

CHAPTER 19

EFFECTIVE NEGOTIATIONS AND ALTERNATIVE DISPUTE RESOLUTION



Learning Objectives

After studying this chapter, a student should be able to:

- Prepare effectively for a negotiation
- Recognize the behavioural principles and strategies for effective negotiations
- Know how to respond to questionable tactics used by other negotiators
- Assess the effectiveness of a negotiation using multiple criteria
- Explain the differences between distributive and integrative approaches to negotiations
- Describe various types of alternative dispute resolution

INTRODUCTION

Successful professionals in the mortgage brokerage industry have to be successful negotiators. Solid negotiation skills are critical for handling all aspects of mortgage transactions on behalf of your clients. Indeed, your clients will select your services in part because of your ability to effectively negotiate their interests. In addition, negotiation skills are important for working with all those in your professional life, whether it be your administrative staff, your partners, your webpage designer, or a developer you are working with.

If you are like most people, you have actually been negotiating, to some degree, all of your life. Through trial and error and a dose of common sense, you have probably acquired numerous negotiation skills that work for you. Experience is extremely necessary and valuable in negotiations, and you may already be a very successful negotiator. However, trial and error is a relatively slow, and occasionally faulty, way to acquire new negotiation skills. The purpose of this chapter is to efficiently and systematically boost your negotiation skills by describing specific behaviour techniques that have been proven to work by years of accumulated negotiation research. Whether you are a novice or an experienced negotiator, this chapter will push you toward more effective negotiation strategies.

The plan for this chapter will be as follows. It begins by examining the nature of effective negotiations and how we judge the effectiveness of a negotiation.

Next, it will explore a particular perspective or mindset toward negotiations that research shows will lead to the best negotiation outcomes. Following this, you will learn about specific behavioural strategies to consider while preparing, executing, and ending a negotiation. This chapter will also discuss several additional considerations, including how to avoid and respond to some common negative negotiation behaviours, and will conclude with a discussion of what to do if your negotiation fails, by highlighting the use of alternative dispute resolution procedures.

THE NATURE OF EFFECTIVE NEGOTIATIONS

What is an effective negotiation? How do we know if we were successful in a particular negotiation? These are important questions that you must be able to answer before you can improve your negotiation skills.

Negotiation experts agree there are several important criteria for determining whether or not a negotiation is successful:

- 1. The first criterion is the efficiency of the negotiation.** As you know, negotiations can vary dramatically in terms of how long they take to resolve, and how much effort both parties expend in the process. Sometimes the time and effort invested in a negotiation makes sense, given the importance of the negotiation or the achieved outcomes. Other times, however, that quantity of time and effort is out of step with the nature and importance of what is being negotiated. Effective negotiations utilize the least necessary time and resources.
- 2. The extent to which both parties are satisfied at its conclusion.** In many ways, this sense of satisfaction is entirely subjective – only the person who ends up with a particular outcome can judge its value to them personally. An outcome that satisfies one person might not satisfy another. Parties can be satisfied with the negotiated terms of the agreement, but sometimes, they can also be satisfied with walking away from the table without an agreement when the conditions necessitate it. In that sense, sometimes a negotiation that is not resolved can be considered a successful one.

3. **The extent to which the negotiation does not leave wasted resources on the table.** As you will learn later on in this chapter, successful negotiations involve finding creative ways by which to divide a set of goods so that the value of the goods is fully realized or utilized.

Example

Two estranged brothers inherited a 100-acre parcel of land from a distant relative. This land included old growth timber, pasture land, and it had 50 feet bordering a good fishing lake at one end. The brothers quickly negotiated to subdivide the property between them, and split it down the middle into two 50 acre parcels with 25 feet of lakefront each. Unfortunately, in their haste, the brothers never came to realize that one of them only wanted a large acreage of forest in which to build their dream home, start an organic farm and gain cash from the timber, whereas the other brother would have loved more lakefront to spend all his vacation time on the water. Thus the forest owned by one brother was never walked on, nor was the 50 foot of lakefront fully appreciated by the other. Had they been more effective negotiators, they would have come up with a solution that maximized the value of the land between them by giving each brother much more of what they valued.

