

NEGOTIATION

Excerpted from *Legal Services Practice Manual: Skills*
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Negotiation is a process of exchanging proposals toward the voluntary settlement of a dispute involving two or more parties. In negotiation, the parties must *communicate* with each other, either directly or through representatives, and must *agree* to the final outcome. Usually the outcome involves a compromise for all parties, resulting from concessions made in the course of the bargaining. When lawyers act as representatives, the client's consent to the settlement is required by ethical considerations and legal rules. Negotiation differs from adjudication in several fundamental ways (See Figure 1):

Other factors which will influence the decision of whether to choose between negotiation and litigation/adjudication include timing, costs, efforts required, publicity, attitudes toward governments control and risk of total loss. In general, negotiators can attempt to control these variables to a greater extent than litigators. Of course, preliminary use of litigation, including discovery, may be necessary to establish the credibility and information to achieve client goals through negotiation.

Why study negotiation? One might guess from a survey of the legal writing on the subject that the only lawyers interested in negotiation are private practitioners who specialize in personal injury litigation. Until lately negotiation was a subject strangely absent from the rigors of traditional legal study.¹ Can we safely ignore the subject?

The primary reason to study negotiation is that lawyers spend so much of their time doing it. In the most extensive area of litigation—personal injuries cases—it is estimated that more than 95% of all insurance claims are settled through negotiation. Where court claims are most difficult and lawsuits problematic, the case in which suit is filed is the rare exception. Even litigation specialists spend a small portion of their time in the courtroom. In addition to formal settlement

negotiations, they negotiate procedural issues involved in discovery (witness interviewing, scheduling depositions, getting and giving answers to interrogatories), pretrial motions, scheduling cases for trial, setting strategy with the client and so forth.

Legal services advocates are no exception to this rule. We negotiate with caseworkers and bureaucrats to that our clients don't starve while waiting for an administrative hearing. We jawbone with the landlord because our clients can't afford the risk of losing their home. We negotiate and mediate family disputes to find a workable solution to problems which are deeper than court orders can address. We negotiate with administrators and legislators to secure better-written rules for our clients. We negotiate more than we perform any other professional activity.

The study of negotiation can enhance one's ability to achieve a successful result by increasing one's awareness of the process. If we know that a period of issue definition has to precede more substantive bargaining, we may be less hesitant to put a high demand on the table. When we learn that probing for information about the other's values and attitudes is a normal part of the negotiation process, we will listen and seek what we need to know to improve settlements. When we learn that consecutive concessions are usually perceived as a sign of weakness, we may become clearer about our duty to our client to insist on concessions from the other side.

ADJUDICATION	NEGOTIATION
<ol style="list-style-type: none"> 1. <i>Third parties control the process and outcome.</i> 2. <i>Parties disagree on facts, legal or social norms, or values.</i> 3. <i>Resolution is based on relatively inflexible principles and rules.</i> 4. <i>Outcome is limited to an either/ or decision.</i> 5. <i>Adjudication is less suited to sorting out the complexities of a long-term relationship which changes frequently.</i> 6. <i>Adjudication is rule-applying.</i> 7. <i>Adjudication is retrospective.</i> 8. <i>Adjudication is objective, based on acts and behavior regardless of person.</i> <p><i>Figure 1</i></p>	<ol style="list-style-type: none"> 1. <i>Parties control the process and outcome.</i> 2. <i>Parties have conflicting interests, but are likely to agree on values and facts.</i> 3. <i>Resolution is flexible and pragmatic.</i> 4. <i>Settlement involves a wide spectrum of choices.</i> 5. <i>Negotiation occurs more frequently when the dispute involves a complex, multifactored relationship of long duration, a “bilateral monopoly” such as husband- wife, case worker-client, landlord-tenant.</i> 6. <i>Negotiation is rule-making.</i> 7. <i>Negotiation is prospective.</i> 8. <i>Negotiation centers on the person and is subjective.</i>

This text presents principles and techniques about negotiation, including tactics, strategies and examples. A separate booklet entitled “Negotiation in Action” is a transcript of a landlord-tenant negotiation with comments to illustrate the application of the textual materials to legal services practice. Our sources of information for the texts include personal experience and the writing of lawyers, social scientists and other practitioners of negotiation. Specific topics will include:

- Skills of successful legal negotiators
- Negotiation terminology
- Elements of negotiation
- Typical stages of negotiation
- Verbal and nonverbal behavior
- Agenda-setting, location, opening offers threats, commitments and other strategies

SKILLS OF EFFECTIVE LAWYER-NEGOTIATORS

As with trial practice and appellate advocacy, there are skills which distinguish the effective

from the ineffective negotiator. Once we identify these skills, we can develop a program of self-improvement. Recent, ground-breaking research gives us the basis for describing a few characteristics of effective lawyer-negotiators. We can infer some of the requisite skills from the characteristics.

Professor Gerald. R. Williams of Brigham Young University conducted the study. He interviewed several hundred randomly-selected lawyers in Denver and Phoenix, asking them to call to mind a lawyer whom they considered to be an effective negotiator. The criterion was to think of someone they would choose to represent them in a matter involving litigation and complex negotiations. The respondents then rated this person in a questionnaire of III items. Next, half of the respondents were asked to answer the same questions with an average negotiator in mind; the other half, an ineffective negotiator.

