

# PROGRAM ON NEGOTIATION

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## PRINCIPLES OF NEGOTIATION OUTLINE

### I. Introduction

- A. We all negotiate as a part of our job on a daily basis. Though we seldom speak of them, 9 out of 10 of our best “wins” were probably negotiations. We can all become much better negotiators.
- B. The first step to improved negotiation abilities is consciousness. We all have a style of negotiation whether we are conscious of it or not. We must become conscious of how we negotiate. We must also become conscious of how our opponent negotiates. A conscious style can become an effective strategy.

### II. Traditional Styles of negotiation.

- A. The competitive negotiator sees any situation as a contest of wills in which the side that takes the more extreme positions and holds out longer fares better. The competitive negotiator moves psychologically against the other person with behavior designed to unnerve the opponent. Competitive negotiators expect similar behavior from their opponents and therefore mistrust them. Competitive negotiators tend to employ a strategy, which often includes the following tactics:
  - 1. A high initial demand.
  - 2. Limited disclosure of information regarding facts and one’s own preferences.
  - 3. Few and small concessions.
  - 4. Whenever possible, the competitive negotiator appears to make a concession without really making one.
  - 5. Competitive negotiators may also make an initial demand that is a false issue so that they have something to concede later.
  - 6. Competitive negotiators engage in threats and arguments.
  - 7. Apparent commitment to particular positions during the negotiating process.
  - 8. Elective disclosure about one’s own case for the specific purpose of undermining one’s opponent rather than trying to attain a mutual agreement.

Empirical research repeatedly demonstrates a significant positive relationship between a negotiator's original demand and his payoff.

To the extent that the success of a negotiation strategy is measured by the payoff in a single negotiation involving the division of limited resources between two parties, studies of simulated negotiations suggest that the competitive strategy yields better results than other strategies for the negotiator.

However, the competitive strategy suffers several disadvantages:

1. The likelihood of impasse is much greater for negotiators.
2. Competitive tactics engender tension and mistrust between both participants.
3. A prosecutor may hold a grudge against a competitive negotiator in future negotiations.
4. A prosecutor may hold a grudge against a defendant who was the recipient of a great deal resulting from a competitive negotiation.

B. The cooperative negotiator grants concessions in order to create both a moral obligation to reciprocate and a relationship built on trust that is conducive to achieving a fair agreement. The cooperative negotiator does not view making concessions as a necessity resulting from a weak bargaining position or a loss of confidence in the value of her case. Rather, the cooperative negotiator values concessions as an affirmative negotiating technique designed to capitalize on the opponent's desire to reach a fair and just agreement and to maintain an accommodative working relationship. Proponents of the cooperative strategy believe that negotiators are motivated not only by individualistic or competitive desires to maximize their own utilities, but also by mutual desires to reach a fair solution. Cooperative negotiators assert that the competitive strategy often leads to resentment between parties and a breakdown of negotiations. Cooperative negotiators expect opponents to reciprocate with concessions of similar size. Cooperative strategies include any strategies that aim to develop trust between the parties and that focus on the expectation that the opponent will match concessions ungrudgingly.

The major weakness of the cooperative approach is its vulnerability to exploitation by the competitive negotiator.

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Both the competitive and cooperative strategies focus on the opposing positions of the negotiators. Each negotiator attempts to achieve as many concessions from the other as possible. These concessions move the negotiations closer to an outcome favorable to the negotiator. Each concession has the effect of diminishing the opponent's satisfaction with the potential agreement.

**COOPERATIVE**

Participants are friends

**COMPETITIVE**

Participants are adversaries

|  |  |
|--|--|
| Goal is agreement  | Goal is victory  |
| Make concessions to cultivate relationship                       | Demand concessions as the price of relationship                              |
| Soft on the people and the problem                               | Hard on the people and the problem   |
| Trust others   | Distrust others  |
| Change position easily   | Dig in to a position   |
| Make offers  | Make threats   |
| Search for the single answer: the one the other side will accept | Search for the single answer: the one the competitive negotiator will accept |
| Accept one-sided losses to reach agreement                       | Demand one-sided gains as the price of agreement                             |
| Insist on agreement, yield to get it                             | Insist on a position, apply pressure   |
| Try to avoid a contest of will                                   | Try to win a contest of will   |
| Disclose bottom line   | Mislead about bottom line  |

### III. “Principled Negotiation” - Harvard Negotiation Project.

In 1981, Professors Roger Fisher and William Ury published their seminal book, Getting to Yes: Negotiating Without Giving In. Their book advanced the theory of negotiation developed at the Harvard Negotiation Project. It is a strategy largely based on problem solving or integration. Issues are decided on their merits rather than through a haggling process focused on what each side says it will or won't do. The theory suggests that you look for mutual gains wherever possible, and that where your interests conflict, you should insist that the result be based on some fair standards independent of the will of either side. The style is hard on the merits, soft on the people. It employs no tricks or posturing. There is no war like mentality to determine a winner and a loser. The negotiators obtain what they are entitled to while still remaining decent. This has been referred to as “principled negotiating,” “mutual gains negotiating” or “win-win negotiating.” This method of negotiation sets out to:

