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THE ART OF NEGOTIATING*

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I. INTRODUCTION

Negotiating is an art. A negotiation is a planned effort to achieve something almost as elusive as beauty—mutual agreement. In a commercial context, the skilled negotiator envisions the deal as painters contemplate the images of their paintings. The final outcome of each artistic endeavor is the result of applied creativity. A painter employs brushes and paints on canvas. The negotiator's tools are speech, prose, humor, and body language, resulting in mechanically applied text on paper.

An element common to all types of art is the intellect—an ability to understand the medium and creatively to shape the form. Early in their careers, painters learn certain basic concepts relating to color, shapes, and sizes, as well as how to apply such concepts imaginatively to their work. They begin with primary colors; they learn to blend them; and they determine which combinations work best for them. Similarly, negotiators develop basic skills. They learn to refine them, and they determine how to employ them to make a deal. Note that people possess such skills at various levels and that we are speaking of art, not science. Each negotiation—like each work of art—takes on a different character. Just as each artist is influenced and inspired by events, places, people, and cultures, so is each negotiator. In this article, we identify the negotiator's basic skills, suggest how to develop them, and illustrate their application.

II. SKILLS OF A NEGOTIATOR

A. *Understand Your Client*

In the United States, attorneys, as agents of their clients, generally play an important role in the negotiation of business deals. For an attorney to negotiate a deal effectively for or with a client, the attorney must understand the client's goals, requirements, and business. The attorney should comprehend the client's priorities, including the elements which the client is willing to concede and those that the client considers vital.

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* This article is based on the practical experiences of the authors.

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Your role as the attorney negotiating on behalf of your client will be easier if you have knowledgeable clients who clearly know what they want to achieve. Part of your task is to help your clients articulate, enumerate, and prioritize their objectives. In doing this, you help them and, at the same time, you prepare yourself. In the course of assisting your clients, you help them on at least five fronts: (1) you attempt to provide them with information; (2) you analyze the "legal context" of the transaction; (3) you give them the benefit of your experience in dealing with the issues at hand; (4) you help them explore their options; and (5) as devil's advocate, you challenge their assumptions and positions. It is not your business to make decisions for your client; the client, not the lawyer, "calls the shots." Your client sees the transaction in a unique light—through the client's knowledge of the facts, business sense, experience, sense of acceptable risk, and relationship with the other side. Only the client can decide whether the risks are worthwhile and acceptable. If well advised, the client will decide what is important to both sides and which points are "dealbreakers."

B. *Know the Law and Your Client's Facts*

Your knowledge will have a direct impact on your negotiating abilities. Here, as elsewhere, knowledge is power. Your knowledge of statutes and of the common law is indispensable and is one of the most important contributions you will make to the negotiating process. Although it is useful to be able to write clearly, it is essential to know how your words will be interpreted by a court should a dispute arise. Your knowledge of both the law's substantive terms and the interpretation courts have given those terms directly influences your ability to draft a contract. For example, very often it is not necessary to negotiate or to draft matters clearly covered by applicable law. In New York, landlords need not "beat to death" their insistence on absolute discretion in granting or in withholding consent to assignment by their commercial tenants of a leasehold interest. It is enough to say that their consent is required. Here, the law is clear,[1] and resources would be squandered if too much effort was expended to negotiate or to draft this point. Is a landlord, however,

1. *See* Mann Theatres Corp. v. Mid-Island Shopping Plaza Co., 464 N.Y.S.2d 793, 797-98 (App. Div. 1983), *aff'd*, 468 N.E.2d 51 (N.Y. 1984):

> It scarcely bears repetition to note that in the absence of statute or an express restriction in a lease, a tenant has the unrestricted right to assign or sublet . . . . But where the lease contains an express provision restricting assignment or subletting without the landlord's consent, the landlord may arbitrarily refuse consent for any or for no reason . . . , unless the provision requires that consent not be unreasonably withheld.

