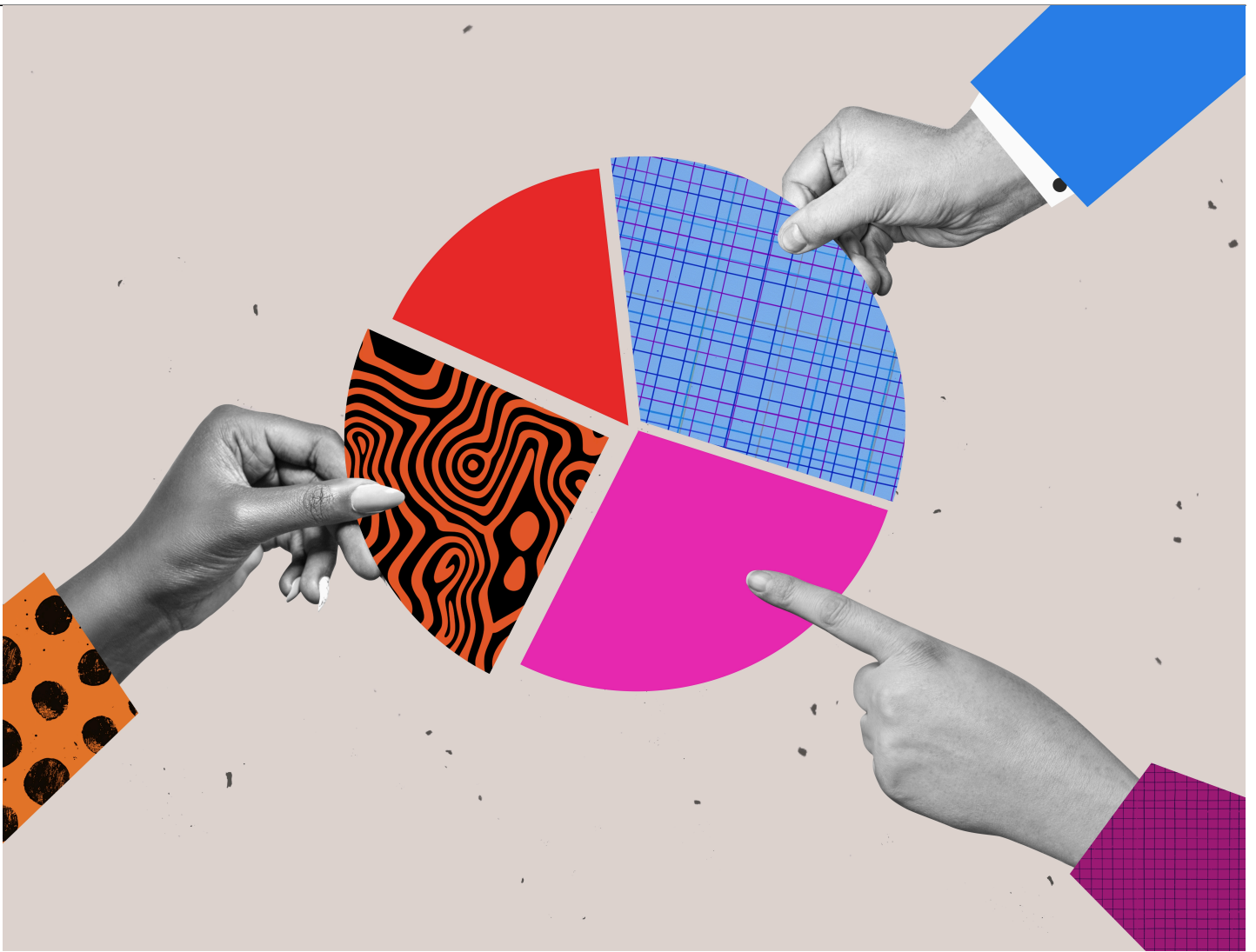




Expanding the Pie: Value Creation in Negotiations

Litigation and Dispute Resolution



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Most of us picture two parties across a table when we hear the word “negotiation.” But the concept is far broader: any interaction meant to persuade or influence someone else counts as negotiation, whether it happens in a boardroom, an email chain, or a hallway conversation. By that definition, in-house counsel negotiate constantly — with business clients, outside counsel, regulators, and each other.

