

OG Energy Education Series

Negotiating with Ethics: Not Just a Suggestion



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The Dilemma

- ❖ A **dilemma** is a situation in which a difficult choice must be made between two or more alternatives, especially equally undesirable ones.
- ❖ This brings about ethical considerations and the story of the Landman Golfer and the Attorney Golfer playing in a tournament together.

The Ethical Dilemma



Definition of Ethics

(along with quotes from successful leaders)

- ❖ **Ethics** is based on well-founded standards of right and wrong that prescribe what humans ought to do in terms of rights, obligations, benefits to society, fairness, or specific values.
- ❖ Knowing the difference between what is morally right and wrong and acting accordingly.
- ❖ Doing the right, decent thing even when you have the power to do the convenient, self-serving thing.
- ❖ Doing what you believe to be right and owning it – regardless of the outcome.
- ❖ Key ethics include the principles of honesty, integrity, fairness, and empathy.
- ❖ Acting in a way that does not negatively impact someone's character and credibility as a respected leader, coworker, and friend.
- ❖ It is possible to follow the law to the letter and still be unethical. Ethics don't necessarily equate to legality.

Definitions of Negotiation

- ❖ To confer with another as to arrive at a settlement of some matter.
 - *Merriam Webster Dictionary*
- ❖ Negotiation is the deliberation, discussion or conference upon the terms of a proposed agreement; the act of settling or arranging the terms and conditions of a bargain, sale or other business transaction.
 - *Black's Law Dictionary*
- ❖ Bargaining (give and take) process between two or more parties (each with its own aims, needs, and viewpoints) seeking to discover a common ground to reach an agreement to settle a matter of mutual concern or resolve a conflict.
 - *BusinessDictionary*
- ❖ Back-and-forth communication designed to reach an agreement when you and the other side have some interests that are shared and others that are opposed.
 - *Getting to Yes: Negotiating Agreement Without Giving In*

Key Takeaways in Negotiations

- ❖ **Negotiation** is a strategic discussion that resolves an issue in a way that both parties find acceptable.
- ❖ **Compromise** is normally the basis of negotiation.
- ❖ **Negotiating** is used in everyday life (e.g. reduce debts, lower the sale price of a house or car, improve the conditions of a contract, or otherwise get a better deal).
- ❖ When **negotiating**, be sure to:
 - justify your position
 - put yourself in the other party's shoes
 - keep your emotions in check,
 - and know when to walk away.



Getting the Basics Right In Negotiations

❖ Be yourself

- Don't try to be someone you are not, or you will lose credibility.
- Don't use power or challenging talk and put the other side on the defensive right off the bat.

❖ The best negotiators are good listeners

- Learn what the other side is wanting through their questions and style of negotiating.
- Silence is not a bad thing.
- Patience is great for a discovery period.
- Some people just want to talk.

Getting the Basics Right In Negotiations

❖ Prepare!and then Prepare some more!

- What do I want to accomplish? AND write down an **answer**.

❖ Be honest and ethical

- It is never acceptable to deceive the other side. ETHICS RULE!

The Lawyer's Conduct in Negotiations: Rule 4.1

- ❖ The American Bar Association addresses (in a broad sense), the conduct of an attorney representing a client in negotiations.
- ❖ **Rule 4.1: Truthfulness in Statements to Others (Transactions with persons other than clients):**
 - In the course of representing a client a lawyer shall not knowingly:
 - (a) make a false statement of material fact or law to a third person; or
 - (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 16.

The Lawyer's Conduct in Negotiations: Rule 8.4(c)

❖ Rule 8.4(c) of the American Bar Association Rules of Professional Conduct:

❖ ***Misconduct***

❖ It is professional misconduct for a lawyer to:

- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation.
 - This Rule appears problematic because some of the routine negotiation tactics involve misrepresentations – exaggerated claims, statements about acceptable terms and reservation prices, and puffing about the qualities of an item.

