

NEGOTIATION

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- I. The negotiation dance
 - A. We do not trust the outcome without it.
 - B. I own a car with blue book value of \$25,000. You offer to buy it from me at \$20,000. I say “Sold!” You are now uncomfortable with the deal because:
 1. “I could have done better.”
 2. “Something’s wrong with that car.”
- II. What are my negotiating counterpart’s objectives?
 - A. We hope the objective is to reach a reasonable, mutually agreeable outcome.
 - B. Sometimes it is not:
 1. Find out if an *unreasonable* outcome is possible.
 2. Lay the groundwork for future negotiations
 3. Going through the motions to satisfy a third party
 - C. You are not going to know, most of the time.
- III. Negotiating in the face of uncertainty
 - A. Two kinds of negotiation are always in play:
 1. Competitive/distributive: getting the most vs. paying the least.

2. Cooperative/integrative: finding ways to reach a mutually beneficial satisfaction of interests.

B. Competitive negotiation:

1. Usually about the money
2. Focused on “positions” (proposed outcomes)
3. Predictable process (the dance) and outcome (somewhere in the middle)
4. Use of purportedly rational justification for unreasonable positions
 - (a) Inflated demands
 - (b) Lowball offers
 - (c) Range dictated by empirical factors
 - (d) Actual numbers within range are dictated by concealed and often arbitrary factors (emotionally-driven positions, corporate precedent, authority limits, ego/power games)
5. In employment cases, the settlement point is often one-third of the way up from the first offer to the first demand.

C. Cooperative negotiation

1. Addresses underlying needs and wants of parties, which are often not monetary
2. Focused on interests (desired benefits to party) and not limited by positions
3. Imagination, creativity, humor and non-linear approaches can develop mutually beneficial solutions

4. Requires openness
 - (a) Identify interests
 - (b) Generate options and different approaches, seek the elusive “win-win”
 - (c) Select among options based on realistic assessment of what will work (accountability, simplicity are important elements)
5. Only the clients know what they really want, and they only know once they have approached the problem in a cooperative mode.
 - (a) To disclose interests requires trust, rare in litigation
 - (b) Conflict tends strongly to make mutually beneficial outcomes difficult to identify, and therefore impossible to consider

IV. The Six Stages of Negotiation

- A. Convening: getting the parties together to explore agreement.
- B. Preparation: homework that will affect whether there is agreement, and drive the outcome if there is
- C. Introduction: breaking the ice, establishing rapport, setting the tone
- D. Communication: information exchange (can be hostile or friendly) concerning the problem, resources, options. Posturing is inevitable here.
- E. Bargaining: getting to the deal, offer & counteroffer, various gambits, usually competitive/distributive

- F. Closing: achieving the outcome
 - G. If you run into a roadblock or impasse at one stage, it is usually because you did not complete one or more of the previous stages
- V. Negotiating Gambits
- A. Convening stage
 - 1. Be sure you are negotiating with the right people at the table
 - (a) Authority
 - (b) Interests affected
 - 2. Preconditions (must agree to offer a certain amount to start) or imperatives (must have certain point or no negotiating) can complicate things later, but represent strong bargaining tool. It is bargaining up front—position of power.
 - 3. Deadlines can be powerful, but can prevent agreement
 - B. Preparation stage:
 - 1. Educate yourself about the lawyer's and client's negotiation style and habits from past negotiations
 - 2. Assess your and your negotiating partner's risk adversity, need for resolution, economic pressures, non-economic pressures
 - 3. Identify key assumptions and be able to prove or disprove them convincingly
 - 4. Assess your Best Alternative To A Negotiated Agreement (BATNA) and that of your

negotiating partner. Expect to negotiate between those outcomes.

