

# Negotiation Strategies: Civility and Cooperation Without Compromising Advocacy

LINDA ROBERSON

When we talk about negotiation, we mean advocacy on behalf of a client in a family law case with no neutral third party involved. Our focus is on settlement discussions in cases where both parties are represented by counsel, though many of the ideas presented in this article can be adapted for use in a case involving an unrepresented party. We are looking at four-way (attorneys and clients) or two-way (attorneys only) meetings and analyzing the skills, strategies, and approaches that lead to successful resolution of family law disputes. Our definition of success includes not only financial gain and/or emotional satisfaction for our clients, but also the long-range impact of settlement decision on future family interactions.

"Negotiation" is not mediation. There is no neutral. All participants have a perspective and lawyers act as advocates. "Negotiation" is not the delivering of ultimatums. It implies flexibility, willingness to listen, and the ability to compromise to reach a satisfactory result for both parties.

## WHY NEGOTIATE?

More options are available in negotiation than in contested litigation. Thoughtful, creative, cooperative work by attorneys and clients leads to the development of arrangements that meet the needs of the parties but are not available to the trial court. Tax planning, built-in future accommodations to predictable changes in the parties' situations, and horse-trading are all part of negotiated settlement conferences and all are unavailable to the court. Negotiation provides the parties' best chance to arrive at the resolution that best fits their needs.

Negotiation facilitates the solving of problems by the people who best know the facts and person-

alities involved in the dispute, so that the eventual resolution of the case better reflects the parties' actual needs and priorities. The lawyers who have worked with their clients over a period of months are far more knowledgeable than is the judge who sees the clients under extremely artificial circumstances for a few hours or at most a limited number of days.

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*Linda Roberson is a shareholder in the Madison, Wisconsin, law firm of Balisle and Robertson, S.C. She concentrates her practice in the area of family law and estate planning. She has served as senior legislative attorney for the Wisconsin Legislative Reference Bureau and in that capacity participated in the drafting of the Divorce Reform Act and the Uniform Marital Property Act. She has also taught extensively at the University of Wisconsin Law School and in continuing legal education programs. Recent publications include Eckhardt's Workbook for Wisconsin Estate Planners (co-author, 1990, revised periodically, most recently in 2004); and The Marital Property Classification Handbook (co-author, 1999). A past president of the Wisconsin Chapter of the American Academy of Matrimonial Lawyers, a past director of the State Bar's Family Law Section, and the past chairperson of the Family Law Council of Community Property States, she is a fellow of the American Academy of Matrimonial Lawyers and the National Academy of Elder Law Attorneys and a found member and current vice-chair of the Divorce Cooperation Institute. Her website is [www.b-rlaw.com](http://www.b-rlaw.com).*

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Negotiation can almost always be accomplished faster and less expensively than litigation. Negotiating often obviates the need for pricy, time-consuming formal discovery and saves clients the expense of presenting their case in court.

A negotiated settlement provides a stronger basis for amicable future dealings between the parties, a factor of profound importance when there is an ongoing relationship between them because they have children together or because one party has an ongoing financial commitment to the other. A negotiated settlement also provides more incentive for compliance, since the parties have accepted and committed themselves to the resolution rather than having it imposed upon them by an outside authority.

### PROBLEMS UNIQUE TO THE NEGOTIATION OF FAMILY LAW ISSUES

The level of emotional involvement and distress is significantly higher in family law cases than in most other legal disputes. Moreover, the emotions run high on both sides—unlike a personal injury case or an employment discrimination case, where the injured party or aggrieved worker may be distraught but the insurer or employer are not personally emotionally involved.

The broad range of judicial discretion in family law cases results in similar cases being decided very differently by different judges, making predictions difficult in complex cases. While, like lawyers in other cases, we bargain “in the shadow of the law,” that shadow in a family law case may be blurry at the edges.<sup>1</sup>

The prevalence of divorce in our society creates a plethora of self-appointed experts who have a lot of advice to offer. Family members and friends may generalize from their own experiences and help perpetuate an unrealistic view of the parties’ respective entitlements. They may have their own agendas for revenge or retribution or compensation for perceived wrongs suffered by their friend or relative during the marriage. Everybody has an opinion about a divorce.

Nobody ever “wins.” Every client feels—legitimately—that he or she has lost. Divorce imposes very real personal and financial losses, by its very nature, even if the system is working well. The client for whom you achieve a superb settlement will still likely feel aggrieved. And a big “win”—taking unfair advantage of the other side—may have down-the-road negative consequences in terms of compliance problems and continuing family dynamics.<sup>2</sup>

### THE SCIENCE OF NEGOTIATION: WHAT WE CAN LEARN FROM THE SCHOLARS

Many insightful and experienced social scientists and scholars have studied negotiation techniques and there is much we can learn from them. Roger Fisher, William Ury, and Bruce Patton’s tremendous *Getting to Yes: Negotiating Agreement without Giving In*, initially published by Fisher and Ury in 1981, was the first practical approach to the kinds of negotiating lawyers are called upon to do regularly and started a dialogue that has continued over the intervening two and a half decades.<sup>3</sup> Two recent contributions, *Beyond Winning: Negotiating to Create Value in Deals and Disputes*, by Robert H. Mnookin, Scott R. Peppet, and Andrew S. Tulumello,<sup>4</sup> and *Difficult Conversations: How to Discuss What Matters Most* by Douglas Stone, Bruce Patton, and Sheila Heen, are especially noteworthy.<sup>5</sup> The importance of the work of these scholars, and others involved with the Harvard Negotiation Project, cannot be overstated. While it is impossible to summarize the insights of these and others working in this field, there are a few major points that should be highlighted in the context of our discussion here.

