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## Becoming a Better Negotiator

Among the anomalies involved in the practice of law is the disparity between the substance of continuing legal education (CLE) programs and the reality of practice. As a rough, totally unscientific estimate, 90 percent of CLE programs in family law involve, in one sense or another, litigation skills. However, my surveys of family law attorneys across the country reveal that 90 percent—or more—of family law cases are resolved through negotiations. If you accept these estimates (or anywhere near them), that means that 90 percent of CLE deals with what lawyers actually do only 10 percent of their time.

Why is this so? Perhaps one reason is that litigation CLE is “sexier.” Conducting cross-examination, making closing arguments, and presenting testimony are all skills shown on TV; and such shows do not aim to bore viewers. Trials are exciting. Settlement negotiations are not. Perhaps ego plays a role. (What? Divorce lawyers have egos? No way!) Machismo in law is trying cases, not settling them. Indeed, some lawyers think that even discussing settlement (see chapter 7, “Preparing the Client for Settlement”) is a sign of weakness.

There may be other possibilities, but I believe that the answer is “none of the above.” Rather, I suspect that most lawyers believe that litigation requires special skills entailing rigorous training, while settlement is intuitive and comparatively easy, i.e., that settlement merely requires taking a position and making compromises. This is true, but only in the same way that one might believe trial law is easy because it merely requires asking questions and making an argument.

Being a *good* trial lawyer requires skills and experience. The same applies to being a *good* negotiator, rather than just being a lawyer who negotiates. The difference in negotiations is more profound, however. Not only do the enhanced skills afford the client a better financial result, but, done skillfully, negotiating can enhance the opportunity for a more peaceful relationship with the ex-spouse in the future. Not only are these aims not contradictory, they are complementary. The less friction between the parties, the greater the incentive to cooperate in the future, not only in terms of parenting but financially as well.

So, if negotiating is not solely intuitive, what can you do to become a better negotiator? Below are a few suggestions on the topic.

### **Read This Book**

Oh, wait, you are already doing that!

### **Read Other Material**

There is a huge amount of material on the art of negotiations, ranging from philosophical to practical to intellectual. A starting point surely is Roger Fisher and William Ury's classic book *Getting to YES: Negotiating Agreement Without Giving In*.<sup>1</sup> In addition, there are substantial resources on how to negotiate in numerous different forums, many of which can be adopted for family law cases.

Reading books in other disciplines can also aid in becoming a better negotiator. As discussed throughout this book, negotiations involve an understanding of human beings and human emotions. Therefore, any book (or course) on psychology could be an invaluable aid to settlement. A recent best seller, *Freakonomics*,<sup>2</sup> and its sequel, *SuperFreakonomics*,<sup>3</sup> for example, marry economic theory and pop psychology in areas as diverse as drug dealing and sumo wrestling. Of course, much of economic theory is premised on understanding

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1. ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (1981).

2. STEVEN D. LEVITT & STEPHEN J. DUBNER, *FREAKONOMICS: A ROGUE ECONOMIST EXPLORES THE HIDDEN SIDE OF EVERYTHING* (2005).

3. STEVEN D. LEVITT & STEPHEN J. DUBNER, *SUPER FREAKONOMICS: GLOBAL COOLING, PATRIOTIC PROSTITUTES, AND WHY SUICIDE BOMBERS SHOULD BUY LIFE INSURANCE* (2009).



human motivation, so study in that area could also find application to settlement negotiations. Furthermore, in settlement negotiations we are trying to sell our proposal. In addition to understanding psychology, books on marketing and sales could provide useful ideas on the art of persuasion.

### **Watch Other Lawyers**

Prior to joining my present firm, my only experience in settlement negotiations was plea bargaining as a prosecutor (law schools in my day did not offer courses in alternative dispute resolution). Of course, plea bargaining is radically different from divorce settlement negotiations. Since the prosecutor has far less to lose at trial, the stakes are not the same on both sides of the table; and the settlement dynamics are far different from a divorce where both parties have skin in the game.

However, I had the privilege of watching Leonard Loeb, my boss and later my partner, negotiate divorce cases. Although some of his style does not fit my personality, I learned and adopted a great deal of his technique.

For example, I saw one session in which Leonard was representing a wife in a long-term marriage whose wealthy husband had been caught philandering. Leonard opened the negotiating session as follows:

When I asked my client what she truly wanted arising from this divorce, she assured me that she really didn't care about property division or support. What she really wanted was to use a rusty razor and make him eligible for membership in the Vienna Boys Choir. Now, I assured her that the goal was not attainable in a literal sense, so I've had her translate it to dollars.

Although there is no way that I could ever make such an "opening statement" and keep a straight face, watching his style—and the reaction of the other lawyer—was highly instructive.

Of course, most lawyers are not so lucky: negotiations are not public sessions. Still, if you are an associate with an experienced partner, she may welcome a "second chair" in negotiations; and you can watch the styles of two lawyers in one setting.

Remember, though, that a negotiating style must fit your individual personality. Just like all recipes say "season to taste," all negotiating styles must be "seasoned" to fit the individual style of a particular attorney.

