

## **“ENHANCING YOUR NEGOTIATING TECHNIQUES”**

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**BASIC THEORIES, APPROACHES AND TECHNIQUES  
OF NEGOTIATION**

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## BASIC THEORIES, APPROACHES AND TECHNIQUES OF NEGOTIATION

Many articles approach the study of negotiating techniques from a single-negotiator perspective. This article explores negotiating techniques from the dual negotiator perspective, the most common of which is perhaps the client-attorney team approach, and will focus primarily upon the role of the attorney. In so doing, it is the intent of the author to enable both the client and the attorney to use his or her negotiating partner more effectively.

### I. NEGOTIATION.

The negotiation of any matter is generally the key to that matter's settlement or resolution. Of course, many negotiations are lost in the "trenches of drafting" and any good negotiator must also be able to draft that which has been won by negotiation. All attorneys are capable of being good negotiators; many can be very good and some can be excellent. Some individuals have a natural flair and ability while others require careful development of their skills.

### II. CREATIVITY.

The negotiation of a matter provides the lawyer with many opportunities to use creative abilities. Some attorneys simply "run through" the issues basically accepting that which the other side is willing to give with respect to each and every issue. However, the good negotiator recognizes that a negotiation often may be likened to a "three act play" with a beginning, a middle and an end, and the excellent negotiator attempts, at all times to be the director. Each

aspect of the negotiation provides the lawyer with many opportunities to exercise skill, knowledge and creativity.

The good negotiator draws upon his or her entire life's experience together with the substantive knowledge of those areas of the law which impact upon the negotiation. In drawing upon one's life experience, it is just as important to be able to recognize and understand personality traits of the client and the opposition, as it is to have the ability to recall an anecdote, joke or "war story" when the circumstances call for such an interjection. The use of such devices may be just as important as understanding the substantive area of the law since a well-placed anecdote, joke or war story may be just the "mechanical" device necessary to re-enforce a point that one wishes to make or to undermine a point the opposition has made.

### III. PREPARATION.

There is nothing more important to insure success at a negotiation than proper preparation. Oftentimes attorneys make the mistake of considering themselves fully prepared simply by having a good and thorough grounding in the various areas of the law that will be touched upon during the negotiation. Such an attitude is both naive and foolish. What is equally as critical to a successful negotiation as a knowledge of the law is a knowledge of one's client's needs and concerns as well as those of the adversary. Accordingly, following the acquisition of any knowledge necessary to deal with the substantive areas of the law, one must then think through the alternate and varying positions that might be taken with respect to whatever issues might be considered to be deal points. It is important for the negotiator to "play act" in his or her mind the various strategies and positions that might be employed, in the abstract initially, with respect to any issue or term that the attorney believes may be a negotiation point. By preparing in this manner, the attorney is not preconditioned to the client's needs and is thereby able to "free

think” each issue and point so that he or she may be able to provide additional approaches to an issue, additional satisfactory resolutions for the client, and ultimately, the compromise position for both parties to reach consensus and move to the next point. Failing to analyze each point prior to meeting with the client may cause the attorney to deal with the very same “blindness” that the client brings to the table. Therefore, this analysis should be done prior to talking through the issues with the client.

Negotiations, without having first sat down with the client, should be avoided whenever possible. Even if one has had the opportunity to discuss the issues with one’s client via telephone on several occasions, it is still to one’s advantage to find even a few minutes to meet with the client privately. This may be accomplished by arranging to meet the client in the waiting room of another attorney’s office well before a meeting, or by inviting the client for a cup of coffee at a nearby diner or coffee shop prior to the meeting. In so doing, the negotiator and the client will at least have a brief opportunity to obtain “a feel” for the other. Since negotiation involves a certain degree of play acting, it is worthwhile for the attorney and the client to get an understanding of the other person’s “body language”. In all events, it is essential that the attorney speak with the client in order to discuss the client’s needs and concerns and thereafter formulate a basic strategy for the negotiation.

A meeting, either in person or via telephone, or several meetings, is always appropriate in order to draw out the real needs and concerns of the client. Oftentimes, having done the preparation discussed above, it is the attorney who helps the client develop the “final” position on many of the issues since the attorney, if he or she thinks through the issues beforehand, will be able to sit down with the client with an open mind – very often one of the critical reasons attorneys are employed, i.e., to bring intelligent and creative objectivity to a particular situation.

