USING YOUR HEAD: THE BRAIN GAME

BY

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I. INTRODUCTION

Concussions are a common occurrence in many sports ranging from soccer and boxing to gymnastics and football. Almost every athlete at some point in his or her career is going to be faced with at least one concussion. I remember my first, and fortunately only, concussion very vividly. I was a 12 year-old gymnast and I was practicing a specific tumbling pass on the floor exercise; in the middle of my tumbling pass I over-rotated, landed directly onto my back, and my head whipped onto the ground. My coach came running over and I was visibly shaking, my teeth were chattering, and the whole room seemed to spin. She checked to make sure I could move my legs and that my vision was still intact, then we waited for my mother to take me to the doctor. It was a startling experience and one that I would luckily never have to experience again. For professional football players, however, concussions are an everyday reality that they and their families must live with. They must put their well-being and lives on the line during practice and games if they want to receive a paycheck from their employer.

To date, there has been a constant increase in the average number of NFL concussions reported per week from the years 2009-2012. [1] How can this be true? The NFL has seemingly taken measures to combat NFL concussions by prohibiting face-masking (grabbing a player's helmet by the face mask), banning head-slaps, and outlawing "spearing" (leading with the top of the helmet when hitting or tackling another player. [2]) Could more have been done to prevent the current NFL concussion lawsuit? These are some of the issues that I will address in this paper. The primary focus, however, will be how to negotiate with someone when there is a power imbalance. Power imbalances in negotiations cause the less powerful negotiators to walk away from the negotiating table feeling dissatisfied and angry.

This article has 6 sections. The first section is the introduction. The second section discusses the background and history of NFL concussion research. The third section discusses how to negotiate when there is a power imbalance between the negotiating parties. The fourth section hypothesizes on what happens to clients when too many attorneys become involved and try to focus on their own needs and not the needs of their clients. The fifth section focuses on the power and benefits of alternative dispute resolution as opposed to litigation. The last section concludes the discussion with my overall perception of the concussion problem and what to expect of the outcome.

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[1] J. Brad Reich, *When "Getting Your Bell Rung" May Lead to "Ringing the Bell": Potential Compensation for NFL Player Concussion-Related Injuries*, 12 Va. Sports & Ent. L.J. 198 (2013).

[2] *Id.*

II. HISTORY OF CONCUSSION RESEARCH AND THE NFL

A. General Overview

The concussion problem currently facing the National Football League is not a new occurrence. In 1903, before the NFL existed, college football was the pinnacle of football in the United States. [3] The New York Times compared college football to 'mayhem and homicide', and, in 1905, eighteen college players died from head injuries. [4] It was obvious that concussions were a big problem and some preventative measures needed to be taken to curb the violence and injuries prevalent in football. At the urging of President Theodore Roosevelt, college leaders attended a conference at the White House to promulgate safety rules for the game of football. [5] These meetings paved the way for a Rules Committee and the National Collegiate Athletic Association was formed in 1910. [6]

The medical community began getting involved with the problem, and, in 1952, the New England Journal of Medicine published a study, the first of its kind, tackling athletic concussions and football players. [7] The study came to the conclusion that players who incur concussions more than three times or one concussion with more than momentary unconsciousness should not be exposed to further trauma. [8] That conclusion was terrifying, and yet nothing significant was done to change the game of football. The game was being played exactly the same way disregarding the findings of the medical journal.

In 1994, however, the NFL formed the Mild Traumatic Brain Injury Committee (MTBIC) to study the effects of concussions [9] after the growing concerns surrounding player concussions. The leadership of this committee has been controversial and under scrutiny since its inception. [10] Many individuals, including

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[3] Rodney K. Smith, *Solving the Concussion Problem and Saving Professional Football*, 35 Thomas Jefferson Law Review 129 (2013).

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] J. Brad Reich, *When "Getting Your Bell Rung" May Lead to "Ringing the Bell": Potential compensation for NFL Player Concussion-Related Injuries*, 12 Va. Sports & Ent. L.J. 200 (2013).

[8] *Id.*

[9] David S. Cerra, *Unringing the Bell: Former Players Sue NFL and Helmet Manufacturers over Concussion Risks in Maxwell v. NFL*, 16 Mich. St. J. Med. & Law 269 (2012).

[10] See J. Brad Reich, *When "Getting Your Bell Rung" May Lead to "Ringing the Bell": Potential compensation for NFL Player Concussion-Related Injuries*, 12 Va. Sports & Ent. L.J. 201 (2013).

current and former NFL players, do not think that the work the MTBIC has been doing is completely accurate and many think that the work is biased.