Id.

required to mitigate a tenant's damages if the latter defaults on the lease? Here, the law is not clear.[2] In such a context, it is worth everyone's resources to delineate the parties' respective rights and obligations carefully. In the course of your practice, you will learn what must be said and what is better left unsaid.

Your knowledge of the *facts* of a deal is equally essential. You must know the context within which the law will apply, the way that issues will arise, and, indeed, which issues are likely to arise. Your client is not interested in academic dissertations. For example, an attorney representing a purchaser of a building should be so familiar with the building itself—through having examined it, studied inspection reports, met with management personnel, etc.—that the attorney can anticipate matters requiring representations, answers, and particular agreements.

In addition, your knowledge of your client's business goes hand-in-hand with your understanding of the facts. An attorney representing a purchaser of a building must understand what the client finds interesting and what the client expects to achieve. The attorney must know how the client intends to finance the purchase, what the client intends to do with the property,[3] and how the client intends to make a profit.[4] Your knowledge of your client's business will allow you to shape a deal to meet the client's needs. For example, if the purchaser plans to syndicate the deal, the transaction should have a structure, and the contract should contain certain conditions that facilitate syndication. This purchaser's attorney should also understand income-tax law, securities law, partnership law, and generally keep in mind the practical reality of the situation.

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2. In the residential leasehold context, New York courts give inconsistent holdings regarding the landlord's duty to mitigate. *Compare* Parkwood Realty Co. v. Marcano, 353 N.Y.S.2d 623 (Civ. Ct. 1974) (imposing a duty to mitigate) *with* Centurian Dev. Ltd. v. Kenford Co., Inc., 400 N.Y.S.2d 263 (App. Div. 1977) (refusing to impose such a duty), *appeal dismissed*, 408 N.Y.S.2d 507 (1978). *See generally* Thomas A. Lucarelli, Note, *Application of the Avoidable Consequence Rule to the Residential Leasehold Agreement*, 57 FORDHAM L. REV. 425, 428 n.18 (1988) (discussing the present confusion among New York courts regarding mitigation of damages following default of residential leases); Rubin v. Dondysh, 549 N.Y.S.2d 579 (Civ. Ct. 1989) (collecting cases), *rev'd*, 588 N.Y.S.2d 504 (1991).

In the commercial leasehold context, the law is a bit more clear. *See* Syndicate Bldg. Corp. v. Lorber, 512 N.Y.S.2d 674 (App. Div. 1987) (holding that commercial landlord has no duty to mitigate, and collecting cases). *But see* 437 Madison Ave. Assocs. v. A.T. Kearney, Inc., 466 N.Y.S.2d 931 (Civ. Ct. 1983) (imposing a duty to mitigate), *aff'd*, 488 N.Y.S.2d 950 (Sup. Ct. 1985).

3. E.g., should improvements be demolished? Should a rental apartment building be converted into condominium ownership?

4. E.g., should the client lease and manage the building or "flip" the contract or property to someone else?

C. *Reputation*

Your reputation will play a role in your ability to negotiate effectively. You will become known in the legal and business communities by the way you handle a deal and by your knowledge or lack of it. You must expect to deal with some of the same people with whom you have negotiated previously or with people who have heard about you. A reputation as a strong negotiator can give you increased power before you come to the table. And once you have established a good reputation, it is important to preserve that reputation lest you dissipate one of your key assets. On the other hand, you should never underestimate your opponent, whatever his or her reputation may be. Preconceived notions about your opponent based on the opinions of others can prove very dangerous. They may lead you to fail to perceive opportunities when you can gain significant advantages in the deal, or—worse—to assume inappropriately aggressive stances, thus killing the deal.

D. *Rapport*

Rapport plays a role in all negotiations. Going into a negotiation, your goal should be to establish meaningful communication in an atmosphere in which people are willing to resolve differences. It is often wise to make people comfortable in discussing the issues. The nature of your relationship with your opponent will not necessarily be friendly, but it should be marked by trust and confidence. You want the other side to feel that it makes sense to pursue the deal and to work *with* you rather than *against* you.