It is not infrequent that an attorney will help a client to understand the total picture better and thereby enable the client to rethink that which the client's position ought to be, as well as to help the client re-evaluate the "trade offs" the client is willing to make by better understanding which terms are more important to the client and, equally as important, which terms may be more important to the adversary and not of such great concern to the client thereby providing the client with a better understanding of the client's arsenal of "giveaways".

It is most important for an attorney to help his or her client to maintain flexibility. Flexibility is often the ingredient necessary to enable a party to compromise a position in a manner where that which the client has given up is less valuable than that which the client has been able to obtain from the opposition, thereby allowing the client to realize a benefit and yet cause the parties to reach agreement. In that connection, it is equally as important for the client to discuss and fully understand with the attorney the needs and concerns of the opposition. It is foolish and short-sighted to neglect the other side's needs and concerns. An understanding of the other side's needs and concerns can often provide the negotiator and the client with the ability to provide concessions which, while unimportant to the negotiator and the client, are nevertheless looked upon with value by the other side.

It is difficult to over-prepare for a negotiation, and a good negotiator should "play out" various aspects of the negotiation prior to the meeting. This mental play-acting allows the negotiator to internalize responses and statements and become more comfortable in the ensuing dynamic.

#### IV. ARRIVAL AT THE NEGOTIATION.

While one can overplay the concept of who gets "home territory" and who is required to do the traveling, in certain circumstances it can be and is important. It is obvious to say that, in

general, it is a sign of strength to demand or strongly request the opposition to come to one's office or the office of the client. However, before discussing venue with respect to control and other dynamics, one might consider venue from a perspective of the tone of the meeting. Obviously, a meeting at a lawyer's office around a large table with pictures of dead people on the wall is much more formal and austere than a meeting in a lunchroom, a cozy deposition room or a diner or restaurant or, for the matter, any place at the client's office which also has a greater tone of informality. In other words, the setting of the meeting can set the tone for the meeting, and there are many reasons why one may wish to have a formal as opposed to an informal setting – it should be thought through and, if possible, the setting for the meeting should match the intended tone one wishes to create for the meeting. Of course, this may often not be practical.

Having discussed the setting, we return to the venue to consider venue strategy. Most attorneys do not feel it necessary to stand on formality and overly fight to have the meeting at their office. Of course, if the meeting is at the negotiator's office, it is that much more easy for the negotiator to control the meeting. Control of the meeting, whether by aggressive tactic or otherwise, generally falls in the hands of the stronger and more skilled negotiator, regardless of venue.

Control can be obtained by simply sitting at the head of the table, by sitting next to the only phone in that office, or by sitting next to the door. Control may also be obtained by commencing the actual negotiation, as apart from the prenegotiation social amenities to be discussed in the next section.

The important concept to remember is that control is a “bouncing ball” and can be fought for, retained and relinquished at various times in a negotiation. It is not necessary to maintain

control at all times or at any time during the negotiation so long as one understands why one has or does not have control.

#### V. OPENING STATEMENT AS WELL AS PRE-OPENING PLEASANTRIES.

When one enters a negotiation from strength, it is often desirable to keep the humanization factor to a minimum and maintain a strong sense of formality so that the opposition does not get the feeling that it can ask for things it would otherwise not feel comfortable in asking for. In other words, as people get to know each other better and become transactionally friendly, one often finds that the weaker side feels that it can take greater liberty in asking for things or requesting concessions. Accordingly, it may be appropriate to seek to expand the pre-opening pleasantry aspect of a transaction when one feels one has little or no bargaining strength. It is this period of time that allows the observant negotiator to begin to get a feeling for the opposition, as well as by carefully listening to what is going on, to oftentimes pick up valuable information that the other side does not realize it is disclosing.

In other words, THE SUCCESSFUL NEGOTIATOR IS AN EXCELLENT LISTENER AND A CAREFUL OBSERVER. It is not uncommon for clients to talk shop, during which times valuable information can be disclosed as well as the disclosure of general feelings and attitudes. In addition, one can often learn if there are time constraints or other artificial impacts on the other side which can help the negotiator.

THERE ARE NO HARD AND FAST RULES IN THIS OR ANY OTHER AREA OF NEGOTIATION. The best thing a negotiator can do is to use the pre-opening aspect of the meeting to get a “feel”, if possible, of the situation and a general “lay of the land”. In addition, the negotiator may very well wish to use this aspect of the meeting to say informally that which might be offensive or impossible to say on a formal basis.

