


# Fundamentals *of a* Successful Negotiation

Making deals is a natural part of life,  
but few people know the fundamentals

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Although it is not always in the forefront of our minds, we all spend a significant part of our daily lives negotiating. We all negotiate with our spouses and significant others, with our children, and our co-workers. For lawyers, that percentage increases substantially since a large part of our day is spent in discussions with opposing counsel. Improving one's negotiation skills not only increases the potential for more successful results, but it also increases one's enjoyment throughout the process. Although my parents tell me that my first negotiation started soon after birth (some would call it manipulation rather than negotiation), I did not begin to formally study negotiation until well after completion of law school and commencement of practice of law.



**L**ike many of my vintage, my law school curriculum was restricted to the traditional subjects like criminal law, real property, contracts, torts, and constitutional law. It was not until after my departure that the University of Illinois College of Law saw fit to include more non-traditional subjects like negotiation within the spectrum of course options.

Soon after commencing practice as a fledgling lawyer, it became apparent to me that I would not be drawing on my knowledge of criminal and constitutional law in the day-to-day practice, and that instead it was of paramount importance to develop skills that would enable me to provide clients with the end result they envisioned. Getting to that end result almost always involved a negotiation. Since the vast majority of cases settle prior to trial, negotiation is an essential element in each trial lawyer's daily diet. Transactional lawyers spend much of their day negotiating various contract provisions. It soon became clear to me that honing my skills as a negotiator was essential to a successful practice. It also became clear that I enjoyed the negotiation process, and that I had some raw talent that was in need of refinement.

The availability of literature on the subject of negotiation was much more limited 30 years ago. Much of what existed was in the form of psychological studies and books for lay people on "win-win" techniques. I read what I could find, and learned much through trial and error. I tried to find ways to immerse myself in negotiation training. By happenstance, I found a very enjoyable locale in which to develop a negotiation-training program. I was asked to participate in a series of programs on real estate law to be presented to real estate brokers and agents as part of their continuing education program. While at first blush it sounded relatively mundane, I perked up when I was told that the venue was the Caribbean, and the classroom a cruise ship. I suggested negotiation as the subject matter, and, after a little negotiation, the course sponsor accepted.

**F**or several years, I spent two weeks each year on a ship discussing negotiation techniques and putting the Realtors through negotiation exercises. The job presented a unique opportunity to observe a multitude of mini-negotiations. It also was a first-rate setting for negotiation practice as my pupils descended upon the straw markets in each port. While Americans are used to purchasing goods at the listed price, much of the international community is more comfortable with negotiating prices on a day-to-day basis. The vendors in the straw markets are adept at negotiation. While they may never have formally studied the principles, they know them intuitively. As my charges returned from each port, we shared stories of successes (and failures) during their shopping adventures. It was interesting to note the wide range of prices that were paid for the same goods, sometimes even from the same vendors.

Over the years, I have developed a list of negotiation principles that I refer to before the commencement of any formal negotiation. They are:

**1. Be thoroughly prepared.** Like most things in life and certainly in the practice of law, preparation is the key to a successful outcome. Preparation includes being fully briefed on the facts and the law. Plan your strategy. There is an old saying that goes, "if you don't know where you are going, any road will take you there." Draw your roadmap. Assess your optimum alternatives. Set a goal or several goals. Determine what are acceptable and optimistic outcomes. Set a bottom line position, and do not deviate from it unless facts developed during the negotiation dictate that movement is appropriate. In setting the bottom line, do so in a realistic manner. At the same time, establish an appropriate aspiration level. People with higher aspiration levels traditionally do better in negotiations. However, an unrealistically high aspiration level will doom a negotiation to rapid failure. Prepare a list of your best arguments and your weakest points. Practice your arguments; practice rebutting your weak points. While you should be realistic about the weaknesses of your position, do not dwell on them. Concentrate on your opponent's weaknesses, and convince yourself of the strengths of your arguments. Until you convince yourself, you cannot convince anyone else. Do your homework on your opponent and the decision maker on the other side. At the minimum, search the Internet, or have a basic background search performed. Ask your colleagues about prior experiences, if any, with your opposition. If a mediator or other third party is taking part in the process, find out as much as you can about her/his background and techniques. With a mediator involved, there may be two negotiations going on simultaneously; one with the opposition and one with the mediator. The more you know about the mediator's techniques, the greater the chance you will be able to use that for your own benefit.