#### *The Concept of the Value-Creating Trade*

This idea is an extremely important one because it creates a mindset for successful, creative negotiation. Articulated by Mnookin and his colleagues, the value-creating trade is a solution that either leaves both parties better off than they were before—a double benefit trade—or makes one party better off but leaves the other no worse off—a trade providing a benefit with no detriment.<sup>6</sup> Mnookin and his colleagues identify four sources of value for a value-creating trade.<sup>7</sup>

#### *Differences Between the Parties*

Parties who have *different preferences and different resources* will place differing values on the same thing. It is possible to use these differences to create an improvement for both parties. Mnookin’s example posits a swap between a vegetarian who owns chickens and a carnivore with a large garden.<sup>8</sup>

An example from a family law practice might be a working mom who needs child care after school and a dad who works from 7:00 to 3:00 every day and would like to spend more time with the kids. It is easy to see how a placement schedule that gives Dad after-school time maximizes his time with the children and saves Mom the difficulty and expense of

procuring child care. And there is an added benefit from the children's point of view: they spend more time with a parent and less time in third-party care.

Another example is a short-term marriage with no maintenance entitlement; there are two assets: \$100,000 in wife's pension plan and \$100,000 in home equity. The wife is a busy physician and does not want to move. The husband is a poet and will never make the kind of money that allows him to put away significant savings for retirement. The wife earns in the comfortable six figures and can easily replace the retirement savings. It is easy to see how this case can be settled with both parties happy with the result.

Parties who have *different forecasts*—different beliefs about what the future holds—may be able to reach agreement based on their different predictions and expectations.<sup>9</sup> For example, a wife who is entitled to maintenance may be willing to accept a buyout (a lump-sum maintenance payment or a disproportionate share of the parties' property) because she thinks her soon-to-be-ex is a lazy lout who cannot hold a job and she will have terrible enforcement problems if she holds out for continued support. Her husband may be willing to accept the up-front payment approach because he plans to make a ton of money in the next few years and he does not want to have to share it with her. With very different expectations about what the future will hold, both are willing to accept the same deal.

Parties with *different risk preferences* may be able to reach agreements that satisfy both of them because of their differing attitudes toward risk.<sup>10</sup> Assume that a risk-averse husband and his risk-tolerant wife own a speculative piece of real estate. He concentrates on the possibility that the property may be condemned by the power of eminent domain to build a highway. She is betting on continued city development and thinks she can put a shopping center on the property. She may be willing to pay him more than he thinks it is worth, but less than she thinks it is worth, in order to retain sole ownership of the property. They will both think they got a great deal.

Sometimes parties have *different time constraints*, and timing can therefore be a factor that facilitates agreement.<sup>11</sup> Suppose that the parties agree that neither of them can afford to keep the house, but the wife has one more year of medical school and does not want to move until she leaves town to start her residency. If the husband agrees to defer putting the house on the market for several months, the wife's needs are met and she owes him a concession someplace else. Maybe she will pay all of the prop-

erty taxes, or maybe she will defer on the division of personal property. They will both get something that is important to them out of the negotiation, and both will be better off as a result.

### **Noncompetitive Similarities**

More often than one might think, the parties to a divorce action have similar needs and goals.<sup>12</sup> Mom wants a nice house for the kids to be in while they are with her; Dad also wants the kids to have a comfortable living arrangement when they are with Mom. The wife is financially dependent on the husband; he is willing to accept this dependence and take responsibility for providing for her because he knows she has health problems, or because he does not want her going to the adult kids for money, or for any number of other reasons. The parents may have the same goals for providing college money for the kids, or providing financial security for a child with special needs. A productive, cordial relationship may be a goal for both parties, especially where they will have to interact as parents or where extended family relationships are strong and continuing. Focusing on these and other noncompetitive similarities creates joint gains and fosters goodwill.

### **Economies of Scale and Scope**

Because what was once one household is now becoming two, it is not likely that we will find many economies of scale or scope in family law negotiations.<sup>13</sup> But there are some. In a temporary order, for example, the parties can agree to maintain and each pay their fair share for automobile insurance so that their cars remain on the same policy with a lower premium than the parties would pay if they each insured independently. Maintaining family health insurance coverage as long as possible is another example.

### **Reducing Transaction Costs**

There are several ways in which a negotiated agreement reduces transaction costs.<sup>14</sup> First, in terms of dollars and cents, it is generally far more time-consuming and costly to litigate than to negotiate and resolve differences through compromise. We have all told our clients, "Your family is better off if you pay her/him, rather than paying me." Negotiation also reduces the risk of deception or proceeding with misinformation or "information asymmetries" (*i.e.*, where one party has access to in-

formation that is not available to the other party). And negotiation creates the opportunity to structure a solution that fully utilizes all sources of value as described *supra*.

### ***Thinking About the Parameters of Negotiations: The Concepts of the BATNA and the ZOPA***

First articulated in 1981 by Fisher and Ury, these concepts provide a way of organizing and prioritizing negotiation positions.<sup>15</sup>

"BATNA" is an acronym for the Best Alternative To a Negotiated Agreement.<sup>16</sup> Of all possible alternatives—what you can do without joint agreement if you walk away from the negotiation table—this is the realistic option that best serves your client's interests if no deal is reached. "Reservation value" is the translation of the BATNA into a value representing the point at which the client is no better off reaching a deal than he/she is in walking away from negotiations and accepting the BATNA.<sup>17</sup>

"ZOPA" is the acronym for the Zone Of Possible Agreement—the bargaining range created by the reservation values of each party to the negotiation.<sup>18</sup> A successful negotiation will allocate the ZOPA in some fashion between the parties—meaning that everyone does better than his/her BATNA.

### ***Managing the Tension Created by Negotiation***

Social scientists have looked at the issue of how to manage the tension inherent in negotiation. Mnookin and his co-authors have some very useful suggestions.<sup>19</sup>

*Advance preparation.* Preparation in advance is crucial to successful negotiation.<sup>20</sup> Identify issues. Identify your client's interests and the interests of the opposing party. Contemplate opportunities to create value. Know your alternatives. Establish realistic goals.

*Combine empathy and assertiveness:* demonstrate your understanding of the other's perspective while simultaneously asserting your own interests.<sup>21</sup>

- *Empathy* is "the process of demonstrating an accurate, nonjudgmental understanding of the other side's needs, interest, and perspective."<sup>22</sup> This process has both cognitive (thinking it through) and affective (feeling it) components. It requires both internal (thinking and feeling) and external (demonstrative)

action. Showing empathy does not mean you agree—or that you like what you are hearing—or that you sympathize. Rather, it is the willingness and ability to express how the world looks to the other person in a neutral way.

