# NEGOTIATION

## Things Corporate Counsel Need to Know but Were Not Taught

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Michael Leathes

Foreword by Michael McIlwrath, GE Oil & Gas

Wolters Kluwer

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*Written by internal counsel, for internal counsel: clear, concise and inspirational. Personifies that the "benefit of the bargain" is not simply a game of numbers.*

Ute Joas Quinn, Associate General Counsel Exploration and Production, Hess Corporation

*Spot on! A user-friendly book that I was using before I reached the end. It made me think more creatively about all my negotiations to come. A must-read for every current and future in-house counsel.*

Cyril Dumoulin, Senior Legal Counsel Global Litigation, Shell International

*A lively, entertaining work. A multi-faceted approach to the art of negotiation. A convincing demonstration of what it is about and how it actually works.*

Isabelle Hautot, General Counsel International Expertise, Orange Telecom

*A clear and most comprehensive, not to mention, practical, book on negotiation. I picked it up and could not put it down.*

Wolf Von Kumberg, former Associate General Counsel and European Legal Director, Northrop Grumman Corporation; Chairman of the Board of Management, Chartered Institute of Arbitrators; Director, American Arbitration Association; Member, ArbDB

*It has been such a pleasure to read what is destined to inspire in-house counsel and many others for negotiating deals and settlements. It covers the landscape from both theoretical and practical angles. I found myself nodding in recognition and agreement all along the way.*

Leslie Mooyaart, former General Counsel, KLM Royal Dutch Airlines; former Vice President and General Counsel, APM Terminals (Mærsk); Chairman, The New Resolution Group

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# About the Author

Michael Leathes spent his career as a corporate counsel with Gillette, Pfizer, International Distillers & Vintners and BAT based variously in Brussels, New York and London. His pro bono duties included board memberships of CPR Institute (2003–2006) and the International Mediation Institute (2007–2015).

**Comments**

This book was peer reviewed in draft, but if you have comments, suggestions, ideas or contributions that could be considered for the next edition, Michael Leathes would value hearing from you. He can be contacted at ML@MichaelLeathes.com and via www.MichaelLeathes.com, from where certain materials, such as the roleplay in Appendix 7 can be downloaded.

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# Foreword

**by Michael McIlwrath**

**Global Chief Litigation Counsel, GE Oil and Gas**

A decade ago, I interviewed Michael Leathes for a podcast that I was hosting at the time called International Dispute Negotiation. It consisted of interviews with leaders in dispute resolution around the world. Unlike most of my other guests, who were happy to speak about themselves and their practices, Michael turned the tables on the interviewer.

He started *his* interview by asking me why my employer, General Electric, stood behind mediation as a form of dispute resolution, and why we had decided to invest both effort and money into the International Mediation Institute. IMI is a non-profit based in the Netherlands that Michael himself had co-founded to promote high standards of mediation around the world. I fumbled an answer on the spur of the moment about what mediation offers as a mechanism for resolving disputes.

But the real answer to Michael's question was actually much deeper, and it is only with the benefit of having read his book on negotiation these many years later that I can provide a fuller, better answer: traditional methods of resolving conflict are profoundly unsatisfactory and out of sync with the way business is conducted in the modern world. The speed of commerce, and the fluidity with which borders and time zones are crossed, and the virtual marketplaces where business is conducted, have long surpassed the ability of even the most efficient courts and arbitrators to keep up with the disputes that arise from them. And the gap is only getting greater with the passage of time.

Within this gap is a vast need for lawyers and business leaders to find solutions that may not be perfect, but that keep their deals moving instead of getting bogged down with the costs, distraction and uncertainty of litigation and arbitration. And they must do this while working seamlessly with counterparties from cultures and legal systems that may be identical one day and entirely alien the next.

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What mediation offers is the opportunity to negotiate and find solutions for disputes and deals that rapidly and flexibly, allow businesses to keep moving. Through negotiation, mediation mirrors what already makes businesses thrive. I am sure this is why Michael ultimately found mediation so suitable for the businesses whose legal departments he successfully led over the years, and it is why we at GE have had such success in encouraging its use.

And yet negotiation, the core of mediation, is also a learned skill that is undervalued and underappreciated by both businesses and the legal community. When, nearly twenty years ago, I went about looking for negotiation training materials for myself and my colleagues, I assumed that law firms would have plenty for us to borrow. Instead, I could not find a single law firm where negotiation is systemically taught, and only one or two firms where any of the lawyers had even attended an external training.

This was confounding. As much as negotiation is a core skill in business, it is the foundation of what lawyers do. It is obviously called upon when we are in a "contract negotiation." But we are also in a negotiation when we appear in front of a judge or arbitrator, or at a mediation, or even when writing a letter to opposing counsel. We can never assume that our business partners will receive 100% of what they want, which is why they hire us lawyers. In fact, this was the reason I titled my podcast, "International Dispute Negotiation" because, at the end of the day, negotiation is deeply embedded in all forms of resolving disputes.

This is also the gap in skills that Michael's book begins to fill. I say *begins* because negotiation and by extension negotiation training are fields in their own rights that are not only rich, vast in their applications, but are also in rapid development and expansion as science reveals more about how people process information and reach decisions. It is probably a good thing that the "canon" of negotiation has yet to be written.

Therefore, while Michael's book aims to provide skills to the in-house counsel, it will also find a natural home in the offices of any law firm. In fact, lawyers who discover this book and embrace its teachings are bound to find they are more at ease in meetings with their business colleagues and more successful at their jobs, because negotiation is a language the business speaks.

To say that this book begins to fill a significant gap should not understate the breadth covered in the pages that follow, which is considerable. Michael provides insight on the importance of preparation, recent discoveries in neuroscience, problems that frequently arise in cross-cultural situations, and the ethical challenges that lawyer-negotiators face. He covers useful negotiation techniques and innovative methods that can yield high impacts, such as the use of impartial deal facilitators to aid in deal negotiations and not just to help parties resolve disputes.

And he also preaches to this choir when he writes about the low-hanging fruit by which in-house counsel can add enormous value to their businesses by promoting negotiating training. Indeed, the in-house lawyer imagined by this book is a true business leader who is fully engaged in the process of identifying and adding value, not just a lawyer

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relegated to the tasks of *docugotiation* or *litigotiation*, terms Michael has used for those who spend their time drafting terms in agreements and supervising disputes. The lawyer who reads this book should be one who wants to lead, innovate, inspire and increase value for their business or their client.

And I would be remiss with this introduction not to second Michael's suggestion of a greater emphasis on negotiation in law schools and professional legal development, and for a modern, global accreditation system – supported by businesses, law firms, and academia – for those who achieve objective standards of negotiation skills. It is a big idea, but it is one that would provide a substantial contribution to filling the current gap.

Of course, Michael Leathes has never been someone to traffic in small ideas. If the reader has neither the time nor the inclination to join in future initiatives associated with this big idea, they can rest assured that by the end of this book they will be a far more successful and appreciated counsel by their business colleagues or their clients than when they started reading Chapter 1.

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# Preface

This book is not a user guide to negotiation. There are exceptional books out there that set out to do that, many of them listed in the bibliography. Rather, it aims to inspire negotiation ideas and concepts from the standpoint of a lawyer employed by a company or other organization.

I have drawn this inspiration from two sources.

First, from the teaching of academics and trainers. In the many places that I have done so in the following pages, I have attributed the points mentioned to the sources I have used. Many of these points are well worth following up in their books.

I have also drawn from what I learned on the job as an internal lawyer for international companies. At an early stage, I was fortunate to be delegated with negotiating assignments. There were few negotiation skill books and courses forty or more years ago. You graduate from that School of Hard Knocks resolving never to make the same mistakes again, but negotiation is not a defined art or science. Never are two experiences the same. You learn as you go, trying not to make the same mistakes more than once.

We all need to make paradigm shifts in fast-changing times. Corporate counsel, whether employed in companies or government, can diversify from legal matters to delivering a wider value as negotiators; from managing to leading; from self-centered positions to mutual interests; from not accepting the inevitability of *Litigation As Usual* to finding creative strategies and processes to secure negotiated outcomes within and beyond the legal arena.

An important inspiration for negotiation is not a negotiation book, but one on team leadership. Getting It Done: How To Lead When You're Not In Charge is a 1998 book by Professor Roger Fisher and management consultant Alan Sharp. It was republished as Lateral Leadership: Getting It Done When You're Not The Boss, in 2004. It remains a great starting point. Fisher and Sharp identify many of the attitudes and skills that cause external deals to be impeded by internal politics and lack of leadership.

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Corporate counsel are often in a perfect position to practice what Robert K Greenleaf, drawing on classic texts from the Zhou Dynasty, called *servant leadership,* and what the Danish conflict resolver Tina Monberg calls the Butterfly Effect in Serve to Profit: Butterfly leadership (2014).

Business schools (though, sadly, few law schools) teach negotiation skills and techniques, but more often as an elective than as a core subject. Most people emerge from business schools and law schools as instinctive positional bargainers expressing themselves in the form of wants and demands rather than needs and interests. They tend to be touchy about negotiation. Tunnel vision and a gladiatorial approach can block their ability to explore wider prospects and better opportunities.

Without realizing it, most are doing a disservice to the interests they represent, and to themselves. Today's market is driven more by quick and efficient outcomes. New ways of negotiating are gaining widespread acceptance because they are pragmatic, fast, optimize value and are more sustainable. Business leaders can no longer feel free to take silly risks with shareholders' assets. The premium now is on responsible leadership and management. That includes reputation enhancement, especially in this world where you can be made and destroyed on social media. It includes being a good party to do business with and securing certainty with minimum time, risk, cost and exposure. CEOs increasingly expect creative strategies for managing risks and costs and securing more effective outcomes.

Most of us know that, as corporate counsel, we have a wider responsibility than the one owed to the person or group to whom we report. It extends to our employers' shareholders and other stakeholders beyond the organization.

Some law firms and other service professionals, unconsciously or not, prioritize their income over a client's outcome. Realizing that this outmoded attitude has no viable future, many have moved on. Discerning external counsel, accountants and consultants know that to retain their ever more astute and demanding customer base, and to gain new business, they need to prove themselves as achievers of early results, as dealmakers, dispute avoiders and solution providers, and not just as good advisers, processors and litigators even if that means losing billings per case. This is also consistent with many modern Bar Rules.[1]

So the expectations on corporate lawyers have changed. The term *general counsel (GC)* implies the broader nature of the role, and not only of the most senior in-house lawyer. We are expected to be business and operational people who are lawyers, not lawyers with a business orientation.

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I felt there was no point writing another negotiation book unless it makes an important point for internal counsel. Actually, seven important points, all of which emerge in more detail in the pages that follow. They are:

- Corporate and other internal counsel should not confine themselves to *docugotiation* and *litigotiation* – negotiating terms in agreements and settlements. Those who diversify as commercial negotiators outside the legal frame become true *general* counsel, empowered to lead, innovate, inspire and increase their value.
- Cross-cultural negotiations would lead to more effective outcomes if negotiators take more time to listen and truly understand the other party. Even though most people are not entirely stereotypical, understanding cultural frameworks is essential.
- Prepare better and faster by using openly available e-tools. Preparation is key, and the preparer is at the center of negotiations.
- The dynamics of neuroscience may make your eyes glaze over, but understanding the basics of brain science improves negotiation.
- Using a neutral facilitator to help the parties forge a more effective deal is a greatly under-used opportunity. By having a trusted impartial person take charge of the process frees everyone up to negotiate better. It should not be confined to dispute settlement.
- Legal education needs to include negotiation skills. Negotiation is a hard, not soft, set of skills and can be assessed. Accreditation should be offered to those who pass negotiation skills assessments.
- It is time for an international initiative, backed by top educators, businesses, professional service firms and professional bodies to set high-level global negotiation knowledge and skills standards, as well as an international code of negotiation ethics. An international negotiation institute would not provide training or other services but promote and encourage more and better education on negotiation in all main languages and cultures, treat negotiation as a hard skill, inspire more people to take negotiation courses and improve the quality and effectiveness of negotiated outcomes.

Michael Leathes, January 2017

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CHAPTER 1

# Expectations

The Power To Do More

Dell Technologies slogan

Only rarely, it seems, does a leader make a public statement on the valued qualities of corporate counsel. It grabs your attention when made by the boss of one of the world's most admired and successful companies that employs hundreds of corporate counsel across numerous industries.[1]

On October 17, 2012, Jeffrey R. Immelt, Chairman and CEO of General Electric Company, was asked to introduce his then General Counsel, Brackett B. Denniston III, who was being honored at an event organized by the Pro Bono Partnership in New York for his leadership in voluntary legal services. Mr. Immelt delivered his remarks without notes:[2]

> *There are three things I love about Brackett that I think great lawyers do. The first is that he is tough-minded. Today, you need a "yes" or "no". "Maybe's" don't cut it any more. Being surrounded by a legal leader and a legal team that is willing to get right there into the trenches with you and be accountable is unique and important, and Brackett does that. He is business savvy – let me tell you, in an organization in the world we live in today, no function sets the culture of the entire company the way the legal function does. You set the boundaries of who we can be; you define the field that we play on, and I couldn't do it without having a business savvy partner like Brackett Denniston, who not only is brilliant in the law but understands how engineering works, understands our aviation business, and is willing to get his hands dirty from the standpoint of running the company. And the third piece is – you have to have trust. Companies these days are so exposed, and there is no way we can run a company like GE unless we have trust – unless you have people around you that you can trust, that you know are going to do the right thing, and that you can just rely on their judgement – even, sometimes, when you don't like it, and you know it's the right thing to do. So – tough-minded, business-savvy, trust – that's Brackett Denniston.*

Skills and competency as a lawyer were largely assumed.



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Earlier, writing in the Spring/Summer 2011 edition of the Hudson Institute's American Outlook magazine,[3] Mr. Immelt had used the same *tough-minded* adjective to describe Ronald Reagan, who had served as GE's Goodwill Ambassador prior to his political career. By *tough-minded* he meant: addressing problems realistically and with determination, intolerance of *"maybe's," "accountability"* and *"willingness to get right there into the trenches with you."* In The Other Kind of Smart (2009), Harvey Deutchendorf postulated seven habits of tough-minded leaders:[4] managing emotions; self-confidence; choosing whom to associate with wisely; facing one's fears and taking action; saying no when necessary; and being self-disciplined and independent.

Jeff Immelt's characterization of his GC's value raises the questions: how do GC's themselves interpret the competencies they need to meet the expectations of top management, and is negotiation one of them?