Cooperative v. Aggressive Styles

The all-over results showed two distinctive styles of legal negotiators. The first is the “Cooper-

ative” type who was seen to be trustworthy, ethical, personable, sincere, courteous, forthright, tactful and fair. The other type earned the label “aggressive-combative” and was seen as ambitious, forceful, clever, attacking, active, demanding and aware of the other negotiator’s characteristics. Figure 2 shows the distribution of both types generally and among effective and ineffective negotiators.

Sixty-five percent of the lawyers described in the survey fit the cooperative classification; thirty-five percent, the aggressive classification. These figures represent the distribution of such types in their communities. However, we see from the chart that cooperative lawyers are overrepresented in the ranks of those classified as effective (78%, compared to only 65% of the total). On the other hand, aggressive-combative lawyers constitute 35% of the sample but only 22% of the effective negotiators, and are overrepresented among the ineffective negotiators, consisting 68% of that group—three times more than their 22% in the sample. Cooperative attorneys constituted only 32% of the ineffective negotiators—about half of their 65% in the sample.

We conclude that: a) attorneys with a cooperative style are more likely to be seen as effective than attorneys with an aggressive style; and b) attorneys with an aggressive style can be effective if they develop other characteristics. We do not recommend that legal services lawyers attempt personality changes to alter the dominant, forceful or clever aspects of their personalities. Rather we suggest that you concentrate on the following qualities:

Characteristics of All Effective Negotiators

All effective negotiators, whether aggressive or cooperative, were found to be:

- experienced
- skillful in reading cues
- perceptive
- astute at knowing needs of O*
- analytical
- prepared
- realistic
- honest

- rational
- reasonable
- convincing
- intelligent
- self-controlled
- effective trial attorney

* Throughout the manual, O will stand for the “other side.”

We are well-advised to develop these qualities.

	Cooperatives	Aggressives
<i>Percent of study</i>	65%	35%
<i>Percent of effectiveness</i>	78%	22%
<i>Percent of ineffectiveness</i>	32%	68%

Figure 2

Experience comes with time. Yet, we can increase our experience daily: seek opportunities to negotiate. Observe how others negotiate in many daily experiences, like returning goods to a store, setting work schedules, and dividing labor in the office or home. In your case, don’t negotiate just to get the experience. However, when it is to your client’s advantage to negotiate, don’t hesitate. In significant cases, improve our client-representation by teaming with an experienced negotiator. You’ll learn and the client will benefit. Recording negotiations—or at least taking time to analyze them afterwards—will enhance your experience.

Analytical Skills. Learning to be perceptive, rational, realistic, reasonable and intelligent is not easy; it takes practice. Develop a system to prepare for negotiations as you would for a trial. Identify information needs regarding the case and your assessment of O’s position. Write out your client’s target points, resistance points, potential concessions, commitment points and leverage. Compare it to your assessment of O’s positions. Plan your offers and concession and the reasons for each. Avoid “negotiating games” such as Split the Difference, Washout (dismissing both parties’ claims) and Even numbers (“Because you conceded \$1000, I’ll concede \$100.”). Itemize the

value of your case in relation to other recoveries in the jurisdiction. Tie all concessions to reasons. **Skill in reading cues.** This skill also improves with practice and attention. Study your opponent's mannerisms. Note differences from one negotiation to the next. Identify nervous mannerisms which may alert you to weak points. Test whether his commitments are credible or whether he can be moved to further concessions. Pay attention to concession patterns and chart them out, if possible, during a break of after the session. Look for signs that your arguments are persuasive. BE QUIET. LISTEN.

Getting to know the needs of O is useful in case settlements, indispensable in negotiations involving future relationships. Preliminary research among other lawyers and community members may produce some of this "nonlegal" information. Research both the lawyer and the client. Try to read behind the O's demands to see what O's priorities are. You may be able to offer an alternative which meets O's needs more cheaply. ("My client will make the repairs in exchange for a rent deduction and a longterm lease," or "My client will drop the fair hearing request if you and I can review his file and make all the necessary adjustments."). The need of the caseworker to avoid hearings and the failure of the landlord to do the repairs are weaknesses in negotiation. Your ability to find these needs will give you leverages.

Honesty and self-control. These are not mutually exclusive characteristics. Don't be honest to the point of disclosing your resistance point. You need to develop self-control to guard against damaging revelations of client confidences or wishes. The skillful negotiator maintains an honest image by developing ways to avoid lies without appearing evasive or deceptive ("You and I know that good negotiators never reveal their authority," or "Sure, I'll tell you my authority, then you tell me yours," with a wink to reveal that you know the game). Self-controlled behavior also includes knowledge of when your ego might get involved and the ability to control your emotions. This may mean expressing your anger to lend credibility to a point. It also means avoiding the compulsive anger which will lead to escalation and impasse.

Preparedness and effectiveness. Finally, the skills of being *prepared* and being an *effective trial attorney* are a composite of the above skills. To be rational and realistic, you need to organize your case, know the facts and law, develop a trial notebook and anticipate the problems and strategies that will arise at trial. Realistic attention to the likely arguments of O or the judge or jury will allow you to be convincing. You can test your realism and persuasiveness by rehearsing a trial or a negotiation with a colleague or friend. And you'll be building experience at the same time.

