



PROGRAM MATERIALS

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The Art of Negotiation in Different Legal Settings

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THE ART OF NEGOTIATION IN DIFFERENT LEGAL SETTINGS.

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OVERVIEW (60-MINUTE PRESENTATION)

**Effective
Approaches to
Negotiations**

**Low-Value Offers,
Discounting or
Squabbling Over
Bills**

**Estimates, Damages,
and Evidence**

**Recorded
Statements**

**Leading and Loaded
Questions to Elicit
Unfavorable
Admissions**

**Medical Record and
IME Tactics**

**Social Media and
Surveillance Delays**

**Avoiding
Communications
and Lack of
Communications**

**Lack-of-Authority
Games**

**Misrepresentation of
Policy Benefits or
Denial of Coverage**

**Using the Threat of
a Bad Faith Claim to
Get Adjusters to
Negotiate on Better
Terms**

PRE, DURING & POST-
NEGOTIATION TACTICS

APPROACHING NEGOTIATIONS IN GENERAL

NEGOTIATION

**“To confer with another person so as to arrive at a settlement of some matter; also to arrange for or bring about such conferences”
(Merriam-Webster Dictionary)**

4 Steps of the Negotiation Process

1

PREPARATION: Preparing in advance can improve your confidence, give you clear goals to work toward, and provide a strategy to base your approach on.

2

BARGAINING: Bargaining is about creating value for both you and other parties despite your differences.

3

CLOSING: Closing a negotiation can mean coming to an agreement or ending the discussion without reaching one.

4

LEARNING: Reflecting on the process and learning from your experiences enables you to become a better negotiator.

FOUR STEPS IN NEGOTIATION - HBS

FRAMING

- How an offer is described strongly affects how the other side views it.
- Max Bazerman, Margaret Neale, and Tom Magliozzi finds that people tend to resist compromises—and to declare impasse—that are framed as losses rather than gains.
- Suppose that a **company offers a recruit a \$20,000 increase over her current salary of \$100,000**. This offer same offer of \$120,000 is more likely to **appeal to her than an offer framed** as a \$30,000 decrease from her request of a \$150,000 salary. **Stressing what the other party would gain rather than lose is an important form of framing in negotiation.**

COGNITIVE FRAMING IN NEGOTIATIONS

- “A cognitive frame is a subjective mechanism through which people evaluate and make sense of situations, leading them to pursue or avoid subsequent actions.”
- Types of cognitive framing –
 - **Interests-based frames** - People are often concerned about what they need, desire, or want. People talk about their positions, but often what is at stake is their underlying interests.
 - **Rights-based frames** - People may also be concerned about who is right that is, who has legitimacy, who is correct, or what is fair.
 - **Power-based frames** - Negotiations resolved by power are sometimes based on who is physically stronger or is able to coerce the other, but more often, it is about imposing other types of costs economic pressures, expertise, legitimate authority, and so on.

GETTING TO YES WITHOUT GIVING IN – ROGER FISHER & WILLIAM URY

- In general, recommended steps for successful negotiation are:
 1. Separate the people from the problem.
 2. Focus on interests, not positions.
 3. Invent options for mutual gain, that is work together to create options that will satisfy both parties.
 4. Insist on using objective criteria for judging a proposed solution.

EMPATHY AND THE LOOP

- A technique to demonstrate understanding and empathy with another party.
- The empathy loop has three steps:
 - (1) Inquire about a subject or issue,
 - (2) the other side responds, and
 - (3) you demonstrate your understanding of the response and test or check that understanding with the other person.
- In other words, you loop your understanding of the other side's perspective back to them.

3 CONSIDERATIONS FOR EFFECTIVE NEGOTIATING

- Appreciate that rarely does one side “win” in negotiations. Rather, the objective should be that the parties walk away with an agreement they can live with.
- Framing, adapting/evaluating, and empathy.
- “Regret is usually a waste of time – as is gloating.” - Thomas Crown Affair (1999)



LOW-VALUE OFFERS, DISCOUNTING OR SQUABBLING OVER BILLS¹²

STEP I - KNOW YOUR BAFTA

- BAFTA – best alternative to a negotiated agreement.
- Before going into a negotiation do your homework.
 - What does the policy limit(s) provide?
 - What are the facts and circumstances (for example, where are you in the process and was a separate lawsuit, for example, filed under the DTPA)?
 - What is your bottom line?
 - What are the costs (financial, emotional, and perhaps reputational) to litigating versus settling?
 - What is the Present Value Calculation a/k/a Time Value of Money?

