

NEGOTIATION

Things Corporate Counsel Need to Know
but Were Not Taught



Michael Leathes

Foreword by Michael McIlwrath, GE Oil & Gas

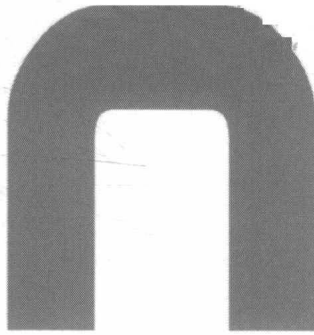


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Negotiation

Corporate lawyers are rarely trained to negotiate. Yet negotiate they must, frequently.

This peer-reviewed book, dedicated to corporate counsel organizations worldwide, draws upon the latest negotiation teaching and the author's long in-house counsel experience, to provide you with the knowledge, skills, tools and techniques to:

- be a more creative negotiator;
- gain greater authority and control over process and outcome;
- add more value to your business; and
- know where to go for further inspiration.

With its wealth of examples and practical materials, this is a source of value for all in-house counsel, private practitioners, business managers, mediators, arbitrators and many others.

Dedicated to corporate counsel organizations worldwide, including:

American Bar Association, Sections of Business Law and Litigation, Corporate Counsel Committees
Arbeitsgemeinschaft Syndikusanwälte des Deutschen Anwaltvereins
Association of Caribbean Corporate Counsel
Association of Corporate Counsel
Association of Corporate Lawyers Sri Lanka
Asia Pacific Corporate Counsel Alliance
Associazione Italiana Giuristi di Impresa
Association Française des Jurists d'Entreprise
Australian Association of Corporate Counsel
Bendrovių & institucijų teisininkų asociacija (Lithuania)
Bolagsjuristernas Förening (Sweden)
Canadian Corporate Counsel Association
Commerce & Industry Group (UK)
Corporate Counsel Association of New Zealand
Corporate Counsel Association of South Africa
Corporate Counsel Forum of the International Bar Association
Corporate Counsel International Arbitration Group
Corporate Counsel Women of Color
Danske Virksomhedjurister
Eesti Juristide Liidu Ettevõtlike juristide Ühendus (Estonia)
European Company Lawyers Association
Global Counsel Leaders Circle
Hong Kong Corporate Counsel Association
In House Counsel Worldwide
Indian Corporate Counsel Association
Indonesian Corporate Counsel Association
In-House Counsel Forum Korea
In-House Lawyers Association New Zealand Law Society

Instituto dos Advogados de Empresa (Portugal)
Institut des juristes d'entreprise (Belgium)
International Bar Association Corporate Counsel Forum
Japan In-House Counsel Network
Krajowa Izba Radców Prawnych (Poland)
Latin American Corporate Counsel Association
Legal Management Council of the Philippines
Malaysian Corporate Counsel Association
Mexican Company Lawyers Association
Nederlands Genootschap van Bedrijfsjuristen
Nigerian Bar Association Corporate Counsel Forum
Norges Juristforbund
Round Table Mediation und Konfliktmanagement der deutschen Wirtschaft
Russian Corporate Counsel Association
Seccion de Abogados de Empresa (Spain)
Singapore Corporate Counsel Association
Teollisuus Lakimiesten Yhdistys RY: Industrijuristföreningen (Finland)
The In-House Community (Asia and MENA)
The Pakistan In-House Lawyers' Forum
Udruga korporativnih pravnika; (Croatia)
Udruga Pravnika u Bankarstvu (Bosnia and Herzegovina)
Unie Podnikových Právníků České Republiky (Czech Republic)
and to
all internal lawyers listed in the Wolters Kluwer Directory of Corporate Counsel

About the Author

Michael Leathes spent his career as a corporate counsel with Gillette, Pfizer, International Distillers & Vintners and BAT based variously in Brussels, New York and London. His pro bono duties included board memberships of CPR Institute (2003–2006) and the International Mediation Institute (2007–2015).

Comments

This book was peer reviewed in draft, but if you have comments, suggestions, ideas or contributions that could be considered for the next edition, Michael Leathes would value hearing from you. He can be contacted at ML@MichaelLeathes.com and via www.MichaelLeathes.com, from where certain materials, such as the roleplay in Appendix 7 can be downloaded.

