SAVING MR. BANKS AND OTHER INTEREST-BASED NEGOTIATIONS

Michael Rogers*

Consider the negotiation in the movie Saving Mr. Banks between Walt Disney (Tom Hanks) and author P.L. Travers (Emma Thompson) over the movie rights to Mary Poppins and the settlement of the national tobacco litigation that involved many billions of dollars. What do these famous negotiations have in common? Both included interest-based negotiation issues. In Saving Mr. Banks (the impetus for this article), Walt Disney unsuccessfully tried for over twenty years to purchase the movie rights to Mary Poppins by offering money alone. It wasn’t until he discovered Travers’ underlying interest and addressed her “backstory” concern relating to her difficult father that Disney met success.1 In “Killing Joe Camel” (my name for the national tobacco litigation settlements which involved billions of dollars for Medicaid cost reimbursement), the States not only wanted reimbursement, they had an underlying interest in curbing teen smoking. That interest was met by an agreement to discontinue Joe Camel ads and other limitations on tobacco promotions and sponsorships.

The goal of this article is to encourage the use of interest-based negotiations. Some of the stories included will be familiar; others will be fresh. In Getting to Yes, Fisher and Ury identify four principles of negotiation (“principled negotiation”) that can be employed effectively in almost any type of dispute resolution: (1) Separate the people from the problem; (2) Focus on interests rather than positions; (3) Invent options for mutual gain; and (4) Insist on using objective criteria.2 Because focusing on interests is the sec-

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2 ROGER FISHER & WILLIAM URI, GETTING TO YES: NEGOTIATING AN AGREEMENT WITHOUT GIVING IN 17 (Bruce Patton, 3rd ed. 2011) (emphasis added). GETTING TO YES is a key negotiation text based on the work of the Harvard Negotiation Project; other books that build on this are: WILLIAM URI, GETTING PAST NO: NEGOTIATING IN DIFFICULT SITUATIONS (Revised ed. 1995) and ROGER FISHER & DANIEL SHAPIRO, BEYOND REASON: USING EMO-
ond step identified in Getting to Yes, and inventing options for mutual gain is the next, some of the examples will include both sides of that interests/options coin. Many times a student has overlooked a creative solution tied to the underlying interests in a practice problem and then said during the ensuing class discussions, “I wish I had thought of that.” Students also prefer examples and stories from practice to explanation by lecture. Thus, examples or stories supplemented by analytical narrative will be my primary methodology. In Section I, this article will discuss and explain interest-based issues applicable to both transactions and litigation. Next, in Section II, it will set out and analyze a number of creative uses of interest-based negotiations in a variety of transactional settings taken from books, articles, newspapers, and true stories solicited from lawyers and mediators. In Section III, numerous and varied litigation examples taken from many sources are analyzed and discussed. Hopefully, you find these examples and the related discussion educational, inspirational, and interesting.

I. TRANSACTION AND LAWSUIT BARGAINING—COMMON THREADS

A. The Need to Negotiate Well is at Its Apex

Interest-based bargaining is nothing new, but it has never been more important to make it part of your tool kit. For litigators, the need to negotiate effectively has steadily increased. At the time of my graduation from the University of Oklahoma College Of Law in 1974, few, if any, law school courses on negotiation were available. New lawyers learned by trial and error (lots of error) in practice. When I agreed to teach a Negotiations course at Baylor Law School back in 1984, there were few texts and self-help books. Many lawyers still thought that a willingness to negotiate was a sign of weakness. My favorite guest speaker that 1984 winter term was

3 FISHER & URY, supra note 2.

4 Because the primary purpose of this article is to encourage the use of interest-based negotiations, the use and sharing of these stories is not only okay, but also highly encouraged.
the late Professor Emeritus Matt “Mad Dog” Dawson, the former Practice Court Professor at Baylor who was a fellow in the American College of Trial Lawyers. He told the class that when he practiced back in the late 1930s, approximately 90% of cases filed went to trial. Conversely, he said that in the 1980s, approximately 90% of cases settled. The percentages had flipped! Has that continued? In a word: yes.

Mediations became pervasive in the 1990s, particularly in big cities. I took mediator training from the American Arbitration Association and Attorney Mediators Institute in Texas in the early 1990s. The Texas Legislature had recently passed the Texas ADR Act in 1987, which created a state policy favoring settlements, particularly in parent-child matters. Dispute Resolution Centers were established in counties having a population in excess of 150,000. Significantly, the most recent court activity report of The Texas Office of Court Administration reveals that fewer than one-half of 1% of cases filed in Texas go to jury trial. One of the appearing sources later in this article, prominent family law attorney Ike Vanden Eykel, recently reported that he used to try at least six major divorce cases a year. Now, one trial every two years is more typical. So the settlement rate for litigation has soared.

On the other hand, transactions may be different from the adversarial nature of litigation; they are voluntary arrangements that have always been dependent upon a successful negotiation. As Dr. Chester Karrass says, “you don’t get what you deserve, you get what you negotiate.” Thus, bargaining plays a significant role in both settings and, whatever the nature of your practice, the need to negotiate well is at its apex.

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5 I taught my 100th section of ADR in 2014. In my classes, I’ve primarily used the Goldber, Sanders, Rogers book since its original publications.


7 Id.

8 The Texas Office of Court Administration, Court Activity Reporting and Directory System, http://card.txcourts.gov/ReportSelection.aspx (last visited Nov. 11, 2014). The OCA runs a comparison of all civil and family activity within district and statutory county courts in Texas. During the time period from January 1, 2013 to December 31, 2013, a total of 722,628 were on the dockets, and only 329 of these were disposed of by jury trials.

9 Dr. Chester L. Karrass is the leader in the field of negotiating and has created, designed, and conducted many successful seminars on the topic. He has also written bestsellers such as: Chester L. Karrass, The Negotiating Game: How to Get to What you Want (Thomas Y. Crowell Co. 1970); Chester L. Karrass, Give and Take: The Complete Guide to Negotiating Strategies and Tactics (1993); Chester L. Karrass, In Business as In Life, You Don’t Get What You Deserve, You Get What You Negotiate (1996).
The academy has embraced this need to provide education and training in alternative dispute resolution, which has impacted the law school curriculum nationwide. For example, the University of Missouri School of Law (“MU School of Law”) established the Center for the Study of Dispute Resolution (“CSDR”), whose purpose is to develop “[t]he use of dispute resolution techniques to enhance informed decision-making.” Along with the CSDR, MU School of Law created the first L.L.M. program in Dispute Resolution. Similarly, Pepperdine University School of Law established the Straus Institute for Dispute Resolution, one of the world’s leading educational programs in the field. One of the academic programs offered by Straus is an L.L.M. in Dispute Resolution.

B. Negotiation Currency

Cash, or its equivalent, is coin of the realm in both transactions and lawsuits. Interest-based negotiation adds creative currency or non-monetary currency. Creative currency is money or something of economic value with a creative twist that enhances the appeal of the offer to one or both of the parties. Deferred compensation, purchasing an annuity in a structured settlement, or allocations tied to tax savings are a few examples. Non-monetary currency is not economic in nature but is nonetheless valuable because it satisfies an underlying interest. A face saving gesture, an apology, acceptance of responsibility, or a compliment are common examples. All three types of currency will be employed in the examples below.

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10 Notably, U.S. News has also recognized this significance and currently ranks the best dispute resolution programs as part of its Best Law Schools Ranking. Unsurprisingly, Pepperdine was ranked as number one, while Missouri followed closely at number 5. Dispute Resolution, U.S. News, http://grad-schools.usnews.rankingsandreviews.com/best-graduate-schools/top-law-schools/dispute-resolution-rankings (last visited Nov. 12, 2014).


12 Id.


14 Id.
I always start my second class in Alternative Dispute Resolution (ADR) distinguishing between distributive bargaining and integrative bargaining. Distributive bargaining is a raw economic exchange. It is a zero sum game. Every dollar one party receives comes out of the pocket of the other party. A classic example is a personal injury case in which both parties’ only interest is the amount of money to be paid. The win-lose aspect of distributive bargaining makes movement difficult because neither party has an underlying interest that can be leveraged creatively to achieve a resolution.

This classroom presentation involves easily understood examples of interest-based bargaining. The most famous example in all of ADR literature is the two women who both want all of the available oranges. I think this hypothetical is in every book written on integrative bargaining. Because each woman wants all of the oranges, their positions (what they want) directly conflict. However, if one asks why they want the oranges in order to learn their underlying interest, we learn that the interests do not conflict. In fact, each woman can get 100% of what she wants just by asking “why?” One woman wants the oranges for the juice to serve at breakfast and the other woman wants the oranges for the rind in order to flavor a cake. Thus, the objects at issue are 100% divisible, which makes movement easy and leads to an obvious solution.

