



**LAWYER TO LAWYER MENTORING PROGRAM
WORKSHEET KK
INTRODUCTION TO NEGOTIATION**

Worksheet KK is intended to facilitate a discussion about the most important points about negotiation with another lawyer and potential issues associated with negotiations.

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- Discuss how a lawyer should prepare for negotiation of a legal matter, including when and how negotiation should be initiated, particularly in the new lawyer's area of practice.
- Discuss ways to involve the client in negotiation.
- Share with the new lawyer tips for negotiating with an attorney with years of experience, with a friend, with someone you do not get along with, etc.
- Discuss the ethics and professionalism issues in negotiating on behalf of your client.
- Talk about the skills that are needed to be an effective negotiator and how to acquire them.
- Share "best practices" with the new lawyer on how to appropriately deal with others on behalf of your client. Review the tips in the attached article. Jeffrey D. Diener, *When Negotiating, Shed Your Armor*, THE YOUNG LAWYER, Vol. 10, No. 7, May 2006
- Share with the new lawyer "war" stories of attorneys who have ultimately harmed their client because of their incivility and lack of consideration in dealing with opposing counsel, the judge or the jury.
- Read and discuss the attached. David J. Abeshouse, *Civility and Negotiations*, GPSOLO MAGAZINE, Oct./Nov. 2005; Stewart Levine, *Developing the Attitude of Resolution*, LAW PRACTICE TODAY, Sept. 2005.

When Negotiating, Shed Your Armor

By Jeffrey D. Diener

Some lawyers compare their preparation for negotiations to a warrior donning armor for battle. We may be moving from a negotiating mindset into battle-mode too readily since we typically represent clients who want to accomplish deals or resolve problems with other parties, not do battle with them. Here are some tips for a more productive process:

- 1. Always keep the client's goal(s) in mind.** Don't lose sight of the big picture when negotiating a particular point. Clients respect counsel who get through difficult deal points and put pen to paper. (Some firms offer clients "busted deal" fee discounts so your firm loses too.)
- 2. Pay attention to the details.** Allow your supervisors to focus on the big-picture issues. That way, the client wins, supervisors win, and you win because you will be invited back to take on more responsibility in the next deal.
- 3. Lose the "opposing" counsel mindset.** If you think about and refer to the lawyers representing the other party as "opposing counsel," you will treat them as the opposition. Their client, like yours, probably wants to accomplish a deal.
- 4. Factor for local customs.** In Japan, for example, it is common to concede a point only after several rounds of discussion because it is important for a Japanese lawyer to show that he represents his client zealously. If you are unwilling to go through this process, you won't be serving your client well.
- 5. Be cool.** When you come across a tantrum thrower, don't get caught up in their moment.



By staying cool you're effectively managing the other party's counsel. Eventually counsel may refocus on the deal. If counsel won't calm down, tell your client. Your client can usually talk to the other business people "offline" who may get their counsel to behave.

6. Be creative. It's easier said than done after being awake for two weeks and working through negotiations for the past fourteen hours. This is exactly when you should step back, keep the situation under control, and look for creative ways to accomplish your client's goals rather than resorting to a war cry.

7. Communicate with your client. Make sure you understand what your client wants and how to achieve it. Your representation is important to your client's reputation and ability to continue to operate effectively. Discuss your strategy and keep your client informed. If things seem to be moving sideways, make sure your team is aware so together you can move the process in the right direction.

8. Be reasonable. I have done several deals with a client considered to have made the "best" offer even when it offers less cash than others. My client wins because of its reputation for being reasonable and efficient. Another client refuses to work with a particular company solely because of that company's

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READY RESOURCE

■ *Creative Problem Solvers' Handbook for Negotiators and Mediators, Volume One: PC #474-0060; Volume Two: PC #474-0061, 2005.* Section of Dispute Resolution members receive a discounted price. Order online at www.ababooks.org or call 800/285-2721.

FOR MORE INFO

Visit the ABA Section of Dispute Resolution at www.abanet.org/dispute/home.html for resources to enhance your negotiation skills.

Negotiating

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lawyer. Don't become the reason that your client doesn't get business.

9. Enjoy! The negotiating process can be challenging and enjoyable. Deals have a way of getting done more quickly when you're in a positive frame of mind.