STEP 2 – ESSENTIALS FOR NEGOTIATING WITH INSURANCE

- KNOW THE CONTRACT AND HAVE THE KEY TERMS HIGHLIGHTED FOR EASY REFERENCE.
- BE ABLE TO SUBSTANTIATE WHY YOU SHOULD RECEIVE THE FULL POLICY LIMITS.
- ARE THERE OTHER PARTIES INVOLVED OR MITIGATING FACTORS (for example, the insurance contract required you to do something and you did not do it).

STEP 3 – THE LOW BID OFFER & SQUABBLING OVER BILLS

- **1. Do not be insulted.** Keep calm and carry on. At times, it is appropriate to raise one's voice and vary the tempo.
- **2. Respond gracefully.** If you react defensively or combatively, it usually builds a wall where there could have been a bridge.
- **3. Write a strategic counteroffer.** In your preparation, you should have point-counter-point prepared.
- **4. Expect a counteroffer to your counteroffer.** Working through a lowball-offer situation can be a process that takes a couple of days.
- **5. Negotiate other terms.** Start with the “low hanging fruit” – those items that are more likely to bring agreement and reach

BILLS

- Get copies of the actual bills.
- Prepare a ledger and have a copy of the bills so that you can hand them over one at a time and the opposing party can check them off. If there is an issue with a particular bill, then discuss it.
- Have cancelled checks or credit card statements available to verify payment.



ESTIMATES, DAMAGES, AND EVIDENCE

ESTIMATES

- First, it depends on the type of case and insurance policy. For example, is it
 - Automobile
 - Home
 - Cybersecurity
 - Directors & Officers
- Second, what happened and what estimates do I need
 - Automobile – two body shop estimates of the damage to compare against the insurance adjuster.
 - Home – what is covered. Again, get at least two estimates for a roof, etc. to counter the insurance adjuster.
 - Cybersecurity – work with their cyber team, contact an attorney, forensic cyber company, etc.
 - D&O – depends on the facts and circumstances.

DAMAGES

- It depends on what is at issue. If it is a car accident with no injuries, then it is straightforward.
 - Same with a house – if your roof is blown off, chances are you'll need and will get a new one. Make sure that the new one meets any new codes or requirements and that factor is considered.
 - What experts do I need and what is required to be ascertained before a certain type of lawsuit is filed?

TYPES OF EVIDENCE

- Present sense impression = write down all you can after an event.
- Written communication.
- Location of any cameras.
- Contracts.
- Medical records.
- Photographs/videos.
- Post-event steps that were taken. If a company, following policies and procedures, etc.



RECORDED STATEMENTS

PRESENT SENSE IMPRESSIONS OR RECORDED STATEMENTS

- A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in his memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.
- This hearsay exception has three foundational requirements: “Rule 803(5) allows a memorandum or record of an event to be read into evidence where (1) the witness once had knowledge about the matters he recorded, (2) the witness now has insufficient recollection to enable him to testify fully and accurately about those matters, and (3) the record was made or adopted by the witness at a time when the matters were fresh in his memory and reflected his knowledge correctly.” State v. Brown, 258 N.C. App. 58 (2018); State v. Spinks, 136 N.C. App. 153 (1999).
- If the foundational requirements are satisfied, the memorandum or record may be read into evidence or played for the jury, but the recorded recollection itself may not be received as an exhibit unless it is being offered by the adverse party. G.S. 8C-803(5). This limitation is intended to “prevent a jury from giving too much weight to a written statement that cannot be effectively cross-examined.” G.S. 8C-803(5), Official Commentary; State v. Spinks, 136 N.C. App. 153 (1999).

TAPE RECORDINGS

- KNOW THE LAW OF THE STATE WHERE THE RECORDING OCCURRED, AS WELL AS OTHER STATES IF IT OCCURRED ACROSS STATE LINES.
- In general, the courts in California rule illegally obtained recordings inadmissible as evidence in court proceedings. This means the party with the recordings will be unable to use them during a divorce case unless a judge gives him or her special permission.