Do the Right Thing

- ❖ It is possible to follow the law to the letter and still be unethical.
- ❖ Some negotiation tactics that are certainly questionable from an ethical standpoint are:
 - **Lies:** making a statement that is contrary to known fact.
 - **Puffery:** exaggerating the value of something.
 - **Deception:** making a misleading statement (misrepresentation).
 - **Nondisclosure:** Omitting or hiding a pertinent fact.
 - **Nickel & diming:** repeatedly asking for more favors or resources after a negotiation has presumedly ended (renegotiating).

Write five words you can spell (5 marks)

1. five
2. words
3. you
4. can
5. spell

very clever! +2

For the Landman: AAPL Code of Ethics and Standards of Practice

- ❖ The **Code of Ethics** shall be the basis of conduct, business principles and ideals for the members of the AAPL; and it shall be understood that conduct of any member of the Association inconsistent with the provisions set forth in this Article shall be considered unethical and the individual's membership status shall be subject to review for possible disciplinary action as prescribed in Article XVI of these Bylaws.
- ❖ In the area of human endeavor involving trading under competitive conditions, ethical standards for fair and honest dealing can be made increasingly meaningful by an association organized and dedicated not only to the definition, maintenance and enforcement of such standards, but to the improvement and education of its members as set out in the Standards of Practice. Such is the objective of the AAPL, and such is its public trust.

AAPL Code of Ethics and Standards of Practice (cont.)

❖ Section 1

- It shall be the duty of the Land Professional at all times to promote and, in a fair and honest manner, represent the industry to the public at large with the view of establishing and maintaining goodwill between the industry and the public and among industry parties.
- In his dealings with landowners, industry parties and others outside the industry, the Land Professional shall conduct himself in a manner consistent with fairness and honesty, such as to maintain the respect of the public.

AAPL Code of Ethics and Standards of Practice (cont.)

❖ Section 2

- Competition among those engaged in the mineral and energy industries shall be kept at a high level with careful adherence to established rules of honesty and courtesy.
- A Land Professional shall not betray his partner's, employer's, or client's trust by directly turning confidential information to personal gain.
- The Land Professional shall exercise the utmost good faith and loyalty to his employer (or client) and shall not act adversely or engage in any enterprise in conflict with the interest of his employer (or client). Further, he shall act in good faith in his dealings with the industry associates.
- The Land Professional shall represent others in his areas of expertise and shall not represent himself to be skilled in professional areas in which he is not professionally qualified.

What Can Be Done About Unethical Landmen?

❖ Filing a Complaint

- Any person, whether a member or not, having reason to believe that a member is guilty of any conduct subject to disciplinary action, may file a complaint in writing with the executive vice president. The complaint must be signed and dated by the complaining person and accompanied by a statement in support of the complaint. A complaint may be in any form that gives the information required. The executive vice president shall refer any complaint to the chairman of the Ethics Committee, who shall notify all members.

AAPL Disciplinary Actions

- ❖ Conduct of any member of the Association inconsistent with the provisions set forth in the Code of Ethics shall be considered unethical and said individual's membership status shall be subject to review for possible disciplinary action.
- ❖ The Ethics chairman, or the Ethics assistant chairman acting in his place, shall notify the accused member in writing as to the committee's decision within a reasonable time but not later than thirty days from the decision of one of the following: (a) dismissal of complaint; (b) censure; (c) suspension of membership for a stated period of time; (d) allowed to resign; (e) expulsion; (f) revocation or suspension of certification.
- ❖ If censure is the decision, the chairman shall so notify all participants in the proceedings and the Board of Directors. If the decision of the Ethics Committee is suspension, allowance of resignation, or expulsion, and no appeal has been filed within thirty days after notice of such decision, the Ethics Committee shall thereafter notify all members of such decision in an AAPL-authorized publication.
- ❖ There is a "Member Expulsion List" for individuals who have been expelled from membership due to AAPL violations of the Code of Ethics and Standards of Practice.

Assessment and Plan Development for a Negotiation

❖ Develop your vision for the deal

- Negotiations start from the very first contact.
- As the Negotiator, it is your job to have a Vision of the Deal and do as much preparation as time allows **BEFORE** you communicate with the other side.
- Most negotiations are won or lost even before the talking begins, depending on the quality of the preparation.
- “What is it that I want to accomplish?” and write down an answer.