The personality of each negotiator affects the rapport among the negotiating parties. Depending on the setting of the negotiation, the type of deal, your bargaining power, and your opponent, you may want to emphasize certain characteristics and to play down others. For example, a lender's attorney with a "stiff" attitude will not kill a mortgage deal if the borrower can only get financing from that lender. On the other hand, a borrower's attorney who seems evasive, untrustworthy, or too aggressive may find the deal evaporate in his or her hands. In addition, you may want to shift some of the burden of negotiating to your associate, depending on the circumstances and on the type of transaction. If your opponent appears inexperienced or insecure, it may be a good idea to designate someone from your side whose credentials are less obvious to negotiate with the opponent to alleviate the opponent's defensiveness. Remember, the object is not to put on a brilliant performance, but to be effective.

To some degree, all attorneys are "actors." Most attorneys have diverse experiences and have represented landlords as well as tenants, lenders as well as borrowers, and sellers as well as purchasers. As a

result, they know how to argue both sides of each question. While the ability to articulate your thoughts and to persuade the other side is essential, it is perhaps more important to be able to understand your opponent's objectives and requirements. This enables you to plan your overall negotiating strategy. In addition, you should expect that at times there will be misunderstandings and difficult discussions. Charm and a sense of humor—in addition to perspective, a sense of priorities and of balance, and a thorough knowledge of the law—will help you overcome any rough spots.

One of the most important attributes a negotiator should have is the ability to bargain and to strategically compromise different points in a manner that promotes the negotiation. As discussed earlier, the more information you have, the better your ability will be to compromise strategically. Although to some extent this seems to be an innate talent, it can certainly be developed and refined through years of observing others and of experiencing your own negotiations.

E. *Attitude*

A good reputation, experience, prestige, presumed power, knowledge, or your client's importance may cause you to "bully" or intimidate the attorney on the other side. Although many attorneys use this tactic, a common defect of this approach is that it may cause the other side to be defensive and distrustful. This approach may have an even more negative effect if the other side refuses to consider the deal because they have to negotiate with what they believe is an unreasonable attorney. In such a situation, if you are a "bully," then even if your client loves you, chances are that the client will still want to proceed with the deal and will hire a different attorney. Obviously, this is a result you will want to avoid.

To be a successful dealmaker, you should inspire people to trust you and rely upon what you say. The development of a relationship of trust requires that the documents that follow any phase of the negotiation accurately reflect the agreements that the parties have made. It is inexcusable if, for example, after months of negotiating, attorneys prepare "final" documents for execution that change, or covertly add to, the provisions that the parties have already agreed upon. If the documents must go beyond the agreement as it stands, an explanation is necessary. Otherwise, a time will come when no one will want to negotiate with you (much less have you represent them), except those you would rather not represent.

Taking advantage of mistakes made by your opponent is also a bad idea. For business people, it is often an acceptable way to get ahead. For example, your client, who is buying a building, is unlikely to tell the seller that the leasing market is better than the seller thought and that the purchase price is on the low side. Attorneys, however, are in a different

position. As agents, they should not take advantage of their opponents' mistakes because they will never build the relationship of trust and confidence necessary to effect a deal. Generally, however, an attorney does not have an obligation to educate the other attorney as to the law, or to point out perceived errors of judgment. If, however, you know that the attorney said something he or she could not have meant, or failed to draft something of importance to him or her through mere inadvertence, you will do your client harm by not bringing the error to the other side's attention.

III. APPLICATION OF SKILLS

Now that we have described some of the attributes of a successful negotiator, let's go to the table and see how they are applied.

