

A NEGOTIATOR'S GUIDE

a guide for Ontario real estate agents

**JACK ZWICKER BA, LL.B, LL.M (ADR)
Barrister, Solicitor, mediator**

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AUTHOR'S PROFILE

Jack Zwicker, BA, LL.B, LL.M, has been a practising lawyer since 1976. He carries on a private law practice in Markham.

Jack has specialized in residential and commercial real estate law over the past twenty eight years. More recently, Jack has obtained Certificates from the Faculty of Law of the University of Windsor, at Windsor, Ontario in Introductory and Advanced, Alternative Dispute Resolution (ADR) and in June 2003 obtained his Masters of Laws Degree in Alternative Dispute Resolution, from Osgoode Hall Law School at Toronto.

For six years, Jack was a lecturer in real estate law at Centennial and Seneca Community Colleges in Toronto.

Jack is a seasoned professional in the practice of real estate law and combines writing and teaching using a 'workshop format' geared to the needs of the groups with which he works. Jack also teaches three of RECO's courses entitled *Legal Protection; Beyond Powers of Sale, and Facilitating Negotiation*. Jack acts as both a trainer and coach to private sector clients requiring assistance with their negotiations and also acts as a mediator and arbitrator.

With his many years of expertise as a lawyer and negotiator specializing in real estate transactions, and his active role as a facilitator and writer in this field, Jack is held in high esteem by his peers.

LEARNING OBJECTIVES

This guide will help you,

- ✓ understand the difference between what a client *needs* and what he *wants*
- ✓ understand the importance of learning whether another agent or his client is a *soft bargainer* or a *hard bargainer*
- ✓ understand how a *soft bargainer* should respond to a *hard bargainer*
- ✓ understand the need for detailed preparation before any formal negotiation begins
- ✓ understand how to extract clients' real needs from the things they say that they want
- ✓ understand the importance of locating a zone for possible agreement (*ZOPA*) and measure the cost of any agreement against the costs of other alternatives
- ✓ understand how to 'reframe' needs to assist clients in understanding their common interests
- ✓ improve your negotiating skills by learning how to narrow differences by emphasizing common interests
- ✓ learn how to build trust by getting clients to make achievable commitments
- ✓ learn how to test commitments
- ✓ learn how to create disincentives to break commitments

SOME KEY DEFINITIONS

Issues: the matters which require resolution in order for a deal to be made.

Needs/Interests: a person's financial and/or psychological requirements.

Common Interests: financial and/or psychological requirements which are shared by parties in negotiation.

Interest-based negotiations: a negotiating process which seeks mutual gain by meeting mutual needs.

Positional bargaining: an adversarial approach which depends on the use of hard bargaining to extract advantage for one side only.

Hard bargainer: a person who is unwilling to consider another persons' needs and who is concerned primarily with his own gains.

Soft bargainer: a person who is willing to consider the other persons' needs and who is concerned with achieving mutual gain.

Preparation: the fact gathering that needs to be done before undertaking formal negotiations.

ZOPA: The 'zone for possible agreement' or middle ground where common Interests line up allowing for commitments based on mutual gain.

Reframing: a questioning process which assists negotiators in extracting a person's real needs and in determining the extent to which common interests exist.

BATNA: better alternatives to a negotiated agreement.

Workable Options: the terms and conditions which are most likely to work.

Introduction

From the time we are small, we negotiate. Whether our negotiations are with our parents, siblings, friends, teachers or co-workers, we constantly seek to have others meet our needs by offering to do things for them. Whether we consciously realize it or not, every time that we engage in a discussion or in behaviours which are calculated to get our needs met, we are negotiating!

The purpose of this course is assist you in sharpening your negotiating skills. In preparing these materials special care has been taken to provide you with typical examples of negotiations between real estate agents and their own clients, and among real estate agents. These examples are designed to provide you with both a theoretical understanding of the reasons for conflict, and of the practical means of successfully resolving conflict. It is not the purpose of this course to provide any guidance regarding the legal and/or ethical obligations imposed by the Real Estate and Business Brokers Act, [REBBA] and applicable regulations, and by the RECO Code of Ethics and agency codes. In designing these materials special care has been taken to acknowledge the unique nature of the relationship between agent and client which most often eliminates the opportunity for traditional, face to face negotiations.

The purpose of this course then is to help you better understand the human dynamics involved in negotiation. Because successful negotiation is a life skill, it takes understanding, practice and reflection about the approaches which work best for you. It is up to each of you to determine the extent to which the skills taught in this course apply to your practice as a real estate professional.

PART I: Understanding Negotiation

Distinguishing Between 'Needs' and 'Wants' : Needs

In any set of negotiations, the parties to the negotiation have needs. All too often, we do not fully appreciate our needs. More often than not our needs are financial. However, they may also be psychological. For example, the need for respect, recognition, or status can be central to a particular negotiation apart from the need for money or property.

Whenever we do not take the time to examine our real needs, or to discover other's needs, we risk entering into negotiations based upon the exchange of *positions*. And positions express only what we want, and not what we really need. Every successful negotiation depends upon two things happening at the same time. Each person who negotiates must make an unselfish, reasoned attempt to work out the things which are important to him. He must also make an unselfish, reasoned attempt to work out the things which he believes are important to the other party.

The trick then is to engage in a critical analysis of what is really important to all of the negotiating parties.

