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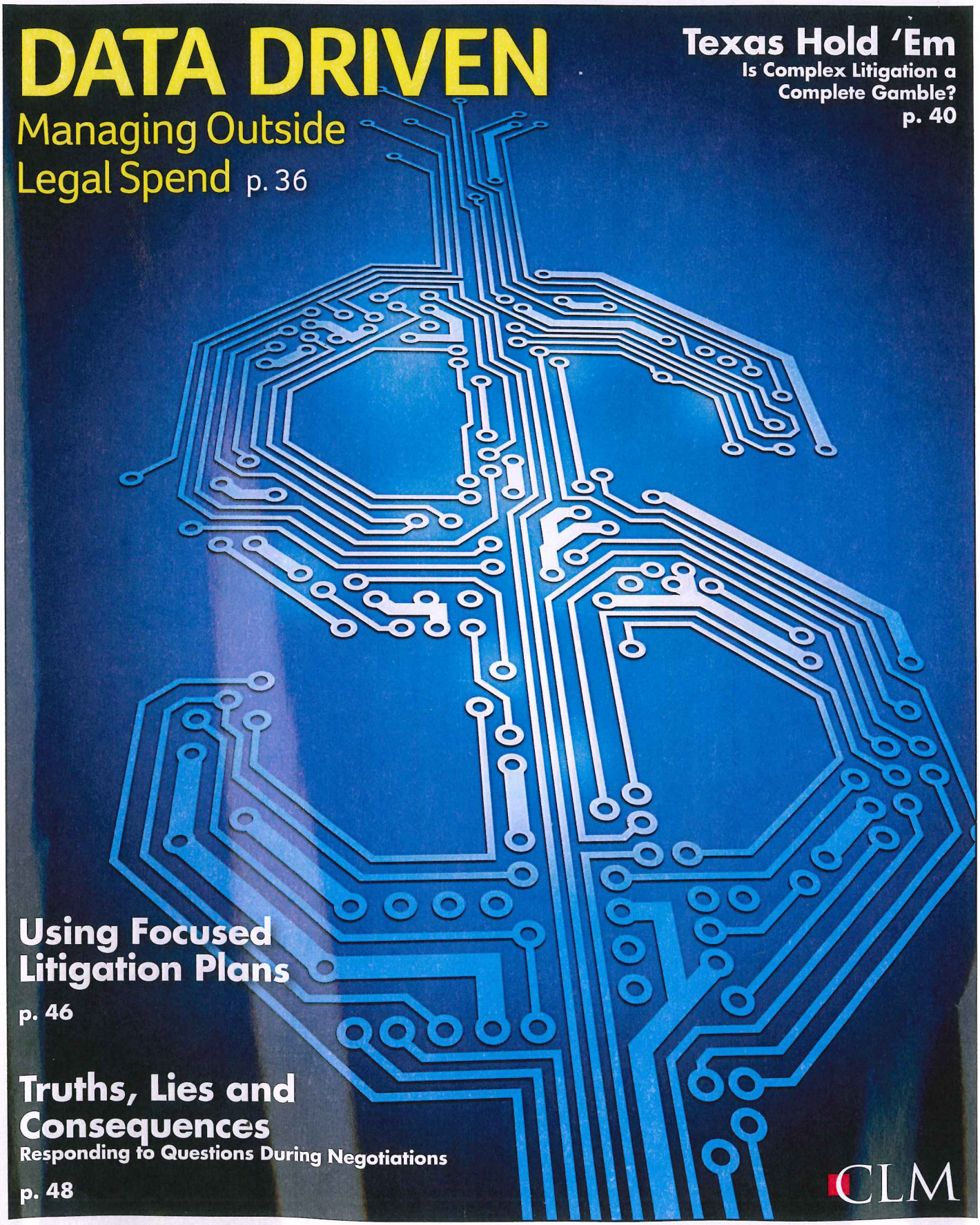

