gap, and then have to pay fees of skilled helpers (such as lawyers and accountants) from their diminished share. Lawyers understand the marketing need to justify their fees, and to support disenchanted clients who will be their main source of publicity for future clients. Therefore some lawyers may feel the need to negotiate long and aggressively on the last gap.

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[11] A relationship conflict is one of the five types of conflict identified by C. Moore *The Mediation Process* (San Francisco: Jossey Bass 1986). It arises where disputants have entered into repetitive patterns of negative behaviour towards one another including stereotyping each other.

[12] See previous on "opening offers"

***Recriminations for Lost Time and Money***

Reaching the last gap sometimes brings home a depressing reality to one or all the negotiating parties. They are about to settle for a deal which was offered and rejected one or two years previously. Now they are about to settle for the same figures with nothing to show for one or two years of tension, absences from work, uncertainty and thousands of dollars of expenditure on legal and other experts' fees. This pattern reflects the negotiation adages that "the right offer at the wrong time is the wrong offer"; the negotiation dance takes time and money; disputes settle when they are ready to settle - not before.

However this loss of time and money will result in some angry statements particularly by negotiators who are not repeat players:

* "We could have settled for these arrangements two years ago if you had only been less greedy"
* (To the lawyer) "I've spent another x thousand dollars on you - and what do I have to show for it? Nothing!"
* "I was willing to settle for that amount one year ago - but now you'll have to pay all my legal expenses"
* "Two years of pain and expense - for what? - only to make the lawyers richer".
* (To the lawyer) "I wish you had pushed me to agree two years ago when these similar figures were on the table".
* (To the lawyer) "Your initial advice two years ago suggested that I'd get much more than this paltry offer. And now you seem to be pushing me to accept".

This is a familiar litany of recrimination for lost opportunity against self, the other party, and the expert advisers. It can make navigating the last gap a tense passage of blame and defence both within and across negotiating teams.

Some lawyers attempt to deflect or anticipate client blame for their behaviour by producing old written letters of advice to settle; by negotiating aggressively to win the last gap; by blaming the old misdiagnoses on unknown and subsequently emerging facts; by reducing legal fees in the light of the "disappointing outcome"; or by recommending an umpire's decision so that the umpire, and not the lawyers can be blamed for the outcome.

**Latent Request for a Symbolic Apology**

In family disputes, the return of a particular "minor" chattel sometimes becomes a cause celebre not because the item in itself is important to either person. Rather it represents one form of "unfinished emotional business". This is a sense of hurt from a past particular or series of events which is sought to be remedied by an apology. As a verbal apology is seen as unlikely, one party demands a symbolic apology by insisting upon the return to him/her of a bicycle, painting, hallstand, necklace or set of books. The possessor of the item will usually be reluctant to effect the transfer so long as this might be interpreted as an apology - as (s)he is convinced that apologies should be coming the other way on the "correct" interpretation of history and righteousness.

**Can the Last Gap be Avoided?**

Are there any strategies whereby the last gap can be avoided in negotiations - or is it inevitable? This is certainly a worthwhile topic for empirical research. How often is there a clear impasse over the last gap? What are the variable factors which can be measured when the last gap is absent?

It may be that almost every negotiation necessarily involves a measure of distributive and positional bargaining, and therefore a measure of pain and pause.

Nevertheless, a number of preventative strategies may help both parties to prepare for the last gap so that it creates less of an impasse.

**Education - Talk and Diagrams**

A skilled helper (lawyer, counsellor, negotiator, mediator) can educate a client concerning predictable patterns of negotiation and impasse by:

* giving out literature or videos on negotiation
* repetitively giving educational lecturettes
* drawing negotiation diagrams
* listing the fifteen ways to cross the last gap so that the client can consider these in advance[13] .

This education process may cognitively help the one shot client to:

* reduce the sense of panic or anger when the last gap is reached
* feel some control over the stressful and mysterious negotiation process.

However, the obvious should be stated-intellectual assent by a client to a series of "educational" verbal propositions from the mouth of a skilled helper may be a totally ineffective learning experience. The humbling adage is that family law clients only hear every fifth word spoken by their lawyers.

