
1

Building Trust in Negotiations

Tracy L. Allen

To achieve client settlement objectives, effective negotiators start the process by establishing a relationship and building trust with opposing counsel.

I. Prepare for the negotiation

Determine your client's needs and interests. Allow information to flow freely between you. Expansive thinking may bring to light those aspects of the situation that need the most attention or cause the most concern. Work with your client to identify what you each believe to be the other party's probable needs and desires. They are not necessarily adverse or exclusive. The better you understand where the other side is coming from, the better you can prepare your offers and successive strategies.

After identifying needs and interests, brainstorm what outcome alternatives realistically exist. Then engage your client in a frank and candid conversation about what is achievable and what outcomes are highly unlikely. This dialogue addresses client expectations. What does your client need to achieve? Reach agreement with your client regarding the results to be achieved. You don't want to initiate a negotiation without knowing where the client wants to be at the end of the experience. Think in terms of ranges and broader concepts, not bottom lines or absolutes. Encourage your client to remain flexible. In negotiations, new information frequently surfaces that can be the catalyst and justifiable reason for changing a particular position or course of negotiation.

Be clear on your limits and authority. Always know your best and worst alternatives to a negotiated agreement—what is the best and the worst you might expect if the case proceeds to trial? (a/k/a BATNA-WATNA)

II. Invite negotiations using positive tones

At the right time, invite the other party into the negotiation in a positive tone. Make sure the timing is right in the life of the dispute or the transaction to commence negotiations. An offer to negotiate that comes out of the blue could be interpreted as a sign of weakness, causing the other side to toughen its position. This can be avoided if you offer a rationale for your timing: before filing suit for the plaintiff, before filing an answer for the defendant, or after an important deposition, the emergence of new information, or filing of an important motion. Parties must be emotionally and intellectually ready to engage. They should have sufficient information as well as identifiable risk to engage meaningfully.

III. Begin by first building trust

As you start the negotiation, continue your focus on building trust with the other party before fully engaging in the substantive negotiations.

Before discussing the dispute, talk about common interests such as travel experiences, recent books or movies, children and grandchildren, bar functions, and activities. Remind the other side that you have few differences between you. If the case is a big one, consider inviting the other side to lunch or breakfast for a less formal discussion and to gain insights into the other party's interests and needs. This collection of information prior to beginning formal negotiations will assist all in structuring a productive exchange.

A beginning dialogue should include recognition of the commonalities and mutuality of the parties. Clarify your understanding of the other party's needs and desires. Your interest in them suggests a genuine desire to learn about their views, in turn, enhancing trust. People want first to be understood before they can understand.

IV. Resist the urge to cut to the chase

Building trust means taking time to fully explore and exchange information about the parties' respective needs and goals. This requires patience and careful, active listening. Avoid the impulse to skip over preliminaries and talk dollars before the time is right.

V. Gather as much information as you can

The more information you have, the better you can assess risk and properly evaluate your case. Gathering information takes patience. Use open-ended questions that invite the free flow of information. Ask the other side to explain their reasoning or the assumptions that form the basis of their position or demands.

An effective negotiator not only asks questions, but also acknowledges the other side's points and concerns. In verbalizing your understanding of, and expressing your appreciation for, the other party's views, you are building trust.

Be willing to respond to inquiries from the other party. The other side will lose trust if information only flows one way. Information exchange increases trust among the participants, which make the end part of the negotiations easier. In maximizing the exchange of information, you will better understand the apparent risks to your client and the other party of not making a deal.

VI. Reassess risk and opportunity

Use the information obtained to reassess risk and opportunity with your client throughout the negotiations. Invite the other negotiator to engage in the same exercise. By risk, we mean, in light of the information that has been exchanged, what is the likelihood your client will achieve none, some, or all of the outcome goals? Reevaluate and change course where appropriate. Anticipate if and how the other side will change its positions. Be prepared to manage the other side's reaction to your client's changing positions.

VII. Avoid drawing a line in the sand

Negotiations take place in the face of uncertainty and mixed motives. If you remain flexible, and leave some room to maneuver, the negotiation always has some place to go. Send signals with positive intentions to keep the negotiations going forward. Use the trust that has been generated as well as the progress made thus far to fuel and continue negotiations. Even if you don't expect a specific offer to be accepted, you want to encourage the other side to respond with a counter offer.

Avoid ultimatums. Ultimatums destroy trust. An ultimatum also surrenders control of the negotiation to the other party. Moreover, most people think you are bluffing when you make threatening statements or declare an ultimatum. Ultimatums make reentry into the negotiation much more difficult for you. It is far easier to suggest an adjournment so you have the option to return.

VIII. Keep the trust you've built intact

If you have not reached a full solution as you approach the end of the negotiation, keep the trust you've built intact. Even if negotiations don't end in agreement today, they may start again next month. And if that trust doesn't help with this client, maybe it will provide a foundation of trust for the next one.

This is the time to think about reciprocity. The other side may be reaching its end game too. Do not fall prey to frustration. Work to reach consensus and confirm progress made thus far. This avoids mixing up or misinterpreting messages being given in the exchange. Restate what has been agreed on so far.

At this critical point in the negotiation, make sure everyone is functioning with the same foundational information and assumptions. It is not necessary for everyone to agree on what it all means. It is far more

important that they understand where and why they disagree so they can each assess the risk of not concluding the negotiation in a successful manner.

IX. It's never only about money

As you reach what appears to be the end of a negotiation without a full deal, it's easy to assume that the trust you extended was misplaced. Do not lose faith. Remember that resistance is evidence of an unmet need. The unmet need may not be economic. Be willing to think about noneconomic options or issues that may be driving the positions.

Creativity can be perceived as a sign of interest or caring. Brainstorm options. Consider solutions that incorporate respect and recognition of the other's ideas, positions, goals, and ego. Look for ways for everyone in the negotiation to save face. Remain respectful.

X. Close the deal

Be ready and willing to make adjustments to proposals that don't matter. Remember reciprocity. It too has a flavor of trust. Be willing to reallocate or reprioritize the elements of a full solution. Share the altered structure with your client while focusing on the value and objectives achieved in the proposal as reframed. Think about how to repackage or reframe the context of a proposal. Recognize and expose the benefits to all the participants versus leaving the negotiation without a full solution.