Wants

When anyone undertakes to negotiate, he must confront the difference between what he 'needs' and what he 'wants'. All too often we confuse the things we need with the things we would like or 'want'. I may *want* a \$4,000.00 ROLEX watch. However, if my watch breaks and my objective is to have a reliable time piece, I do not *need* to spend \$4,000.00 to meet my objective.

A Practical Approach to Separating 'Needs' from 'Wants'

Because our 'wants' always exceed our 'needs', the question we have to ask is how we separate 'needs' from 'wants'. Let's take as our starting point your dealings as a listing agent with a client who is eager to list a property for sale. You meet with the client knowing that you have to come to agreement with the seller regarding the length of the listing; the commission you expect him to pay; and the asking price of the property.

Problem #1

Dealing With a Difficult Seller: Obtaining a Listing

Let's assume that in discussing a new listing with a potential client, the seller tells you that he wants to list his home for ninety days. Let's assume the property is located in an isolated, rural, sparsely populated area where the market is such that it presently takes an average of 180 days to move a property. Let's also assume that the seller who has no particular knowledge of the real estate market, or real estate practice, insists that the property be listed for a price that is \$200,000.00 higher than the average of all recent, comparable sales. Lastly, let's further assume that the seller is no rush to sell, is pleased with his present home, has not bought another home, and is in strong financial shape.

There are a few strategic steps you should follow when dealing with a 'difficult seller'.

Never confront the client head on.

You will quickly realize in dealing with a difficult client that he 'wants' what he 'wants'. You may feel at the outset that he is misinformed about market

conditions. If the client presents as a head strong, know-it-all, merely contradicting him and setting out the facts as you see them will not work. A good place to begin is with a discussions of the seller's 'need' to sell. A seller who does not 'need' to sell may not be *motivated* to accept any offer to purchase unless a spectacular offer happens to come along that is presented by a buyer who has very special needs, or a lack of knowledge of market conditions in the area in which the particular property is located.

I suggested that confronting a difficult client, head-to-head, with facts that contradict his assumptions about length of listing, and asking price will not likely work. More often than not, clients can be hard to work with owing as much to their *aggressive personalities*, as to a lack of good listening skills. Generally, aggressive people are also poor listeners. The difficult client does not 'intend' to be difficult. He comes across as difficult simply because 93% of the clients you are likely to ever deal with, have what conflict literature describes as 'co-operative personalities'. The remaining 7% have 'aggressive personalities'.

The typically 'aggressive personality' is a poor listener; a continuous talker who likes the sound of his own voice; tends to shout out others down; wants to make a quick deal; does not want to take the necessary time to provide or check information; is disinclined to let other takes time to fact check important information with others who are knowledgeable; and is disposed to threaten in order to get his way.

Get Information by Using Open-Ended Questions

When dealing with an aggressive client, you gain no advantage by mimicking his behaviour. Your purpose is to obtain a listing because you believe that you can work at successfully marketing the seller's property. And the way to approach a difficult seller is by asking him a series of 'open-ended' questions. An *open-ended question* is one which probes for information without suggesting any

desired response. A question that suggests the desired response is known as a '*closed question*'. Whenever you watch courtroom dramas like *Law and Order*, and observe the prosecutor cross-examining the accused by aggressively suggesting the answers he wants, you are being presented with an exercise in 'closed questioning'. Closed versus open questions are more likely to make others distrustful and hostile.

While this technique often works well in the courtroom where the cross-examining lawyer confronts a witness and has the right to compel him to answer questions, it is seldom useful in the business world.

When dealing with a difficult seller, approach your task as a problem solver. If the seller insists that the property be listed at twice its probable market price based on recent comparables, ask the seller a series of questions which are intended to probe the factual assumptions he may be making. For example, you might want to engage in the following discussion:

1) Ask the seller whether he is aware that of the most recent ten sales of similar homes in your neighbourhood, the highest price obtained was \$240,000.00? Show him the disclosed sale prices.

2) Ask for his reasons for believing that his property is likely to sell for so much more than any of these other homes?

3) If the seller tells you that he has done extensive renovations, and believes this makes the difference, you might ask him whether he is aware of any other homes in the neighbourhood where similar renovations were done, and whether any of these homes have recently sold. Proceed to ask him if he is aware of the sale prices for any such homes. Then show any disclosed sale prices to him. Perhaps the seller is unaware of some or all of these facts and is simply a wishful thinker.

4) If the seller persists in telling you that he absolutely must sell for \$400,000.00, despite your best efforts to inform him of the facts, there are two likely possibilities that you need to consider. One is that your potential client has an unstated agenda. If this is true, you need to continue to probe for information to determine whether you can help your client. The fact that the seller may have an unstated agenda does not *necessarily* make him an unmanageable client.

When clients persist in staking out unreasonable positions, it may be due to more than aggressive personality that they engage in adversarial behaviour. While some individuals are predisposed to argue with others, it is important to try to determine whether a seller who has trouble accepting reality faces a very real financial problem which he is not disclosing to you. For example, perhaps the seller is involved in a business transaction with a partner that is draining him financially or is involved in a messy divorce. His position regarding price may reflect fear or perhaps even desperation which has absolutely nothing to do with the current market for the home he wants to sell.

The 'Question-Answer' Approach

The open-ended questioning process I am recommending is really not all that difficult to perfect. It involves a sequence of questions that are not intended to corner or judge the client. They involve the kinds of questions that any friendly conversationalist should be able to engage in. Each open-ended question should elicit a factual response and each response should act as a springboard for the next open-ended question. Each question should be put in a friendly and sympathetic manner so as not to antagonize the seller. Assuming that the client is rational and motivated to sell, the open-ended question and answer approach should provide you with all of the information you need to guide your client.