In July 2014, the Global Counsel Leaders Circle, a forum of senior corporate counsel and compliance officers, published a report[5] based on interviews with eight GCs, other internal counsel, two Board Chairs, an Audit Committee Chair, private practice lawyers and executive search firms. The report focused on corporate governance, and the following is an extract in a section on competency (presented in alphabetical order):

> *In our discussions with legal chiefs and those who select them, as well as the top executives they work with, we compiled this list of competencies for GCs today: Advocacy aptitude and experience; business acumen; calm temperament; communications skills; crisis management ability; foresight and identification of trends; independence; integrity and good ethics; judgment; leadership competency; legal knowhow; management skills (including ability to involve and coordinate internal and external resources, as well as delegate); media awareness;* **negotiation skills**; *problem solving ability.* [emphasis added]

Business acumen and a deep knowledge of the business is a need widely identified by internal lawyers. In their book The Generalist Counsel: How Leading General Counsel are Shaping Tomorrow's Companies (2013),[6] Prashant Dubey and Eva Kripalani interviewed many current and former corporate counsel, most of whom emphasized the importance of being valued by core commercial and other functions. Several of those quoted, such as Amy Shulman and Jeff Kindler, both former GCs of Pfizer Inc, had run businesses before being appointed as the company's GC.

In different ways, all the GCs interviewed indicated that business savviness entails much more than having had experience of business. It means being seen and felt to be business savvy – speaking the right language, expressing great ideas, making creative and helpful contributions, and being involved and adding timely value in the key issues. One visible measure of a GC's commercial acumen is running the legal function as a business, one that credibly produces a return on the overhead's investment, contradicting the widespread perception of internal lawyers as another dreaded cost center.

Trust is closely connected to savviness. Trust is partly related to depth and breadth of experience. Virgil had advised in The Aeneid in 19BC to *"trust one who has gone*





*through it."* Trust, as everyone is aware, takes time to build and is gained by being appreciated for exercising good judgment; by providing guidance that is reliable and typically not risk-averse, conventional and theoretical but, when circumstances allow, daring, pragmatic and innovative; by building a reputation for contributing a perspective that is broader than the legal aspects; and by not talking and writing like a lawyer except where legal-speak is essential to the issue, as it may be in dealings with other lawyers on technical issues, but is otherwise usually inappropriate.

## HOW INTERNAL LAWYERS ARE PERCEIVED

There is some, but limited, research on how corporate counsel are valued within their organizations. In January 2014, researchers Lubomir Litov and Simon Sepe of the University of Arizona and Charles Whitehead of Cornell Law School, published the results of their empirical research in Lawyers and Fools: Lawyer-Directors in Public Corporations.[7] This found that in 2009, 43% of United States companies had at least one attorney as a member of their Board. The reasons may be related to necessity but the research also suggests that having a lawyer on a company's Board has a positive impact on the value of the company. Businesses are often exposed to more legal threats from regulation, and compliance has become a more significant issue. Legal monitoring and control increases value by reducing exposure to risk. For example, in September 2015, the US Department of Justice issued strict new guidelines[8] for public prosecutors and attorneys to increase the incidence of criminally charging individuals involved in corporate wrongdoing.

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In 2013, The Global Legal Post, a London-based researcher and publisher that produces a magazine and blog of analysis and comment aimed at business lawyers internationally, presented The GC Excellence Report[9] based on survey results from 270 internal counsel. A further Report was published in 2015.[10] These Reports note the growing commercialization of the role of corporate counsel, but from a low base. Only 8.8% of those surveyed in 2013 were members of the Boards of their organizations, and, amazingly, only 20% aspired to become Board members. The 2015 Report, like the Arizona/Cornell research, emphasizes that increased regulation and litigation and the emphasis on compliance are main drivers of the development of internal lawyers.

While the role of corporate lawyers is clearly expanding and changing rapidly, the evidence suggests that the momentum originates more with outside pressures than the positive individual contributions that in-house lawyers can and should make to growing and improving stakeholder value. Corporate counsel face a daily dilemma: being practical and commercial and valued as a risk-taker while simultaneously protecting the business as a gatekeeper and ensuring compliance with laws, regulations and codes. These two responsibilities often conflict. Business colleagues tend to more easily remember the occasions when lawyers act to protect the business, rather than those where they use their skills to add value to it creatively. Internal lawyers therefore need a breakout strategy. They need to apply their skills and position to

counter the perception that their role is only focused on keeping their business out of trouble. Negotiation is a prime way in which corporate lawyers can do just that.

## WHY LAWYERS NEED NEGOTIATION SKILLS TRAINING

Lawyers, whether working as external or internal counsel, are rarely trained to negotiate, even though they have to negotiate frequently.

Most of us are natural skeptics. We tend towards pessimism, seeing problems before opportunities. We value factual evidence, definitions, analysis, winning, control and process. Our professional training and practice tends to be based on analytical capabilities, so most of us are likely to develop these skills more than others. When we negotiate, we are likely to adopt a fairly rigid positional approach based on rights and reasoning. Subconsciously, we tend to use our IQ more than our emotional intelligence (EI) or social intelligence (SI).

Business leaders tend to be different from lawyers psychometrically. Most are intuitively opportunistic, creative risk-takers and experimenters, otherwise they would most probably be in different jobs. They may see the downside but they focus on the upside. Daniel Pink asserted in A Whole New Mind (2006)[11] that business leaders apply more EI and SI than other groups of professionals.

For those of us lawyers employed by an organization, this creates a conundrum. How dominant should our analytical orientation be in our work and interactions with emotionally-savvy business people? Negotiation, requires considerable EI and SI in addition to IQ. To represent our organizations as lead negotiators, we need to negotiate commercially, not abandoning our legal instincts but adapting them with new skills and interacting well with EI-orientated business people.

Most newly-qualified lawyers are unlikely to have had formal training in negotiation. As Michael McIlwrath, Global Chief Litigation Counsel at GE Oil & Gas has explained, before GE began their international negotiation training program in around 2002, he canvassed many of GE's large international law firms, asking to borrow materials from their training courses. But he could not find a single firm that had a negotiation training program, and only a few had lawyers on their staff who had undertaken any negotiation training.

That was in 2002 and things are changing now. In recent years, in the Netherlands, for example, legal training includes training in early dispute resolution, including mediation. Some leading law firms are today putting new recruits from law school onto obligatory internal courses, some of which cram the curriculum of a typical MBA course into five or six weeks. This equips them far better to engage with clients and hit the ground running.

In-house law departments, however, may be reacting more slowly. GE was ahead of the curve. Some do have sophisticated business induction programs, but others, it seems, let new corporate counsel hires learn (and make mistakes) on the job, as I did.





As we will see in Chapter 3, negotiation is a skill and aptitude that firmly sits at the intersection of analytical, social and emotional capacities, and demands elements of each. Lawyers can capitalize on their analytical and rational nature if they also draw on their ability to navigate emotions and apply creativity to a roughly equal extent, depending on need.

Legal education in most countries is devoid of negotiation courses. Lawyers are primarily educated to apply knowledge of law and legal process to achieve desired ends. Legal process involves a defined series of steps, approaches and mindsets that are quite rigid and inflexible, which can constrain lateral moves outside the recognized limits of conventional process. This is true even when stepping outside the process into sometimes unfamiliar territory would be risk-free and could well lead to a more effective, safer and less costly result. Process can perpetuate an unhealthy comfort in habitual, tried & true ways of doing things that often take time, generate cost, incur risk, are inflexible and get nowhere.

At one point in my career, my in-house legal colleagues were responsible, for monitoring the trademark applications being filed by a major international competitor. When the team spotted a trademark application that was questionable, for example because it arguably resembled one of our own trademarks, they would automatically file a legal challenge, or opposition, regardless of whether the competitor's trademark application might impact on our business. Our competitors, not surprisingly, did exactly the same to us. This had been going on for decades, and no one could remember who started it. Once an opposition was filed, a stream of formal arguments and counter-arguments followed that took time and energy and incurred sometimes monumental legal and expert fees, often with no success. The strategy was more designed to harm the competitor, than to protect ourselves.

One day, we wrote to our competitor and proposed that, for a trial period, when we intended to oppose one of their trademark applications, we would contact them informally to explain, in general terms, why we would be doing so. We added that we would appreciate it if they extended the same courtesy to us. The competitor seemed to think it was a sensible idea, and agreed to follow suit. The number of oppositions filed by each company against the other almost halved overnight, along with the costs involved. More interestingly, the dialogue it opened up led to various negotiations for deals over trademark rights that significantly benefited both companies.

Post-qualification legal training in most countries also assumes trainees will pursue careers advising others, rather than assuming direct ownership of issues or problems, as internal counsel often have to do. It is assumed not only that lawyers advise clients, but also that clients will obligingly follow the advice given. Lawyers, like doctors, are therefore trained to develop a subconscious detachment from the issues on which they advise. That subtle and often invisible psychological separation can give the impression that the adviser is less engaged, even indifferent. Corporate counsel need to overcome these deficiencies in their approach by the way they think, speak and behave.



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Language (such as referring to business colleagues as "clients," or the use of the personal pronoun "you" rather than "we") can easily suggest that the Law function regards itself as some kind of ersatz professional firm, that internal lawyers see their role as purely advisory, that they stand apart and do not partner with the business people and do not share the same stake in the problem. It can create a very negative impression. It suggests *not getting right there into the trenches with you.*

As a result of their training, and of their practice in law firms, lawyers naturally think in the linear terms of rights and liabilities, and win or lose. Lawyers are much more inclined than business people to approach a challenge as a battle to be won rather than a problem to be solved. They invariably set out on a quest for evidence, precise definitions and detailed analysis before they can begin to devise a game plan. This has its merits, especially when preparing for a negotiation, but also has its limits. The expectations of those who engage corporate lawyers are generally much more kaleidoscopic and geared to a multi-dimensional, multi-disciplinary, results-based approach to problem solving, in which gut-feel, rooted in knowledge and experience, predominates. Lawyers need to be trained to seek outcomes that leverage their analytical skills but also draw on their EI and SI to a much greater extent than their training and natural inclinations would encourage.

Outcome-Based Education (OBE) has gained momentum around the world in many areas of learning, but has had a disappointingly slow uptake in legal education in most countries, and has been implemented poorly in other countries . This is partly due to inadequate inclusion in existing curricula. OBE assesses students not just on their technical knowledge of inputs like textbooks and rules, but on the practicalities of whether they can achieve whatever result is required by applying wider skills that lie beyond conventional technical training. Legal education seems to have lagged behind accountancy, medicine, HR, project management and other disciplines in embracing OBE.

Change is happening, but slowly. Two reports in 2007 by the Carnegie Foundation for the Advancement of Teaching[12] and by a team under Roy Stuckey, Professor of Law at the University of South Carolina,[13] urged US law schools to broaden their range of courses. These recommendations are beginning to take root, especially in the US and the UK, but take-up is patchy and the pace of progress is slow.

Although business schools aim to impart more real-world skills, many still focus on traditional managerial skills, such as financial management, business strategy, economics, marketing, manufacturing and supply chain operations, statistics and business analysis. There are some important exceptions, but the core courses of most MBA programs are usually drawn from these areas. Many MBA courses do not feature negotiation as a core subject. Although, of course, some do, usually negotiation is an elective course, as negotiation is seen as a "softer" skill – harder to measure and assess.

Professors Robert Rubin and Erich Dierdorff at DePaul University's Kellstadt Graduate School of Business in Chicago conducted a study in 2009, which was updated in 2011, to determine the extent to which the core curricula of 373 business school MBA



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programs in the US were aligned with a managerial competency model derived from over 8,000 American business leaders.[14] Their analysis showed that most core MBA curricula emphasize analytical competencies such as administration and control, the task environment and managing logistics and technology. However, the competencies perceived as most critical by business leaders are the more creative skills, such as managing decision-making processes, human capital, strategy and innovation. The Kellstadt study noted that these are the very "soft" skill abilities least covered in required core MBA curricula. Decision-making, according to the Kellstadt study, was a core course in only 13% of MBA programs, even though negotiation is very much a decision-making skill.

As a result, many MBA graduates emerge from business school without having been trained or assessed in negotiation skills. In reality, business people can emerge from management training with as few taught negotiation skills as their lawyers. And yet, in the average company, the business people usually consider negotiation to be a core part of their role, largely because they consider themselves as the "owner" of all business-critical issues, and the lawyers as mere "advisers." Consequently, to the extent that the lawyers do negotiate, they most frequently confine themselves to doing so in esoteric legal environments involving other lawyers.

## POST-QUALIFICATION TRAINING

The postgraduate Harvard Program on Negotiation (PoN) was innovative, inspiring and unique when introduced in 1983. Although the PoN remains one of the global leaders in negotiation training, other centers of learning, especially some business and postgraduate law schools, and also some dispute resolution trainers, have contributed to the wealth of knowledge, teaching and skills generated in the negotiation field. Others, including a few (but only a few) law schools, are now incorporating elements of negotiation training into core curricula.

But over the next few years, demand for these skills will increase as the expectations of businesses and professional firms crystallize and become increasingly geared to minimizing costly post-qualification training, and as graduates strive to maximize their employability. Business and law schools are likely to systematically incorporate negotiation skills into their standard mandatory curricula, driven by increased market demand for more OBE-trained professionals. *Adventure learning* is the term given to getting these skills played out in real environments and is described in detail in Venturing Beyond the Classroom (2010) edited by Christopher Honeyman, James Coben and Giuseppe De Palo, part of a project initiated by Hamline University to develop second generation negotiation teaching. Hopefully, adventure learning will become increasingly common in negotiation education.

Meanwhile, lawyers who have trained themselves to negotiate "on-the-job" need to ask whether their anecdotal exposure to negotiation is really enough to make them effective negotiators, and many will need to increase their negotiation knowledge and skills through training.

## MARKETING NEGOTIATION SKILLS INTERNALLY

Expectations can usually be met to some degree by smart marketing. Corporate counsel need to promote their skills and added value as broadly as possible. A good starting point is to recognize that internal law functions naturally suffer from an inbuilt perception problem. It is usually not a personal phenomenon (though it certainly can be) and most often arises from the conventional cynical view that business people, and the public in general, have of lawyers – that they are specialists rather than generalists, often more detached from the rough and tumble of the business than engaged in it, inclined to be more cautious than adventurous, and see their role as restraining freedom of action rather than enabling and encouraging it. Corporate lawyers with responsibility for the compliance area are especially exposed to the risk of being branded as naysayers and brakes on business momentum because, however creative they may be, the rigors of the discipline are largely inflexible.