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ABA General Practice, Solo & Small Firm Division

GPSolo Magazine - October/November 2005

Civility and Negotiations

By David J. Abeshouse

Civility is—and should be—a core negotiation issue. The degree to which one employs ordinary civility in negotiations often has a marked effect on the bottom-line result. It also can make life more pleasant, even in fundamentally adversarial situations, essentially the norm for business litigators and transactional lawyers. An example of what *not* to do is the opposing counsel who—instead of working together to resolve a dispute or problem in customized, mutually acceptable fashion—prematurely blurts out, "I'll see you in court." This knee-jerk reaction usually fails as a negotiation tactic, for many reasons:

- It reflects a lack of analytic forethought and a tendency for emotional outbursts, two aspects that make this lawyer a less-than-formidable adversary.
- It essentially obliterates the possibility of counsel working together for the mutual benefit of the clients, who likely could achieve through a tailored settlement a result far better for both sides than any court would order. Because the vast majority of business litigations settle before trial, it is a fair bet that the parties will end up in some sort of settlement negotiations, regardless.
- Over time, this lawyer will develop a reputation as a loose cannon and a temperamental, petulant, unprofessional person to whom others would not refer clients. Opposing counsel often serve as a good referral source for future business because they have seen firsthand what the lawyer can do in the trenches.
- Finally, to the extent that this lawyer's own client learns of his reaction, the client may become dissatisfied with a lawyer who seems out of control and willing to put his own emotional needs ahead of the client's best interests.

In a hearing before an arbitrator, the less civil party often merely is endeavoring to overcompensate for unfavorable facts or law, whereas the more civil party in a dispute often feels no need to descend into incivility. Indeed, obstreperous counsel thus inadvertently acknowledges implicitly that he or she likely has a less than wholly legitimate case on the facts and/or law—not something a lawyer seeks to communicate to the one who is judging the case and will issue the final determination.

Don't lose your temper. Rather, lose the temper, yelling, and foul language. Although

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"venting" might improve your mood, it rarely works to your advantage in negotiations. Yes, occasionally it may tend to intimidate; however, the same result likely could be achieved in those instances without the expletive-laden, high-decibel diatribe. Most often, it will cause a diminution in credibility and respect. And that's a price not worth paying for the occasional negotiation advantage it arguably might afford. Indeed, a prompt apology for an emotional outburst might gain more ground toward a good working relationship and achieving the negotiated goal.

Employ common courtesy and civility as a matter of routine. Make it a part of your natural way of dealing with others, and you will see how effective it is, both in terms of results and in your quality of life. Sure, there are times when the need for some more forceful language and volume may be indicated, but this should be the exception rather than the rule. (The rarity of your outbursts will also increase their impact.) And by refusing to respond in kind when someone personally offends you by words or actions, you refrain from lowering yourself to their level, and that in itself is a laudable goal. Even the matter of responding to e-mails and telephone voice mail messages encompasses these tenets of common courtesy and civility—prompt response by you encourages similar treatment by your counterpart. The more the enlightened use these means of conducting legal and business negotiations, the more likely their use will spread. How much better things would be if this became the usual mode for the majority.

David J. Abeshouse practices business litigation and alternative dispute resolution in Uniondale, Long Island, New York. He is an arbitrator and mediator as well as an advocate. Visit his website at www.bizlawny.com or contact him at david@bizlawny.com.

Contact information:

ABA General Practice, Solo and Small Firm Division
321 North Clark Street
Chicago, IL, 60610
phone: 312.988.5648
fax: 312.988.5711
genpractice@abanet.org

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Law Practice TODAY

Developing the Attitude of Resolution

Stewart Levine

September 2005

The legal profession is based on the adversarial model. In today's culture of high stakes litigation, that usually translates to winning at any cost. I think it's time to examine the foundational principle and determine with "fresh eyes" whether the adversary system is as sound in 2005 as it was in 1775. Certainly a great deal has changed: technology, globalism, educational levels, the number and kind of transactions.

I'm not saying we must do away with litigation and adversarial process. But I do believe it's time to relegate "adversarial think" to a place of last resort, a place you go when you and your resolutionary have failed. I raise this in a column about management because of the "bleed" of attitude from the litigation head that truly gets in the way of reasonable problem solving and rewarding relationships.

During my second year of law school I had my first job in the legal industry. I was an intern at a legal services clinic in Camden, New Jersey. On my first day I was handed 25 cases to work on. This would be my job for the semester. Three weeks later I asked the managing attorney for more cases. When he asked about the 25 he gave me, I told him I resolved them.

He was very surprised. He asked how I did it. I told him I reviewed the files from a perspective of fairness to everyone, spoke to my clients and called the attorney or agency on the other side and reached a satisfactory resolution when they said yes to my proposal.

I knew nothing about being a lawyer! I had no idea whether the cases were difficult, needed to take a long time or had to be handled in any particular way. With a "beginner's mind," I found the solution that worked best for all concerned. Simple? It was for me.

I spent the next 12 years becoming a "successful" lawyer--and becoming less effective at resolving matters, and unhappy with whom I was becoming. My mindset was spilling over into my failing marriage and my failing relationships with my partners. Feeling frustrated, anxious and fearful, I stopped practicing law. I spent the next 15 years unlearning--recovering what I knew about resolution when I started, discovering its component parts and learning how to teach and model it for others.