Dealing With An Impossible Seller

On the other hand, let's assume that the seller is not only an annoyingly aggressive personality who just loves to scrap but also appears wholly unable to deal with reality and appears not to have an unstated agenda. You have two opposite choices.

Choice #1

You can *elect not to deal* with a client who acts as though he knows more than you do and absolutely refuses to accept advice. When you meet a new client and ask him for a listing, matters such as price, length of the listing and commission are all negotiable. If, in your view, the client appears not to negotiate in good faith, you are not required to spend your time and money on him. Remember, that as much as each of us sees a challenge as an opportunity to obtain a profitable result, a client who absolutely and irrationally will not accept advice, may not be a manageable client. Lying at the root of the problem is the client's 'need' or motivation to sell. The client described in Problem #1 at page 8 who 'wants' to sell without 'needing' to sell may be a client who is unlikely to accept any 'reasonable' offers unless one of those offers involves a spectacular price which is unsupported by recent comparable sales. A client who deals strictly by rolling the dice may win or lose. The odds in his favour are probably significantly less than even.

A potential client such as this will cost you time and resources which may be better spent on other clients who are manageable. The decision to deal with or to refuse to take a listing from this kind of client is personal. Viewed rationally, you may want to look at your schedule and consider whether other existing or potential client relationships are a 'better alternative', a better use of your time and resources. A better alternative to a poorly negotiated agreement with this

type of client [BATNA] is a good agreement with another client who is realistic and manageable. Remember negotiation involves choices and your final choices should *always* take your better or best alternatives into account.

Choice #2

Your opposite choice, is to plunge ahead with an unmanageable, and unmotivated client who may want to sell, while not 'needing' to sell. If you see this kind of client as a challenge whom you do not wish to cast off, be aware that you may be disappointed. You may spend time and resources that produce no results, nor the seller's gratitude. If you elect to take a listing at substantially over the current market for similar properties, you should be careful to limit the time and resources you spend so that you do not jeopardize your other listings or client relationships. Successful negotiators achieve good results when the parties to the negotiation are motivated. In other words, good deals are made when each side recognizes that it has to 'give' in order to 'get'. When one side plays the game of 'I win, you lose', the odds are heavily against success.

Working Out Needs : A Key Point

The most important point to remember about working out needs is that deals are made when *the parties mutual, reasonable needs are met*. What this means is that each party to a negotiation must concern himself as much with satisfying the other party's needs as with satisfying his own. In other words, to quote US business executive, networking guru, author and professor, Dr. Ivan Misener, "givers gain".

Problem #2

Dealing With a Difficult Client: The Fearful Buyer

Rob is interested in buying a small retail plaza. He has a stock portfolio which is not performing well and wants to withdraw about 1.2 million dollars and use it as equity to purchase a plaza. Rob has just suffered a major illness which has ended his ability to carry on his profession. He is very fearful of making a 'bad investment', as he no longer has the capacity to earn new income. He has already dealt with at least six listing agents and has allowed no fewer than three offers to expire due to concerns about existing leases, and vacancies. In one of these deals, the seller disclosed a retail store vacancy before an offer was made but did not volunteer until after accepting the offer that the particular vacancy had continued for two years. He contacts you and wants to make another offer to purchase. What approach would you make to the listing agent for financial information knowing that Rob is fearful and has a tendency to walk away?

Get to Really Know the Buyer

In dealing with any fearful client, it is important for you to *intimately* understand his needs. The fearful buyer is always a more difficult client to work with than the self-assured client who is a risk taker. The challenge for you is to clearly understand this buyer's needs so that when the right opportunity comes knocking, you are able to persuade him that the financial facts squarely meet those needs. The key question is, how do you recognize the right opportunity?

Get Critical Facts 'Before' Making An Offer

The difficult buyer has to be dealt with in much the same manner as the difficult seller. Since every successful negotiation directly depends upon meeting

as many of the seller's and the buyer's reasonable needs as possible, one of the factors which makes fearful buyers nervous and distrustful is negative information which is disclosed only after an offer is accepted, taking him by surprise. Fearful buyers are generally more risk averse. It is no surprise that negative disclosures, or disclosures that are inconsistent with information that is initially supplied can cause a fearful buyer to walk away from a conditional deal. One of best precautions you can take to retain a buyer's level of confidence in you, and in the deal, is to get vital information at the outset thereby eliminating the risk of surprise.

Get Information by Using 'Open-Ended' Questions

You need to deal with a difficult buyer in the same way as a difficult seller by using the 'open-ended question and answer' approach described earlier. The value of this approach lies in the fact that it is friendly, non-judgmental and is not intended to make the other person, whether the seller or his agent, hostile.

Problem #3

Dealing With A Buyer 'Impossible To Please'

Max wants to buy a home. He has already spoken with at least 6 other agents. He has not made any offer. He is very particular and difficult to pin down both with respect to the features of his 'ideal home' and the kind of neighbourhood into which he would like to move. He own a spacious, recently built, well-appointed home and lacks for nothing. You have shown him 50 homes and nothing seems to please him. What should you do?

Use Open- Ended Questions to Separate 'Needs' From 'Wants'

We previously looked at the approach you need to take in dealing with a seller who seems 'impossible' to deal with. The same logic applies to your dealings with 'impossible' buyers. Having shown 50 properties to him, without getting him to make an offer, you need to go back to first principles and ask yourself whether you have a clear understand of your buyer's 'needs'. We know that deals are made when 'needs' are met. The question you need to ask yourself is whether you have misunderstood one or more of the buyer's essential needs causing you to strike out. Again the open-ended question and answer approach works best in revisiting this issue.