4. **How the negotiation impacts the relationship between the negotiating parties.** Effective negotiations involve a process that preserves or improves, rather than undermines, relationships. At the end of a successful negotiation, all parties should be willing to negotiate or do business with one another in the future. This last factor is particularly important in the mortgage brokerage industry, where most negotiations involve individuals who have, or would at least like to have, an ongoing business relationship.

NEGOTIATION APPROACHES

How can you become a more effective negotiator? It requires both a change in perspective or approach, as well as a change in behaviour. Let us look first at this new approach, which will then be the basis for the behavioural strategies.

The naïve or inexperienced negotiator will typically hold a *distributive perspective* about negotiations. Such a perspective involves viewing the negotiation as a conflict, with one winner and one loser. With this view, the negotiation involves parties entrenched in opposing positions, sitting at opposite ends of the table, arguing and defending against each other in a show of who has the most power, until they compromise down to one agreed upon

solution. Typically, this orientation occurs because the negotiators fixate on opposing positions around a single issue, such as price, and engage in a tug of war because in such a situation, one negotiator's gain is the other's loss.

distributive perspective

a mindset that negotiations are a zero-sum conflict, wherein one party's gain is equal to the other party's loss

In contrast, expert negotiators tend to approach negotiations from a “win-win” or *integrative perspective*, where “integrative” refers to the potential for the various interests to be combined to create a more valuable outcome for all parties. With such an outlook, the negotiator focuses less on their particular position on a single issue, and more on the underlying interests and needs of both parties. The parties attack the problem facing them, not each other. Viewing the negotiation as joint creative problem solving rather than head-to-head conflict with one winner and one loser, the negotiators are able to explore ways by which to creatively divide up resources so that both parties' needs are fully met. This mindset has nothing to do with being nice, or generous. Rather, it involves recognition that successful negotiations have to address all parties' needs, not just those of the party with the most will. The adoption of this mindset leads to behaviours that ultimately produce the most optimal negotiations: ones that are efficient, that lead to better outcomes and satisfaction for the parties, and that enhance the relationship in the process.

integrative perspective

a mindset that negotiations are a collaborative problem solving process rather than a head-to-head conflict, whereby the parties focus on the underlying interests and needs of each other

Consideration can now be given to the behaviours and strategies that emanate from this integrative perspective. Specifically, you can apply this approach to each component of the negotiation process: preparation, communication and exchange. Each of these components will be addressed in turn next.

Preparation Principles

If you remember just one word from reading this chapter, it should be: prepare. The single best thing you can do to improve your negotiation effectiveness is to

prepare. Most people do not prepare at all for their negotiations, or if they do, they prepare inadequately. Preparation involves not only thinking about the negotiation before going to the table, but also systematically gathering information and making key decisions. Following are the questions to ask yourself the next time you plan to negotiate.

What are the Issues?

A good place for you to start your preparation is to list all the issues that will or could be negotiated. For example, in real estate transactions, some issues may be obvious, such as price, closing date and subjects. However, it is equally important to consider additional issues that might otherwise be overlooked, such as particular repairs, special financing or storage. The goal here is to increase the resources to be traded around before you worry about how to divide up the resources between you and your negotiation partner. Why? Because the more issues you have to negotiate between you, the easier it will be to reach an agreement, and the farther away you will be from a zero-sum game, going back and forth on a single issue. This might seem counterintuitive; after all, having more issues makes things more complex. But having more issues also allow for more creative solutions, and increases the possibility that everyone's needs will be met.

How can you expand the issues? First, ask yourself what else would you like to have in the final outcome, if you could have anything that you want. It does not hurt to ask – you may or may not get them in the agreement, but it expands the possibilities. Second, what items do you think the other party might like to have? Of particular interest are those things that you believe the other party will value that cost you little or nothing to give away, but that you can trade for things you do value.

What are the Interests?