❖ What is your planned outcome?

- What are your expectations for success?

Assessment and Plan Development for a Negotiation

❖ Developing Desired Deal Terms

- **Financials:** Get your top and bottom authority for the deal.
- **Asset characterization:** What do you need of the asset? (100%, or a portion?)
- **Long & short-term goals:** Layered negotiations? Dates for each phase.
- **What are your wants and must haves:** Important to separate them.
- **How to unwind a bad deal:** Make sure that you are not promising absolutes in your negotiations and leave room for TRUTHFUL exceptions that give you an out (e.g. subject to approval of title, approval from supervisor, etc.).

Who Owns the “D”?

- ❖ Who is the decision maker? Identify the person who can decide, agree, and sign-off on the deal.
- ❖ Who are the authorities and what are the boundaries?
- ❖ Who has the power to agree summarily and to recommend the deal to the decision maker?
- ❖ Make sure that you ask up front when the decision maker would be able to come to the table and execute a binding agreement at closing.



Identifying Your Walk-Away Terms

❖ BATNA

- Know your “**Best Alternative to a Negotiated Agreement**”
 - This is your Walk-Away Alternative.
 - Your BATNA is how you will measure if you are still on track for getting a good deal and help keep you on track.
 - If negotiations start to go sideways, you know you have already given yourself permission to walk away at certain points.
 - Take the time to research alternatives and discuss them with your team prior to negotiations (more people looking = more alternatives).
 - Try to identify the other party's Walk-Away Terms (use their perspective and step into their shoes to produce ideas).

Illustration of BATNA

❖ “Zone Of Potential Agreement” (ZOPA)

- The overlap between the seller's and buyer's settlement range.

❖ Seller's settlement range is a biddable range acceptable to the seller.

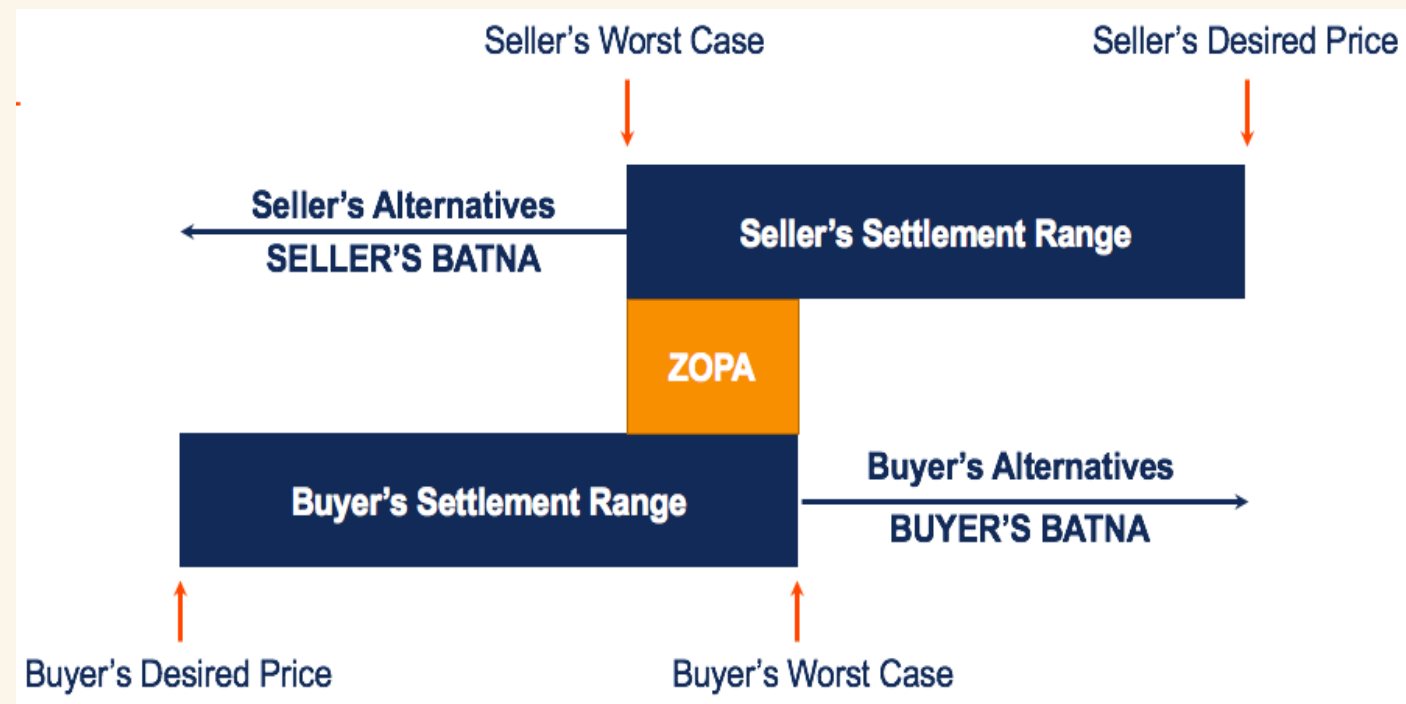
❖ Buyer's settlement range is a biddable range acceptable to the buyer.