If after revisiting this issue you still do not have a clear understanding of your client's needs, in the absence of miscommunication, it may just be that your client has no clearly defined needs. Remember the client who 'wants' something without 'needing' it, may be an impossible client to satisfy in which case your better or best alternative [BATNA] may lie in dealing with other clients. In any negotiation you have to do a cost-benefit analysis however basic it may be. You do not want to invest your time and resources where better income and cost-efficient alternatives are available to you.

PART II: PREPARING TO NEGOTIATE

Maintaining Client Trust:

Preparation Avoids Conflict and Surprise

As I suggested earlier, we often take negotiation for granted largely because we often negotiate subconsciously, without resorting to principle.

This kind of approach may work in very simple social or business situations and may not require any degree of prior preparation before negotiation begins. As the subject matter becomes more complex, early preparation becomes especially important.

Fact Gathering

I suggested in dealing with the 'fearful buyer' in problem #2 at page 15, why it is that fact gathering is vital to successful negotiations. The recommendation made does not apply merely to 'fearful buyers'. If we respect others' needs as we wish our own needs to be respected, it make sense that no one appreciates receiving false, misleading, or incomplete information. And seldom do people transacting business like surprises. Naturally, the degree to which you prepare will reflect the complexity of the transaction. When preparing for a negotiation, either with your own client or with another agent, remember that effective negotiators engage in *interactive dialogue*. This means that one talks and the other listens. And then they reverse roles. This is an essential part of the process of engaging in open-ended questions and answers.

If in dealing with another agent only one side prepares properly, one of two things is likely to happen. Either a lop-sided deal results which may not stand the test of time. Or the unprepared party will feel so overwhelmed that he cannot participate in the process. In other words, the probable outcome of poor advance preparation is either no deal at all, or a bad deal.

Building Trust is Like Walking Up Stairs

When dealing with potential clients, success directly depends not only upon your understanding their needs but also upon building trust and maintaining it. Every successful negotiation is based upon the following critical elements;

- l) Understanding that clients' essential needs are not merely financial in nature.

Often psychological factors such as 'fear' versus 'comfort' are the deal breakers which see clients walk away.

2) Clients who lack previous experience in real estate are likely to show higher levels of uncertainty due to their own lack of knowledge. Uncertainty usually expresses itself as fear when clients feel pressured to commit.

3) Trust must be earned and should never be taken for granted. Simply because a seller lists with you for the first time, or a buyer works with you for the first time, is no guarantee of a high level of initial trust, much less permanent trust. The level of a client's initial trust will obviously be higher when your name has been referred by a person whom a given client strongly trusts. However, this does not mean that the initial trust which your client has in you cannot decline or disappear, if your representation leaves him uncertain as to whether you have a clear understanding of all his 'needs'. The most important need is for relevant information which may have a direct impact on any decision to make an offer, or to proceed with it.

4) Even if a high level of 'agent-client' trust is present based upon successful, past dealings or strong recommendations from third parties who have already dealt with you, you need to assume that your client has absolutely no reason to trust a complete stranger with whom he has never previously dealt.

5) Building and maintaining trust in the other party to a transaction will directly depend upon your willingness to attend to your client's need to maintain his comfort level. Once again, this happens when the client's need for truthful and accurate information about the property and any important aspects of the transaction are satisfied.

6) Because there is no logical need for one stranger to trust another, building

trust and maintaining it directly depend on the extent to which sellers and buyers opposite needs are satisfied. And satisfying opposite needs is more likely to occur when needs are openly and completely discussed and clear and detailed agreements are reached to meet those needs. There is never any long term advantage for an agent to provide verbal assurance to a client about something which matters to him unless the other party to the transaction is prepared to make a written commitment.

Preparation Means Listing Issues

When dealing with more complex real estate transactions, it is especially important to make two *sets of lists* of all of the issues you expect to arise during any offer presentations. The reason that this is important is that very seldom will you engage in a traditional face-to-face negotiation with another agent and his client. As transactions grow more complex, and as sign backs potentially increase in number, you need to track the issues that matter to each party. As negotiations proceed clients may change positions regarding various issues. Opposite each issue, set out your clients' needs. In other words, ask yourself what your client 'needs' regarding each particular issue in order to make a deal. Again be realistic and remember successful negotiation is about meeting *reasonable and verifiable needs* and not about attacking the other side with a perfect wish list.

Once you and your client complete his list of issues and needs, try to get him to put himself in the shoes of the other party and make up two similar lists as though he were the other party. Be warned that this is probably the most difficult single exercise in preparing for a negotiation. Understanding the other party's reasonable needs is the springboard to your cobbling a deal together that allows both sides to satisfy their mutual needs.

Indirect Negotiations Eliminate Reliance on Body Language

It may come as surprise that only 30% of human communication is verbal. Body language accounts for the remainder. What this means is that the exercise of working out the other party's needs does not strictly depend upon words spoken, or faxes and e-mails sent. Because human communication often sees words mismatched with body language [the words say yes and the body language says no!], it is especially difficult for real estate agents to know for certain whether honest, accurate and complete information is received from another party.

Because traditional face-to-face negotiations are not the norm in real estate transactions, it is especially important for you to protect yourself against the risk of misreading another party's intentions by paying close attention to the need to *document* any matter which is important to your client. IN other words verifying facts is absolutely critical. The burden on real estate agents to meet client needs is so much higher than that on other professionals simply because you seldom have the opportunity to rely on the other party's body language.