In a typical negotiation, parties tend to focus on their *positions*, which constitute a particular stance of what they state they want on a given issue, and of what they believe is the ideal solution they must have (for example, a particular closing date or price in a real estate transaction). In contrast, *interests* are what motivate the parties to take a particular position or be set on a particular

solution. It is the reason why the parties take the stance or position that they do: why must they close by June 17th or why must the property be subject to septic installation? These interests reflect negotiators' needs, desires, dreams, fears, and concerns. For every interest, there are typically numerous positions that can satisfy it. For example, the fear of carrying two mortgages can be addressed by taking a position that the closing date has to be far in the future, or by an agreement whereby the sale is subject to getting financing or a bridge loan.

positions

the stated desires of parties on a particular issue

interests

the motivation behind parties' positions

When negotiating, both negotiators will take a particular position on a given issue, but it is vital to know why each party is taking those positions; that is, to know the underlying interests that drive them to their stated position. Later in this chapter, we will elaborate on why a focus on interests in the negotiation process is so important. For now, at the stage of preparation, it is critical to think very clearly about your own interests and also to anticipate those of the other party, before you sit down to negotiate.

How do you identify the underlying interests of the parties before negotiating? Answering these questions will lead you down the right path:

- Why does your client want what they say they want?
- What is the other party likely to ask for? Why would they ask for this?
- Why might you be unwilling to accept the terms the other negotiator is likely to put forth?
- What will your client be worried about?
- What will the other party be worried about?
- What are the consequences to the other party of accepting the terms that you request?

Keep in mind two facts about interests. First, each party to a negotiation usually has multiple interests, not just one. Furthermore, if there are multiple parties involved on one side of the negotiation table, they do not necessarily have the

same interests. For example, one spouse may be particularly concerned about value; the other may urgently require the proceeds from the sale of a property. Second, the most powerful interests are often basic human needs such as self-esteem, control and security. These needs are not often talked about or acknowledged by the person who holds them, yet they may ultimately explain much of their attitude and behaviour in the negotiation process.

What are the Priorities?

After determining the various issues on the table, you have to decide how important each issue is to you or your client, and to the other party. What are the most critical issues to you? What might be the deal breakers for the other party? On what issues will there be wiggle room? What issues are you willing to give up on in order to get the things that are really important to you or your client? Likewise, what do you foresee as the most and least important issues to the other side?

Determining priorities of the parties is critical for several reasons. First, you must enter the negotiation with a true understanding that you will have to give something up in order to get what you value. If you are able to enter into the negotiation and get every issue exactly as you like, it is unlikely to be a true negotiation.

However, once you come to realize that negotiation has to involve trade-offs, it is important to consciously and carefully determine what you are willing to give on in order to get that which really matters to you based on your interests. This is one reason why knowing your real interests (or your client's interests) is important.

Determining both parties' priorities is also critical because effective negotiations do not revolve around convincing arguments and persuasion, but around creative exchanges that maximize each party's interests. The creative exchange that leads to satisfying solutions cannot take place if you do not do your homework and enter the negotiation with a clear understanding of the potential trade offs for you and your negotiation partner.

What are Some Possible Solutions?

Before going to the negotiation table, consider as many possible inventive solutions, involving all the issues you have considered, that can be combined to make both parties satisfied. Even if a particular solution will not work, bringing it to light may spark other possible solutions that will work. The more possibilities for both of you to consider, the more likely it is that one of those possibilities will satisfy everyone's needs.

We often underestimate the importance of this task before negotiating. We tend to only worry about solutions during the negotiation, and not before. We tend to think there must be just one solution to our negotiation, perhaps a split down the middle between each party's positions, with each giving up half of what they want. Sometimes we cannot fully appreciate that ultimately, both negotiators' needs can be met; a negotiation needn't be a zero-sum game where the only solution is a compromise down the middle. We sometimes err in believing that only our own needs are our concern. The truth is that negotiated settlements occur only when both parties are satisfied. Therefore, it only slows down the negotiation to ignore the other negotiator's interests instead of considering all interests simultaneously.

How can we come up with potential creative solutions that can satisfy both negotiators? Make time to generate possible solutions, ideally before the negotiation even takes place. Look for potential shared interests – things that both negotiators would like as part of the solution. Also use a brainstorming technique. This involves creating as many varied and outlandish ideas as possible. It also involves separating the creation of ideas from the judging of the ideas. Do not judge too soon – put all ideas down on paper. Only when all ideas are down should you consider the merit of each.

Consider Objective Standards

Too often, we attempt to seek a negotiated agreement that is based on the relative power of each party's will, with the strongest or most stubborn party winning the most. A more constructive approach is to focus less on what each party wants, and more on identifying and agreeing upon some objective standard by which to find an acceptable solution. That objective standard of fairness could take many forms, depending upon the nature of what is being negotiated. Examples of standards might include expert opinions, market

standard, cost of replacement, depreciated book value, competitive price, or the law.