**"Keep something in reserve"**

Some lawyers appear to coach clients to "keep something in reserve" in preparation for the prophesied road block at the last gap. On standard negotiation principles, the "something" should be of high value to the offeree, but of lower value to the offeror. Identifying these extras requires a problem solving search for the "interests, needs and goals" of the other side. For example, the offers held in reserve in family disputes might be:

* a promise to keep a parent fully informed of all the child's activities and school reports.
* a promise to use best endeavours to ensure that a child phones regularly.
* an undertaking to pay private school fees or medical and hospital insurance.
* a request to babysit a child during a holiday period.
* an undertaking to publicise and promote a spouse's business, dispute the martial breakdown.

[13] See later in this paper for the 15 ways to cross the last gap.

**Maximalist opening offer**

Some lawyers routinely advise clients to "open high, as it is easy to give up something; but very difficult to take back". This homespun wisdom supposedly prepares the client to make concessions around the last gap, as (s)he knows (at least in theory) that the initial claim has been overstated in value.

This rule of thumb is a two edged sword. It may fulfil its aim, or may in fact cause the very problem of deadlock it is aiming to predict and avoid. For example: First, used against inexperienced negotiators or lawyers, or against a one-off party, it may cause considerable anger for being "unreasonable" or "out of the range". It fulfils the prophecy that he offeror is "unreasonable", "hysterical" or "greedy" and negotiations are terminated.

A predictable pattern of stand-off, bluff, harassment, threat to use an umpire, followed by eventual incremental concessions is resumed.

Secondly, used against an experienced negotiator or client, the maximalist claim is usually readily identified, named and ignored. Thereby the unexperienced offeror lawyer or client may not have the skills to withdraw without loss of face.

In the jargon of negotiators, the unexperienced offeror made the opening offer "high" but not "soft". (S)he failed to attach sufficient understandable code words to the high opening.

Thirdly, used against an experienced lawyer or client, the maximalist claim may result in a maximalist counter-claim. The following months or years of incremental concessions will leave both parties with an even heightened tension over crossing the last gap.

**Problem-solving Opening Approach**

Another increasingly popular (but far from infallible) preventative strategy, is to open communications in a problems solving style. For example, "My client has the following five goals....."; "My client has the following three concerns....."; "This is our understanding of a chronology of facts"; "We are willing to discuss possible options or solutions but would first like you to set our your client's general or specific concerns and goals"; "Can you provide us with the following information and documents so that we can properly advise our client"; "Please advise what information and documents you require".

These classic problem solving openings are designed to delay stating positions, maximise communication; reduce suspicion; and put as many chips of value on the negotiating table as possible. In the jargon of the industry, it is worthwhile spending time and skill to enlarge the pie so that packaged or linked bargaining can then take place. The last gap is delayed by keeping all issues unresolved by face saving conditional and linked offers at different levels of specificity. "Bill, would you be prepared to move towards Jane's valuation figures if Jane moved towards a lower percentage?" "Jane, what if you received the business immediately, would you be prepared to give Bill some of the chattels he has requested?"

It has been one of the myths of the dispute resolution industry that this helpful problem solving approach will dispense with positional bargaining and the last gap. This is clearly not correct. Even a packaged and linked multi issue offer eventually

becomes specific in its numbers and terms, an at that point there will be a last gap. "That proposition sounds interesting, but I'm not prepared to give you all the chattels on your list - I want the painting"; "We are getting closer, but I can never drop my percentage below 55%". The mixed nature of all negotiations between competitive positional and cooperative problem solving is well established.

**How to Cross the Last Gap in Negotiations**

Apart from anticipating the last gap, what strategies are available to cross this hurdle in negotiations or mediation?