Characteristics of Ineffective Negotiators

Ineffective-cooperative negotiators were described as courteous, honest, friendly, cooperative, trustful, forthright, patient, adaptable, obliging and forgiving. Unlike their effective-cooperative counterparts, they are not skillful at reading cues, effective at trials, using threats, being reasonable, prepared or knowing the needs of O. The ineffective-cooperative negotiator seems pliant, gullible and lacking in either traditional legal skills or preparation. The ineffective-aggressive legal negotiators don't learn the needs of O, withhold information, are rigid, unreasonable, uncooperative, use "take it or leave it" tactics and don't save the face of the other attorney. In addition, lawyers describe this negotiator as irritating, hostile, argumentative, loud and impatient. Like the effective-aggressive counterpart, the ineffective-aggressive lawyer is attacking, aggressive and uses high opening demands. However, the ineffective negotiator is seen as a bluffer, while the effective legal negotiator conveys an image of being convincing, realistic and rational despite making high opening demands.

The crucial skill in this area seems to be the ability to make high demands which O will see as realistic. Relating the case to the probabilities of success, likely damage awards or injunctive rulings will improve your skills in this area. Use of arbitrary pie-in-the-sky figures from your pleadings will probably be seen as a sign of bluffing and inexperience. When you are not confident of the value of your case, try to induce

O to make the first offer so that you get some idea of the bargaining range. Then respond with a high offer if O's offer is in the medium-to-high range of your expectations. If you are confident of your evaluation, with reasons to support your high demand, take the initiative and set the tone for convincing O of your assessment.

All effective negotiators had *low* ratings on the following qualities:

- rude
- sarcastic
- timid
- intolerant
- complaining
- reckless
- spineless
- hostile

The effective-cooperative were very low on timidity, complaining and spinelessness. The effective-aggressive were low on rudeness, hostility, sarcasm and intolerance. Thus effective-aggressive are more polite and effective-cooperatives more forceful than their labels suggest.

Rudeness, hostility, and intolerance. Neither effective type practices incivility. Remember that our *rudeness, hostility and intolerance* ultimately disadvantage our clients. Debate and argumentation are important parts of negotiation. We want to convince O that our client is entitled to a good settlement. We don't expect O to agree with our principles or to abandon his or her role as advocate for a client. We do well in most cases to save our *sarcasm* for the post-mortem with friends. Good manners do produce good results.

Timidity and spinelessness also will disadvantage our clients. As professionals, we have a duty to present our client's case as persuasively as possible. This will require active, positive assertions about why our client can win at trial. Timidity in negotiations will signal O that you will be timid—and probably ineffective—at trial. Firm resolve is all that is needed. Blustery macho aggressiveness will probably be seen as bluffing.

Settlement/breakdown ratios. Williams also studied negotiations of specific cases and was able to determine the effects of different negotiation styles on the rate of settlements and breakdowns. The results are shown in Figure 3.

The figures suggest that effectiveness does not just relate to success in achieving a settlement. The performance of the aggressive-ineffective shows that a hidden factor of quality of settlement underlies the various categories. One wonders about the relatively high settlement rate for those arrogant s.o.b.s in the aggressive-ineffective group as compared to the low settlement rate for those trustful Casper Milqtoasts in the cooperative-ineffective group. Williams speculates, persuasively, that the former cave in when their bluffs are called and the latter are so badly outmaneuvered in negotiations that they prefer to go to trial rather than accept a paltry settlement.

Mixing the Styles in Negotiations

Thus far, we've looked at styles and skills in isolation. In practice, our styles and skills interact with that of the other negotiator. What happens, for example, in a negotiation between an effective-cooperative and an effective-aggressive? Williams also studied videotapes of various negotiations. He concluded that an effective-cooperative is subject to exploitation by an effective-aggressive adversary who refuses to make concessions. The reason is that the effective-cooperative will continue to make concessions and establish a cooperative basis for settlement even after O has refused to reciprocate. To counteract this tendency, the cooperative negotiator should insist on reciprocal concessions and risk impasse if the other refuses to cooperate. The need to anticipate the mixture of negotiation styles suggests another piece of advice. Know your adversary. Try to see what category of the Williams study fits. How does that compare with your own style? Keep files on lawyers with whom the office frequently negotiates.

Type of Negotiator	Settlement Rate	Breakdown Rate
<i>Cooperative-Effective</i>	84%	16%
<i>Aggressive-Effective</i>	67%	33%
<i>Cooperative-Average</i>	62%	38%
<i>Aggressive-Average</i>	50%	50%
<i>Cooperative-Ineffective</i>	36%	64%
<i>Aggressive-Ineffective</i>	67%	33%
Figure 3		

Insurance lawyers keep files on the plaintiff-personal injury bar. Our client deserves no less systematic knowledge of adversaries. We repeatedly face the same lawyers representing landlords, collection agencies, welfare departments and public institutions.

Ultimately, you will need to accumulate your own knowledge as the result of your “experiments of one.” To maximize the benefits of your experience, note your observations after each negotiation and keep a file, listing techniques that you want to try in the future.

NEGOTIATING TERMINOLOGY

Negotiation has a specialized vocabulary which in large part reveals the structure of negotiation and helps to define key concepts which we will use.

The target point. This is a party’s negotiating goal. For example, a plaintiff negotiating the settlement of a divorce case may want support payments of \$100 per child per month. The defendant may want to limit support payments to \$30 per child per month.

The resistance point. Both parties enter negotiation with an understanding that they may be unlikely to achieve their goals. They come

prepared to compromise. The least acceptable solution for a party—the bottom line—is the *resistance point*. A bargainer’s resistance point can shift upward or downward during the negotiation. Indeed much of the process involves convincing O that your resistance point is much higher than it is and that O should adjust his or her resistance point to meet yours. In our example, plaintiff may see \$50 per child per month as a minimum acceptable figure based on personal needs and defendant’s ability to pay. Defendant may set a “bottom line” of \$70 per month. If we put this on a chart, it looks like this (assuming one child).