- *Assertiveness* is the ability to express and advocate one's own needs and perspective.<sup>23</sup> It is not belligerent (*i.e.*, it does not belittle the other or infringe on the other's rights) and it is not submissive (*i.e.*, it respects one's own needs and interests).

Not surprisingly, the research tells us that problem solving works best when each side has empathic and assertiveness skills.<sup>24</sup> Interestingly, it also shows that the individual negotiator who has these skills and uses them effectively will do better in the process, even if the other side does not respond in kind.<sup>25</sup>

Experts have identified three ineffective negotiation modes:

- (1) *Competing*—Marked by a lot of asserting but little empathizing, this is a style that is highly partisan and wants to be in control and "win." The risks of a competitive style are escalation of hostilities, stalemate, and long-term damage to relationships.<sup>26</sup>
- (2) *Accommodating*—Demonstrating a lot of empathy but little assertiveness, this is the style of negotiators who want to be liked and who focus on preserving relationships to the possible exclusion of the substantive matters at hand. The risks of an accommodating style are exploitation and failure to deal with a real problem which can lead to more trouble down the road.<sup>27</sup>
- (3) *Avoiding*—With this style there is little empathy or assertiveness, but rather the demonstration of conflict aversion to the point of disengagement. Obviously, you are not going to resolve a problem by avoiding it.<sup>28</sup>

The good negotiator makes use of this information by understanding his/her own stylistic tendencies; by expanding his/her skills; by developing the ability to diagnose others' tendencies and to challenge others to empathize or assert as needed; and by valuating his/her interactions, determining

whether they are productive, and modifying behavior to be more empathic or assertive as indicated.<sup>29</sup>

### **Lawyers as Negotiators**

The lawyer has much to offer in the negotiation process.<sup>30</sup> The lawyer knows the law, and we bargain “in the shadow of the law.”<sup>31</sup> The lawyer knows the process. The lawyer may know some of the players—the judge, the court commissioner, counsel for the other side. The lawyer knows how others in similar situations have resolved their disputes. The lawyer has advocacy skills: the ability to speak and write persuasively. The lawyer has research skills, to assist in resolving questions in the law. The lawyer has (we hope) negotiating skills. The lawyer has contacts to help in resolving disputes—appraisers, accountants, social workers, and psychologists. The lawyer has computer programs to help organize facts and positions—spread sheets, after-tax support calculators, and so on. Many lawyers have a staff of paralegals and associate attorneys who can help with research, drafting, appearing in court, and more. The lawyer may offer strategic advantage: sometimes it is helpful for a client to say “I’m just following my lawyer’s advice.”

Some standard legal mindsets can frustrate effective negotiation. It is important to identify and avoid three common pitfalls:

**The “Zero-Sum” Mindset.** The all or nothing view. If you win, I lose.<sup>32</sup>

**The Adversarial Mindset.** The position that lawyers are supposed to be aggressive and belligerent.<sup>33</sup>

**The Hired Gun Mindset.** The client’s fantasy that his/her counsel will be a pit bull with the opposition but with the client will transform into an obedient golden retriever who fetches on command.<sup>34</sup>

### **Hard-Ball Tactics That Frustrate Negotiation**

Mnookin and his co-authors have identified ten hard-bargaining tactics that make negotiation difficult or impossible.<sup>35</sup> They are:

1. Extreme claims followed by small, slow concessions.
2. Committing to a course of action that reduces options and binds the other party’s hands.
3. Take-it-or-leave-it offers.

4. Asking the offerer to bid against him or herself.
5. Playing “flinch”: piling demands on until the other side reaches the breaking point.
6. Personal insults and attacks.
7. Exaggerating or misrepresenting facts.
8. Threats: drastic consequences promised or predicted if one’s demands are not met.
9. Belittling the options and choices available to the other side.
10. Good cop/bad cop tactics.

## **THE CONTEXT FOR NEGOTIATION**

Parties may adopt one of three widely differing approaches to the representation of divorcing clients: conventional, collaborative, and cooperative divorce. Each approach works according to its own rules of the game.

### **Conventional**

This is the traditional of the three alternatives. Conventional divorce practice is often seen as excessive and adversarial, with single-minded devotion to the client’s legal and financial interests to the exclusion of other concerns. In conventional divorce, there is a premium attached to “winning” and what is seen as good for one party is generally assumed to be bad for the other.

### **Collaborative**

This is a relatively new alternative to “conventional divorce,” where the parties and counsel “collaborate” on process and outcome. They commit to settle the case, and everyone agrees that counsel will withdraw if no settlement is reached. (Critics argue that the parties are bargaining “in the shadow of losing their attorneys,” which may cause abandonment anxiety.)<sup>36</sup>

### **Cooperative**

Cooperative divorce also attempts to address the criticisms of the conventional divorce process identified by “collaborative divorce” proponents, but also to make use of aspects of the conventional system as appropriate. The availability of formal discovery and the ability of counsel to remain on the case if negotiations are unsuccessful are two significant differences between “collaborative divorce” and “cooperative divorce.”<sup>37</sup>

## PREPARING THE CLIENT FOR NEGOTIATION

### *Educate Your Client*

Clients with unreasonable expectations are clients whose cases are impossible to settle and difficult to litigate (and likely to generate an account receivable). Start from the very beginning of your relationship with your client to help him or her develop reasonable expectations.

We negotiate "in the shadow of the law" (to borrow Robert Mnookin's descriptive phrase).<sup>38</sup> Be sure your client understands from the very beginning of your representation what the statutes and case law say about the issues in the case. If the law is not clear on an important issue, make sure the client understands that and comprehends the predictable risks and benefits of going forward. While you can always ask for something that the judge probably would not order, and while the parties can agree to provisions that the judge does not have authority to order, and while your client can decide not to push for everything to which he or she is legally entitled, it is important for the client to have a basic understanding of what would likely happen if negotiation fails.