A. *Who Will Negotiate for Your Client and When*

Prior to commencing a negotiation, your client should decide who, between the two of you, will do the actual negotiating. The client may decide that he or she wants to negotiate certain points, usually only the basic business terms, in a separate meeting with the business people on the other side, and that the attorneys should negotiate all of the other points. On the other hand, the client may decide to negotiate all of the points of the deal side by side with you. The latter approach proves to be very effective after you have represented your client in several deals and have developed a style that complements the client's own. The client may also choose to take the "good guy/bad guy" approach, allowing one party to play an understanding and agreeable role and allowing the other party to play a tough and inflexible role. Sometimes this approach may be taken inadvertently because of your client's or your own personality. You should note that your opponents may take offense to this approach, rendering the "bad guy" ineffective; then again, they may not.

B. *Rhythm and Length*

Each negotiation has a particular rhythm. It is in your favor if you can bang the drum and set the beat by which issues are raised. In most cases, it is best to start the negotiation slowly in terms of raising difficult issues, to prove to the other side that you are a reasonable person. Meaningful discussion in the initial meetings will often lead to a smooth long-term negotiation. Sometimes, however, this approach is utilized for different motives. For example, if you have never dealt with your opponent, you may choose to reserve discussion on problematic, albeit important, issues and initially raise points that can be resolved easily to build a positive relationship with your opponent. This same approach may also be taken

if you have previously dealt with the other side and you know how difficult they are. If you are dealing with obstinate people and you raise the problematic issues first, the other side may leave the negotiation at your first meeting or fight you on every point. In either case, you may never have the opportunity to establish a sturdy foundation from which to continue the negotiations.

Your determination of when to raise certain issues often depends on who you are dealing with and the surrounding circumstances. If you were shopping for a rug in a Turkish bazaar, a good strategy might be to look at thirty-seven rugs in which you have no real interest, negotiate hard for two or three of those rugs and, as you start to walk away empty-handed, nonchalantly ask the exhausted vendor the cost of the rug you happen to see as you are walking away (the only rug you really wanted anyway). In most cases, however, the timing naturally flows from the discussion at hand.

The rhythm and length of a negotiation are interconnected factors. The fear always exists that a lengthy negotiation may result in a breakdown of communication between the parties. Delays resulting from redrafting documents or in setting up meetings may have the inadvertent effect of killing a deal because the parties have too much time to think, to worry, or to find another deal. In addition, the longer it takes to close the deal, the greater the risk that unanticipated negative events will intervene. Many deals that were negotiated for months, and even years, fell apart in one day following the October 1987 market crash.[5] An ability to proceed with due diligence, to respond rapidly, to create a sense of direction and a promise of fast agreement allows you to corner the other side and to close the doors of escape. Of course, deliberate delay when the other side is anxious is also a strategy. Delaying a negotiation can be used to your advantage if you are waiting for certain events to occur or for certain factors to reveal themselves (for example, a change in interest rates). But, in such a case, be sure you know who wants the deal the most.

C. *Location*

The location of the negotiation may also affect the rhythm of the negotiation. The Turkish bazaar strategy described above obviously would not be useful if you were shopping in a high-class department store in New York City. Similarly, although many New York real estate

5. *See* Sherry R. Sontag, *Out-Clauses Revisited: Can a Market Crash Be an "Act of God"?*, NAT'L L.J., Dec. 14, 1987, at 1 (noting confusion among parties to underwriting agreements and tender offers as to the meaning of standard "out" clauses—such as "force majeure" or "material adverse change in market conditions"—in light of a 500-point drop in Dow Jones Industrial Average of Oct. 19, 1987).

developers think that a deal should be made at the first meeting or not at all, a deal being negotiated in Saudi Arabia, no matter how well matched to the parties' needs, may require many negotiating sessions. Few issues can be raised, much less resolved, in each session when difficulties in communication and differences in custom are present.