Another example involves the first nice vacation that my late wife and I enjoyed. We started our discussion by taking opposite positions. She wanted to go to Hawaii and I wanted to go to Las Vegas. We could have made the negotiation distributive in nature and chosen to vacation in a place neither of us wanted to go to, such as at the Great Salt Lake. We could have alternated trips to Hawaii and Vegas with each spouse being happy every other year. Instead, although I didn’t know the label of integrative bargaining then, we engaged in it. We asked, “Why Hawaii, Why Las Vegas?” Diane wanted to go to Hawaii for white sand, blue water, and tropical fishes. I wanted to go to Las Vegas to try to break the bank at blackjack. We realized that both of our underlying interests could

15 You will probably not do a lot of negotiating about fruit; however, in a recent class journal, one of my students provided a hypothetical about a banana. Two guys each want the banana. Why? One guy wants to eat the banana and the other person wants the peel in order to create a slip and fall lawsuit. This hypothetical tells me two things: first, the student understands interested-based bargaining; and second, he has not had a course in legal ethics, or I hope not.
be satisfied by picking places that have both beautiful beaches and casino gambling. Thus, there were many options for mutual gain. Over the course of our marriage, we went to Aruba over twenty times, Nassau multiple times, Saint Maarten several times, and other places that satisfied our “whys.” Most importantly, we were both happy every year.

D. Listen

Before we return to principled negotiation, a condition precedent to effectiveness is listening. Until you know what your counterpart wants and why, you will never be successful at getting what you want.16 “Active listening gives you an advantage.”17 You will receive better information, learn more, and make fewer mistakes. We need to ask why and then listen carefully. Jeff Jury,18 a friend and former student, lectures to my class not to “lawyer-listen.” “Lawyer-listening” is a non-pejorative term for the tendency of lawyer-advocates to form a response before the speaker is finished, thereby diverting concentration from the speaker. It seems to be a natural human defensive tendency when faced with conflicting information or argument. A growing body of research tells us that the human brain is not equipped to “multi-task”19 Therefore, the most efficient advocacy begins with engaged listening.

17 Id.
18 Jeff Jury is a nationally recognized mediator and arbitrator. He has taught alternative dispute resolution at Baylor Law School, the University of Texas Law School, and Southern Methodist University Law School.
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II. TRANSACTIONS

A. Win-Win Solutions

“Win-win” became part of our wordstock between 1980–85 and is closely tied to negotiation outcomes. In fact, www.Dictionary.com defines win-win as “advantageous to both sides, as in a negotiation.” Another definition calls for “a success for both sides.” Because transactions (the subject of this section) are voluntary arrangements, it is sensible to seek a win-win outcome. Why transact if it’s not advantageous to both sides? The Power of Nice suggests that one should aspire to a “WIN-win,” not “win-win,” by seeking the bigger win. There is nothing wrong with high expectations. As an aside, there is a popular cartoon in circulation that is funny but not accurate. A character in the cartoon talking to a psychologist says that, “it is not win-win unless I win twice.”

B. Identifying Interests

When are interests identified? In the four tenets of principled negotiation from Getting to Yes, identifying underlying interests is second. Inventing options for mutual gain is next. While it may not always be that linear in practice, I agree that interests should be identified early. In fact, in the preparation stage one should consider creative possibilities. Next, “why” should be asked during the informational exchange that kicks off most negotiations. Later, during the negotiation, one should think again to the “why,” and maybe a new creative idea breaks an impasse or closes the deal. Transactional examples and analysis follow below.

21 Id.
22 Id.
24 In fact, many authorities recommend setting high expectations. For example in Guerilla Negotiating, the authors tell us that “[g]uerillas set high expectations.” JAY CONRAD LEVINSON, MARK A. SMITH & ORVEL RAY WILSON, supra note 17, at 13.
25 FISHER & URY, supra note 2.
26 Id.
My colleague, Professor Laura Hernandez, teaches Entertainment Law, an excellent course due in part to her practice experience. Several years ago when I was sitting in on her class, to my delight, she started discussing negotiation issues. One of her topics was “in-kind value,” which throughout this article I call non-monetary currency. In the beautifully illustrated paragraph below, Professor Hernandez sets out several important examples of valuable in-kind or non-monetary currency.

EXAMPLES OF IN-KIND VALUE IN THE ENTERTAINMENT INDUSTRY

Credit provisions are a heavily negotiated and important aspect in every entertainment industry contract. Within promotional materials, the placement of one’s name, the size of the font used, the placement of one’s likeness (if in an acting role) may not correlate to monies paid for that project, but it will garner more work and money in the future if the project is successful. Conversely, a failed project may reduce one’s future prospects. For example, in the movie poster below, it is clear that in “Maleficent,” Angelina Jolie is both the star and driving force behind the film’s marketability. Indeed, her name appears above the credit to the studio, Disney.

28 Id. at 152 (citing King v. Innovation Books, 976 F.2d 824 (2d Cir. 1992)).
Malificent’s box office success, a domestic gross of approximately $241.4 million, will certainly bring more industry power to Jolie as she develops more film projects either to star in or direct.  

Further, courts recognize a misrepresentation or omission of crediting provisions to constitute a violation of the Lanham Act, the federal act protecting trademarks, precisely because of the direct effect on an entertainment professional’s future earning capacity.\textsuperscript{30}

\textit{Saving Mr. Banks}

\textit{Saving Mr. Banks}, directed by Baylor Law Alumnus John Lee Hancock, is a movie about a negotiation for the rights to make a movie (\textit{Mary Poppins}). As previously mentioned, it was the impetus for this article.

For twenty years, at the urging of his daughters, Walt Disney tried, unsuccessfully, to negotiate the movie rights to P.L. Travers’ \textit{Mary Poppins}. For these twenty years, the seemingly bitter, curmudgeonly author rejected every money offer Disney made to her. But one day, her books stopped selling and money grew short, forcing Travers to make the trip to L.A. and begin work on the movie adaptation of her cherished novel. Disney put on a show for her—car service, fancy hotel, gift baskets and stuffed Disney characters—but Travers still played hardball. When she was introduced to the Sherman brothers, who were to score the movie with their lighthearted songs, she immediately began barking commands at them. She set rules against animation, chirping, prancing, and music. Talk about an aggressive negotiator!\textsuperscript{31} (And, this was the scene that made this ADR teacher sit up and pay close attention.)

For two weeks, Disney did his best to court Travers in order to get the movie produced. Just when he started to think things were

\textsuperscript{30} Biederman \textit{et al.}, supra note 27, at 151–52 (referring to 15 U.S.C. § 1125(a)); \textit{see} \textit{Smith v. Montoro}, 648 F.2d 602, 607 (9th Cir. 1981)

Such big box office names are built, in part, through being prominently featured in popular films and by receiving appropriate recognition in film credits and advertising. Since actors’ fees for pictures, and indeed, their ability to get any work at all, is often based on the drawing power their name may be expected to have at the box office, being accurately credited for films in which they have played would seem to be of critical importance in enabling actors to sell their ‘services,’ i.e., their performances (Emphasis added).

\textsuperscript{31} Aggressive negotiators are referenced in many texts, although by different titles. \textit{See}, e.g., Fisher \& Ury, supra note 2, at xxvii (The \textit{hard negotiator} sees any negotiation as a contest of wills in which the side that takes the more extreme positions and holds out longer fares better.) (emphasis added); Gerald R. Williams, \textit{Legal Negotiation and Settlement} 24 (1983) (describing \textit{competitive negotiators} as “dominating, competitive, forceful, tough, arrogant, and uncooperative”) (emphasis added); Herb Cohen, \textit{You Can Negotiate Anything} (1982).
getting better, she found out about his intent to use animated penguins. No animation was her number one rule, so she left the studio and hopped on a plane back to London—risking leaving all the money and fame behind. Disney, however, came up with a new plan. He jumped on the next plane to London and showed up at her front door. He told her that he understood that Mary Poppins, the character, was not there to save the children; she was there to save their father, Ms. Travers’ father. Disney told Travers that if she lets him make the movie, “George Banks and all he stands for will be saved. Maybe not in life, but in imagination.”

The viewers learn in that moment that Travers was not holding back from the deal because of some idolized version of Mary Poppins that she had, or because of some anti-Hollywood idea. She wasn’t holding back because he didn’t offer enough money. Travers lived a hard life with an alcoholic father, whom she loved dearly. Because of his flaws, she was scared of having her and her father’s story told. It took Disney’s promise to redeem Mr. Banks, a form of non-monetary currency, for her to sign the rights over.