- Separate the people from the problem.
- Focus on interests, not positions.
- Generate a variety of possibilities before deciding what to do.
- Insist that the result be based on some objective standard.
- Have a **Best Alternative To a Negotiated Agreement** firmly in mind. (BATNA)

This is not a concession-based strategy that seeks to divide a fixed pie. Rather, it maximizes the parties' potential for problem solving in order to increase the joint benefit

and expand the pie. The integrative negotiator strives to identify problem-solving solutions, which are not readily perceived.

| COOPERATIVE  | COMPETITIVE  | PRINCIPLED   |
|--|--|--|
| Participants are friends                                       | Participants are adversaries   | Participants are problem solvers; separate the person from the problem; care about the person but focus on the problem |
| Goal is agreement  | Goal is victory  | Goal is a wise outcome reached efficiently/amicably  |
| Make concessions to cultivate relationship                     | Demand concessions as the price of relationship                              | Separate people from the problem   |
| Be soft on the people and the problem                          | Be hard on the people and the problem  | Be soft on the people and hard on the problem  |
| Trust others   | Distrust others  | Proceed independent of trust   |
| Change your position easily                                    | Dig in to your position  | Focus on interests not positions   |
| Make offers  | Make threats   | Explore interests and motivations  |
| Search for the single answer: the one the opponent will accept | Search for the single answer: the one the competitive negotiator will accept | Develop multiple options to choose from; decide later  |
| Accept one-sided losses to reach agreement                     | Demand one-sided gains as the price of agreement                             | Invent options for mutual gain where both interests are met  |
| Insist on agreement  | Insist on your position  | Insist on using objective criteria   |
| Yield to pressure  | Apply pressure   | Reason and be open to reasons; yield to principle, not pressure  |
| Try to avoid a contest   | Try to win a contest of will   | Try to reach a result based on standards independent of will   |
| Disclose bottom line   | Mislead about your bottom line   | Avoid having a bottom line   |

**IV. Rule #1 of principled negotiations: do not argue over positions.**

- A. Bargaining over positions locks the negotiator into a position. The more a person clarifies a position and defends it against attack, the more committed they are to it. The more we try to convince the other side to change their position, the more

locked in they become. Ego then becomes identified with their position. Their position becomes about saving face rather than serving their issue. Future actions must then be reconciled with past positions, creating a stalemate.

- B. Pay attention to the underlying concerns. Arguing about specific positions steers the parties away from the true underlying issues.
- C. Negotiating is not about splitting the difference (haggling). Splitting of the difference between final positions rather than a solution carefully crafted to meet the legitimate interests of the parties. Neither side is satisfied with the agreement.
- D. Arguing over position is inefficient. Positional negotiating creates incentives that stall settlements. Each side tries to improve their chances for a favorable settlement by starting with an extreme position. There is an inherent deception as to what is actually necessary.
- E. %#@\*^ you, we're going to trial! Arguing over position endangers an ongoing relationship. Bargaining becomes a contest of wills. Each side tries through sheer will power to force the other to change its position. While this tactic may work for defense attorneys on a case that is ripe for trial, criminal defense attorneys negotiate approximately 100 cases for every case they take to trial.

**V. Rule #2 of principled negotiations: build trust.**

- A. One of the most important ways of establishing trust is predictability.
- B. People who are prepared are trusted much more than people who wing it.
- C. Build credibility. Don't lie or use negotiation tricks or bluffs.
- D. Concerned.
  - 1. About client.
  - 2. About district attorney.
  - 3. About public policy.
- E. Build rapport.

**VI. Rule #3 for principled negotiations: prepare to negotiate.**

- A. Criminal defense attorneys spend hours preparing for trials, while often winging negotiations. Negotiating too early in the case may leave the criminal defense attorney unprepared to negotiate from a position of knowledge and creativity. A full knowledge of legal and factual issue prior to sitting down to negotiate is necessary in order to develop effective negotiation strategies.
- B. Client interview. A thorough client interview may be the most important aspect of a successful negotiation. To negotiate effectively, we must be familiar enough with our client to personalize and humanize him or her in the eyes of the prosecutor. An inability to answer questions about our client in the midst of a

negotiation will seriously undermine our credibility and ability to attain a successful settlement.

1. Education.
2. Employment.
3. Goals.
4. Family.
5. Disabilities.
6. Mental and emotional health history.
7. Any other biographical information.
8. Analyze and define a bargaining range in conjunction with your client.
9. Analyze and clearly define your BATNA with your client.
10. Brainstorm the interests that lie behind positions. It is not enough to articulate a position, articulating a reasonable basis for taking the position is much more persuasive.

C. Investigate and research.

1. What are the potential issues of law and fact?
2. List the positions, known and assumed, for each issue.
3. List the possible lesser included charges.