The settlement range is the overlap, if any, between the resistance points; in this case, between \$50 and \$70 per month. Unless the resistance points change, any settlement will fall between \$50 and \$70.

In some cases, of course, there may not be a settlement range. The threat of deadlock may then stimulate the parties to modify their expectations.

Settlement Range					
<i>P receives</i>	\$100	\$70	\$50	\$30	0
<i>D pays</i>					
<i>\$ per month</i>					
	<i>Target Point</i>	<i>Resistance Point</i>	<i>Resistance Point</i>	<i>Target Point</i>	

The bargaining range describes the points within which the parties while exchange proposals. Assume that Plaintiff opens with demand for \$120 per month, hoping for \$100 (target point). The bargaining range then is between \$20 and \$120, with realistic discussion more likely in the \$100-\$30 which represents the target points of the parties.

A concession is an offer by a party to settle the dispute on terms more favorable to O than the previous offer. Generally, O has the option of accepting the offer, rejecting it entirely, or proposing an alternative which, in turn, includes a concession from O.

A commitment point is a concession which is reinforced by the negotiator's firm resolve to give no further concessions. To demonstrate the credibility of the commitment, the negotiator may link it to a clear principle, to a pledge of personal reputation, to a threat of deadlock or escalation of the dispute, or some other evidence of finality. Referring to our previous illustration, suppose P says: "I can't feed and clothe the child on less than \$60 per month." P express commitment to the principle that feeding and clothing the children is the minimum acceptable solution. D can still satisfy the principle by offering to provide \$40 per month and clothe the children as necessary. In another scenario, D might say, "I'd rather go to jail than pay more than \$50 a month." P could still counter with a proposal that D pay \$50 and provide some food stamps. However, D could not agree to pay \$60 a month without losing face and credibility.

The commitment point differs from the resistance point. A negotiator can make a commitment at any point which is credible. Generally, skilled negotiators make commitments close to their target points. Of course, if pressed to that point, the negotiator will make a commitment not to exceed the resistance point ("I don't have any authority to pay more than \$70"; or "I'm at the limit.")

Leverage is the power of a party to induce a concession from O. Use of leverage may include persuasion based on principle ("It's only fair that we contribute the same proportion of our income to support the children."). It may also include threats ("You can quit your job, but I'll press for the court to hold you in contempt.") or promises ("I'll expand your visitation schedule if you pay \$80 a month.").

A bargaining tactic is an action taken at a specific time in the bargaining process. In contrast, a bargaining strategy is a thought-out series of tactics to be used throughout the process. For example, the plaintiff may use the \$120 opening demand as a tactic supporting an overall

strategy of making a high initial demand and allowing a few small concessions to reach a target point of \$100 per month.

Simple-term costs need to be distinguished in the negotiating context. Fixed costs refer to disadvantages already incurred or unavoidable. Future costs, of course, have not been incurred. Once a deposition has been held, or interrogatories answered, the cost becomes a fixed investment in the case. The threat of extensive discovery or trial implies potential saving if settlement is accomplished. Once the costs become fixed, they may be added to the resistance and target points of the parties, reducing or eliminating the settlement range. Costs are not limited to financial expenses. They may include time, reputation, power, well-being and other factors.

ELEMENTS AND STAGES OF NEGOTIATION

Case Settlements versus Continuing Relationships

Legal services lawyers face at least two distinct types of negotiation. Case-settlement negotiation is the most familiar, involving the resolution of a dispute which arose in the past and is unlikely to repeat itself. Landlord-tenant, consumer, employment-discrimination, and domestic relations cases often fit this definition. In other cases, the parties have a continuing relationship, and the focus of the negotiation is to obtain an agreement to govern this future relationship. Examples include negotiation of custody, visitation and child support in the domestic-relations area; negotiation for the purchase of house under land contract; negotiation of the terms of a consent order to govern the treatment conditions in a state institution; and negotiation with the government on behalf of a community organization seeking a voice in allocation of community development funds. The differences parallel those between negotiation and adjudication:

Case Settlement	Continuing Relationships
<i>1. The time orientation is in the past.</i>	<i>1. The parties look to a future event or relationship.</i>
<i>2. The facts are fixed by past events.</i>	<i>2. The parties can create new facts to meet their needs (e.g., an escrow account, a committee, a bond).</i>
<i>3. The law is given and can be applied to the facts.</i>	<i>3. The parties define their own rules and write them into the settlement document (contract, deed, order).</i>
<i>4. The parties bargain to divide a fixed sum (often called “share bargaining” or “zero-sum game”).</i>	<i>4. The parties engage in problem-solving to identify a result which will maximize benefits to each.</i>
<i>5. Rules are limited to the legal arena unless both agree to expand.</i>	<i>5. Rules include economic, social, legal, and political norms.</i>

Strategies and tactics in these two types of negotiation will differ dramatically. In case settlement we expect bluffing and puffing; in continuing relationships, we expect relating and creating.

The Elements of Negotiation

Experts express a remarkably similar view of the negotiation process, whether their expertise originates in legal negotiations, diplomacy, business, labor-management relationships, anthropological study of tribal councils or legal-services practice. The common elements of negotiation are 1) information-gathering and problem-identification; 2) explorations of alternatives, including formulas to resolve the issues; and 3) final exchanges and agreement. All lawyers tend to be aware of the latter two elements. However, those recently admitted to the bar are only dimly aware of the information-gathering aspects of negotiation.

