The Science and Art of Effective Negotiation

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The ability to negotiate effectively is one of the most important skills that any lawyer can develop. Here, we explore the habits of highly effective negotiators. We will discuss effective negotiation skills to use at the bargaining table, including preparation, active listening, and collaboration. We will also explore strategies for identifying issues and finding common ground to build momentum toward successful resolution. Beginners and experienced negotiators alike will learn negotiation tools and techniques to maximize the likelihood of reaching a mutually acceptable agreement.

Rackham and Carlisle's Research Regarding Skilled Negotiators

In 1978, researchers Neil Rackham and John Carlisle conducted a landmark study of the face-to-face behaviors used by skilled negotiators. They compared the behaviors of 49 skilled negotiators with those of average negotiators over a total of 103 separate negotiating sessions.[1] The 49 skilled negotiators came from diverse backgrounds, including union representatives (17), management representatives (12), contract negotiators (11), and others (9).[2] The skilled negotiators were selected based on the following criteria:

(1) They were rated as effective by both sides;

(2) They had a track record of significant success; and

(3) They had a low incidence of implementation failures, meaning the agreements they reached were viable and successfully implemented.[3]

Rackham and Carlisle used the following definition of negotiation: "A negotiation is the verbal process of coming to agreement over the allocation of scarce resources."[4] They concluded that skilled negotiators utilize certain types of behaviors significantly more frequently while regularly avoiding other types of behaviors. Rackham and Carlisle's research found that skilled negotiators avoid the following behaviors: irritators; immediate counter proposals; defend/attack

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[1] Neil Rackham and John Carlisle, *The Effective Negotiator – Part 1: The Behaviour of Successful Negotiators*, The Journal of European Industrial Training. Vol 2. No. 6, pp 6-11 (1978).

[2] *Id*.

[3] *Id*.

[4] Neil Rackham and John Carlisle, *The Effective Negotiator – Part 1: The Behaviour of Successful Negotiators*, The Journal of European Industrial Training. Vol 2. No. 6, at p. 7 (1978).

spirals; and argument dilution.[5] On the other hand, skilled negotiators utilized the following behaviors significantly more frequently than average negotiators: behavior labelling; testing understanding and summarizing; seeking information; and giving internal information.[6]

[5] Neil Rackham and John Carlisle, *The Effective Negotiator – Part 1: The Behaviour of Successful Negotiators*, The Journal of European Industrial Training. Vol 2. No. 6, pp 6-11 (1978).

[6] Neil Rackham and John Carlisle, *The Effective Negotiator – Part 1: The Behaviour of Successful Negotiators*, The Journal of European Industrial Training. Vol 2. No. 6, pp 6-11 (1978).

Behaviors Avoided

Irritators

When Rackham and Carlisle refer to irritators, they are referring to a negotiator saying gratuitously favorable things about themselves or their offer, such as characterizing their offer as "fair" or "reasonable." Such gratuitously favorable expressions directed at oneself have no persuasive value to the other side but rather serve as an irritant because they imply that the other side is *not* being fair or reasonable. Skilled negotiators used irritators 2.3 times per hour while average negotiators used irritators 10.8 times per hour. "The conclusion must be that most people fail to recognize the counter-productive effect of using positive value judgments about themselves and, in doing so, implying negative judgments of the other party."[7]

Immediate counter proposals

Skilled negotiators made immediate counter proposals much less frequently than average negotiators. "The difference suggests that the common strategy of meeting a proposal with a counter proposal may not be particularly effective."[8] One of the reasons that immediate counter proposals are ineffective is they are often perceived as blocking or disagreeing rather than as a proposal. Additionally, they may introduce new or additional options, which can complicate or overwhelm the other party at a time when they are least receptive because they are focused on their own proposal that they have just laid out.[9]

Defend/attack spirals

Defending and attacking refers to the use of emotional or value-loaded behaviors that negotiators use to attack others or to defend themselves. Examples include comments such as, "You can't blame us for that," or "It's not *our* fault that the present difficulty has arisen."[10] Rackham and Carlisle found that average negotiators use more than three times as much defending and attacking behavior as skilled negotiators.[11]

Argument dilution

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[7] *Id*.

[8] *Id*.