Illustration of BATNA

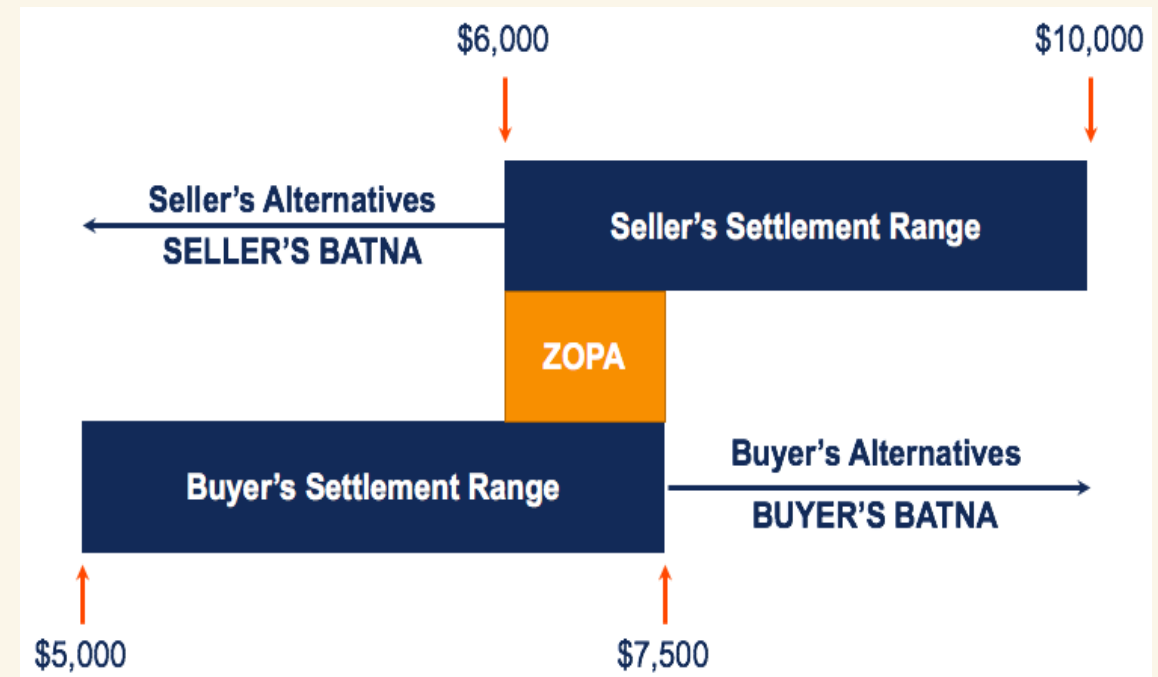
❖ Buyer's/Seller's **worst case** is the starting point of the respective parties BATNA IF:

- Buyer offers a price that is lower than the seller's worst case, then the seller is better off going with an alternative.
- Seller offers a price that is higher than the buyer's worst case, then the buyer is better off going with an alternative.