What are Your Alternatives?

Before going to the negotiation table, be very clear what your next best alternative is to reaching agreement with the other party. If for some reason, you have to walk away from the table without a solution in hand, what will you end up with? You will always have an alternative. What becomes important here is to have the best alternative you can create before you negotiate and to be conscious of that alternative.

Why is it so important to know what your alternatives are? Such alternatives represent your next best scenario, your backup plans to a given negotiation. A strong back up plan keeps you calm, collected, confident, and powerful – and it prevents you from appearing desperate. A desperate negotiator is likely to be exploited. An understanding of your best alternative is also important because it helps you to know the point at which you should walk away from the negotiation. This will be discussed in more detail in the next section.

Before negotiating, seek to cultivate one or two solid alternatives. Start with a generated list of possible alternatives, develop some into viable alternatives (do your homework to make sure they are feasible), and choose one that seems like your best. For example, suppose you are hiring some staff and you are negotiating the terms of an employment offer with someone you would like to hire. Your various alternatives might include not hiring anyone but continuing to do the work yourself, outsourcing the work to an agency, or hiring someone else you interviewed. After weighing the pros and cons of each, you may decide your next best alternative is to hire the other person you interviewed if this negotiation falls through.

Keep in mind several points about alternatives. First, although your alternatives will give you a sense of your power, the amount of power you actually possess will depend on the relative strength of the other negotiator's alternatives. Thus, the one with the better alternatives tends to have more clout in the negotiation. Second, alternatives are about perception. This is why some negotiators will try to convince you they have strong alternatives when none exist, and why we might be reluctant to share our true alternatives when they

are not strong. Finally, be careful not to lump your alternatives together, to trick yourself into thinking that if you walk away from the negotiation, you will end up with all parts of the various alternatives when in fact you will only get one of your alternatives.

Know Your Resistance Point

Your *resistance point* is your bottom line. It is the point you will not cross and at which you will walk away from the table and toward your best alternative. For example, in assisting a buyer in purchasing a home or service, the buyer's resistance point may be dictated by the maximum they have to spend, or determined by the price of comparable properties or services they are considering in the same location.

resistance point

a term used in negotiations to refer to the bottom line, or the least acceptable deal a particular party will accept in a negotiation

Why is it important to know your resistance point before you negotiate? First, it stops you from making an irrational or emotional decision to carry forth with a negotiation that is not in your or your client's best interest. People have a tendency to continue in a negotiation even when it may not be rational to do so. It may be because their emotions, ego, or a sense of competition takes over. Or perhaps it is because they have already invested so much time and effort that it is difficult to walk away. In such cases, people are prone to agree to things they might not have otherwise agreed to had these factors not been present. To protect yourself from falling into this trap, you need to create some boundaries before you get involved in the negotiation. This will allow you to walk away with confidence when it comes to the point where you should walk away.

Set a High Goal

Keep in mind that your resistance point is the worst-case scenario. Although you will reach a deal provided the negotiated settlement is at or above your resistance point, you certainly do not want to focus your attention on that resistance point! As you can imagine, if you fixate too much on your resistance point, that is exactly where you will end up.

To counter the influence of a focus on your resistance point, and to maximize your performance in the negotiation, it is critical that you establish an aspiration target before you negotiate. This is your ideal, your best-case scenario. Much research on goal setting demonstrates that having a challenging, specific goal leads to much higher performance than unchallenging or general goals. To illustrate, a salesperson who sets a target to try to sell a particular item for a specific high but realistic price, will tend to negotiate a better agreement than a salesperson who does not have such a specific high target in mind. This is not to suggest that if you set such a target, you will obtain it – it is merely a goal to focus on, not necessarily achieve. However, by setting an aspiration target during the preparation phase, you will focus your attention and energy in that higher direction and will very likely get closer to that goal than had you not set it.

These principles covered so far, regarding the preparation phase of the negotiation, will continue to be central in the negotiation itself. In addition, there are a number of additional principles to be taken into account in the negotiation phase. These principles can be loosely grouped into the key components of a negotiation: principles that apply to the exchange component, principles pertaining to the communication component, and principles related to the relationship component of a negotiation. Though these categories may provide a useful framework for remembering them, keep in mind that all of these principles must be taken into account throughout the negotiation.