There are many ways to address the negative image. They are usually there on or under the surface, in seriousness or in jest, and must not be brushed aside. Some corporate counsel regularly survey those they work with to tease out how they can improve and add more value. Being appreciated for having outstanding negotiating skills is one major area that can dramatically contribute to positive perceptions.

This potential of corporate counsel can be projected on both theoretical and practical levels.

On the theoretical level, it is tempting to pay little attention to our role profiles or job descriptions. They are usually hidden from view to all but our boss, a few colleagues and HR professionals. Neglecting job descriptions, or allowing them to become outdated or moribund, is a lost opportunity. Role profiles can be strong marketing tools when used creatively, for example in induction packs for new business managers. Having a website for the legal function is important for communicating the involvement and value of internal lawyers in the strategic development of the business, the purposes and breadth of the function, and for offering business people practically useful tools and information. Shrewd inclusion of negotiation, including negotiation skills training for business managers, can convey a highly business-tuned approach, and help dispel some of the outdated and negative imagery popularized by non-lawyers. Posting well-presented role profiles of each counsel or functional grouping on an intranet site can also help change perceptions, as can war stories and successes.

On the practical level, it should be possible to present the Law function as a value generator rather than a cost center. We must avoid being disingenuous, but values attributed to the involvement of internal lawyers can usually be measured, a substantial discount factor applied, and still arrive at a bottom line that shows the value we have added far exceeding our cost.

There are many examples. One would be to apply Six Sigma (6σ) principles to the Law function, or an area of the function's role, such as mergers and acquisitions, litigation, intellectual property, law firm management or compliance. 6σ is used by thousands of





businesses worldwide as a methodology and a set of practices and tools for improving output quality by removing "defects," and can certainly be applied to staff support activities. The underlying precept is that all actions are parts of processes that can be defined, measured, analyzed and improved, combining to become "Critical To Quality" (CTQ) in business terms. Metrics are a central feature of 6σ and therefore provide a basis for demonstrating value of the activity being assessed.

6σ would have a clear application, for example, in dispute resolution. A major case being litigated or arbitrated can be viewed as a project, which, actually, is all it is in business terms. CTQs would include negotiating a resolution (and thereby achieving certainty) as quickly as possible, achieving a low-cost settlement when measured against the risks and costs of losing, preserving relationships and reputation, and minimizing management time. Litigation, in 6σ terms, can be classified a *defect* that can be *removed* through an early outcome. This can be presented conservatively, and therefore credibly, as value-generative on an individual case basis. For example:[15]

| *Cost Item* | *Legal Fees (USD)* | *Amount at Risk (USD)* |
|---|---|---|
| Litigating the case | 200,000 | 2,000,000 |
| Negotiating a settlement | 50,000 | 1,400,000 |
| Avoidance costs | 150,000 | 600,000 |
| (Conservatively assume that just 33% of Avoidance Costs are attributable to Law function negotiation) | | |
| Total Cost Avoidance | 50,000 | 200,000 |

Total Cost Avoidance for dispute = USD 50,000 + USD 200,000 = USD 250,000

To boost the credibility, it can be useful to add what is not quantified, such as reputational benefits and preserving long-term relationships.

Many legal issues are akin to business processes. Lawyers can adapt systematic methods and principles for process improvement in manufacturing, logistics and project management such as 6σ and Lean (a Toyota-derived production system). In so doing, corporate counsel are appreciated for bringing business disciplines to their own field to the extent possible, making the task of meeting expectations much easier.

In Legal Design Lawyering: Rebooting Legal Business Model with Design Thinking (2016), Professors Véronique Fraser and Jean-François Roberge at Quebec's University of Sherbrooke warn of the danger posed by the mental maps instilled by legal training and involuntary adherence to prescribed process. These factors subconsciously direct lawyers how to behave in certain ways. Professors Fraser and Roberge have proposed the complementary development of a problem-solving competency called Legal Design Lawyering based on design theory which draws on the cognitive capacities of "knowing," "analyzing," "synthesizing" and "creating" to enable issues to be addressed more holistically and effectively. Although Legal Design Lawyering is a nascent concept, the modern demands of businesses and governments are likely to encourage its development and use internationally.



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### DIVERSIFYING TO DELIVER

Demonstrating fine negotiating skills is a prime way to meet the expectations that modern business management increasingly have of their internal counsel at all levels. Negotiation offers corporate counsel two intrinsic values. First, you can demonstrate a competency that is ancillary to your main legal expertise or responsibility, for example mergers and acquisitions, contract management, litigation and arbitration, compliance, intellectual property, environmental issues or whatever. There is a further, even higher value – a corporate counsel who is perceived to be a good business negotiator per se transforms the perception of their commercial and other colleagues. You can be the obvious choice to lead the business negotiating team partly because of your legal ability but also, perhaps mainly, because of your competency as an effective negotiator.

There is a lot to think about as a negotiator. Preparation is paramount and is a natural responsibility for a corporate counsel to assume in many, if not most, mainstream negotiations. You get in early and can exert strategic influence on the course of the deal or settlement. It will benefit you and others to know how neurobiology and culture are likely to impact upon typical negotiating circumstances. You can bring the negotiating team to understand the changing spectrum of leverage as the negotiation progresses and to communicate well. A good negotiator will always be thinking about how to configure the process to the predicament, rather than the other way round, and to bring creative flair to the experience. The corporate counsel is perfectly placed to deploy dispute avoidance strategies, and bring unavoidable disputes to an early and beneficial outcome. And, crucially, to negotiate ethically. Ben Heineman Jr., a former GC of General Electric (1987–2003), points out in High Performance with High Integrity (2008) that internal counsel need to strike the balance between partnering the business units while guarding the company's integrity and reputation. These are complementary, not contrarian, responsibilities.

All these things need to be done using the right tools, processes and techniques. The following chapters aim to cover all these needs and opportunities. Let's explore them further.



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## CHAPTER 2
# Preparation

*By failing to prepare you are preparing to fail.*

Benjamin Franklin

The lesson of rigorous preparation has been taught throughout history.

In the 5th Century BC, Sun Tzu, in The Art of War, denounced lack of preparation as the most heinous of crimes, and celebrated good preparation as the greatest of virtues. In the 1st Century, Seneca defined luck as something that happens when preparation meets opportunity. Michelangelo grumbled that if people knew how hard he had to prepare to gain his mastery, it would not seem so wonderful at all. In Henry V, Act 4, Scene 3, Shakespeare has the King giving the most famous pep talk in history to his overwhelmed army as they prepared for the unlikely English victory at Agincourt in 1415, explaining that *all things are ready if our minds be so*. President Lincoln is often credited with the remark that if he had eight hours to cut down a tree, he would spend the first six sharpening his ax, though the comment has more plausibly been traced to an Appalachian lumberjack in 1956. Napoleon admitted that it was not innate genius that suddenly and secretly enabled him to decide what he should do in unexpected circumstances, but thought and planning. In 1946, the first President of the International Standards Organization, Howard Coonley, accurately predicted that business leaders would in future be rated on their ability to anticipate problems rather than to meet them as they come. A stream of legendary American Football coaches, among them Michigan's Fielding Yost and Alabama's Bear Bryant, have perpetuated the pre-game mantra that *the will to win is worthless without the will to prepare*. And decorators the world over, when asked to name the ultimate secret behind a beautiful paint job, are certain to reply: *preparation, preparation, preparation*.

This increasingly busy world leaves most of us with less, or even no, prep time. We suffer from task saturation. Normality, in this constant state of un-readiness, is forcing us to rely on assumptions, instinct, hearsay, gossip and guesswork to get through the day. Negotiators who claim an intricate familiarity with the industry, subject matter or

past experience, will often use this knowledge to compensate for a thoughtful and thorough analysis of the esoteric situation at hand. They may be deluding themselves.

I learned the importance of preparation through embarrassment. Almost forty-five years ago, about three months into my job as a junior counsel with Gillette, the GC decided I should gain familiarity with the business. One assignment was to spend a few days with a wholesaler's sales manager visiting retail stores. We went from one to another, discussing planned stock levels for different products, point-of-sale materials, upcoming advertising campaigns and credit terms.

On the afternoon of the second day, the sales manager suggested that as I had now witnessed how things are done, I should take the lead with the last customer on our visit list. It was a local chain of convenience stores and our appointment was with the owner in person. The sales manager had given 120 days credit terms for a limited period to help the stores through a difficult time, but now wanted to bring this down to 60 days. He asked me to take the lead. I had a weak grasp of the customer's sales levels of our products, no real understanding of their business model and did not spare a thought for their situation. I should have asked the sales manager these questions as we traveled to the meeting. But in the over-confidence of youth, I thought I could do it spontaneously, as the sales manager had appeared to do with the previous customers.

It turned into a humiliating experience. The owner of the stores, who thought I was a management trainee, took full advantage of the rookie that I was, agreeing to tighter credit but in return proposing new terms that sounded perfectly reasonable to me, including additional volume discounts. The new terms would have undone years of painstaking negotiations by the sales manager and his team. He took over from me, and wrapped up the discussion. I still fairly accurately recall the severe lecture he gave me in the car afterwards: *I threw you in deep because I expected you to fail and I was there to rescue the situation. In whatever you do, figure out your goals and stick to them, do not underestimate anyone, know more about them than they do about you, never assume, listen carefully, be patient, and leave a good feeling, as you may return.*

Fortunately, there is much we can do using available tools to reduce the time and effort needed for effective negotiation prep work, though all these tools demand discipline, initiative and care. Most of these time and energy savers can be adopted by anyone facing the prospect of any form of negotiation. With the right e-tools, you really can prepare on the fly.

To be their most effective, negotiators need to cover a lot of territory:

- be perceived appropriately by the other party;
- understand as much as possible about those you deal with;
- have the best possible information you can get;
- know your real leverage and focus on the other party's;
- think carefully about where the other side is coming from;
- distinguish between what they want and what they need;





- separate fact from fiction, and fairness from unreasonableness;
- know when to talk and when to walk;
- bring your own side along with you;
- know where best to turn for support;
- be skilled in listening, questioning and deep exploration;
- focus and do not let yourself be distracted; and
- generally be psyched up for the task.

## PREPARING OURSELVES

The first impressions exuded by any negotiator, deliberately or accidentally, are among the uncountable things that really count. The vibes you transmit can have a huge impact on the way the negotiation is set up; how seriously you will be respected and trusted; who the other party puts forward to negotiate with you; their initial attitude and negotiating stance; how defensive, responsive, flexible, amenable or aggressive they are when they begin; and what expectations, realistic or imaginary, they may have. Your ability to negotiate successfully is partly related to how you handle what a management guru might call your *brand essence*.

All perceptions are kaleidoscopic. One of the loose colored beads in the negotiation cylinder is your persona, or what you want people to know of it. You can benefit from, and can equally be compromised or impeded by how you dealt with other parties in the past; how the other negotiator generally perceives the organization you represent; and by what the other party can find out about you, personally and as a professional. It is difficult, or too late, to change the first two of these, but the third is largely within your control. You can either neglect or craft your online persona, and the impressions that people draw from it. It is a basic, but common, error for negotiators to neglect their public *brand essence*.

We can also get it badly wrong without realizing it. For example, you often see external counsel claiming strong international competency and experience, while their bios are overwhelmingly domestic. Nonetheless, external counsel are generally far better placed than internal counsel to present themselves publicly. They also have an obvious incentive to do so, as they sell their knowledge and expertise in the open market. They all have law firm websites that promote their résumés, often citing their background, experience, awards, presentations, client lists and achievements. Yet many of these biographies fail to reveal their true personae. There are few videos embedded in their write-ups that would give people they later meet in negotiation a hands-on feel for their personalities, few links to articles they have written that give an insight into their beliefs, attitudes and convictions. Most professional litigators or arbitration counsel, for example, will extol their expertise in taking legal action for their clients, but give little away about their overall negotiation and settlement abilities. Perhaps they believe that to do so could be misconstrued as diluting the tough, me-no-compromise impression they think they need to cultivate, and their assumption of client expectation tells them



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to portray a win mentality rather than the versatility and pragmatism implied by the combination of a strong settlement and litigation track record.

Despite these common limitations, external counsel make better use of online marketing opportunities. Unlike external counsel, corporate lawyers usually operate behind the proverbial corporate or government veil. They tend to focus on internal PR as they do not have to sell themselves in the open market, and trying to do so could conceivably be frowned upon by their employer. The result, however, is that many corporate counsel are practically invisible at a public level, and there is little or no useful information about them for another party's negotiator to appreciate.

Corporate counsel therefore often overlook the value of their online presence. Anyone who keys in your name plus your organization is not likely to learn much, perhaps only a few one-liners on business and social networking platforms. Invisibility may not create a negative impression, but it can be a missed opportunity. The right kind of public information can generate a perception that will have a positive effect in any negotiations. We only get one chance to make that crucial first impression. Internet browsers provide that opportunity, if we take advantage of them. An important halo effect is created if you are seen publicly, via respected media, as an authority on a particular issue or field, even if the subjects covered do not have a direct bearing on, or are beyond the scope of, any prospective negotiation in which you are likely to be engaged.

One of the best ways of creating a controlled online profile is to publish articles and comments in professional blogs and other publications. There are now numerous quality forums in most fields that will gratefully accept thoughtful material and comment originating from the demand side – i.e. the organizations directly affected by, or involved in, particular issues. Once published, any browser will be likely to include a link to it when you are looked up online by potential negotiating partners. Where you have carved out an area of expertise for yourself internally, perhaps in a subject you feel passionately about and has a special value to your business, you have an opportunity to deliver presentations at seminars and conferences. Many of these can be made available online by conference organizers, and will also be picked up by search engines. The publishers of most blogs, articles and conferences will automatically link to the résumé you provide them, which can include your affiliations to membership organizations, such as a local, regional or global corporate counsel body, and many others. Being a member of professional or governmental committees or task forces indicates a desire to contribute to future development, and suggests peer-respected expertise and authority. Contributing online book reviews of appropriate publications will form part of your browser profile and do not take long to write. We should not over-egg our credentials, interests and external affiliations, but also not undercook them through silence and invisibility. Keep them updated. Allow photos of yourself where appropriate.

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Online links can tell a prospective negotiating party many things about you. They show that you "exist" outside the safety of your own organization; that you have opinions on important issues; are considered a thought leader on certain matters; and evidently respected by peers at a cross-sector level. These impressions together generate perceptive conclusions, such as whether you appear likely to have the internal authority to influence your organization to back up statements and commitments you make in negotiations. They underpin your credibility.

