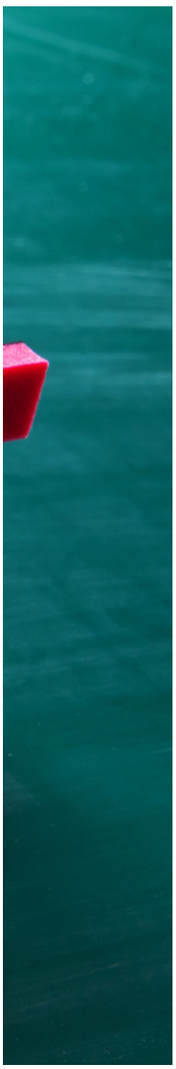
Becoming a Great Negotiator:

Six Tips for Lawyers

In law, as in life generally, favorably resolving complex problems often requires the willingness to give up some things in exchange for getting others. Lawyers who are great negotiators can help clients reach optimal results.

BY DAVID W. SIMON & JOHN BURROWS



Negotiation is a core component of most lawyers' professional lives. Lawyers negotiate daily on behalf of – and with – clients on matters of great consequence. Whether they involve the terms of a transaction, a dispute with a supplier, competitor, or former employee, or communication with a governmental regulator or enforcement authority over the rules of the game or whether the rules have been broken, negotiations permeate nearly every aspect of the practice of law.

Notwithstanding the importance of negotiations in a business-oriented law practice, lawyers tend to assume negotiating is just part of who we are and what we do. Generally, lawyers don't invest as much time and energy in developing negotiation skills as they do with other professional skills, such as oral or written advocacy or investigative and fact-finding techniques. That is a mistake. There are several ways lawyers can improve negotiation skills and thereby more effectively serve clients and achieve better results. Below are six tips for lawyers, who are usually good negotiators, that can help them become great negotiators.

Tip # 1: Know Your Negotiation Style, Diversify by Developing Other Styles, and Build Complementary Negotiation Teams

Negotiating style plays a crucial role in achieving successful outcomes. Negotiation styles cluster into five categories: competing, compromising, collaborating, avoiding, and accommodating. Each style brings strengths and weaknesses that affect the negotiation process and the outcome of a negotiation. Knowing your style (or styles) and the strengths and weaknesses is vital to improving your negotiation skills. Having facility with multiple styles and deploying them effectively based on the circumstances and strategic objectives of the negotiation will produce better results.

It can be valuable to understand your dominant style and its strengths, weaknesses, and appropriate applications. A simple self-assessment, developed by training firm Tero International, provides insight into individuals' negotiating style or styles and strengths and weaknesses.[1]

It isn't necessary to be good at all styles. Negotiating is a team sport, and it is rarely necessary (or wise) to go it alone. If you understand what you are good at and in which areas you lack skills, you should consider building teams that include colleagues with complementary styles to cover as many as possible. Particularly in significant negotiations, this is well worth the investment and will produce better results.

Tip #2: Prepare, Prepare, Prepare

Many lawyers excel at preparing for a negotiation. They have a firm grasp of the facts, the evidence, the regulations, and the legal frameworks. This is important but not sufficient. More time and energy should be devoted to developing the negotiation strategy itself. Doing so requires lawyers to understand their clients' objectives, which usually involve a lot more than just "obtain [X] amount of money" or "get a deal done." Negotiators must understand clients' true business objectives to negotiate favorable outcomes. They also need to understand the other parties' objectives and interests. "The first mistake is to focus on your own problem, exclusively. Solve the other side's as the means to solving your own."[2]

Key to preparation is understanding your side's "best alternative to a negotiated agreement" (BATNA) and reservation value. This requires identifying all the potential alternatives to a deal and evaluating and valuing each.[3] Putting yourself in the position of the other party and understanding its BATNA is also crucial. Once you do both, you can map out the options and identify a "zone of possible agreement" (ZOPA) that covers the territory between BATNAs.

The BATNA can be easy to figure out in a litigation context. It is often calculated by determining the potential outcome of the case, the likelihood of success, and the cost of litigation. It can be more complex, though, and might require consideration of additional factors, for example, other sources of supply, an alternative approach to an acquisition, or the possibility of building a solution internally.

There will almost always be multiple variables in a negotiation. For example, in a dispute, money, timing, the scope of the release, and restrictions on future business conduct all will likely appear in a settlement agreement. Lawyer negotiators must understand the value of each variable to the client and, in preparation, should rank them in importance and consider attaching numerical scores to keep focused on the right things in the negotiation itself. This helps a lawyer negotiator make sensible trade-offs that are in the client's interests.

Part of preparation involves negotiations with the client. It is important to engage with key client stakeholders (who may have different views of the BATNA and might value resolution variables differently) to develop consensus and get buy-in so there is agreement on what a successful resolution looks like in advance of the negotiation.

