

Crossing the Last Gap

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Editors' Note: It's three o'clock in the morning. You've been negotiating or mediating since 9 a.m. and everybody is exhausted. Each side has made more concessions than it really thinks it should have had to, and the gap between the parties has narrowed to millimeters. But there it has stuck, and will stay stuck unless you do something new. Every sophisticated negotiator or experienced mediator has a personal answer to this problem, a private stock of a few gambits, often tried and sometimes successful. But John Wade has the longest list we have ever seen, 16 techniques in all. Not one of them works all the time, but together they can materially improve your batting average.

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? Will the lease have a five year renewal option attached?

Most lawyers and business people can relate horror stories with humor 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 check to cover the last gap in order to help 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, which include:

- The last dance—Negotiations are often compared to a dance, where one or more parties circle each other apparently reluctant to end the process or relationship.
- Unfinished emotional business—Commercial "common sense" sometimes does not prevail at the last gap as one or more parties have a deep hurt or loss which has not been acknowledged or "resolved."

- The last straw—"I have given up so much already"—A common method of negotiation is for each party to open with extreme claims and then gradually make small moves toward a settlement between those extremes. This process often leaves one or both parties with an increasing sense of "loss" and anger.
- Sense of having been tricked—When the last gap is reached, the party who opened with what they perceived to be a "reasonable" offer, often feels tricked as the bargaining range has been dragged towards the person who started with an extreme or "unreasonable" offer. [Schneider, *Aspirations*]
- Skilled helpers attempt to prove worth—Sometimes lawyers (or union officials, etc.) negotiate aggressively about the last gap as a form of theater to justify the fees they will be demanding from their already disappointed clients.
- Recriminations for lost time and money—Sometimes the last gap triggers anger, as the negotiator realizes that he could have settled for the same amount two years earlier. Instead, he has invested two years of time and money to achieve "nothing."

How to Cross the Last Gap in Negotiations

What strategies are available to cross this hurdle in negotiations or mediation? One aspect of an adviser'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. A negotiator can give information concerning the range of options which are available. What follows is a list of options on how to cross the last gap.

Options for Crossing the Last Gap in Negotiations

The sixteen methods are as follows:

- Talk—Try to convince.
- Split the difference.
- Expanding the pie by subdividing the last gap.
- Expanding the pie by an add-on offer—"What if I moved on.....?"
- Refer to a third party umpire.
- Chance—Flip a coin.
- Chance—Draw gradations from a hat.
- Transfer the last gap to a third party.
- Conditional offers and placating incremental fears—"What if I could convince client to...? How would you respond?"
- Pause—and speak to significant others.
- Pause—and schedule time for a specific offer.
- Defer division of last gap; divide rest.
- Sell last item at auction; split proceeds.
- Pick-a-pile; you cut, I choose.
- Skilled helper has a face-saving tantrum.
- File a (further) court application—pursue pain and hope.

Talk—Try to Convince

A common response at the last one million dollars, \$10,000, at the last set of paintings, or the 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 reiterating 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 of walking out, stonewalling, buying elsewhere, 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 negotiator 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 any of us as we’ve all heard them before. The last gap is never crossed by logical argument, so I’m going to ask each of us in turn, which one of the other options on the board you could live with.”

Nevertheless, some degree of managed speechmaking at the last gap may serve latent functions of catharsis, boredom, the last dagger, further emotional pain, 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.

Split the 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.”

Double Blind Offer—Split the Difference Via Formulae

This method is 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 a confidential offer; and that there will be no agreement unless and until one confidential offer is say at least 75% of the other (or perhaps unless and until parties are only \$65,000 or less apart).

Thus if each confidentially moves \$10,000 and offer \$290,000 and \$210,000, then there will be no automatic splitting the difference, as $\$210,000/\$290,000 = 72\%$.

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.

Expanding the Pie By Subdividing 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 with or without interest or a painting can be used for alternative months by different parties, with one or the other paying shipping and insurance.

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 an impasse is reached, they switch (or have a fellow negotiator switch) to an interest-based problem-solving approach.

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 judge.
- Agreeing to refer just the issue of crossing the last gap to an arbitrator. A respected expert can be paid for two hours of her time to come to a binding oral or written decision only on the last \$20,000, car, Christmas Day or the terms of a leasing option.

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.

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 losing.
- 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 the lottery involved in “going to court,” and also reflects the educational conversations of many lawyers and clients.¹
- Is so abhorrent to some risk-averse disputants that they return to the remaining list of options with enthusiasm!

Chance—Draw From a Range of Solutions

This is an alternative version of chance which avoids the all-or-nothing result of flipping a coin. The disputants agree 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 on each slip of paper. The person drawing the slip receives whatever number is on the drawn piece of paper; the residue of the last gap goes to the other disputant. The writer and some colleagues have used this method successfully on several occasions in business disputes.

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

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.

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.