Building and maintaining a visible online profile is useful for any corporate negotiator in any organization. It is not difficult to achieve. It is never too late to begin. Deciding on one or more focus areas relevant to your role, and then expressing interesting views publicly, can be challenging and enjoyable. The payback, though often intangible and, as Einstein might say, *uncountable*, will prove to be a good investment.

I have found that my title is also an important piece of my negotiating persona. Role titles are often historic and inherited. Most are designed to address internal relativities and distinctions, especially in hierarchical structures. Outsiders' perceptions will inevitably be influenced to some degree by the words used in your title on email signatures and cards. Outsiders rarely appreciate the internal subtleties. Internal titles that do not spin well externally need to be reconsidered, or some negotiators may be able to convince their boss to let them use a second, more authoritative, influential and descriptive title for external use.

Sorbonne Professor Eliane Karsaklian includes a toolkit in her book The Intelligent International Negotiator (2014) which, among other things enables you, through a questionnaire, to determine whether your personal behavioral style as a negotiator emphasizes an approach as amiable, driver or analytical. This can be a helpful aid when preparing yourself. If you know what elements your natural style accentuates, you can more easily adapt yourself to the demands of each negotiation you experience.

## PREPARING THEM

We tend to assume that we have no control over the other side, and that we are powerless to prepare them for a forthcoming negotiation. But in most situations, there are things we can do that can have an influence on the framework for a negotiation before the interaction begins. Executed well, those investments can pay high dividends surprisingly fast, giving a strong yet subconscious sense of your leadership and control over the course of the negotiation.

Effective leaders subtly set atmospheres and agendas. A natural leader will be one who influences what happens next, without appearing overbearing or aggressive, or even perceived as pulling the strings. Influence that is not seen and felt to be controlling can be exercised in numerous ways. Who proposed that discussions take place – you, your

external counsel, or the other party? How was that idea communicated? Who proposed or described the agenda, rationale, timing and location, and how were these things framed? Were they communicated off-the-record and verbally, and was it clear that the other party's input would be welcomed? How approachable people consider you to be largely depends on how implicitly sociable you project yourself. Are you exuding familiarity, hospitality, normality, informality and humanity between the lines? Or do you delegate these initial negotiation dance steps to outside counsel or others who may not convey an image of communicability and openness in quite the same way?

Doing these things yourself, communicating with the appropriate person in the other party, signals your quiet confidence. It suggests you are in control without that vibe being received negatively. It builds rapport and helps you influence how the other party reacts to you. Your initial projection indicates whether you are a decision maker or influencer, both of which can gain almost instant respect, or an implementer and technocrat, which may not. In turn, that can have a bearing on whom they put forward to engage with you in the negotiation, and what stance or attitude they adopt.

Although style is heavily dependent on cultural norms, many negotiations among lawyers are mainly positional in nature. If you strongly demonstrate from the outset that your style is a more problem-solving, less process-driven approach to negotiating, the other party is likely to be less positional to match you, even if they do so subconsciously. This can take time, so that your stylistic message comes across repeatedly. You may never truly know whether your approach worked, but getting a negotiation off in a way that the other party is on your plane, and not you on theirs, is a crucial, yet often ignored, prep task.

Soon after I joined one of my companies, I discovered that our relationship with an approximately similar-sized competitor was so bad that virtually all my business and legal colleagues spoke about the competitor in the most negative ways. The two companies were not on speaking terms and each had sued the other on numerous occasions at the slightest provocation, with dozens of lawsuits pending around the world. No attempt had been made to resolve any of these conflicts by negotiation because neither party would blink and propose talks. Arriving in the job from the outside, indeed from a company that enjoyed relatively civil relations with most of its competitors, I found this testosterone-charged, puerile situation untenable and self-defeating.

I called my senior team together. Did anyone have creative ideas for how we could break the vicious circle of mutual self-destruction? Some probably thought it a naïve question, but the current relationship was simply racking up huge litigation costs for little apparent benefit. Immediately one colleague piped up that we were sitting on an asset that we had owned for many years in a certain major country; the asset was redundant to us commercially, but the competitor needed it to protect themselves from third party unfair competition. The asset could not be used to harm us in any way, but we had never considered offering it to them out of pure spite. She explained details of this odd situation and how it had arisen. The asset in question really should belong to the competitor, but it had been expropriated by a government and eventually we had





acquired it when we bought the nationalized company. It was perfect! What if we were to give the asset away to the competitor without seeking anything in return? Might the shock and awe that would ripple through the competitor provoke a change in attitude? Most agreed that it might, but would our own top management ever agree? A few of my colleagues thought it was madness.

I brought up the matter with the CEO. Transferring an asset to a competitor required Management Board approval. I explained the goal: to kick-start negotiations to settle a long string of lawsuits. I proposed not, in fact explicitly not, to attach any conditions to the asset transfer. The competitor would inevitably feel obliged to reciprocate but it would be clumsy and mercenary on our part to suggest what shape that reciprocation might take. The CEO was initially skeptical, given the identity of the competitor, but saw the fire in my eyes and came round to the idea. The Management Board subsequently agreed the strategy too.

I called the person who held the equivalent position to me in the competitor. He was a seasoned and streetwise corporate counsel, well-known and admired through his profile in industry associations, and it was easy to check out his credentials. He had a top academic background and had been a partner in a major international law firm in the past. He was startled by my call. I explained I had recently arrived in my company – he said he knew that, which I liked – and in reviewing the considerable number of legal issues between our companies I had learned about this important stray asset. Would he be interested in acquiring it? Silence. He asked how much. I told him, nothing; it was an historical anomaly which I felt needed correcting. More silence. Then more silence. Hello? He slowly, cautiously, said that he appreciated the thought, but tentatively asked what internal consents I needed to transfer this asset. I explained that Management Board approval was needed. He chuckled. Maybe, he said sarcastically, we can talk again once that approval was forthcoming. I told him OK, and that I'd call him back the following week (I did not say I already had the necessary approval).

The following week, I phoned him again and confirmed top management approval to transfer the asset for USD 1, but asked if he would just cover any minor legal costs we might incur. Silence, again. He said he was stumped for words and asked how I managed to pull it off. I simply explained that when the Management Board understood it would have been irresponsible to hold onto an asset that, while legally ours, rightfully belonged to someone else, and that it would not harm our interests if it were transferred, they agreed. Wouldn't any reasonable person reach the same conclusion? I remember him saying, with a perceptible hint of astonishment: *something's changed in your company*, to which I think I replied: *we all benefit from change*.

As it turned out, this simple occurrence empowered my team and me to negotiate a number of deals and litigation settlements with this competitor. It had positively altered the competitor's perception of us as individuals, and of my employer. And it bode well for me, too.

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## PREPARING COUNSEL

There are advantages and pitfalls to relying on external counsel when preparing for negotiation. Proxy communications between parties, where each is represented by external lawyers, can be the only appropriate way to begin a dialogue, for example when litigation has begun and inflexible protocol or legal rules preclude direct contact. But external counsel are often inclined to take this too far in the interests of maintaining their control and involvement. It can lead to misunderstandings, complications, setbacks, even disaster. As Kenneth Cloke points out in Mediating Dangerously: The Frontiers of Conflict Resolution (2001), people often confuse debate and dialogue; debate is an argument, while dialogue is more what Ken calls *thinking together*. Lawyers are more schooled in debate than dialogue, so debate is what they intuitively do.

There is also the pervasive influence of hourly billing. While their clients are generally motivated by securing the earliest acceptable outcome, external counsel are also driven by earning the highest available income. The tension between outcome and income can in some cases lead to conflicts of interest. Everyone denies it, but everyone knows it is a risk factor.

As we noted in Chapter 1, few lawyers have been trained in negotiation. Most have acquired their negotiating skills on the job. Because of their training and professional practice, a typical lawyer's instinctive orientation is based on power, rights, evidence and process. This single-mindedness can be a great asset in the right context, such as intractable litigation and arbitration. But in a negotiating environment, a rigid rights-based approach channels each party's needs, concerns and goals through the legal prism. Too easily, a fairly straightforward negotiation morphs into a battle to be won by the strongest gladiator using the conventional weapons in a lawyer's arsenal, such as reliance on legal principles and intimidation skills.

Some negotiations clearly do require the deployment of a legalistic and positional, rights-based approach that can best be executed by aggressive outside counsel intent on beating the other party's lawyer into a groveling submission. But this is relatively rare. More common are negotiations where commercial and legal issues intersect, and where corporate counsel and their business colleagues lead, or at least share control with, external counsel.

As the party-based owner or co-owner of the issue, the internal counsel has a series of important decisions to take regarding the involvement of outside counsel. Should external counsel be up-front and openly involved, or operate behind the scenes? Is the external counsel route the only or best way to set up the negotiation, or could that be done more effectively by a business colleague, or by you, or jointly with the external lawyers? Who should be seen to be in control on your side – you or your external counsel, or the two of you together? These questions can affect how the other party handles the negotiation.



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Whether you use your outside counsel visibly or privately, you need to ensure they are properly prepared, and to clarify who is in overall strategic and operational control. External counsel can be critical in developing arguments and implementing tactics, but these need to be part of a strategic framework. Sun Tzu's Art of War warned that *while strategy without tactics is the slowest route to victory, tactics without strategy is merely the noise that precedes defeat*. Outside counsel need clear directions on strategy, and in most situations that should come directly from internal counsel.

## SYSTEMATIC AND SYSTEMIC PLANNING

Whether you are preparing to negotiate a new deal or resolve a dispute, planning systematically, and also systemically, will not only make the negotiation process easier, but also more successful.

Getting to Yes: Negotiating Agreement Without Giving In (1981) by Harvard Law School Professor Roger Fisher and the social anthropologist William Ury, advocated interest-based (also called integrative or win-win) negotiation, as opposed to rights and power-based approaches, to achieving agreement. It set off a domino drop of scholarly focus on collaborative problem-solving negotiation and conflict resolution coaching that prioritizes underlying interests and needs rather than claims and positions. Two years later, Harvard Law School, together with MIT and Tufts, initiated a research and teaching project that became the Program on Negotiation. As the 1980s unfolded, several leading negotiation experts involved with this movement broke new ground with articles and courses that advocated the importance of a systematic approach to interest-based outcome generation.

Probably because disputes are so adversarial and challenging to manage, the systematic approach first got applied to dispute management. Professors Ury, Jeanne Brett of the Kellogg School of Management and Stephen Goldberg of Northwestern University, published Getting Disputes Resolved: Designing Systems to Cut the Costs of Conflict (1988) which offered a range of methodical ways to address disputes using interest-based negotiation strategies.

Almost overnight, Dispute Systems Design, or DSD, became fashionable in conflict resolution, and has since become ingrained in many organizations to correct the previously ad hoc, haphazard, almost accidental approach to disputes that had prevailed in the past.

The basic DSD model is helpful in understanding the fundamentals of negotiation strategy in both deal and conflict scenarios. DSD centers on three main methods for resolving disputes: power, rights and interests. Power-based systems involve a clash of titans, as where a workforce union threatens strike action against an employer. They tend to occur when civil negotiations fail, and the parties descend into dysfunctional behavior. Rights-based approaches revolve around legal entitlements, arguments about rules and regulations, rights and wrongs and redressing the past. They are generally dominated by litigators and are highly positional. Interest-based negotiations

are geared towards addressing the respective parties' needs. They have a collaborative, problem-solving character and are generally orientated more toward the future than simply redressing the past.

The Ury/Brett/Goldberg conception of DSD enunciated several new design principles for an outcome generation system and envisaged four critical stages. They are relevant not only to the resolution of disputes, but to negotiations in general. They include focus on interests, stakeholder consultation and feedback, and ensuring that all stakeholders are incentivized, skilled and supported in using the system. The four stages of a system can be broadly summarized as diagnosis and analysis; designing the system; implementing it; and post-outcome assessment.

Six years later, Professor Fisher and Harvard researcher Danny Ertl put out Getting Ready to Negotiate: A Step-By-Step Guide to Preparing For Any Negotiation (1995). This was soon followed by two dispute resolution professionals, Cathy Costantino and Christina Sickles Merchant who published Designing Conflict Management Systems: A Guide to Creating Productive and Healthy Organizations (1996). These works combined interest-based negotiation principles and DSD thinking, and enabled us to approach negotiations in more sensible, effective ways.

Fisher and Ertl's manual bills itself as *The Getting To Yes Workbook*. They point out that the extent of most people's prep work is usually highly self-centered and limited – to decide what they want and what they will settle for. This typically leads to a largely positional exchange on a narrow bandwidth of possibilities and deters negotiators from exploring creative options for mutual gain that are the hallmark of interest-based negotiations. As Fisher and Ertl put it, *positional preparation leads to positional negotiation*, and preparing only by making a list of demands and concessions is preparing for a poor negotiation.

Fisher and Ertl and Costantino and Merchant made a strong case for a structured, systematic approach to negotiation preparation, in both conflict resolution and deal making.

Fisher and Ertl proposed seven essential elements of a system to enable the negotiator to prepare. Each element employs checklists and forms to give the structure clarity. Those seven elements are: identifying interests (yours and, hypothetically, the other side's), possible deal options, alternatives to an agreement, legitimacy from external standards, the quality of communication with the other side, building relationships and mutual commitments.

Costantino and Merchant focus on the role of negotiation in conflict resolution, which is often assisted by a mediator in DSD. They stress the importance of stakeholder collaboration in the design of any system, and build their architecture around alternative dispute resolution (ADR) processes, especially mediation. They enunciate and explore six core elements for a good system design: whether to use ADR; if so, configure the process to the problem; include preventative ADR methods; ensure users have the knowledge and skills to make the right choices; simplicity and ease of use; and allowing users to control the method and to decide upon the mediator.



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What most parties fail to appreciate is that dispute resolution processes can generally be employed where there is no dispute. After all, the settlement of a dispute is just a deal, little different in its fundamental nature from a deal arrived at without the backdrop of a formal dispute. As discussed in Chapter 7, neutral facilitators can play an important role in deal making. Even arbitration, a process very different from mediation but, like mediation, almost exclusively used in dispute resolution, can be used to help negotiating parties who are not in dispute, but deadlocked, to break the impasse and move forward. So it is not only possible, but often wise and creative, to embrace DSD principles when negotiating deals.

There are also other important factors that need addressing in negotiation prep work. These include determining the deal's overall strategic framework; identifying your leverage and assessing how the other side may perceive it; the apparent leverage of the other side and how you and they evaluate its significance; overcoming reactive devaluation on both sides; the risks and benefits of uncertainty; deciding who needs to be consulted and who must endorse any deal; your mandate from your organization; tactical options; post-deal implementation and enforcement considerations; logistical matters and timing.

