

# **The Art of Negotiation**

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## I. Basic Principles

- A. A negotiation involves relationships
  - 1. Relationships between the lawyers involved
  - 2. Relationships among the parties
  - 3. Relationships between the lawyers and the opposing parties

[Example: The Unexpected Tug]

- B. A negotiation is not about winning an argument
- C. People have a basic need to be treated with dignity and respect
- D. In a negotiation, feelings matter

## II. Prepare Thoroughly in Advance

- A. Fully understand your client's goals and objectives
  - 1. Does your client want an agreement?
  - 2. What does your client want to achieve?
  - 3. What does your client want to avoid?
  - 4. Is there a range of acceptable outcomes?
  - 5. Are matters of principle or personal values involved?
  - 6. Are there any non-negotiable issues?
- B. Understand as much as possible about the other party
  - 1. What are the likely goals and objectives of the other party?
  - 2. Are matters of principle or personal values involved?
  - 3. What is the emotional content of the dispute, and how are the emotional issues best addressed?

4. What can you learn on Google?

[Exercise: Koua Fong Lee / Toyota]

[Default in Texas]

[Stoned in the Spa]

C. Learn as much as you can about the other lawyer

1. What is the other lawyer's reputation from other negotiations?
2. Is the other lawyer trustworthy?
3. How does the other lawyer negotiate?
4. Where does the other lawyer fit in his or her organization?
5. What is the other lawyer's relationship with his or her client?
6. What can you learn on Google?

[Exercise: Selected Lawyers]

[The Wings of Justice]

D. Consider matters beyond the strengths and weaknesses of the parties' legal positions

1. What factors motivate the parties to reach agreement?
2. Where does your client have leverage?
3. Where does the other party have leverage?
4. How can the parties and/or the lawyers engage in a conversation about their mutual or complementary interests that could be served by a negotiated resolution?

[The Wings of Justice, again]

[Group Discussion: Other Examples]

### III. Create the Right Opportunity

- A. Timing is everything; the parties will not reach agreement unless they are ready to reach agreement
- B. Clearly identify the negotiator(s)
- C. Consider the advantages of separate settlement counsel
  - 1. They can raise the settlement issue without fear of communicating weakness
  - 2. They can help a lawsuit proceed on parallel tracks -- a litigation track and a settlement track
    - a. The litigators can focus on preparing the case for a judicial resolution (dispositive motion or trial)
    - b. Settlement counsel can be relationship builders working to find possible opportunities for a non-judicial resolution
  - 3. Separate settlement counsel can engage counsel for the other party in a dialogue without the baggage of the adversarial process
- D. Do everything possible to negotiate with the decision maker(s)
  - 1. Schedule around the availability of the decision maker(s)
  - 2. If the other lawyer tries to control the negotiations, consider suggesting a mediation with the parties and lawyers present and insist on a joint session
- E. Do whatever you can to negotiate from a position of *apparent* strength
  - 1. Remember that ambiguity and uncertainty can be turned into leverage points
  - 2. When you believe you lack leverage, bluff

[Default in Texas, again]

## IV. Be an Effective Negotiator

### A. Be yourself

1. Negotiating skills and techniques should be adapted to your own style and personality
2. Be authentic
3. Do not try to be someone else

### B. Prepare yourself mentally

1. Negotiations involve subtle balances and imbalances of power
2. Develop a ritual or practice that helps you be calm, centered and comfortable with yourself and in full possession of your own power

[Group Discussion: Examples]

3. Make sure your goals and key points are clearly in mind

### C. Put the adversarial mindset away

1. Your goal is not to persuade or convince
2. Arguing your case will usually get in the way of a resolution

### D. Embody integrity and credibility

1. Be careful that everything you say is absolutely true, and follow up on any commitments you make.
2. Never lie
3. Understand the difference between telling the truth, and telling the *whole truth* (telling the *whole truth* can be inadvisable or even unethical)
4. Choose words carefully
5. Communicate clearly
6. Promptly correct any inadvertent misstatements

E. Practice total awareness

1. Try to notice everything that happens
2. Body language, gestures, word choices and tone of voice can speak volumes
3. Avoid being so focused on a “script” that you miss what’s happening
4. Look for tips, cues and openings from the other party or from the other lawyer

F. Avoid distractions

1. Give every negotiation event, including communications about scheduling, your complete and undivided attention
2. Hold calls
3. Turn off your cell phone
4. Put your Blackberry away

G. Project confidence

1. Be self-assured without being arrogant
2. Stay comfortable with yourself and remember the other person’s behavior is not about you

H. Take the high road and stay on it

1. Treat the other parties and their lawyers with dignity and respect, no matter what happens
2. Reactive adversarial behavior is nearly always counterproductive
3. Find a way to stand your ground without responding in kind
4. Consider emulating the strategy of a marital artist, responding in the moment without being reactive

I. Avoid giving your power away to the other party or the other lawyer

1. Making friends is not your goal

2. Be respectful, but not deferential
3. Avoid becoming defensive
4. Avoid appearing nervous, impatient, distracted or unprepared
5. Keep note-taking to a minimum
6. Know when to avoid blinking or looking down
7. If you feel power shifting away from you, do something to break the shift

[A Bowl of Animal Crackers]