D. *Which Side Will Lead, and When*

Determining which side will lead a negotiation and set its framework may affect the control of the deal. Taking control of a negotiation may seem like a good idea because it enables you to define the issues, thus shifting the onus onto the other side to come up with counterproposals. In certain situations, however, it may actually be better for you to let the other side lead, particularly if you are ignorant of its overall position. If you hear your opponent's position first, for example, it may reveal that the other side is willing to give you more than you had anticipated. In any case, it will give you a position from which to continue the negotiations. By using this approach you may also avoid the situation in which you lead with a point that your opponent will not or is not yet ready to concede—thus risking an early killing of the deal.

Leverage is a part of all negotiations. Usually one side will have more bargaining chips than the other and will seek to take advantage of that fact. For example, if you are acting as a lender providing financing for the development of an office building when such financing is scarce, you will use that leverage to structure the deal to your advantage. Leverage also influences the rhythm of a negotiation. In the landlord-tenant scenario, if the market has an abundance of leasable space, the landlord may choose to offer the tenant a "pre-negotiated" lease. Here, the landlord is telling the tenant that it has recognized the latter's points and has accommodated the tenant on such points to the extent acceptable to the landlord. The effect of this approach is to focus the negotiations on more important issues, as well as to make the landlord appear amenable to a deal. In a market with little space, however, a landlord may choose to capitalize on the situation by offering the tenant a "take-it-or-leave-it" lease and fighting them on every point, including more-or-less inconsequential ones.

E. *Drafting*

Taking control of a negotiation by controlling the drafting of documents is usually advantageous. Here again, you are building a framework within which the other side must work. One advantage of drafting a document is that you will discover the issues that have not been "thought through" at the negotiating table. The result of such a process is that you can formulate positions on these aspects and put them on the table in a form you prefer. Indeed, your client may reexamine whether the

client wants to do the deal at all unless certain issues can be resolved in the client's favor. Another advantage of control over the drafting is the power it gives you to influence the pace at which the deal proceeds.

On the other hand, in certain circumstances it may advance the progress of the negotiation if you allow the other side to present you with what should be a mutually acceptable document, unless you anticipate that the other side will be obstinate with respect to all or most of the issues. One of the disadvantages of drafting a document is that the language of the document is often construed against its drafter. Also, as we mentioned earlier, in certain cases you may want to find out your opponent's initial position by having the opponent draft the document.

The circumstances of a transaction frequently dictate the appropriate party to draft a document. The seller of a building, for example, possesses information relating to the building and is therefore the appropriate party to prepare the contract of sale. In addition, depending on the side of the deal that you are on, it may or may not be pivotal to control the drafting of the document. A property seller will want control over the drafting of the contract because the typical purchaser will insist on many representations and covenants concerning the property, whereas usually the purchaser's only important obligation will be to pay the purchase price.

In certain situations, the other side will attempt to wrest control of the drafting by giving you a document that they have prepared, instead of commenting on the document you have prepared. For example, in a leasing scenario the landlord's attorneys usually draft the lease. A franchise tenant that has a strong bargaining position and a legitimate need to have all of its leases on a common form for financing and operational purposes, however, is likely to prepare its own lease.

F. *When to Postpone Deal Points and When Not To*

At the negotiating table, it is best not to defer resolution of points, unless the other side has reserved decision on the same issues. Otherwise, the negotiations may go on forever. Ideally, issues raised in later negotiations should be issues that require revisitation because of agreed-upon changes in the deal, new issues that have arisen or that have taken on new importance as a result of the development of the deal, or issues that were inadvertently overlooked because they were not thought out completely. Then again, sometimes a client wants the attorney to handle the first meeting alone and to negotiate a difficult point in order to glean insight from the discussion and then reserve decision on the point. This permits the client either to negotiate beyond what the attorney negotiated or to show that the client is a true statesperson and can give up points that the attorney did not or could not.