[9] Neil Rackham and John Carlisle, *The Effective Negotiator – Part 1: The Behaviour of Successful Negotiators*, The Journal of European Industrial Training. Vol 2. No. 6, pp 6-11 (1978).

[10] Neil Rackham and John Carlisle, *The Effective Negotiator – Part 1: The Behaviour of Successful Negotiators*, The Journal of European Industrial Training. Vol 2. No. 6, at p. 8 (1978).

[11] *Id*.

The skilled negotiators outlined fewer reasons to support each argument. Contrary to the way most attorneys provide numerous reasons to support each argument, Rackham and Carlisle found that "the skilled negotiator tended to advance single reasons insistently, only moving to subsidiary reasons if the main reason was clearly losing ground."[12] In turns out that outlining multiple reasons to support an argument provides the other party an opportunity to simply attack the weakest one and dilute the stronger ones.

Behaviors Utilized

Behavior labelling

Skilled negotiators use behavior labelling by calling attention, in advance, to the category of things they are about to discuss. For example, rather than asking, "What was the cost of the widget," skilled negotiators said, "Can I ask you a question? What was the cost of the widget?" Instead of making a proposal, they began, "If I can make a suggestion …." and then followed this label with their proposal.[13] Rackham and Carlisle posit that behavior labelling gives the negotiator the following advantages:

(1) "It draws the attention of the listeners to the behavior that follows. In this way social pressure can be brought to force a response.

(2) It slows the negotiation down, giving time for the negotiators using labelling to gather their thoughts and for the other party to clear their minds from the previous statements.

(3) It introduces a formality which takes away a little of the cut-and-thrust and therefore keeps the negotiation on a rational level.

(4) It reduces ambiguity and leads to clearer communication."[14]

Testing understanding and summarizing

Skilled negotiators engaged in testing understanding and summarizing more frequently than average negotiators. "Testing understanding is a behavior which checks to establish whether a previous contribution or statement in the negotiation has been understood. Summarizing is a compact restatement of previous points in the discussion."[15] Skilled negotiators seek clarity and aim to avoid or prevent misunderstandings.

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[12] *Id*.

[13] *Id*.

[14] Neil Rackham and John Carlisle, *The Effective Negotiator – Part 1: The Behaviour of Successful Negotiators*, The Journal of European Industrial Training. Vol 2. No. 6, at p. 8 (1978).

[15] *Id*. at p. 9.

Seeking information

Skilled negotiators spend more time seeking information than average negotiators. As a percentage of all negotiators' behaviors, skilled negotiators engaged in information seeking behavior 21.3% of the time as compared to average negotiators who engaged in information seeking behavior only 9.6% of the time. Rackham and Carlisle identified the following advantages of seeking information:

"(a) Obtaining the necessary information with which to bargain;

(b) Using questions as a deliberate strategy. For example:

(i) Questions give control over the discussion;

(ii) Questions are more acceptable alternatives to direct disagreement;

(iii) Questions keep the other party active and reduce their thinking time;

(iv) Questions can give negotiators a breathing space to allow them to marshal their own thoughts."[16]

Giving internal information

The skilled negotiator is more likely than the average negotiator to make statements about what is going on inside their heads, such as feelings and motives.[17] Explicitly providing information about one's internal considerations, whether genuine or not, gives the other party some sense of security. Rackham and Carlisle found that giving internal information "was also often used instead of disagreeing behavior. For example, if a price quoted seemed too high, the skilled negotiator would say, "I'm very worried that we seem so far apart on this particular point …" instead of disagreeing flatly with it."[18]

Taking the most useful behaviors that Rackham and Carlisle observed and combining them with years of my own observations in the negotiation arena, what follows are the six key habits that commercial negotiators should develop in order to maximize the likelihood of consistently reaching sustainable agreements.

Six Negotiation Habits to Develop

Successful negotiators prepare, build trust and rapport; manage emotions; analyze best and worst alternatives to a negotiated resolution; utilize an interest-based negotiation model; and engage in brainstorming and joint problem solving.

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[16] *Id*.

[17] *Id*.

[18] *Id*. at p. 11.

