

LEGAL NEGOTIATIONS

*Getting
Maximum
Results*

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The sponsoring editor for this book was Mary Kay LaRue and the legal editor was Susan Wessel.

To Barbara, Laura, and Jeffrey, for their fairness in negotiating and, most of all, for their love.

MKS

To Bobbi.

RMS

And to our parents.

MKS & RMS

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Preface

While negotiations vary widely, attorneys consistently confront problems and issues concerning negotiating methods and techniques. Whether novice or experienced, the lawyer must grapple with a series of questions that determine whether optimal results will be achieved. For example, he or she must determine how best to:

- Maintain credibility

- Persuade

- Decide whether to confront or cooperate

- Obtain information and reduce uncertainty

- Plan creatively, efficiently, and effectively

- Properly identify client goals

- Counsel the client to create understanding

- Obtain clear authority from a satisfied client

- Use and respond to emotional appeals or pressures

- Choose and implement strategies and tactics from a wide range of available alternatives, rather than from only a few used from habit or lack of knowledge

- Understand the dynamics of the process

- Push for optimal results, and yet close deals and settlements beneficially

- Structure and draft agreements to achieve client goals and protect or improve gains made during the negotiation

Having knowledge to answer these questions properly leads to increased effectiveness and improved negotiation outcomes. Lack of this knowledge not only decreases the negotiator's effectiveness, but also adds to the difficulty, tension, stress, and uncertainty inherent in negotiations.

Legal Negotiations: Getting Maximum Results is designed to present comprehensive, readily usable approaches to all aspects of negotiating, and to improve negotiating skills of both novice and highly experienced negotiators. The materials are not aimed merely at separating the forest from the trees, but rather at identifying methods for prevailing in an array of forests and rocky terrain, and anticipating and avoiding pitfalls. It is a book for lawyers, although most of the material is equally applicable to business professionals and entrepreneurs, as well as other professionals who negotiate.

Legal Negotiations begins with an introduction and orientation to the dynamics of the negotiation process and basic guidelines for negotiating effectively. Chapter 2 explains how to identify and define client goals. The third chapter details the nine key strategies and countermeasures. In the next four chapters, 52 useful tactics are examined, as well as tactical countermeasures. Chapters 8 and 9 contain structured steps for proper planning, an often overlooked, yet critical, factor. Techniques for persuasive communication and eliciting information are explored in Chapter 10. The next chapter explains methods for drafting agreements, and practical ethical considerations are reviewed in Chapter 12. After each chapter, a summary and review assists the reader in integrating the material. In addition, a detailed Appendix provides a working guide for use in actual negotiations.

Using these methods, lawyers and other negotiators can improve their skills, understanding, power, control, and results.

All entities and persons in the examples are fictitious, and do not depict any living or deceased person, or any entity.

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§1.01 Introduction

Most lawyers recognize the importance of negotiations in their lives. They spend a substantial part of their professional time negotiating. In addition, like everyone else, they also negotiate in their personal lives.¹ An attorney's real effectiveness as a professional is heavily influenced by his or her negotiating skill, or lack of it. How he or she is perceived by clients and other lawyers is greatly affected by this skill or the lack of it. Most matters, whether they are transactional or adversarial, are resolved by negotiation.² However, few lawyers (or nonlawyers, for that matter) fully understand the art and science of negotiation.³

¹ Menkel-Meadow, *Legal Negotiation: A Study of Strategies in Search of a Theory*, 4 Am B Found Res J 905, 908 (1983); H. Cohen, *You Can Negotiate Anything* 15-16 (1982).

² S. Goldberg, E. Green & F. Sander, *Dispute Resolution* 19 (1985) [hereinafter Goldberg]; H. Cohen, *supra* note 1; Menkel-Meadow, *supra* note 1.

³ In studying negotiations in the context of social psychology, it has been suggested that pertinent topics from social psychology include utility theory, social judgment theory, influence theory, social facilitation theory, coalition theory, and the relative effects of the person and the situation, and that significant variables affecting a negotiation can include the objectives, incentives, strategies, tactics, role reversal, conference size, complexity of the issues, accountability to the negotiators' constituencies, and stresses and

Virtually everyone, though, recognizes the uncertainty that is present in negotiations. Uncertainty and lack of control are the two key factors which often can make negotiating a difficult, frustrating, anxiety-filled, and stressful endeavor. The lawyer may be uncertain about questions such as:

1. What does the client really want to achieve?
2. What is it realistically possible to achieve?
3. What does the other party really want?
4. What is the other negotiator really seeking?
5. What are the best means to influence the other party and its negotiator?

The uncertainty and lack of control are compounded by the many factors that can lead to negotiations which fail to achieve their objectives. These include:⁴

1. Lack of a sufficient understanding of the negotiating process
2. Inadequate prenegotiation information gathering
3. Improper analysis and planning
4. Ineffective communication
5. Lack of knowledge about and ability to use a broad range of strategies and tactics
6. Becoming lost if a lack of movement or a deadlock occurs
7. Inadvertently being placed in a position or placing another in a position where compromise is impossible without a loss of face
8. Parties allowing emotions to govern decisions due to a failure to counsel properly
9. Differing opinions by the parties, due to their possessing different information to the disadvantage of both
10. Unrealistic client expectations
11. Habitually negotiating with only one style
12. Linking multiple matters together
13. Having bottom line positions that do not overlap to form an area of potential agreement, or have very little overlap, because of miscalculations of benefits, detriments, and risks

The goals of the authors are to assist negotiators in:

1. Reducing their levels of uncertainty, stress, and anxiety
2. Increasing their degree of control and efficiency

tensions involved in the negotiation. D. Druckman, *Negotiations: Social-Psychological Perspectives* 20 (1977).

⁴ Goldberg, *supra* note 2, at 88.

3. Improving and maximizing their negotiating results

These goals can be achieved through a readily implemented negotiation approach to improve perceptions, analysis, and communications abilities, while providing a flexible system for choosing from a full spectrum of strategies and tactics. These strategies and tactics encompass a wide variety of techniques and methods, including the use of power, competitiveness, persuasion, bargaining, cooperation, problem solving, and combinations, so that counsel can effectively adapt to any situation and achieve the optimal results possible in terms of the client's goals and the realities of the situation.⁵ This will benefit anyone who negotiates serious matters. "Knowledge plus skills plus self esteem equals competence."⁶

Of course, all of the problems in negotiations cannot be totally eliminated. Any such promise would be false. But the problems can be significantly curtailed and performance can be markedly improved through an increased understanding of the negotiation process and of the best means by which the negotiator can influence outcomes. This understanding will be presented in a form which then can be successfully and practically implemented. The starting point for this increased understanding and the ability to implement it successfully is the consideration of the very process of negotiation. This is a basic premise for optimal negotiating.

§1.02 Negotiation as a Process

Negotiation is a process through which parties determine whether an acceptable agreement can be reached. It is far more than just a series of offers and counteroffers. It is not merely a choice between being competitive or cooperative. Rather, negotiation is the process through which information is exchanged, evaluated, and used as the basis for decisions about whether to agree at a given point or at all.

Effective negotiation entails the controlled gathering and exchange of a wide variety of information to assess the parties and the potential for agreement. This information includes the parties':

1. Positions
2. Needs
3. Interests
4. Goals

To the extent that a negotiator's personal position can influence the process, the information also includes the personal interests, needs, and goals of the negotiator.

⁵ See Menkel-Meadow, *supra* note 1, regarding the general approaches to the study of negotiation.

⁶ T. Warschaw, *Winning By Negotiation* 18 (McGraw-Hill, Inc 1980).