Some people use this technique of renegotiating points to take what we call a "second bite of the apple." At the start of a negotiation, you may decide to save certain issues for discussion at later meetings for the reasons we discussed earlier. The danger inherent in the use of such a tactic is that if your opponent determines that you saved a crucial issue in bad faith, it may kill the deal, resulting in a waste of time and of money. When your opponent takes a second bite of the apple, you are likely to be annoyed; remember that when you try it.

G. *Cultural Considerations*

Negotiation is often affected by the intercultural context of the deal. In light of the recent surge in investment by foreigners in the United States,[6] cultural considerations promise to be important for some time to come. Each culture has its unique mode of communication. Whether the negotiation takes place in the foreign country or in the United States, you will be at a disadvantage if you do not understand the culture of the other party and the effect it may have on the course of the negotiations. Dealing with another culture requires you to understand and, to some extent, to accept some of the customs of that culture.

One difficulty that often arises in negotiations is the problem of communication—the difference in spoken languages, expressions, and body language. A deal you are negotiating may be at the mercy of a translator who is unable to communicate well. Even the most astute translator may have difficulty conveying thoughts that have nuances that cannot easily be translated into the other language. Basic English words do not have the same meaning in translation. For example, the word *value* is frequently translated into the Russian *цена*, which usually means *price* or *cost*.[7] As a result, it may be hard for Americans to elicit information concerning the underlying value of a project, as opposed to its cost in dollars. The language barrier also affects the rhythm of the negotiation by taking longer to convey thoughts and for others to understand your points.

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6. *See* Tom Redburn, *Difference Between "Us" and "Them" Blurs in a Global Economy*, L.A. TIMES, Aug. 8, 1989, § 4, at 1, 7 (stating that between 1980 and 1988 foreign investment in U.S. plant and equipment increased from $54 to $262 billion, while foreign investment in U.S. corporate debt and equity increased from $53 to $345 billion). *But see* John Burgess & Steven Pearlstein, *Foreign Investment in U.S. Firms, Land Fell in 1991: Recession Blamed for 66% Decline; Treasury Securities Also Find Fewer Buyers Abroad*, WASH. POST, June 10, 1992, at F1 (noting a sharp decline in foreign investment in the United States).

7. *See* RUSSIAN-ENGLISH DICTIONARY 694 (O.S. Akhmanova ed., 13th ed. 1985) (giving the English word *price* as the primary definition of the Russian word *цена* and listing the English words *worth* and *value* as only figurative translations).

In addition, one must learn what certain body language means in another culture.[8]

To negotiate successfully in an intercultural context, you should understand the precise role that negotiation plays in the foreign culture and how decisions are made. Americans negotiating with Japanese businessmen must understand that the Japanese decision-making process is an inherent part of the Japanese corporate structure.[9] Unlike Americans, Japanese do not usually announce their authority. Often, one is not sure exactly who is making the decisions. This is because the Japanese decision-making process involves layers of staged decision makers and agreement by consensus, including people not present at the meetings.[10] The purpose of a negotiation to the Japanese is not to resolve issues but to *understand* them—and to enable the people in attendance to convey the results of the meetings to their superiors.[11]

Another thought to keep in mind is the fact that the Japanese are very relationship-oriented.[12] To gain the trust and confidence of your Japanese counterparts, you should pay particular attention to the cultivation of

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8. *See* David J. McIntyre, *When Your National Language Is Just Another Language*, COMM. WORLD, May 1991, at 18 (discussing the pitfalls of negotiating in another language and the ways businesses can alleviate the problem).

9. *See* ROSALIE L. TUNG, BUSINESS NEGOTIATIONS WITH THE JAPANESE 48 (1984) (discussing how Japanese negotiators must often consult with the government or other firms in the industry through the *kondankai*, or government-sanctioned committees comprising representatives from government, finance, and industry); Karel G. van Wolferen, *The Japan Problem*, 65 FOREIGN AFFAIRS 288 (1986) (discussing key components of the Japanese political economy, including conflict avoidance, the union of public and private sectors, lack of central authority, and disperse power centers); *see generally* MARK ZIMMERMAN, HOW TO DO BUSINESS WITH THE JAPANESE 118-129 (1985) (relating the author's experiences with the cautious, indirect, and fastidious Japanese decision-making style).