FEDERAL RULES OF EVIDENCE: 801-03, 901

- **Rule 801. Definitions** - The following definitions apply under this article:
 - (a) **Statement.** A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.
 - (b) **Declarant.** A "declarant" is a person who makes a statement.
 - (c) **Hearsay.** "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.
 - (d) **Statements which are not hearsay.** A statement is not hearsay if-- (1) prior statement by witness; (2) admission by party-opponent.
- **Rule 802. Hearsay Rule** - Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.
- **Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial.**
- **Rule 901. Requirement of Authentication or Identification.**

FEDERAL RULE OF EVIDENCE 408

■ **Compromise Offers and Negotiations**

(a) Prohibited Uses. Evidence of the following is not admissible — on behalf of any party — either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction:

(1) furnishing, promising, or offering — or accepting, promising to accept, or offering to accept — a valuable consideration in compromising or attempting to compromise the claim; and

(2) conduct or a statement made during compromise negotiations about the claim — except when offered in a criminal case and when the negotiations related to a claim by a public office in the exercise of its regulatory, investigative, or enforcement authority.

(b) Exceptions. The court may admit this evidence for another purpose, such as proving a witness's bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

■ **Notes**

(Pub. L. 93-595, §1, Jan. 2, 1975, 88 Stat. 1933; Apr. 12, 2006, eff. Dec. 1, 2006; Apr. 26, 2011, eff. Dec. 1, 2011.)



LEADING AND LOADED QUESTIONS TO ELICIT UNFAVORABLE ADMISSIONS

LEADING VS. LOADED QUESTIONS

- Leading questions are intended to lead people to answer questions in a specific way based on how these questions are phrased.
- Loaded questions are similar to leading questions in that they subtly (or not so subtly) push the user toward a particular response.

LEADING QUESTIONS

- “Our food is the best on the market, isn’t it?” the employer likely expects a positive or affirming answer. The interviewee can’t realistically object without sounding like they’re in direct opposition to the beliefs of the employer.
- Although this is a basic conversational example, the **same kind of bias** can occur in web forms, surveys, or feedback instruments. Whenever the form or survey creator presupposes an answer, it places the respondent in an awkward spot while obligating them to answer a certain way.

LOADED QUESTIONS

- Loaded questions are similar to leading questions in that they subtly (or not so subtly) push the user toward a particular response. The defining feature of this question is that an assumption about the respondent is included implicitly within the question.
- Loaded questions can be asked about many different things in society: a product, a person, or a business.
- From a product angle, the problem with loaded questions is that they assume that your user loves whatever product you're asking them about. Maybe all you're looking for in these cases is positive answers, but if you want honest feedback and transparent data, you must phrase each question without preconceived ideas.



MEDICAL RECORD AND IME TACTICS

MEDICAL RECORDS

- HIPAA
- Minimum Necessary

IME

- The Texas Rules of Civil Procedure – specifically, Rule 204.1 – allow for a defense expert doctor to conduct an independent medical exam (IME) of the plaintiff under certain circumstances including where the plaintiff's physical and/or mental condition is in issue. The Texas Supreme Court recently addressed both the timing and substantive hurdles a defendant must meet in order to secure an IME of the plaintiff.
- On December 2, 2022, in *In re Auburn Creek Limited Partnership*, 655 S.W.3d 837 (Tex. 2022), the Texas Supreme Court held that a Texas trial court abused its discretion in failing to allow an IME to go forward and in striking the defense expert, in part, for his inability to offer certain opinions without the IME.
 - At issue in *Auburn Creek* were the plaintiffs' alleged neuropsychological damages stemming from alleged exposure to carbon monoxide while residents of an apartment complex.
 - In its mandamus opinion, the Court held that defendants' motion to compel the IME was timely as it was filed more than "30 days before the end of [the] applicable discovery period." Rule 204.1(a).
- **The Court held that in this case it was error for the trial court to deny the defendants' neuropsychological expert an opportunity to examine and test the plaintiffs concerning their claimed neuropsychological deficits allegedly sustained from carbon monoxide exposure while they were tenants in defendants' apartment complex.**



SOCIAL MEDIA AND SURVEILLANCE DELAYS

SOCIAL MEDIA CONSIDERATIONS

- Using social media may have unintended consequences during a time of need.
- Insurance adjusters often use these posts as evidence when determining the validity of an insurance claim.
- While social media can provide evidence to support your claim, insurance companies can also use your posts to deny or reduce your claim.

