Effective Negotiations in Family Law

by Richard Maurice Barrister B.Ec LL.B NMAS Accredited Mediator

A good compromise, a good piece of legislation, is like a good sentence; or a good piece of music. Everybody can recognize it. They say, "Huh. It works. It makes sense."

BARACK OBAMA, *The New Yorker*, May 31, 2004

This paper focuses on how to conduct successful face to face negotiations, whether at Court or elsewhere. Many of these techniques however will apply to negotiations by correspondence as well. These strategies are applicable to Family Law proceedings as well as many other types of litigation.

The keys to effective negotiation are:

a. Thorough preparation
b. Be firm but always remain polite
c. Remain detached
d. Listen to the whole proposal and any arguments put in support
e. Problem solving
f. Try to avoid entering into complex debates about the merits
g. Patience is strength
h. Trade a concession only for a concession
i. Communication of Offers
j. Ethics and Reliability
k. Implementation
l. Keep your client involved
m. Dealing with your client during negotiations
n. Sign everyone up on the day

Thorough preparation

1. Negotiating power always lies with the person who is best informed and prepared. Good preparation is absolutely essential for a successful negotiation. The more prepared you are before entering into talks, the more likely it is that the result of negotiations will be acceptable to all parties involved. Accordingly your client is more likely to be happy with, or at least to accept, the result.

2. Good preparation involves:

   a. Being fully briefed on the significant facts and issues in the case. The best way to do this is to prepare a comprehensive chronology of facts;

   b. Analyze the case from a practical perspective by asking:

      - What are the essential problems that your client needs solved?
      - What relief is available from the Court?
      - Identify any propositions or unifying principles that the facts of your case suggest.
      - Anticipate the arguments to be raised by your opponent; and
      - Figure out how to counter those arguments when you are negotiating.

3. Work through the negotiation process from beginning to end so you are fully prepared for any eventuality.

4. In financial cases the first step always is to agree on a *compromise* balance sheet before you start talks. Contentious figures are often resolved by adopting a midpoint. Emphasise to your client that these

are the figures for the day only and are necessary to cross-check offers and to reality test them which will give you some flexibility.

Be firm but always remain polite

To this end:

a. Successful negotiators are assertive and challenge everything. They know that most often everything is negotiable but restrain themselves during negotiations to keep things civil.

b. Don't be hostile and avoid empty threats – "If the husband won't agree to this today this she'll seek indemnity costs."

c. Turn down the sarcasm – it never helps with negotiations.

d. Analyse the net effect of any proposals on your client's entitlements.

e. Be flexible not dogmatic. There maybe a different way to achieve a similar outcome.

Remain detached

5. It is important that a negotiator remains detached and keeps his or her emotions or personal views suppressed during negotiations. Lawyers can sometimes get too invested in their client's case. They may feel indignant about the other party's conduct. They may be dealing with an opponent who they dislike or find annoying. Remain calm at all times and do not show frustration or anger. Instead try to use a little humour instead – believe me it works.

6. Difficult negotiations on complex or sensitive issues like parenting, can be frustrating and impassioned but allowing emotions to take control throws you off message and off track.

Listen to the whole proposal and any arguments put in support

7. Good negotiators have the capacity to listen attentively to the other party during negotiations. Active listening includes the ability to read body language as well as verbal communication. It is vital to listen to the other party to identify common ground during discussions. Instead of spending most of the time defending their client's viewpoint, an effective negotiator will spend a lot time listening to the other party and finding clues for the resolution of matters still in contention.

Problem Solving

8. Finding consensus requires identifying a variety of solutions to the same problem(s). Instead of concentrating on his or her desired goal for the negotiation, the individual with skills can focus on problem-solving, which may avoid getting off track.

Try to avoid entering into complex debates about the merits

9. You will waste a lot of time if you and your opponent shadow box about the strengths and weaknesses of your respective cases. Remember that the other side is only negotiating with you because they know that there is some merit in your case. If they thought otherwise they probably would not put any proposal to you other than dismissal of your client's claim.

10. On the other hand, I think *"horse trading"* ought to be avoided a although some lawyers regard it as an integral part of their stock in trade. Try to avoid it if you can. One way is to work with the common ground of the parties by including in your offer(s) elements that meet the needs or expectations of both of them. You might even choose to adopt the approach and style of offers used by your opponent offers to underline your desire for consensus.

Patience is strength

11. Good negotiators are very patient. As I have said they focus initially on finding common ground and then, in a methodical way, work on settling more contentious issues one at a time. Do not rush your negotiations or your opponent may interpret this as a sign of desperation or weakness on your client's behalf. To counter this instead express optimism and confidence to your opponent about your client's offer(s).

12. Having said that, always be willing to walk away; in other words never negotiate without options. If you rely too much on a single outcome from negotiations, you narrow your options including the chance to walk away at an opportune moment. The threat to do so often produces a concession from your opponent. However use this technique wisely and sparingly as it may backfire and force your own client into making concessions.

13. Everyone has their own perspective about a case. Successful negotiators always look at the situation from the other side's point of view. Consider how your opponent and his or her client will assess your offer before making it.