All these considerations need to be assessed when designing your own management framework to help you to prepare for a negotiation.

## PREPARING A NEGOTIATION FRAMEWORK

For the corporate counsel, leading or being actively involved in the design and build of a negotiation framework is a powerful and smart way to demonstrate to all internal stakeholders the value that a lawyer can add in negotiation far beyond the technical legal arena.

As every negotiation is different, no single framework fits them all. Any effective Negotiation Framework (NF) needs to be adapted to each situation and be seen as a flexible instrument, capable of being updated and revised once the initial prep work is complete. Every NF is systemic and most of the NF's moving parts interlock with others. Approached properly, building and running a practical, user-friendly NF is an exciting task.

The secrets behind a good NF are structure, understanding, flexibility, brevity and specifics. Most can be captured in bullets, often as one-liners. Different stakeholders can be asked to contribute, enabling the NF to become a powerful collaboration platform, one that engages wide and active participation among internal stakeholders and with outside advisers. Set up the NF on a shared electronic platform to which each stakeholder can have access and, as appropriate, edit rights. Taking the initiative to construct the NF is invariably appreciated. As the initiator, you will usually be seen

CHAPTER 6

# Communicating

*The single biggest problem in communication*

*is the illusion that it has taken place*

George Bernard Shaw

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Sometime around 60AD, Seneca explained that the meaning of communication is *to understand as well as to be understood*. Stephen Covey, in his best-seller The 7 Habits of Highly Effective People (1989), emphasized the sequence. The Fifth Habit is: *seek first to understand, then to be understood*.

Communication is double-sided. You communicate not only when you speak or write but when you hear and interpret what is not said or written and how you behave in response. Communication is passive and active. Passive communication is gathering information by listening and comprehending, often through open questioning. Active communication is about conveying information and ideas by word, behaviour and action.

Negotiation and communication are inseparably intertwined. The quality of a negotiation is directly related to the quality of the spoken, written and non-verbal communication flow. A great negotiation depends on great dialogue. Negotiations also do not just happen face-to-face; a lot of professional negotiating is done by email and other e-communication media, frameworks that offer different opportunities and pitfalls from traditional face-to-face negotiating. Let's first focus on face-to-face negotiating, and then explore how e-communication changes the frame.

## NEGOTIATION PLATFORM

Where interactions have been bad during the build-up to formal negotiations that are likely to be difficult, take the initiative to press the communications reset button. Perhaps the purpose of the negotiation is to try and settle a conflict, or colleagues or

external counsel have been fencing with the other party, or tensions are running high for some other reason. Even where the negotiating parties have no relationship history prior to negotiating, it is critical to kick off with good communications and to set up an appropriate and positive negotiation platform.

Most successful negotiations require a bedrock of patience, respect, decency, politeness and courtesy, at least on a superficial level, even where the parties are deadlocked or in conflict, and even when some participants are cantankerous or objectionable. Your behavior to repair or reinstate any of those missing elements, for example through small acts of unexpected thoughtfulness, can work wonders, provided your motives are not misinterpreted. The effect can be particularly dramatic if you are likely to surprise the other party. For example, simple gestures like arranging for a chauffeur to collect the party from the airport for transfer to their hotel sends a welcome signal. Try planning the timing of the negotiation in such a way that you can first invite the other party to dinner or lunch to generate a positive interaction. There are numerous ways to create communication platforms, but they need deliberate and thoughtful effort.

Building a negotiation platform in whatever way is appropriate to the circumstances does something else. In a subtle way, your initiative gives you an element of authority and control that does not threaten the other party. On the contrary, they are likely to appreciate it.

## KICKING OFF

Allow time for banter and socializing. It may seem like lost time to low contexters, but is never wasted as it helps to build rapport. Never express impatience or frustration at this point. Wait for the other party to indicate when they are ready to start negotiating more formally. Their reticence may be cultural and their desire to assess and bond may be strong.

Having clear negotiation goals is always essential, even if the intention is merely to engage in negotiations about negotiations. An agenda agreed in advance can be a hindrance as well as a help, depending on the situation.

The advice offered by some negotiation specialists is mono-cultural. As discussed in Chapter 4, some cultures are naturally uncomfortable with rigidity and may feel they are being railroaded when the other party proposes an agenda or moves too quickly. Most cultures feel less threatened by a common general goal, especially when it is expressed in aspirational terms. Consider the possible cultural implications when planning negotiations.

Where an agenda is likely to be helpful and well-received, take care to phrase it in objective terms and resist language, order and implications that are loaded or imply bias. Consider who will attend, and who among those present has decision-making power and influence. For example, where the parties will be accompanied by external counsel, do you really want them running the dialogue? The answer may be yes, for example where the issues are highly legal-technical, or your relationship with the other





party is poor while that between the external counsel is more amenable. But consider also whether the negotiation risks degenerating into polarized positions if the external counsel start trading blows and scoring points across the table. External counsel are instinctively motivated to grandstand on their clients' behalf, but is that productive in the situation at hand? Perhaps it is the right thing to do – to get the positions on the table at the outset – but then for the lawyers to back off and let the owners of the issues lead the interaction. Control your external counsel. Legal issues are almost always positional in nature and inhibit exploration of options for mutual gain. Listen to the advice you are given, but do not necessarily follow it. Follow your gut instincts.

It is usually best to configure negotiations so that the other party talks first, assuming they are willing to do so, but not necessarily if they are likely to get straight to the point and make the first offer. Letting the other party speak first enables you to listen and question, assess their leverage and consider ways forward that may previously have been invisible.

## PASSIVE COMMUNICATION: LISTENING

Listening is more than just hearing, especially in a negotiation setting. It has two main purposes: to comprehend and to challenge. Your non-verbal signals usually disclose your listening purpose. When the party conveying information feels you are listening in order to understand, you are developing your relationship with them, and the information flow spontaneously increases. This is particularly true when your whole body exhibits your active listening, for example by echoing and mirroring the speaker. Active listening is an important part of passive communication. If you listen in order to defend, rebut and react, the speaker is likely to pick up your signals, and the quality and style of the interaction may well change. Taking notes, for example, in order to argue your view can inhibit active listening because your non-verbals indicate you are writing, not apparently engaging with the speaker. You can overcome any negative impressions your non-verbal signals may have conveyed by summarizing and reframing what you heard, referring to your notes, and seeking confirmation that you understood correctly.

Active listeners are those whose behaviors, in particular non-verbal signals, make it evident to the speaker that the listener has not just heard what is being said, but sees what they mean. Displaying attentiveness through physical behavior, like matching and mirroring the speaker's physical stance, politeness, empathy, clarifying questions, positive tonal sounds like "uh-ha," perhaps occasional note taking when doing so shows you are recording something said, avoiding distractions and maintaining concentration, all convey the impression that the speaker is being respected and understood. A dialogue is developing and a relationship is building.

It usually helps to summarize, and possibly to reframe, what you have understood using positive and equivocal language, without any judgmental overlay, and invite confirmation that your understanding is correct. Robert Mnookin, Professor of Law at Harvard Law School and Chair of the Program on Negotiation calls this "*looping*" in his



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book Bargaining With The Devil: When to Negotiate, When to Fight (2010). Looping creates a series of links between what the speaker says, what the listener understands, what the listener summarizes back to the speaker, and finally the speaker's confirmation that the listener understood correctly. A virtuous circle or loop of comprehension. *Think Loop* is a great motto.

Listening for what is not being said is more difficult but can be even more revealing and important. A speaker's non-verbals and carefully chosen words can suggest that more information may be available with a little encouragement. Active listening and receptive behavior can provide some of that encouragement by building trust with the speaker and lowering their guard, as can follow-up clarificatory questioning. Taking a break together by going for a walk changes the dialogue environment and capitalizes on informality. Philosophers' one-liners often capture the point: Friedrich Nietzsche wrote that *all truly great thoughts are conceived by walking*. Two people in step together in the same direction, occasionally exchanging comments about things they encounter, is a very different experience from the formality of sitting across a meeting room table, however familiar that may be. Musings and off-the-record remarks are easier to express when the speaker is not looking at, or being watched by, the listener.

True active listening can be very difficult to pull off. In a negotiation setting, the task involves more than convincing the speaker that we are taking their words seriously and genuinely striving to understand what they are saying, and doing so because we want to. Intellectually, we must also try to manage the probable clash between our own views, factual knowledge, interests, positions and beliefs and those of the person we are listening to. Project manager and facilitator David Fraser extols the virtues of *mindful listening* in his book Relationship Mastery: A Business Professional's Guide (2015).

Psychologists call this phenomenon cognitive dissonance. The contradictions that surface can range from mildly uncomfortable to highly stressful. While actively listening, seeking new insights from the speaker, we are simultaneously struggling mentally to reconcile the differences between what we think and believe and what we are hearing and understanding. Perhaps we are being told things that we know to be untrue, or that we strongly disagree with, or that are offensive, humiliating or patronizing. There is a natural urge to hit back, defend, correct and explain.

The experience of listening, struggling with the cognitive dissonance that often arises from the new information that we are taking on board, and managing our own biases, actually enables us to become more creative. It takes effort. If we consciously use the new information creatively, we can start to envisage new options that may not have occurred to us before. We may revise our own thinking, or generate new possibilities or fresh approaches to the goal of the negotiation. To flush them out, we usually need more information. Which is where artful questioning comes in.





## PASSIVE COMMUNICATION: QUESTIONING

In his book Value Negotiation: How to Get the Win-Win Right (2010) Horatio Falcão, Professor of Decision Sciences at INSEAD, points out that *information asymmetry*, the gap between the information available to the parties and their understanding of it, or the imbalance of information between the parties, is what causes many negotiation problems. People tend to fill the gaps with assumptions, guesswork, rumor and hearsay, but if only they would engage in effective questioning, they would more easily be able to replace conjecture with knowledge. In Negotiation (2003), one of the Harvard Business Essentials series, this crucial information gap is referred to as the *negotiator's dilemma*.

Questioning is an exploratory exercise. Good dialogue through smart questioning can improve your preparation and strengthen leverage. You need to be sincere in how you go about it if you want to tease out new insights and information, overcome pushback and get past any roadblocks.

There are lots of different types of questions and, in negotiation, it is important to master them all. I like to think of questions as tools. Different instruments for different jobs. Questions can perform a range of tasks depending on how they are phrased and the purposes behind them.

Open questions do not invite a specific response, leaving the answerer to choose how to reply and with what level of detail. Use open questions for diagnosis, and when you are looking for general context or insights to help you address the rationale behind something. Open questions can also exert a subtle influence because the person answering subconsciously feels more comfortable, more in control, and less challenged through cross-examination. It may be an illusion of control, but it often works in the questioner's favor. People tend to be less defensive and also less aggressive when being asked open questions. Open questioning helps you understand positions more clearly, and to begin to dig into the needs, concerns and fears that underpin them.

There is an endless stream of appropriate open questions, such as:

"Could you tell me about...?"

"What do you think about...?"

"How do you feel about...?"

"How did that happen...?"

"What's your take on...?"

Some of the most effective open questions begin with, or pivot around, a single interrogative: *Why?* or *Why not?*

"Why?" begins the sentence construction of all children as soon as they can talk. Often, "why?" and "why not" are sentences in themselves. As we all know, children's "why?"



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questions can be so innocent and basic that they are difficult to answer. Kids find the responses to their "why?" and "why not?" questions formative and revealing. Negotiators can find them revealing too.

Why? questions can be difficult both to ask and to answer in negotiations. Depending on how they are asked, they can be interpreted as quite aggressive, suggesting irritation or annoyance or implying cynicism, challenge, doubt, interrogation, sarcasm or a fishing expedition. To encourage helpful answers, most people soften these questions with pleasant, genuine tones and additional wording, such as: "Can you help me understand why...?" and, as a follow-up: "Ah, yes, I'm starting to understand where you're coming from more clearly, but why...?"

The answers to "Why?" questions are revealing because they tend to elicit responses based on feeling and behavior as well as logic and facts. "Why?" questions dig deep. So it helps to phrase the question to encourage expression of practice, reasons, beliefs, passions and purposes. Do not avoid *why?* type questions about strategic, policy, emotional or philosophical areas. They can explain a lot and reveal hidden anxieties that you may be able to address without compromising on your needs. For example, the answer may reveal that someone has been hurt or harbors a grudge, which might be addressable with a sincere apology. Avoid assuming you know the answer; you may very well be wrong.

Clarifying questions and requests are natural follow-ups to open questions:

"Could you elaborate on...?"

"I'd like to learn more about..."

"What did you mean by...?"

Closed questions are specific, using more probing interrogatives such as when?, what?, who?, where? and how?. Their aim is targeted and functional. They invite a shorter answer, such as yes or no, and are more investigative, designed to understand particular matters or opinions. People tend to be more guarded when asked closed questions because their freedom in answering is restricted. They find it harder to be evasive or to bluff.

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## EFFECTIVE ANSWERING

Most negotiation books, courses and materials focus on the art of effective questioning but equally important is art of effective answering. In any dialogue, you are not the only one asking the questions. When you provide answers, you do, of course, have to be truthful and not mislead. Your answers may strengthen your leverage by weakening how the questioner views their own leverage. Or they may have the opposite effect.

As a lawyer, you will be bound by whatever rules of professional conduct govern your professional status. Ethics could be relevant when confronted with uncomfortable questions and situations. But those rules and your own standards of integrity do not





necessarily mean that you need to disclose everything that may conceivably be relevant to the question. Most people will try to bluster their way around difficult questions by trying to change the subject, or to reframe the question before answering. Responding to part of the question, pretending to answer the question by actually addressing a different one, or responding with a question of your own, are all common politician tactics. Sometimes they work, but they risk diluting trust, which in turn creates suspicion and causes people not to cooperate, or to do so with caution. Chapter 9 deals more comprehensively with negotiation ethics.

In Beyond Winning: Negotiating to Create Value in Deals and Disputes (2000), Professors Robert Mnookin and Scott Peppet, respectively at Harvard and Colorado law schools and Andrew Tulumello of the Gibson Dunn law firm, address how lawyers may react when asked a question they really do not want to answer. They point out, not surprisingly, that you should prepare yourself for the most awkward questions that may be asked, and then prepare your answers. Share these Q&As with your colleagues so that the team is singing the same tune. Cluster those to which the straightforward or complete answer would damage your interests or dilute your credibility. Decide on appropriate responses. Sly evasion suggests embarrassment, guilt or something to hide, so the best avoidance is almost always an honest sidestep, one that offers a credible explanation for not answering. For example:

"I am really not in a position to answer that right now because..."