Tip #3: Favorably Anchor the Negotiation

When you have a solid understanding of the other side's BATNA, making an

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aggressive first proposal for a settlement is usually advantageous. Academic research has consistently found an "anchoring effect" associated with establishing the starting point for negotiations, with the ultimate result affected by the starting point.[4] Thus, if the ZOPA for a settlement is between $10 and $100, an initial offer of $2.75 is more likely to produce a settlement at the low end of the range, whereas an initial offer by the other side of $150 is more likely to produce a settlement at the high end of the range.

Outrageous and offensive first offers can backfire rather than anchor. The offer should be aggressive enough to make the lawyer offering it a little uncomfortable but not so aggressive as to cause the other side to exit the negotiation. First-offer anchoring is most effective when it is specific, rational, and defensible and is initiated by the party with more power in the relationship.[5]

Tip #4: Consider the Structure, Setting, and Timing of the Negotiation

Lawyers often give insufficient attention to the timing and location of and participants in a negotiation — important "set-up" factors that affect results. The most obvious example is in litigation, when the court sets a mediation date (often close to trial) and the parties are given one day with a mediator to settle a dispute. Such a reactive, passive approach to the setting is less effective than a more thoughtful, considered, strategically structured negotiation process.

The timing of the negotiation is key, and the right time to negotiate will vary based on circumstances. Resolutions will be reached and deals cut only when both parties understand the facts of the dispute or transaction well enough to determine their respective interests, positions, and BATNAs.

Don't assume that the issues are sufficiently ripe: carefully consider when negotiations should start. And avoid artificially cabining the negotiation around a single day or days. It might not be possible to settle a dispute during a one-day mediation or reach an agreement on deal terms during a few days of meetings. On the other hand, sometimes time pressure, even artificially created, helps push the parties to agreement. Think through all these factors and plan what a negotiation process, extending over a longer period, might look like.

The location of the negotiation can affect the likelihood of success. Will it occur at your office, the other side's office, or a neutral site? Will it be a formal setting like a conference room or a courtroom or a more informal setting like a restaurant, coffee shop, bar, or sports event (for those negotiations where confidentiality is less important)? It is often effective for the party with more power in the relationship to go to the other party's office to negotiate, particularly if the goal of the negotiation is compromise.

When the parties are stuck and finding a ZOPA is elusive, changing the setting to a more casual environment that promotes more personal interaction among the parties can be extremely effective. J.T. Rogers' play *Oslo* about the Oslo Accords provides an excellent and extended illustration of this dynamic, showing the near magical power of a setting totally disconnected from the parties and the dispute (a villa in Norway) and the power of personal relationships (forged through isolation and the sharing of meals and drinks) in helping the Palestine Liberation Organization and the Israeli government reach an agreement on some of the most difficult disputed issues in history.[6] The dynamics of any negotiation will be affected by the milieu, and it is always important to consider the setting carefully and strategically.

As you structure the negotiation, also consider who should participate and who should take the lead in the discussions. The right participants will depend on the facts and circumstances of the negotiation and each lawyer's strategy, but don't just assume that the lawyers will lead or even that the key business representatives most closely tied to the disputed issues should be involved.

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1) Know your negotiation style, diversify by developing other styles, and build complementary negotiation teams.

2) Prepare, prepare, prepare.

3) Favorably anchor the negotiation.

4) Consider the structure, setting, and timing of the negotiation.

5) Look for opportunities to create value, not just divide a fixed pie.

6) Think like a lawyer, consider post-deal risks, and craft solutions to mitigate those risks.

Think strategically about your objectives and how to achieve them, and make sure the other party is involved and brings the right people as well.

Tip #5: Look for Opportunities to Create Value, Not Just Divide a Fixed Pie

It is not unusual for lawyers to find themselves in what appear to be distributive negotiations, in which one side wins at the other's expense. Settling a dispute and reaching agreement on a deal's price are typical examples. Sometimes this is the mandate for lawyers, who must then work to achieve the best distributive result for clients. But there are many situations when a lawyer negotiator can help turn distributive negotiations into integrative negotiations, in which new value is created.[7]

Here are a few examples:

• In a dispute with a supplier over products that did not meet specifications, perhaps the dispute could be reframed from, "how much of a refund do you owe us?" to "how can we expand our relationship to make you a reliable, long-term partner?" Perhaps a client invests capital in the supplier to allow it to purchase new equipment, takes an equity stake, and gets a credit on future purchases to compensate for the defective deliveries.

• In a dispute with a distributor over its poor performance and a client's inadequate notice of termination, perhaps the negotiation could be reframed and expanded to facilitate the sale of the distributor to a different, successful distributor in a neighboring state, thus maintaining for the client a local presence in the market and a well-respected brand but bringing in new management and better operations.

• When representing a client in a dispute with a governmental regulator over a compliance issue, rather than simply compromise or fight, it might be possible to move away from the dispute with the regulator and lobby the legislature for a change to the underlying statute that will remove the issue from the regulator's jurisdiction or fundamentally change the standard by which the client is judged.