Habit 1 - Prepare

Identify Goals

One of the most important things negotiators should do is work with their client to identify their specific goals, prioritize those goals, and then imagine what the other side's goals might be. A few prompts to help elicit this information from a client include:

1. If you had a magic wand, what would the ideal outcome be for you?
2. What do you hope will be different as a result of this negotiation?
3. What is most important to you?
4. What is least important to you?
5. If you had what you really wanted, what would that allow for?

Too often, when lawyers try to influence or persuade, they suffer from myopathy. They only look at the issue from their own perspective. In order to increase negotiation effectiveness, flip the script and consider the issue from the perspective of the other side. Spend some time helping a client consider these questions:

1. What do you think is most important to *them*?
2. What do you think is least important to *them*?
3. What motivates *them*?
4. What options or solutions might *they* propose?
5. If *they* had what *they* really wanted, what would that allow for?

Then spend some time thinking about possible solutions that would not only work for your client but that might also work for the other party. Effective negotiators know that it is important to offer something to which the other side can say, "yes." For them to give you something, they also need to get something out of the negotiation. Effective negotiators plan for multiple different options and possibilities that may arise in a negotiation. One strategy for maintaining flexibility is to establish, in advance, a maximum, a minimum, and an ideal target. Rackham and Carlisle found that skilled negotiators were more likely to approach a negotiation with a defined range as their objective, rather than an inflexible single point.[19]

Habit 2 – Build Trust and Rapport

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[19] Neil Rackham and John Carlisle, *The Effective Negotiator – Part 1: The Behaviour of Successful Negotiators*, The Journal of European Industrial Training. Vol 2. No. 7, p. 4 (1978).

Trust is critical in negotiations. It can take great effort and a long time to build and can be destroyed in an instant. Harvard Professor Frances Frei identifies the three components of trust as authenticity, rigor in one's logic, and empathy.

Empathy is commonly defined as the ability to understand and feel what someone else is feeling. Empathy is critically important for any negotiator because it creates an opportunity for the person on the other side of the bargaining table to feel truly heard and understood. Nursing scholar Theresa Wiseman has adeptly identified the following four qualities of empathy:

1. Perspective taking;
2. Staying out of judgment;
3. Recognizing emotions in other people; and
4. Communicating back the emotion you see.

Staying out of judgment can be particularly challenging for those trained as lawyers because our training teaches us to regularly evaluate right and wrong, lawful and unlawful, good and bad. One of the tools I recommend for staying out of judgment and maintaining room for curiosity is to give my brain another job to do. I assign it the job of asking curious and open-ended questions, such as:

1. What are they feeling?
2. What do they need?
3. What is important to them?
4. What do they value?
5. Where is the common ground?

In addition to helping negotiators stay out of judgment, asking open-ended questions helps to build trust and rapport by demonstrating genuine interest and uncovering new information. Open-ended questions are also less likely to trigger defensiveness and more likely to empower problem-solving by the other person.

Habit 3 – Manage Emotions – Yours and Theirs

There is an outdated view that emotions have no place at the negotiation table. On the contrary, the "things that people care about – not just outcomes, but also respect, power, and identity – are all bound to stir up strong emotions. As a result, separating the people from the problem [one of the strategies touted in the seminal negotiation book *Getting to Yes*] is neither possible nor desirable."[20] Highly effective negotiators have high emotional intelligence,

[20] Kimberlyn Leary, Julianna Pillemer, and Michael Wheeler, *Negotiating with Emotion*, Harvard Business Review (January – February 2013).

meaning they are adept at identifying and managing emotions at the negotiation table. "Emotionally intelligent people have the capacity to:

- identify the emotions they and others are experiencing;
- understand how those emotions affect their thinking;
- use that knowledge to achieve better outcomes; [and]
- productively manage emotions, tempering or intensifying them for whatever purpose."[21]

Negotiations are stressful. The stakes are high, and conflict is always bubbling beneath the surface, if not escalating in plain sight. Alison Brooks and Maurice Schweitzer, of the University of Pennsylvania, researched the effects of feelings of anxiety on negotiation performance. They used music to amplify the feeling of anxiety by playing Hitchcock's *Psycho* for the experimental group and Handel's *Water Music* for the control group. After listening to the respective music, subjects from each group were paired to do a simulated negotiation through instant messaging.[22] "The anxious subjects had lower expectations, made lower first offers, responded more quickly to offers, … exited the bargaining sooner, … and … they got worse outcomes."[23]

Effective negotiators must be adept at noticing and managing their own emotions as well as the emotions of others at the negotiation table. Afterall, as lawyer, mediator, and licensed clinical social worker Bill Eddy says, "Emotions are contagious. You can easily absorb someone else's upset emotions and become upset in the same way yourself … But you can often consciously choose not to absorb their emotions … [and] can often influence the other person's emotions with your positive emotions."[24] There are numerous strategies for identifying and managing emotions during a negotiation, but we will only discuss three here.