"Can I ask you the same question because...?"

"I wish I knew enough to address that..."

"I need to check on some points before I can respond to that"

or humor, which can break the tension of the moment.

One potential approach, suggested by Mnookin, Peppet and Tulmello, is to address the problem that the question presents, for example that the other party is effectively inviting or enticing you to lie. Turn round the question and ask the other party how they would react if you asked them a similar question, which you have avoided doing up to that point. Say that this kind of questioning is not helping to move the discussion forward and the last thing either party should do is to be economical with the truth. This approach will not work in all situations, but is worth keeping in mind.

## ACTIVE SPEAKING

Communicating persuasively with clarity, sensitivity, credibility and conviction, giving reasons for your proposals, sounds obvious but is a vital yet tricky skill. It needs to draw on all three of the brain's operating systems described in Chapter 3 on all three of the listener's modes of ethos, pathos and logos. Active speakers often prefer short sentences, one per point, because brevity is less complex and has more impact. Avoid monologues; they suggest bluffing. Pause between sentences, allowing the listener to absorb or interject. Welcome interruptions, but rewind and recover the flow

afterwards. Give examples, short stories and other anchors to illustrate and support, and to appeal to the listener's emotions. Repeat key points several times, always briefly.

Many TED Talks offer excellent examples of active speaking, among them Simon Sinek's on How Leaders Inspire Action, viewed over 5 million times at the time of writing. He gives three inspiring examples (Apple, Martin Luther King and the Wright Brothers) to prove his points. His sentence construction holds attention. On average every three minutes in his eighteen-minute TED talk, Simon repeats his core message: *"People don't buy what you do, they buy why you do it."*

Good active speakers avoid aggression, dispel fear and doubt, project fairness and optimism, emphasize the positives in any situation, and make it very clear that they personally believe what they are saying. This way, they encourage collaboration by making their listeners feel safe, a sentiment they may not have been expecting, and which helps to trigger the zone of convergence of the brain's three cognitive operating systems described in Chapter 3. When people feel safe they are much more likely to trust and cooperate, trading value and compromises in pursuit of a mutually acceptable deal.

## NON-VERBAL COMMUNICATION

Sub-conscious non-verbal signals are an external expression of internal feelings, and like words, they can easily be read and interpreted.

In a 2016 interview with the athlete video platform Unscriptd, Andre Agassi, former World No. 1 tennis player and eight-time Grand Slam champion, explained how he overcame the challenge of beating Boris Becker in the 1990s. His story memorably illustrates the importance of non-verbal signalling in negotiation:

*Tennis is about problem solving... and you can't problem-solve unless you have the ability or the empathy to perceive all that's around you. The more you understand what the problem is through other people's lens, the more you can solve* [things] *in life and in business.*

*Boris Becker, for example, beat me the first three times we played, because his serve was something the game had never seen before. Well, I watched tape after tape of him, and stood across from him three different times, and I started to realise he had this weird tick with his tongue... He would go into his rocking motion, his* [service] *routine, and just when he was about to toss the ball he would stick his tongue out. And it would either be right in the middle of his lip, or it would be to the left corner of his lip. If he was serving and he put his tongue in the middle of his lip, he was either serving up the middle or to the body, but if he put it to the side, he was going to serve out wide.*

*The hardest part wasn't returning his serve; the hardest part was not letting him know that I knew this. So I had to resist the temptation of reading his serve for the majority of the match, and choose the moment when I was going to use that information on a given point to execute a shot that would allow me to break the match open. That was the difficulty* [I had] *with Boris. I didn't have a problem breaking his serve. I had a problem hiding the fact that I could break his serve at will because I just didn't want him to keep that tongue in his mouth – I wanted it to keep coming out!* [Agassi went on to win nine of their next eleven matches.]





*So I told Boris about this after he was retired... I couldn't help but say: "By the way, did you know you used to do this, and give away your serve?" He just about fell off the chair, and he said: "I used to go home all the time and tell my wife, it's like he reads my mind, and little did I know that you were just reading my tongue!"*

In the early 1970s, Dr. Albert Mehabrian, now Professor Emeritus of Psychology at the University of California, Los Angeles, published the results of studies indicating that certain forms of face-to-face communication comprise 7% words, 38% tone of voice and 55% physiology. These findings have been misunderstood and widely misrepresented ever since, distilled in the vernacular to suggest that 80% to 90% of communication takes place through the medium of what is metaphorically called "body language." I do not buy this. If it were true, you could watch a movie in mute mode or in any completely unfamiliar language and understand 93% of the dialogue. Perhaps it's just me, but I find this impossible. Professor Mehabrian's studies focused on the interpretation of emotional preferences, what people liked and disliked, not on risks, desires, needs, hopes or other sentiments.

Nonetheless, there is no doubt that non-verbal signals are a major part of the communication matrix. Quite how much is impossible to say, and is affected by lots of variables like culture and context, but it is fair to conclude that a significant proportion of emotional expression is communicated non-verbally. This means that signals not expressed verbally are crucial for negotiators to read, and to read accurately. It is an important area because there is far more emotion in professional and business life than most people realize. In fact, business, like politics, is highly emotive and provokes strong feelings in those involved.

In his book Bargaining With the Devil: When to Negotiate, When to Fight (2010), Professor Mnookin quotes many examples of mega-negotiations where emotion played a dominant role. His examples cover not only the emotional rapport between the parties but also how they behaved toward one another and to the outside world, and how they approached the deals they negotiated and the disputes that erupted.

One commercial instance he mentions is the infamous software dispute between global competitors IBM and Fujitsu, in the late 1980s and 1990s. Mnookin, then a professor at Stanford Law School, was asked to be an arbitrator in the dispute, a role that morphed into a hybrid of arbitration and assisted negotiation. One of the points he makes, in a thirty-seven-page revealing chapter devoted to this case, is that when the dispute began, the two corporations saw each other as not just enemies, but in satanical terms. Demonization is a common emotional stance among competitors. Fujitsu and IBM each deeply mistrusted and felt betrayed by the other. Professor Mnookin quotes extreme invective used by both the Americans and, very unusually, by some of the Japanese



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people involved. The bottom line remains that because emotion and feelings play a major role in negotiation, the Mehabrian findings are important, even if the percentages should be interpreted with a pinch of salt.

Emotion is not the only sentiment conveyed non-verbally in a readable manner. Tone of voice, even noises, can carry clear meaning, and can often be interpreted more easily than physiological features.

At a large conference in Kuala Lumpur a few years ago, I arrived late and took a seat on the front row in a session led by Professor Joel Lee of the Faculty of Law at the National University of Singapore. He is one of the foremost thinkers and researchers in assisted negotiation and its cross-cultural aspects. His subject that day was non-verbal communication. To illustrate the impact of voice tone, he happened to pick on me, as one of the closest members of the audience to the stage, and asked me to close my eyes. With over 200 people watching intently, I closed my eyes and after a few moments of silence, I heard him scream aggressively, at very close range: "*Michael, you bastard!*" (he was either a phenomenal actor, or had chosen this highly public moment to convey a deep contempt he harbored that had previously escaped my attention). He then told me to open my eyes and explain how I felt about what I had just heard. I said I felt under attack, insulted, shocked and saddened, especially coming from him, someone I admired as one of the best brains in the field.

Professor Lee then asked me to close my eyes again. Ten seconds elapsed. The silence in the lecture hall was deafening. Almost inaudibly, I heard him say, in a sensuous, almost seductive, way: "*Michael, you bastard*" (now convincing me it was all an act!), then asked me to open my eyes and explain my reaction to this second delivery of the same three words. Unsurprisingly, it was the opposite of the first.

Tonality strongly impacts interpretation, especially when combined with facial and other physical expressions. A lot of negotiation takes place over the phone, and when it does, we need to rely on tone to understand fully what is being said.

Professor Lee summarized his thoughts on this fascinating area in a post on the Kluwer Mediation Blog.[29] In it he suggests some ways in which tone of voice helps negotiators to interpret underlying meaning. For example, with many English speakers, an upward inflection at the end of a sentence suggests that a question is being posed, or something that may be negotiable, whereas a downward inflection may indicate a command that does not invite further discussion. This is not always the case, however. Many English speakers from Northern Ireland, for example, habitually end sentences with an upward inflexion. Another example is the use of tonal changes in certain parts of a spoken sentence, with an upward tonal inflection, or a louder or softer delivery for a few words suggesting a different intention to the rest of the sentence.

In their book Mastering Negotiations Through Body Language and Other Nonverbal Signals (2015), Greg Williams and Kristin Williams-Washington urge negotiators to use non-verbal signaling to capitalize on their underlying likability, regardless of the toughness of the negotiation taking place, since these signals help build rapport in





difficult conditions. Professor Lee, in an earlier blog post,[30] suggested that consciously using non-verbal characteristics to match or mirror your negotiating partner can aid the generation of rapport. Simple rapport-building practices like respectfully and subtly adopting another person's seating stance, or gestures, or nodding at the speed at which the other is speaking, can create a positive atmosphere.

Learning the basic principles of interpreting another person's physiological behavior is a good investment for negotiators, though there are obvious dangers in jumping to conclusions too quickly. There are many books and websites on this subject. One informative guide is What Every Body is Saying: An Ex-FBI Agent's Guide to Speed-Reading People (2008) by Joe Navarro. With separate sections for different parts of the body, Navarro explains possible meanings behind common Western behaviors. However, as he would readily agree, some of these fail to transport across cultures. While a Westerner may nod their head to indicate agreement, a Japanese head nod is more likely to indicate that the listener has heard the speaker but does not necessarily suggest agreement with what is being said. A native of India may rock their head from side to side to signify "yes," but a Westerner may interpret this action to mean uncertainty. Raising the shoulders and lowering the neck indicates sorrow or apology in some cultures, but in France it suggests uncertainty, or lack of knowledge. So physiological signals can easily be misread, and need to be interpreted in light of culture and other contextual signals.

Just as important, perhaps even more so, is the challenge of regulating the non-verbal signals you send to the other party. The books on non-verbal communication listed have useful tips on communicating messages in negotiation contexts. Carol Kinsey Goman, author of The Nonverbal Advantage: Secrets and Science of Body Language at Work (2008) has many suggestions, such as having your hands palms-down when speaking to display confidence, and speaking early in the negotiation process indicates engagement in the dialog. Other experts have similar suggestions. The corporate counsel negotiator may wish to resist the temptation to do what most lawyers do, which is instinctively to extract papers from a case or bag before the negotiation begins. Communicate a different non-verbal message by having no papers before you for as long as possible. Although papers are inevitable when negotiating the wording of a contract, for example, only produce them when needed, not in anticipation of need.

One of the most watched TED Global talks, with 38 million views, was given in June 2012 by the social psychologist Amy Cuddy, an Associate Professor at HBS, entitled Your Body Language Shapes Who You Are.[31] Subtitled in forty-five languages, Professor Cuddy explains why our non-verbals affect how others see us, as well as our perceptions of our own confidence and power, giving many examples in the process. By regulating our body signals, we are able to reduce internal stress levels, increase our influence and be more successful negotiators. Your mindset is often revealed by your non-verbals, and your non-verbals can also influence your mindset.

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## EMOTIONAL INTELLIGENCE

Effective communicating in negotiation demands effective handling of emotions – your own as well as those of others. In short, EI which we touched upon in earlier chapters.

The ability to recognize, manage and apply emotions first attracted the EI label in the 1960s. It was not until the 1980s that the discipline really crystallized in a program developed at Tufts University called Project Spectrum. This was a study aimed at assessing children's education, led by Howard Gardner, Professor of Cognition and Education at the Harvard Graduate School of Education and author of Frames of Mind: The Theory of Multiple Intelligences (1983). Other social psychologists built on this work, including Peter Salovey, now President of Yale University and Professor John Mayer at the University of New Hampshire. Together with Dr. David Caruso, an EI trainer at Yale, they worked to define five areas that together make up EI. Psychologist Daniel Goleman then refined these areas for popular attention in his international bestseller Emotional Intelligence: Why It Can Matter More Than IQ (1995).

The five components of EI as presented by Goleman are self-awareness, self-regulation, motivation, empathy and social skills.

Self-awareness is recognizing and monitoring your feelings as they arise and properly understanding the effect they may have on other people.

Self-regulation is the ability to manage your feelings so that you can express them appropriately.

Motivation, in the EI context, is the marshalling of emotions in pursuit of a goal.

Empathy is the ability to recognize and be sensitive to the feelings and emotions of other people when making decisions.

The social skills element involves the capacity to manage the emotions in others and therefore the ability to develop relationships effectively and persuasively.

Although EI is now widely discussed, people still misconstrue what it is. In a 2009 post in the Psychology Today blog,[32] Professor Mayer felt it necessary to set the record straight by pointing out that EI is not agreeableness, optimism, happiness or calmness. These may be characteristics of EI, but are not what researchers define as EI.

Just as you can test your own IQ, you can also measure your EI and your ability to manage emotional information. This can be done online through a number of professional assessment organizations such as Multi-Health Systems Inc[33] which uses the comprehensive and validated Mayer-Salovey-Caruso Emotional Intelligence Test (MSCEIT). Goleman developed a shorter test that is not as comprehensive but is useful as an indicator of your EI and is cost-free from various organizations' websites such as the management consulting firm Hay Group.[34] These assessments, like the Myers-Briggs and other personality assessments, are valuable tools to promote a sharp awareness of your EI strengths and shortcomings and help you to improve your negotiating skills.





Although EI is a topic of great interest, its practical effect on communication and negotiation is more difficult to determine with certainty. The Harvard Program on Negotiation Daily Blog[35] reported on a US-Korean study[36] involving 200 participants that tried to establish whether EI impacts on negotiation outcomes, especially building trust, the parties' wish to work together in the future and mutual gain. The study found that higher EI correlated with greater rapport, trust and willingness to work together. But this particular study, which involved students and used a points system to measure the value of the deals they struck, could not find a clear correlation between EI and the quality of negotiated outcomes.

Some observers have expressed caution that, in some situations, high EI levels may actually impact negatively on negotiated outcomes because high EI individuals may find it harder to be tough-minded in negotiations and can therefore find themselves being exploited. Although this seems like a real problem, as with any other risk, awareness can enable you to manage it through discipline, sticking to your goals, knowing your ATNAs and always giving reasons when unable to compromise. I personally happen to score highly in EI tests, but have rarely been conscious of having been exploited in a deal, or feeling I have given too much away, except in my early career. If anything, just based on my own anecdotal experience and entirely unscientifically, I am convinced that higher EI helps generate improved outcomes especially in joint venture (JV) and other negotiations where the sustainability of the deal and the continuing relationship between the parties are crucial factors. EI can soften difficult and intractable parties if you also use it to drive your goal achievement.