One aspect of a mediator's role is to be an expert in the dynamics of negotiation and to educate the disputants concerning these dynamics. Parties can then have some confidence, even though they may feel in the wilderness, that there are well trodden paths which they have some power to choose between. On some classic model of mediation, this education is not necessarily advice-giving. Rather the mediator or negotiator can give information concerning the range of options which have emerged in the strategies of negotiation. (A mediator or negotiator can give this information before or after the last gap has been reached in the negotiation). What follows is a list of options on how to cross the last gap. Some of these can often be helpfully written on a whiteboard. Each disputant may be advised "You will need to choose one of these methods if you want to reach a settlement tonight. I am going to ask you each in turn which of these methods you (i) would at least consider as a possibility; or (ii) prefer; or (iii) would like to avoid"

This ritual of visualising options in dispassionate words on a whiteboard may assist the disputants:

* to resume a style of joint problem solving.
* to withdraw gracefully from a strongly stated position - "I will never settle unless I get that car".
* to realise that impasse on the last increment is a normal stage in negotiations.
* to realise that there are many solutions and there still is opportunity to negotiate about the most palatable of these.
* assist the parties to avoid a dramatic and premature walkout before all the options have been considered.

**Options for crossing the last gap in negotiations**

The sixteen methods are as follows:

(1) Talk - Try to convince

(2) Split Difference

(3) Expanding the pie by subdividing the last gap

(4) Expanding the pie by an add-on offer - "What if I moved on.....?"

(5) Refer to a third party umpire

(6) Chance - flip coin

(7) Chance - Draw gradations from a hat

(8) Transfer the last gap to a third party

(9) Conditional offers and placating incremental fears - "What if I could convince client to...? How would you respond?"

(10) Pause - and speak to significant others

(11) Pause - and schedule time for a specific offer

(12) Defer division of last gap; divide rest

(13) Sell last item at auction; split proceeds

(14) Pick-a-pile; you cut, I choose

(15) Skilled helper has a face-saving tantrum

(16) File a (further) court application – pursue pain and hope.

**(1)** ***Talk - Try to Convince***

A common response at the last one million dollars; or $10,000; or at last set of paintings; or last car, is for one or both disputants to talk - to rehash old arguments in an attempt to convince the other party to give in. These arguments take various forms:

* "I have given up so much in these negotiations; now it's your turn".
* A lengthy filibuster re-iterating all the merits of the speaker's claims, and the weaknesses of the agitated or glassy-eyed "listener".
* An angry speech about how the listener's first offer was outrageous, so (s)he should make the last incremental concession "to be fair".
* A lengthy speech about the cost of litigation, the costs already incurred and the likelihood of settlement at the door of the court.
* A detailed historical version of the concessions made to date in the negotiation leading to the predictable conclusion that it is the listener's turn to be reasonable and make the last concession.
* A short but angry speech with express or implied threats about walking out, stonewalling, scorched earth, subpoenaing relatives or business associates, or advising the Commissioner of Taxation about unpaid tax of some kind.
* A combination of some or all of these speeches.

Anecdotally, these speeches rarely appear to be directly successful in crossing the last gap. The listeners may become inflamed to hear such a one-sided presentation (yet again) so late in the day, and deliver a counter speech or the speaker may back himself/herself into a positional corner. One mediator/facilitator strategy is to interrupt the flow of words with an attempted educational comment, and redirect the disputants to the remaining list of options on the board. "I don't think that these arguments are going to convince either of you; you've both hear them all before; the last gap is never crossed by logical argument; I'm going to ask you each in turn which one of the other options on the board you could live with".

Nevertheless, some degree of managed speech making at the last gap may serve latent functions of catharsis, boredom, the last dagger, further emotional pain, or attempted justification of perceived role and fees of a skilled helper, or the farewell address. A

managed last speech may be important given the complex psychological functions which the last gap appears to serve[15] .

**(2)** ***Split Difference***

This method is commonly suggested where the last gap consists of money or other divisible items - such as time with a child. It has the merits of simplicity, that both parties "lose" equally and that it is culturally commonplace.

However, given the complex psychological dynamics surrounding the last gap, "splitting the difference" may be seen as too quick, part of an orchestrated plan of attack, or involving another painful "loss".

**(3)** ***Expanding the pie by sub-dividing the last gap***

The last increment can sometimes be divided in ways apart from an equal split by dividing the time of use or time of payment. For example,

* the last $10,000 can be paid over time in instalments
* the last $100,000 can be paid at a later date with an interest component
* a painting can be used for alternative months by different parties, with one or the other paying shipping and insurance.
* both parents can meet a child on his/her birthday at a common venue, rather than each having exclusive time with the child.