B. The Pellman Committee

Around 1994, then NFL Commissioner, Paul Taglibue, appointed New York Jets' team doctor, Dr. Elliott Pellman, as chair of the MTBIC. [11] Some voiced concern that there was a lack of impartiality on the committee, because Dr. Pellman might have an ulterior motive jeopardizing his job as team doctor. It follows, therefore, that the research he conducted might have been skewed in favor of the NFL. [12] Dr. Pellman was a rheumatologist, which is a doctor that specializes in musculoskeletal diseases and not neurological diseases. [13] A rheumatologist does not have the same training that a neurologist would have and therefore many were skeptical of any studies done by the MTBIC.

A study, released by the MTBIC, stated three things: 1. The research that was currently available in 2007 did not show that sustaining one or two concussions could lead to permanent problems if the concussion was treated properly, 2. That there was no "magic number" for how many concussions amounted to too many concussions, and 3. That players are not at a greater risk of injury once they received medical attention for the concussion. [14] According to Leigh Steinberg, famed NFL super-agent [15], "players were specifically being told [by Pellman], that there were no long term risks associated with sustaining concussions". [16] The MTBIC was vehemently announcing that the link between neurological problems and concussions was completely unfounded and inconclusive. [17] These findings were quite controversial and independent researchers were finding conclusions contrary to the MTBIC's findings. [18] Public scrutiny was beginning to mount and the NFL could feel the pressure. In light of the controversy surrounding the MTBIC's

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[11] *Id.*

[12] See *Id.*

[13] Raymond L. Yung, *What is a Rheumatologist?*, American College of Rheumatology, (last updated Aug. 2012) http://www.rheumatology.org/practice/clinical/patients/rheumatologist.asp.

[14] J. Brad Reich, *When "Getting Your Bell Rung" May Lead to "Ringing the Bell": Potential compensation for NFL Player Concussion-Related Injuries*, 12 Va. Sports & Ent. L.J. 201 (2013).

[15] Attorney Leigh Steinberg, Lecture at Southern Methodist University (March 3, 2014).

[16] *Id.*

[17] See Rodney K. Smith, *Solving the Concussion Problem and Saving Professional Football*, 35 Thomas Jefferson Law Review 140-41 (2013).

[18] *Id.* at 139.

"research", Dr. Pellman was asked by the NFL to step down as chair of the committee. [19] The NFL had the opportunity to appoint doctors to conduct unbiased and thorough research into the true cause and effect of concussions, but again they seemed to fall short of the mark.

C. The Casson Committee

Roger Goodell became the next commissioner of the NFL, and he appointed Dr. Ira Casson as the chairman of the MTBIC. [20] The Casson Committee mirrored the thoughts and opinions of the Pellman Committee; by this time, the public and Congress were completely fed up. [21] Congressional scrutiny came down on the NFL in 2009 and brought the concussion crisis to the public forefront. [22] During the Congressional hearing, Commissioner "Goodell refused to answer questions about whether he thought there was a link between playing football and the cognitive decline of some retired players." [23] In the aftermath of this hearing, which was termed "embarrassing" [24], two co-chairmen of the MTBIC resigned and the NFL suspended the committee's concussion research until neurologists replaced all the vacated spots. [25] Commissioner Goodell also asked Dr. Casson to step down as the chairman of the committee. [26] The NFL at this point had two opportunities to remedy the concussion problem in their league, but their apathetic attitude caused them to fail twice in a row and caused their players to continue to endanger themselves.

D. Objective Criteria

There were doctors conducting player brain trauma research independently of the NFL, and their findings were quite contrary to those of the MTBIC. [27] As early as

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[19] *Id.* at 141.

[20] Rodney K. Smith, *Solving the Concussion Problem and Saving Professional Football*, 35 Thomas Jefferson Law Review 141 (2013).

[21] *Id.*

[22] See David S. Cerra, *Unringing the Bell: Former Players Sue NFL and Helmet Manufacturers over Concussion Risks in Maxwell v. NFL*, 16 Mich. St. J. Med. & Law 271 (2012).

[23] J. Brad Reich, *When "Getting Your Bell Rung" May Lead to "Ringing the Bell": Potential compensation for NFL Player Concussion-Related Injuries*, 12 Va. Sports & Ent. L.J. 204 (2013).

[24] See *Id.*

[25] See David S. Cerra, *Unringing the Bell: Former Players Sue NFL and Helmet Manufacturers over Concussion Risks in Maxwell v. NFL*, 16 Mich. St. J. Med. & Law 271 (2012).

[26] Rodney K. Smith *Solving the Concussion Problem and Saving Professional Football*, 35 Thomas Jefferson Law Review 142 (2013).

[27] *Id.* at 139.