Here’s an uncomfortable truth: negotiation research shows that negotiators regularly agree to deals that leave real value on the table. And lawyers are not immune; [one study](#) of over 2,000 settlements showed that lawyers frequently made decisions that led to suboptimal outcomes for their clients.

Given how often we negotiate, it’s worth digging into why this happens — and what you can do about it.

Most of us default to positional bargaining: one side opens with an extreme offer, the other counters with an equally extreme one, and they trade concessions until they land somewhere in the middle. This kind of haggling has its charms — it’s intuitive, and most of us have done it since childhood. But

it frequently produces agreements that are less valuable than what's possible, because focusing solely on haggling leaves no room to learn what the other side actually needs.

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Consider this real example: a parent passes away and leaves a beach house to two siblings, in equal shares. One sibling wants to sell immediately and split the proceeds, while the other wants to keep the house and sell it in five years. If all these parties do is haggle, the only compromise is to “split the difference” at 2.5 years or something similar.

However, if the parties can move beyond their respective demands to dig into the reasons behind their positions, the possibilities for other, more elegant options become apparent. It turns out that one sibling is worried the property's value will decline due to increasingly severe coastal storms and flooding. The other doesn't care about sale value — the house carries fond memories, and they aren't ready to part with the house.

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Based on these interests and with counsel's help, they agree to appraise the house now but postpone the sale for five years. If the value drops by then, the sibling who wanted to wait will compensate the other for the difference. This approach is more valuable than the “split the difference” solution because it better addresses both parties' real interests without leaving anyone worse off: one sibling gets more time to keep the house, and the other is protected against a decline in value. This effectively “expands the pie” by giving each sibling more value in the outcome.

Although this may seem simple in the abstract, it can be very difficult to achieve in practice, where time pressure, mistrust, and old habits can inhibit what's possible. To overcome those limitations, negotiators can try the following approaches:

- **Change assumptions.** Value creation starts with a mindset shift: from assuming the pie is fixed to assuming it can be expanded. Changing this assumption shifts the negotiator's stance from thinking about negotiation as a tug of war to thinking about it as a scavenger hunt. This helps you to stay open-minded and keep asking questions — the answers often reveal value you didn't know existed.
- **Move from positions to interests.** Positions are what we want; interests are why we want

them. Positions are the tip of the iceberg, while interests are the needs, concerns, and fears beneath the surface. Instead of sticking to positions, be prepared to explain what concerns your proposal is intended to address, and to ask the other side to articulate the same.

- **Look for sources of value.** Value can frequently be found in some common areas. Shared interests can be a good source of value. For example, both sides in negotiation usually want to minimize the costs of future disputes, creating opportunities to negotiate dispute resolution provisions that do just that. Differences can also be a powerful source of value. Differences in the parties' risk tolerance, timing preferences, or forecasts aren't obstacles — they're opportunities to create value. For example, if we disagree in our forecasts about how profitable a relationship will be, we can design contingencies that appropriately allocate resources based on what actually happens.

The next time you're staring down a stalled negotiation, resist the urge to just split the difference. Ask why the other side wants what it wants. The answer might just get both of you a bigger piece of the pie.

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[Kyle Glover](#)