John Lee Hancock, the director of Saving Mr. Banks, was kind enough to respond to several questions from me. As to Saving Mr. Banks, he pointed out that P. L. Travers also had non-economic concerns relating to the artistic nature and quality of the film. John explained:

I was attracted to the script for several reasons but mostly because it is the rare film that is about the creative process and shines a light on the conflict between art and commerce. Disney’s approach was, initially, strictly commercial. When he realized that wasn’t working he appealed to the artist in P. L. Travers and was finally able to secure the rights to her books.

John is a believer in the use of non-monetary currency in business and his personal life. He believes, “that ‘in-kind value’ and ‘interest based negotiations’ are present to some degree in all negotiations, even strictly commercial ones.”

As to any movie project proposed to him, some of his interests are regular guy interests. Others relate to his top director status:

Each time I take on a project my agent and lawyer handle the negotiations, peddling offers and terms back to me again and again as the deal is made or broken. Money is an important part of any deal but other factors far outweigh it. ‘Is this a movie that I’m desperate to make, at any cost?’ ‘Do I get to stay home

32 Mr. Hancock is a top director, of movies including, in addition to Saving Mr. Banks, The Rookie, The Alamo and The Blind Side.
during filming?’ ‘Can my family come and visit?’ ‘Do I get to choose my cast and crew?’ ‘Is this the type of film that might be awards worthy?’ And, yes, as Professor Hernandez posits, some credits may be negotiated in advance, which adds inducement. In the case of Maleficent it served both parties well. As much as Angelina wanted her name above the title, Disney probably wanted it more.33

As to the importance of negotiating style and respect he says, “More than anything I’m looking for a fair deal for both sides and respect. If the tenor of the negotiations becomes too sour, the partnership moving ahead may be negatively affected no matter how much money they’re willing to pay.”

 TRANSACTION #2
A CAR FOR LAW SCHOOL

In the journals from class that I require from students, there are many war stories about negotiations between students and parents. The choice of a car for law school is a frequent subject. The parents often have extra leverage due to a willingness to pay all or part of the costs of the car. In a recent journal, a female law student lamented the original positions: parents—a high mileage tank of a car with a small engine; student—a little red Corvette with a huge V-8 and Bose stereo. The parents wanted safety and to the extent possible, good mileage. The student wanted flash, dash, and a great stereo. They actually listened to each other and chose a red Toyota Solara. That choice satisfies several interests because it is an attractive convertible (stereo included), yet enjoys decent gas mileage and a good safety record. Both sides won.

This transaction is included to demonstrate that interest-based issues arise in large transactions, like movies and NBA contracts, but also in small transactions, like family issues. Here, the parties had the additional interest of maintaining the peace in the family, which can be of overriding importance.

33 In an amazing coincidence, Laura Hernandez chose to feature Maleficent in her piece for me about in-kind value without knowing that I would be communicating with our law school graduate John or that he had made an important contribution to that film. And, I didn’t realize until the final draft of this article that John had reshot the opening of Maleficent at the request of the producer.
Another true story I use from my practice is a business transaction example. I practiced law in excess of nine years, primarily in the securities and municipal bond field. My role was usually to quarterback the transaction. My firm worked with investment banks, small and large. One of my favorite clients owned a local investment bank. He was excellent at finding deals but not so great at detail work. And that was terrific because he paid me to do the detail work. One transaction was particularly instructive on interest-based negotiations. The investment banker lender, Ted, asked me for a set of documents. He had bare bones information about the proposed transaction but enough to allow me to generate a simple set of documents. This may be hard to believe, but back then we actually killed trees by printing the words on paper and then circulated hardcopy documents. The borrower, who I will call Bill, did not know about trust indentures and bond ordinances, but he did know what a personal guarantee was, and he was upset about it. I was afraid the deal was about to blow up so I brought everyone into our offices. Item one on the agenda was the necessity of an individual guarantee agreement. Bill’s position was that a corporate guarantee should be sufficient, while Ted’s position was that he needed an individual guarantee agreement from Bill. Thus, the positions were directly in conflict. I asked Bill what his concerns were about signing an individual guarantee agreement. He revealed that he was sixty years old, the financing was for twenty years, and he did not want the financing to tie up his estate. I asked Ted about the corporate guarantee agreement and whether it would be sufficient. He said the company was too new and small to justify a loan just on the corporation’s credit. So, the positions conflicted, but the interests, maybe not. The good news was that both borrower and lender were equally optimistic about the future of the company and thought that in a few years the corporate balance sheet would be far more impressive. After reviewing the interests, I proposed (invented an option) that we draft an individual guarantee agreement with a release provision in it releasing Bill from all individual liability once the corporate net worth achieved a certain multiple of the then outstanding bonds. Thank goodness for optimism. Both parties accepted my suggestion and we ultimately closed the deal. Better yet, I got paid a reasonable fee and vacationed in Aruba.
It is very common for parties to engage in integrative bargaining without expressly acknowledging it, or even knowing it. Another example of this is from the early 1990s when eleven major San Francisco hotels and the hotel employee union agreed to promote interest-based negotiating between them. Each party hired a fact-finding team to identify common interests, which resulted in a very positive outcome.

TRANSACTION #4
OIL & GAS LEASE

The use of an oil and gas lease for a term of years between a landowner and an oil company is so standard, often on a printed form, that it is hard to remember that a signed lease memorializes an interest-based integrative bargain. The landowner wants a cash bonus up front and often asks for surface protection. He does not want to sell a fee simple estate. The oil company pays the bonus, fronts the cost of drilling, and provides technical expertise. It is not interested in owning the surface. If oil is discovered, the oil company’s working interest in the production is burdened by the landowner’s royalty interest (this is a provision subject to distributive bargaining e.g. 1/8 or 3/16 royalty) and they share the money when production is sold. While there are many terms and stipulations that can be added, the basic structure results from interest-based negotiation.

TRANSACTION #5
COLLEGE COACH CONTRACTS—STABILITY AND SECURITY FOR A COACH

Ian McCaw has been Director of Athletics at Baylor since 2003. None of Baylor’s successful coaches has been hired away by another institution despite the fact that some other high visibility conference schools have greater resources. Ian has told my ADR class on multiple occasions:

I work hard to establish a relationship with our coaches and listen to what they say they want (and why). As to money, I do

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not seek victories. I have the salary figures for comparable coaches and seek to pay at the market. As to duration of contract, I can meet the interests of stability and long-term security better than most of my peers because Baylor is a private school that will approve very long-term contracts. Many public schools cannot or won’t offer up to a fifteen-year contract.

TRANSACTION #6
SPORTS—PRO BASEBALL

The final contract entered into between Cal Ripken Jr. and the Orioles involved a laundry list of non-monetary currency and creative currency used to satisfy the underlying interests of both parties. The additional terms and conditions go well beyond the typical baseball player salary negotiation, including perquisites more common for a CEO. Many options were invented for mutual gain.

CAL RIPKEN, JR.—Creative Money—Balancing acknowledging Cal’s on and off-field accomplishments with team’s desire for fiscal responsibility.

Cal wanted five years for $50M, and this was based on the top players in the game. The Orioles wanted three years for $12M, based on the top shortstops in the league. Over the next nine months, the teams edged toward five years, with the Orioles up to $25M and Cal’s reps down to $35M. The Orioles negotiator was Larry Lucchino, former top trial lawyer. Cal’s agent tried moving the setting of the negotiations to change things up: his farm. Then, both sides agreed that a deadline they could both aim for would help. They landed on Cal’s birthday, which was approaching in a few months.

Cal wanted a contract that acknowledged the totality of his accomplishments in the game to date, and also his contributions to the community, his outside business ventures and future security. The team wanted a figure that acknowledged his recent decline in production and met the team’s interests—fiscal responsibility, setting future contract precedents, yet still keeping one of the all-time greats.

This opened the door to figure out ways to acknowledge Cal’s contributions in ways other than standard salary. This included post-career compensation which added money to the overall contract but did not raise his pay for active years; merchandising rights in the stadium; special hotel accommodations
on the road; designated parking; seats and a sky box for his family (which he paid for).

On his birthday, Cal signed the biggest contract of his career. He wanted five years, he got it. The Orioles didn't want to pay the highest salary of the day; they didn't. Cal got a top contract by getting a combo of revenue streams and something else he wanted—staying in the city he called home.35

The Orioles had earlier used creative currency in the form of deferred compensation to make their star Eddie Murray happy.36 It was a true win-win solution.