Exchange Principles

Effective negotiation, as briefly mentioned earlier, is not so much about persuasion and influence as it is about the creative generation and exchange of possible resources between negotiators with different needs and interests. There are several important considerations that will facilitate this exchange process.

Focus on Interests

It is critical to focus the negotiation on interests, not positions. As previously noted, positions are the verbally stated desires on a particular issue. Less experienced negotiators will tend to focus on positions, insisting they can not move from the stance they have taken. The problem with this approach is that it does not allow much room for movement, with each party locked into opposing

positions. The more energy negotiators put into stating and defending their positions, the more they tend to become entrenched in them. This cuts off the opportunity for both parties to consider other positions, ones that are as good, or better, than the one they are fixated on.

One way to avoid getting trapped in opposing positions is to focus the negotiation around the underlying interests of the parties involved. When you look underneath stated positions to the interest motivating it, creative solutions emerge. It is usually only by focusing on the true underlying desires and needs of each party that creative solutions abound. Fortunately, for every interest, there are usually several, or in some cases, numerous positions that can fulfil it.

As already discussed, it is important to seek out as much information as you can about your own and the other party's interests before you negotiate; however, you should continue this exploration during the negotiation process as well. How do you get at underlying interests during the negotiation? First, if you share your underlying interests with your negotiation partner, often they will reciprocate. Talk openly about your own interests. Spend less time talking about what you want, and more time talking about why you want what you want. Be respectful of their interests and convey that you understand them. Second, consider putting forth a choice of possible solutions composed of different combinations of the issues, finding out which one they prefer and infer interests through their preferences. Finally, use the direct approach and simply ask why they want what they want. By taking the focus off positions and putting it onto interests, you may find that each of your needs are not at all incompatible and that with some creativity and brainstorming, you come up with solutions that make both of you content.

Packaging and Trading Off

It is natural and common to proceed in a negotiation issue by issue, tackling one problem at a time. Often parties negotiate the easier issues first, leaving the difficult ones until the end. However, considerable research demonstrates that more optimal solutions are reached when parties package and trade multiple issues simultaneously.

There are several benefits to packaging issues simultaneously. First, by putting forward a package of issues as a proposal, and countering with a different

proposal, both parties can express their interests without revealing too much information to the other party. Second, and more importantly, packaging allows for more creative problem solving. The more issues you combine, the more possible solutions there are.

Focus on Objective Standards

Ideally, you will agree first on principles or objective standards, before arriving at a solution. For example, rather than argue about what price one is willing to pay or not willing to sell for, the parties can debate the standard by which they will come to agree on the real value of the property. Frame your discussions, when possible, around a joint search for finding the best objective standard; in other words, talk about figuring out how to determine a fair price on a piece of property rather than argue about which price is the fair one. If the other party puts forth a number, ask them how they arrived at that number, how did they know it was the correct one, or what principles underlay their calculation.

Strategic Concessions

A concession is putting forth an offer that concedes your prior position somewhat. Of course a negotiation can only proceed to the extent that both parties are willing to make concessions where necessary. However, it is very important that these concessions occur in a relatively reciprocal fashion; that is, that each party takes turns in making concessions. This suggests that if you put forth a concession or place an alternative solution on the table, however small, it should be met by a comparable gesture on the part of the other negotiator. Although these norms are obvious, it is not uncommon for one party to engage in several consecutive concessions rather than wait for the other party to also concede. Sometimes one will make multiple concessions, or step into the roll of putting forth repeated offers, ideas and solutions, simply to avoid silence, to make the other party happy, or to keep the negotiation going. Remember to avoid this pattern if it is your tendency. By making repeated concessions or one proposal after another, without expecting the other negotiator to follow with similar behaviour, you merely encourage the other party to hold tight and not participate.

Communication Principles

Creative exchange and problem solving can only occur with sufficient and effective communication between the negotiators. We can now examine some critical aspects of communication that are essential for integrative negotiations.