Strategies for Dealing with a Hard Bargainer

We have already looked at the prototypical 'aggressive personality'. Aggressive personalities are also 'hard bagainers'. There are a number of things to understand before you map out your negotiating strategy with a hard bargainer. The first thing to understand is that if you, like 93% of those surveyed, have a co-operative personality, you don't need to imitate the other person. Conflict resolution studies involving negotiation between opposite personality types suggest that you are generally better off using a strategy which allows you to be yourself! It takes too much psychic energy to be something you are not and at the end of the day, good deals are based upon satisfying mutual needs. All the negotiating heat in the world is no substitute for light.

Eventually, the 'hard bargainer' has to come down to earth and deal with reality because no negotiation can succeed unless both sides are realistic. Without realism, no deal can provide an exchange of value that the parties perceive as fair.

Rather than being put off by a classic hard bargainer, try the following strategies. Allow him to voice as much as wants until he runs out of energy. Opera singers aside, most of us simply do not have the physical stamina to shout for very long. As he tires his volume will decrease to a more manageable level. When this happens, it's your turn to talk. Try moving to a neutral topic for a short while which may help to distract him. As he settles down, begin to deal with your issues. If you really want to take him by surprise, ask him what he needs before you deal with your own needs. By doing so you show empathy, and by showing empathy, even the crustiest negotiator will know that you are trying to meet his needs.

Be direct and tell him that you intend to verify any information he provides before you are in a position to commit to a possible agreement. And remember that in most markets there are usually alternatives. Before making any deal, shop the market and determine what alternatives are available so as to ensure that you are likely to make the best possible deal. Making the best deal when there are known alternatives is more than good common sense. It is evidence of solid preparation [fact checking] before making commitments.

As a matter of strategy, whenever you negotiate, you have two opposite choices. The first is to keep your cards close to your vest and not discuss your alternatives with the other party. The second, however, is to discuss those alternatives with the other party when circumstances dictate that that is the proper course. You will know from the context of your negotiations when to discuss your alternatives with the other party. And that will happen if the alternatives so favour you, that you feel empowered to use them as a bargaining

lever with the other side. But remember, an alternative empowers you in negotiation only if the facts that support it have been verified. An alternative is of no value if it is not factually verifiable.

Locating the ZOPA

In every negotiation there is a *zone for possible agreement*. Conflict resolution literature refers to this concept by the acronym ZOPA. For example, if a only one property is for sale on a particular street and fifteen buyers are interested in making an offer, the ZOPA will naturally move to the high end of fair market value. Indeed, in a strong sellers' market, fair market value may increase and the ZOPA along with it. However, in a strong buyers market, the ZOPA is likely to move to the lower end of fair market value and indeed fair market value may drop taking the low end of the ZOPA along with it.

The ZOPA need not be in the middle of the range between low end and high end. In a 'perfect world' where the financial ability of the buyer to pay and the need of the seller to sell are evenly matched, in the absence of any other inventory of homes for sale in the neighbourhood or other potential buyers, price should saw off down the middle. Since we do not live in a perfect world, the final price which the parties agree upon will reflect the extent to which one party's needs exceed the other's. In any negotiation, sawing price off down the middle, otherwise known as *splitting the difference* is not a rational basis for working out price. Disparity in economic need especially where one party senses it about another will directly influence price and other terms.

PART III : GETTING AGREEMENT

Narrowing Differences

As I suggested earlier successful negotiation requires mutual gain without which parties do not each make the best possible deal. The concept of mutual gain is based upon two elements. The first is that parties are less likely to come to agreement about anything unless there is something of value in the transaction for all sides. The second element is that having come to agreement, parties are less likely to look for reasons to break their commitments if they continue to feel that the deal they have made is fair for everyone. By its very nature, negotiation involves give and take and no side gets everything it wants. Since fairness is a relative concept which has nothing to do with perfection, it means that each side believes that its needs have been *reasonably* satisfied.

Once again, since it is the seller's and buyer's needs that must be satisfied for a deal to be made, it is vital at all times that those needs have a *rational* foundation. It is only when 'needs', both material and psychological, are examined using the question and answer approach discussed earlier that compromises between sellers and buyers become possible.

Typical Seller/Buyer Conflicts

1) Disagreements About Price: The Seller and Buyer are Far Apart

The seller owns a well appointed home with significant upgrades. There is a sellers' market in his community and the seller knows the recent comparables. The buyer really likes the seller's home and decides to make an offer which is at or below the low end of fair market value. You are the selling agent and want to keep your client's offer alive.

Your Strategies

Having qualified your buyer to purchase a home in the seller's price range, use the 'question and answer approach' and ask him why he wants to make

a low end offer. If his answer is that he wants to *test* the seller to see what happens, revisit the facts regarding current market conditions. If the market is a seller's market tell your client that two possibilities come to mind. The first is that the seller may have already received a better offer, or that other better offers are possible. If that is the case the buyer is unlikely to win in a bidding war.

The second possibility is that the seller, being 'house proud' may be offended. If the buyer still wants to 'test' the market, ask him whether he really 'wants' to buy this particular home. More importantly, review with him the reasons why this particular home is his 'ideal home'. If the buyer can advance a rational argument for 'needing' to buy this particular home, you are more likely to convince him not to test the market when the odds are that he may be competing against a better offer, and that the seller who presumably is knowledgeable about market conditions, will be offended. If your buyer persists in wanting to test the market, what he is telling you is that he is not serious about buying this particular home. It may well be that this particular home is not his 'ideal home' or that he presently has no conception of an 'ideal home', and therefore 'wants' but does not 'need' to buy at this time.