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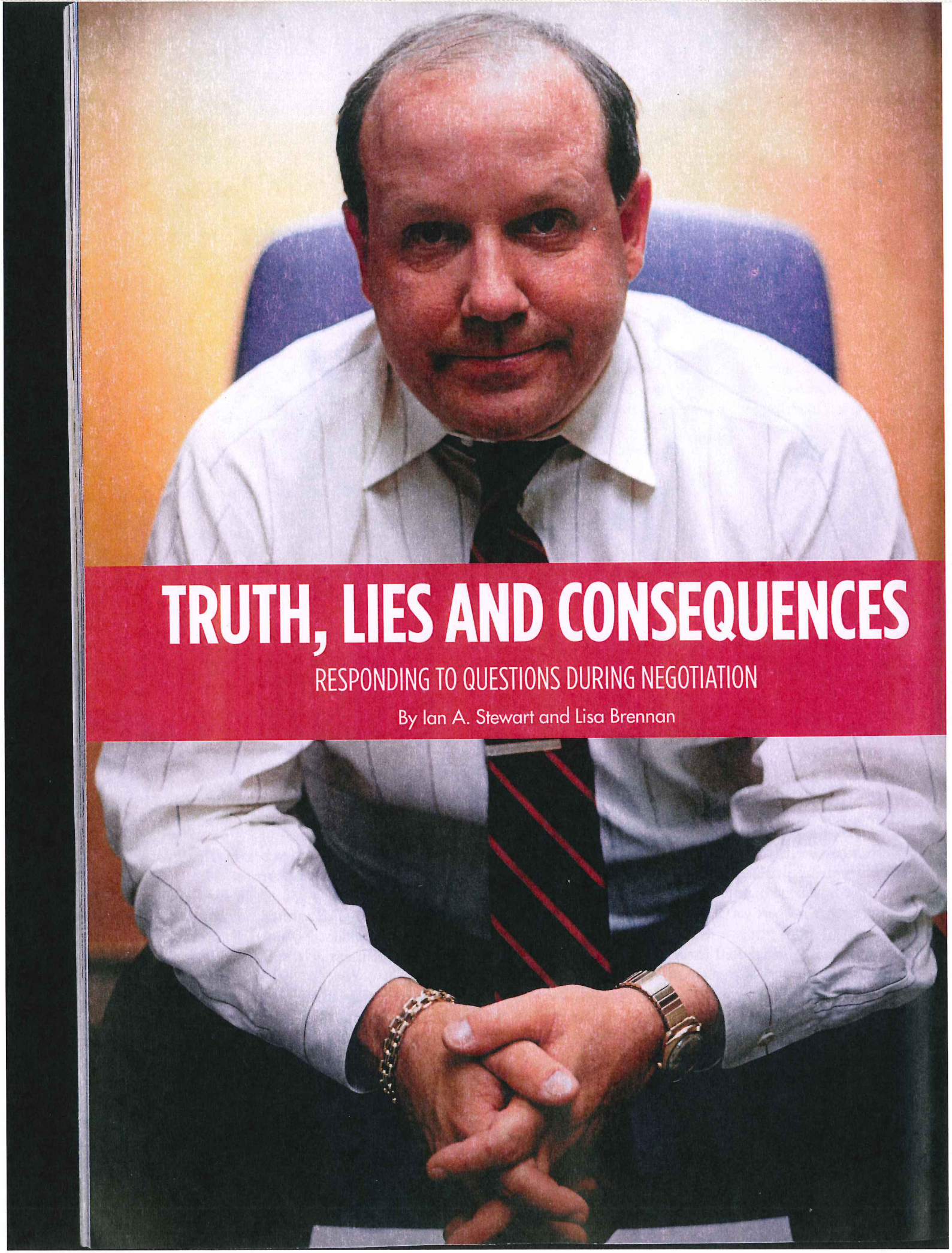