Take a Breath

The first strategy for identifying and managing emotions during a negotiation may seem rather simple, but it is often overlooked and yet is incredibly valuable. Take a slow, deep breath. Particularly when we experience stress or anxiety, which happens regularly during a negotiation, our breathing becomes quick and shallow. Taking deliberate, slow, deep breaths calms the nervous system, sending vital oxygen to the lungs and the brain. Slow, deep breathing supports the engagement of that part of the brain that is responsible for creative thinking and problem

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[21] *Id*.

[22] *Id*.

[23] *Id*.

[24] Eddy, Bill, *Calming Upset People with EAR: How Statements Showing Empathy, Attention and Respect Can Quickly Defuse a Conflict* (2021) at p. 135.

solving, both of which are critical during negotiations. As an added benefit, the calmer you are, the more contagious your calm is.

Take a Break

The second strategy for identifying and managing emotions during a negotiation is to take a break. Although the Harvard Program on Negotiation refers to this concept as going to the balcony, it can be accomplished by stepping outside, walking around the block, or getting a drink of water. The point of taking a break is to temporarily step away from the challenging situation to give yourself and others a little space and to recalibrate your approach.

Make an EAR Statement[25]

The third strategy for identifying and managing emotions during a negotiation is to make an EAR statement.[26] Bill Eddy describes an EAR statement as one that shows either empathy, attention, or respect or all three.[27] Eddy defines empathy as "saying something that shows you understand how the upset person might be feeling at the moment, such as worried, hurt, angry, or frustrated."[28] Note that offering someone else a conclusory assertion of "I understand" is much less effective than providing to them that you really do understanding by saying, "I understand that this is really frustrating to you." Eddy defines attention as verbalizing to the other person that you will listen to and then remaining focused on the person as you endeavor to truly hear what they are experiencing or feeling. "By saying that you want to understand, you are offering a connection to them that others may have refused to do. You sacrifice nothing to pay attention closely for a few minutes."[29] Finally, by respect, Eddy means "that you find something that you can respect about the person, no matter how small."[30] Making an EAR statement does not necessarily mean that you agree with the other person. Rather, making an EAR statement is a way of acknowledging the other person's experience, perspective, or feelings.

"Wise negotiators understand that managing emotions means more than identifying them and then setting them aside. Just like star athletes who are in the zone, wise negotiators are centered, energized, and resilient in the face of strong feelings. They prepare emotionally as well

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[25] Eddy, Bill, *Calming Upset People with EAR: How Statements Showing Empathy, Attention and Respect Can Quickly Defuse a Conflict* (2021).

[26] *Id*.

[27] *Id*.

[28] *Id*. at p. 135.

[29] *Id*.

[30] *Id*.

as substantively for any high-stakes negotiation."[31] "Being … a skilled negotiator requires attunement to one's own emotions and the ability to relate affirmatively to the emotions of others."[32]

Habit 4 – Analyze Best and Worst Alternatives to a Negotiated Agreement

Before and during any negotiation, it is important to know and remember your BATNA, also known as the best alternative to a negotiated agreement and your WATNA, or the worst alternative to a negotiated agreement. These data points provide an important context through which to view the negotiation.

How to Analyze Your BATNA a/k/a Best Alternative to a Negotiated Agreement

Step 1: If you do not reach an agreement during the negotiation, what is the very best possible outcome your client could achieve in Court? In other words, if you represent the Plaintiff, you succeed on all your factual and legal arguments in Court such that your client is awarded all the compensatory (and punitive, if applicable) damages you seek. Alternatively, if you represent the Defendant, you succeed on all your factual and legal arguments in Court such that you either prevent the Plaintiff from recovering anything or keep the Plaintiff's recovery to a minimum. This is $X.