Eddie Murray wanted to be the fourth player in MLB history with a $1M per year contract. The Orioles, who had been successful the last two decades, lagged behind teams with comparable success in attendance and television revenues because of their smaller market. The Orioles would not budge from $600,000 per year. After an impasse of several months, Eddie’s agent asked the Orioles if they thought he was worth $1M. They said they thought so, but that they couldn’t afford it now. The Orioles were rolling out a multi-year marketing plan that would take several years before they saw a revenue increase. The sides came up with a solution that paid Murray $700,000 per year, with the remaining $300,000 paid off at a later date. This became one of the earliest uses of deferred compensation in a major league contract. Murray didn’t need the final $300,000 immediately, and the Orioles had money left to increase their marketing efforts. Both sides got what they wanted.37

In addition to discussing the baseball contracts above, the Power of Nice has many other helpful examples. As earlier mentioned, it suggests seeking the bigger win (thus a WIN-win).38 However, with two winners, it is sometimes difficult to determine who has achieved the bigger win, which is a good problem to have. Consider the outcome in Dirk Nowitzki’s contract described in transaction #7 below.

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36 Id. at 210–14.
37 Id.
38 Id. at 45.
TRANSACTION #7
NBA CONTRACTS

To a veteran professional basketball player with plenty of money, a realistic opportunity to win an NBA championship ring is an interest that often outweighs his interest in maximizing money. This recent AP story is a great example of parties using non-mone
tary interests to reach a mutually beneficial deal:

Phil Jackson sought to clear something up: Suggesting Carmelo Anthony take less than a maximum salary wasn’t his idea.

It was Anthony, Jackson noted, who first brought up leaving money on the table to help build a winning team.

Now it’s about time to see if all All-Star forward will—and if it would be in New York.

Free agency opens Tuesday, and it’s no longer just a means for players to make their situations better. That might be Anthony’s goal, but for players such as LeBron James and Dirk Nowitzki, improving their teams might be the biggest benefit.

The maximum contract was long one of the true validations of players. But even the very best realize now that if a team-mate also makes the max, a team risks having half the salary cap tied up in two players.

“I think it puts limitations on a team,” said Jackson, the Knicks president. “What happens is then you end up having two or three players that have big contracts and everybody else is either your veteran minimums or young players that are coming in, or you just don’t have that middle ground of a player that’s a veteran, comfortable, leadership-quality people. I think that Miami explored it and I think they got the most out of it. I’m wondering what direction it’s going to go now.”

James, Dwayne Wade, and Chris Bosh accepted a little less than max salaries in 2010, allowing Miami to sign all three and afford help around them. Doing so again now could allow the Heat to replenish its roster, which would have been nearly impossible if they had decided to keep playing under their existing contracts.

Nowitzki seems committed to staying in Dallas and giving the Mavericks a discount to afford complementary pieces. The best example of seeking depth over dollars may be Tim Duncan on the NBA champion San Antonio Spurs. He could be paid less than half what Anthony will make next season.

Sometimes a veteran player who loves his franchise will accept less than market value thus giving his organization a “home team
discount.” Dirk Nowitzki recently signed for significantly less money than his market value commanded, motivated by remaining in Dallas.39 And his new contract gave the Mavericks a better shot at competing for another NBA championship ring by allowing salary cap space to acquire a new starter—Chandler Parsons.40 This acquisition of a young star may pay future dividends as well. It improves the Maverick’s ability to attract young stars in the future! Who won more?

C. Transactions Conclusion

In transactions, non-monetary currency can add value without cost regardless of the size of the transaction. The only limit is party creativity. Transactional negotiation can result in outcomes a court cannot order such as the formation of a partnership. Interest-based transactional negotiation is not new. Oil and Gas leases have been utilized since the 19th century. Yet creativity and the use of non-monetary currency flourishes today. In fact, recent NBA contracts reveal that underlying interests can sometimes be satisfied with non-monetary currency more valuable than cash (e.g. the potential of an NBA championship ring) to the person knowingly giving a money discount.

III. Litigation: Win-Win?

The previous section commenced with a discussion of win-win solutions in transactions. However, because of the adversarial nature of litigation, win-win is not often realistic. Many students comment that the Getting to Yes approach of interest-based, “win-win” negotiation does not seem to be “real world.” While not detracting from the notion that the most durable agreements satisfy both parties’ interests to some degree, “tolerate-tolerate” is often the more likely settlement scenario in the litigation context. Recognizing that litigation adds cost variables that affect interests, such as time and expense, “tolerate-tolerate” becomes a non-cynical term for the vetting of interests during litigation. It is more likely that litigated cases will settle when each side will tolerate a settle-

39 Id.
40 See Eddie Sefko, Rockets’ Parting with Parsons Gives Mavs Promising Forward, THE DALLAS MORNING NEWS, July 14, 2014, at 1C.
ment option, rather than incur the costs going forward. Or, as I have heard many times from risk managers or attorney advocates during mediations, “I can live with that” or “I could do worse!” Problem solving in an adversarial setting is different than transactional negotiation. It is more like solving a puzzle. Eric Galton and Lela Love have written:

One aspect of mediation is that it can reveal undercurrents and it can add the missing pieces of the puzzle to bring resolution. Conflict is influenced by things that happened decades earlier, by old alliances and enemies, by professional and personal orientations, by values and preferences, by youth and age, by the pressures of debt or the prisons of addictions, by personal needs of all types, such as the need for order and clear lines, and by connection and loyalty to certain people due to one’s own history. All these things can aid or aggravate conflict resolution. All these things, if understood and used can provide a bridge to make the pieces fall into place – to generate understanding and options . . . .

A. Breaking Down Barriers

Professor James J. White has pointed out that it is naïve to think that all disputes can be resolved without distributive bargaining occurring at some point. That criticism is fair but, first note that his statement agrees that sometimes principled negotiation can resolve a dispute. And, when staring distributive bargaining in the face, perhaps non-monetary currency can serve as an ice-breaker. It can break down emotional and psychological barriers which otherwise prevent forward-looking settlement negotiations. Professor Kim Kovach agrees:

When participants engage in a discussion of interests, the positional or adversarial approach is often less dominant. The mediator is able to sift through and go behind the stated demands to ascertain the parties’ real desires and needs. In essence, this

41 ERIC R. GALTON & LELA P. LOVE, STORIES MEDIATORS TELL XV (ABA 2012).
42 I would add particularly those with significant harm and large recoverable damages.
43 For example, see Omar’s story in the Avoiding Contract Litigation section. GALTON & LOVE, supra note 41, at 34.
44 Great examples of breaking down barriers are seen in the Apology section below. Particularly, the story involving a surgery nurse and a patient that ended in a hug, and the story involving a principal who chose to name an award after a child who died in a school bus wreck. Id at 21.
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process, moving from positions to interests is at the basis of mediation and principled negotiation.\

Moffitt and Schneider demonstrate that a single position may have many interests that the lawyers need to know to effectively represent their client:

Negotiators are sometimes unaware of the relevant interests in a negotiation because they focus too heavily on one or both sides’ negotiation positions (what they say they want), rather than on their interests (why they want that). A plaintiff might demand “a million dollars” to settle her claim against her former employer. Her position is perfectly clear: $1 million from her former employer will settle her claim. Without knowing more about the plaintiff, however, we cannot know for certain what her underlying interests might be. Having financial security for retirement? Having a face-saving story to tell her family? Removing roadblocks to her future career development? Restoring her reputation among her former colleagues? Covering short-term expenses? Punishing the company for what she perceived to be despicable treatment? If this plaintiff’s attorney fails to ask enough questions to understand her client’s true motivations – her true interests – the attorney will be constrained to seek only one type of settlement: one that produces a million dollars. (Is it possible to satisfy the client with a settlement that includes different terms? Is the client indifferent to the payment form? Does the client care about the scope of the release? Is the client operating within important time constraints?)

If punishment is her main interest, that goal is better accomplished in the courtroom. The other potential interests are well suited to creativity in negotiations. In fact, in the employment law segment Michael Buchanan suggests a form of non-monetary currency to assist in career development.

The paragraph below and the first paragraph in the next section provide additional insight on interests vs. positions from the late, great mediator Kevin Thomas McIvers:

Tip #7 Interests Really Matter. Even in Money Negotiations.

“It's only about the money,” a familiar comment of lawyers and judges, when a party in negotiation insists otherwise. Is it really absurd to speak of “interests” in the typical money negotiation,

47 See infra Employment section.
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or is there something real and worth considering? Mediation theory is based largely upon the concept of “interests.” The idea is that the important needs or concerns of a party are often obscured beneath an emotionally charged and misleading array of concepts which demonize the opposition, and justify one’s own notion of reality. These concepts are translated into a “position” in the negotiation, usually expressed in the form of great conviction about the righteousness of one’s cause, and relative inflexibility (real or feigned) in the terms of negotiation. Mediation ideally gets beyond positional bargaining, by exploring what was unsatisfactory in a party’s past experience, and what that party needs in the future (i.e. interests).  