Example of BATNA

- ❖ Buyer shops around and assigns a maximum value of \$7,500 for a particular car.
 - Buyer's BATNA is anything over \$7,500.
- ❖ Buyer is willing to pay up to \$7,500 for the car but would ideally want to pay \$5,000.
- ❖ Seller can easily sell her car for \$6,000.
 - Seller's BATNA is anything less than \$6,000.
- ❖ Seller offers to sell her car to Buyer for \$10,000.
- ❖ In this case, there is a **zone of potential agreement - \$6,000 to \$7,500**.



BATNA Summary

- ❖ List all alternatives to the current negotiation.
 - What could you do if negotiations fall through?
- ❖ Evaluate the value of each alternative.
 - How much is each alternative worth to me?
- ❖ Select the alternative that would provide the highest value to you.
 - This is your best alternative to a negotiated agreement.
- ❖ After determining your BATNA, calculate the lowest-valued deal that you're willing to accept.



Walk Away Phrases (cont.)

Soft Approach

- I would really like to make this deal work. I'm sure you would agree that it's got to work for both of us.
- Here's the thing: we're going to lose money if we move forward with the terms you're requesting.
- We wouldn't be able to provide you with the level of quality and service that we have a reputation for providing to our clients.
- So, if these are the terms you need to make the deal happen, then we're not the right company for you.
- If you have any additional flexibility, let me know. Thanks for considering us.

Medium Approach

- I'm trying hard to earn your business, but I can't do it at the terms you're asking for.
- I'm afraid we're going to have to bow out.
- I wish you well in finding the right vendor to make your project successful. Thanks for considering us.

Firm Approach

- We're not a fit for what you're looking for in terms of rates (or customer support, etc.). Thanks for your interest and we sincerely wish you success in moving forward.

Walk Away Phrases (cont.)

- ❖ The key here is to use these phrases at the walk-away point and truly be willing to walk away. Some deals are just bad for you. These negotiation walk-away phrases are designed to put the brakes on a bad deal in a polite way and turn the tables to score a better deal for you.

Setting the Tone for Your Negotiation

❖ When, where, and how?

- **When** can be important if you are a morning person!
- **How** we do negotiations has changed dramatically with technology advancements (meet in person, by phone, Skype, videoconference, MS Teams, ZOOM, webcasts, and other platforms/options).
- **Where** you meet is something to be thought through carefully.
 - Home court advantage
 - Neutral location
 - Depends on who you are meeting with (landowners, pros, competitors)

Setting the Tone for Your Negotiation (cont.)

❖ Power of Civility:

- Play nice, no one likes a bully.

❖ Power of Integrity and Trust:

- Be on-time.
- Pay attention.
- Do what you say you will do and when you will do it.
- Effectively communicate any changes or delays.
- Always maintain **credibility**, it is the most **important** tool.

❖ Power of Pacing, Timing, and Breaks:

- Take care of everyone to make the negotiation pleasant (room temp, beverages, breaks, and keeping on time).
- Provide an agenda if possible.

Challenges in Negotiating

❖ Defusing Emotional Negotiations/Negotiators

- Take a break.
- Pause and say nothing.
- Calmly and slowly ask for clarification.
 - “What I think I hear you saying is that...”
- Do **NOT** get mad and do not attempt to get even.
- Apologetic attitude: “I am sorry for not hearing you clearly, I would like to understand your side”.
- **Joint problem solving:** “I need your help on this issue, I have come up with a few ideas and I would like to hear your ideas on how we might deal with this effectively”.
- Focus on interests, not positions.

What makes a Good Deal and Contract?

- ❖ Make sure that the negotiation process has appropriate details and an agenda.
 - Upfront planning is essential.
- ❖ All important terms, financials, roles, and obligations are included.
- ❖ Send changes and comments on agreements in PDF format.
- ❖ The Agreement is organized and easily administered.
- ❖ The Parties are willing to do another deal together.
- ❖ Win-Win perception upon coming to a final agreement.