2002, Dr. Bennet Omalu, a forensic pathologist, conducted research that led him to find one of the first cases of football-related dementia by studying the brain of former professional football players. [28] Other studies were done and found even more startling results "that those who have suffered concussions are more susceptible to further head trauma for seven to 10 days after the injury." [29] There were numerous studies, between 2003-2012, being done by independent physicians that indicated there were higher rates of depression among NFL players that had sustained multiple concussions and that there was a relationship between brain damage, Alzheimer's, and retired NFL players. [30] These findings were definitely contrary to anything the NFL had reported, yet the NFL refused to listen.

In 2010, Dr. Omalu testified before a Congressional committee that following general principles of medicine dictate permanent brain damage and dementia would follow repeated blows to the head. [31] Another critic of the MTBIC findings was Dr. Robert Cantu, chief neurosurgeon at Boston University. [32] Dr. Cantu admonished the studies conducted by the MTBIC and stated that the sample size used was too small and was biased. The results were preliminary at best, and they should not be taken as even remotely conclusive. [33] In the wake of this criticism and the objective, unbiased studies being run by respected physicians, the NFL began to admit a few things. Greg Aiello, NFL spokesman, stated, "it's quite obvious from the medical research that's been done that concussions…lead to long-term problems." [34] Commissioner Goodell added Dr. Robert Cantu as a consultant to the newly named Head, Neck, and Spine Committee, which replaced the MTBIC. [35] Admitting that concussions were a problem and appointing Dr. Cantu as a consultant were the first positive steps the NFL made towards solving the concussion problems.

III. How Do You Negotiate with Goliath?

A. Introduction

Imagine a negotiation where the other party has more negotiating power. An easy example is to imagine a child having a discussion with their parent. The parent tells

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[28] *Id.* at 132.

[29] *Id.*

[30] *Id.* at 133.

[31] *Id.*

[32] *Id.* at 139-140.

[33] *Id.* at 140.

[34] David S. Cerra, *Unringing the Bell: Former Players Sue NFL and Helmet Manufacturers over Concussion Risks in Maxwell v. NFL*, 16 Mich. St. J. Med. & Law 271 (2012).

[35] Rodney K. Smith, *Solving the Concussion Problem and Saving Professional Football*, 35 Thomas Jefferson Law Review 143 (2013).

the child to finish their homework before watching television. A typical scenario in that situation is that the parent told the child to do homework, the child whined and complained, the parents got mad, the child had to finish the homework, and generally was not allowed to watch television. It was a lose-lose situation, because the child had to do homework and not watch television, and the parents were upset because they had fought with their child. Most adults wish that the younger version of themselves had known about the negotiation tricks to use when someone has more power. This section of the paper will explain some techniques for negotiating with someone when there is a power imbalance, and the other party is the most powerful person at the table. These tactics will then be applied to the NFL concussion debate and give pointers to the players and attorneys involved in the current debate.

B. Form an Alliance

William Ury, in his TED talk, "The walk from 'No' to 'Yes,'" discusses the power of togetherness. He quotes an old African proverb, "When spider webs unite, they can halt even the lion." [36] He says that, "If we're able to unite our third-side webs of peace, we can even halt the lion of war." [37] He describes the third-side as a mutual understanding of a problem. The third-side will be discussed more in section 5 of this paper. This way of thinking goes right along with the old adage that two heads are better than one and it holds especially true when one party is negotiating against a more powerful party.

Forming alliances with others who are similarly situated, against a common enemy can multiply your power among your allies. [38] If, when having the television versus homework debate discussed earlier, the child had brought a sister, brother, or friend into the discussion, they might have been able to come up with an innovative or fresh idea. The friend might have come up with the idea that the child could get extra television time that night if the child finished homework in a record setting pace with no parental help. Creating a group of allies takes considerable planning and organization [39], typically we don't possess these traits as children. This is why we almost invariably would be at the table doing homework and not watching television.

Another example of forming an alliance involves class action suits. Often times, class action suits can help those who have disproportionately lower bargaining power

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[36] William Ury, The walk from "no" to "yes" (Oct. 2010) (transcript available at http://www.ted.com/talks/william_ury/transcript).

[37] *Id.*

[38] See William Goldman, *When David Meets Goliath: Dealing with Power Differentials in Negotiations*, 5 Harv. Negot. L. Rev. 105 (2000).

[39] *Id.*

become more vocal and powerful with their claims. In the current NFL concussion debate, approximately 4,500 former and current professional football players have joined forces to sue the NFL. [40] It is likely that these players will be able to receive more money from the NFL as a group than they would be able to receive alone. This assumption, however, does not apply to the more seriously injured players though, because they would probably be able to receive a greater amount of money by appealing to the jury individually than in one big class.