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*"Negotiation" is not the delivering of ultimatums.*

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Be sure the client understands from the beginning that you and he/she will at all times be courteous and respectful of the opposing party and his/her attorney. Explain that a collegial atmosphere improves your ability to advocate well for your client and will save him/her money, whether the case is tried or settles. Explain that cooperative responses such as setting over hearings, extending deadlines, and the like are standard operating procedure, and do not constitute weakness, concessions, or special favors.

Discuss fees, right up front and on a continuing basis as well. Clients need to understand the transaction costs of the positions they take. Send regular bills so the client is not surprised by your fees at the end of the case. If the client falls behind in payments, address this issue promptly. This is not only sound business practice, but it is continuing education about another aspect of your representation that will help your client make appropriate decisions throughout the case. It will also protect you

from being in a situation in which your client owes you a lot of money and you thus have a stake in the settlement.

Keep up-to-date on books and articles that may help your client develop a perspective that permits him or her to be an effective negotiator. You may want to give clients a reading list, or you may even want to purchase a particularly appropriate book for the client and give it to him or her.<sup>39</sup>

### *Identify the Issues*

Experts at the Harvard Negotiation Project have identified three different conversations that you should have with your client prior to entering into negotiations with the other side.<sup>40</sup>

*The "what happened?" conversation.* Clients need to tell you their story, and you need to hear it in order to establish a trusting attorney-client relationship (psychologists would refer to a "transference" relationship). Listening empathically enables you to understand where your client is and what work he or she needs to do in order to be able to engage in productive negotiations.<sup>41</sup>

In this conversation it is important both that you join with your client and empathize with him or her, but also that you begin to help the client explore alternative explanations for behavior that has led up to the divorce. While it is important to say "That must have made you very angry" or "My feelings would be hurt if someone said that to me," it is equally important to say, "It sounds like he was really out of control. Is it possible that he spoke out of anger and didn't really mean what he said?"

You need to help your client move past assigning blame to the other party for the problems that have brought them to this point, so you and your client can deal with current realities.

*The "feelings" conversation.* Your client may be in an emotional state that makes negotiation difficult or impossible. An angry client cannot accurately assess either his/her own or the other party's positions. A depressed client cannot participate adequately in his/her case.

A guilt-ridden client may be all too ready to agree to an inequitable agreement that he/she finds punitive at a later date. Help your client assess where he or she is emotionally and make a referral to a capable mental health practitioner if appropriate. In some cases, you may want to delay negotiations until your client has better control of his/her emotions.<sup>42</sup>

*The "identity" conversation.* Here is where the real substantive work begins. This is the point at which

you begin to determine what is at stake in the legal action and how you can best go about achieving the client's goals.<sup>43</sup>

Develop a case action plan with your client. Discuss together all of the relevant issues and establish priorities. Continue to work on reasonable expectations. Help your client develop a mindset that allows him or her to compromise.

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*Cooperative responses do not constitute weakness.*

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Develop a mutual understanding with your client as to what you will view as success. Identify areas where the client should expect to be flexible and should be prepared to compromise.

This discussion should occur "in the shadow of the law."<sup>44</sup> If either party wants or needs something that the court cannot do, your client should be aware of the legal alternatives. If the law is uncertain, your client should know that. If the judge is biased, share that information with the client. Your client should be as realistic as possible about the likelihood that his or her position will prevail in court, and should understand the probable outcome of failure to negotiate successfully.

Identify areas in which you need more information in order to formulate a proposal, and areas in which additional information may avoid a dispute. For example, parents who disagree about the needs of their five-year-old may choose to follow the advice of a mutually-chosen child psychologist. Or parties who disagree about (or do not know) the value of a business or other asset may choose to hire a joint evaluator or appraiser and to accept his/her opinion. With respect to each subject or area in which you need more information, develop one or more ideas about how to obtain this information cooperatively.

Help your client discover why a particular position is important to him or her. Does he or she want equal placement of the children because he or she will feel like a second-rate parent with anything less? Can you reframe this with the client so he or she can be more flexible?

Develop general goals and try not to quantify them. A spouse worried about long-term financial needs might restate his goal as "I need enough for a comfortable retirement" rather than "I need at least \$500,000" or "I need half her 401(k)." A spouse anxious about her connection to her children might

identify her goals as "I need enough time with my kids to maintain my parenting relationship with them and to insure that they feel at home in my home" rather than "I won't settle for anything less than alternating weeks."

### ***Negotiate with Your Client***

The late Leonard Loeb, revered nationally in family law practice for his wisdom and common sense, often observed that "the hardest negotiation you must do is with your own client." This maxim is worth remembering. Explore sources of added value with your client. Identify areas in which your client and his/her spouse have similar interests. Identify and discuss barriers to effective negotiation and assist the client in moving beyond the zero-sum, adversarial, and hired gun mindsets. Foster the concept that you and the client are a team, with different but complementary skills and information that you bring to the bargaining table. Emphasize that there is learning to be done on both sides. Share control. Be neither a hired gun, following the client's demands uncritically, nor a parent or guru, telling the client what to do. Establish parameters so that the client understands your ethical obligations and your professional standards. Expect differences of opinion with your client. Discuss in advance the likelihood that such differences will arise, and invite the client to be straightforward about sharing differences of opinion with you so you can come to a mutual understanding. Be sure your client understands and accepts that the lawyers are only one part of the equation and that clients bear significant responsibility for finding solutions and making them work.

## **GETTING READY FOR NEGOTIATION**

### ***Identify and Share the Goal(s) of Each Negotiation Session***

Negotiation is an ongoing process. Ideally, there will be multiple opportunities for discussion and several different negotiation sessions as the case progresses. In fact, it makes sense to look at every communication with opposing counsel as an opportunity for negotiation. Negotiation will have different goals, depending on where you are in the case. A first meeting with opposing counsel will likely focus on finding temporary solutions to immediate problems. A second session might concentrate on developing an appropriate information base from

which to negotiate settlement. Subsequent sessions may deal with issues one at a time, or you may want to employ an approach that presents a package deal resolving all issues simultaneously.

Communicate your goals and agenda to opposing counsel in advance of the meeting. If the two of you are not on the same page, modify the agenda to address all of the concerns either party needs to bring to the table now. Be willing to suggest to your client that some issues can be deferred to a subsequent meeting.