5. Analyze the hard numbers and damage side of the case: numbers are powerful and less likely to engage emotional responses
6. Make a plan with an objective
 - (a) You may not achieve your objective, but studies show those with an objective do better
 - (b) Identify intermediate points
 - (c) No war plan survives first contact with the enemy, and no negotiating plan survives the first exchange of offer and counteroffer
 - (d) Convince yourself of your opening position. Sincerity is effective
 - (e) Keep some of your powder dry

C. Communication stage:

1. Use questions
 - (a) Begin open-ended and move to slowly to more leading questions.
 - (b) LISTEN and contemplate for content, implications and NOT to argue with statements
 - (c) Repeat back answers without pejorative language to demonstrate the negotiating partner has been heard. THEN make your counterpoint.
 - (d) Keep your own answers short

- (e) Observe body language carefully for incongruity
 - (f) Listen for verbal leaks
2. Avoiding answers to difficult questions
 - (a) Ignore the question
 - (b) Partial/unrelated answer, change question as part of answer
 - (c) Specific response to general question; general response to specific question
 - (d) Rule the question “out of bounds”
 - (e) Humor
 - (f) Tell a story
- D. Bargaining stage
1. Go FIRST—it is an opportunity to influence the negotiating partner [This is against the conventional wisdom]
 2. Reject extreme offers IMMEDIATELY, e.g., “C’mon, make me a real offer.” or “Be serious. If we start with that, you’ll only be getting something equally ridiculous back from me.”
 3. Always “flinch” at the first offer
 4. Pacing communicates: a quick response says that the concession was relatively easy.
 5. Try to work on what your negotiating partner has shown was persuasive, even if it is not the strongest point.
 6. Use principled positions and concessions

7. Retain detachment and focus on BATNA.
8. Probe for what may be behind positions, pay attention to inconsistencies
9. Mixed messages: usually signal multiple participants on the other side with different viewpoints or agendas.
10. Persuasion tools
 - (a) Socratic dialogue
 - (b) Appeals to reason, emotion
 - (c) Flattery
 - (d) Humor
 - (e) Threats, warnings & promises
 - (f) Intransigence
 - (g) Silence
 - (h) Stories
 - (i) Step-by-step review of particulars
 - (j) Authoritative third party appeal
 - (k) The unexpected
11. Off-limits: false statements of material fact or law
12. Unanswered questions: keep asking until you get an answer
13. Styles: be aware of different styles of different legal cultures
 - (a) Employment/commercial: nickel & dime

- (b) Personal injury/ insurance defense: cut to the chase
- (c) Insurance adjusters: put out substantial amount to start, but will hold to “take it or leave it” when (lowball) authority limit is reached

E. Closing Stage

1. Ensure all desired elements of agreement are on the table before agreeing to anything
2. When agreement appears likely, positions can harden and prevent agreement, but usually agreement emerges. Consider using insurance adjuster approach.
3. If impasse looms, switch negotiating subjects and come back.
4. Praise the other side’s reasonableness to invoke more of it.
5. Conditional offers (“I cannot offer this, but if you do, I will get it accepted with no attempt to improve on it.”)
6. Respond instantly to a “take-it-or-leave-it” offer with your own “take-it-or-leave-it” (I was just about to say the same thing)
7. “Nibblers” who seek additional concessions once agreement reached: “What will you give me in return for that?”
8. Repeat and immediately commit to writing what has been agreed, and that this is it.

VI. Stupid Negotiation Tricks To Try (possible responses)

- A. Large bargaining team (bring your own)

- B. Time pressures (punch through them if it is a bluff)
- C. Nice cop/mean cop (call it for what it is)
- D. Limited authority (“But you would not be here if you could not make a recommendation that would be followed, right?” “No? Well, there is no point in us talking.”)
- E. Uproar/threat of havoc (point out self-defeating quality of action or use humor)
- F. Anger, real or feigned (remain calm, rational, ask “Help me understand...” questions, allow venting)
- G. Walking out/hanging up (cooling off period)
- H. Extreme position (Columbo “ignorant probing” approach)
- I. Getting personal (calmly identify by name what is happening, how it is not productive)
- J. Dumb like a fox (don’t let your guard down)
- K. “So what?”/trivializing concessions (humor)