For example, a negotiator with a strong position who is looking to show even greater strength might indicate, in casual conversations with his or her counterpart, that the client would like to make the deal but really does not care because this deal is only one of many of a similar nature and, therefore, the client will come out on the law of averages whether or not this deal is made. Similarly, the negotiator might indicate that the client feels that the client has gone as far as possible and is walking into this meeting as a courtesy because the client has no intention whatsoever of making any further concessions. Of course, the tactics available to the negotiator are only limited by the negotiator's creativity. If one is to indicate that one's client is not prepared to go further or make any other similar type statement intended to "freeze" a position, it is much more effective if it is supported by logical reasoning or with an underlying fact.

Initial control is taken by the individual who terminates the pre-opening pleasantries which may last from 30 seconds to 30 minutes, depending upon the amount of coffee and tea interruptions, and commences the meeting by making the statement which moves the meeting from the pleasantry stage to the initial discussion stage. This statement can be made by any party at the table and puts initial control into the hands of the person making the statement because that person is then in the best position to create the agenda for the meeting or, at very least, suggest the starting point. A starting point can be critical, and while it may not be agreed to by the others present, it is the individual making the opening statement who has the opportunity to pick and choose the starting point.

## VI. THE BEGINNING OF NEGOTIATIONS.

While negotiations may not always resemble the following anatomy, for purposes hereof we shall break the negotiations into three components: the beginning, the middle and the end.

The first aspect of the negotiation will therefore be the beginning which can run for any period of time until the negotiations settle into a particular mode. It is in the beginning that strength is often exercised and weakness is often exposed. Generally, the agenda is set and the parties agree upon the manner in which they are going to work through the negotiations. Oftentimes, a discussion ensues regarding when the “big issues” will be addressed. Sometimes they are saved for last; other times they are addressed first. It is important during the beginning of the negotiation for the negotiator to assert himself or herself and put forth the positions and concepts that he or she wants to permeate the entire negotiation. There are a multitude of strategies that can be employed at this point depending upon too many fact patterns to be addressed here; however, it is important for the negotiator to carefully listen and observe everything that is being said and done. Oftentimes, as indicated before, much is disclosed by the opposition without it realizing it has done so. While it is at best an inexact science, often much can be disclosed from body language.

There are many opening tactics that may be employed. One tactic that is used is the so-called “start real hard no matter what approach”. This tactic uses initial aggression and purposefully puts the negotiation initially on the brink of falling apart with the hope that the other side will become concerned and show weakness. Thereafter, it is followed by certain conciliatory attitudes which are then taken as much more important so that minor concessions can carry greater weight than they would have otherwise carried by virtue of the initial approach.

Another approach that is used is the casual “good-guy” approach which is used to camouflage an extremely hard-nosed approach on the actual substantive issues. Such an approach enables the negotiator to be a super tough person on the issues while also showing

himself or herself to be an otherwise “nice guy” who is forced to take these positions because of either the client’s demand or because of real or feigned leverage.

Many other approaches may be used, initially including approaches to telescope or expand the negotiations. Sometimes it may be in the best interests of the negotiator to make sure all the deal points do not get resolved on the same day. On the other hand, it may be in the best interests of the negotiator to force through discussion of all the deal points. Similarly, it may be worthwhile to cover all the deal points but leave certain deal points open. Techniques regarding speed and emphasis are, of course, subject to each situation and a variety of variables.

Another opening technique is to create confrontation on every issue as opposed to providing no opposition on every issue. There may be reasons to set the stage initially to indicate a long and arduous negotiation; while, on the other hand, there are reasons to create the other impression. This, of course, can be done by picking and choosing the order in which issues are discussed. This approach, once again, takes one back to the overriding issue of control and determination of the agenda or adjustment of the agenda once control is obtained.