Step 2: If you do not reach an agreement during the negotiation, what is it going to cost your client to achieve the very best outcome in Court? In other words, how much will they pay in court costs, plus attorneys' fees, plus expert witness fees, plus time away from work, plus stress, plus damage to important relationships in order to achieve the very best outcome in Court? This is $Y.

Step 3: Calculate $X minus $Y and this is your BATNA.

Illustrative Example: By way of example, assume Plaintiff is a commercial landlord suing a commercial tenant for failure to occupy the commercial space when agreed and to pay the agreed upon rent. Defendant commercial tenant argues that Plaintiff commercial landlord failed to mitigate its damages by timely marketing the commercial space. For purposes of this example, assume that if Defendant commercial tenant succeeds on its failure to mitigate damages argument, then the unpaid rent damages will be reduced by exactly one-half. Assume that it is undisputed that the lease provided for commercial rent of $2,500.00 per month for twelve months and Defendant commercial tenant did not pay rent for any of that period of time. Assume that the commercial space remained vacant during the twelve-month lease period and that the written lease agreement provides for interest from the date of breach at the legal rate of

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[31] Kimberlyn Leary, Julianna Pillemer, and Michael Wheeler, *Negotiating with Emotion*, Harvard Business Review (January – February 2013).

[32] Kimberlyn Leary, Julianna Pillemer, and Michael Wheeler, *Negotiating with Emotion*, Harvard Business Review (January – February 2013).

8% (assume one year of interest for this example) and attorneys' fees at the statutory rate of 15%. Assume that legal fees and costs for Plaintiff commercial landlord through trial are $15,000.00.

Plaintiff commercial landlord's BATNA analysis is as follows: Assuming Plaintiff commercial landlord wins all legal and factual arguments and the Court finds in its favor, Plaintiff's best outcome in Court is **$21,900.00**, which is calculated as follows: $2,500.00 x 12 months = $30,000.00 + $4,500.00 (for 15% attorneys' fees on $30,000.00) + $2,400.00 (for 8% interest on $30,000.00 for one year) - $15,000 for attorneys' fees and costs expended in order to achieve that best possible outcome in Court.

How to Analyze Your WATNA a/k/a Worst Alternative to a Negotiated Agreement

Step 1: If you do not reach an agreement during the negotiation, what is the very worst possible outcome that could happen in Court? In other words, you lose every factual and legal argument in Court and the very worst happens. This is $A

Step 2: If you do not reach an agreement during the negotiation, what is it going to cost your client to end up with the very worst outcome in Court? In other words, how much will they pay in court costs, plus attorneys' fees, plus expert witness fees, plus time away from work, plus stress, plus damage to important relationships in order to achieve the very worst outcome in Court? This is $B.

Step 3: Calculate $A + $B and this is your WATNA.

Illustrative Example: Using the same fact pattern above, Plaintiff commercial landlord's worst possible outcome in Court is a finding that Plaintiff failed to mitigate its damages. Accordingly, Plaintiff commercial landlord's worst possible outcome in Court is **$3,450.00**, which is calculated as follows: $2,500.00 x 12 months = $30,000 reduced to $15,000.00 for failure to mitigate damages + $2,250.00 (for 15% attorneys' fees on $15,000) + $1,200.00 (for 8% interest on $15,000.00 for one year) - $15,000 for attorneys' fees and costs to get to a verdict.

In this example, Plaintiff commercial landlord's BATNA is $21,900.00 and its WATNA is $3,450.00, which provides two reasonable data points for negotiation purposes.

If there are multiple different claims or causes of action to be negotiated, then you should conduct a BATNA and WATNA analysis for EACH separate claim. Then you should rank your claims so that you know which one has the best BATNA as well as which one has the worst WATNA. Calculating your BATNA and WATNA in advance of negotiation helps you understand the range of possible outcomes and provides measurable data points as you consider offers and make proposals throughout the negotiation process.

