

WRONG FOOT NEGOTIATION
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How to Get Off on the Wrong Foot in Any Negotiation Setting

Negotiation goes on in everyone's life and it goes on all the time. We negotiate with our teenagers when we trade an extra hour out in the evening for washing the car. We negotiate with our spouses when we decide where to vacation. We negotiate with the auto mechanic over the completion date for the repair work. What you get out of negotiation is entirely based upon what you are ready to put into the process. Your creativity, tenacity and preparedness are your tools for success. In order to maximize your position at negotiation, you should also be aware of these eight sure fire ways to get any negotiation started off on the wrong foot.

1. Think in terms of "Winning". The notion of "winning" is taken from the sports world where your goals, points, rounds or baskets are easy to tally and compare to your adversary's. Both of you are competing for the same thing. During the negotiation process attempts to "keep score" are useless. A concession easily made by one party may have great significance the other. Who "won" the round -- the party that perceived it gave up nothing or the party that perceives it received a great benefit without making a similarly significant concession? The reason for negotiation is to reach a successful resolution of the issues. Come to any negotiation, whether facilitated or not, with a view toward eliminating as many differences as possible to maximize cooperation and increase the likelihood of success.

2. Promise the moon. It is important that your client understand that negotiation is a process where the parties educate each other about the strengths and weaknesses of the case. You need to discuss all these weaknesses as well as the strengths prior to the negotiations. The client needs to understand in highly factual disputes what "burden of proof" means, and must also be informed of the possible effect of the rules of evidence on certain documents or testimony. Your client must also understand that your opening position in negotiation is simply that.

3. Greet the opposing parties with a cold stare. Negotiations start at first contact. If you believe that compromise is in the best interest of your client and that resolution is reasonably possible, deliver that message as soon as possible. In spite of whatever anxiety you may be experiencing, signal your willingness to work toward resolution with a warm handshake and a relaxed greeting. Work with your client and yourself to view the dispute, for purposes of negotiation, as a problem to be solved with the input of the other side.

4. Engage in prolonged posturing. In this culture, negotiation is a dance. Seldom would either party leave happy if the first offer was accepted. It is anticipated that opening positions will usually include puffing; however posturing should not go on past the initial round. Those who study the negotiation process have found that positions in the "insult range" are likely to have one of two responses; a similar insult or a termination of the negotiations. Neither of these responses furthers the objective of resolution.

5. Open with a big round number. If you are Plaintiff's counsel, your monetary position should be presented through an analysis of the recoverable damages. For example in an employment case, back pay, front pay, fringe benefits, emotional distress, punitive damages, and fees are all potential components of a monetary recovery. A thorough analysis which

supports a figure for each element of recovery will be more carefully considered by the defense and the offer suggests a considered response in kind.

6. Open with “costs of defense.” Douglas Hedin, opines in his work “How Advocates Prepare: A Plaintiff’s Lawyer’s View”, How ADR Works, (Norman Brand Editor), that the “costs of defense offer” is tantamount to the defense lawyer saying “I could beat you in court, but I don’t want to waste my time, and so I’ll donate my fee to you to settle the case.” Hedin calls the “cost of defense” offer ironic, since the reason for negotiating is to attempt to reduce the costs and eliminate the risk of trial. No advocate can actually guarantee a win at trial and the “costs of defense” offer is seldom at the level of the actual trial fees and costs.

7. Have a vague notion of the facts and law. There is no substitute for preparation. A successful negotiation can turn on your ability to strongly demonstrate that the other party’s position is incorrect. Have the crucial appraisal at hand. Be ready with the pay records. Know, understand and be ready to intelligently discuss the difference in the expert opinions. Take the time to update your legal authorities. Bring copies of any case law that impacts the other party’s position.

8. Have no idea what your client really wants. A major strength of trying to negotiate your client’s dispute to resolution is that you are not confined to bargaining over money. Mastery of the rules of competitive bargaining (i.e. who gets how much of what there is) is necessary to negotiate a good monetary settlement. Mastery of the techniques of integrative bargaining (i.e. finding ways to create value) can bring more a durable settlement with higher client satisfaction. Discuss thoroughly with your clients what their interests are before the negotiations. Ask your employer client whether it is in the company’s interest to help the employee find another job. Ask the wrongful death plaintiffs if a large donation to a charity in the deceased’s name would help them process the loss. What you assume has value to them may actually have little worth, and their true interest may provide the key to the ultimate resolution of the negotiations.