Barriers to Communication

- ❖ Clear communication between parties is essential. However, there are many barriers that can lead to misunderstandings. Often what is said is not what is heard.
 - **Language Barriers:** Know your audience ahead of time and make appropriate arrangements. Foreign languages and expressions, buzz words, slang, technical terms, industry lingo, etc..
 - **Interpersonal Barriers:** Created by individuals who stare at their phone, don't engage, talk quietly to their team while you are talking, often leave the room during critical times, etc.
 - **Cultural Barriers:** Religious, ethnical, and social differences affect perception and can lead to misunderstanding.
 - **Emotional Barriers:** People can be consumed by anger, fear, hostility, unrealistic expectations, and more making it difficult for them to hear or understand a message.
 - **Gender Barriers:** Variations can exist in the ways males and females communicate which can create miscommunication or hostility.

Personal Negotiating Styles

- ❖ In his article “Personal Negotiating Styles Can Make or Break a Negotiation,” Mark Latz believes that all negotiating styles can be found in varying degrees within three labels:



The Competitors



The Accommodators



The Conflict Avoiders

Personal Negotiating Styles (cont.)

THE COMPETITORS

- Enjoy conflict, competition, and control.
- Usually have big egos and are not great listeners.
- Love to talk, so prepare by **having questions to ask and listen**.
- Strategy should include an offer that will allow for a **concession strategy**.
- Stick to your principles and don't cower.
- Be direct and use eye contact.

THE ACCOMODATORS

- Value **good relationships**, love to be liked, dislike conflict and sometimes unnecessarily concede.
- Good listeners and information gatherers.
- People often open up to them and say too much. **Prepare how much information you will share** with them before the negotiation and don't share any more.
- Do be sensitive. Accommodators are often highly focused on creating a relationship and are less likely to agree to terms that can hurt a relationship.
- They often focus on independent standards like market values (issues hard to dispute).

THE CONFLICT AVOIDERS

- Have a strong need to avoid conflict.
- Usually skilled at avoiding answering questions and may appear to be unengaged.
- When negotiating with a Conflict Avoider, **focus on long-term**, while keeping focused on your goal and be patient.
- You may need to be more diligent and focused on **getting them to answer** direct questions.

Checklist

1. Prepare and research.
2. Write down your own vision of the deal.
3. Know your BATNA.
4. Practice negotiating.
5. Ask questions.
6. Listen. Be comfortable with silence.
7. Approach every negotiation with a win/win attitude, until you find that won't work
8. Be honest (create trust and credibility).
9. Know your leverage. Don't use it unless you must.
10. Know your weakness and how you will make up for your weakness.
11. Remember, people make deals, not companies or organizations.

Worksheet

QUICK PREPARATION WORKSHEET

YOUR VISION FOR YOUR DEAL:

| MY SIDE | THEIR SIDE |
|---|-------------------------------|
| Interests (Identify Parties): | Interests (Identify Parties): |
| Options: | Options: |
| Alternatives (BATNA): | Their BATNA: |
| <div>Proposals:</div> <div>ASPIRE TO:</div> <div>MIDDLE GROUND:</div> <div>CAN LIVE WITH:</div> | |

| | | | |
|---------------------------------|------------|-------------|-----------------------------|
| NEGOTIATION GAME PLAN WORKSHEET | | | |
| | | | |
| Negotiating Partner | | | |
| Date | | | |
| Negotiating Topic | | | |
| | | | |
| Needs & Interests | Rank Order | Description | Negotiating Partner Insight |
| | 1 | | |
| | 2 | | |
| | 3 | | |
| | 4 | | |
| | | | |
| Desired Scope | 1 | | |
| | 2 | | |
| | 3 | | |
| | | | |
| Desired Terms | 1 | | |
| | 2 | | |
| | 3 | | |
| | 4 | | |
| | 5 | | |
| | | | |
| Price Range | Target | | |
| | Max | | |
| | | | |
| BATNA | | | |
| | | | |
| Communication Strategy | | | |
| | | | |
| Relationship Strategy | | | |

Recommended Books

- ❖ Chris Voss, *Never Split the Difference* (HarperCollins Publishers, 2016)
- ❖ Roger Fisher and William Ury, *Getting to Yes: Negotiating Agreement Without giving in* (Boston: Houghton Mifflin, 1981)
- ❖ Deepak Malhotra and Max H. Bazerman, *Negotiation Genius: How to Overcome Obstacles and Achieve Brilliant Results at the Bargaining Table and Beyond* (New York: Bantam Books, 2007)
- ❖ Robert Mnookin, *Bargaining With the Devil: When to Negotiate, When to Fight Split the Difference* (New York: Simon & Schuster, 2010)
- ❖ Jim Camp, *Start With NO: The Negotiating Tools That the Pros Don't Want You to Know* (New York: Crown Business, 2002)

This article, by Robin A. Forté, first appeared in the March/April 2003 edition of the Landman magazine.