**2. Evaluate the type of negotiation and the variables and outcomes.** There are several variables in a negotiation. An upfront analysis of the type of negotiation will save you time and more likely produce a successful result.

- Determine if this is a zero sum negotiation; that is, one in

which one dollar given to one side must, by necessity, come from the other side. This type of negotiation leaves less room for creativity and is most likely susceptible to a predictable outcome. If there are many moving parts in the negotiation, creativity becomes an important aspect of the process. In a zero sum negotiation, the eventual outcome will almost always fall close to the midpoint of the first genuine offer from each side. It is not, however, always easy to figure out at what point a genuine offer is made.

- Determine if this is a one-time negotiation or one negotiation in a long-term relationship. Nothing is worse than winning the negotiation but losing the relationship in the process. Be mindful that the short-term victory can turn into a long-term loss. Each negotiation in a long-term relationship sets the tone for future negotiations.

- Determine if the negotiation is simply about money, or if it also includes other things such as status and saving face. Thoroughly assess both your client's non-monetary needs and those of your opponent.

- Honestly evaluate the relative bargaining positions of the parties. Determine who has the upper hand, as well as the facts upon which you base that decision. Relative bargaining positions may change as facts come to light during the actual negotiation, and therefore it is important to constantly reassess the bargaining positions of the parties.

- Fully analyze the consequences of not reaching an agreement. Do this for both parties. There are times when no result is better than the options being made available by your opponent.

**3. Set the stage.** In planning, consider things such as site and seating. The physical locale may sometimes be critical. It is almost always better to negotiate on your home turf. Always prepare your client for the process. Discuss location at the table, when to talk and when not to talk, and what, if any, nonverbal cues you may use to communicate with your client. I am not an advocate of artificial gamesmanship in the staging process. Cheap tricks like decreasing the height of your opponents' chairs prior to the negotiation or creating an uncomfortable physical climate will not generally prove to be an advantage. At the same time, be mindful that others may attempt to utilize such ploys, and you should be prepared to call them on it if it arises. Never let someone get away with manipulating the physical setting. When you enter the negotiation room, make sure all the chairs are of equal height, and that your opponent does not place you in a position where a booster seat will be required to reach the table. Don't get stuck squinting into the sun, or under the air conditioner or heater. Those who play poker are already aware that it is imprudent to sit with your back to a mirror or window since it potentially allows your opponent to read whatever you are looking at, which at times may be your bottom line number.

**4. Work your way through the process.** At the commencement of the process, try to make a list of things to keep in mind.

- At the inception, try to gather as much information as possible from the other side without reciprocating in kind. Start with small talk, and then proceed to ask open-ended questions. Try to assess motivation and attitude. Determine if the other side has an open-ended time schedule or has a time limitation. If it is not clear from the outset, ask how long the other side has allotted for the negotia-

tion. Try to gauge the experience and sophistication level of your opponent, but be careful to make sure that you are not “being played” by a canny opponent.

- Determine the tone that you would like to set, and constantly reassess it. There are times, for example, when cooperative bargaining should turn into ultimatum stating, but they are rare.

- Be conscious of nonverbal cues. Things to look for are clenched teeth (anxiety, anger), sitting on the edge of the chair (interested in what is being said), leaning back in the chair with hands behind one’s head (confidence in one’s position and/or lack of respect for the other person’s position), hand and finger positions (steeping gesture of the hands signals contemplation), touching one’s glasses (signals hesitancy), hands in the palms up position (expresses sincerity), and leaning on one’s hands (indicates frustration and impatience). While you may be adept at interpreting nonverbal cues, your opponent may be adept at sending false signals. This opens up the process to intrigue. While negotiations are serious business, the distractions involved in following nonverbal cues can be refreshing and revitalizing. Concentrating from time to time on nonverbal cues allows you to expand beyond the subject matter and then circle back to the main issues at hand. It is a game within a game, allowing you to participate in recess while the negotiation continues. In a very important negotiation, it is quite helpful to have a sidekick along. Your accomplice cannot only carry your briefcase, but also concentrate on the nonverbal communication. He or she can also remind you of the original boundaries that you set, just in case you begin to get caught up in the auction mentality that a negotiation can become.