J. Be patient

1. Outlast the other side
2. Don't let the desire to reach agreement compromise your objectives
3. Know when, and how, to walk away; there may well be another day

[A Vulcan Squeeze with Heart]

## V. Understand and Appreciate Differences

A. People have different values, hopes, dreams, fears and motivations

1. People may respond in unexpected ways
2. Differences in values are hard to bridge

B. People have different communication styles

1. Personal differences

[Example: Concepts vs. Data]

[Example: Direct vs. Indirect]

[Example: Contextual vs. Bottom Line]

2. Cultural differences

[Group Discussion: Examples]

3. Gender-based differences

[Group Discussion: Examples]

C. People have different gifts

[Resource: [www.strengthsfinder.com](http://www.strengthsfinder.com)]

D. People have different ways of perceiving the world and making decisions

[Resource: Myers-Briggs Personality Types]

[Illustration]

[Note: Most lawyers have different profiles than most non-lawyers]

E. People have different ways of processing information

[Exercise: The Four Groups]

[Discussion: The Ways We Think]

[Illustration]

[Resource: [www.benziger.org](http://www.benziger.org)]

F. Understand how the brain works

1. Every decision a person makes has an emotional component
2. The executive function of the brain is off-line while a person is emotionally over-activated
3. Don't try to reason with a person while they are emotionally over-activated
4. The "fight or flight" response triggered by fear or a sense of danger overrides all other cognitive functions

## VI. Use Effective Negotiation Techniques

### A. Try to create rapport

1. People generally are guarded with people they don't know
2. Small talk helps people get to know each other
3. Really listen to the other party

### B. Acknowledge the other party's experience

1. There often is a difference between what happened and how a person experienced what happened
2. You can acknowledge the other party's experience and feelings about what happened without agreeing with the other party's position
  - a. "I understand"
  - b. "I think I see where you're coming from"
  - c. "That's hard"
  - d. "I'm very sorry that happened to you"

### C. Address any elephants in the room

1. They won't go away on their own
2. They will get in the way of a meaningful dialogue
3. Name them and talk about them
4. Examples include racial, cultural or gender differences relevant to the dispute, known misperceptions, and past misunderstandings

[Group Discussion: Examples]

### D. Deal with the emotions involved in the dispute

1. People become involved in disputes over things they care about
2. The way a party feels about a situation will affect the course and probably the outcome of negotiations

3. Emotional energy is real
  - a. Feelings cannot be rationalized away
  - b. You can move or transform emotional energy, help it dissipate, or pay for it

[Slimmer in Seattle]
4. You can use emotions to your advantage

[Down in the Dump]
- E. Try to take principled positions rather than positions that seem arbitrary

[Dry in Lake Elmo]
- F. Choose your key points and keep coming back to them
  1. They should have emotional as well as intellectual appeal
  2. They do not need to be limited to the legal issues involved in the dispute being negotiated

[Flats in Buffalo]

[The Duck Patrol]

[Exercise: Koua Fong Lee / Toyota]
- G. Ask questions and use the power of silence to obtain information and concessions
  1. In our culture, silence makes most people uncomfortable
  2. Asking a question and waiting for the answer will often lead the other negotiator to start talking
  3. Avoid taking the pressure off the other negotiator by starting to talk yourself
- H. Sidestepping questions is okay
  1. You are not giving a deposition
  2. You can respond to a question with a question of your own

- I. Consider using analogies and metaphors when it is appropriate to do so
  - 1. Analogies and metaphors create images that are powerful communication tools
  - 2. They can help make points in an indirect and non-confrontational manner that is less likely to provoke a defensive or adversarial reaction

[Rotten Egg Futures]

[A Game of Hangman]

- J. Overcome objections without arguing

- 1. It can be effective to acknowledge the objection while pointing out something else
  - 2. Asking a question can be helpful, such as “Have you considered this?”

- K. Techniques to break an impasse

- 1. Take a break
  - 2. Talk about something else
  - 3. Expand the conversation
  - 4. Search for common ground, keeping the goal firmly in mind

[A House in Beaumont]

- L. Don't negotiate against yourself

- M. Never reveal your bottom line unless you intend to stick to it no matter what

- 1. If you say you are making your best or final offer, and you later make a better offer, unless circumstances have fundamentally changed you will lose credibility with the other party and the other lawyer in the current negotiation and in future negotiations
  - 2. Never disclose your “maximum authority” to a settlement judge, to a mediator, or to the other lawyer; to do so is an ethical breach of the attorney-client privilege

- N. Special considerations when negotiating with bullies

1. Don't hope the bully will like you; that's not your job
2. Remain focused on your objective; don't get thrown off balance by the bully's behavior

[Maligned in Miami]

3. Look the bully in the eye and hold your ground
4. Politely, but firmly, insist on boundaries; you are not participating in a negotiation in order to take abuse

[Pummeled in Pensacola]

5. Understand the bully's vulnerabilities, and use them to your advantage when it is constructive to do so

[The Houston Hangover]

## VII. Close the Deal

- A. Be sure you have a meeting of the minds on all key points
  1. Loose ends can make a deal unravel
  2. It can be very difficult to come back later to issues that were not addressed, especially if the other party assumes they were implicitly resolved as part of the agreement
- B. Confirm the agreement in writing