10. *See* TUNG, *supra* note 9, at 47 (discussing the *ringi-sho*, or system under which proposals must be endorsed by all concerned individuals in a Japanese corporation).

11. *See id.*

12. *See* ZIMMERMAN, *supra* note 9, at 75-87 (discussing the absolute necessity of establishing *ningen kankei*, or long-term relations, before business may be conducted profitably among or with Japanese businesspeople); *see also* van Wolferen, *supra* note 9, at 302:

> In Japanese society . . . [t]here is no tradition of appealing to universal principles of using legal procedures to keep order in society. Individuals and groups accept their positions and their lot because a stronger power holds them in place . . . . The ins and outs of the grand balancing act among the semiautonomous components of the system are not finally determined by reason, but by power.

Id.

relationships with the individuals on the other side. You should scrupulously adhere to the formality of introductions and discourse.[13] Note, however, that often the relationships one develops with Japanese counterparts are usually purely business relationships.

Because respect and appearance are important aspects of Japanese culture, negotiation with Japanese should be conducted in a nonconfrontational manner. To say the least, an American developer's technique of making deals by projecting his or her power and decision-making abilities at a meeting in the form of a point-by-point, knock-down battle is an unavailing technique for negotiating with the Japanese.[14] During a negotiation, the Japanese are usually quiet listeners, and they may be insulted or offended by such American techniques.[15]

Negotiation with Russians takes on a different form. Here, the negotiation is viewed as a contest of intellect or a debating match[16] in which strict attention is paid to detail[17] and knowledge of facts. Because the Soviet Union has been a socialist country, negotiations conducted by individuals are frequently not profit-oriented, as is predominantly the case in the United States. Instead, they are driven by the participant's desire to

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13. *See* ZIMMERMAN, *supra* note 9, at 25-40 (detailing the essentials of proper social etiquette with Japanese businesspeople).

14. *See, e.g.*, Sergey Frank, *Avoiding the Pitfalls of Business Abroad*, SALES & MARKETING MGMT., Mar. 1992, at 48, 50 (examining the pitfalls in a hypothetical negotiating session with a Japanese business if carried on according to the standard American approach).

15. For an excellent discussion that relates the Japanese approach to negotiating with Americans to interrelated aspects of Japanese psychology, geography, history, economy, and political structure, see George Friedman & Meredith Lebard, *Irreconcilable Differences: The Future of the Rift*, PSYCHOL. TODAY, May 1992, at 48.

16. *See* RAYMOND F. SMITH, NEGOTIATING WITH THE SOVIETS 14 (1989):

> Russians frequently test one another in the early stages of a relationship. It is not uncommon for two Russians to get into an argument shortly after they have gotten to know one another. If both argue long and hard for their respective points of view, however the argument comes out, their friendship has the possibility of deepening. If, however, one gives in too easily, they are not likely ever to become friends. The winner will not respect the loser for having given in so readily. Perhaps more importantly, he will not trust him. . . . [W]hat seems in private conversation to an American to be a reasonable respect for the other person's opinion, may appear to a Russian as, at best, wishy-washy, at worst, contemptible.

Id.

17. *See id.* at 56 (summarizing the author's as well as others' experiences negotiating with Soviets and tracing the Russian capability for negotiations "of the most painstaking and detailed kind" to a "belief among Soviets negotiators that form affects substance, or at least that it can affect it").

achieve a status as a powerful negotiator.[18] Whereas Americans measure their success by monetary gain, the Russians often perceive success in terms of power and position, with politics playing a very important role.[19]

As with Japanese, appearances are important to Russians, but for different reasons. In this century, Russians have not been a commercial people, and with the recent reforms in the Soviet Union, they are testing their wings.[20] As a result, during negotiations Russians often conduct themselves in a guarded manner, careful not to permit any lack of experience to show. The result is often a long, drawn-out negotiation, notwithstanding initial agreement on virtually all of the issues. Again, decisions by Russian negotiators will often be the result of an involved thought process in which all points are exhaustively considered.