B. Non-Party Interests

McIvers observes that sometimes we must deal with the interests of other persons at the table such as spouses or attorneys. Even in a straightforward money negotiation, the best negotiators and mediators have a keen eye for the interests of others around the table. Everyone in negotiation has interests beyond the sum of money under discussion. A personal injury plaintiff may have a spouse who must be accounted for, or specific financial goals (i.e. to pay for college or retirement). A young associate may need to impress the partner, or the firm’s important client. An insurance adjuster may need cover (or documented “new information”) to justify a shift on a misevaluated file. Certain participants may need to experience a measure of control at the table (unfulfilled ego-related needs have killed many negotiations).

McIvers has just warned us about persons, not a party. Once, I conducted a mediation that did not settle until the plaintiff was offered enough to pay off his spouse’s car note unrelated to the lawsuit. This was “a sum of money beyond the sum of money” under discussion. The amount of the car note is what it took to settle—the lawsuit evaluation amount by risk managers mattered not. Fortunately, the balance of the note was just slightly higher than the defendant’s realistic evaluation and, he was willing to bump up his offer to get the case settled.

49 Id.
Another time, I conducted a mediation far away from my hometown that did not settle that night, but settled on the same terms several weeks later. I think the defense attorney wanted credit for settling the lawsuit. Professor Kovach raises an even tougher issue. What if the lawyer’s unstated goal is at odds with that of the client?50 For example, he doesn’t want to settle the case because the trial will generate huge fees. Later in this article there is a segment on collaborative law. The rules of that procedure eliminate this concern by requiring the lawyers to resign if the case doesn’t settle!

C. What of Non Monetary Currency?

1. Consider an Apology

An apology is commonly employed in litigation while rarely applicable in transactions. But the problem with apologies is that they often do not come across as sincere. Most apologies come off just a means to achieving the quick end of a dispute, which is self-serving. However, the effective apology conveys a sincere message of sorrow. It conveys to the wronged party that their point of view is being considered and it demonstrates an understanding of how their trust was betrayed. A genuine apology is incredibly effective in resolving disputes and should be a tool used to increase the “value” of the non-monetary consideration that is an apology.51

This next case study was provided by a successful law alumnus who is board certified in personal injury law and prefers to remain anonymous. The settlement included a very significant economic/money component along with a highly effective apology:

A number of years ago, our client had a surgery for a ruptured spleen caused by an accident. Following the surgery, he suffered for 18 months with severe intestinal problems. Eventually, a CT scan revealed a sponge had been left in his abdomen from the spleen surgery. A follow-up surgery resulted in the removal of ten inches of his intestines where the sponge had caused an irreversible deterioration. During the mediation, the surgical nurse responsible for the sponge count gave a sincere, tearful apology

50 Kovach, supra note 45, at 189.
51 For a good read on how to effectively apologize in any scenario, see Beverly Engel, How to Give a Meaningful Apology, UMass Amherst Fam. Bus. Ctr., http://www.umass.edu/fambiz/articles/resolving_conflict/meaningful_apology.html (last visited Nov. 12, 2014).
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to our client for making the error during his first surgery. This completely changed the dynamics of the mediation and the attitude of our client toward resolution. The case was easily resolved, and the process ended with the nurse and our client giving each other a hug and reaching closure.

Our alumnus revealed that the apology wasn’t like this: “Mistakes were made. You have suffered a great deal and I am sorry,” said in a monotone. Rather it was more like this: “I made a terrible mistake. There was no excuse for missing that sponge. Your pain has been terrible. I haven’t been able to sleep since I learned of my error. I have been sick all over. Please forgive me. It will never happen again.” All said while sobbing!

2. Even Doctors Apologize!

Most states have apology laws that allow one to express sympathy without fear of such statement being admitted at a subsequent trial. The article below indicates that an apology and acceptance of responsibility by a physician is good business.

When a treatment goes wrong at a U.S. hospital, fear of a lawsuit usually means “never daring to say you’re sorry.”

That’s not the way it works at the University of Michigan Health System, where lawyers and doctors say admitting mistakes up front and offering compensation before being sued have brought about remarkable savings in money, time and feelings.

“What we are doing is common decency,” said Richard Boothman, a veteran malpractice defense lawyer and chief risk officer for a health system with 18,000 employees and a $1.5 billion annual budget.

The estimated $5.8 billion annual cost of malpractice claims nationwide has drawn scrutiny as President Barack Obama and Congress plot an overhaul of the nation’s $2.4 trillion health care system. So far, Obama has spoken in broad terms about shielding doctors from unwarranted lawsuits without capping damage awards, but medical malpractice is an issue that deeply divides. Doctors, hospitals, trial lawyers and patient advocates disagree not only on the solution but the problem itself.

Is it the high price of malpractice insurance? The difficulty for victims of medical errors getting justice? The cost of un-

needed tests ordered by lawsuit-wary doctors? The “burying” of medical errors that kill tens of thousands of Americans yearly?

Officials at the University of Michigan say their approach addresses doctor, patient and public concerns.

The willingness to admit mistakes goes well beyond decency and has proven a shrewd business strategy, according to a 2009 article in the “Journal of Health & Life Sciences Law” by Boothman and four colleagues at the Ann Arbor school.

According to Boothman, malpractice claims against his health system fell from 121 in 2001 to 61 in 2006, while the backlog of open claims went from 262 in 2001 to 106 in 2006 and 83 in 2007. Between 2001 and 2007, the average time to process a claim fell from about 20 months to about eight months, costs per claim were halved and insurance reserves dropped by two-thirds.

Boothman said the health system learns of possible medical errors from doctors themselves, as well as from patients or their lawyers. In any case, the university conducts a peer review to see if there was an error and if changes are needed to prevent a recurrence.

Equally important, health system doctors and officials offer to meet with patients and their families, sometimes to explain that treatment was appropriate and sometimes to admit a mistake.

“I do believe caregivers want to do this,” said Boothman, whose second-floor office looks out on the University Hospital at the heart of the sprawling medical center, 35 miles west of Detroit. “It’s not a hard sell at all, as long as you can reassure them it’s OK.”

Some statutes, including the Texas ADR Act, are much broader in scope that the typical apology law. No words spoken during an ADR procedure, including words of apology or an admission of fault are admissible at trial. And, this rule applies before or after the commencement of legal proceedings.

3. Safety Plans

Many injured parties do not want to see a repeat of a tragedy and putting safety measures in place has value for them particularly after their monetary interest has been satisfied. This next case

54 See Texas Alternative Dispute Resolution Act, supra note 6.
55 Id.
56 Id.
involves an apology and safety plan printed in the hometown newspaper.

Back in 1994, a seven-year-old child from Fort Worth named Spencer Dent was killed during a trail ride at a camp near Estes Park Colorado. Lightning spooked the boy’s horse, which reared and fell backwards landing on the boy. Nothing hurts as much as the death of a child. An agreed-to-be-printed apology was run in the Metro and Sports Sections of the Fort Worth Star Telegram. The parents had demanded an apology, stronger requirements to protect children (details were set out), and an admission that the involved counselor in charge of the ride was employed without complying with the camp’s employee screening procedures. Deep regret was expressed about the incident and resulting tragedy. Subsequently, a Spencer Barrett Dent Memorial Foundation was established.

A lawsuit following the death of a child is nearly always more about an apology and acceptance of blame. It is not the typical personal injury settlement scenario of, “I pay you X dollars and we sign mutual releases” without admitting fault. A safety plan is a valuable addition to the settlement package. A positive affirmation of the child’s life can also be potent. In another tragic case following the death of a child in a wreck with a school bus, the principal of the school offered to create an award for the outstanding music student each year. The boy had been a talented musician and heavily involved in the school’s music department. The parents were moved. Naming the award for their son was worth more than any amount of cash. Kudos to the principal.

Concussions in the NFL have been a hot topic of litigation in recent years. Federal courts have been flooded with concussion lawsuits, with one just in 2014 resulting in an $870 million settlement. Many players, particularly those involved in this settlement, have sought monetary compensation for their injuries. However, an earlier settlement relating to heat stroke death instead focused on non-monetary or equitable relief, specifically the implementation of safety plans:

57 Fort Worth Youth, 9, Dies in Riding Accident, FORT WORTH STAR-TELEGRAM (July 31, 1994).
58 Id.
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The widow of Vikings lineman Korey Stringer has reached a settlement with the NFL over his heatstroke death during training camp in 2001.

Under an agreement with Kelci Stringer, the NFL will support her efforts to create a heat-illness-prevention program.

No other terms of the settlement, announced Monday by a family spokesman, were released.

