**The Art of Effective Negotiation**

**Co-Presented By: Colleen L. Byers, JD, MBA, ACC and Frank C. Laney, JD**



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. Beginners and experienced negotiators alike will learn negotiation habits to maximize the likelihood of reaching a mutually acceptable agreement.

## Negotiation Habits to Develop

Attorneys should develop certain negotiation habits to maximize the likelihood of consistently reaching sustainable agreements. Successful negotiators prepare, build trust and rapport; and manage emotions.

### Habit 1 - Prepare

Before engaging in any negotiation, it is important to spend some time preparing for the negotiation. In advance of a negotiation, skilled negotiators think carefully about what they hope to accomplish by the end of the negotiation. If they do not know where they want to go, then it will be difficult to chart a course to get there.

*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 client's 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 the other side 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. Researchers Neil Rackham and John 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.[1]

**Habit 2 – Build Trust and Rapport**

Trust is critical in every negotiation. It can take great effort and a long time to build. It can also 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. Questions unearth missing information which can lead to answers parties have not imagined. Questions invite deeper reflection about complex or interrelated challenges, to go beyond favored or simple solutions and obvious ideas. Questions spark insight and creative thinking that enable new solutions and that bring to light hidden options. Questions break parties

[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. 7, p. 4 (1978).

out of prior rigid ideas that leave them at an impasse. Questions encourage curiosity to replace certainty, a vital shift for the problem-solving necessary when the usual solutions are not working.

> *When faced with a problem, it's tempting to tell people what to do. It feels efficient and makes us feel important and useful. But if the goal is understanding and discovering not-yet-visible solutions and opportunities, telling will not help you reach it. If the goal is real buy-in and commitment to a solution, telling doesn't work very well. With goals like these, you can lead the discovery of better solutions and influence lasting outcomes by learning to ask good questions in the right way and at the right time.* ~Tammy Lenski

*Active Listening*

Another key component of building trust and rapport is engaging in active listening, which includes reflecting back to the other person what you are understanding them to say. If either side refuses to listen, then the negotiation will quickly stall out and head toward impasse. It is understandable that your client believes strongly in their narrative and they need to know that you, as their lawyer have their back. But what is the harm of considering (without even conceding), that the other side might have one or two good points or legal arguments? Afterall, listening might help you to learn what is most important to the other side, which might be the key to unlock an outcome to which your client could easily agree.

*Reflecting*

Reflecting generally means responding back to the speaker the essence of what the speaker has said. This has several useful purposes. First, it tells the speaker that you heard what they said. Second, that you thought what they said was important enough for you to pay attention to it and remembered it. Third, by reflecting back, you are confirming that you heard them correctly, and if you did not, you are inviting them to tell it to you again until you get it right. This has the impact of building confidence and trust. It communicates that the speaker is worthy of being heard and that you care enough to make sure you have heard the story correctly.

Examples of Reflecting:

So, you say this has been very difficult for you.
I can see that you feel under a lot of pressure.
It sounds like his actions had a big impact on how you do your job.

*Two Components of Reflecting – Summarizing and Reframing*

Summarizing is similar to the simple "I understand" listening response but goes much deeper. In summarizing, you listen to the whole story, or if the story is long, a large part of the story, then repeat it back to see if you understand. The reflected story is usually in a summary or

shorter version, keeping the important points and dropping out the parts that will not move the negotiation forward. The listener may ask clarifying questions to better understand parts of the story. The listener asks along the way or at the end if she understood or got it right. The speaker then either confirms that the listener understands and got it right or gives additional information until the listener does understand. Summarizing enables a negotiator to gather information, confirm it is accurately heard, and build trust through deep listening.

Reframing is like Summarizing, but with a twist. The listener is not simply repeating what the speaker said but is changing it in subtle ways. It is still the same story, painting the same picture, but the listener is putting a different frame around the picture to give it a different look. It can give different meaning to the same story.

The most common reframing is to remove emotional, derogatory, or negative language. One side may tell the story using words that are very hurtful and accusatory, making it hard for the other side to hear what is being said without becoming defensive and argumentative. Reframing, or telling the same story without the negative language, helps bring down the emotions, models a calmer and more helpful way to talk about the issues and transforms the story into one the other side can hear and understand.

Reframing can also shift the focus of the story from a hopelessly intractable situation to one that has the possibility of being solved. It can help the parties see their situation and relationship differently. Instead of adversaries, they are teammates whose task is to jointly defeat the problem that is tormenting them both. Reframing can move parties from focusing on positions to starting to examine and express their needs and interests. The purpose of reframing is to get the parties to see their history, their present situation, and their future options differently. An effective negotiator should practice these and other good communication skills in all aspects of their life until thoughtful, reflective listening becomes second nature, an ingrained habit.

**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."[2] Highly effective negotiators have high emotional intelligence, 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]

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

- productively manage emotions, tempering or intensifying them for whatever purpose."[3]

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.[4] "The anxious subjects had lower expectations, made lower first offers, responded more quickly to offers, … exited the bargaining sooner, … and … they got worse outcomes."[5]

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."[6] 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 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*[7]

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

The third strategy for identifying and managing emotions during a negotiation is to make an EAR statement.[8] Bill Eddy describes an EAR statement as one that shows either empathy, attention, or respect or all three.[9] 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."[10] 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."[11] Finally, by respect, Eddy means "that you find something that you can respect about the person, no matter how small."[12] 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 as substantively for any high-stakes negotiation."[13] "Being … a skilled negotiator requires attunement to one's own emotions and the ability to relate affirmatively to the emotions of others."[14]

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?

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[8] *Id*.
[9] *Id*.
[10] *Id*. at p. 135.
[11] *Id*.
[12] *Id*.
[13] Kimberlyn Leary, Julianna Pillemer, and Michael Wheeler, *Negotiating with Emotion*, Harvard Business Review (January – February 2013).
[14] Kimberlyn Leary, Julianna Pillemer, and Michael Wheeler, *Negotiating with Emotion*, Harvard Business Review (January – February 2013).

## Additional Resources

Fredrike Bannink, *1001 Solution-Focused Questions*

Bill Eddy, *Calming Upset People with EAR: How Statements Showing Empathy, Attention and Respect Can Quickly Defuse a Conflict*

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*