Elements 1 & 2: Information-Gathering & Problem-Identification

The major task in information-gathering is to identify the type of information sought. New lawyers tend to think of information as the facts of a case. This perception ignores the

negotiation process itself. Frequently, the most important facts to a negotiator are O’s values, attitudes, beliefs and evaluation of the case at hand.

A skilled negotiator seeks information about O’s resistance point, knowing at the same time that O seeks information about his resistance point and that each of them must try to hide that information from the other. Thus, direct questions such as “what does your client want from this case?” will likely generate distorted, misleading information in a case settlement negotiation.

Information-gathering proceeds by cues, inferences, body language, verbal and nonverbal leaks, offers, reactions to offers, concession patterns and credibility assessments. For example, a negotiator may discover more useful information from the size of O’s file or the organization of O’s office than from any statement O makes about his eagerness to go to trial. A threat to go to trial while staring off to one side or wringing hands may communicate O’s true feelings about going to trial. Information about trial preparation may flow naturally from questions about the possible length of the trial, the number of witnesses, or

the stipulation sought. This information in turn permits inferences about O's view of the value, costs and complexity of the case. Because offers, counteroffers, reactions to offers and concession patterns go to the heart of the exchange process in negotiation, they tend to be compact sources of information.

The early stages of information-gathering and exchange may cover a period of months and even years in legal negotiations, depending on the state of the court's docket and the needs of the parties. Sooner or later, one of the parties becomes satisfied with the information level and formulates an opening demand, thus moving the information-gathering process to the point of problem identification. When one party makes the initial offer, the other knows whether the offer is within his or her resistance point and thus whether a settlement is possible within the apparent bargaining range. O is likely to respond with an exaggerated offer, above or below the target point. The parties experience a need to exchange offers which competes with their need to camouflage data. Failure to make a demand on a given issue will risk loss of a claim because of unwritten rules which discourage escalation of demands during bargaining or tacking-on of demands at the conclusion.

Because their early stage services the double function of exchange of information and presentation of issues for the agenda, distortion of information, especially exaggeration, will be at its peak. This phase frequently involves "oratorical fireworks," as the negotiators put on a show for each other of their constituents.

Element 3: Search for Alternatives

A third major element of negotiation involves the search for alternative compromise solutions. The parties explore the settlement range in search of potential concessions. In a multi-issue negotiation, the search may include tactics such as pairing demands to test the possibility of mutual concessions ("We'd consider more rent if you'd agree to repair the roof and toilet."). The parties continue to seek information and to focus on persuading the other to reassess the case and lower his or her target point and resistance point. Exchanges of offers and

concessions are the primary sources of information. Threats and promises may also play a major role.

Element 4: Bargaining to Settlement or Impasse. The fourth major element of negotiation consists of final bargaining to an agreement or impasse. The parties test other's limits, searching for the bottom line. Use of threats and other leverage is likely at this stage as the parties face the prospect of lowering their sights. Lawyer-advocates should probe, test and use tactics designed to reach a settlement as close as possible to O's resistance point. They should not satisfy themselves with achieving a settlement barely above their own resistance point. The measure of competence is whether they achieved the best client goal was barely attained.

When both sides have pushed their position to its limit and impasse seems likely, the parties may arbitrarily compromise their position with "intrinsic magnetism,"⁵ using formulas such as splitting the difference and rounding off, or using a mathematical formula (multiply probable amount of recovery by probability of success; 3 times special damages, etc). When other possibilities have been exhausted, such formulas provide an alternative to impasse. When other possibilities have not been explored, an offer to split the difference suggests that O has no principled basis for the offer, is not prepared to relate settlement to the merits of the case, would gain an advantage from splitting the difference, or all of the above. Between the lines of such an offer, one can frequently read a willingness to make further concessions because of the lack of a firm commitment inherent in such an arbitrary formula.

Four Stages of Legal Negotiations

In a major study of legal negotiations, Williams identifies four chronological stages. *The first stage encompasses "orientation and positioning."* The negotiators get accustomed to each other's style, personality and method of negotiation. During this stage, they also make initial offers which establish a bargaining position which is either "maximilist" (high

opening demand, perhaps even unreasonable), “equitable” (fair to all parties), or “integrative” (indicating a willingness to explore for mutually advantageous alternatives).

In case settlement negotiations, this stage can last for months or years. Only one-sixth of the cases in Williams’ study were settled more than 90 days before trial; another sixth within 30 days and 90 days of trial; the remaining two-thirds within the last 30 days before trial.

The second stage is called “argumentation.” The negotiators probe for information about the other’s real position, make at least one concession in their initial offer, and try to conceal their resistance point. Uncertainty and the attempts of the negotiators to cope with the limits of information characterize this stage.

The third stage is called “emergence and crisis.” A deadline approaches neither side wishes to make further concessions. Final demands are stated. Williams observes that creative, successful negotiators interpret the “take it or leave it” demand as meaning “take it or leave it or come up with something else.” In this way, the lawyers search for a formula acceptable to them and their clients.

Agreement or final breakdown comprises the fourth stage. In agreements, negotiators may still need to formalize the language and work out minor details. Some “oh, by the ways” may be added at this stage, if truly minor. Some unscrupulous lawyers will attempt to pressure agreement on some major concessions after this point by having a client reject the agreement, feigning a mistake, or other devices. The psychological momentum is powerful. Faced with such a tactic, the lawyer should resist acquiescence and alert other legal services that the adversary uses such tactics.