**(4)** ***Expanding the pie by an add-on offer***

One party can attempt to overcome an impasse on the last increment by re-opening a "decided" issue, or adding another issue to the negotiating table. In these ways, there is an attempt to prevent the "last" issue from being the last.

For example,

* "I would be willing to give up my lounge room couch if you return the children's bikes to my house".
* "If that last $10,000 is paid to me, I would be willing to redirect all old customers to you".
* "We have already agreed that you will occupy the house for 3 years, but I'm willing to reconsider that time period if I can have that painting".

Obviously, it is not always easy to re-open or to discover extra value to place on the bargaining table. One of the clear benefits of questioning and listening skills is that a negotiator can develop ideas on the needs concerns and interests of the other disputant so that extra value can be put on the table. Some negotiators begin bargaining with a positional style. When on impasse is reached, they switch (or have a fellow negotiator switch) to an interest based problem solving approach.

**(5)** ***Refer to a Third Party Umpire***

The impasse of the last item can be "resolved" by:

* agreeing to refer the whole dispute to an arbitrator or to a judge

[15] See previous discussion of "Why is the Last Gap so Difficult to Cross?"

* agreeing to refer just the issue of crossing the last gap to an arbitrator. A respected expert can be paid for two hours of his/her time to come to a binding oral or written decision only on the last $20,000, car, Christmas Day or week of the school holidays.

In mediation, the disputants may request that a trusted mediator make a recommendation or a binding decision on how the impasse should be resolved. Most mediators respond to such requests with reluctance and make speeches about neutrality. However, occasionally the parties manage to persuade the mediator to accept one or both of those roles.

In passing it should be mentioned that judging and arbitrating have many different sub-categories which can be set out for disputants to consider. These include baseball arbitration (both parties submit a figure to the arbitrator who can only choose one of the submitted figures); night baseball arbitration (both parties submit secret and sealed offer; the arbitrator makes a decision and opens the sealed offers; the offer closest to the arbitrator's decision is binding); high-low arbitration (parties agreed to the range of outcomes; the arbitrator can only decide within that range); "night" high-low arbitration (each party submits a sealed high-low range of outcomes; the arbitrator or valuer makes a decision which is only binding if the decision falls within the overlap of the ranges when these are disclosed; scope arbitration (the arbitrator is only authorised to decide upon a range of outcomes divided by say 15%; parties agree to settle within that range); on-the-papers arbitration (a cheap and quick decision making process where there are no oral presentations); early neutral evaluation (an expert gives a non-binding assessment of the likely court outcome of a dispute).

### (6) *Chance - flip-a-coin*

Chance provides an important option for deciding who gets the last gap. This is because flipping a coin:

* is cheap and fast
* involves equal chance of winning or loosing
* avoids loss of face by being "beaten" by other more personal strategies
* is sometimes culturally acceptable in a gambling society
* provides a stark visual metaphor of "going to court" and also reflect the educational conversations of many lawyers and clients[16]
* is so abhorrent to some risk averse disputants that they return to the remaining list of options with enthusiasm!

### (7) *Chance - Draw from a range of Solutions*

This is a alternative version of chance which avoids the all-or-nothing result of flipping a coin. The disputants care that several solutions will be written out on slips of paper, placed in a hat, and the one drawn out will prevail.

For example, if the last increment is $20,000 then ten slips of paper can be placed in a hat beginning with "$2000" and ending with "$20,000" with gaps of $2,000" written

[16] eg. A. Sarat & W. Felstiner, *"Law and Strategy in the Divorce Lawyer's Office"* (1986) 20 L & Soc'y Rev 93; A. Sarat & W. Felstiner, *"Law and Social Relations: Vocabularies of Motive in Lawyer/Client Interaction"* (1988) 22 L & Soc'y Rev 737; J. Griffiths, *"What do Dutch Lawyers Actually do in Divorce Cases"* (1986) L & Soc'y Rev 135; J.H. Wade, *"The Behaviour of Family Lawyers and the Implications for Legal Education"* (1989) 1 Leg Ed Rev 165.

on each slip of paper. The drawer receives whatever number is on the drawn piece of paper; the residue of the last gap goes to the other disputant.

Of course this method can be extended to a range of more complicated alternative solutions.