C. Appeals to the Public

How many times have big companies been shamed into giving into their employees, because the general public hears about their plight and is outraged at the employer's conduct? This has happened many more times than imagined. The idea of appealing to the public is not a new concept. In the 1600s, Cotton Mather appealed to the public's sense of religious fervor by inciting fear into the Puritans. [41] This fear stemmed from Mather's book that declared witchcraft was among them and the devil was near at hand. [42] This led the public to accuse many women of witchcraft and this led to the torture and killing of many innocent victims. The Salem Witch trials were partly due to Cotton Mather's appeals to the public's fervent religious beliefs. Hopefully, your appeals to the public during a power imbalance in a negotiation won't be for a sinister reason such as Mather's.

Most individuals, no matter how much power they have, possess a moral compass or a gut feeling that something just doesn't seem fair. [43] Oftentimes, "moral power can function as effectively in negotiation settings as other, [more] rawer forms of power." [44] A good illustration of this technique is found in Harvard Negotiation Law Review article, "When David Meets Goliath: Dealing with Power Differentials in Negotiations,":

> "In some cases, virtually an entire claim rests upon a moral foundation. For example, fifty years after the end of World War II, a number of Nazi-era slave laborers have pressed claims for compensation against the corporations (or their successor entities) that "employed" them during the war. Given the passage of time, one might consider these demands legally dubious, but the horror of the practice, as well as the moral stigma that companies would suffer from rejecting the claims, has led a group

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[40] Ken Belson, *Many Ex-Players May Be Ineligible for Payment in N.F.L. Concussion Settlement*, N.Y. Times, Oct. 17, 2013, http://www.nytimes.com/2013/10/18/sports/football/many-ex-players-may-be-ineligible-to-share-in-nfl-concussion-settlement.html?_r=0.

[41] Douglas Linder, The Witchcraft Trials in Salem 2 (Oct. 15, 2007) (unpublished manuscript) (available at SSRN).

[42] *Id.*

[43] See William Goldman, *When David Meets Goliath: Dealing with Power Differentials in Negotiations*, 5 Harv. Negot. L. Rev. 107 (2000).

[44] *Id.*

> of roughly sixty-five companies to contribute to a 10 billion mark ($5.19 billion) fund to compensate the laborers." [45]

As discussed earlier in this paper, when unbiased doctors started studying the effect of concussions on the brains of NFL players, the public began to become outraged at the findings. The public's outcry could be heard all the way into the NFL's boardrooms and the research of the MTBIC only fueled the public's intuition that something just wasn't right about the NFL's stance on concussions and brain injury. In the recent litigation regarding concussions in the NFL, the public has been abuzz over the number of NFL players who have been injured and asked to step back on the field. Prominent players who have received concussions have begun to speak out about their symptoms and the memory loss and injury associated with their concussions. The amount of coverage the NFL concussion discussion has gotten over the last few years is due directly to the appeals by the players to the public. Without the public outcry, the NFL may never have come to the bargaining table to discuss the concussion problem plaguing the NFL.

D. Weakness can sometimes be power

Sometimes those who have less power can actually use that weakness as power and ultimately get what they want out of a negotiation. There are three ways that weakness provides leverage in negotiations. First, indifference on the part of the weaker party can lead to the powerful party adapting to the desires of the weaker party. [46] If the weaker party can threaten to walk away from the table and actually be able to walk away from the table then the more powerful party will have to concede to the weak party's demands or risk losing the deal completely. The weaker power does not want to use this power unless their best alternative to a negotiated agreement (BATNA) is either equal to or greater than what the powerful party is offering. Second, sometimes the weaker party can garner sympathy from the more powerful party by playing on their emotions. [47] This is similar to appealing to the public, but, this time, you are appealing the sympathies directly from the stronger party. This technique can be a little tricky depending on your setting. In sports negotiations, the negotiators typically play hard ball and garnering sympathies from them usually won't work and will make you appear weak. [48] Third, sometimes the strength of one party can lead them to concede to the weaker party's request if the stronger party "faces public criticism for taking action against the weaker." [49] The phrase that all publicity is good publicity does not ring true in these types of

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[45] *Id.* at 107-108.

[46] *Id.* at 108.

[47] *Id.*

[48] See David. B Falk, *The Art of Contract Negotiation,* 3 Marq. Sports L.J. 15 (1992).

[49] William Goldman, *When David Meets Goliath: Dealing with Power Differentials in Negotiations*, 5 Harv. Negot. L. Rev. 109 (2000).

situations. The stronger party that is in the public eye wants no publicity regarding negotiations with weaker parties, whom the public will think are being exploited by the stronger party.