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 an incremental counteroffer. 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 counteroffers. This works best if there are at least two negotiators (e.g., 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 hypothesized offer. Moreover, the offeree's response is also clearly conditional ("if your client makes that offer...") and can be withdrawn readily. However, raising any suspicion of renegeing will usually be counter-productive at such a late stage of nearly successful negotiations.

Pause—And Speak to Significant Others

The intensity of a negotiation 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. [Mayer, *Allies*] Where a mediator is being used, it is often helpful for all disputants to make contact with the mediator during the break to clarify, brainstorm and hypothesize on negotiation dynamics (e.g., "What will be the likely response if I make this offer...?")

A skilled "significant other" can also assist an entrenched person to work through a visual risk analysis (again). What are the risks if the gains from the negotiation are "lost" due to a relatively minor last goal or gap?² The writer has found that a renewed, visual, and private risk analysis is helpful with parties jammed on the last gap. "What are your goals; what have you gained so far; and what will be lost if you leave here without an agreement?" For example, here is a common "life goal" list prepared by the writer as mediator while sitting with each disputant during family property negotiations which are "jammed" over a last monetary gap.

LIFE GOALS?	THIS OFFER??
To get on with life	
To open a new business	
To invest money	
To stop paying lawyers	
To stay healthy	
To minimize contact with "x"	
To reduce stress on colleagues	
To take a holiday	
To focus on my work	
To avoid becoming bitter	
To regain "control" of my life	
To settle "in the range"	
To reduce risks of paybacks	
To receive [\$540,000]—current offer \$500,000	
Other??	

Once the goals are visualized and reflected upon, anecdotally most clients are reluctant to lose the 14 dangling gains for the chance of acquiring one missing goal (the last gap).

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 predictable outcome 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 (e.g., 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, ritualizes conflicted conversations, provides a deadline, and allows the parties to return to the negotiation table knowing what has been decided.

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%.

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.

Recently, the writer was mediating a conflict which jammed on the last gap of who would receive an emotionally important house. The mediator offered to conduct an instant auction, if both parties agreed that the highest bidder would receive the house. They did, and the negotiations concluded successfully.

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, and to parents cutting up children’s birthday cakes.

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.³

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.

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, lawyers, or other team members try this option from their box of tools. For example, with varying degrees of simulated anger, the mediator, or other “helper” comments: “I cannot believe it. We have all sat here for three hours and patiently and successfully nego-

tiated through four issues. Now you're about to throw it all away on this miserable pile of furniture. You all really disappoint me. I'm not going to let you out of here until we do the right thing and etc., etc."

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

This dramatic option may be particularly successful if the aggressor has gained the respect and trust of all parties (both lawyers and disputants) over a period of time.⁴

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 or years of concessions. Accordingly, one of the negotiators delivers a mixed message of pain and hope "I believe that this dispute will settle. We have made progress today and, in my opinion, we are not diagnostically in the 1-3% of disputes which need a judicial decision. However we both may need to suffer more pain and expense of filing (further) court applications, open offers, and paying lawyers. Could we now agree to a time to talk over the phone in say 14 days time? etc." (Competent negotiators 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 and transaction managers are becoming more sophisticated in their knowledge of negotiation dynamics. This chapter has attempted to systematically explain some of the reasons for the difficulties experienced in crossing the 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 negotiator's repertoire for working with disputants and negotiators to cross the last gap.

Endnotes

See original version of this topic, John H. Wade, *The Last Gap in Negotiations—Why Is It Important? How Can It Be Crossed?*, 6 AUSTRALIAN DISPUTE RESOLUTION JOURNAL 92 (1995).

¹ See, e.g., Austin Sarat & William Felstiner, *Law and Strategy in the Divorce Lawyer's Office*, 20 LAW & SOCIETY REVIEW 93 (1986); Austin Sarat & William Felstiner, *Law and Social Relations: Vocabularies of Motive in Lawyer/Client Interaction*, 22 LAW & SOCIETY REVIEW 737 (1988); John Griffiths, *What do Dutch Lawyers Actually do in Divorce Cases*, 20 LAW & SOCIETY REVIEW 135 (1986); John H. Wade, *The Behaviour of Family Lawyers and the Implications for Legal Education*, 1 LEGAL EDUCATION REVIEW 165 (1989).

² See John H. Wade, *Systematic Risk Analysis for Negotiators and Litigators: But You Never Told Me It Would Be Like This*, 13 BOND LAW REVIEW 462 (2001).

³ Precedent clauses for such agreements can be found in AUSTRALIAN FAMILY LAW AND PRACTICE (CCH) at 43-400 and in W and W (1980), FAMILY LAW CASES 90-872 at 75, 531 (Australia).

⁴ G. RICHARD SHELL, *BARGAINING FOR ADVANTAGE* 111-13 (1999); ROBERT B. CIALDINI, *INFLUENCE: THE PSYCHOLOGY OF PERSUASION* (1984).