We use the term “final breakdown” loosely. The case ends only after the opportunity to appeal a judgment has passed and the judgment has been satisfied. Given our clients’ limited ability to pay, we should not be reluctant to attempt to negotiate away substantial portions of money judgments or to seek a favorable payment plan.

SUMMARY

Skills of Effective Lawyer-Negotiators

A lawyer with a cooperative style (trustworthy, firm, courteous, ethical) is more likely to be evaluated by other lawyers as an effective negotiator than a lawyer with an aggressive style (forceful, clever, attacking, ambitious). Conversely, aggressive lawyers are far more likely to be evaluated as ineffective.

Some lawyers with aggressive styles are effective. All effective negotiators are experienced, have well-developed analytical skills, learn the needs of others, are effective trial attorneys and are persuasive, honest, self-controlled and skillful at reading cues.

Ineffective negotiators with an aggressive style are judged to be rigid, hostile, insensitive to face-saving needs of O, and users of take-it-or-leave-it tactics and bluffs. Ineffective negotiators with a cooperative style are judged to be friendly, obliging, patient, trustful and adaptable.

Effective negotiators of both styles are *not* rude, timid, complaining, hostile, sarcastic, intolerant, spineless or reckless.

Cooperative-effective lawyers have the highest settlement rate (84%); cooperative-ineffectives, the lowest (36%).

Structure, Elements, and Stages of Negotiation

Case Settlement negotiations involve more competitive forms of bargaining (share bargaining) than do negotiations in which continuing relationships among the parties are involved. In the latter situations, the interests of all parties may be served by mutual *problem-solving* based on shared information, exploration of creative alternatives and trust.

There are four essential elements of most negotiations:

1. *Information-Gathering.* Information needs to include facts about O’s assessment of the case or

issue, including estimates of O's target and resistance points. Information tends to be distorted.

2. *Problem Identification.* From the information and from initial offers and demands, the parties get a picture of the bargaining range and the gap which needs to be covered. "Blue sky bargaining" tends to obscure the nature of the problem.

3. *Search for Alternatives.* This function is served either by offers, concessions and paired demands or by joint exploration for creative alternatives.

4. *Bargaining to Settlement or Impasse.* Tactics are designed to test the limits of alternative solutions. A formula for final compromise needs to be identified.

In *legal negotiations*, the following *stages* have been observed:

1. *Orientation and Positioning.* A "Getting to Know You" stage which can last up to about 30 days before trial.

2. *Argumentation.* Initial offers and probes for information dominate this stage.

3. *Emergence and Crisis.* All parties communicate a "final" demand which the skillful negotiator takes to mean "take-it-or-leave-it or come up with something new."

4. *Agreement or Breakdown.*

The Environment for Negotiation

Location. Generally, there is a home court advantage; however, the non-host has opportunities to gather information from the host. Thus, during information-gathering early stages, the visitor may have an advantage.

Audience. Presence of a client often restricts concession-making. Client-participation in community group negotiations involving political-social issues may be necessary and advantageous to the group and the lawyer. In

these cases, careful preparation of strategy and tactics is crucial.

Medium of Communication. Casualness, including telephone use, communicates that a case is routine. Face-to-face communication produces more cooperation. Telephone communication is adequate. Writing is inferior.

Negotiation Mindset. Lawyers can choose among cooperative, competitive or individualistic atmospheres and try to communicate their personal mindsets to influence O's mindset.

Time Limits. Time pressure such as a trial date facilitates concession-making, and favors the party under least pressure. Creating time pressure by imposing deadlines may be necessary in some cases.

Multiple Issues and Parties. Increasing the number of parties geometrically increases communication problems. With multiple issues and parties, a negotiator should focus on aspects which are certain such as the willingness of O to make further concessions. Setting an explicit agenda with easy, general issues coming first is a good tactic. Face-saving issues may need to be addressed first. Expect partial settlements.

Ingroup Bargaining. Important concessions maybe made in group strategy meetings. Full expression in group planning meetings may be essential to successful team negotiations. Steps should be taken to avoid *Groupthink*—the suppression of dissent by an insecure group.

Agenda-setting. Whether implicit or explicit, every negotiation has an agenda which is typically limited to items raised early in the discussion. Formal agendas usually include demands which have built-in concessions.

Communication and Information-Gathering Strategies.

Direct Verbal Approaches. Questions and listening are the best approaches to acquiring information. Distortions in information exchange may limit the value of open-ended questions. Variations in the form of questions,

use of challenges, outside investigation and bargaining for exchange of information all are useful tactics. “Passive inscrutability” has also proved to be effective.

Nonverbal Behavior and Deception. Some negotiators lie. Sometimes they signal their lies through body and voice mannerisms. The face is the best nonverbal sender. Hands are next; legs/feet are worst. Incongruence between words and movements often signals deception.

Protecting Your Data. There are many devices for responding to direct questions without revealing private, strategic information. These responses include lies, neutralizing with an equivalent question, denial, changing the question, giving an incomplete answer, giving the impression of completeness, changing the subject and confronting the subject.

Bargaining Strategies and Tactics. There are five general types of strategies which should be considered in legal negotiations:

1. **“Tough”.** This includes a high initial demand, no concessions unless pressed, small concessions, high target and resistance points and a generally unyielding approach (may be necessary against a touch O).
2. **“Soft”.** To reduce tension and threat of stalemate, a negotiator can take small, unilateral steps which do not diminish power and which demand reciprocation, thereby promoting a Gradual Reduction in Tension (GRIT). (Probably useful in community change situations and other negotiations in which the parties expect to have a continuing relationship.)
3. **“Moderate tough”.** Use high but realistic opening demands, yield concessions only when forced by O. Tie concessions to reasoned commitment points (recommended foremost case settlement negotiations).
4. **“Fair”.** Propose a result fair to both parties and expect (or insist on) acceptance. Generally not considered good faith bargaining. Danger-

ous to use around lawyers. (Not recommended, except perhaps with client consent if O is unrepresented and has little bargaining power.)