***Decide on the Structure of the Meeting:  
Two-Way or Four-Way?***

The four-way meeting—both clients and their respective attorneys—is the most common negotiation format. If the clients can participate in a business-like, productive meeting that obviously moves their case forward, this is the best option. Everybody hears the same thing and is on the same page. Communication is simpler because all involved persons are at the table. Clients' frustration levels are reduced because they see that progress is being made.

If your client is emotionally distraught, a four-way meeting may not be the best option.

A client who sobs throughout the session distracts other participants from the subjects at hand, does not further your goal of viewing the negotiation as a business-like financial planning exercise, likely cannot exercise reasonable judgment or decision-making, and may bring out feelings of defensiveness, impatience, or anger from the other party. A client who is extremely angry may explode in the session and cause disagreements to escalate rather than help to resolve them. In these cases, a four-way meeting may not only be uncomfortable, but may actually work against your goals. There are several alternatives.

*Shuttle diplomacy.* Both clients are present in the same office suite but in different conference rooms. The lawyers discuss the agenda together and then each of them confers separately with his or her client. If agreements are reached, all parties may meet together for a concluding brief period in which the agreements are stated in the presence of all involved.

*Clients are available by telephone.* The lawyers meet and discuss the agenda, and then confer separately with their respective clients by telephone. If agreements are reached, the lawyers compose a joint letter to the clients stating the agreements.

Because of client communication difficulties, comfort level, or convenience, a two-way meeting

may be preferable. In this format, the lawyers meet and discuss the agenda, and develop a plan of action or a proposal to resolve one or more issues. Each lawyer subsequently confers with his or her client and follows up with correspondence detailing the client's position with respect to the matters discussed.

*My office or yours?* It is courteous to offer to go to opposing counsel's office. Often meetings can be set up to alternate between the lawyers' offices. If you are working from spreadsheets or other computer-generated financial documents that you may revise during the course of your meeting, or if you are working together on language for a proposed Marital Settlement Agreement, one counsel's computer competence or equipment may dictate the choice of the meeting place. Similarly, if you need extra space for shuttle diplomacy and one office is better set up for that than the other, choose the more comfortable location. Be sure your client understands why the meeting is where it is. If one client is particularly fragile, or angry, or otherwise vulnerable, schedule the meeting for the location where that person will be most comfortable.

***Do Your Homework***

Negotiation is not just a friendly chat. You will be far more successful if you plan ahead and come to the meeting with materials that will help to move the case along. In an initial meeting, you might bring only a preliminary financial disclosure statement and a list of documents or information you need from the other side. If you know there are issues that will require expert consultation—valuation of a business, for example—come prepared with a short list of acceptable experts and (if possible) their curriculum vitae, so opposing counsel will have as much information as possible about your suggestions. At subsequent sessions, you might bring a preliminary marital balance sheet; after-tax support schedules showing the effect of support in various scenarios; copies of appraisals; copies of newly-filed tax returns; and any additional information that will help to move the case along. It is always helpful if you can provide material to opposing counsel a day or two in advance, so there are no big surprises that must be dealt with before you can get down to business.

Preparation for a negotiation session includes a discussion with your client about the goals for that specific session, what the client would like to see happen, and possible room for concessions and compromise. You should go into the session knowing the

range your client has authorized you to work within, and with the flexibility to make agreements within that range. Think outside the box and come prepared with a variety of alternatives, if possible.

## AT THE NEGOTIATION SESSION

### *Deal with Basic Needs First*

Negotiation in family law matters differs from most other negotiations because of the disruption that marital dissolution creates in the lives of our clients. Unless these issues are addressed and the disruption minimized, clients will be afraid, angry, and distracted from making sensible decisions about their financial matters and their children's future.

If the parties have not already separated, shelter concerns must be addressed at the outset. Where will each of them live? Where will the children be? Temporary accommodation issues must be resolved before clients can turn to more long-term concerns. Unfortunately, all too often domestic violence and other safety concerns must be addressed and dealt with. Basic support issues must also be addressed immediately: We do not want one party to be disadvantaged because of a precarious financial position before we can reach agreement on a temporary order. We do not want one party to go without legal representation because the other controls all available funds. We do not want school tuition or mortgage payments to go unpaid while we are gathering preliminary information.

If necessary, make interim agreements that sunset in a month or two, without precedent or prejudice, to give everyone some modicum of stability while you quickly gather information to make more long-term arrangements.

### *Negotiating for the Information you Need to Resolve the Case*

Begin the information-gathering process with informal discovery. Ask for the specific information you need. Do not make blanket requests. Write a cordial letter making your requests in writing, or bring your requests in writing to an early negotiation session, so everyone will have a checklist to follow, and so you can document your attempts to gather information. Offer to provide information that you know is essential. Do not wait to be asked. Set reasonable deadlines for the exchange of information, and be willing to extend those deadlines on request. Informal meetings with the par-

ties' expert(s) can be helpful. Keep your word. If you have agreed to provide something, do it. If you have agreed to find something out or track down a requested document, do it.

Negotiate for cooperative discovery. With respect to assets whose values are disputed or unknown, more information is obviously necessary. As an alternative to the conventional practice of each party's retaining his or her own expert, it makes economic sense to reduce transaction costs by hiring experts jointly where possible. A second alternative is to agree that one party will go ahead with his or her choice of expert, and the other will have the opportunity to review the expert's opinion or appraisal and then decide whether to hire a second expert. In cases where there are two differing expert opinions, suggest that the two experts confer and come to an agreement on value. Paying the experts for their time to do this is far less expensive than deposing them and requiring them to appear at trial. If the experts cannot reach agreement, at least they can jointly identify the areas of difference and the reasons for their differing opinions. Another alternative is to choose a third expert jointly and ask him or her to review the work of the differing experts and come up with a value that is acceptable to both parties.

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*Timing can be a factor that facilitates agreement.*

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Expert opinion is especially valuable with respect to placement disputes. If the parties can develop confidence in a reputable, experienced child psychologist or social worker, and can focus on the children's needs and well-being, they will likely accept the mental health professional's recommendations. As a result, placement disputes will be resolved with both parents being satisfied that they have done the best they can for their children.