I thought about how the most effective judges and lawyers understand people's real concerns. They know what to honor and what to respect. They know how to frame situations and condition people's

expectations. They embody a tradition that accommodates competing concerns and builds understanding. Winning or losing is not the point of their work. Their game is resolution, and getting people back to their lives. They are "resolutionary thinkers."

10 Principles of the Attitude of Resolution

The 10 principles that follow reflect the values that make up the attitude of resolution. This attitude is the place of beginning, a critical first step. It is not enough to go through the motions of any conflict resolution process mechanically, without first cultivating an attitude of resolution.

It will take time to change the way lawyers think. The beliefs and patterns you have about conflict took a long time to develop. They are embedded deeply and operate in unconscious ways. It will require reflection, intention and repetition to change your thinking habits about collaboration and conflict. Faith and trust in yourself and others is called for. You can accomplish it.

This is a foundational step. The aim is that through practice and repetition, just like you developed an adversarial mind, you can develop and cultivate a resolutionary mind. Here are the principles:

Abundance. One of the primary contributors to adversity is the belief that "if you get yours, then there won't be enough for me." This is a scarcity mentality. But the most powerful negotiating tactic is to find out what the other side wants and figure out how they can have it. The likelihood is that they will try to do the same for you. In most situations there is enough for everyone to get what they need. Rather than fighting about dividing a small pie, we need to focus on how to make the pie bigger.

Efficiency. We spend a great deal of time and process wasting resources. Often the patient dies while we are operating--the business is ruined or the assets are consumed during the battle. How many times have you seen the marital home, the only asset of a marriage, consumed by the process, or the cost of litigation exceed the amount at stake? How many lawyers have huge, never-to-be-collected receivables? We need to be concerned early on about using resources efficiently, not wasting them.

Creativity. Lawyers are trained to see issues and problems. We spend a good part of our legal education studying adversarial situations. We learn to think in terms of problems and issues. We look for them in every situation instead of focusing our brainpower on the potential creative solutions that will take care of the needs and concerns of all involved. We need to use creative thinking to figure out how everyone can get what they need.

Fostering resolution. A key to becoming a resolutionary is becoming a quick study in process design. The traditional adversarial process often makes the conflict worse. The time it takes and the standard admonition to cut off communication are not very helpful. The other side becomes demonized. As the battle escalates, they become the enemy. The systems are systems of "confliction," like pouring gasoline on an already-burning fire.

A resolutionary looks at the situation, and from the perspective of standing in the clients' shoes, tries to design the best process--a process that will get to resolution quickly without making things worse. Bottom line outcomes are more important than following the steps prescribed by some traditional process.

Openness. This is not about opening your chest cavity, bearing your soul and putting your heart on your sleeve. It's about telling the truth you believe in the situation, and listening to what others say is their

truth. Posturing wastes resources. The sooner people have the opportunity to share their side of a situation directly, the sooner resolution can happen. Hiding behind procedures or rules of evidence does not help the catharsis and disclosure needed to resolve a situation. Authenticity is the key.

Long-term collaborations. The resolutionary uses a context of fostering relationship. This is the basis of all productivity and satisfaction. Even when relationships are broken down, it is possible to see the situation as temporary. The worst conflicts are among people with the deepest relationships. A resolutionary sees relationships as long term. That is a perspective that fosters continuity. When you consider the cost of putting in place new personal or professional relationships, it is obvious that preservation is an important value.

Feelings and intuition. As lawyers, our conditioning is that our primary means of analysis is logic. Resolutionaries understand that legal practice is usually more about life situations and transitions that people experience. In guiding them to satisfactory results, we must go beyond logic and include the human and emotional aspects that impact the personal and professional lives of our clients. Our internalized experience over time also will allow us to trust our own instincts and intuition in advising clients. Given that the transitions and major life transactions we advise clients through are based on personal relationships, we can trust and use the personal assessments on which we base our advice.

Disclosing information. Traditionally, lawyers withhold information. We divulge only what we have to, or what the rules require. We come from the premise that information is king, and the less "you" know the better off "I" am. Anything less than full disclosure creates mistrust and sets up a dynamic that does not contribute to resolution. Resolutionaries encourage communication and disclosure. They realize that the resources consumed in holding on are not worth the cost of trust and getting to the bottom of things.

Learning. Resolutionaries understand that their goal is not to win at all cost, but to share information and discover the concerns on the other side. They hold the conflict resolution process as a learning exercise. Everyone teaches everyone else their perspective and what's behind it. When everyone shares this way, the potential for a creative result--a result beyond expectation--becomes possible. As a law student, this is what I thought litigation was about--getting the best result through shared information.