Negotiating with Nice (or Use Nice as a Negotiating Tool)

It has always amazed me that some in our industry believe that the way to successfully negotiate is by being greedy, pushy, demanding and sometimes insulting. I was recently on the listening end of a demand that began with "I understand that your staff is overworked, undermanned and under-intelligent, but this is what I need from you...." Any guesses as to how this silver-tongued negotiator fared with me? Let's just say I suggested she call back when she was in a better mood – which apparently did not happen yet, since she hasn't called back. But the interesting part is that this person believed that the way to elicit kind, favored treatment from me was to offer me a stream of insults.

My negotiating theory is that we should try to be a thermostat, not a thermometer, and set the mood of the negotiation. I believe that if you be friendly you generally get friendly. However, I also believe that if the other party insists on an aggressive or antagonistic approach, that we may respond in kind. If they want to yell about it, we can yell, too. (In fact if they yell, we can hardly keep from yelling and if they are nasty, we can hardly keep from being nasty). If they want to make overreaching demands, we can respond in kind. We will only let them belittle or demean us a certain amount, regardless of how much we need them or their product. We will pay their outlandish price or concede to their outlandish terms only if we absolutely must. Then most of us will put these people on the elephant list – that list we will remember forever – of people to get even with.

It is very well documented that people are willing to pay money (or perhaps forego a potentially profitable deal) in order to get even with one who has put the screws to them, either by making them take unconscionable terms or by making them look stupid. So we should be careful that we don't do anything to get on someone's elephant list.

It should be too obvious to require elaboration that good business relationships are built on deals that are fair to both parties considering all factors. As someone once said "don't let your short term greed get in the way of your long term greed." While the phrasing of that is done to be semi-humorous, the practical translation is "don't let your short term greed get in the way of your long term success." Because success is built on long-term business relationships.

It should be similarly obvious that we neither enjoy nor seek out "tough traders." Rather we tolerate them as a necessary evil, remember them forever and avoid future dealings with them if possible.

Go nice early. It will make you money.

This article appeared in the January/February 2000 issue of The Landman

Helpful Hints

By Robin Forte', CPL

Director of Education

Negotiate by Listening

This will come as a shock to some negotiators (at least some that I have dealt with), but there may be many times during a negotiation that listening is the best tactic.

I think listening is at least a three-step process. First, we must stop talking. Second, we must receive the verbal input into our thinking process. Third, we must care, or be sensitive to, or actually respond to what the other party said.

For most of us listening is against our nature for two reasons. One, we believe that, given enough time, we can talk the other party into almost anything, which, of course, includes going along with our deal. Two, most of us are just uncomfortable with silence, and since we are such good talkers, we tend to want to fill every void. Here, it is valuable to remember that the other party is also uncomfortable with silence and will also strive to fill the void — maybe with information we desperately need. So listening starts with silence, ours.

Then we should receive the information presented, digest it and perhaps even write it down so that we don't gloss over it or dismiss it or even forget it. An incidental benefit here is that some of us might even come across as kind, caring people. (There's no way I'm going to come across this way, but it could work for you.)

Then try to accommodate the need, if it is reasonably possible, and certainly if it is a no-cost or win/win accommodation. If we can't accommodate the request, we should at least address the issue and see if there is another way to tackle the problem.

I don't want to stray from the main point — that we should listen more. If you have any doubts about your listening tendencies or abilities, put a timer on yourself and see where you land. Rule: if you are talking more than 50 percent of the time, you have room for improvement.

Remember to use silence and listening as negotiating tools.

Are you listening?

I Thought We Were Negotiating Here?



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