In the NFL negotiations, the players are definitely the weaker party, and the NFL is the stronger party. If the players were able to show indifference to the NFL through boycotting playing time until the negotiation for the concussion litigation reached a number all the players felt comfortable with, then the NFL would be forced to concede to some of the players' demands. It is hard in a class action suit, however, to convince all the players to boycott a playing season. If all the players involved in the litigation could boycott playing until the dollar figure was acceptable to all involved players then that type of conduct could work. This would be extremely hard to do, however, because a lot of the players involved in this litigation are past players who do not possess the leverage to hold off playing because they are not currently on any team's roster. As mentioned earlier, most professional sports teams and those negotiators negotiating on behalf of players, typically play hardball. Those who play hardball usually take emotional appeals as weakness and will not give into emotional demands. So, appealing to emotions in the negotiating room of the NFL concussion litigation would not be a prudent move for a negotiator. Public scrutiny, as discussed previously, worked extremely well in the NFL concussion litigation in regards to forcing the NFL to begin a dialogue with the players. Using the threat of public criticism in the negotiation room with the NFL or other professional sports teams will work if the weaker party, the players, have a strong enough emotional case to garner sympathy from the public. The public has an emotional attachment to concussions in professional sports, and organizations, such as the NFL, know this and do not want the wrath of public scrutiny to befall them again.

E. Objective Criteria

In the famed book, "Getting to Yes," [50] Roger Fisher and William Ury discuss how desperately you need to use objective criteria in negotiations. I believe that using objective criteria is even more important in situations where there is a power imbalance. Objective criteria needs to be from a completely unbiased source, hence it needs to be objective or impartial. In a sports related example, presented in Carrie Menkel-Meadow's book, "Negotiation: Processes for Problem-Solving," objective criteria are used quite successfully:

> "Consider new criteria used by Billy Beane, general manager of the Oakland A's baseball club, to evaluate and choose new players. For example, rather than equating on-base percentage with a player's slugging percentage, he valued on-base percentage three times the value of the slugging percentage, thus giving more weight to walks and a general ability to get on base. Ultimately, a follower of Beane's

[50] Roger Fisher & William Ury, Getting to Yes: Negotiating Agreement Without Giving In (Bruce Patton, 2d ed. 1991).

> method, Theo Epstein, became general manager of the Boston Red Sox and, using these new criteria, helped build a team that won its first World Series in 86 years." [51]

When using objective criteria, Fisher and Ury lay out three basic points to follow in the negotiation [52]:

1. Frame each issue as a joint search for objective criteria;
2. Reason and be open to reason as to which standards are most appropriate and how they should be applied; and
3. Never yield to pressure, only principle.

The researches conducted by both Dr. Cantu and Dr. Omalu, discussed earlier, are perfect examples of objective criteria. These two doctors researched the concussion problem in the NFL and came up with completely unbiased and impartial findings. These findings would be a great standard to go by when discussing the compensation NFL players should receive for the brain damaged incurred from playing professional football. When these studies came out in the media, the NFL was forced to concede that the MTBIC was not doing its job and that is what spurred the changes to the committee. Objective criteria can be a source of power for those who are at a weaker bargaining position than their counterparts. If the attorneys for the NFL players involved in the concussion litigation can harness the power of objective criteria then their bargaining power can be greatly increased.

G. Increasing your Power

There are three types of power that social psychologists have identified in society and, these types of power also exist at the negotiating table. [53] The first type of power is usually described as independence of others. [54] Typically, in society, this kind of power usually happens when a person gets their first adult job and is able to depend solely on themselves for their own well being. In negotiation, this type of power is usually referred to as one's BATNA or best alternative to a negotiated agreement. [55] The better the negotiator's BATNA the less dependence they have on the other party, and, therefore, the more strength they have in a negotiation. The second form of power is referred to as role power and comes from the position one holds or the title they possess and is usually found in organizational hierarchies,

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[51] See Michael Lewis, Moneyball: The Art of Winning an Unfair Game (2003).

[52] Roger Fisher & William Ury, Getting to Yes: Negotiating Agreement Without Giving In 88 (Bruce Patton, 2d ed. 1991).

[53] Adam Galinksy & Joe C. Magee, How Power Affects Negotiators, Program on Negotiation Harvard Law School Blog (June 25, 2013), http://www.pon.harvard.edu/daily/negotiation-skills-daily/how-power-affects-negotiators/.

[54] *Id.*

[55] *Id.*

such as the National Football League. [56] The last type of power comes in the form of psychological power, and this type of power can be generated even "when you lack objective power." [57] A person can create a temporary sense of power by playing mental games with themselves. [58] One way to create power is by thinking about a time in your life when you felt powerful or had substantial power. [59]

A study done by social psychologist Amy Cuddy also found that when you "pretend to be powerful, you are more likely to actually feel powerful." [60] She did a study that involved lower power poses (hunched over, closed arms) and high power poses (superwoman stance). [61] Participants were either asked to assume high power poses before an interview or low power poses before an interview. The results were astonishing; those who had engaged in high power poses before the interview dominated the interview and the employers, who were blind to the study, wanted to hire the high power posers over the low power posers. [62] What Amy found was that "our bodies change our minds and our minds can change our behavior, and our behavior can change our outcomes." [63] So, interestingly enough, "being powerful and feeling powerful have essentially the same consequence for negotiations." [64] So the old adage, fake it till you make it can be an invaluable tool in the struggle for power during a negotiation.