*J'ai seulement fait ici un amas de fleurs étrangères,
n'y ayant fourni du mien que le filet à les lier*

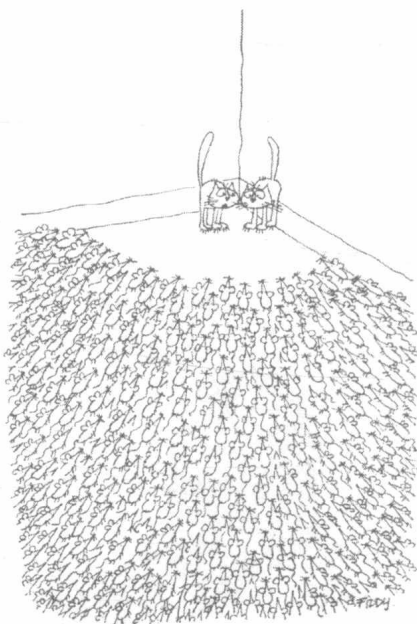
*I have merely gathered a posy of other people's flowers,
only the thread that binds them is my own*

Michel de Montaigne 1588

(Essais, Book III)



Drawing of Michael de Montaigne reproduced from Wikipedia



"Well don't just stand there - negotiate!"

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Foreword

by Michael McIlwrath

Global Chief Litigation Counsel, GE Oil and Gas

A decade ago, I interviewed Michael Leathes for a podcast that I was hosting at the time called International Dispute Negotiation. It consisted of interviews with leaders in dispute resolution around the world. Unlike most of my other guests, who were happy to speak about themselves and their practices, Michael turned the tables on the interviewer.

He started *his* interview by asking me why my employer, General Electric, stood behind mediation as a form of dispute resolution, and why we had decided to invest both effort and money into the International Mediation Institute. IMI is a non-profit based in the Netherlands that Michael himself had co-founded to promote high standards of mediation around the world. I fumbled an answer on the spur of the moment about what mediation offers as a mechanism for resolving disputes.

But the real answer to Michael's question was actually much deeper, and it is only with the benefit of having read his book on negotiation these many years later that I can provide a fuller, better answer: traditional methods of resolving conflict are profoundly unsatisfactory and out of sync with the way business is conducted in the modern world. The speed of commerce, and the fluidity with which borders and time zones are crossed, and the virtual marketplaces where business is conducted, have long surpassed the ability of even the most efficient courts and arbitrators to keep up with the disputes that arise from them. And the gap is only getting greater with the passage of time.

Within this gap is a vast need for lawyers and business leaders to find solutions that may not be perfect, but that keep their deals moving instead of getting bogged down with the costs, distraction and uncertainty of litigation and arbitration. And they must do this while working seamlessly with counterparties from cultures and legal systems that may be identical one day and entirely alien the next.

What mediation offers is the opportunity to negotiate and find solutions for disputes and deals that rapidly and flexibly, allow businesses to keep moving. Through negotiation, mediation mirrors what already makes businesses thrive. I am sure this is why Michael ultimately found mediation so suitable for the businesses whose legal departments he successfully led over the years, and it is why we at GE have had such success in encouraging its use.

And yet negotiation, the core of mediation, is also a learned skill that is undervalued and underappreciated by both businesses and the legal community. When, nearly twenty years ago, I went about looking for negotiation training materials for myself and my colleagues, I assumed that law firms would have plenty for us to borrow. Instead, I could not find a single law firm where negotiation is systemically taught, and only one or two firms where any of the lawyers had even attended an external training.

This was confounding. As much as negotiation is a core skill in business, it is the foundation of what lawyers do. It is obviously called upon when we are in a “contract negotiation.” But we are also in a negotiation when we appear in front of a judge or arbitrator, or at a mediation, or even when writing a letter to opposing counsel. We can never assume that our business partners will receive 100% of what they want, which is why they hire us lawyers. In fact, this was the reason I titled my podcast, “International Dispute Negotiation” because, at the end of the day, negotiation is deeply embedded in all forms of resolving disputes.

This is also the gap in skills that Michael’s book begins to fill. I say *begins* because negotiation and by extension negotiation training are fields in their own rights that are not only rich, vast in their applications, but are also in rapid development and expansion as science reveals more about how people process information and reach decisions. It is probably a good thing that the “canon” of negotiation has yet to be written.