Adding issues, parties, or both to the negotiation can help achieve better results for clients.[8] Asking questions like these – "What uninvolved parties might highly value elements of the present negotiations? What outside issues might be highly valued if they were incorporated into the process? Are there any parties outside the immediate negotiations that can bear part of the risk of the deal more cheaply than the current players?"[9] – can help lawyers reframe a negotiation and create new value for clients.

A final tip for lawyers seeking to maximize value creation is to consider a post-settlement process through which the parties, perhaps with a bit

of distance from the negotiation itself, think about the deal they reached and determine whether there are ways more value can be created that benefit all participants.[10] Perhaps during the negotiation, one party mistook the other side's position for an interest or failed to identify an opportunity for some interest to be satisfied in a lower-cost way. In a no-pressure, the-deal-is-still-the-deal-unless-we-both-agree-to-modify-it way, additional value can be identified and claimed.

Tip #6: Think Like a Lawyer, Consider Post-Deal Risks and Craft Solutions to Mitigate Those Risks

Lawyers must always be aware that some negotiated resolutions will not be sustainable. It can be tempting (especially for lawyers strong in the competing style) to push too far and get a deal that feels like a total win in the present but represents a ticking bomb that will cause the client pain and disruption down the line. For example, resolution of a dispute at a price the other party can't afford to pay will likely lead to its bankruptcy and probably a lower total payout than might have been obtained through something less than a total win. These issues are especially important if there will be a continuing relationship between the parties, as is often the case in business disputes.

Smart lawyer negotiators think hard about what could go wrong and negotiate a resolution to mitigate those risks. Some of this will be a function of deal structure — money up front, personal guarantees, escrows, and insurance are all effective tools. Contingent agreements that tie payouts to performance or allocate the risk of some unknown variable can also be effective.

Risk mitigation can also be accomplished through appropriate structuring of the negotiation process, with deal implementation and execution front of mind.[11] This starts with thinking ahead, a skill lawyers generally excel at, and imagining what the relationship between the parties might look like a year after the deal has been reached. What might go wrong that could affect either party and the value each is expecting to extract from the deal?

In a process that perhaps is less comfortable for many lawyers, implementation-oriented negotiators should 1) help the other side prepare for the negotiation by effectively analyzing its interests and capabilities, to prevent the other side from making commitments it cannot fulfill; and 2) assume some responsibility for alignment of interests throughout the negotiation.[12] This is particularly important when representing the larger, more sophisticated party to the negotiation.

Risk-mitigating lawyer negotiators will produce more sustainable deals for their clients if they focus on ensuring agreement on the spirit of the deal, not only the specific terms. Deals often fall apart or fail to generate the value anticipated over fundamental disagreements about the "social contract," that is, the real nature and purpose of the deal.[13] Key to accomplishing this is an understanding of the future relationship between the parties — for example, does the deal involve a one-time payment with a complete break or an ongoing supply agreement extending years into the future? — and the nature of any ongoing relationship — for example, is this a merger of equals or an acquisition that fundamentally extinguishes the target? Ensuring alignment on what the parties are doing and how this will work going forward will reduce the risk of default or of a failure to extract the contemplated value.

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Conclusion

Lawyers are almost always good negotiators, but the thoughtful and strategic application of these six tips can help them become great negotiators, creating more value for their clients and sustainable resolutions. **WL**

ENDNOTES

[1]Tero Int'l Inc., Negotiations Self-Assessment Inventory (2014), https://www.tero.com/pdfs/negassessment.pdf.
[2]James K. Sebenius, *Six Habits of Merely Effective Negotiators*, Harvard Bus. Rev. (April 2001) (reprint no. R0104E).
[3]Deepak Malhotra, *Accept or Reject?*, Negotiation (Aug. 2004) (reprint # N0408D).
[4]Wolfram Lipp, Remigiusz Smolinski & Peter Kesting, *Toward a Process Model of First Offers and Anchoring in Negotiations*, Negotiation & Conflict Mgmt. Rsch. (forthcoming), https://ssrn.com/abstract=4163493 (July 15, 2022).
[5]*Id.*
[6]J.T. Rogers, *Oslo* (2017).
[7]Max H. Bazerman, *The Mythical Fixed Pie*, Negotiation (Nov. 2003) (reprint #N0311A).
[8]David A. Lax & James K. Sebenius, *3D Negotiations: Playing the Whole Game*, Harvard Bus. Rev. (Nov. 2003) (reprint #R0311D).
[9]*Id.* at 8.
[10]Bazerman, *supra* note 7.
[11]Danny Ertel, *Getting Past Yes: Negotiating as if Implementation Mattered*, Harvard Bus. Rev. (Nov. 2004) (reprint #R0411C).
[12]*Id.* at 6-8.
[13]Ron S. Fortgang, David A. Lax & James K. Sebenius, *Negotiating the Spirit of the Deal*, Harvard Bus. Rev. (Feb. 2003) (reprint #R0302E). **WL**