Being response-able. To be a resolutionary is to see the occurrence in a larger context. Resolutionaries try to foster the development of others. They realize there is a great cultural tendency for people not to do the work of taking responsibility for resolving their own situations and to look for another person to take care of "it" for them. Resolutionaries understand that people learn in adverse situations and they coach their best clients to be responsible. It's easy to exemplify noble character when times are good. This gift gives people the experience of participating in resolving their own conflict, and in the process discovering and experiencing their own character.

Evaluating a Situation the Resolutionary Way

When a situation is presented a resolutionary asks the following questions:

Who has what concerns? What is each person's reality about the situation? (They stand in everyone's shoes so they can treat everyone fairly.)

How quickly must action be taken?

What is the measurable loss and continuing cost and risk of nonresolution? (They are sensitive to wasting resources.)

Who is needed for effective resolution? (They want all essential parties to participate.)

How do we get everyone to the table with the right attitude? Who needs an attitude adjustment, and what's the best way to do it? (They realize getting people to the table is more than half the work.)

What constraints or environmental conditions exist? (They need to know the context in which the conflict is taking place.)

Are there laws, regulations, principles, customs, agreements or other standards for the situation? (They look for objective metrics as a basis for evaluation.)

What future relationships are essential? Who will continue together? (They are thinking of the long term.)

What is acute and needs immediate attention? (They are concerned with others' resources and damage control.)

What's the best action plan? Who will do what, by when? (They understand that the best way to get to a place is to set a goal; in the process you become collaborators and teammates.)

These steps allow you to be an advocate without being an adversary.

When you probe and listen to the underlying concerns of the other side, accommodation and satisfaction for everyone is possible. Solutions can be invented to accommodate the interests of both sides. Sometimes, strong partisan advocating for each side is the best way to understand all parameters of a situation.

You must know the difference between advocating strongly and being adversarial. Many lawyers operating today ignore the difference. Remember that effective resolution comes from relationships created from an honorable attitude. Unfortunately, over the past few years "Rambo" tactics have become commonplace. We all would be well advised to read the best-seller *Everything I Need to Know I Learned in Kindergarten*.

The core competency of the resolutionary is the ability to lead people to a new vision that returns them to the real business of their lives, without the ongoing internal chatter of continuing conflict. The job of the resolutionary is to lead the client to resume collaboration and cooperation.

The solutions of the resolutionary reestablish the working relationships that are essential for business, family or government activity. They provide options that contribute to the present and future quality of our lives.

What a Resolutionary Embodies

I believe Resolutionaries have the following qualities and abilities. If you aspire to being a resolutionary, it's time to start cultivating these qualities.

Collaboration--They treat everyone respectfully and are always open to learning. They make the complex simple.

Confidence--They know the value they contribute; they act on their assessments.

Creativeness and innovation--They design what they need to get the job done.

Empathy--They have compassion; they honor and legitimize everyone's concerns.

Fairness--They understand that tomorrow is another day; winning is not everything.

Faith and trust--They know the situation will be resolved.

Open--They create trust and the presence for people to open up into.

Getting to the core--They have an uncanny ability to see the core of the conflict.

Honesty and integrity--This generates trust in everyone; they walk their talk.

Intelligence--They are smart and aware of what's really going on.

Judgment--They have experience and a sixth sense of what will work.

Life experience--They have high mileage (bald, gray or possessing an old soul).

Listening skills--They listen with their entire presence and hear what is / not said

Control of the process--They know process is integral to resolution.

Open mind--They are not committed to a particular resolution.

Practicality--They try whatever works.

Care for people--They know it's always a relationship problem.

Tolerance for conflict--They remain centered, grounded and fair in the storm.

Conclusion

Your initial, automatic reaction may be that law is based on an adversarial model, and to suggest otherwise would undermine the system. I suggest that lawyers exist to facilitate the machinery of our institutions--commercial, governmental, political and charitable. If we are better able to facilitate through collaboration, then that is the way to proceed.

Given the levels of professional unhappiness, client complaints, citizen frustration and costs of conflict, we have little to lose and a huge upside potential. In the great majority of situations, clients will be happier, societal transactions will move forward with less friction, and lawyers will reap the benefit of deeper levels of personal and professional satisfaction as they accomplish their work with, not against, other lawyers.

Lawyers have an opportunity to reposition themselves as conflict resolvers. We can be the solution, not part of the problem. In so doing we will restore pride in the calling we answered.

Shifting a basic premise on which a system is based is no simple matter. But if we miss what people are asking for, we will miss a golden opportunity.

Author's Note: ResolutionarySM is a service mark of Stewart Levine. The term was first articulated by a satisfied client in 1991 who, after a very delicate matter, looked at me and exclaimed "you are a resolutionary."

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