As is the case with the entire negotiating process, the initial aspect of negotiation is an orchestration, oftentimes filled with play acting and the creation of impressions. It is at this point that the bromide “first impressions are very important” turns out to be true. Because a skillful negotiator may wish to create impressions and create a tone which may not appear to be in the client’s best interest of quickly ending the negotiation in a successful manner, it is particularly important for the negotiator and the client to spend time with each other so the client can learn the negotiator’s tactics and discuss the strategy that the negotiator intends to employ. It is very difficult and often impossible to create impasse and slowdown without first obtaining the client’s approval. Very few clients are willing to risk a deal. It is important, therefore, for the negotiator

to explain to the client (unless the circumstances indicate otherwise) that the negotiator has no intention of killing or stalling a deal. Rather, the negotiator is using techniques to get resolution of issues more favorable to the client than might otherwise be obtained were the negotiator not to take apparently negative positions (without, however, jeopardizing the transaction). Of course, there are circumstances when the client will indicate that certain points are deal points, and if the client cannot obtain certain minimums, the client is prepared to kill or postpone the deal. These situations are generally quite easy to deal with because the negotiator knows very well that without obtaining the predetermined minimums the negotiator can present the ultimate bluff by packing his bags and walking out. It is with all of the other issues which are not “killer” deal points to the client where the skillful negotiator attempts and can obtain better terms than he or she might otherwise get if he or she carefully uses the variety of tools and techniques available.

While the opposition should never be under-estimated, most people are generally not willing to spend the time and endure the continual confrontation that can occur with long and difficult transactions. It is the nature of most to look for compromise and to find non-confrontational approaches. It is this element of human nature that the skilled negotiator can exploit by creating confrontation and prolonging negotiations to only, later on in the negotiation, attempt to act as the compromiser and the expediter, but in a manner so as to obtain better resolutions for the client through the device of finally looking for ways of expediting matters or avoiding confrontation. One approach in connection with this method is to postpone the issues where the negotiator has the least leverage so that they are raised at a time when all of the participants are looking for compromise and acceleration. Such an approach may enable the negotiator to lump together issues where he or she is weakest in such a manner so as to obtain better terms for the client either by oversimplification or perhaps by putting the “last six issues

on the table and splitting them equally in terms of who gets the advantage”, thereby perhaps giving the negotiator better terms on two or three points than would have been obtained were each issue individually negotiated.

## VII. THE MIDDLE GAME.

The middle aspect of the negotiation comes immediately following the end of the initial tensions – about the time when the participants in the room begin to relax and fall into a type of rhythm in terms of dealing with the issues. It is at this point that the tone has been set, the leverage of the parties has generally been exposed and the strong participants have come to the fore. Through the middle period of the negotiation, without more, the rhythm stays the same and the parties move from issue to issue generally having dealt with the difficult issues initially or having decided to postpone the difficult issues. For that matter, another available technique is to put to the end any issue that comes up which is of particular difficulty, either because it is recognized as such when the issue is first addressed or is recognized as such by the manner in which the issue is negotiated without resolution.

The middle aspect of the negotiation need not nearly be as calm and set as indicated. In fact, it is a particularly good time to use the device of contrast. This can be done in many ways, and one way which can be successful is to pick a theme as being particularly important to oneself or to the client and fight hard on every issue that touches upon the theme. For example, the theme the negotiator may choose is the speed with which the deal must be done; therefore, every issue dealing with speed is artificially created and made a deal point. Another theme might be the collateral security which the client demands. Therefore, every issue dealing with collateral security becomes crucial. Oftentimes simply putting forth these themes as being important to the client enables the negotiator to fare better in respect of the issues dealing with this theme,

particularly when the theme has inherent validity and the negotiator continues to return to it as important to the client. Using a theme as a device is particularly beneficial because the opposition cannot argue the invalidity of the theme. For example, the opposition cannot argue, in theory, that the other side is not entitled to collateral security if in fact the deal calls for such. The only issue about which the opposition can argue is how much collateral, not if any collateral, should be given. Therefore, the negotiator starts with a “leg up”. Using a device such as this can become particularly important because not only can the negotiator obtain better terms with respect to collateral security but the negotiator may decide to push quite hard only subsequently planning much later in the negotiation to ease off on the collateral being sought, using that easing off mechanism as a trade off for something else the negotiator really needs or wants. This is a device which might simply be called creating a deal point for the purpose of relinquishing the point in order to trade for something really important to the negotiator. This technique can be extremely useful and there are often several unimportant points to a client which can be raised to a higher level because of their inherent validity only later to be traded for, or perhaps be obtained. In all events, it is a win-win dynamic for the negotiator. However, in order to create and obtain better terms, the negotiator must know and understand the business aspects as well as the legal aspects of his or her client’s business so that he or she can create deal points out of lesser points and clearly understand the real points that the client needs to win.