### ***Take Courses in Negotiating***

Just because you have been negotiating for years doesn't mean you can't do it better. Although, as stated above, there are far more legal education courses offered on litigation, there are, fortunately, quite a few on the skills of negotiating. Some of these skills can be found in mediation courses. Others can be found in collaborative law training. Still others can be found in business schools. These skills can include listening, planning, problem solving, and communicating.

### ***Take Courses in Related Skills***

Negotiating well requires a large set of skills, not all of which are taught in courses on negotiations. Courses in psychology, physiology, human development, marketing, and conflict negotiations all have skill sets that can be highly useful in negotiation sessions. After all, the goal of negotiating is to reach an agreement with other human beings. Therefore, understanding human relationships (psychology) and how humans listen and process information (physiology) and resolve conflicts would be highly helpful in this arena.

Mediation courses can be very helpful as well. Although mediation is not identical to settlement, many of the skills and techniques are transferable. Moreover, mediation is becoming more and more common as a standard settlement model in every divorce case. Even if you don't intend on becoming a mediator yourself, learning how a mediator is trained may be useful when representing a client in mediation.

In an ideal world, there would be a required course in law school simply on listening skills. Listening is not intuitive. Some people are better at it than others. Those who can listen well will pick up cues that can lead to far better negotiating skills. For those who are not intuitively good listeners, there are skills that you can learn that can make you better. For starters, read *The Family Lawyer's Guide to Building Successful Client Relationships* by Sanford M. Portnoy.<sup>4</sup> And as that great philosopher, Yogi Berra, once said, "You can observe a lot by just watching."<sup>5</sup>

4. SANFORD M. PORTNOY, *THE FAMILY LAWYER'S GUIDE TO BUILDING SUCCESSFUL CLIENT RELATIONSHIPS* (ABA Family Law Section 2003).

5. BrainyQuote, Yogi Berra Quotes, <http://www.brainyquote.com/quotes/quotes/y/yogiberra125285.html> (last visited Oct. 13, 2012).



### ***Be Self-Critical***

I heard a story once about a professional speaker. He said that when he gives a speech, there are three versions. There is the one that he plans to give. There is the one that he actually delivers when he improves on the original version while actually giving the speech. And “[i]f you want to hear a truly great speech,” he said, “drive home with me afterward and hear the speech that I should have given.”

Each of us can improve our skills by considering what we did right and wrong during an actual case. Do a self-analysis after each case. Ask yourself what you could have done better. Make every case a learning experience.

### ***Get Feedback from Other Attorneys***

Many times, our egos prevent us from asking for assistance. However, especially if you are a young lawyer, there is a great deal of experience available from lawyers who have been doing this for a long time. And many of these experienced lawyers would be pleased—even flattered—to share feedback. So, after completing an action (during the case is probably not wise), take an older lawyer to lunch or coffee. No CLE credit will be given, but it may be the best education you will ever get.

### ***Get Feedback from Former Clients***

Asking a former client for feedback may be helpful. Yes, there is a danger in this as you may hear things you don’t want to hear. And there is a natural tendency to get defensive. But if you can park your ego at the door for a while, you may get a lot out of this exercise. It is, after all, the client whom you are serving.

In my firm, we do this in two different ways. First, we hold a post-judgement meeting (sort of like an autopsy) after every case. Often, we will not charge for that conference. It provides closure for the attorney-client relationship both personally and professionally and also an opportunity to ask for a critique.

There are clients who may not be comfortable providing such feedback in person, so we provide an anonymous opportunity. Approximately once a year, we mail an evaluation form that can be sent in anonymously. One of the nice side effects of this form is that the vast majority of former clients say only nice things—sometimes very nice

things that make for pleasant reading. But although that is good for ego inflation, the education comes from the few who provide helpful criticisms and suggestions for improvement.

### **Be Creative**

I am amazed at the number of times attorneys ask whether there is a form for a certain procedure. Many years ago, I taught a course for family law paralegals. After one class, a young lady shyly approached me and asked me whether a certain form was accurate. The form had been widely used throughout the state for many years, but, sure enough, there was an error. From then on, until the replacement form became commonplace, I would see lawyers robotically using the old form with the error.

On the other side of the coin, Minneapolis lawyer Stuart Webb did not like the concept of a lawyer as a combatant rather than as a problem solver. Believing that the threat of court was inimical to the future relationship between parents, he invented a form of law based on collaboration rather than adversity.<sup>6</sup> As discussed in this book (see chapter 19, "Collaborative Divorce"), collaborative divorce is not the only negotiation method. However, it does illustrate what can happen when someone—forgive the cliché—thinks outside the box.

The point is this: Don't rely on forms. Don't believe that just because "that's the way it's always been done" means that "that's the only way to do it." Experiment. Learn. Then, please, share. Life is a learning process.

### **Summary**

Life is a learning process. Although settling cases seems intuitive, there is a huge quantity of information available on the topic of becoming a better negotiator. Whether through reading material, courses, or personal efforts, all divorce lawyers should be making continuous efforts to improve their skills.

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6. Yishai Boyarin, *Generating Win-Win Results: Negotiating Conflicts in the Drafting Process of the Uniform Collaborative Law Act*, 38 HOFSTRA L. REV. 495, 495 (2009).