- Continually look for creative ways to turn a zero sum negotiation into one that can be settled without simply taking a dollar from one party’s pocket and putting it into the other party’s coffers. This is traditional thinking outside the box. If you are skillful in the information gathering phase, you may be able to identify options which can enrich your opponent without a diminution to your side of a similar magnitude.

- Be on the lookout for tricks your opponent may seek to utilize. These may take the form of disingenuous antics or statements. Things like threats, an argumentative demeanor, attempts at intimidation, ridicule, intransigence, and flattery may be tried. The most effective way to counter these tactics is to let your opponent know that you are aware of what he or she is doing. Once someone who is using such a technique is exposed, his or her confidence will melt faster than the Wicked Witch in *Wizard of Oz*.

**5. Two great allies.** While guarding against techniques used by your opponent, be mindful of two very legitimate weapons that you have in your arsenal, namely: patience and silence. The next time you are alone with a relative stranger, let the other person do the talking. It may amaze you how quickly most individuals will seek to fill the silence. The longer you remain silent in a negotiation, the more likely it is that your opponent may begin negotiating against herself or himself. The more patient you are, the more likely it is that the negotiation may swing in your direction. Most Americans are anxious to make progress and move on. Make their impatience your ally. While your time may not be unlimited, if you convey that image, it may motivate your opponent to make con-

cessions in an attempt to move the negotiation along.

**6. Once you make your arguments, make them well.** Persuasive arguments are generally objective, orderly, comprehensive, insightful, and articulate. If your demeanor displays these characteristics, you will be more likely to make progress with your opponent. The better the presentation you make, the more likely it is that your opponent will be responsive to your statement of the facts and to your arguments.

**7. Watch out for the game players.** Be mindful of those who are employing techniques or games to influence the negotiation. There is always the good cop/bad cop play, the “I don’t have the authority” gambit, and the outrageously large demand attempt. All of these should be exposed to the sunlight as soon as possible. If you are the decision maker or have the decision maker in the room and the other side does not, the negotiation should cease forthwith. Negotiations which are not principal-to-principal or agent-to-agent have very little chance of ending successfully. If a principal is negotiating with someone without the authority to make a deal, it is almost guaranteed that the principal’s last offer during the negotiation will be renegotiated after the agent confers with her or his principal.

**8. Leave the last nickel.** If the negotiation is one in which a continuing relationship is either likely or possible, it is best to leave the last nickel on the table. That nickel, so long as the other party understands that you left it there (it is not necessary that it be acknowledged, however), will pay significant dividends in subsequent portions of the relationship; and, more importantly, if you attempt to take all the nickels off the table, your opponent will use every opportunity to attempt to recoup those nickels during subsequent encounters.

**9. Be mindful of your reputation.** Even if the negotiation is a one-time encounter, it is likely that your reputation will have an impact on negotiations with third parties. A reputation as a tough, but fair negotiator who lives up to his or her word is what you are seeking. It is the top-shelf description of someone who is successful at this craft. To the extent your reputation deviates from that, you will begin each negotiation at a disadvantage. There is a fine line between puffing and lying in a negotiation process. Every day, members of the Bar tell their opponents that the last offer is the best and final one, when in fact, they know that there is further room for negotiation. While puffing is generally anticipated, outright lying is neither anticipated nor acceptable. While the distinction is sometimes difficult to articulate, most practitioners clearly know where the line should be drawn.

In summary, approach negotiation like the other portions of your practice. Study the craft, prepare thoroughly, constantly evaluate alternatives, and seek creative solutions. A successful negotiation is a rewarding experience and a valuable service to your client. And by the way, never try to out-negotiate a car dealer. **BAL**

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