Kelci Stringer had filed a wrongful-death lawsuit against the league, claiming the NFL hadn’t done enough to ensure that equipment used by players protected them from injuries or deaths caused by heat-related illnesses.60

Safety plans integrated into settlements are on the front burner these days. The next example involves an oil well blowout:

A man injured two years ago in an oil well blowout gave up a $30 million jury award Monday after the well operator agreed to devise a safety plan to prevent accidents.

“The only reason I’m doing this is so no one else will have to go through the pain, suffering and disfigurement that I went through. One cannot put a monetary value on personal human suffering,” said John Caballero, 42, of Victoria, a former oil-field worker injured in the October 1995 blast.

Mr. Caballero was testing a well owned by Esenjay Petroleum Corp. of Corpus Christi when a pressure-regulating device failed causing a blowout that threw him 30 feet into a stand of pipe.

He suffered scarring to his scalp, brain damage, vision and hearing loss, broken vertebrae in his neck and back, a crushed foot and ankle and a dislocated hip.

At the time, Mr. Caballero was a triathlete and had planned to compete in an international “Ironman” competition.

In July, a jury found Esenjay liable for the accident and awarded Mr. Caballero $12.3 million in actual damages and $30 million in punitive damages.

But Mr. Caballero offered to relinquish the punitive damages if Esenjay agreed to implement a safety plan. After months of negotiations, the deal has been finalized.

Mr. Caballero, who no longer can work or compete in athletic competitions, said he was pleased with the deal.

“If I can just reach one company,” he said, “it’s well worth the effort.” Esenjay still must pay Mr. Caballero actual damages. However, the two parties have negotiated a new amount that is

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less than the $12.3 million initially awarded Mr. Perry said, adding that the settlement is confidential.

The award was renegotiated to offset the possibility of an appeal and ensure that r. Cabellero was fairly compensated, his attorneys said.61

This is a great example of interest-based negotiation—Mr. Caballero valued the implementation of safety measures more than he valued money. This creative negotiation, and altruistic act, did not go unnoticed. In 1999, Mr. Caballero and his attorneys received the ATLA’s Steven J. Sharp Public Service Award for their roles in improving safety in the workplace and encouraging responsible corporate decision-making.62

D. Employment Litigation

Michael Buchanan, a partner in a national employment law boutique, represents employers. Employment litigation often involves emotionally charged situations with the displaced former employee needing a job. Mike recommends a form of non-monetary currency that had not previously been encountered—a letter of introduction rather than a letter of recommendation. The former can be positive and helpful in the job marketplace for the displaced individual, yet less likely to create liability for the employer client than a flawed letter of recommendation. He also suggests a careful, conservative allocation of damages between lost wages (taxable) and mental anguish (not taxable). Strategies he uses include:

1. The parties are already emotional. If I use an approach that inflames the plaintiff’s emotions even further, I become part of the problem and not part of the solution. So . . . both because it is my nature and because it works for me, I always treat the opposing lawyer and the opposing party with respect. I find that it helps the plaintiff bury his/her anger and start focusing on the future.

2. I do not let my clients agree to “letters of recommendation.” The Texas Supreme Court has made clear in a case involving the Boy Scouts that a laudatory recommendation can create liability for the former employer if the employer chooses to

61 Plaintiff Turns Down $30 Million, DALLAS MORNING NEWS (Dec. 2, 1997).
be selective in its comments and does not share “the whole picture.” However, I am a big fan of the “letter of introduction” which stops short of “recommending” but can be couched in positive terms that may assist the opposing party with repositioning in the workplace. [See Appendix A for an example letter.]

The letter of introduction never really comments on the employee’s performance and skills. But it is worded sufficiently positively to be of assistance to the hypothetical employee in that it talks about the scope of his job responsibilities (e.g. this guy had important duties) and provides a cover story for why he was let go.

3. A letter of introduction can be undone by a call from a prospective employer to the HR Department. HR Departments are routinely instructed by their employment counsel to limit themselves to a “neutral reference” (e.g. dates of employment, job title and duties). Oftentimes as part of a resolution, I will negotiate a scripted reference process. To illustrate, the settlement agreement will obligate the plaintiff to refer prospective employers for the first year to make inquiry to the VP of Operations. The settlement document will then obligate the VP of Operations to a script when a prospective employer makes inquiry:

“Robert served as Director of Operations from 1998 until August 2014 when the Company made the painful decision to close its Waco plant. The Company is grateful for Robert’s contributions and wishes him every success in the future.”

Again, the message is positive but stops short of a recommendation. After a year (at most two), my settlement agreements state that the plaintiff thereafter will refer prospective employers to HR and that HR will follow the Company’s neutral reference policy.

4. In the old days, both plaintiff and defendant would characterize between 90 and 100% of the alleged damages as “mental anguish” to avoid having to take out tax. The obvious benefit is that the “mental anguish” characterization put more immediate money in the plaintiff’s pocket.

Both the EEOC and the IRS started cracking down on the practice in light of the reality that the biggest component of alleged damages in an employment lawsuit is past and future wages (for which income tax, social security, and Medicare taxes must be deducted).

It is still possible to apportion between damages for which deductions must be made and damages for which deductions
need not be made. Practitioners just have to be conservative in making their apportionments.

E. *Family Law Litigation*

The discussion of contractual alimony (creative currency) in note one comes from nationally recognized family lawyer Ike Van-den Eykel. The second note below is his example of non-momentary currency meeting the needs of self-esteem and respect by others in a joint custody setting.

1. It is common in our practice to utilize contractual alimony as a settlement tool in divorce cases with property. If the spouses will be in different tax brackets after the divorce, which is not uncommon at all, then it is wise to examine whether it is appropriate to consider using contractual alimony as part of the property division. The payments are deductible by the payor who will be in a higher tax bracket than his or her former spouse. The payee of the alimony will declare the payments as income in the calendar year received but at a lower tax bracket than the former spouse. In effect, the government picks up part of the cost of the property division by the differential in tax brackets. The process is perfectly legal and is an effective method for creative negotiation. And it is something a court can’t order!

2. A great example of interest-based negotiations can be found in a method we have utilized many times in the successful settlement of custody disputes. It is not uncommon in these cases to have both sides deeply divided in their respective positions and be dug in for a long fight. What is needed is a way to make both sides feel they have succeeded and allow them to be positive about the result of a settlement. The method we use is called “Letting Him/Her Wear the Tee Shirt.” What that signifies is giving the parent who does not have primary possession the title of Joint Managing Conservator even when their access time equates to that of a Possessory Conservator. By giving the parent the title (and allowing them to wear a tee shirt that states they have Joint Custody), they can proudly boast of having “Joint Custody” of their child or children and it often times will result in breaking the stalemate and lead to a settlement. This approach does not cost the primary parent anything and is a show of respect for the other parent. This is a very effective settlement tool.
F. Collaborative Law, by Kristin Algert of Austin

Kristin is one of my former Family Law students who is Board Certified in Family Law and practices solely Collaborative Law, a subset of Family Law. She points out:

In divorce cases, clients have financial interests, child-related interests and relationship interests.

In collaborative law, the goal of the process is to obtain the best possible outcome for the client and the client’s family. Instead of staking out positions and then trying to figure out how to force the other spouse to acquiesce, the collaborative lawyers develop the clients’ respective interests and focus on meeting the clients’ interests by way of communication, persuasion, and building relationships.

Frequently negotiation is seen as a proposal and a response; a counter-proposal and then an impasse; finally, let’s “split the difference.” In Julie MacFarlane’s book The New Lawyer: How Settlement is Transforming the Practice of Law, Julie MacFarlane summarizes all of this nicely:

Researchers have found that most settlements result from one or two exchanges of offers only. Further, this exchange is usually done at arm’s length, not by face-to-face contact, and is almost always a monetized solution reflecting the anticipation of likely legal outcomes . . . rather than creative or original solutions or outcomes.63

Interest-based negotiation allows professionals to do better than that as the following examples demonstrate:

1. Case #1: Letter of Apology & Acknowledgment

In this case, Husband and Wife had five children all over the age of 18 and had been married for 25+ years. At the time of divorce, Wife was angry because of Husband’s infidelity. The parties started their case in litigation and spent several thousand dollars on a temporary order hearing to address who would remain in the marital residence and support issues. After this hearing, Husband and Wife heard about the collaborative process and they decided to switch to the collaborative process and collaborative lawyers (primarily motivated by cost). Wife carried her anger to the collaborative process making negotiating difficult. Husband realized that

Wife needed an apology from him and he wrote a letter to his wife apologizing for his infidelity, accepting responsibility for the damage he caused their relationship. He also acknowledged his wife’s parenting by expressing how proud he was of their adult children. The sincere apology and acknowledgment reduced Wife’s anger and the parties were able to move forward with productive negotiation and ultimately settlement. This is a great example of how non-monetary things sometimes have great value in a negotiation.