Be appropriate and reasonable with the use of formal discovery. There are many good reasons to make judicious use of interrogatories and requests for production of documents. If the informal discovery process is not as successful as it needs to be, or if you need sworn statements that the information you are being given is complete and correct, formal discovery is helpful. However, formal discovery does not need to be conducted in an adversarial manner. Do not send form blanket documents that ask for everything including the kitchen sink. Tailor

your requests carefully so that you are not harassing the opposing party or creating an unfair burden on him/her. Remember that you can always send a second set of interrogatories and requests if the responses do not fully address your concerns or raise other questions. Do not go overboard in what you ask for: do you really need 20 years of tax returns, or will 3-5 years generally be sufficient?

Be accommodating in requests for extensions. On the other hand, if you are the one requesting an extension, keep your word about when the response will be provided.

### AFTER THE INITIAL NEGOTIATION AND FOLLOWING UP

Despite your best efforts to resolve issues, you eventually may have disagreements that you have not been able to settle. At this point, it is fair to think about depositions, document requests, and requests to admit. At an earlier point, you might have used these techniques, but you deferred in order to avoid any concerns about harassing an opposing party or gaining any unfair strategic advantage. But now it is time for more formal discovery.

Remember that parties generally fear depositions. Do not make the process any more unpleasant for them than necessary. Be a good host. Permit consultations with opposing counsel as the client desires and provide a private place for these consultations if possible. Offer soda or coffee frequently and do what you can to make sure that everyone is physically comfortable.

Schedule depositions cooperatively after consultation with the opposing attorney. Do not continue the deposition for an unduly long period of time. If you cannot finish in a reasonable time, continue it to another day. Do not ask unnecessary questions. Treat the deponent and counsel with respect. If you are sending a subpoena *duces tecum*, allow at least the legally required minimum of 30 days for the deponent to gather the requested materials. If your client is being deposed and during the deposition has agreed to provide certain documents or follow-up information, keep your word and follow up as agreed.

Requests to admit can be used to clarify areas of dispute.

A second round of interrogatories or requests for production of documents may be appropriate. As with the earlier set, be focused and specific in your questions and requests, and accommodate reasonable requests for an extension of time.

If you make commitments to the opposing side during a negotiation session, it is crucial to continued good relations that you keep your word. If you have agreed to contact an expert, do it, and copy the opposing counsel so he or she knows you have followed through. If you have agreed to produce documents, do so promptly. If you have volunteered to research an issue or do some calculations, meet that commitment quickly. If you cannot get to the job you have taken on right away, explain that it will take you a while (be specific if you can) to get to it so the other side will not be waiting on pins and needles.

Most importantly, if you have reached an agreement, it should be reduced to writing *immediately* to reduce the possibility that someone will change his or her mind.

### THE FINAL SETTLEMENT CONFERENCE

After everyone has all the facts and information they need to make an informed decision, you are ready for serious settlement negotiation. By this time, you have established a cooperative working relationship and settled into a routine of working together.

Prepare for a final settlement conference the way you would prepare for trial. Bring a completed, signed financial disclosure statement; do not rely on an incomplete draft. A marital balance sheet with columns for each party's position on value can be a very useful tool. A proposed stipulation of the facts that the parties agree on can help to narrow the issues in dispute. A Marital Settlement Agreement issue checklist or a proposed Marital Settlement Agreement with blanks to be filled in as agreements are reached can help to focus the issues in dispute.

As you format your materials, do everything you can to reduce confusion and to clarify the differences between your position and that of the opposing party. It is helpful if both parties use the same order of assets for marital balance sheets or support alternatives. If you are responding to a draft proposal from the other party and counsel, it is both courteous and efficient to give them a redlined re-draft so that they can see exactly what you want to change.

Aim for an agreement that will stand the test of time. Post-divorce litigation can be more contentious, more expensive, and more damaging to families than the initial divorce experience. Plan ahead.

Allow enough time for serious discussion. Do not schedule a settlement conference when one

party must leave at a specific time for any reason or when an attorney will be interrupted for any reason during the negotiation session. These disruptions are rude and distracting, and may give the impression that one party or counsel has more important matters to deal with, leaving the other side feeling devalued and defensive.

The lawyer who is hosting the session should provide for creature comforts. Offer coffee or soft drinks at regular intervals. If you have scheduled an all-day session, provide a comfortable lunch break with reservations at a nearby restaurant or ordered-in food. A little candy or a cookie can help dispel mid-afternoon exhaustion.

Consider having a paralegal or secretary on hand to revise documents promptly without distracting the lawyers from the discussions at hand.

## IMPASSE BREAKING

We all know that negotiations do not always go smoothly. But most barriers to settlement can be successfully overcome. Two general principles work well when you get stuck: First, narrow the issues as much as you can. Second, be precise about the problem. ("We are \$50,000 apart on the property division" or "We disagree about the value of the business" rather than "We don't have an agreement on property division.") Here are some of the more common ways in which settlement negotiations are derailed, and some possible approaches to getting the case back on the settlement track.

### *Size and Composition of Divisible Estate*

Disagreements as to value of one or more assets/debts, or about whether a specific asset or debt should be included in the divisible estate. Do not waste time and goodwill arguing over whether the house is worth \$210,000 or \$220,000. Consider these alternatives: If the value difference is relatively small, split the difference. Another approach is to add up all of the values according to each party's position, and split the difference between the aggregate values. That way the parties can disagree about the value of every separate asset but still settle the case. A third alternative is to horse-trade. Accept one party's position on value of one asset and accept the other party's position on another asset value or the amount of debt to be included in the divisible estate. Or give up an item of sentimental value in return for acceptance of your client's value of an asset or debt: "You can have the heirloom cradle

but all of my VISA card debt is included as divisible."

If values are significantly different, the *supra* approaches probably will not work. In that case, consider these alternatives: Ask the experts to compromise their values of disputed assets for which there are appraisals or evaluations. Or hire another expert and agree to be bound by his/her report. A third approach is to suggest mediation. Another option is to schedule a conference with the judge and ask for his/her input.