Habit 5 – Utilize an Interest-Based Negotiation Model

Interest-based negotiation, also known as integrative negotiation, is a negotiation model that focuses on the underlying needs, interests, and concerns of all parties rather than their stated

positions or demands. This is a win-win model as opposed to the traditional adversarial approach of the United States adversarial system. Rather than one party getting more pie while the other party gets less, in an interest-based negotiation model, the goal is to expand the pie to find a mutually satisfactory outcome for both parties. This model encourages collaboration by fostering open dialogue, identifying shared interests, and developing creative solutions that preserve relationships while satisfying each party's core objectives. Rackham and Carlisle found that "the skilled negotiators gave over three times as much attention to common ground areas as did average negotiators."[33]

An interest-based negotiation model is most beneficial when there is an ongoing relationship of some kind, whether personal or business, because it seeks to support the parties in improving their communication with and understanding of each other. An interest-based model using joint problem-solving seeks to create win-win outcomes where both parties' interests are met rather than setting up a win-lose dichotomy where one party gets everything they want and the other gets nothing. In addition to improving both the likelihood and sustainability of a negotiated resolution, an interest-based negotiation model offers the parties a chance to maintain and perhaps even improve their relationship.

Many people start negotiating by stating a position or making a demand. Skilled negotiators understand the critical distinction between a position and an interest. For example, "I want a fence on our property line" is a position. "I would like more quiet and privacy" is an interest that may be underneath the position. Interests are what cause a party to take the position of demanding a fence. Effective negotiators understand that the party demanding a fence has interests that are driving that demand. If they can uncover those interests, it is possible to explore another way to meet those interests that might be more acceptable to the other party. One of the best ways to get beneath positions in order to uncover the hidden interests, is to ask open-ended questions, such as the following:

1. Help me understand what is important to you about having a fence?
2. If you had a fence, how would that help?
3. If you had a fence, what would that allow for?
4. What would a fence mean to you?

Once the interests of privacy and quiet are unearthed on one side and the interests of aesthetics are unearthed on the other side, then the negotiators can begin brainstorming possible ideas for a solution that meets the combined interests of privacy, quiet, and aesthetics.

Habit 6 – Engage in Brainstorming and Joint Problem Solving

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[33] Neil Rackham and John Carlisle, *The Effective Negotiator – Part 1: The Behaviour of Successful Negotiators*, The Journal of European Industrial Training. Vol 2. No. 7, p. 3 (1978).

Once the negotiators have identified the parties' interests, particularly those that are shared interests, they can engage in a brainstorming exercise, which is a method of joint problem solving. Think of the brainstorming exercise as a white boarding exercise in which the parties start with a blank canvass and think as creatively as possible. Assure the parties that seemingly silly or crazy ideas will help stimulate their creative thinking and there will be a more serious evaluation and reality testing of each of the possible options after they have brainstormed all of the potential options. Write down all the ideas as possibilities without judging, evaluating, or commenting on them initially because this will temper creativity and there will be time later to fully evaluate any viable options. Just because someone puts an idea on the brainstorming sheet does not mean they are agreeing or committing to it. In fact, encourage the parties to generate ideas they think might work for the *other* party. Be thorough in this idea generating process. Some open-ended questions that can help generate ideas during this brainstorming exercise include:

1. What is the craziest idea you can think of to solve this problem?
2. What is a variation of the other side's idea that might work for you with an adjustment?
3. What specific option might work for you?
4. What is another idea?
5. What else might work?
6. What ways can you think of to solve this?

This brainstorming exercise generates new possible ways to solve this problem in a way that addresses the interests of both parties and keeps the negotiation moving toward a mutually acceptable outcome.

As with any other habit, developing these negotiation habits takes time and consistent practice. Engaging in a regular practice of self-reflection or debriefing after each negotiation can help negotiators gain important insights and hone effective habits more quickly. A few self-reflective prompts include:

1. What went particularly well during that negotiation?
2. What factors contributed to the things that went well during that negotiation?
3. What would I do differently during the next negotiation?

Additional Resources

Roger Fisher, William Ury, Bruce Patton, *Getting to Yes – Negotiating Agreement without Giving In*

William Ury, *Getting Past No - Negotiating in Difficult Situations*

Roger Fisher and Scott Brown, *Getting Together: Building Relationships As We Negotiate*

Roger Fisher and Daniel Shapiro, *Beyond Reason: Using Emotions as You Negotiate*

Marshall B. Rosenberg, *Nonviolent Communication: A Language of Life: Life-Changing Tools for Healthy Relationships*