Since the NFL is an organizational structure, the negotiators they sent to the concussion settlement negotiations possessed role power, which was described above. The player representatives in the negotiation, however, can equalize that power or overcome it through psychological power. This psychological power can be gained through striking power poses before the negotiation, maintaining powerful body language throughout the negotiation, and mentally psyching themselves up by envisioning power roles they have played in the past, or envisioning past successes. Athletes are particularly good at psyching themselves up through mental games, because sports psychologists typically coach athletes into mentally envisioning

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[56] *Id.*

[57] *Id.*

[58] *Id.*

[59] *Id.*

[60] Amy Cuddy, Your body language shapes who you are (June 2012) (transcript available at http://www.ted.com/talks/amy_cuddy_your_body_language_shapes_who_you_are).

[61] *Id.*

[62] *Id.*

[63] *Id.*

[64] Adam Galinksy & Joe C. Magee, How Power Affects Negotiators, Program on Negotiation Harvard Law School Blog (June 25, 2013), http://www.pon.harvard.edu/daily/negotiation-skills-daily/how-power-affects-negotiators/.

themselves scoring the game-winning touchdown, shooting the perfect basket, or sticking the perfect dismount. In gymnastics, our coaches would always tell us to envision our success by visualizing perfect routines in our heads prior during competition. This type of visualization helped me to win a individual National Championship. I have also used this type of visualization with the athletes I coach and have found that their confidence increases and their routines are actually much better after visualization exercises. Utilizing this type of psychological power is helpful in all negotiations, but it is crucial in negotiations when there is a distinct power imbalance, and you are the weaker party.

IV. Too many Quarterbacks Ruin the Play

There are many ways to increase your power when negotiating against a more powerful opponent, but there are even more ways to decrease or give up your power in a negotiation. By recognizing these pitfalls, a negotiator can train themselves not to make these common mistakes and ultimately be more successful and powerful at the negotiation table.

One common mistake, pointed out in Andrea Schneider's article, "Effective Responses to Offensive Comments," is that negotiators will sometimes improperly respond to the other party's offensive or low offer which decreases their power. [65] When a negotiator is faced with an aggressive or positional negotiator, typically they will respond by playing the aggressive negotiator's game. [66] When you are in a lower power position during a negotiation, this will workout negatively for your side. When a negotiator responds with this same type of aggressive behavior, escalation can occur and the entire negotiation can be ruined.

Schneider recommends four other tactics that can be used, and these other tactics are much more conducive to maintaining your power in a negotiation. [67] First, a negotiator can deflect the offensive tactic or power ploy by changing the subject. [68] By changing the subject or focusing on the issue that lies at the root of the problem, you can focus your discussion on issues that are more important to your side. Another way to deflect the other side's offer is by using silence. [69] If the other side uses a power ploy that you find objectionable, sit quietly until the other side speaks again. Silence is a powerful way to steer the topic back into a more desirable area. Second, a negotiator can confront the power ploy by naming it, and informing the

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[65] Andrea Schneider, *Effective Responses to Offensive Comments*, 10 Negot. J. 107, 110-113 (1994).

[66] *Id.*

[67] *Id.*

[68] *Id.*

[69] *Id.*

opponent that those tactics are not the most suitable way to negotiate. [70] This type of confrontation can usually be quite successful, because it calls the other side out on adversarial tactics that are not helpful towards a mutually beneficial agreement, and this sometimes embarrasses the other side and makes them want to be more amenable to make up for their misbehavior. Third, change the negotiation into a problem-solving, mutually beneficial discussion about underlying interests as mentioned in, "Getting to Yes." [71] The last way Schneider suggests for dealing with power ploys and offensive comments is to change participants. [72] While this can work well in some situations, sometimes involving more people or different people can be detrimental to the overall interests of the parties that you are representing. Sometimes, too many quarterbacks ruin the play.