Therefore, while Michael’s book aims to provide skills to the in-house counsel, it will also find a natural home in the offices of any law firm. In fact, lawyers who discover this book and embrace its teachings are bound to find they are more at ease in meetings with their business colleagues and more successful at their jobs, because negotiation is a language the business speaks.

To say that this book begins to fill a significant gap should not understate the breadth covered in the pages that follow, which is considerable. Michael provides insight on the importance of preparation, recent discoveries in neuroscience, problems that frequently arise in cross-cultural situations, and the ethical challenges that lawyer-negotiators face. He covers useful negotiation techniques and innovative methods that can yield high impacts, such as the use of impartial deal facilitators to aid in deal negotiations and not just to help parties resolve disputes.

And he also preaches to this choir when he writes about the low-hanging fruit by which in-house counsel can add enormous value to their businesses by promoting negotiating training. Indeed, the in-house lawyer imagined by this book is a true business leader who is fully engaged in the process of identifying and adding value, not just a lawyer

relegated to the tasks of *docugotiation* or *litigotiation*, terms Michael has used for those who spend their time drafting terms in agreements and supervising disputes. The lawyer who reads this book should be one who wants to lead, innovate, inspire and increase value for their business or their client.

And I would be remiss with this introduction not to second Michael's suggestion of a greater emphasis on negotiation in law schools and professional legal development, and for a modern, global accreditation system – supported by businesses, law firms, and academia – for those who achieve objective standards of negotiation skills. It is a big idea, but it is one that would provide a substantial contribution to filling the current gap.

Of course, Michael Leathes has never been someone to traffic in small ideas. If the reader has neither the time nor the inclination to join in future initiatives associated with this big idea, they can rest assured that by the end of this book they will be a far more successful and appreciated counsel by their business colleagues or their clients than when they started reading Chapter 1.

Preface

This book is not a user guide to negotiation. There are exceptional books out there that set out to do that, many of them listed in the bibliography. Rather, it aims to inspire negotiation ideas and concepts from the standpoint of a lawyer employed by a company or other organization.

I have drawn this inspiration from two sources.

First, from the teaching of academics and trainers. In the many places that I have done so in the following pages, I have attributed the points mentioned to the sources I have used. Many of these points are well worth following up in their books.

I have also drawn from what I learned on the job as an internal lawyer for international companies. At an early stage, I was fortunate to be delegated with negotiating assignments. There were few negotiation skill books and courses forty or more years ago. You graduate from that School of Hard Knocks resolving never to make the same mistakes again, but negotiation is not a defined art or science. Never are two experiences the same. You learn as you go, trying not to make the same mistakes more than once.

We all need to make paradigm shifts in fast-changing times. Corporate counsel, whether employed in companies or government, can diversify from legal matters to delivering a wider value as negotiators; from managing to leading; from self-centered positions to mutual interests; from not accepting the inevitability of *Litigation As Usual* to finding creative strategies and processes to secure negotiated outcomes within and beyond the legal arena.

An important inspiration for negotiation is not a negotiation book, but one on team leadership. *Getting It Done: How To Lead When You're Not In Charge* is a 1998 book by Professor Roger Fisher and management consultant Alan Sharp. It was republished as *Lateral Leadership: Getting It Done When You're Not The Boss*, in 2004. It remains a great starting point. Fisher and Sharp identify many of the attitudes and skills that cause external deals to be impeded by internal politics and lack of leadership.

Corporate counsel are often in a perfect position to practice what Robert K Greenleaf, drawing on classic texts from the Zhou Dynasty, called *servant leadership*, and what the Danish conflict resolver Tina Monberg calls the Butterfly Effect in *Serve to Profit: Butterfly leadership* (2014).

Business schools (though, sadly, few law schools) teach negotiation skills and techniques, but more often as an elective than as a core subject. Most people emerge from business schools and law schools as instinctive positional bargainers expressing themselves in the form of wants and demands rather than needs and interests. They tend to be touchy about negotiation. Tunnel vision and a gladiatorial approach can block their ability to explore wider prospects and better opportunities.