It is perhaps the middle aspect of the negotiation in which all of the devices coupled around human nature can become important. It is here where life’s experience, and the negotiator’s ability to recognize that the negotiation is a stage, becomes important. Very often a quip, a joke, a war story or some other similar technique, is just what is needed to break the ice or reduce the pressure that may have been created for a number of reasons. Sometimes the

negotiator needs to create some levity or break the tension because he or she is doing too well; sometimes it is necessary because he or she is doing poorly and needs to, in a gentle or joking manner, take the opposition off stride. These techniques cannot be learned from a book or an article – they must be observed and developed through one’s social intercourse through all of the human situations that come about, whether it is learning how to handle a bad joke at a cocktail party or how to deal with an auto mechanic who does not want to service your car until the year 2022.

There are many artificial impacts which can have calculated results on a negotiation and oftentimes come some time during the middle. For example, lunch is often a rhythm breaker and a necessary interruption. Therefore, the good negotiator must first decide whether or not he or she wants to break for lunch, and, if there is going to be a lunch break, how to use the lunch break. Is it going to be social as opposed to business. To what extent will it be purely a lunch break as opposed to a lunch where the parties keep working. There are many considerations in connection with this potentially important break since it is generally the longest. Of course, there are telephone breaks, bathroom breaks, interruptions through others who inadvertently or advertently come into the negotiation room and so on. In fact, there are even weather breaks if negotiations are being conducted during a bad snow or rain storm. Another type of break is what might be referred to as “the will I be able to get my car out of the parking lot” break or “will the lot be closed” break. Each one of these breaks can create an artificial tension on one or more of the participants as well as create a welcome or unwelcome diversion. The important thing for the negotiator to recognize is that they each have a definite, to a greater or lesser extent, impact on the rhythm of the negotiation and can be used effectively by the skilled negotiator to increase

his or her position. In a very real sense, the negotiation is a chess game; some moves are worth careful consideration; on the other hand, some are throwaway moves.

As one can see, a good negotiator must maintain a high degree of intensity, regardless of how relaxed or joking the negotiator may want to appear during the entire negotiation.

Accordingly, a good night's sleep is quite helpful. In addition, being physically as well as mentally fit is also very helpful. That is not to say that "gold medalists" will negotiate better than others; however, during the course of what may be a 4 to 12 hour negotiation, with breaks, the person who is more mentally and physically fit, will generally fare better – if nothing else, that person will be more likely to be able to stay alert throughout the negotiation.

Important techniques which often arise in the middle of negotiations but of course can be used at any of the ends, whether the front or the back, are the devices of antagonism and compliment. Generally speaking, it is unwise to antagonize the opposition. On the other hand, antagonism can be used to intimidate the opposition if appropriate when the opposition is either ill-prepared or uninformed. However, antagonism should not be directed toward the other person; rather, it should be directed toward that which the other person is saying. It is generally a mistake and frankly "bad form" to attack the other person directly. It is much more effective to attack the statements of the opposition. By the same token, a well-placed compliment can often be disarming to the opposition as well as making the one giving the compliment look like the "regular guy" to all participants. A compliment to the opposition need not go to the opposition's legal ability or the opposition's position; rather, it could go to the opposition's tie or blouse or briefcase.

Another device which when appropriately used can be quite effective is that of humility; similarly effective, is the device of self-assuredness. These antithetical devices can each disarm and/or intimidate the opposition.

It should be quite obvious that there are numerous such devices that a negotiator can develop and have available in the arsenal of negotiating tactics. Of course, each negotiator must develop his or her own arsenal since not every device will work with every negotiator since each negotiator should work with those devices which are most apt for his or her personality. The use of a device which does not fit the negotiator is as awkward and as obvious as wearing sneakers with a pin-stripe suit. As each negotiator develops, both as a lawyer and as a human being, the negotiator will recognize his or her strengths (and hopefully his or her weaknesses) and thereby use devices that fit those strengths. Using devices which cause feigned attitudes and feelings is not only not going to work and eventually be seen through but is as well being dishonest with one's self. The good negotiator may play act and oftentimes will need to do so, but at all times the good negotiator should be true to himself or herself and not lose sight of the truth.