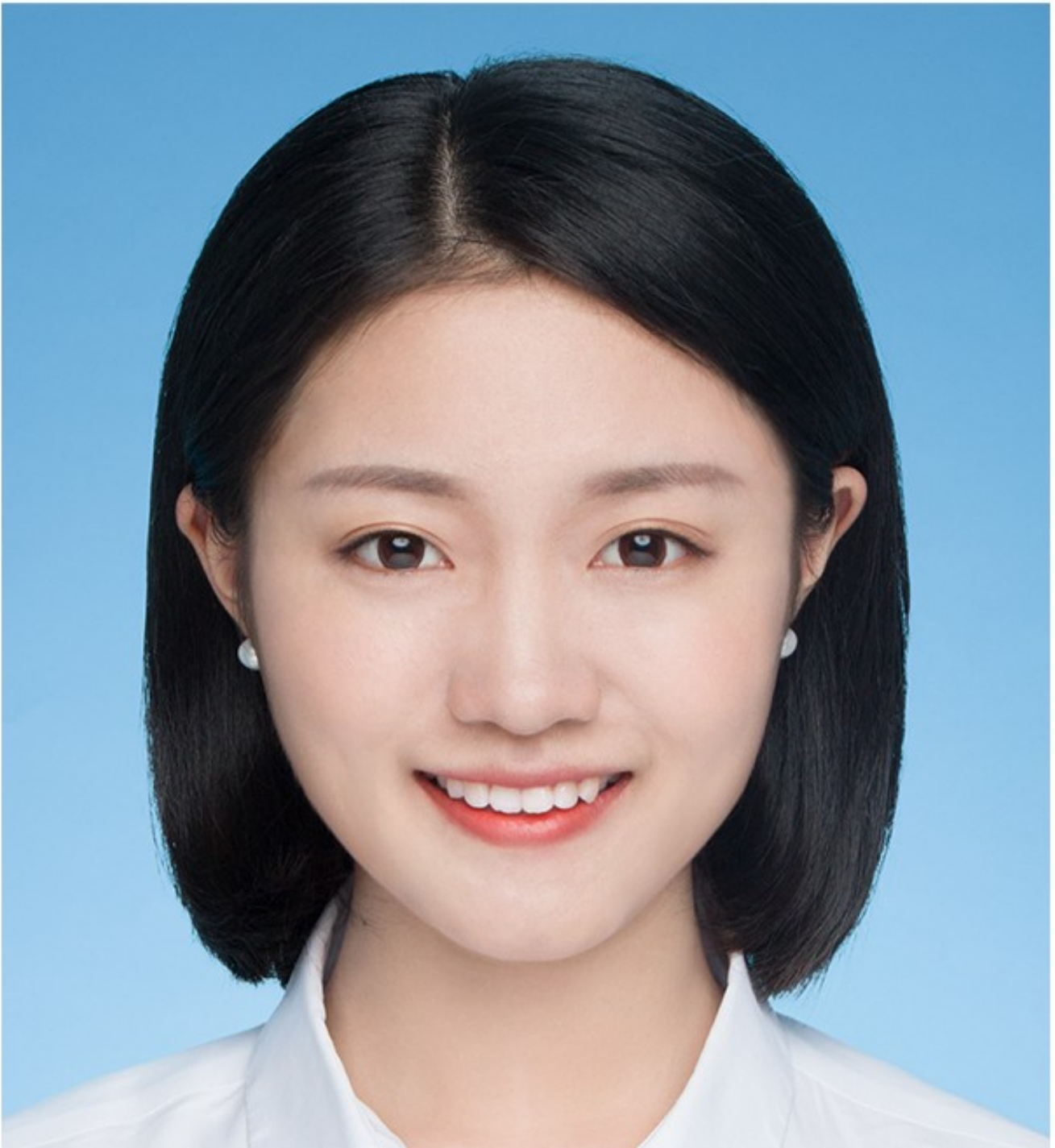


Partner

Pierce Atwood LLP

Kyle Glover is a partner at the law firm Pierce Atwood LLP. In his law practice, Glover assists clients with a wide range of matters related to the negotiation of complex technology and intellectual property transactions. In addition to his subject-matter and legal expertise, he advises his clients on negotiation strategy throughout the deal life cycle, including advising on deal set-up and structure, process, and substantive contract issues. He also typically represents his client in negotiations with counterparties to the transaction, where he employs cutting-edge negotiation techniques and best practices to resolve conflict, clarify concepts, and create value. Glover is also Adjunct Professor of Law in negotiation at Georgetown University Law Center.

Pally Huang



J.D. candidate

Columbia Law School

Pally Huang is a J.D. candidate at Columbia Law School, where she serves as a staff editor of the Columbia Journal of Gender and Law. She was a summer associate at Pierce Atwood LLP and previously served as a judicial intern for the U.S. District Court for the District of Massachusetts. Before law school, she worked for the United Nations, focusing on humanitarian response and funding. In spring 2027, she will serve as a judicial extern for the U.S. Court of Appeals for the Second Circuit.