5. **“Needs”.** Establish a supportive climate, exchange facts and seek creative, mutually beneficial solutions. Useful if the pie is not fixed; parties are skillful and change is beneficial for both.

In general, tough strategies produce higher case settlements and more deadlocks than the other strategies.

Persuasion and Influence Strategies

Rewards. By identifying and manipulating the potential rewards, e.g., by making a concession or praising cooperative behavior by O, a negotiator can help to establish a cooperative atmosphere. Case settlements are usually competitive; resolution of social issues can more easily become cooperative.

Reading Concession Patterns. Look at the size, rate, pattern, firmness of, and reasons for concessions to get clues to O’s resistance point. Irregular, conditional concessions, demanding reciprocity and linking concessions to stated reasons are all tactics likely to elicit counter-concessions.

Commitment Tactics. Effective negotiators establish credibility for threats and promises by showing tangible evidence of performance, past behavior, or the inherent believability of their statements. Final commitment to a position shifts the burden to O to accept, reject or come up with an alternative. Bluffs reduce effectiveness.

Threats are usually a measure of last resort. Other tactics for avoidance of stalemate are more likely to lead to settlement (e.g., GRIT or “salami tactics”—slicing up the issues). Threats are more likely to be effective if seen by O as defensively motivated and nonaggressive. Threats are effective only if prospective and avoidable by O.

Face-saving. Negotiators can identify O's face-saving needs by paying attention to hedging statements and aggressive actions designed to hide weaknesses with a show of strength. Face-saving issues are often more important than the substantive issues. Steps must be taken to shore up the ego of O (not necessarily concessions).

Ingratiation. The deliberate promotion of liking for oneself, as by emphasis on common values, interests, experiences—or the expressed recognition of O's good qualities—may improve settlements.

Third party resources can add power to your position. In community disputes, use of mediation, arbitration or other forms of third-party conflict resolution may be a powerful alternative to stalemate.

Personality Factors

Impression Management. People skilled at self-monitoring can convey deceptive impressions of themselves.

Machiavellianism. There are a substantial number of Machiavellian personalities in the legal profession, and in the world. To avoid exploitation, we need to recognize the sign of Machiavellianism and alert others.

Interpersonal sensitivity varies widely among individuals. Differences among negotiators, i.e., interpersonal style and decision-making style can affect the process and outcome of negotiations.

Anxiety. High levels of evaluate anxiety lead to cooperative, but ineffective negotiation.

Summary - Getting to YES Negotiating Agreement Without Giving In

By Roger Fisher and William Ury
with Bruce Patton, editor. 3d edition, 2011.

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- Your ego becomes identified with your position. You now have interest in "saving face".

- As more attention is paid to positions, less attention is devoted to meeting the underlying concerns of the parties.

- Dragging feet, stonewalling, threatening to walk out, and other such tactics become commonplace and all increase the time and costs and the risk of no agreement at all

- Bitter feelings generated by one such encounter may last a lifetime
- Choosing a soft and friendly position makes you vulnerable to someone who plays a hard position - hard always dominates soft

In principled negotiation, the participants should come to see themselves as working side by side, attacking the problem, not each other.

Any method of negotiation may be fairly judged by 3 criteria:

1. it should produce a wise agreement if agreement is possible
2. it should be efficient
3. it should improve or at least not damage the relationship

II. The Method

2. Separate the people from the problem

Recognize that emotions and egos can become entangled with the problem affecting your ability to see the other party's position clearly.

Three sources of people problems: people perceive things differently (most conflicts are based in differing interpretations of the facts); emotions may run high (especially when interests are threatened) and communications are faulty (not listening, grandstanding)

• Clarify perceptions

- Put yourself in the other person's shoes to understand the problem from their view. Feel the emotional force with which they believe in it.
- Understanding is not the same as agreeing - one can understand perfectly and completely disagree
- Don't deduce their intentions from your fears
- Discuss each other's perceptions:
- Look for opportunities to act inconsistently with their perceptions.

• Recognize and legitimize emotions

- Make emotions explicit and acknowledge them as legitimate
- Allow the other side to let off steam
- Don't react to emotional outbursts: adopt the rule that "only one person can get angry at a time"
- Use symbolic gestures

• Communicate

- Whatever you say, you can expect that the other side will almost always hear something different
- Sometimes, parties give up and talk merely to impress 3rd parties on their own constituency
- Listen actively and acknowledge what is being said
- Speak to be understood - put yourself in the role of a co-judge working toward a common verdict
- Speak about yourself, not about them: describe a problem in terms of its impact on you ("I feel let down" instead of "you broke your word")

3. Focus on interests, not positions

- The difference between interests and positions is crucial: interests motivate people; they are silent movers behind the hubbub of positions. Your position is something you have decided upon, while your interests are what caused you to decide.

- Ask "why?" Ask for another's interests, making clear that you do not want justification, just a better understanding their needs, hopes, fears, or desires that they serve.

- Ask "Why not?" Identify the basic decision that the other side sees you asking them for, and then to ask yourself why they've not made that decision. What interests of theirs stand in the way?

