

MASTER THE ART OF NEGOTIATION

Greens List

15 March 2018

Presenter - Tim McFarlane



McFarlane Legal

dispute resolution

Topics to be discussed:

1. Is negotiation a science or is it a black art?
2. How to improve negotiation outcomes.
3. What is the BATNA?
4. What to do when a party will not move.

Is negotiating a black art, a science or a question of who is the slickest talker?

‘In seeking to settle a matter pursuant to his client’s instructions or the procedures of the court, the practitioner in some senses, gives up his “adversary” role in favour of a “negotiating” role. In that co-operative role, it is important that practitioners may be relied upon by the other party and his advisers to act honestly and fairly in seeking a reasonable resolution of the dispute.’

Legal Practitioners Complaints Committee v Fleming [2006] WASAT 352



McFarlane Legal

dispute resolution

Definition.

Negotiation is a process in which two or more people with some ability to influence each other, communicate and interact with a view to making a decision on a problem which effects them. It involves the parties promoting their rights and interests and adjusting their positions and views in a common effort to achieve settlement.

What are the vital aspects to consider in an effort to improve negotiation outcomes?

Preparation:

- ▶ Fundamental is the preparation that is necessary before any negotiation.
- ▶ Preparation entails:
 - ▶ Knowledge of all the facts and circumstances.
 - ▶ Understanding of all parties' positions.
 - ▶ Who is to be involved - the parties and lawyers.
 - ▶ Relevant law and the impact.



McFarlane Legal

dispute resolution

Techniques and Styles.

- ▶ Psychology of classic negotiation techniques.
 - ▶ Positional negotiating vs. Interest-based negotiating.
 - ▶ Characteristics of each approach.
 - ▶ Advantages and disadvantages.

Techniques and Styles (cont'd).

	Positional Negotiating	Interest-Based Negotiating
Advantages	<ul style="list-style-type: none">• Can be quick• Uncomplicated• Favours the powerful party• Inexpensive	<ul style="list-style-type: none">• Flexible (other issues can arise)• Maintains relationships• Can achieve better agreements / outcomes• Can redress power imbalances
Disadvantages	<ul style="list-style-type: none">• Inflexible• Can be damaging to relationships• Can be predictable / tedious• Can result in sub-optimal agreements	<ul style="list-style-type: none">• Takes more time• Can be more complex



Attributes of Skilled Negotiators.

- ▶ Well prepared, as is their client.
- ▶ They present their case clearly.
- ▶ They have thoughts about the tone they will use:
 - ▶ Persuasive, not aggressive; matter of fact;
 - ▶ Will the word 'sorry' be used?
 - ▶ Sewing seeds of doubt.
- ▶ They use the opportunity to gather information in a non-threatening way.
- ▶ They think about their initial offer, how concessions might unfold, together with other issues which may arise.



Practical Pointers.

- ▶ Hasten slowly.
- ▶ Seek to collaborate and achieve some common ground.
- ▶ Attempt to gain control of the process.

What is the BATNA?

- ▶ BATNA - Best alternative to a negotiated agreement and how to identify it.
- ▶ Crucial to understand the clients' attitude towards negotiation.
- ▶ Zone of possible agreement (ZOPA).
- ▶ Can you achieve an agreement otherwise not available through judicial process?
- ▶ Pyrrhic Victory

What to do when a party will not move.

- ▶ Persistence.
- ▶ Adjourn the discussions.
- ▶ Change the dynamics of the negotiation.
- ▶ Walk out.



McFarlane Legal

dispute resolution

Finally.

“On the one hand, the negotiator must be fair and truthful; on the other hand, he must mislead his opponent. Like the poker player, a negotiator hopes that his opponent will overestimate the value of his hand. Like the poker player, in a variety of ways, he must facilitate his opponent’s inaccurate assessment. The critical difference between those who are successful negotiators and those who are not, lies in this capacity both to mislead and not be misled.”

James J. White *‘Machiavelli and the Bar -
Skilled Limitations on Lying in Negotiation’*
1980 American Bar Foundation

Research Journal Res J 926-930



McFarlane Legal

dispute resolution

QUESTIONS?

For more information please contact:

Tim McFarlane - (03) 9602 5440