Legal training and practice almost everywhere relies on the application of dispassionate norms, such as rules, facts, logic, risks, positions and rational argument, to achieve results. Most external counsel behave true to this type – relatively formal, impassive and temperate. Just as you can spot a police officer in plain clothes at 100 paces, you can generally identify a lawyer in the blink of an eye. Some would argue that they have to maintain this accepted aura of professionalism, despite masking their true personality, owing to the strictures of ethics, convention, protocol and liability.

This is not to imply that lawyers lack emotion, just that most tend naturally to allow its expression in a tactical way rather than as a personal asset. In reality, emotional undercurrents run deep in legal practice. Lawyers are expert in believing the veracity of their own arguments. Litigation lawyers that practice before juries are skilled in the art of emotional persuasion. Nonetheless, when negotiating on behalf of a client, many external counsel have difficulty liberating their persona from their professional convictions and inhibitions.

Corporate counsel are far less constrained by these implicit restrictions. Being a party, or one of the party's team, the internal counsel often has a greater interest in building a relationship with the other party, for which effective use of EI is critical. This is another reason why internal counsel should always consider carefully what involvement or role, if any, external counsel should have during planned negotiations.



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I recall a difficult negotiation with a JV partner. My company had financed the venture and the other party had contributed the technical expertise as well as marketing and sales. Profits were split 50–50. The twenty-year relationship had become strained in the period leading up to the negotiation because the business began performing poorly. We wanted to dissolve the venture, but leave the door open to a possible future collaboration. The negotiation was about how to divide up the JV's rights and assets, which both parties wanted to use independently once the JV dissolved.

The other party's external counsel pulled out a copy of the JV agreement, entered into over twenty years earlier, and did most of the talking. She said that her client's engineers and other experts were the ones that had developed the IP rights and the intrinsic value, and their individual names were on all the patents even though they had been assigned to the JV. She was extremely positional, saying the only arrangement she could possibly envisage was that the rights would be assigned to her client when the JV dissolved, and that the most my company would receive would be a non-exclusive, royalty-bearing license. It was a demand, her idea of an anchor, not a proposition for discussion. We did not agree, proposing to leave the JV as an IP owning but non-operational company that would continue to license the patents to both parties and on a royalty-free basis. The talks became acrimonious and legalistic and the parties' external lawyers argued interminably, ultimately arriving at a positional deadlock from which neither would back down. Communications stopped. The air was acrid.

I ran into the other party's internal counsel at a conference dinner a week or so later. We had always got on well, but this time I sensed a greater distance. Without mentioning the JV, I proposed that we skip the dinner and find a nearby restaurant. I'll buy this time, you buy next time, I suggested. He hesitated, studied my eyes, smiled and nodded. He knew exactly what I had in mind. We were both managing our emotions. As we entered the first restaurant we came upon, we noticed a full suit of armor in the lobby, with the visor dropped into the fight position. "*Gladiators!*" he exclaimed, "*shall we go elsewhere?*" We laughed, both of us envisioning our external counsel locked in mortal combat. "*Oh, let's have a drink and drown them.*" After we sat down and ordered, I asked: "*Shall we go off the record, strictly between us, no reporting back?*" He winked: "*No other way to go forward.*"

We admitted we should not have left the negotiation in the hands of unrestrained warriors. Inevitably, it degenerated into an arcane fight over poorly-drafted words in a dusty contract signed by former managements of both parties. It was backward-looking, and we needed a forward-facing solution. We agreed it would make sense if we each explain what our respective companies needed out of the situation, and why, and then brainstorm some future-orientated solutions. I spoke first, being totally honest. He reciprocated. It turned out that each company had completely different business interests in the IP rights; there would be no competition, and neither need have any commercial fears about the other. Before we got onto the desert, we had





mapped out a potential solution that left the patents in the dormant JV until they expired, with each party taking a royalty-free non-exclusive license and sharing royalties charged to third parties.

Looking back, all five of the components of EI played a role in breaking the deadlock. Each party had been concerned that the other would be a competitor and sought to limit the downside. Emotions were running high, stirred up by the invective of two external counsel unable to agree and stumbling over words in an old agreement. As internal counsel, we had the flexibility and self-confidence to trust one another with information that could break the deadlock. We both wanted to find a solution based on a fair mutual gain outcome. We built on our relationship to discover that our companies would be exploiting different market segments, and that our initial concerns were unfounded.

In negotiations that are likely to be particularly strained, perhaps because of an acrimonious history, high stakes, the imminent threat of litigation or the presence of difficult personalities, anything that can ease tensions and promote some degree of relaxation to encourage the release of latent EI should be valuable. There are several simple ways to do this.

As suggested in Chapter 3, eating together is one proven method. One researcher who has conducted some studies on this fascinating subject is Professor Lakshmi Balachandra at Babson College in Massachusetts, a business school specializing in entrepreneurship. In an article[37] in the Harvard Business Review, Professor Balachandra presented the results of experiments in which 132 MBA students were asked to perform a roleplay in which their task was to negotiate the final terms of a JV involving a potential value of between USD 38 million and USD 75 million. Some of the students were asked to share a meal while negotiating, either in restaurants or in meeting rooms, while others were not given that opportunity. There was a clear and substantial correlation between those that ate together while negotiating and the most mutually profitable negotiated outcomes. Those who negotiated in restaurants achieved value 12% higher, and those eating in conference rooms achieved 11% higher value than those who did not eat together at all. The researchers were convinced that it was the act of negotiating while eating together that made the difference. But to be sure, the experiment was run again to compare results when all the negotiators were asked not to negotiate but to complete a jigsaw puzzle. The puzzle participants all performed about the same. Interesting, but why?

In The Choreography of Resolution: Conflict, Movement and Neuroscience (2013) edited by Michelle LeBaron, Carrie MacLeod and Andrew Floyer Acland, the view is persuasively expressed that anything parties can naturally do together in a synchronized way can generate subconscious empathy and a heightened degree of openness because they tend to set off mirror neutrons in the participants' brains. Sharing a meal has a certain synchronicity, and can have that effect, as can walking together while taking a break, and this can create implicit and unspoken bonds. When you think about it, the results of Professor Balachandra's experiments are not really surprising.



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## TENSION RELEASE: HUMOR

Appropriate humor in the form of witticisms, irony and amusing anecdotes can be a great tension-breaker and point-maker. Professor John Forester at Cornell University has observed the negotiation impact of humor, in the form of perceptive and imaginative responses during the course of communication. He notes[38] that negotiation humor can acknowledge historic issues, disrupt expectations of parties and encourage new actions and relationships while avoiding being clumsy, insensitive, disrespectful or forceful. Relatively safe ground is humor directed at the preposterous situation in which all the parties find themselves, self-deprecating humor and remarks that strike a chord in the minds of the party to whom they are expressed but who would never have spoken them openly. Ed Brodow, author of Negotiation Boot Camp: How to Resolve Conflict, Satisfy Customers and Make Better Deals (2014) quotes an occasion when a US diplomat, arriving in Pyongyang to negotiate the release of an American pilot shot down over North Korea, asked: *"Well, is he OK? Does he still have his fingernails?"* This was met by a long moment of stony silence, after which the North Korean delegation burst into fits of laughter. It was a bit risky, but proved to be an effective tension breaker.

However, humor does not necessarily travel well, and can sometimes do more harm than good. Much depends on the cultural situation, the facial and other physical expressions that accompany it, as well as tone, timing and content. Telling a funny short story or anecdote that bears a relevance to the matter at hand can be an effective way to communicate a reality that may be awkward or seen as hostile to express openly.

## TENSION RELEASE: VENTING

Unless they are dispute settlements, few negotiations, especially those that are collaborative in nature, are focused on the past. Even distributive negotiations are related to the present, not the past. Yet a party may come to a deal negotiation with serious hang-ups about the past, perhaps because they feel wronged. Unless they have the opportunity to vent these feelings, progress can be slow or stall.

Researchers and skills trainers are divided on the value of encouraging or allowing a party to vent their anger and frustrations. Most of the literature on the subject originates in the individualistic cultures of North America and northern Europe, yet cultural issues can drive the need to vent and how it is expressed. There is no universal, reliable guidance on this issue because it is circumstance-driven. When a party gets emotional and upset, I have usually tried to give them the opportunity to express themselves, and to convey a degree of empathy for their anxiety. I have generally tried to do this by making it apparent that I will not take it badly, however severe the message. This was a way to exert control. To prevent emotional outbursts leading to meltdown, it is important to display sincere compassion and resist the temptation to argue, strike back, hint at ridicule or convey any negativity. Take it calmly and make





it clear that you genuinely understand their feelings. Half apologize: *"I'm sorry you feel that way."* Or acknowledge: *"I know exactly how you feel."* Or share: *"Something similar once happened to me..."* Consider accurately repeating and reframing what you heard. Such engagement helps contain the underlying feelings and restore equilibrium. To do otherwise risks creating a vicious circle and adding fuel to the fire.

Controlled venting can release tensions, clear the air and enable negotiators to move forward. It can be better to let it happen than bottle it up, but always take care – in Negotiating the Nonnegotiable: How To Resolve Your Most Emotionally Charged Conflicts (2016), Professor Daniel Shapiro at Harvard Medical School/McLean Hospital warns that venting can just as easily reinforce anger as release it.

## TENSION RELEASE: APOLOGIZING

Lawyers hate apologies. Somewhere or somehow, instinct tells them, liability lurks. That may, indeed, be so on occasion, but far less often than lawyers assume. When expressed with sincerity, apologies can be cathartic for both the injured party and the perpetrator of the words or act that has caused offense, hurt or loss of face. Appropriate apologies expressed in the right way cost nothing but humility, and have the power to remove important blockages to the progress of a negotiation.

A spontaneous apology or expression of regret, communicated from the heart, is an act of EI because the perpetrator is openly recognizing the offense and is empathizing with the injured party. Apologies can restore the perpetrator's integrity and face, and reconcile parties' emotions.

Deborah L. Levi, a Boston litigator and mediator who tragically died of breast cancer aged 34, left an important legacy for negotiators throughout the world with her award-winning article in the NYU Law Review on The Role of Apology in Mediation.[39] Deborah identified four general categories of contrition and apology in the context of dispute settlements, but they apply equally to deal making:

- tactical (acknowledging the victim's suffering in order to gain credibility and influence the victim's bargaining behavior);
- explanation (attempting to excuse the offender's behavior and make the other party understand that behavior);
- formalistic (capitulating to the demand of an authority figure); and
- happy-ending (accepting responsibility and expressing regret for the negative act).

Deborah suggested that apologies may play less of a role in commercial disputes because she felt that business relationships are impersonal and financially orientated, and because they are characterized, in her experience, by the heavy-handed and dispassionate role of litigators. While external counsel may bristle at the very idea of apologies, fearing the implication of admission of liability, business issues are generally just as emotive and temperamental as interpersonal matters. Whatever your view and

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experience, any negotiator contemplating the possibility of offering an apology as a way to break through impasse or improve the quality of dialogue will find Deborah's article helpful. Legal implications should certainly be considered, but artful wording can often overcome them.

One of the key defects identified in the wake of the 9/11 outrage was the problem that emergency responders – police, fire and ambulance services – encountered in communicating with one another. A project was launched to correct this glaring and dangerous deficiency. It was important technically and also from national security and public confidence perspectives.

The challenge was given to a leading US technology company. Among the elements needed to complete the project was a major technology that had been developed by an Asian company. The US company had already worked on another project with the Asian company and had obtained a license for the use of their technology, which it felt also covered the 9/11 project. But when the Asian company saw its technology being used on the 9/11 project, it strongly objected, saying that the previous license was specific to another deal and did not cover the 9/11 assignment. It threatened an injunction to prevent the US company from using the Asian technology for the 9/11 project.

The Americans felt they had a good position on the license issue. But a delay on the 9/11 project, given its high profile and security importance, was untenable. The dispute had to be resolved immediately. The Asian company felt that the Americans had acted dishonorably and the Americans needed to dispel that notion. The matter was so critical that the American company's CEO proposed a meeting with the Asian company's President.

The first thing the American CEO did was to address the Asian President directly. He said something like: "*We apologize if you are under the impression that we have misappropriated your technology. That was never our intent.*" The words were sincere. Technically, he was not apologizing for having misappropriated the technology, but for having given the impression that misappropriation had taken place. Nonetheless, because of the way it was delivered, this apology was enough to get the two sides talking again. They were then able to negotiate an extension to the license to cover the 9/11 project and potentially other projects in the future.

The deal delivered mutual gain. The Americans now had broad licensed use of the technology and the Asian company had a major long-term partner for these and other projects. The opposite result might have occurred had the lawyers controlled a backward-facing strategy, which might have resulted in a lawsuit over the interpretation of the original license. Perhaps a pyrrhic victory would have been won, but it would have been practically valueless.





## FRAMING AND REFRAMING

Framing is the term given by negotiators to how the scope and content of a matter is defined and expressed. Issues are the value-creating drivers in any negotiation, whether they are few or many. How they are framed influences how they are discussed. Most negotiations involve many frames, starting with why the negotiation is taking place, to the things that need to be discussed, and to the details of the final agreement. Negotiations involve a constant ebb and flow of framing and reframing until agreement is reached.

A good analogy is the picture frame. In existence since art began in caves and on rocks, in one form or another picture frames have two main functions: to present the image in the best possible way, and to protect it.

Framing issues in a negotiation is similar. You frame an issue how you would like it to be viewed. Your framing may also be protecting an interest you have in the issue.

The significance of framing propositions and statements began to attract wide attention from about 1981, when the late Professor Amos Tversky, working together with Daniel Kahneman, published studies to support their Prospect Theory on how people manage risk and uncertainty. They are related in Kahneman's Thinking Fast and Slow (2011). The bottom line, as political spin doctors have long known, is that the type of response that you get to a proposition is influenced by how you present it, just as the quality of an answer you get often depends on the quality of the question you ask.