2) Disagreements About Price : The Seller and Buyer Are Close

The seller and buyer are a 1,000.00 or less dollars apart, both sides are begging to dig in, act out, and it looks as though one or both are ready to walk away. You are double ending this transaction. You want the seller and buyer to compromise and make this deal.

Your Strategies

First recognize that sellers and buyers sometimes begin to act irrationally just when they are within a hair's breadth of reaching agreement. It may be that the sign-back marathon which does not take place face to face is tiring everyone out, seller, buyer and agents alike. As you know these marathons often occur at all

hours of the day and night, without any of the participants having an opportunity to take a break and to refresh themselves. It is no surprise that under the pressure of a sign back marathon without a break and without refreshment, clients and agents alike wilt. Think of what happens to you when you attend an all day course. If you sense that this is what is happening, have both sides take a 'time out'. The concept of a 'time out' is used by professional negotiators and mediators whenever parties begin to act out and seem to lose their way as problem solvers. More often than not, losing one's way is not a symptom of an underlying problem of unsatisfied needs but rather of exhaustion.

Keep the dialogue going. But take a break first. In this kind of situation having the parties meet face to face to finish the deal after first taking a refreshment break should allow them to recharge their batteries before resuming discussions. During a time out there should be no discussion of any contentious subject matter. The reason that face to face meetings do work is that parties who are that close to agreement are given an opportunity to realize how really close they are. Once they recognize what they may lose and the time and possible opportunity costs associated with that possible loss, they reconsider.

3) Disagreements About Size of Deposit

A buyer wants to offer to buy a home in Toronto for \$450,000.00 with \$1,000.00 deposit. You are the selling agent. The market is a seller's market and you have been warned that there are multiple offers. How should you deal with the buyer?

Your Strategies

Both the common law and common sense consider the size of a deposit as evidence of serious intent on the part of any buyer. Knowing that the seller has received offers which may be a better alternative for him [BATNA], you should ask your client why he wants to offer only \$1,000.00. Presuming that the buyer

has been qualified to make this purchase, it is possible that the buyer may be 'testing' for a reaction in much the same manner as the buyer who tests regarding price. The same procedure suggested in problem #1 applies here.

4) Disagreements About Closing Dates

A seller and buyer have agreed on all terms other than the closing date. The seller has already bought and is looking to match up his closing dates so that both transactions take place on the same day. The buyer insists on a different date. They seem deadlocked and the deal is about to fall apart. What can the listing and selling agents do?

Your Strategies

Once again, if exhaustion is setting in, take a break. Disagreement about a key term should invite a review with your client of his needs. If you are working with the seller who has already bought and is not getting his buyer to cooperate, ask him why closing both deals on the same date is so important to him. Listen for his reasons. If his reasons reflect a desire to get both moves out of the way on the same day and not to pay for the costs of arranging a bridge loan, you may want to review with him the risks of attempting two closings on one day.

Ask him what his back up plan would be if for some reason, his buyer's mortgage financing was advanced so late in the day that his lawyer ran out of time and was unable to move funds in time to complete his purchase. Fortunately, this does not happen often, but it is a risk and it does happen. Secondly, canvass the additional costs the seller's mover might charge if he loads up early and has to wait for keys to the seller's new home to be released later in the day. Remind the seller that any scenario contains risk and risk if it materializes usually costs people time, money, and aggravation.

If this approach does not break the log-jam use the same techniques with the selling agent to probe for the buyer's need for his preferred closing date.

5) Disagreements About Chattels and Fixtures

The seller and buyer have basically reached agreement about the price of the home but the inclusion of certain chattels and fixtures is causing them to become deadlocked. You are working with the buyer. What can you do?

Your Strategies

As the selling agent, once again it is vital that you review the buyers needs so that there is no further misunderstanding. It is not surprising that many buyers of average means make offers which seek to include the usual five appliances, the central air and central vacuum systems and accessories, automatic garage door opener and remote controls, fireplace covers and accessories etc. The issue you should review with buyers and also with the listing agent is the age and quality of each item the buyer seeks to include.

If we assume that sellers are more likely to want to take like-new appliances and other chattels and fixtures with them that have been purchased recently, it stands to reason that the buyer cannot realistically ask for these items without expecting to pay close to the retail price for equivalent new items. Conversely, if the appliances and chattels are old, they probably have a limited life expectancy and may not be worth buying. Since both parties can be taken to have an equal need for these items, the only rational basis for making an offer is to predetermine a fair market price for equivalent items of similar age and quality. What a buyer should never do is overpay for old chattels and fixtures especially in the absence of a manufacturer's warranty, and a seller's warranty that seldom survives closing.

A second strategy to bear in mind regarding chattels and fixtures is that lawyers often disagree about the specific application of these legal terms in given situations. As a result, sellers and buyers sometimes make deals mistakenly believing that they are not in conflict regarding the chattels and fixtures that the seller is obligated to leave behind. Only after closing when funds have already changed hands does the buyer learn for the first time that the seller had a different understanding of the meaning of these words. When that happens the lawyers for both sides have to see whether some agreement can be reached, in the absence of which the parties are off to court.