#### VIII. THE END GAME.

The final third of the negotiation can end with a whimper or with a bang. Very often the mode of the negotiation has turned into one of quickening pace in order to work through all of the remaining issues so that the parties can adjourn with a feeling of completion. It is during this aspect of the negotiation that many seemingly small points are easily given away by the negotiator who is tired or the client who has become somewhat bored, lost interest or is more concerned about getting home for dinner or catching a plane. It is the aspect of the negotiation where the skilled negotiator strengthens his or her resolve and takes the time to win the important points. Very often simple "stick tuitiveness" can win a multiple of points since the side with

greater resolve can often cause greater compromise from the other side. Quite often it is nothing more than the side with greater resolve that wins the points. One way to combat a negotiating strategy where the adversary focuses on every little point toward the end is for the other side to simply adjourn the meeting early, whether it be by half an hour or 40 minutes. By simply indicating that nothing further can obviously get done “in time” and using the stubbornness of the other side to put the balance of the deal off to another day, the leverage may shift away from the side that is moving slowly.

There are many other end play gambits. When a negotiator finds that the client is weakening his or her position, it is not uncommon for the skilled negotiator to simply end the meeting by saying that the balance can be worked out by the negotiators via telephone. In this manner, weaknesses surfacing from the client can be further avoided. Another approach for the negotiator who has the obvious strength as the meeting winds down is to announce in whatever way that is not offensive to the group that the meeting cannot adjourn and no one should leave until the deal is either completed or dies. This can be accomplished by simply indicating how difficult it will be to get everyone together or how difficult it will be for the negotiator to find time to meet again with his counterpart due to the parties’ hectic schedule. Obviously, positions and strategies change depending upon who has the leverage at any given time in the meeting and particularly with respect to the end of the meeting since oftentimes issues that could not be resolved during the meeting are raised again for resolution.

One of the advantages to the negotiator, regardless of leverage, in connection with deferring issues that could not be resolved during the meeting and raising them again at the end of the meeting is that it gives the negotiator the advantage of obtaining much more information and feel for the issues by virtue of having discussed many issues subsequent to the issue creating

impasse. With the additional time, the negotiator will most likely find another way to compromise the issue, given the trade-offs that previously occurred. Moreover, the negotiator will probably develop a clearer perception of where the leverage is, in general, and where the leverage is in respect of the particular issue.

It is not uncommon for the skilled negotiator to be able to take a weak overall position and nevertheless win a point at the end of the negotiation which could not be previously won. This can be accomplished through a variety of techniques, perhaps the simplest of which is to announce that since the other side won all of the other big issues, this one has to go to his or her client. This approach may fall under the category of humanizing the negotiation in order to play upon the feelings of each side.

Humanizing a negotiation has many beneficial aspects to the negotiator. First, it allows the negotiator to soften otherwise harsh positions as well as to create a rapport on a social level even though there is an adversarial tone on a negotiating level. Moreover, as indicated before, simple humanization of the negotiation can enable a very weak side to win several points on the basis of simply saying “you guys took everything else – we need to have this one point”. If the negotiation is properly humanized, this may be accomplished. On the other hand, the strong negotiator with all of the leverage may wish to avoid humanization of the negotiation so that he or she will not give up points which he or she would not have had to give up based upon the respective deal leverage. On the other hand, the strong negotiator with a great deal of leverage may wish to humanize the transaction so as to soften, through a social basis, the bitter pill that the other side is being required to swallow because of the respective leverage. In that regard, the negotiator must be able to determine with his or her client the extent to which “the wheel will turn”. In other words, it is foolish to “beat up” the other side, notwithstanding the leverage, if

further deals will occur in the future or third-party contacts will cause a roughshod approach to hurt the negotiator in other transactions for the same client.

In general, it is always best to make the other side feel that it has walked out with “a win”, and has done well, regardless of reality. It is always appropriate to give the other side a sense of success with respect to a negotiation. This can be done even though the negotiator wins virtually all of the important points. One way to accomplish such a feeling for the other side is to have cogent and rational reasoning for the positions being taken by one’s client. Sometimes the reasoning may be nothing more than “it is corporate policy”; nevertheless, even such a simplistic reason may very well be accepted by the other side and thereby remove the “sting” of what is, inherently, a harsh approach to a particular issue. In addition, there are often many points that are quite unimportant to the negotiator that can be given up to the other side. Sometimes, in the play acting of the negotiation, it is important for the negotiator to stand fast knowing he or she intends to give them up so the other side really feels it has obtained a victory. Another way to provide the other side with a sense of victory is to allow the negotiation of a particular point to be won by the other side after the other side has made a presentation of the reasons why it should win, with the negotiator supporting those reasons and agreeing with them, thereby giving the other negotiator the sense of having won the point on the merits through intelligent negotiation.