The most powerful interests are basic human needs: security, economic well-being, sense of belonging, recognition, control over one's life

- If you want the other side to take your interests into account, explain to them what those interests are.

- Make your interests come alive - be specific!

- Acknowledge their interests as part of the problem - be sure to show your appreciate their interests if you want treatment in like kind.

- Put the problem before your answer: give your interests and reasoning first and your conclusions or proposals later

- Look forward, not back: instead of asking someone to justify what they did yesterday, ask "Who should do what tomorrow?"

4. Generate options for mutual gain

- Separate inventing from deciding - invent 1st, decide later.

- Look for options that will leave the other side satisfied.

- Every negotiation has shared interests. Shared interests are opportunities. Make them concrete and future-oriented.

- Jack Sprat could eat no fat, his wife could eat no lean, and so betwixt them both they licked the platter clean.

- Look for items that are low cost for you but high value for them, and vice versa.

- If you place yourself firmly in the shoes of your opposite number, you will understand their problem and what kind of options might solve it.

- If you want a horse to jump a fence, don't raise the fence.

- It is usually easier to refrain from doing something not being done already than to stop an action already underway.

- Making threats is not enough. Offers are usually more effective.

- When planning, write out 1-2 sentences on what the most powerful critic of the other side might say about your proposal.

5. Insist on using objective criteria

The final step is to use mutually agreed and objective criteria for evaluating the candidate solutions.

- Negotiate on the basis of objective criteria and NOT the will of either side.

- Possible sources of objective criteria include scientific findings, professional standards, or legal precedent.

- Rather than agreeing on substantive criteria, the parties may create a fair procedure for resolving their dispute – one cuts, the other chooses.

- Commit yourself to reaching a solution based on principle, not pressure.

- Be open to reason, but closed to threats.

III. Yes But...

6. What if they are more powerful?

Develop your BATNA

The reason you negotiate is to produce something better than the results you can obtain without negotiating.

BATNA - Best Alternative To a Negotiated Agreement - develop it for every negotiation and keep it close.

- Invent a list of actions you might conceivably take if no agreement is reached

- Improve some of the more promising ideas and convert them into practical alternatives

- The better your BATNA, the greater your power. The relative negotiating power of each side depends mainly on how attractive to each is NOT reaching an agreement.

- Consider the other side's BATNA: if theirs is so good they don't see any need to negotiate on the merits, consider what you can do to change it.

7. What if they won't play?

1. Continue to use the principled approach. This approach is often contagious.

2. Use "negotiation jujitsu" -- refuse to respond in kind to their positional bargaining. Deflect attacks back on the problem –ask for reasons underlying their position. Take it as constructive criticism and invite further feedback and advice. Personal attacks should be recast as attacks on the problem.

Getting them to play - use these statements to help the cause:

- o Please correct me if I am wrong
- o We appreciate what you're done for us
- o Our concern is fairness
- o We would like to settle this on the basis of independent standards, not of who can do what to whom
- o Trust is a separate issue

- o Could I ask you a few questions to see whether my facts are right?
- o What's the principle behind your action?
- o Let me see if I understand what you're saying
- o Let me get back to you
- o Let me show you where I have trouble following some of your reasoning
- o One fair solution might be...
- o if we agree ... and if we disagree...
- o We'd be happy to see if we can leave when it's most convenient for you
- o It's been a pleasure dealing with you

3. Involve a third party to fuse the views of the opposing parties.

What if they use dirty tricks?

Sometimes parties will use unethical or unpleasant tricks in an attempt to gain an advantage in negotiations.

- Deliberate deception:

- o Phony facts: get in the habit of trusting but verifying factual assertions
- o Ambiguous authority: find out about the authority of the other side - it's okay to ask "how much authority do you have in this particular negotiation?"
- o Dubious intentions: get them to commit to their intentions
- o Less than full disclosure is not the same as deception: if asked, "what would be willing to pay?", then answer "let's not put ourselves under such strong temptation to mislead."

- Psychological warfare:

- o Stressful situations: When the tricky party uses a stressful environment, the principled party should identify the problematic element and suggest a more comfortable or fair change. Subtle personal attacks can be made less effective simply by recognizing them for what they are.
- o Personal attacks: comments on clothes, being late, interrupting to deal with others - all attacks. Bring it up explicitly and they should stop.
- o Good-guy/Bad-guy: recognize it and just remain consistent between the two - ask the good guy the same questions as the bad guy.
- o Threats: simply state, "I only negotiate on merits. My reputation is built on not responding to threats."

- Positional pressure tactics:

- o Refusal to negotiate: recognize this tactic as a ploy to gain the upper hand, talk about their refusal to negotiate, and then insist on using principles
- o Extreme demands: ask for principled justification of their position until it looks ridiculous even to them
- o Escalating demands: call it to their attention and maybe take a break while you consider whether and what basis you want to continue negotiations
- o Lock-in tactics: resist lock-ins on principle - make a joke and don't take the lock-in seriously. Also reassure them that your practice is to never yield to pressure, only to principle. Avoid making the commitment a central question.
- o Hardhearted partner: recognize the tactic ("...oh but my wife...") and then get the other person involved
- o A calculated delay: make these tactics explicitly known - consider creating a fading opportunity for the other side - establish deadlines
- o "Take it or leave it": consider ignoring this at first - say something like "CASE X was your final offer before we discussed the principles of CASE Z"
- Don't be a victim: question your own motives on whether or not you would deal this way with a family member or good friend. It is easier to defend principle than an illegitimate tactic.