2. Case #2: Joint Letter to Children
Husband and Wife had two minor children and had been married for fifteen years. Husband was a successful executive and Wife was a full-time mother. At the time of divorce, Husband had a large sum of money set aside as deferred compensation. And even though the funds were not in a 529 account or other custodial account for the children, Husband reported that the funds had always been earmarked to pay for the children’s college educations one day. The presumption was that the funds belonged to the community estate and were subject to being divided by the court. And even though Wife acknowledged the earmark for college education, she was unsure she would have enough assets to live comfortably post-divorce without having to go back to work and give up some of her parenting roles. In addition, Wife did not like that it would one day appear to the children that their father was paying for all of their college expenses. The solution was two-fold: (1) Husband agreed to use frequent flier miles to pay for the children’s airline travel when Wife took the children on vacation and to visit colleges (low cost to Husband-high value to Wife); and (2) Husband and Wife crafted a joint letter to the children that they would give to the children when it was time for the children to go to college. In that letter, Husband and Wife talked about setting aside funds that belonged to both of them so that they could ensure that the children’s college costs were covered. Again, this is a great example of non-monetary solutions creating value in the negotiation.64

Kristen identifies use of the air miles as high value and low cost. One should always be able to identify such a scenario. In class, I critique an AAA mediator training video, which involves an office building full of tenants threatening to move out (constructive eviction) because the HVAC system is very faulty. An investigation reveals that the subcontractor reduced the size of the vents on

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64 Additional examples from Kristen’s collaborative law practice are set out in Appendix B.
every floor because of an obstruction. The right way to deal with the obstruction would be an equally large but different shaped vent. During the simulated mediation, the contractor reveals to the mediator that he has a crew that is not busy for the next few weeks. He offers free labor from this crew if the owner of the building and architect will purchase new vents and other parts. Pop the cork on the champagne bottle. This offer of free labor has high value to the solution yet low cost to the contractor because he doesn’t have paying jobs for this crew.

G. Avoiding Family Law Litigation

The Five Love Languages: How to Express Heartfelt Commitment to Your Mate is a 1995 book by marriage counselor Gary Chapman. It outlines five ways to express and experience love that Chapman calls “love languages”: gifts, quality time, words of affirmation, acts of service, and physical touch.

Although I had a successful thirty-seven-year marriage, I wish that I had read this when it was first published in 1995, because my wife lived for fifteen years after that. She treasured words of affirmation, which is a love language that can be entirely satisfied by non-monetary currency. Expressing appreciation costs nothing. I should have expressed my emotions better. However, compared to my Uncle Tom, I gushed words of affirmation. He and my Aunt Willene married in the 1930s and were married for over fifty years until her death. When I was visiting them while in law school (during the 1970s) she turned to Tom and said, “why don’t you ever tell me that you love me?” (I am not making this up.) He replied, “I told you that I loved you in 1938 and if I change my mind I will let you know.” I still laugh at that response. Despite Uncle Tom’s insensitive reply, he was a fine man and the marriage endured. However, he should have said, “Honey, I love you and I need to tell you more often.” I include this discussion in the Litigation Section because Gary Chapman’s book reveals how to use non-monetary currency to strengthen marriages, which could reduce the need for divorce actions and creative settlements.

66 Id.
67 See id. at 37–52.
H. Tobacco Litigation

For decades prior to the settlements announced below, Big Tobacco had an almost unblemished record of courtroom success. To start with, the defense lawyers made any lawsuit very slow and extremely expensive. And, an individual suing his cigarette manufacturer for damages had often smoked despite dire warnings of harmful effects.

On the other hand, a State that sued to recover Medicaid expenditures related to illnesses caused by cigarettes was not burdened by contributory fault. Societal attitudes about smokers changed. And, the States interviewed and hired law firms with a track record of success in toxic tort litigation that had the expertise and resources to go toe-to-toe with Big Tobacco and its lawyers. The tide turned and the settlements were enormous.

Most of the headlines and stories about the settlements, such as the one below, focused on cash:

In the largest resolution of a lawsuit against the tobacco industry, five leading cigarette companies have tentatively agreed to a settlement with the State of Texas worth about $14.5 billion over twenty-five years to resolve smoking-related health claims, state officials said.

The agreement in the Texas case, which had been expected, came just as jury selection was about to begin in the state's lawsuit to recover Medicaid money spent treating illnesses said to be caused by smoking. Judge David Folsom of Federal District Court in Texarkana, Tex., had delayed the process twice in the past week to give industry and state negotiators more time to resolve their differences.

The resolution of the Texas litigation helps remove one big potential stumbling block to Congressional consideration of a proposed $368.5 billion nationwide settlement reached in June because a continuing trial against cigarette makers might unsettle lawmakers considering the accord. That settlement proposal, which would involve payments over 25 years, was reached between tobacco producers and more than 40 state attorneys general, including Dan Morales of Texas.68

While cash is the coin of the realm, an earlier story reveals an important underlying interest. It focused on banning Joe Camel and

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68 Barry Meier, Tobacco Concerns Settle Texas Case for a Record Sum, N.Y. TIMES (Jan. 16, 1998).
the desire to reduce the attraction to children to take up smoking.
So Bye-Bye Joe Camel Goodbye!

Joe Camel, the cartoon character that became the focus of perhaps the most intense attacks ever leveled against an American advertising campaign, is being sent packing by the R.J. Reynolds Tobacco Company, which will replace it with stylized versions of Camel cigarettes' original camel trademark.

The unexpected decision, announced yesterday, ends a nine-year run in this country for Joe Camel. The embattled ad figure and his brethren, bearing names like Buster, Max and Floyd, will disappear from billboards, print advertisements, display signs and even store-door stickers. Joe Camel's goofy grin, oversized nose and exaggerated depictions of masculine behavior had helped Reynolds stem a decades-long sales slide for Camel by imbuing the brand with a hipper image.

But the gains in sales and market share for Camel, the nation's No. 7 cigarette brand, came only at a high cost as anti-smoking activists convinced President Clinton, the American Medical Association, several Surgeons General, the Federal Trade Commission and other authorities that Joe Camel was emblematic of what they maintained were the insidious, underhanded marketing gimmicks by which cigarettes are sold in America. Particularly, the activists hit home with contentions that slick, colorful presentations of a grinning cartoon animal were intended to appeal specifically to children to take up smoking.

“Joe Camel represented an icon that refueled the moral outrage of the anti-smoking movement,” said Eric Solberg, executive director of Doctors Ought to Care, an anti-tobacco group in Houston. Reynolds has always denied that Joe Camel—introduced to Americans in 1988 after more than a decade of selling cigarettes to Europeans—was anything but a standard marketing tactic meant to persuade adult smokers to switch to Camel from bigger brands like Marlboro.

A brief statement from Reynolds that disclosed Joe Camel would be extinguished did not mention a ban on cartoons as part of a landmark $368.5 billion settlement reached on June 20 by Reynolds and other tobacco marketers.69

The nationwide Master Settlement Agreement (mentioned in the first article in this section) among the settling states and the participating tobacco manufacturers included numerous provisions de-

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signed to reduce youth smoking. As examples, no youth targeting is permitted in promotion or marketing, a ban on cartoons is set out and, there are limits on tobacco brand sponsorships.

I. Mortgage-Backed Securities Crisis

“Bank of America agrees to nearly $17B settlement.” This was the August 21, 2014 headline to the AP story that the government had reached a settlement with Bank of America over its role in the home mortgage meltdown. Then-Attorney General Eric Holder stated that the bank and subsidiaries had engaged in persuasive schemes to defraud financial institutions and other investors by misrepresenting the value of mortgage-backed securities. However, the $17B sum announced to the public is neither all cash nor the actual costs to the companies being penalized. In fact, that same day the headline in the Dallas Morning News was, “What will the $17B deal cost BofA?” That article provides:

How much will Bank of America’s expected $17 billion mortgage settlement cost the company? Probably not that much.

In mega-settlements negotiated with the government, a dollar is rarely worth an actual dollar.

Inflated figures make sensational headlines for the Justice Department. The expected $17 billion would be the largest settlement by far arising from the economic meltdown in which millions of people in the United States lost their homes to foreclosure.

But the true cost to companies is often obscured because of potential tax deductions and opaque accounting techniques.

Officials familiar with the deal say the bank will pay $10 billion in cash. It will provide consumer relief valued at $7 billion.

70 Meier, supra note 68.
72 Id.
73 Id.
74 Id.
75 How much of $17B settlement will Bank of America really pay?, The Dallas Morning News (Aug. 21, 2014), at 1D.
Whether cash payments are structured as penalties or legal settlements can determine whether targeted companies can declare them as tax-deductible business expenses. Also, consumer relief is an amorphous cost category. Bank of America’s deal could resemble the department’s settlements with JPMorgan and Citigroup. If so, consumer relief could be less costly to the company than the huge figures suggest.