D. Scout your prosecutor.

1. How trustworthy are they?
2. How well prepared are they?
3. What authority to negotiate do they have?
4. What do they care about?
5. What level of self-esteem do they have?
6. What is their style of negotiation?
7. Are they talkers or listeners?
8. What are their behavior habits?
  - a. Defensiveness.
  - b. Rationalizing.
  - c. Role-playing.
  - d. Ego centered
  - e. Irrational.
9. How do they react to full disclosure by a defense attorney?
10. How eager are they to try a case?
11. What level of trial skills do they possess?
12. How do they react to an impending trial date?
13. Attempt to predict the bargaining range of the prosecutor on this case.
14. Brainstorm the interests that lie behind the prosecutor's position. Make a genuine effort to understand where the prosecutor is coming from.

E. Who is the victim?

1. What is their interest in the case?
2. What are their motivations, obvious and subtle?
3. How do they want to see the case resolved?

4. What can your client do to put them in a better place? (Make them whole?)
- F. Who is the judge? What role will this judge play at trial, in sentencing, etc?
- G. Research fair standards
1. Prior practice of specific prosecutor on this type of case.
    - a. Keep a book.
    - b. Other attorneys in office.
    - c. Co-defendants.
  2. Prior practice of prosecutor's office on this type of case.
  3. Prior practice in other counties on this type of case.
  4. National standards. (I.E. Minnesota)
- H. The negotiation strategy
1. Do not limit yourself with self-fulfilling prophecies.
  2. Design options. Rather than focusing on how to slice it, try designing a bigger pie.
  3. Develop an offer strategy, which includes deciding whether to make an opening offer, how to respond to an opening offer, and how to make an offer, which is credible but does not reveal too much.
  4. Develop a plan that places priorities on the issues to be discussed, considering that you can set a less adversarial tone in the negotiation by selecting, as the first item to be discussed, one or more relatively "safe" issues around which problem solving can occur.
  5. Rehearse or role-play with other attorneys.
  6. File motions, prepare to go to trial, etc. ("**Best Alternative To Negotiated Agreement**"). We must have a reputation for following through or we have no best alternative to anything.

**VII. At the negotiation, stop, look and listen.**

- A. What are the prosecutor's ideas, motivations and feelings?
- B. How do their ideas, feelings, motivations, etc., affect the negotiation?
- C. Observe body language.
- D. Listening occurs when the speaker feels heard – not when the listener actually hears.
- E. Listen more – talk less.
- F. Appreciate the power and responsibility of the district attorney.
- G. Put yourself in district attorney's shoes.
- H. Assume district attorney has a good reason for their point of view.
- I. Try to appreciate the district attorney's good reason.

- J. Ascribe a good reason even when you think you know otherwise.

**VIII. Engage the District Attorney in a Spirit of Cooperation.**

- A. A compulsion to win on behalf of our clients may negate the ability to work creatively with the prosecutor to negotiate an agreement that is more satisfactory to both parties.
- B. Engage the prosecutor in brainstorming mutually beneficial agreements.
- C. Test out ideas with the prosecutor in a non-threatening, cooperative manner.
- D. Ask for the prosecutor for help in coming up with an agreement that will be satisfactory to all parties involved.
- E. Watch to see if any suppositions that you have made about the prosecutor are accurate.
- F. Pay attention to any assumptions that the prosecutor seems to be making about you.

**IX. Involve Other Participants.**

- A. Victims.
- B. Police officers.
- C. Client.
- D. Client's family.
- E. Character witnesses, client's employer, teacher, etc.

**X. Know Your B.A.T.N.A.**

A BATNA must be well thought out and specific. An ambiguous alternative to a negotiated plea undermines the integrity of the negotiator and the negotiation process. The attorney who enters the negotiation without a firm BATNA in mind enters the card game knowing that he or she is bluffing. When negotiations seem to be going poorly, pessimism easily sets in. The negotiator then becomes too committed to reaching an agreement – any agreement. A BATNA that is well considered and agreed to with a client gives the negotiator the authority needed to walk away from the table if need be.

**XI. Close well.**

- A. Make it easy for the district attorney.

- B. Secure the agreement in writing.
- C. Do not do anything to create buyer's remorse.

**XII. What is a failed Negotiation?**

- A. We got a bad deal but there was nothing we could do.
- B. We got a decent deal but we could have done better.
- C. We walked away from a good deal.
- D. We failed to see a deal that could have been better for all parties.

**XIII. Why Some Negotiations Fail.**

- A. Sometimes there must be a winner and a loser.
- B. Negotiations are initiated too soon or too late.
- C. One party is not really there to negotiate.
- D. Extreme imbalance of power.
- E. One party is not prepared to negotiate.
- F. One side assumes that something they want is not negotiable sets their sites too low.
- G. One side is afraid to fail or be rejected.
- H. One side is unrealistic.
- I. One side takes things personally.
- J. One side is not trusted.
- K. One side needs approval more than a good deal.
- L. One side gives up too easily or is impatient.
- M. One side can't move off a position.
- N. One side talks too much.

**XIV. Conclusion.**

- A. What is your style of negotiation? What is your negotiation strategy?

- B. Prepare to negotiate.
- C. Creatively solve problems, do not haggle over positions.
- D. Enlist the support of your opponent.
- E. Develop a specific strategy to initiate your BATNA.