Disagreeing to Agree The client was a company whose owners were looking to sell. The investment bank had identified a potential acquirer. So far the investment bank had been working on good faith; now it was time to sign a fee letter.

The investment bank suggested a 1 percent fee. The client figured that its company would fetch $500 million and argued that a $5-million fee would be excessive. It proposed a 0.625 percent fee. The investment bankers thought that the price would be closer to $250 million and that accepting the client's proposal would cut their expected fee from $2.5 million to about $1.5 million. Ultimately, one side would be proved more right than the other as to the market value of the company. But, right now, there was a fog.

Naturally, the investment bank thought it knew best. It could have tried to convince the client that a $500-million valuation was unrealistic and that its fear of a $5-million fee was therefore unfounded. The problem with this approach, though, was that the client didn't want to hear a low valuation. Faced with such a prospect, it might have walked away from the deal and even from the bank altogether—and then there would have been no fee.

The client's optimism and the investment bankers' pessimism created an opportunity for agreement rather than argument. In the end, both parties agreed to a 0.625 percent fee with a minimum guarantee of $2.5 million. That way, the client got the percentage it wanted and considered the guarantee a throwaway. With a 0.625 percent fee, the guarantee kicked in only if the sale price was below $400 million, and the client expected the price to be $100 million above that. Because the investment bankers had expected $2.5 million under their original proposal, now that this fee was guaranteed, they could agree to the lower percentage.

Negotiating over pure percentage fees is inherently win-lose. If the fee falls from 1 percent to 0.625 percent, the client wins and the investment bankers lose. Going from 1 percent to 0.625 percent plus a floor was win-win—but only because the two parties maintained different perceptions.

The negotiations between the company for sale and its advisers were just the warm-up to the real negotiations between the company and its ultimate buyer. Here again, differing perceptions proved to be mutually beneficial.

The company's owners thought that the business was likely to continue growing at 10 percent per year, thus justifying their $500-million asking price. The buyer forecast flat growth and offered $250 million.[19] The buyer might have tried to convince the owners that their rosy scenario was all wet, but that would have been a mistake. Instead, the buyer used the difference in perceptions to help forge an agreement.

The buyer offered a mixture of cash now and delayed payments based on the company's future performance. If the company's growth was flat, the total price would be low. If the company continued to grow as it had, then the seller would get what he was asking for. The benefit of preserving the fog was that each side had a different view of the agreement: the buyer thought he was paying a little, while the owners thought they were getting a lot.[20]

Negotiating in a Fog

MISTAKES

1. **Revealing the minimum you need. You risk getting exactly that, and no more. Posturing is no solution: that risks deadlock.**
2. **Making threats explicit. Even if a threat is already implicit, making it explicit changes perceptions. There's no going back.**
3. **Trying to resolve differences of opinion between you and the other party. This is hard to do, and possibly counterproductive.**

SOLUTIONS

1. **Establish a settlement escrow to promote good-faith negotiating by both parties.**
2. **Bring in a mediator to help the other party understand the consequences of nonagreement.**
3. **Recognize what you and the other party do—and don't—have to agree on. Use differences of opinion to structure win-win deals.**