

NEGOTIATION SKILLS FOR IN-HOUSE COUNSEL

When lawyers think of negotiations, they generally think of a small room with professionals huddled around a table late into the night until the other side is worn down or beaten into submission.

The reality is, particularly for in-house counsel, we are always negotiating. And it's not only in small rooms. "When two or more parties need to reach a joint decision but have different preferences, they negotiate."¹ In any bureaucracy, as in a big company, it can be about the use of resources, sizes of offices, dealing with suppliers, agreeing on a budget or, the most important negotiation of all, their own salaries. It can be face-to-face but more often it's on the phone, by email or text message. Given how critical a skill it is, it's hard to understand why lawyers receive so little formal training in negotiations or, to put it bluntly, bargaining.

While there is no set of rules to guarantee success in commercial negotiations, there are some guidelines that provide a useful framework. Some of the guidelines we have set out here are the outcome of experimental research. They have an empirical base derived from the reality of the bargaining table. We have formulated these guidelines following more than 40 years of experience working with large organisations who were struggling to find practical solutions to very real and pressing negotiation problems.

We have found that, in practice, negotiators continually fall back upon familiar and psychologically comfortable techniques and fail to exercise initiative and enterprise.

So, here are some guidelines that should be useful during the actual process to help you become a better negotiator.

Identify the important points

Highlight the points in the list below you feel are the most important in the pending negotiation. At intervals during the negotiation, review the highlighted points to see whether you have kept each point in mind and whether you are bringing each point to bear in the way that you planned. This act of review means that the negotiation not only achieves the commercial objective intended but also becomes a learning experience.

Companies usually have strategic myopia when it comes to negotiations. "Companies don't make purchases: they establish relationships."² Both sides must win, but it is eminently possible for one of the parties to win more than the other. While this is likely, good negotiators will consider the effect that the outcome will have on the relationship that exists with the other party.

Negotiators operate in a shifting sands environment, which is distinguished by its tremendous freedom of movement. What can actually be achieved is a function of the negotiator's sense of opportunity and enterprise, with the only constraint being their critical point—that is, the point beyond which the negotiator cannot go. These critical points should be determined before the negotiations proceed. However, they aren't set in concrete because they may change as the shape of the deal evolves.

Preparation is critical

It sounds obvious but the better prepared you are for a negotiation, the better you will do. This is because the better prepared you are, the more confident you will be during the process.

Start by thinking about what your CEO really wants from the negotiations. Many legal and other actions in a company invoke strong negative emotions. Your job is to ensure the CEO and/or the Board have realistic expectations of what you and your team can achieve.

Make sure you explain to your CEO and/or Board how negotiations run, the costs involved and that the outcome will likely be a compromise. The resolution of differences involves the process of adjustment and compromise and the distance that separates the parties to a negotiation will only be eliminated when each party makes adequate concessions to admit enough of the other's views for an agreement to occur. The final agreement will lie somewhere between the original positions of the parties involved, although a straight compromise is unlikely.

It is also important to consider options such as alternatives to negotiation. What are the critical, good and 'nice to have' outcomes? Is there a good 'non-legal' outcome such as an apology or a deal?

Gather all the information your company has on the matter. Research the other parties. Work out the three hardest questions you will be asked. Do a simple analysis of your case and their case including what they expect out of it.

Knowledge of the seller's costs is crucial for buyers because, in most cases, the price is not a dominant consideration in commercial negotiation. The important factor is the concept of the total cost. Price conceals the various cost components that go to form that price and there may be no relevance between the costs involved and the price that the seller requests.

Often it appears that one of the parties has superior bargaining strength and ought to 'win' the negotiation. Yet, the outcome of a negotiation seldom reflects the bargaining strength of either side and the skill of a particular negotiator can produce outcomes that commercial reality would suggest are improbable.

Establish and get signed off on the critical point or points beyond which the company is not prepared to negotiate. Establish a range of fallback positions ranging from very minor concessions, through to major concessions, up to any established critical points beyond which you are no longer interested in negotiating.

Good negotiators complete their agreements in a way that leaves the other parties believing they have obtained a great deal as a result of the negotiation process.

During negotiation

The differences separating the parties will be expressed in the form of issues or agenda items. These issues will have differing degrees of importance for each of the parties involved. The extent to which each issue is of importance to each party is referred to as the hidden agenda.

The issues of importance to each party are seldom ever of equal importance to the other. A single issue is unimportant in the overall context of a negotiation. If a single issue is presenting problems, then it should simply be set aside to be dealt with at a later stage.



Generally, the larger the number of issues involved, the more room there is for compromise and manoeuvring.

A willingness to negotiate does not necessarily mean a willingness to arrive at an agreement. Negotiation may simply be a means of exploring attitudes as part of a fact-finding exercise.

Issues are exchanged through the process of concession trading. Since conceding an issue may be interpreted by the other party as a sign of weakness, the concession granted must be conditional to offset this possibility. Concession trading has an important psychological value in that it builds a climate of trust and mutual obligation.

In general, the structure and scope of any negotiation will be a function of the type of issues that are involved. Issues can be either convergent or divergent. Convergent issues favour the interests of both parties to the negotiation, whereas divergent issues provide one party with an advantage at the expense of the other. It seems obvious that the divergent issues need a greater spirit of compromise than the convergent issues. The task of the negotiator is to identify those issues where the interests of both parties have something in common. Once common ground has been established, it can be emphasised and stressed to minimise the disruptive impact of the divergent issues.

Treat each negotiation as a unique event. A particular negotiation should be treated as a novel transaction, even though it may be part of an ongoing relationship and, in so doing, precedents should be disregarded.

Past precedents are often tendered in an ongoing relationship as justification for a current demand. Such a demand by the other party should be treated entirely on its merits and past precedents ignored. Past precedents, however, may be a useful ploy to win you points.

The cost impact of each concession must be calculated in advance. Concessions must never be granted without the cost and impact of the concession being known before it is made. Critical points and fallback positions should never be established during a negotiation. If unexpected options or unexpected opportunities occur during the negotiation, then call a recess to re-think your position. Critical points and fallback positions should never be formed because of the persuasive skills of the other party.

The best negotiating stance appears to be firm but friendly: firm in rejecting unacceptable propositions, but friendly in suggesting that an agreement can be reached. In essence, "No, I'm sorry: I can't accept that proposal. But let's keep talking as I'm sure we can reach agreement."

People prefer a series of wins rather than just one, but prefer one loss. Make concessions, issue rewards and deliver good news in

stages rather than all at once, but convey bad news in one big chunk⁴.

If all else fails, create deadlines by which time decisions must be reached.

Always be ethical

The ultimate bottom line is to always be ethical. Negotiations come and go but your reputation doesn't. There is one thing more important than being known as a tough negotiator and that is your reputation for fairness and doing the right thing. [a](#)

Footnotes

1. Max H. Bazerman and Don A. Moore, *Judgment in Managerial Decision Making*
2. Professor Charles Goodman, University of Pennsylvania, cited in Tony Ellson, *Culture and Positioning as Determinants of Strategy*, Palgrave Macmillan, 2004
3. Daniel Kahneman, *Thinking, Fast and Slow*, Farrar, Straus and Giroux, 2011
4. Katherine Shonk, *Negotiation Briefings*, Program on Negotiation, Harvard Law School.

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