**(8)** ***Transfer the last gap to a Third Party***

This option involves both parties agreeing to transfer the last gap to a child, a charity, to pay the fees of skilled helpers such as lawyers or mediators, or to pay for renovating a house or business before a sale.

Thus for example, last increments from the division of a pool of assets in a matrimonial or deceased estate have been transferred:

* to a trust fund to pay for future child support or private school fees.
* in the form of an antique car to a husband on the condition that he bequeath it to his children.
* to pay a mediator's fees.

Such transfers to third parties may have the clear benefits of mutually avoiding a "loss", and of wedding a third party to the solution chosen.

**(9)** ***Conditional offers and placating the incremental fear***

Where a pattern of incremental bargaining has been established, each disputant will usually be concerned about the consequences of initiating any offer across the last gap. Why? Because any offer is likely to be whittled away by a incremental counter offer. For example, if the last gap between A and B is $20,000, and A offers to split the difference ($10,000 to A) how is B likely to respond? "B is likely to respond, split the difference again - only $5,000 to A". Thus there is a reluctance to make the first move, and the impasse remains intact.

Accordingly, some negotiators make exploratory conditional offers in an attempt to placate the fear of incremental counter-offers. This works best if there are at least two negotiators (eg. lawyer and client) on each negotiating team.

Lawyer: "What if I could persuade my client to make a split-the-difference offer, would you guarantee that you wouldn't try to cut down her offer?"

Opposing

Disputant: "What do you mean?"

Lawyer: "Well I'm not willing to put the effort persuading my client against her wishes to modify her position if you're going to try to cut her offer in half. She will then feel betrayed. I'm not willing to put in the work to attempt to persuade her unless I know what your response will be. And there are no guarantees I can persuade her".

Opposing

Disputant: "Let me talk to my lawyer about this in private for a moment. We'll be right back".

Obviously, this option can be manipulated by a negotiator attempting to discover the other side's willingness to settle for a hypothesised offer. However, the offeree's response is also clearly conditional ("if your client makes that offer....") and can be withdrawn readily. Moreover, raising any suspicion of manipulation will usually be counter-productive at such a late stage of nearly successful negotiations.

**(10)** ***Pause - and speak to significant others***

The intensity of a negotiation or mediation session means that it is easy to become weary, to lose perspective and to make "a mountain out of a molehill". Additionally, some people are cautious and are accustomed to reflecting upon options available before making a commitment.

Accordingly, it is a helpful strategy to suggest a break to consider one or more written options, with a clear appointment to resume negotiations, and with encouragement for each disputant to speak to specified trusted third parties. Where a mediator is being used, it is often helpful for all disputants to make contact during the break to clarify, brainstorm and hypothesise on negotiation dynamics (eg. "What will be the likely response if I make this offer.....?"). Additionally, during the break, the friend (often a trusted lawyer) *may* be able to re-establish team perspective that any “loss” of the last gap is counterbalanced by the “gains” of the proposed settlement.

**(11)** ***Pause - and schedule time for a specific offer***

As a variation on the previous procedure, the parties can actually draft a precise or general form of offer before the break is taken. This may for example represent a mediator's recommendation of "splitting the difference" which is too difficult to swallow during the negotiations.

A time and place is then agreed upon for one party to contact the other and make the offer as drafted (eg. phone on Wednesday night between 6-8 pm). Both agree not to haggle, but either to accept or reject the ritual pre-planned offer and to return to the negotiation/mediation table at a specified time with the result.

This procedure gives a concrete proposal, reduces the fear of incremental haggling during the break, ritualises conflicted conversations, provides a deadline, and allows the parties to return to the negotiation table knowing what has been decided.

**(12)** ***Defer Division of the last gap; divide the rest***

Where parties are in dispute over a pool of assets, it is possible for a portion to be divided as agreed, and for the last gap to be set aside for division at some later time. For example, a wife could take 50%; a husband 40% and the contested gap of 10% be invested in a joint account until the parties are "ready" emotionally or otherwise to deal with that 10%.

The writer has been told of one case where the last contested chattel was the matrimonial bed. The parties chose to divide everything else but to place the bed into indefinite storage until a decision could be made.