As with Japanese participants, your relationship with your Russian counterpart is important. Russians often distrust Westerners. It is therefore important to form a relationship with your Russian counterpart that creates a justified feeling of trust and a sense that you share common goals. It is also important that the Russians sense that you won't take advantage of their inexperience or current problems. Finally, the relationship that you form with your Russian counterpart is often a warm and friendly one, and not necessarily all business.

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18. *See id.* at 24:

> [A]ny U.S. negotiator, at any level, from the president on down, should expect, particularly if new or in the early stages of a negotiation, to be tested by that person's Soviet counterpart. In any negotiation with a Soviet, the American negotiator should be aware that there may be a hidden agenda. Your Soviet counterpart may ostensibly be dealing with the issues at hand, but beneath that he may be trying to determine your seriousness, your determination, whether the relationship is going to be one of two professionals dealing with one another as equals, or whether one is going to dominate the other.

Id. See generally id. at 17-24 (discussing the Russian insistence on observing the hierarchical dimensions of any relationship).

19. *See id.* at 91 (tracing the Russian preoccupation with power and position to long-established patterns in Russian society and noting that, while in America power is achieved through wealth, in Russia power is the *means* of acquiring material and other items in a society of scarcity).

20. For an account of the confusion and uproar surrounding the arrival of market capitalism in the states of the former Soviet Union, and the absence of legal norms to guide commercial development, see Andrew Kopkind, *What Is to Be Done?: From Russia With Love and Squalor*, 256 NATION 44 (1993).

H. *"Winning"*

Who "wins" a negotiation is a question of objectives. The winner of a negotiation is the one who achieves what he or she wants from it. A truly successful negotiation is one in which all the parties are satisfied that they have achieved their important objectives. Thus, everyone can "win."

It is important to note, however, that "winning" requires you to set priorities. As in life, people do not get everything they want out of a negotiation, but you can get the combination of things that are truly important to you in the order you desire. If a deal fails, the person who had more to lose is the "loser," and if a deal succeeds, the person who needed it most is the "winner," because that person could least afford to have it fail. Although you should take pains to understand the objectives of your opponent, whether or not your opponent has achieved, or failed to achieve, *his* or *her* objectives is immaterial if you have achieved *yours*.[21] A truly successful negotiation is one in which all the parties feel satisfied that they have achieved their important objectives.

IV. CONCLUSION

The true test of whether you, as an attorney, are a successful negotiator is whether you have the ability to effect transactions. If you are good, you will be able to effect a high percentage of your transactions. If you are *really* good, you will effect transactions that others thought could not have been done. The ability to resolve differences among the parties creatively and in a manner that advances your client's goals is the ultimate measure of your negotiating abilities.

There is no sure-fire formula to follow to be a successful negotiator. It is a combination of different factors, including luck. We have attempted to explain to you some of the skills that you, as an attorney, may want to develop. The more you read, observe, and experience, the more astute a negotiator you will become.

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21. Winning a negotiation is not a contest of egos. The winner of a negotiation is not measured by how much one bullied the other side or proved one's intellect. For example, if you think a building is worth $1,000,000 and you negotiate to buy it for that amount, you should be satisfied, although your opponent may think the building is worth less. After all, this is the way that transactions occur—because one side thinks it is doing better than the other. A buyer of a building believes that if the buyer owned the building, he or she would not sell it for the price at which it was purchased; and the seller of a building may believe that if the buyer is willing to pay the price for the building, it is worthwhile for the seller to sell it.