TRUTH, LIES AND CONSEQUENCES

RESPONDING TO QUESTIONS DURING NEGOTIATION

By Ian A. Stewart and Lisa Brennan

There are three ways to answer any question: give an honest answer, give a dishonest answer or evasion. We all know that parties to negotiation rarely respond to questions with a straightforward or even honest response. It is common to overstate and understate value for strategic purposes and to demand more or less than one is prepared to accept. This type of misrepresentation is allowable and even expected during negotiation. Model Rule 4.1 (Truthfulness in Statements to Others) excludes estimates of price or value, as well as a party's intentions as to an acceptable settlement. Misrepresenting material information, however, is unethical and can lead to a claim of fraud. Making a material misrepresentation will also harm one's credibility and reputation.

While all negotiations include some bluffing, exaggeration, posturing and "puffery" as an inherent part of the overall strategy, parties must distinguish these innocent statements from false statements of material fact. Topics that particularly lend themselves to material misrepresentation include available insurance, financial assets, the existence of liens, prior claims, criminal history, corporate history, and the existence or nonexistence of an incriminating document.

Block and Evade

So what is one to do when confronted by a troublesome question during negotiation? Blocking or evading the question is always preferable to lying, particularly if that lie would result in a material misrepresentation. There are many good blocking techniques. Just watch any of the Sunday morning political news shows to see masters of evasion at work. One common technique is to respond with your own question. For example, "That's an interesting question, but what I'd really like to know is…" Another technique is to answer a different question by reframing the question and answering it as you have misconstrued it. For example, "If you're asking me [insert modified question], then the answer is…" Yet another strategy is to answer the helpful part of a complex question while ignoring the problematic part. Challenging the relevance of a thorny question can also be effective. For example, "I'm not sure I understand how that makes a difference to plaintiff's case." Other techniques include over-answering the question (by responding generally to a specific question), under-answering the question (by responding specifically to a general question), ruling the question out of bounds, or controlling the agenda. For example, "We'll deal with that later, but right now I would like to discuss…" Of course, one can also simply ignore the question and just keep talking.

It is just as important to recognize when your opponent is blocking a question. Ask yourself, is your question being answered? Listen for verbal leaks that disclose the true meaning of the evasive answer. This includes equivocation: "My client is not inclined go lower," "I cannot offer more now," or "We would like to get $100,000." It can also include prioritizing: "I must have A, I really need B, and I want C." Opponents may also fudge the bottom line: "That's about as far as I can go" or "I don't have much more room."

Bluffing and Ultimatums

The use of bluffing and ultimatums during negotiation is also very common, but can be dangerous. A failed bluff or ultimatum will almost certainly leave you in a worse position because you have lost both leverage and credibility. Be prepared to follow through on your ultimatum. If you decide to bluff, consider the risks first. What is a defendant's most common failed bluff? "I don't have any more settlement authority."

Threats, Warnings and Promises

In responding to questions during negotiation, it is also helpful to recognize the varying degree of effectiveness of threats, warnings and promises. A threat is an action the communicator may take against the opponent. A warning alerts the opponent to consequences that will result from the action of others. It is important to recognize that threats are more potentially disruptive than warnings, whereas warnings are generally more credible than threats because they appear to be beyond the control of the communicator. An effective threat should be carefully communicated, proportionate and supported by the evidence.

ULTIMATELY, WHEN DECIDING HOW TO ANSWER ANY QUESTION, REMEMBER THAT TRUST IS AN ESSENTIAL ELEMENT.

A promise, on the other hand, is more likely to induce positive action by the opponent and is usually less disruptive than a threat or warning. For example, "If you do this, I will reciprocate by doing that."

Ultimately, when deciding how to answer any question, remember that trust is an essential element of any successful negotiation and that one's reputation must be protected. When negotiating with a judge or mediator, it is paramount to the negotiations at hand, as well as negotiations for future cases, that you maintain your credibility. It is certainly possible to effectively respond to troublesome questions while maintaining your own personal integrity — just keep practicing! LM

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