The NFL class action concussion suit involves many players and many attorneys. Sometimes more is not always better. Attorney Chris Seeger, one of the lead attorneys for the NFL concussion settlement, has had numerous clashes with his own clients, attorneys for other players, and the media. [73] Legal experts outside the suit have suggested that the various arguments and disagreements among the attorneys and players within the suit could undermine the settlement. [74] Judge Anita B. Brody ruled that the $765 million settlement was not enough money to cover all the qualifying players, and a new settlement number needed to be reached. [75] Some of Seeger's clients have expressed dissatisfaction with Seeger and the settlement. [76] The players are concerned that the suit has been "hijacked" by lawyers and they foresee a lot of players opting out of the suit. [77]

The players are not the only ones unhappy with the way the suit and settlement negotiations are going; attorneys are also enraged by Seeger's behavior as well. In a recent meeting in January 2014, about 60 lawyers met to discuss the suit and ask Seeger some questions. Tom Demetrio, attorney for Chicago Bear's defensive back Dave Duerson, asked pointed questions that almost amounted to a cross-examination. Seeger continually deflected all questions by citing a "gag order" that allegedly prevented him from sharing information on the negotiations. Other

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[70] *Id.*

[71] *Id.*

[72] *Id.*

[73] Steve Fainaru & Mark Fainaru-Wada, Lawyers Fight Over Settlement Details, ESPN Outside the Lines (Jan. 24, 2014), http://espn.go.com/espn/otl/story/_/id/10346091/lead-negotiator-facing-strong-opposition-concussion-settlement.

[74] *Id.*

[75] *Id.*

[76] *Id.*

[77] *Id.*

attorneys involved in the suit said they were not aware that any order was ever placed upon Seeger. Dubious of Seeger's "gag order", Demetrio filed a motion requesting Judge Brody to direct Seeger and co-lead attorney Sol Weiss to "supply all Plaintiffs' attorneys of record with all the data utilized by them in reaching the proposed settlement agreement." [78] Demetrio dealt with Seeger's offensive behavior by calling him out on it with a motion to the judge. This type of action places Demetrio and his clients in a higher power position. Attorneys for another prominent player in the suit, San Diego Chargers Junior Seau, also filed a motion citing serious deficiencies in the settlement. [79] A provision, preventing players who reject the deal from pursuing a lawsuit against the NFL until the settlement is fully resolved, was a main point of contention for Junior Seau's attorneys. [80] The settlement limits wrongful death claims, which could be extremely detrimental for the families of prominent players, such as Duerson and Seau, who committed suicide by shooting themselves in the chest. They were later diagnosed with brain damage that most likely stemmed from concussions they received while playing football for the NFL. [81]

When parties on one side of the negotiating table start to splinter and argue among themselves, they lose power and the other side automatically gets the upper hand. Allowing Seeger to manhandle this concussion suit and marginalize the other attorneys in the negotiation will do more harm than good for the settlement offers. The NFL will see the dissension among the attorneys and players and might try to use that unrest to their advantage. The attorneys and players need to think about their actions and how the disagreements and quarrels among themselves will affect the overall objective of attaining a fair and just settlement offer for the players. In a public interview, Seeger stated:

> "I've already settled cases, much bigger than this one," said Seeger, who was co-lead counsel in the class action lawsuit over the pain medication Vioxx, which resulted in a $4.85 billion settlement. "I've had a good career. My legacy case wasn't going to be a case that didn't work. It wasn't going to be a case that I wasn't totally proud of. Because I know that most of the people involved in this, including the judge, are going to be thought of more for the NFL case than anything else that they will do in their career. That's silly if you ask me, but it's reality." [82]

This type of statement fuels opponents to hold out on offering high settlement offers because they sense that they are not negotiating against a powerful and united front. Undermining your own power plays into the power ploys of the opposing parties and should never be allowed to happen. If one party senses dissension among their

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[78] *Id.*

[79] *Id.*

[80] *Id.*

[81] *Id.*

[82] *Id.*

own members, they should take a break and work through the problems privately before returning to a negotiation.

V. The Power of Alternative Dispute Resolution

Alternative Dispute Resolution (ADR) is a powerful alternative to litigation. It has been used since the beginning of time to resolve conflicts in a more peaceful and less adversarial way. William Ury gives a great example of ADR being used among bushmen in Africa:

> "Let me give you just a story... About 20 years ago, I was in South Africa working with the parties in that conflict, and I had an extra month, so I spent some time living with several groups of San Bushmen. I was curious about them and about the way in which they resolve conflict. Because… within living memory, they were hunters and gatherers, living pretty much like our ancestors lived for maybe 99 percent of the human story. And all the men have these poison arrows that they use for hunting -- absolutely fatal. So how do they deal with their differences? Well what I learned is whenever tempers rise in those communities, someone goes and hides the poison arrows out in the bush, and then everyone sits around in a circle…and they talk…It may take two days, three days, four days, but they don't rest until they find a resolution, or better yet, a reconciliation. And if tempers are still too high, then they send someone off to visit some relatives as a cooling-off period."[83]

This type of dispute resolution is a successful way to resolve conflict without harming the relationship or reputation of the opposing parties. William Ury describes this type of system as the "third side." [84] In general, people typically think of conflicts or negotiations as two sided: "them" and "us." [85] What people fail to realize is that there is always a third side to these conflicts, the third side is the surrounding community-friends, allies, colleagues etc. [86] This type of thinking can be extremely productive and constructive to resolving differences. Ury states that:

> "…we can play an incredibly constructive role. Perhaps the most fundamental way in which the third side can help is to remind the parties of what's really at stake. For the sake of the kids, for the sake of the family, for the sake of the community, for the sake of the future, let's stop fighting for a moment and start talking. Because, the thing is, when we're involved in conflict, it's very easy to lose perspective. It's very easy to react. Human beings -- we're reaction machines. And as the saying goes, when angry, you will make the best speech you will ever regret. And so the third side reminds us of that.