**(13)** ***Sell the last item at an auction; split the proceeds***

This option involves an agreement to sell the last contested item(s) at a without reserve auction, usually with all parties free to bid. The most determined bidder "wins" the item and the net proceeds of the auction are then divided in portions agreed to beforehand.

**(14)** ***Pick-a-pile***

Where the last gap consists of a number of items such as "all the furniture"; "all the stamp collection"; "all the paintings", then the parties can be offered the "pick-a-pile" option, which is well known to family lawyers.

One party agrees to divide the chattels into two lists of approximately equal value and submit these lists to the other party by a deadline. The other party then has a specified time in which to choose one list as his/her share[17] .

Like dispute resolution by chance, this pick-a-pile option is so filled with risk and tension that some disputants quickly reject it and return to the list of remaining

options with some relief.

**(15)** ***Skilled helper has a face-saving tantrum***

This option is rarely chosen by the disputants. However, some parties comment confidentially during or after a mediation to a mediator - "I wish you would apply more pressure to us both; we are stuck"

Accordingly, when the last gap persists, some mediators try this option from their box of tools. For example, with varying degrees of simulated anger, the mediator comments: "I cannot believe it. You have both sat here for three hours and patiently and successfully negotiated through four issues. Now you're about to throw it all away on this miserable bunch of paintings. You both really disappoint me. I'm not going to let you out of here until you both do the right thing and ..... etc. etc."

This option may cause the mediator to lose reputation and two clients, or may enable both parties to avoid any loss of face by making the last concession. They can blame the mediator for "forcing" the last concession (and rescuing them both from their painted-in corners).

This dramatic option may be particularly successful if the mediator has gained the respect and trust of all parties (both lawyers and disputants) over a period of time.

**(16)** ***File a Court Application – Pursue Pain and Hope***

Sometimes, the last gap is too difficult to cross amidst the sense of loss arising from a day of concessions. Accordingly, the mediator or one of the negotiators delivers a mixed message of pain and hope "I believe that this dispute will settle; you have made progress today; in my opinion, you are not diagnostically in the 1-3% of disputes which need a judicial decision; however you both may need to suffer more pain and expense of filing (further) court applications, open offers, and paying your lawyers;

[17] Precedent clauses for such agreements can be found in *Australia Family Law and Practice* (CCH) "Precedents" tab and in *Australian Encyclopedia of Forms and Precedents* (Butterworths) under "Family Law" tab, Volume 6, precedent 30.165.

could the lawyers now agree to a time to talk over the phone in say 7 days time etc." (Competent negotiators/mediators always organize face-saving methods to re-open negotiations.)

Various versions of this pain and hope speech have sometimes led to awkward silences, and then positive responses to the question "Would you like to take a short break, then try for another 15 minutes to see if this can be concluded today?"

## Conclusion

Conflict managers are becoming more sophisticated in their knowledge of negotiation dynamics. This paper has attempted to systematise some of the reasons for the difficulties experienced in crossing the familiar last gap.

Sixteen ways of crossing the last gap have been described. Visually setting out some or all of these sixteen strategies is a useful addition to a mediator's or negotiator's repertoire for working with disputants to cross the last gap.

## Postscript

Since writing this paper, colleagues have suggested to me various other methods for crossing the last gap. Clearly, there may be many more! One extra for your toolbox is mentioned below.

### (17) *Double Blind Offers*

This method has been used in a number of computer based negotiation programs. Each disputant agrees in writing to make one or more confidential offers to a mediator (or to a computer), on the condition that if the offers are "close" ("close" being agreed upon as a percentage), then the mediator (or computer program) will split the difference and both will be bound. For example, the parties may be stuck at offers of $300,000 and $200,000 with a gap of $100,000 between them. They can agree to each make pairs of confidential offers; and that there will be no agreement unless and until one confidential offer is say at least 75% of the other. Thus if each confidentially move $10,000 and offer $290,000 and $210,000, then there will be no automatic splitting the difference, as 21/29 = 72%. However, if each agrees to another round of confidential offers, and one moves $5,000, and the other moves $10,000, then there is a settlement as $215,000/$280,000 = 77%. Splitting the difference between $280,000 and $215,000 means that the payout-figure is $247,500.