### *Disagreement About the Law*

Sometimes good lawyers negotiating in good faith disagree about the applicable law. Because family law is rarely cut and dried, but instead requires courts to weigh a variety of factors, it is certainly possible for two experienced practitioners to have different views about the likely outcome of the case. Where the law casts different shadows, depending on your perspective and understanding of precedent, agreement may be hard to come by. Be frank with your client about the uncertainty of litigation and the risks involved in holding to your position. The client may want to choose to compromise rather than take the risk of a big loss, which is the other side of the coin of expectation of a big win. Ask one of your partners to sit in on your discussions with your client and offer a second opinion. Your partner may have a good, new idea that will be useful—or, if your partner sees the situation exactly as you do, he or she may be able to help persuade a reluctant client to accept a settlement. Retain a knowledgeable practitioner or a former judge to do early neutral evaluation, so everyone can see how a completely uninvolved expert understands the contested legal issue. Conduct a best-case and worst-case analysis and try to settle some place in the middle, minimizing the risks for both sides and reducing transaction costs. Schedule a conference with your judge and sound him or her out on the legal question that is holding up settlement.

### *Disagreement About Fairness*

There may be differences in opinion about what is "fair" under the circumstances of the case. It is the rare client who says he or she wants to gain unfair advantage in a family law action. To the contrary, virtually every client—no matter how unreasonable—proclaims a desire to be fair, and to achieve only his or her rightful share of the property, the income, or the children's time. It is important for

your client to be able to perceive that, as strongly as he or she feels about the legitimacy of his or her position, there is merit to the other side's view as well. There are two different "true stories" and a different perspective from one's own is not necessarily wrong or bad. Ideally, you have worked with your client throughout the case to develop an understanding of the other party's position and why the other party believes that his or her position is justified. Particularly where children are involved, it is important for parties to value their continuing family connection and to be willing to be generous in order to promote future cooperation. Look for ways to avoid a head-to-head conflict. If both parties want the vacation cabin, can they continue to co-own it, pursuant to a carefully drawn contract, and each use it for specified periods in the year? Can they agree to give it to their children? If he needs \$3,000 per month in child support and she cannot afford to pay it, can you do tax planning so that Uncle Sam picks up some of the tab? If she is concerned about her future security and he is reluctant to give up any of his retirement plan, can you arrange for annuities and/or life insurance and/or other options to satisfy them both?

### **Placement Issues**

Placement disputes are difficult to negotiate because children are not fungible goods and, as we have all known since Solomon, cannot just be divided down the middle. Parents feel extremely strongly—often irrationally—about what they want for their children, and may simply be unable to bear yet another loss in terms of time with a child.

Parents often have strong differences in opinion about the "best interests" of their children. Sometimes good, involved parents genuinely disagree about what the child needs. One or more consultations with a mental health expert can be very useful in this situation. Books on child development or shared parenting can also help.

Many parents are unable to distinguish their own interests and needs from those of the children. We can help here by continuing to pull the focus back to the children. A guardian *ad litem* or the child's therapist may be able to help a parent separate his or her perspective from that of the child.

We have all seen control, punishment, and revenge issues surface at divorce all too often. The left-behind parent who thinks, "If he/she doesn't want to be married to me, he/she has to leave the entire family behind" is an example. We need to be alert for these issues early in the case and be sure

that our client has appropriate counseling support to work through the grief and anger behind these inappropriate responses far in advance of a final settlement conference.

When any of these problems rear their ugly heads at final settlement time, negotiations are extremely difficult. One possible way of reaching resolution despite the presence of one or more of these problems is to use time to our advantage. The less cooperative parent can "win" now with a more restrictive schedule than the other parent wants, and the parties can agree to modify the schedule in six or twelve months—and perhaps to another subsequent modification as well—to arrive at a schedule that the other parent is comfortable with. The delay in arriving at the final schedule is acceptable because agreement now avoids the expense and delay of litigation, and the children (and parents) can ease into the new schedule.

### **Dealing with the Reluctant Negotiator**

Sometimes either opposing counsel or the opposing client is so rigid that there seems to be no room for negotiation. In this situation, we have had success with a couple of approaches.

*Prepare pleadings in advance and bring them to the meeting.* The opposing lawyer may learn something about his/her client by reading the pleadings and accompanying affidavits. Both the opposing lawyer and his or her client will be very clear about what will happen if they do not come to the table and work out a resolution.

*Schedule a deposition.* This approach will certainly get the other party to the table.

Talk informally first; if you can agree, you have a court reporter there to take down and transcribe the agreement on the spot. If you cannot agree, then you have your reporter and can proceed with the deposition.

*Serve interrogatories or a request for production of documents,* accompanied by a cover letter that indicates that you do not need a formal response if the other party will agree to a two-way or four-way meeting and will bring the requested material along.

### **What to Do When the Other Side Doesn't Reciprocate**

Sometimes negotiations are frustrating because the people on the other side of the table are not following the same rules you are. When the other side is not negotiating fairly, remember that your own empathic and assertiveness skills can produce a better

result for your client even when the other side does not respond in kind.<sup>45</sup> The following ideas may help when the lawyer and/or client on the other side are being difficult to deal with.

Back off from substance and see if you can negotiate about the process going forward, so everyone has a chance to be heard. Suggest that the other side start, taking as much time as necessary to relay whatever information seems to be important about the situation or issue at hand. Then, you and your client can have your turn. During your opportunity to talk, check frequently to see if the other party understands your perspective. Continue these process negotiations as necessary.

Another effective process strategy is to enlist the cooperation of the other side in developing a joint agenda. Be sure to include all of their issues on the agenda (even if you see them as red herrings), and be generous about letting them prioritize their issues. Try to frame agenda topics as neutrally as possible.

Use Mnookin's "empathy loop": Inquire, listen to the response, and restate what you heard in a neutral way.<sup>46</sup> Two important things will happen: you will understand, and the other side will know you understand, what is important to the other party in the dispute.