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[83] William Ury, The walk from "no" to "yes" (Oct. 2010) (transcript available at http://www.ted.com/talks/william_ury/transcript).

[84] *Id.*

[85] *Id.*

[86] *Id.*

> The third side helps us go to the balcony, which is a metaphor for a place of perspective, where we can keep our eyes on the prize."[87]

One way to engage the third side is through an Alternative Dispute Resolution method such as mediation. Mediation is a facilitated negotiation where the opposing parties hire a neutral third party to help facilitate communication and try to resolve the conflict in a collaborative manner. Collaborative bargaining involves increasing the settlement negotiation so that both sides leave the negotiation table feeling like they have won the negotiation or at least received a meaningful result.

In the NFL concussion suit, Judge Brody ordered the parties to attend mediation and work towards settlement. Court-appointed mediator and former United States District Court Judge, Layn Phillips mediated a settlement between the NFL and the players; the proposed settlement was for $765 million. [88] Judge Brody was concerned that the settlement amount was not enough to fully compensate the players in the current litigation and urged the parties to go back to the negotiation table to work out a better settlement number. Currently there have not been any new reports on whether the NFL and the players have found a new settlement number, but with another football season approaching and the players disgruntled that no settlement has been reached, the NFL needs to capitulate or risk a player strike. Strikes have occurred a few times in NFL history and they are not good for either side. Neither side wants a strike, but if the players are not compensated for the risks they have endured in the past or for future risks, then they might take a stand and strike and they will probably have the public on their side.

VI. Where Do We Go From Here?

With the current NFL concussion litigation becoming such a prominent story in the news, other sports have been taking a stand against concussions and demanding something be done. The NHL was recently hit with concussion suits from former players. The NCAA is also gearing up for a tough battle against current and former college football players. At the Texas A&M Sports Law Symposium that was held in April 2014, panelists discussed the potential claims that MLB players could bring due to concussions from getting hit in the head with baseballs. Many professional sports have potential claims against their respective leagues for concussions.

The NFL is currently leading the way and even though some of the steps taken by the attorneys for the NFL players have not been the most successful or efficient, bringing the problem to the forefront of the media is essential and they have definitely done that. Getting the public enraged and engaged is one of the biggest advantages that the players, in any professional sport, have against the leagues.

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[87] *Id.*

[88] Kelly A. Heard, *The Impact of Preemption in the NFL Concussion Litigation*, 68 U. Miami L. Rev. 225 (2013).

As discussed in this paper, there are many ways to increase your power in a negotiation against someone more powerful, which includes appealing to the public, forming an alliance, and using objective criteria. The NFL players have done a decent job incorporating these strategies into their negotiation, but with the two lead attorneys potentially compromising the success of the negotiation through selfishness, I am unsure how successful the negotiation will be with Seeger and Weiss as lead counsels. Many players want to opt out of the settlement, because they feel that they could do better on their own. The players do not want to deal with Seeger and Weiss and the ulterior motives that they seem to possess surrounding this settlement. My suggestion would be to appoint new lead counsels for the negotiations, attorneys that are more in tune with the needs and desires of the players. If new attorneys are not appointed then many players might opt out of the settlement and cause the whole negotiation process to implode.

Overall, I do see this litigation coming to a settlement agreement if the lead attorneys are replaced. If the lead attorneys are not replaced, I see this current concussion debate being taken to court and having a long battle take place between the NFL and the players. It would be a shame if the players and the players' families had to wait for a ruling from the court that could potentially take years. Some of these families have already had the loss of a husband or father from the concussion problem and having to wait to receive compensation for those losses just prolongs the pain and suffering that these families are enduring. The families would have to endure pictures of their deceased family members and in depth discussions on why they died and that would not be beneficial or fair to the families of the deceased players. The current players who are also involved in the litigation would have to take time detailing past concussions and bringing up painful experiences they have dealt with in sustaining their concussions, which would be emotionally draining. If the lead attorneys are replaced then a settlement can be reached quickly and the players and families involved in this suit can be properly compensated for their pain and loss. Forcing the players and families to wait for compensation is unfair and unjust.