A critical frame involves what the negotiation is about in the first place. Most framing is selective. In a broad sense, an opening line could be the suggestion "to meet for a coffee," indicating a quasi-social occasion with the potential of addressing a more substantive issue. Many negotiations are preceded by a negotiations-about-negotiations phase. It can be very short, when one party proposes negotiations to the other, or a third party makes a proposal to talk. Exactly how the idea of negotiation is expressed, and sometimes who the proposer is, can determine whether a meeting of minds takes place. Where the concept and purpose of the negotiation are framed quite broadly, such as "*let's talk about the possibilities for a long term collaboration,*" multiple issues are implicitly on the agenda for discussion. Narrower framing usually entails fewer issues, but therefore less scope for value exchange.

When the other party frames an issue in a way you cannot accept, a better way than arguing about it may be to reframe it. As William Ury has said, "*to change the game, change the frame.*" A creative way to reframe is to respond to a proposition by saying something like: "*Let me understand what you are suggesting....*" and then repeat the proposition using different words and ideas that embrace your underlying interests while leaving the other party's basic idea intact, and then ask for confirmation of your understanding. Where the other party is trying to score points, resist the temptation to respond with counterpoints. Making good points is more effective than scoring cheap ones. Be tactful: Churchill once defined tact as *the art of telling someone to go to Hell in*



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*such a way that they look forward to the trip.* Tactful reframing is a smart way to get another party to subtly shift stance or style and open up to a discussion in an area that helps you achieve your goal.

In Chapter 3, we discussed how the brain, specifically the O/S2 social operating system, favors safe framing (e.g., when offered 50 and given the option either to "keep 20" or to "lose 30," most people opt to "keep 20" even though losing 30 produces exactly the same result). Using smart language that appeals to the other party's "safe" mode can influence how someone receives your frame or reframe and how the negotiation progresses from that point.

## CONVEYING NEGATIVES

When you have to decline, or to tell the other party something they really do not want to hear, it can help to use a constructive frame. The more that a negative can be communicated within a positive framework, the more likely it will be accepted.

In The Power of a Positive No: How to Say No and Still Get To Yes (2008), William Ury offers a smart way to turn people down. He advises beginning with a Yes, some positive statement that aligns with your own values and interests. This initial Yes constructs half of the frame. Once done, communicate the No. Then complete the frame with a final Yes, another positive that may possibly envisage a productive next step, or an alternative or other constructive, supportive or mutually beneficial idea. This simple Yes-No-Yes maneuver is a compelling way to frame a negative in a convincing, meaningful, uncompromising and respectful way. And always try to give a credible reason for saying No. In a memorable speech, the banker J P Morgan remarked: *there are usually two reasons for anything: a good reason and the real reason.* Either works.

## STAGING

Like theatre, and most other things outside the home, negotiation is a stage performance. The players need to consider the scenography and the choreography.

The place where parties meet to stage the negotiation can mean a great deal. You probably instinctively feel most comfortable on your home turf, which could be your office, or your counsel's office or somewhere else very familiar to you. More likely than not, the other party will feel that way too and prefer their own home ground. Research in 2011 by two North American business school professors, Graham Brown and Marcus Baer, summarized in the Harvard Business Review,[40] suggests that, in fixed pie distributive win/lose bargaining, parties conducting negotiations on home territory performed significantly better than the visiting party. The researchers ascribed this result mainly to the psychological effect of increased confidence generating a perceived home field advantage, but it may also have cultural roots.





The Brown and Baer results used undergraduate students as participants for their studies, and I wonder how realistic the study scenarios were and whether the results can truly be projected to mainstream commercial negotiations.

Experienced and savvy negotiators will likely ask themselves: *Do we really want the other party to feel uncomfortable from the start?* Although some will instinctively say yes to that question, let's think about that for a moment. Imagine you are the party with the greater, or at least equivalent, strength and the other party is in a difficult starting position. You are likely to be confident and the other party may be somewhat defensive, aggressive or uncommunicative. Are those ideal ingredients of a good negotiation? Where a successful outcome of an integrative negotiation would create a relationship for the future, think again about how you want to influence the mindset of the other party. The natural assumption that you have an advantage when the other party is less comfortable than you is often a dangerous illusion and you can easily adapt yourself to neutralize it. In fact, a party that is feeling uneasy is more likely to be difficult, cautious and negative, all of which are complicating factors in any negotiation.

The simple act of asking the other party where they would prefer to meet is itself a subtle power play on your part. If they suggest their place, and if you readily agree, you are signaling that you feel confident and see no danger. This may surprise, or perhaps even worry them. You are also being accommodating and respectful and therefore likely to arouse similar behavior in response. When the negotiation takes place on the other party's home ground, they are hosting, a role that carries certain implicit responsibilities towards you. As hosting is a social act, you, as the guest, have a privileged chance to witness the other party in their natural habitat. This insight can easily reveal clues about them: how they are established, what else is going on around them, how they behave at home, what the atmosphere is like, how they spontaneously present themselves and how they handle their staff. J.K. Rowling wrote that *if you want to know what a man's like, take a good look at how he treats his inferiors, not his equals.* There may be a great view, or interesting art, or in their office there may be personal things that illuminate their persona. Many of these things are possible social subjects for discussion before the negotiation begins, but they also help to build a character and gain an understanding. Quickly, you start to feel more (or less) comfortable about them than they may be feeling about you.

There are times when it is best to host a negotiation on your own patch, but the smart negotiator knows that the assessment needs to be made from the other party's standpoint. If they are coming a long way, offering to host can be a practical convenience, and another way to show respect. Like humility, hospitality can take the edge off hostility.

You can always propose a third, non-partisan, location. It is hard to find reasons to resist neutrality unless based on practicality or cost. Where there is tension or conflict between the parties, a neutral location may be the best solution all round. If all parties are willing to meet in a third location, try to influence the setting based not only on

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convenience and cost but also ambience and local facilities, such as interesting restaurants and other places to go to take a break, like proximity to a park or beach.

I once led my company to a negotiation with a major international competitor. We agreed to meet at the Crown Plaza at Munich Airport at 9am one day and both parties' delegations had to arrive by plane from abroad on the previous day. Just a short taxi ride from Munich Airport, overlooking the medieval town of Freising, is the Weihenstephan Abbey, a Benedictine Monastery that dates from 725. On the site is reputedly the oldest continuously-functioning brewery in the world, established in 1040. The Weihenstephan Brewery's large versatile dining room is perfect for informal gatherings and can also be adapted for business events. I missed the chance to suggest to the other party that we all dine together socially on the evening before our meeting. Instead, thoughtlessly, I invited my own group and external counsel to join me at Weihenstephan. I lost the golden opportunity to get to know my negotiating party much better in relaxed surroundings. We all make errors, but that was needless, careless and inexcusable on my part. I still kick myself when I think about it.

The significance of seating positions at negotiations are often trivialized or ignored, but they can make communications easier or more challenging. If two negotiating teams come into a room and see a rectangular table, they are likely to sit facing one another. An automatic physical juxtaposition of positions and interests is created at that very moment. It demonstrates that the participants are not part of the same group, but two camps, facing one another like the French and Russian armies at Borodino, prepared to do battle, win or lose, do or die. The perfect alignment for acrimony.

A round table, on the other hand, creates a different sense. Circles evoke notions of relationships and unity in the subconscious mind. Stone age henges are round, as are ancient amphitheaters. King Arthur, according to the Norman poet Wace, created a round table to enable his Knights to deliberate on equal terms leading to the chivalric order of the Knights of the Round Table. Yin and Yang are depicted in a circle. Because of the inclusive connotations, the flag of the European Union comprises stars denoting the Member States arranged in a circle. An extraordinary proportion of modern day logos feature circles: Alfa Romeo, Audi, BMW, Coca-Cola, Dell, Fiat, GE, Mercedes-Benz, NASA, Nissan, the Olympic Games, Saab, Starbucks, Volkswagen, my publisher Wolters Kluwer, and thousands more. Inter-State negotiations are often called Round Table Talks and WTO negotiations are referred to as Rounds.

Round tables help to camouflage power distribution because the seating positions promote informality and encourage the creation of the "in-group" scripts discussed in Chapter 3, freeing people up to relate to one another in a different, more communicative context. People are more socially adaptable at round tables.

If there are just two people negotiating, sitting together at the corner of a rectangular table or seated in a table-free environment effectively at right angles to each other, a more relaxed atmosphere exists. It is easier to avoid eye contact when appropriate, for example while contemplating, and is less confrontational than being seated opposite. Tense relationships can be converted into pro-social behavior by simple staging.





Taking proper breaks from the negotiating table can trigger new dimensions, and help to break deadlocks. As noted in Chapter 5, the simple act of going for a walk together can break tension. Walking side-by-side offers a very different dynamic from the typical confrontational meeting room. In his TED Talk, The Walk from No To Yes delivered in 2010, William Ury remarks that walking has a real power. You are moving in a common direction, taking in fresh perspectives. Even if you are not thinking along the same lines, the brains of the parties are noting some convergence. Walking can be a real tension-breaker.

## E-NEGOTIATING

The type of communication medium can become part of the negotiation itself. Technology has come to the aid of negotiators in several ways, offering email and video conferencing as well as online data rooms and shared spaces, file sharing and tools for e-discovery and due diligence. In the conflict field, online dispute resolution, or ODR, although still in its relative infancy and focused on low-value dispute settlement has developed several functionalities that can help negotiators be more efficient and effective, including those discussed in Chapter 2.

Many governments are exploring how ODR can help reduce administration of justice costs. In April 2014, Professor Richard Susskind, an internationally-recognized authority on the future of technology in legal practice, chaired a UK advisory group on the development of ODR in dispute management. A working paper published on the judiciary.co.uk web portal in 2014 by Susskind and Matthew Lavy, a technology litigator, titled Likely Developments in ODR, predicts the arrival of systems that will help parties not only to analyze legal issues, but to convert them into rational decisions. While Susskind and Lavy note that existing ODR systems already provide useful functionalities for low-cost, non-adversarial negotiations, they say: "*tomorrow's systems may offer prompts on the tactics and strategy of negotiations. These prompts could be of two broad kinds. First, there might be systems that help to optimize one party's position, guiding on what is considered to be in the best interests of the user. Alternatively, in the spirit of game theory, the systems might make concrete recommendations for resolutions that constitute sensible outcomes for both parties (on the principle that rational decisions by individuals can lead to collective decisions that are irrational).*"

While this may be the exciting shape of the future, for the present we need to be aware of the benefits and dangers of using and abusing existing technology when negotiating. Electronic communications involve a range of settings, behaviors and processes that can affect a negotiation's efficiency and outcome, both positively and negatively.

Emails, for example, are a wonderful medium but their nature encourages highly spontaneous, and extremely brief reactions shared or sharable with numerous people. In an early (2004) article in the HBS newsletter Negotiation titled "How To Negotiate



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Successfully Online"[41] by Professor Kathleen McGinn of HBS and Eric Wilson of Cogos Consulting, observed that negotiating online can easily start with a frenzy of activity, followed by a period of collective confusion. They emphasize the importance of first meeting face to face, or at least by video conference, to establish some basic rapport before relying too heavily on email interaction.

Emails can be great for low-hanging fruit and agreeing areas of common ground, but are often far less suited to mainstream negotiating where you really do need to see the whites of the other party's eyes. Nonetheless, when parties cannot negotiate physically, either at all, or all the time, how do the dynamics change?

This question is explored in You've Got Agreement: Negoti@ting Via Email (2009) by five negotiation educators, Noam Ebner, Anita Bhappu, Jennifer Gerarda Brown, Kimberlee Kovach and Andrea Kupfer Schneider.[42] They point out that negotiating while meeting face-to-face changes the kind of information that is communicated and how it is interpreted compared to meeting electronically

Professor Ebner and his co-authors suggest that the two dynamics that influence these changes are the richness of the communication medium in terms of communicating verbal and non-verbal signals (physical presence being rich in this regard while email is lean) and the level of interactivity. For example, where one of the parties has a high context culture where indirect communication exerts a major influence and the other a low context culture, email communication is likely to swing the negotiation pendulum more to favor the low-context, explicit, impersonal frame that can cause difficulties for the high context party and thereby render the negotiation more difficult for all. Because negotiators are less able to build an interpersonal relationship using email, the authors describe five main effects of email negotiating compared with face-to-face negotiation:

- increased contentiousness
- diminished information sharing
- diminished process cooperation
- diminished trust and
- increased effects of negative attribution.

The You've Got Agreement authors recommend a series of skills needed when negotiation by email:

- improved writing ability to enhance clarity and sensitivity
- message management to address the parties' anxieties
- building rapport and showing e-empathy, and
- managing the content in terms of clarity and appropriate framing.

And there's the security aspect. I make it a rule never to use the blind copy box on any email communication. It may save a few seconds by avoiding the need to forward a sent email to someone, but it excludes the risk that the recipient might accidentally respond by clicking *reply all* and potentially cause embarrassment, or compromise or destroy a negotiation or even expose you to liability.





In fact, it is wise to consider carefully who is added to the visible copy box of practically every email. The way the message is received and interpreted can change dramatically depending on who is copied on an email. As a rule, I only copy those who would be in the room if the negotiation is happening face-to-face, though you may need to copy someone else to make a point, or give reassurance to the recipient, or for another good reason.

The subject line is also important, and can help reframe an issue by how it is worded. Be wary of trying to negotiate internally by copying colleagues on an external email; almost inevitably, the words chosen will convey different or confusing messages. These may seem obvious points, but we have all witnessed the consequences of email sloppiness.

When planning a negotiation, consider the differences between face-to-face and electronic communications. It may make sense to meet at the outset to help establish the rapport and build trust, then defer to video conferencing and email at later stages, or for more minor issues. Email is such a ubiquitous way of negotiating that we need to consciously adapt our negotiating skills whenever using email, even where part or most of the negotiation is conducted in person.

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**KEEPING IN TOUCH**

In Staying With Conflict: A Strategic Approach to Ongoing Disputes (2009), Bernie Meyer makes a strong pitch to go out of your way to stay in contact with the other party during a dispute. Where direct communication is inappropriate or officially blocked, find other ways to stay in touch. You could, for example, consider maintaining an open line via advisers. If you see the other party is due to speak at a conference or symposium, think about attending, and make an appreciative or positive comment at a coffee break or in a follow-up note. This implies you are not avoiding issues and have the perseverance and strength to confront them at the relevant moment.

**IN A NUTSHELL**

- Start as positively as the situation will allow.
- Listen first, speak later, unless making the first offer.
- Develop open questioning skills.
- Adopt an active speaking mode.
- Don't score points, make them.
- Know how to interpret non-verbal signals and communicate the right ones yourself.
- Use EI techniques to handle your own emotions and those of the other party.
- Release tension through meals, humor, venting and apologies.