Without realizing it, most are doing a disservice to the interests they represent, and to themselves. Today's market is driven more by quick and efficient outcomes. New ways of negotiating are gaining widespread acceptance because they are pragmatic, fast, optimize value and are more sustainable. Business leaders can no longer feel free to take silly risks with shareholders' assets. The premium now is on responsible leadership and management. That includes reputation enhancement, especially in this world where you can be made and destroyed on social media. It includes being a good party to do business with and securing certainty with minimum time, risk, cost and exposure. CEOs increasingly expect creative strategies for managing risks and costs and securing more effective outcomes.

Most of us know that, as corporate counsel, we have a wider responsibility than the one owed to the person or group to whom we report. It extends to our employers' shareholders and other stakeholders beyond the organization.

Some law firms and other service professionals, unconsciously or not, prioritize their income over a client's outcome. Realizing that this outmoded attitude has no viable future, many have moved on. Discerning external counsel, accountants and consultants know that to retain their ever more astute and demanding customer base, and to gain new business, they need to prove themselves as achievers of early results, as dealmakers, dispute avoiders and solution providers, and not just as good advisers, processors and litigators even if that means losing billings per case. This is also consistent with many modern Bar Rules.¹

So the expectations on corporate lawyers have changed. The term *general counsel* (GC) implies the broader nature of the role, and not only of the most senior in-house lawyer. We are expected to be business and operational people who are lawyers, not lawyers with a business orientation.

I felt there was no point writing another negotiation book unless it makes an important point for internal counsel. Actually, seven important points, all of which emerge in more detail in the pages that follow. They are:

- Corporate and other internal counsel should not confine themselves to *docugotiation* and *litigotiation* – negotiating terms in agreements and settlements. Those who diversify as commercial negotiators outside the legal frame become true *general* counsel, empowered to lead, innovate, inspire and increase their value.
- Cross-cultural negotiations would lead to more effective outcomes if negotiators take more time to listen and truly understand the other party. Even though most people are not entirely stereotypical, understanding cultural frameworks is essential.
- Prepare better and faster by using openly available e-tools. Preparation is key, and the preparer is at the center of negotiations.
- The dynamics of neuroscience may make your eyes glaze over, but understanding the basics of brain science improves negotiation.
- Using a neutral facilitator to help the parties forge a more effective deal is a greatly under-used opportunity. By having a trusted impartial person take charge of the process frees everyone up to negotiate better. It should not be confined to dispute settlement.
- Legal education needs to include negotiation skills. Negotiation is a hard, not soft, set of skills and can be assessed. Accreditation should be offered to those who pass negotiation skills assessments.
- It is time for an international initiative, backed by top educators, businesses, professional service firms and professional bodies to set high-level global negotiation knowledge and skills standards, as well as an international code of negotiation ethics. An international negotiation institute would not provide training or other services but promote and encourage more and better education on negotiation in all main languages and cultures, treat negotiation as a hard skill, inspire more people to take negotiation courses and improve the quality and effectiveness of negotiated outcomes.

Michael Leathes, January 2017

Abbreviations

AAA	American Arbitration Association
ADR	Appropriate (or Alternative) Dispute Resolution
ATNAs	Alternatives To a Negotiated Agreement
BATNA	Best Alternative To a Negotiated Agreement
CEDR	Centre for Effective Dispute Resolution
CL	Collaborative Law
CISA	Centre for Interdisciplinary Sciences
CSR	Corporate Social Responsibility
DRB	Dispute Resolution Board
DSD	Dispute Systems Design
ECA	Early Case Assessment
EI	Emotional Intelligence
ENE	Early Neutral Evaluation
EQ	Emotional Quotient
GC	General Counsel
GPC	Global Pound Conference
HKMAAL	Hong Kong Mediation Accreditation Association Ltd
ICC	International Chamber of Commerce
ICCC	International Client Consultation Competition
IMI	International Mediation Institute
ISDS	Investor-State Dispute Settlement
JV	Joint venture
LAU	Litigation As Usual
MESO	Multiple Equivalent Simultaneous Offers
MCA	Music Corporation of America
NF	Negotiation Framework
OBE	Outcome-Based Education
ODR	Online Dispute Resolution
OECD	Organisation for Economic Co-operation and Development
O/S	Operating System
O/S 1	Emotional Operating System
O/S 2	Social Operating System
O/S 3	Rational Operating System
PATNA	Most Probable Alternatives To a Negotiated Agreement