

# ADR Special Feature

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## 10 tips for an effective — and ethical —



By Bette J. Roth

Your role as business counsel is complex. You are not only responsible for producing a legal and enforceable negotiated agreement, but your duty is to

get the best deal for your clients while conducting the negotiation in a way that reflects positively on them.

Start with your negotiation style: Do you believe a negotiation is a win-lose situation in which the interests of one side will prevail? Do you take a hard-line approach and argue why the other side should meet your demands? Or do you view a negotiation as a challenge to find a win-win solution that can meet the interests of both sides?

The most ethical and effective approach to negotiation is not one that is position-based (i.e., insisting on a position while making concessions), but interest-based. In interest-based negotiations, you help your clients achieve the best result possible in a way that preserves their integrity and addresses their interests and goals.

### 1. Establish your credibility and that of your client

Counsel often overstate or understate the value of the deal to bluff the other side into making greater concessions. Is that ethical or recommended? The model rules recognize the need for zealous advocacy and specifically permit the lawyer to bluff about the value of the subject of a transaction in negotiations

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(Comment 2 of Model Rule 4.1). So, is bluffing recommended? Not to the extent that it compromises your clients' integrity and jeopardizes their ability to close the deal. If so, the conduct could be grounds for legal-malpractice claims or discipline under Model Rule 1.2 (lack of competence in representation).

### 2. Consider sharing negative information

Every lawyer's instinct is to protect information that potentially decreases the value of

the deal for a client, particularly if there is no law that requires disclosure. As an example, selling a piece of real estate where a violent crime took place without disclosing it is not necessarily unlawful (different states have different disclosure requirements), but is it ethical or advisable? Although lawyers generally are not obligated to make affirmative disclosures of fact when dealing with non-clients, such an omission is not necessarily

advisable. It could produce an emotional backlash after the sale that results in litigation (regardless of the merits), the cost of which could easily eat up any profit from the sale. The client may benefit in the long run from a more candid negotiation.

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**3. Determine your clients' interests and goals**

The only way to know your clients' interests and goals is to ask questions and actively listen. Active listening is a technique that demonstrates an understanding of what is being said by summarizing what you hear and making sure you have it right. Exploring and understanding your clients' interests can help them creatively think through their alternatives, and it will give them more power to decide whether or how to close a deal.

Your clients' interests may change during the negotiation; take breaks as needed to consult privately with them during the process.

**4. Discourage your clients from coming to the table with a bottom line**

Before entering into a negotiation, help your clients determine their bargaining zone,

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but discourage a firm bottom line. You most likely will learn things about the deal, the other side, or your client during the negotiation that could make you re-think any predetermined bottom line. A better approach would be to come to the table with a commitment to stay open to exploring all options throughout the entire process, and save your client from the humiliation of having to “re-draw” a line in the sand.

**5. Make as many concessions as you can**

Think through what is really important and what is not. From the very start, strategically make concessions on what you can live without throughout the process. Show open-mindedness and generosity. Offer to host the negotiation and to bring in lunch. Or let the other side host if they want. If you decide to engage the assistance of a neutral third party, agree to use the person recommended by the other side (unless you have legitimate grounds to reject their choice). The more you give, the more you invite the other side to give back.

**6. Develop a rapport with the other side**

Building trust and developing a rapport with the other side are essential. To start, it fosters a positive, friendly environment, and, simply stated, people are more likely to give things to people they like. Additionally, a rapport with the other side will help your client better understand what the other side needs to reach an agreement. Finally, by listening to them, you increase the chances that they will reciprocate and listen to your client as well.

**7. Understand the basis for the proposals**

The more you understand the basis for each proposal, the more you can explore creative options. Just as with your own client, ask the other side questions to determine what is behind their proposal. There is a rea-

son why people get stuck on certain numbers. Is it possible that the number is based on another condition that can be tweaked? Even better, the issue might be resolved with a solution that also helps your client.

**8. Be respectful and don't bully**

Even if the going gets tough, show good faith and respect, and do not make threats. It is not ethical to make threats to coerce another side to make a concession. Further, as a practical matter, bullying most likely will derail the negotiation by causing the other side to become defensive and look for ways to fight back.

**9. Let your clients make the deal they want**

One of the most unfortunate mistakes lawyers make in negotiation is getting in the way of their clients' goals by pushing for the deal that they think is right. Remember: The deal is not about the lawyer; it is about the client. Understand your clients' real interests and goals and support them in reaching the agreement that they really want, even if it turns out that the one initially envisioned has evolved into something new. Your clients may value certain issues differently than you would, and they might have reasons to want to make certain concessions. Understand their reasons and interests, and help them find ways to accommodate them.

**10. Stay optimistic**

It is rarely apparent at the start of a negotiation how, when or even whether it will be resolved. It is never over until the parties say they are done and have left. Stay optimistic and do not lose sight of your clients' goals: As long as the parties are at the table, they are willing to continue to work. Exploit that willingness by staying flexible and understanding the interests of both sides, and you may find a solution that was not previously considered and works for everyone. **RILW**