Some relief comes from actions that do not cost the banks anything. This includes making loans in depressed areas or reducing the principal of mortgages owned by outside investors.

Banks earn a multiple of each dollar spent on some types of relief. Under Citi’s deal, for example, each dollar spent on legal aid counselors is worth $2 in credits. Paper losses on some affordable housing project loans can be credited at as much as four times their actual value.\textsuperscript{76}

Thus, this settlement combines all three types of currencies. It includes cash in the amount $10 billion; creative currency in the form of tax deductions and credits for consumer relief; and non-monetory currency including an admission of wrongdoing whereby the bank must acknowledge making misrepresentations about the quality of its residential mortgage-backed securities. The article above reveals that while some consumer advocates are critical of the credits in this type of settlement, some “welcome any consumer aid.”

\section{Avoiding Contract Litigation}

The following story is taken from \textit{A Short and Happy Guide to Mediation} by Will Pryor:

No matter what they say, it nearly always turns out to be about the money. But not every time.

A venture-capital start-up in Houston was created with the goal of cornering the world oil market with remarkable new drilling equipment. I’m never very good on the technical details.

The new company invited a young member of a Middle Eastern royal family to join the board. We will call him “Omar.” Omar’s role was to introduce the company to the Prime Minister of OPEC, the head of the Argentinian oil company, and other friends of the family. Omar’s uncles, apparently, were disapproving of the idea, something about the way

\textsuperscript{76} \textit{Id.}
Americans do business, and they counseled the young man to reject the invitation.

Omar couldn’t resist. The young oil guru joined the board of directors, and for whatever reason signed a modest consulting agreement that would pay him a stipend of $10,000 per month for five years of his service.

As fate would have it, the company’s fortunes went flat, and about two years into the arrangement a new wave of venture capital had to be rounded up to sustain the business. With the new investment came a new board of directors. Out with the old, in with the new. Bye, Bye, Omar.

Tail between his legs, Omar headed home. But at some point Omar realized, “hey, they owe me that $10,000 per month for about three more years.” Lawsuit. Mediation.

I wanted to be Omar. Omar flew his own jet. His handsomeness was exceeded only by his charm, sense of humor and intelligence. Omar had been educated at the finest schools, and his manners were impeccable. And Omar was freakishly wealthy.

“Mr. Pryor, when they excused me from the board, they dishonored me and they dishonored my family. It is not about the money.” There could not be a trace of a doubt about the truth of his statement. Omar exuded sincerity; his feelings had been hurt; he had been embarrassed. Nor could I overlook the fact that somewhere over the Atlantic Ocean, on his way to attend the mediation in Texas, the cost of the fuel consumed by Omar’s private jet probably surpassed the modest amount of the dollars at issue in the lawsuit.

Let’s remember the lessons from Getting to Yes. Omar’s position in the mediation was that he wanted money, and his position was communicated as a demand for monetary payment. But Omar’s interests were varied: he wanted to “win,” he wanted the other side to be proven wrong, he wanted to salvage something that might impress his family, but most importantly, Omar wanted to save face.

So how was the matter resolved? No money was exchanged, but the company, upon my suggestion, extended a personal, face-to-face invitation to Omar to rejoin the board. I knew that Omar did not want to be on the board. No, Omar just wanted to be invited to rejoin. So Omar graciously declined, and everyone shook hands.

I still want to be Omar.77

77 WILL PRYOR, A SHORT AND HAPPY GUIDE TO MEDIATION 104–06 (2014).
The need for self-esteem drives Omar’s desire to save face. Thus, non-monetary currency can avert litigation. In *Getting Past No*, there is a similar example relating to a British Prime Minister who couldn’t grant a noble title to a supporter. He told that supporter, “You know I cannot give you a baronetcy, but you can tell your friends that I offered you one and you refused it. That’s much better.”

K. Litigation Conclusion

As to litigation, this piece reveals that non-monetary currency and creative currency can be substantial factors in averting or settling numerous types of lawsuits. Even the United States (Department of Justice) engages in interest-based negotiations. When cash is involved, the non-monetary currency often satisfies critical underlying interests that allow both cash and non-monetary currency to be important parts of a solution that would not otherwise be reached. Sometimes an outcome is achieved that a court can’t order such as tax savings from alimony. Without integrative bargaining we are often stuck in the harmful binary choice of a win-lose settlement or worse yet, the matter proceeds to trial—the battleground without bullets. Sun Tsu advises us, “The greatest victory is that which requires no battle.”

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78 Fisher & Ury, supra note 2, at 124.
79 Id.
80 Sun Tzu, The Art of War (1910).
Dear Sir/Madam:

I have the pleasure of introducing you to Robert Rogers.

During Robert’s tenure with the Company (1998-2014), he served in many positions of responsibility, ultimately serving as the Director of Operations at ABC’s Waco facility. In this position, Robert was responsible for the direct supervision of all manufacturing operations as well as all staffing decisions. During Robert’s tenure, the Waco facility achieved new benchmarks in productivity and employee satisfaction.

Due to an unexpected downturn in overseas demand for product, the Company made the painful decision to close the Waco facility and to concentrate manufacturing operations at ABC’s Dallas location. This difficult restructuring decision, while necessary, occasioned the Company to say goodbye to many fine people.

The Company is grateful for Robert’s contributions and wishes him every success in the future.

Sincerely,

Warren Peace
VP Operations
APPENDIX B

3. Case #3: Creative Way to Handle Child Support
Husband and Wife had two minor children who spent equal time with each parent. At the time of divorce, neither Husband nor Wife was employed. Husband had sold a company for a large sum of money and Husband and Wife lived on income generated by their substantial assets. Wife wanted Husband to pay her child support because it was likely Husband would again begin working or at least getting paid as a consultant and she would likely still be the parent signing the children up for activities, school, etc. Husband believed they were in an equal financial position and sharing equal time with the children so no child support was necessary. The solution: Husband retained ownership of the marital residence and a second residence and allowed Wife to live, rent free, in the former marital residence until the last child graduated from high school. In addition, Husband and Wife would share certain household expenses for this period of time. This solution worked because Husband was not paying child support in the traditional sense but Wife was receiving financial assistance that made her feel like Husband was supporting the children. Arguably this solution had a financial impact on Husband who was not collecting rent he would normally deserve; however, Husband felt like he was not paying Wife child support and therefore he was an absolutely equal co-parent. How someone feels about a particular outcome matters and may be the most important aspect of negotiating a settlement acceptable to both parties.

4. Case #4: Creative Way to Handle House Purchase
Husband and Wife had been married for 10+ years and had two young children. Husband had a substantial amount of separate property cash. During the marriage, Husband commanded a high salary and Wife was a full-time mother. Unfortunately for Wife, the parties spent most of their income and did not acquire many assets. Therefore the community estate was nominal at the time of divorce. The marital residence was sold at a break-even amount. Husband and Wife wanted the children to attend school in a specific district so at least one parent needed to live within that school district. Due to Husband’s job and the likelihood that he would need to move out of state, Husband and Wife agreed that Wife would need to live in the desired school district. Unfortunately, few homes were available for lease and Wife could not afford to
purchase a house or to qualify to finance the purchase of a house. The creative solution was for Husband to “loan” his separate property funds to Wife who would use those funds to purchase a home in the desired school district. Wife agreed to sign a note payable to Husband and make interest-only payments to Husband until the last child was out of school or Wife sold the house. The children were able to attend school in the desired district, Wife had access to funds and favorable payment terms that she could not have obtained from a traditional financial institution, and Husband’s separate property funds were safely invested in real estate—a good long-term investment for Husband.

5. Case #5: Side Agreement
Husband and Wife had been married 25+ years and had four children, two of whom were minors at the time of divorce. Husband was a successful financial advisor and Wife was a full-time mother. In the past, Husband had been to rehab for a drug addiction. Although he reported that he was clean and sober at the time of divorce, Wife had lingering concerns and wanted to address her concerns in the divorce in order to ensure the safety of the children during visits with their father. Due to Husband’s work, he had a strong interest in confidentiality. Wife had no interest in embarrassing Husband and in fact, had a financial interest in Husband continuing to be a successful financial advisor. The solution was a separate contract between the parties addressing random drug tests that would be eliminated over a period of time with negative test results, and a schedule with the children that increase over that same time period. Because these terms were in a separate contract between the parties that was only referenced by title in the parties’ Agreed Final Decree of Divorce, no one had to know the terms of the separate contract unless it had to be filed in an enforcement action at a later date. Therefore, both parties’ interests were met in a way that preserved confidentiality and ensured the safety and well-being of the children.