

Essential Negotiating Skills - A New Perspective -----By Myer J. Sankary, Esq., CMCT

Negotiating is one of the core skills for all professionals. Many negotiators rely solely on intuition and conventional wisdom, but fail to achieve their objectives, leaving lots of money on the table. Lawyers can benefit from learning new perspectives about how to negotiate effectively using a reasoned and systematic approach while maintaining awareness and proper use of the power of intuition.

There are many interrelated aspects about negotiations that are studied and analyzed in business schools that are not taught in law school. For example in this article, I will discuss the four critical stages of a negotiation that shed light on how one can create a better strategy for reaching your negotiation objectives. Other areas of study that are equally important include understanding and applying the new social science of persuasion to the art of negotiations; how to level the playing field with power negotiators; how to make smart decisions in the face of uncertainty; understanding the common mistakes that derail negotiations; how to use emotions and psychology to gain an advantage, and how to use the understanding of game theory to advance your negotiation skills. This is a view of negotiations from experienced practitioners who have conducted successful negotiations in a variety of situations, including making deals, settling disputes, and winning in court.

Because negotiation strategies and tactics are so important, many lawyers are turning to negotiation coaches to assist them in planning a negotiation strategy and implementing tactics. A coach is an experienced negotiator who has not only studied the extensive literature in the field, but has years of practical experience as a lawyer, mediator, and educator and can assist lawyers in advancing their negotiation skills.

We acknowledge that every lawyer knows how to negotiate – to a degree. Every salesman knows something about selling. Every manager knows something about running a company. But how many lawyers, salesmen and managers are truly successful and effective negotiators. We negotiate every day – with our family members (did you ever negotiate with a three year old about bedtime – or a teenager about staying out late?)- and we negotiate with just about everyone we deal with every day.

The problem is that our own success, even though sometimes limited, oftentimes interferes with our ability to move to the next level to becoming a more effective and efficient negotiator. By becoming complacent, we will tend to slide backwards into comfortable old habits that may have worked in the past, but do not serve us well in the future.

This program will introduce you to some of the latest ideas about negotiation strategies and tactics by two Harvard Business school professors, Lax and Sebenius, and will provide a framework from which you can draw consistently to increase the likelihood that you will be able to achieve your objectives either for yourself or for your client.

Essentially there are four major phases, stages, or acts in preparing for and participating in negotiations – known as “SDTD:”

1. The Setup away from the table
2. The Design at the drawing board
3. The Tactical exchange at the table
4. The Decision in the face of uncertainty

Lax and Sebenius persuasively argue that negotiators mistakenly focus on only one dimension at the negotiating table of a “win-win” or “win-lose” approach to negotiations. In reality, there are at least three major dimensions to more effective negotiations plus a final stage of making a decision in the face of uncertainty whether to accept or reject the last and final offer or demand. Like an architect, the negotiator must first plan the structure of the negotiations before he or she can successfully build the components of a final agreement. Your negotiating objective should focus on creating value as well as claiming value with a view toward building relationships and implementing an agreement that will be satisfactory for all parties, an agreement that everyone will want to commit to and live up to the letter and spirit of the agreement. The most serious mistake a negotiator can make is failure to implement a systematic strategy that incorporates each of these vital components.

In every negotiation, Lax and Sibenius suggest that there are three dimensions to keep in mind:

A. The Setup – consider what moves you can make away from the table to set up the most promising situation once you are at the table. The “Setup” entails planning to ensure that the right parties are involved, the right sequence, the right issues, the right set of interests, the right table or tables, the right time, under the right expectation, and having the correct understanding of the consequences of walking away if there is no deal. (Remember there are times when no agreement is better than agreement.) As you plan for your next negotiation, consider who should be at the table and what each of their interests are (for example, lawyers may represent the interests of their client, but there is also an agenda that lawyers have that differ from that of their client that may affect the deal).

1. Focus on interests, not positions. An “interest” is what a party seeks to achieve by the negotiations and what he or she cares about that is at stake in the process. It may or may not be money. When negotiating to

purchase or lease real estate, price is important, but the need for the property, its convenience, the timing of occupancy, its utility for the buyer, amount of down payment and future payments, improvements, modifications, etc. are all important elements to be considered when making the best deal. Whether a person is purchasing a home or commercial property, many interests are in play for both the buyer and seller. The skillful negotiator will consider both his or her own interests as well as the interests of the other party.