Trade a concession only for a concession

14. Don't give anything away without getting something in return. Unilateral concessions only weaken your position. Genuine negotiation is a two-way street. To reach a fair agreement each side ought to give ground until they meet somewhere in the middle. Allied with this is the expression *"bidding against yourself"* which means that the process of concessions comes from only one side. Generally, it is not a good idea as it usually produces an unfair compromise.

15. In this way your client either can accept or reject the "last offer" from the other side understanding and weighing up the risks.

Communication of Offers – very important

16. Skilled negotiators are able to communicate offers clearly and efficiently to the other side during their dealings. You need to state your case and proposal clearly to avoid misunderstandings. I have had some rare situations where as a result of a fundamental misunderstanding about an aspect of a proposal a "faux" settlement is achieved only to be exposed when pen is put to paper. It has then all fallen apart.

17. To avoid this, generally I put my proposals in writing and ask my opponent to do the same. Each proposal is identified and numbered at the top – "Applicant's offer #1" etc. You do not need to draft orders simply convey the substance of your proposal.

Ethics and Reliability

18. The application of ethical standards and reliability promote trust and therefore effective negotiations. Both lawyers engaging in talks must trust that the other to keep to their promises and agreements. A skilled negotiator must also be certain that anything offered is capable of implementation before making that offer.

19. Notwithstanding the ethical standards imposed on the legal profession, some of us have been deceived about the true state of affairs of the parties during negotiations. An example is where your opponent has led you to believe that funds in a bank account or a mortgage balance are the same as deposed to in an affidavit or he or she may say nothing about it leaving a wrong impression.

20. If consent orders are signed on that basis only to discover that the actual figures are quite different agreement has been reached through misrepresentation. The net effect is that you will be very cautious when dealing with that person in the future and their reputation for integrity or lack thereof will spread rapidly. A short term advantage is therefore gained at tremendous cost to that person's professional standing.

Implementation

21. As the old proverb wisely says *"there is many a slip twixt the cup and the lip."* Negotiations can break down even after an overall settlement is achieved because the parties cannot agree on the detail about how to implement it. For example, one party might assume that the other will continue to make mortgage payments pending a sale while the other believes payments will cease immediately. Often there are also problem about the timing of a sale of real estate and distribution of the proceeds.

22. The best way to avoid this is to work out with your opponent how to implement the orders before negotiations close and ensure this forms part of the package that is ultimately agreed upon. Implementation must be sorted out before it can be said that settlement has truly been achieved.

Keep your client involved

23. At every stage make sure you keep your client "in the loop". Do not exceed your authority when negotiating. Do not make concessions without instructions. Do not express any views about their proposal until you get instructions.

Dealing with your client during negotiations

24. Your client should remain in charge and, taking care to listen to your advice, make all the final decisions about whether to accept, reject or make a counter-offer. Pressuring your client to settle should be avoided at all costs. However as part of you advice you should explain:

    a. Whether the offer is within the range;
    b. The savings to your client of legal costs;
    c. The likely delay if the matter goes to trial;
    d. The challenges they will face being cross examined and sitting through the trial;
    e. The pitfalls of litigation including the risks that his or her case will not impress the judge and the effect on the outcome for your client.

25. There is a fine line between giving advice to settle because the proposal is satisfactory and applying pressure to convince a client to change their mind and accept an offer.

Sign everyone up on the day

26. This is vital to ensuring that the agreement will be permanent. At Court this presents no difficulty as the judge will expect Terms of Settlement or Minutes of Orders. Away from Court, say at a settlement meeting or mediation, it is just as important as it sends a message of finality and resolution to the parties.

27. In my experience it is rare for parties to withdraw their consent before signed Minutes are made into orders. The other advantage is that the agreement and the method of implementation are crystallized. The last thing you would want is a second set negotiations about the substance or details of the agreement.

Richard Maurice
Barrister and Mediator, Sydney
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About the Author

Richard Maurice holds degrees in Law and Economics from Sydney University. He works as a Barrister & Mediator in Family Law financial and parenting matters.

He was admitted in 1984 and worked in private practice as an employed solicitor in a general practice and later for the Federal Attorney General's Office representing disadvantaged clients and as a duty solicitor in the Family Court, in NSW State Children's Courts and in many NSW Local Courts.

In 1988, he was called to the private bar. Since then he practiced mainly in the areas of Family Law, De facto relationships and Child Support, together with Wills and Probate.

He has appeared in a number of significant Family Law cases including seminal cases on Family Law and De Facto property division like Pierce and Pierce (1999) FLC 92-844 and Black v. Black (1991) DFC ¶ 95-113 and Jonah & White [2011] FamCA 221 and more recently Sand & Sand [2012] FamCAFC 179 and Vega and Riggs [2015] FamCA 797.

He completed the LEADR mediation course on 2006 (taught by Sir Lawrence Street) and a refresher course at the Resolution Institute in 2024. He is a member of the Family Law Section of the Law Council of Australia, is registered with the Civil Mediation Council (UK) and member of the International Society of Family Law. He is an Australian NMAS Accredited Mediator.

www.richardmauricelaw.com