So as to avoid the risk of this kind of post-closing conflict, it is safer for the buyer to specifically list every single item which he wants to have included in the purchase price on a *Schedule* page. Should the seller disagree the list will be signed back. Whatever deal they make will not depend on a court's interpretation of the words, chattels and fixtures.

6) Disagreements About Home Inspection Conditions

The buyer makes an offer to purchase which the seller is willing to accept but for the home inspection condition. The buyer wants to use a clause which allows him to escape if for any reason the home inspector reports on a deficiency. The seller wants to restrict the inspection condition to major deficiencies which he is unable or unwilling to rectify. What advice does the selling agent give to the buyer?

Your Strategies

While both of these clauses appear regularly, from the seller's point of view, the buyer's condition provides a broad means of escape for virtually any reason. One or more minor deficiencies can trigger use of such a condition. Review your client's 'need' for such a clause. If the buyer is fearful of committing to this transaction for some unknown reason, this is an easy escape. Remember

that clients who are not committed to their deals are more likely to breach them or to end them, if they panic.

An uncommitted and uncertain buyer is no benefit to the seller who is depending upon him to close and does not do you any good either! The use of escape clauses which are large enough to drive a truck through should be a red flag about a client's commitment that takes us back to the earlier discussion of a client who 'want's but may not 'need' to buy.

7) Disagreements About Major or Minor Repairs

The home inspector's report lists a number of minor repairs which he feels must be done and several major repairs. The minor repairs involve damaged drywall, paint touch up, screen replacement and replacement of some chipped ceramic bathroom tiles. The major repairs involve replacement of the roof and eaves. The seller prefers to make these repairs before closing and is prepared to warrant that they will be done in a "good and workmanlike manner" until closing. The seller and buyer look to their agents for advice.

Your Strategies

Based on personal experience, it is not a good idea for sellers to undertake to do complete repairs before closing. When discussing this issue with your client, ask him how would he likely respond if the repairs could not be done on time, due to weather or labour or material shortages. And even if the repairs were done before closing, and inspected by the buyer using a contractual right to a subsequent inspection, how would the buyer likely respond if the repairs appeared to have been poorly done. Lastly, should the repairs have been poorly done, what warranty protection would the buyer have after closing.

Because pre-closing completion of repairs, especially major repairs, can be contentious, the best conflict strategy is conflict avoidance. Given that in the

vast majority of real estate transactions sellers and buyers do not continue to deal with one another after closing, the better strategy to avoid potential conflict is to have both sides agree to each obtain two estimates from qualified trades people and take the average of these estimates as the basis for a price abatement which appears on the Statement of Adjustments on closing. Proceeding this way, leaves the seller free from controversy after closing, and any warranty problems the buyer may encounter are his to resolve with the trades he has selected.

8) Disagreements About Surveys

The seller has an existing survey of his home which shows the foundation only. Since the home was built, an in ground pool, pool house and fence have been constructed. The buyer wants an up-to-date survey. The parties agree on all other terms. The buyer looks to the selling agent for advice.

Your Strategies

The cost of a new survey in metropolitan areas can probably be obtained for about \$800.00. If the seller is absolutely unwilling to compromise, you may want to assist your buyer in taking a different tack with the seller. Financing institutions are increasingly expressing a preference for title insurance over surveys. Apart from the fact that land surveyors being human can make mistakes in preparing their surveys, institutional mortgagees like the security of an insurance policy to guarantee title. In addition, title insurance companies cover buyers for deficiencies which an up-to-date survey would have disclosed thereby protecting the buyer and the mortgagee. Title insurance on freehold homes priced under \$500,000.00, prices out in the low \$300.00 range, with condominiums pricing out around \$200.00. If a seller is unwilling to cover the cost of a new survey, see whether he may be willing to absorb the cost of title insurance.

A Technique To Reduce Conflict: Reframing Needs

At times parties who seem to be at loggerheads may not be as far apart as they believe. Or they may share some common interests without necessarily realizing it. For example, let's assume that Jim has listed his home for sale. Rob is working with a selling agent and has made an offer which has been signed back three times. Assume that the market is stable and balanced and that fair market value is known and accepted by both sides. Let's also assume that the seller and buyer are complete strangers.

Rob has just under 25% of the down payment and does not want to apply for a high ratio loan because of the CMHC insurance premium. He does not particularly want to have the selling agent disclose his finances to the listing agent and has positioned his offer by discounting the price by one and half times the amount of the CMHC premium. Rob really wants to buy this home and the seller is motivated to sell because he has already bought a builder's home and is beginning to worry. The seller is annoyed with this offer because he feels that he has already discounted the price below what similar homes have been selling for. Jim asks his agent to set up a face-to-face meeting. The parties and the agents meet at Jim's house.

Dialogue before Reframing

Jim

" We seem to be close on price and aren't disagreeing about anything else. I know you like my home. You have visited three times and you don't seem to have any reservations about the property. We seem so close. Yet your offer asks me to take quite a bit less than every other home is going for in this neighbourhood. I don't understand what your trying to do and I'm getting annoyed. I'm ready to walk away because I think that you take me for a fool. I'm trying to work with you and in the meantime I'm tying up this property. "

Rob

"Well, Jim, don't get me wrong. I've got a lot on my plate now and I just don't know how I can afford to offer you your price right now. I'm not suggesting that you're being unfair".

Reframing by Jim's agent

" If I understand both of you correctly, Rob wants to buy, Jim's price isn't unreasonable, but Rob may have other expenses that are getting in the way and needs some help in financing this. Rob, am I on the right track?"