2. Understand the importance of the “No-Deal” option! A common mistake by negotiators is the belief that they must make the deal at all costs. However, your ability and willingness to walk away from a deal often will strengthen your bargaining position. Sometimes you are better off not entering an agreement. Suppose you are planning to buy a car from a salesman. Assume two situations. In one, you and your wife discuss with the salesman that the car he has shown you has everything you want, you are in urgent need of a car because your clunker might not get you home, and you haven’t seen any other car that suits your needs as well as this one. In the other situation, you and your wife tell the salesman that you have some doubt about whether the car has all the features you want, that you have seen another car B at another dealer who has offered you a lower price than what this salesman has offered, and you preferred the color of other car. In which scenario will you more likely get a better deal?

Your analysis of the “No-Deal” option will prepare you to determine whether or not there is a Zone of Possible Agreement – the ZOPA – with your negotiating partner. If you have a Better Alternative to this Negotiated Agreement (your BATNA) then you will know whether you are better off walking away from this deal. In fact, one of the most important tools you have against a more powerful negotiator is your BATNA. The importance of the Setup phase of the negotiating process is to understand not only your own No-Deal option but also the No-Deal option of the other party. If you believe that the offer you are making will clearly be rejected by the other party, you have created a situation where the other party’s No-Deal option will be better than what you are proposing. Hence, you have given the other party a powerful tool and incentive to walk away from this agreement. On the other hand, in order to strengthen your own hand, you will want to let the other party know the viability and desirability of your walk-away alternative. If the other party wants to make a deal with you, they will have to make a proposal that is in the Zone of Possible Agreement, or they will lose the deal.

3. The Use of Persuasion and Influence. Prepare in advance for your face to face meeting at the negotiating table by determining how you might best use the six principles of persuasion. These principles will guide you about how to be more effective and influential in getting others to agree to your proposals. This topic will be discussed in other articles at a later time.

B. The Deal design – give consideration to all of the elements of the transaction, with attention to the needs and interest of all the parties. As stated above, negotiations is a process of creating value and claiming value – as well as a process of competing and cooperating. Negotiators frequently make the mistake that the only way to reach their objective is to act competitively to claim the largest share of the fixed pie. Aggressive, competitive negotiators often do not get the best deal – they are ego-driven and concerned about winning – claiming the largest share of the fixed pie. They missed the opportunity of increasing the pie for both parties. By focusing on the Deal design, the negotiator’s attention is drawn to the task of creating a bigger pie that can satisfy the needs and interests of both parties with the objective that each party will benefit more from the terms of the deal. Lax and Sebenius suggest that using a drawing board metaphor where the negotiator views the task at hand not as one to divide a fixed pie, but rather as a joint effort to move northeast – a landscape image where the parties find agreement by each moving to maximize and satisfy their needs and interests. “If north is the direction that I want to go, and east is the direction you want to go, then moving northeast may be a very attractive option. In fact, it may be the best option for all parties – better than any of them could do on their own. (at page 12)

MOVING NORTHEAST – FINDING

MOVING NORTHEAST – FINDING A BETTER SOLUTION FOR BOTH PARTIES BY INCREASING THE PIE. START WITH UNCOVERING THE DIFFERENCES THAT WILL MAKE FOR THE BEST TRADEOFFS. (Eg. the story of the two sisters who both want the one orange. How can they maximize their interest.)

Deal design is all about finding creative ways to increase the pie for you and the other party. Although it may seem counterintuitive, the parties should probe to find how their interests are different, so that they can find ways to make exchanges that allow for one side to give something of low interest to him/herself but of high value to the other side. In short, look for ways to dovetail differences to create value. Not only should you look for common ground, but you should create value from differences of interest among the parties.

In developing the design for the deal, consider maximizing the net “value pie” that is available to the parties. The net value is that remaining after costs (legal fees, delays, investment of time of the parties) have been accounted for. In building consensus, it helpful to compare the overall value created by your northeast moves with the value that was available before those moves. The overall value relative to those compromises, should be greater than your starting point, and definitely better than the no-deal alternative. The final deal should incorporate the highest net value and the lowest net cost to the parties.