Strategies and approaches to the end game as indicated before are myriad. Perhaps, however, the most important approach to the end game is the actual end. In other words, the way in which the “good-byes” are made and the transition phrases are used so as to maintain the “glue” for the next meeting or the follow-up telephone conversations. Regardless of how bitter or difficult a negotiation may have been, it is always appropriate to try to end the negotiation on an upnote or with a sense of cordiality. This cannot always be done and should not always be

done but, for the most part, it is good to end in such a manner unless there are good reasons not to do so. In the final analysis, negotiations are composed of people and human relations are critical to move deals forward.

#### IX. CONTROLLING THE PAPER.

It is not enough to negotiate well and leave a room after having “won the negotiation” unless the fruits of that negotiation are properly drafted into the particular document for which the deal calls. There are those who are quick to say that they have no “pride of authorship”. However, the other side of the coin is there are those who say they have “little respect for those who have no pride of authorship”. In other words, the only lasting memory of a negotiation is the written words which document that negotiation. Accordingly, the good negotiator should either be an excellent draftsman or have with him or her an individual who possesses such skills. In fact, an often critical element of a negotiation is determining which side will draft the paper. In general, the side that controls the drafting of the paper always has the advantage because many sub-issues, as well as sometimes major issues, arise as the paperwork is being drafted. Since certain issues and sub-issues may not have been discussed in the negotiation, it gives the draftsman the license to approach it from any perspective he or she may desire. Obviously, the person drafting the document will lean the approach toward his or her client. In addition, drafting allows the draftsman to create nuances and inferences in favor of the draftsman’s client as well as to draft the points won by the other side in such a manner so as to limit them to the greatest extent possible or perhaps even undercut them.

There are almost invariably dozens of sub-issues that will not have been addressed at the negotiation and which are left for the draftsman to approach. They often range from matters such as the manner in which a payment will be made – for example, by check, money order,

certified check, bank check, wire transfer or cash – to such issues as generally considered more substantive such as whether a promissory note will be negotiable and who will be the maker and/or guarantor of that note. It is not uncommon for there to be issues which were not addressed but which are equally as important as the issues that were addressed. Those issues can sometimes be won simply by control of the paperwork. While, of course, the other side may have comments and/or objections to approaches taken by the draftsman, it is nevertheless true, although perhaps a bromide, that “once begun is half done” and therefore the bulk of that which is put on paper will tend to remain close to the manner in which it was initially drafted.

#### X. SURPRISE.

As was already indicated, preparation is the essential ingredient to a successful negotiation; however, it is not uncommon for skillful negotiator to be surprised or to be confronted with a question to which he or she does not know the answer.

As a general proposition, a bluff under such circumstances is foolish. It is generally far better to admit surprise and simply ask for the opportunity to confer with one’s client privately or, in connection with a question to which the answer is not known, to admit that fact and ask for a recess, during which the negotiator can perhaps call the office to obtain the answer.

It is often difficult to have the presence of mind to be able to stop a negotiation when many people are involved and ask for the opportunity to excuse oneself to be able to develop an answer. However, it is far better to feel uncomfortable about wasting five or ten people’s time for 5 minutes than to err on a critical point that could have been handled correctly had one taken the time to do so.

#### XI. CONCLUSION

Every negotiation constitutes a constantly changing mosaic of human emotion, drama, fact, legal issues and a host of outside impacts such as, for example, airplane reservations, parking lot closures, personal events, family illness and the like. In other words, a skilled negotiator is involved with all elements of life and is truly playing out a microcosm of life in all of its aspects. Accordingly, the skilled negotiator is one who understands the factual predicates as well as the legal issues and has a good understanding of all of the human elements that constitute the drama of the negotiation.

There are those who might say that a degree in psychology is almost as important as a degree in the law, and both of those degrees should be coupled with an intensive training course in understanding what the client's economic considerations are as they impact the negotiation. A skilled negotiator is an actor, a director, a lawyer and a psychologist all at once; oftentimes, depending upon the nature of the negotiation, the negotiator may be called upon to be an engineer, an economist and/or otherwise an expert in the business of the client.