Rob

" Yes, you are."

Jim's agent

" *How much are you short?*

Rob

" *I'm short about \$4,000.00.*

Jim's agent

" *What if you were to offer Jim the price he asked for on his last sign back with a second mortgage back for six months for \$4,000.00. Would that help you out?*

Rob

" *Yes it would.*"

Jim's agent

" *Jim, does that idea work for you?*"

Jim

"*Yes, I can live with that*".

The purpose of 'reframing' is to eliminate any possible misunderstanding which results from poor communication where heat is beginning to replace light. Reframing encourages parties to use neutral, factual language that emphasizes their common interests.

Reframing is one of the most valuable tools that professional negotiators and mediators use to move parties closer to agreement when they share common interests without realizing it. Reframing is an especially useful tool when parties are frustrated in their negotiations and begin to behave emotionally risking a triggering of conflict.

Finding Common Interests

I suggested in the material dealing with *reframing* that it is important to point out to clients the extent to which they share needs. Shared needs are often referred to as *common interests*. As valuable a tool as reframing is to make parties realize that not as much separates them as they might otherwise believe, it is a springboard to needs-based bargaining.

A Case Study

Let's assume that John wants to sell his business and the factory and land on which it operates to Bill, his senior manager upon whom he depends. Also assume that Bill is risk adverse and is very nervous about applying for a mortgage in order to fund the purchase of the business and the real estate. John who is 67 travels six months per year and would like to retire in three years. Bill is prepared to take over this company and the real estate. Bill wants to pay for both but unless he applies for financing he will be unable to save enough of his after tax income to pay the purchase price.

John speaks to one of his friends who is an experienced commercial real estate agent who suggests that he and Bill discuss entering into a shareholders agreement which would obligate Bill to acquire the percentage of the business and the real estate which he can afford to pay for over the next three years. In the event that an outside buyer offers to buy both at the end of this three year period, Bill would have a first right of refusal and failing his purchase of these assets at that time, they would be sold to an outside buyer. Bill agrees to these terms.

This case study points out the importance of parties looking for common interests. Negotiation very much like politics is the art of the possible. It follows that no agreement will be made if either party in this scenario pursues the impossible. The impossible given Bill's fear of borrowing money would have been for John to insist upon his going to the bank. Insisting upon the very thing that Bill could not handle might well have resulted in Bill's resignation as senior manager which is the last thing John wanted.

Building Achievable Commitments

The case study we just looked at is a good example of what conflict resolution theory calls *brainstorming*. And the central purpose of brainstorming is to devise practical means of meeting mutual needs. The first task of a good negotiator is to detect and map out all the common interests which the parties share. In this hypothetical case, the key, common interests are:

- 1) the seller's need to sell control of his business to a trusted employee;
- 2) the buyer's interest in acquiring control by paying for it out of yearly after-tax income;

- 3) the sellers need for closure given his desire to give up control in three years;
- 4) the buyers desire to take control in three years;
- 5) the seller's interest in giving the buyer an opportunity to take a controlling position in three years time by giving him a first right of refusal.
- 6) the buyer's interest in preparing himself to buy in another three years.

Once the parties come to understand that they share common interests, their next task is to think about the mechanics of satisfying those interests. It is at this point that both sides need to 'think out loud' and suggest any practical means of meeting their mutual needs.

Because the exercise of brainstorming involves 'thinking out loud', by definition no suggestion binds anyone or is to be considered foolish. Often parties who are stuck in a negotiating rut feel reluctant to voice ideas. And sometimes an idea that one side thinks may sound off the wall, seems inspired to the other, and breaks the log jam!

The key to successful negotiation at this stage is never to be afraid of creative thought.

Remember that in all negotiations, success is measured by both sides making what they perceive as a fair exchange. People who make deals to which they are not really committed are more likely to break those deals once overwhelmed by their own doubts. Apart from the importance of both sides sensing fairness in the deal they have made, it is improbable that any deal will be made if the parties are not interactively listening to one another. Without that interactive listening, needs will not be satisfied and mutual gain becomes less likely.

TESTING COMMITMENTS

Once the parties complete the 'brainstorming' stage, the next task of a good negotiator is to encourage them to critically examine all of their proposals to determine whether or not each is workable. Again, it is never the purpose of interest-based negotiation for one side to insult or ridicule the other. Satisfying mutual needs or interests is more likely to be achieved when each side respects the other despite any disagreements along the way.

The best advice that I can give you at this stage is to constantly double check any practical approach to which you are willing to commit. For example, if you want to lease some space to operate a small business, you need to make sure that the landlord will have the space ready in time for the start date of the proposed lease. If your client needs co-operation from a third party, make sure that it is available.

Creating Disincentives to Break Commitments

During the brainstorming stage, one of the issues which may arise during their negotiations is how to create deterrents sufficient to discourage either side from breaking their deal. Remember that strangers have no reason to trust one another. Once again, the exercise of 'brainstorming' provides the answer. In more complex agreements calling for the parties to continue to do or to refrain from doing various things, they generally make provision for liquidated damages clauses or penalty clauses that obligate one side or the other to pay money or transfer other property where the opposite party has breached a term of the agreement. The parties may also provide for termination of the agreement if a particular breach or breaches are so fundamental that continued performance becomes impossible. Where a fundamental breach occurs after closing, the party suffering damage can terminate the agreement, and sue for any losses incurred up to the date the agreement is terminated.

The deterrent value of these kinds of provisions lies in the mutual understanding of both sides that neither can take his obligations lightly.

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