Do not agree or remain silent if you disagree with the facts alleged or argument advanced by the other side. On the other hand, do not interrupt. When the timing is right, and when a response is called for (e.g., "Isn't that right?" or "You have to agree that ...") and you are trying to keep things low-key, say something like, "Well, there is another way to look at that but we'll get to that later."

Stress reciprocity and recognize when you are not getting it.<sup>47</sup> If you are constantly interrupted or challenged as you try to present your client's viewpoint, say so and remind the other party that he/she has already had a chance to talk and it is important to get both viewpoints across. If issues that are important to your client somehow do not appear on the agenda, be sure they are added. Treat the opposing party and counsel as you would want them to treat you, and then use your behavior as a model to push them to respond in kind.

Recognize hard-bargaining tactics and do not respond in kind.<sup>48</sup> There are a number of alternative responses that will help get the negotiation back on track. Mnookin suggests that one way to deal with hard-bargaining tactics is to name the game and suggest another.<sup>49</sup> Identify the hard-bargaining tactic the other side has employed. Show that you can play that game too. This will illustrate the futility of resorting to hard-bargaining

tactics. Finally, suggest an alternative process that might work better from both sides' perspectives. Be careful to watch your tone of voice and your affect: avoid coming across as preachy or schoolmarmish. Another strategy is to change the players.<sup>50</sup> If the problem is opposing counsel, help your client prepare to deal directly with his/her spouse. If the problem is the opposing party, suggest that the lawyers meet without clients present. Try to get a third party involved if appropriate.

## CONCLUSION

Negotiation is a critical part of lawyering, and lawyers play a crucial role in negotiating their clients' disputes. In resolving disputes, lawyers have, as Abraham Lincoln recognized and as Mnookin and his co-authors quote, "a superior opportunity to do good."<sup>51</sup> We can be creative problem-solvers, encouraging our clients to be fair, assisting them at a disruptive and difficult time in their lives, and helping them find solutions that meet their needs and will be effective over the long term. However, we are also in a position in which we can do much harm. We can treat people badly, escalate hostilities, create insurmountable obstacles to peaceful resolution—and run up huge bills in the process. By looking at our clients' disagreements as problems to be solved cooperatively rather than as battles to be won, we can improve the outcome for our clients and enhance the quality of our own lives.

## ENDNOTES

1. Robert H. Mnookin et al., *Beyond Winning: Negotiating to Create Value in Deals and Disputes* 3 (2000). Mnookin usefully suggests that all negotiation occurs "in the shadow of the law."
2. Mnookin discusses some of the special challenges involved in divorce negotiations. *See id.* at 173-77.
3. Roger Fisher et al., *Getting to Yes: Negotiating Agreement Without Giving In* (2d ed. 1991). *See also* Fisher et al., *Getting to Yes* (1981).
4. Mnookin et al., *supra* note 1.
5. Douglas Stone et al., *Difficult Conversations: How to Discuss What Matters Most* (1999).
6. Mnookin et al., *supra* note 1, 11-43.
7. *Id.* at 14-15.

8. *Id.* at 14. Mnookin describes two possible differences between the parties as “different resources” and “different relative valuations.”
9. *Id.*
10. *Id.* at 14-15.
11. *Id.* at 15.
12. *Id.* at 16.
13. *Id.*
14. *Id.* at 25.
15. Fisher et al., *supra* note 2, at 100.
16. *Id.* Mnookin elaborates on Fisher and Ury’s concept of the BATNA. See Mnookin et al., *supra* note 1, at 20-21.
17. Fisher et al., *supra* note 2, at 100.
18. Mnookin et al., *supra* note 1, at 20-21.
19. *Id.* at 27.
20. *Id.* at 28-30.
21. *Id.* at 46.
22. *Id.* at 46.
23. *Id.* at 47.
24. *Id.* at 48.
25. *Id.*
26. *Id.* at 51.
27. *Id.* at 52.
28. *Id.* at 52-53.
29. *Id.* at 55-56.
30. Mnookin identifies a number of benefits reaped by the client who hires an attorney to negotiate for her rather than negotiating on her own behalf. *Id.* at 93-96.
31. *Id.* at 3.
32. *Id.* at 168.
33. *Id.* Mnookin notes that the belief that lawyers are hired precisely to be adversarial and aggressive is well-articulated by the New York divorce lawyer Raoul Felder. See Raoul Felder, *I’m Paid to be Rude*, *N.Y. Times*, July 17, 1997, at A-23.
34. Mnookin et al., *supra* note 1, at 169.
35. *Id.* at 24-25.
36. The principles of collaborative divorce are described at [www.collaborativedivorce.com](http://www.collaborativedivorce.com). For a critique of collaborative divorce, see Gary M. Young, *Malpractice Risks of Collaborative Divorce*, Wisconsin Lawyer (May 2002), available at [www.younglaw.net](http://www.younglaw.net).
37. The principles of cooperative divorce are described at [www.cooperativedivorce.org](http://www.cooperativedivorce.org).
38. Mnookin et al., *supra* note 1, at 3.
39. Such a reading list might include Fisher & Ertel, *Getting Ready to Negotiate* (1995), in addition to the resources cited in this article.
40. Stone et al., *supra* note 4, at 7-8.
41. *Id.* at 23-82.
42. *Id.* at 83-109.
43. *Id.* at 109-128.
44. Mnookin et al., *supra* note 1, at 3.
45. *Id.* at 48. Many of the Harvard Negotiation Project’s publications discuss how to reach agreement with someone who is unwilling to negotiate or who is locked into an adversarial or unfair negotiating style. See Fisher et al., *supra* note 2, at 101-149; William Ury, *Getting Past No: Negotiating Your Way from Confrontation to Cooperation* (1991).
46. Mnookin identifies the steps in his “empathy loop” as follows: (1) You inquire; (2) The other side responds; (3) You demonstrate your understanding and test or check that understanding with the other side; (4) If the other side confirms your understanding, the loop is complete—if they disagree with your understanding, return to Step 1. Mnookin et al., *supra* note 1, at 63-65.
47. See *id.* at 62-63, 209-10.
48. See *id.* at 24-25, 147-48, 211-21.
49. *Id.* at 217.
50. *Id.* at 218-20.
51. *Id.* at 3.