SURVEILLANCE

- Surveillance has different applications. For example, was there camera footage from a scene. The camera could be from a traffic light/intersection or a nearby building. It may take time to legally request the footage from the owner or the government entity.
- **Post car-accident or workers compensation – oftentimes, insurance companies use surveillance after they take the deposition of the claimant.**
- The insurance company has competing interests – upholding the policy versus making money for its shareholders.
- Common scenarios include insurance companies not paying you what it owes you, but to either prevent you from making any recovery, or having to pay out the least amount possible. Surveillance is the most common one.



AVOIDING COMMUNICATIONS AND LACK OF COMMUNICATIONS

COMMUNICATIONS

- It is important to acknowledge receipt of a communication. Eventually, service or contact will be made and as a rule judges don't like people who play games.
- Lack of communication.
 - Escalate.
 - Get a court order.



LACK-OF-AUTHORITY GAMES

LACK OF AUTHORITY

- This can be addressed up front.
- Obtain assurances in writing that the person you are speaking with has the authority to negotiate the amount being requested.
- Other counters that can be raised down the line are agency authority, misrepresentation or fraud in the inducement. Be very aware of the statute of limitations and if you are not making headway or figure out that an individual does not have decision making authority, then file.



MISREPRESENTATION OF POLICY BENEFITS OR DENIAL OF COVERAGE

MISREPRESENTATIONS

- Read the language.
- Some language is more clear than others.
- Up front, if there is an issue or question with contractual language, make sure to email the broker for clarification and keep the email. If a phone call took place then follow up with an email.
- Material misrepresentations by the insurance company can lead to fraud claims by the insured.



USING THE THREAT OF A BAD FAITH CLAIM TO GET ADJUSTERS TO NEGOTIATE ON BETTER TERMS

THREE FACTORS TO CONSIDER BEFORE MAKING A THREAT DURING A NEGOTIATION

- To assess whether your negotiation tactics will satisfy or violate your interests, answer these three questions:
- **1. Is your threat based on emotion?** Effective negotiators must be immune to momentary pressures and volatile emotions. And a threat should never be made under the influence of anger: multiple studies have linked anger to reduced information processing, risky behaviors, and clouded judgment. A reliable rule of thumb is never to make a threat that you did not plan in advance.
- **2. Will your threat incite a counter-threat that dwarfs your own?** Driven by reaction and revenge, threats often provoke counter-threats. Before making a threat, assess the potential impact of a retaliatory response, lest you initiate a battle that you aren't prepared to fight.
- **3. Will aggressive negotiation tactics cost you more than it will cost the other side?** Threats are not about punishing the opposition; they are about fulfilling your own interests. When you forget this important point, your desire to teach the other side a lesson may cause you to escalate a threat without regard to the toll it could take on you.

BOTTOM LINE...

- If you've determined that a threat would indeed serve your interests, make sure the threat will function as a motivator, not a punishment. Frame it in terms of how compliance will further your counterpart's interests rather than how noncompliance will thwart them.
- DO NOT DO ANYTHING THAT IS IMPERMISSIBLE BY LAW.



CONCLUSION & TAKE-AWAYS

CONCLUSION & TAKE-AWAYS

- FIVE CHARACTERISTICS OF WIN-WIN NEGOTIATIONS
 - Ask questions
 - Listen actively
 - Empathize
 - Consider and explain
 - Think creatively

THANK YOU & QUESTIONS

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RESOURCES

- https://thebusinessprofessor.com/en_US/communications-negotiations/cognitive-framing-in-negotiation
- <https://www.pon.harvard.edu/daily/business-negotiations/framing-in-negotiation/>
- <https://extension.okstate.edu/fact-sheets/negotiation-strategies.html>
- <https://www.forbes.com/sites/forbesbusinesscouncil/2022/08/02/remaining-nimble-and-strategic-five-tips-for-ma-businesses/?sh=1bbfcc2776ae>
- <https://www.pon.harvard.edu/glossary/empathy-loop/>
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