Examples of this type of exchange is found in the case of selling a business where the Seller places a higher value on the business and the Buyer places a lower value, each having a difference in projection of future earnings. Using the “earn-out contingency,” the seller pays less if the earnings do not meet expected levels, but pays more if they do. Structured settlements is another example of bringing the interests of the parties together by exchanging values – the plaintiff wants higher long term monthly payments over time but the insurance company wants to pay less up front to settle the case. The structured settlement meets the needs of both plaintiff and the insurance company.

C. Tactics at the table – what moves will you make when facing the other side at the table, what information will be exchanged, how will you treat the other parties, and what tone and attitude will you use. In this phase of the negotiations you are trying to claim value. What tools will you use to maximize your claim?

Using Distributive Bargaining. Your opening demand or offer will set the tone and guide you through the next moves you will make to reach your objective. How much should you offer or how much should you demand? In the Setup phase you should have considered the value of your claim, or the value of the business your client wants to purchase. You will then make an offer or demand that will maximize your opportunity to claim value. But the challenge is to make the proposals within the Zone of Possible Agreement (ZOPA). “You will want to shape perceptions to claim value.”

Your minimum [-----] Their maximum

Zone of Possible Agreement

The ZOPA is that range of possible of agreement in which it is better for both sides than the no-deal option. You will want to influence the other person’s perception of what is acceptable to you. Ideally, as seller, you will want to end up with a price close to their maximum and as buyer, you will want to pay the minimum that is acceptable to them.

Framing is an important part of the psychological advantage you can gain by framing the transaction in a way that favors your position. In a series of studies, the investigators found that negotiators who focus prior to the negotiation on what they hope to achieve do better in price negotiations than those who focus on what they hope to avoid. This suggests that you should approach the negotiations consciously setting your target where you want to end up. Your target should be ambitious – try to hit the best target possible – this will generally encourage you to use more effort in all aspects of your negotiations. Your opening offer or demand should be just above the most that the other side might be willing to pay. Then you will have room to make concessions that will lead to the ZOPA. (As discussed below, it is essential that you have made a demand sufficiently high or an offer that is sufficiently low so that you have room to make credible concessions so that you activate the reciprocity principle.)

Should you make the first offer or demand? Your justifiable concerns are that if you do not make the demand ambitious enough, you will leave money on the table. But if you are too aggressive, then you will offend the other side, damage your credibility, adversely affect the relationship, and possibly derail the negotiations. What to do? If you do not have enough information to know the true value of what you are seeking, you may want the other side to make the first offer. On the other hand, if you are confident in the amount you should pay or accept for any transaction, then you can gain an advantage by making the first offer that is ambitious because you will be taking advantage of a psychological principle known as “anchoring.” In many studies, people who must make a decision in the face of uncertainty are influenced by the numbers offered by those who have an interest in the transaction. For example, if you are the owner of a house you want to sell, by telling the realtor that you want to get a price higher than market value, based on a reasonable justification, the realtor will be influenced by the price you set – because of the anchoring affect, and he will try to sell the property at that price or close to it. When an anchor is introduced into the negotiation, it can shift perception of the ZOPA in its direction, thereby increasing the likelihood that a final agreement will drift toward the anchor. The result is that a final agreement will favor the one who dropped the first anchor. (A word of caution! If you are unable to provide any reason or justification for your aggressive proposal, the anchor will be ineffective and may indeed sink your cause. Such a move can be counterproductive because you will lose credibility and appear to be unreasonable. Studies have confirmed that giving a reason for your request will substantially increase the likelihood that the other side will accept the validity of your request.)

Conclusion

This discussion is only a beginning toward advancing your negotiation skills. It is worth spending your time reading some of the latest literature on negotiations. One of the best sources of short articles on a variety of topics is the Negotiation newsletter from the Harvard Program on Negotiations. Another good way to get ahead of the game is to consult with an expert negotiating coach. You can become a winner at the negotiation game by applying effort and learning from others.

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