Revealing Versus Concealing Information

There is a fine but important balance between revealing too much information and revealing too little during the negotiation. Obviously, both negotiators need to reveal some information about their preferences if a solution is ever to be found. However, if you reveal too much information too soon, you make yourself vulnerable to exploitation by the other negotiator. Thus, just as you would not show your cards during a game of poker, you know it is equally unwise to reveal your true bottom line or resistance point in a negotiation. The method for maintaining the right balance of openness lies in several principles discussed next.

First, begin with communicating less pertinent information – that which cannot be used against you. As you come to learn more about the other party, trust builds, and the other party likewise reveals information to you, progressing to sharing increasingly more vulnerable information.

Second, provide information in a reciprocal fashion. That is, be sensitive to ensuring that both you and the other side have equal information about each other. Maintaining equal information about one another avoids one party being able to exploit the other. Thus you should talk only as much as the other party, reveal only as much as they seem willing to honestly reveal to you, and insist on a degree of disclosure from the other party that you yourself have provided.

Third, consider offering up and comparing proposals involving multiple issues. Sometimes it is effective to ask the other party which of several proposals they prefer, or if they do not like a particular proposal, to suggest another one. Negotiators feel less vulnerable if they talk in terms of general proposals, involving numerous issues, whereby they merely express preference for one over the other. This technique enables the negotiation to move forward without revealing too much specific information on each side.

The Role of Silence

Many of us believe more is better when it comes to talking during the negotiation. We rapidly fill any void of awkward silence during a negotiation with some vocal expression. Though it is true that you need to talk to be a successful negotiator, there is something very important about being appropriately silent as well. Rather than talk, consider listening to the other side. Ask questions. Make clarifying statements to make sure you understand. And when in doubt about talking too much, try to be still with silence.

If you talk too much during a negotiation, it may undermine your success for several reasons. First, you may fail to come to truly understand the other party and thus lose valuable information. Second, you may give the impression that you are not interested in what the other party has to say. Finally, and most importantly, you may err in revealing too much and thus increase the odds you will be taken advantage of.

Listen Actively

Too often we think if we talk more, we'll get our way. In fact, the better solutions are ones that come from real listening. It allows you to hear what the other party really wants and values – the necessary information you need to find solutions that work for both of you. In addition, when you listen well, the other party feels heard and respected and they are going to be that much more comfortable sharing information with you and working towards a mutually agreeable solution.

Pay close attention to what the other party is saying. Focus on what the other side is telling you rather than on what you want to say next. Ask the other party for clarification or additional explanation when you are not certain you follow their point. When seeking clarification, be sure the tone and manner is genuinely inquisitive and concerned, rather than critical. Finally, paraphrase the other side's main points to ensure you have heard them correctly and to provide an opportunity for them to correct your misperceptions.

Relationship Principles

An additional set of principles for effective negotiations involves how you manage your relationship and interpersonal connection with the other party.

Be Firm but Conciliatory

Be firm with your interests but flexible in your positions. If you have prepared well, you will know what your interests are and the importance they hold to you. Two negotiators who are clear and firm about their interests can often push a negotiation to the most creative and satisfying solutions. However, keep in mind that many different positions may meet your interests. Therefore, stay open minded to different ways of viewing the problem at hand, and to different ways to come to a solution that might work for everyone.

In addition, be firm with your interests but easy with your interpersonal approach. Be likeable. Be polite. Avoid blaming, accusing, and making personal attacks. Listen to the other party, and show courtesy and respect. Find opportunities to genuinely compliment the other party or to express appreciation. Emphasize your concern with getting the other negotiator's needs met as well as your own. You can be sensitive to the other's feelings, attitudes and perspectives while at the same time remaining committed to your interests.

Perspective Taking

Where possible, put yourself in the shoes of the other party and attempt to see the situation the way that they see it. You need not agree with their perspective, but only understand it. Why? Because understanding your own perspective and their perspective at the same time will lead you to the potential solutions that will make you both happy. Remember, both parties have to like the solution in order for the negotiation to end, so it is counterproductive to ignore the other half of the interests involved in the negotiation.

Another advantage of seeing the situation through the eyes of the other party is that you can propose solutions in a way that will appear to be consistent with their values, making them more comfortable agreeing with your proposal. People want to save face, avoid appearing weak, and avoid appearing to change their minds. Thus, the other negotiator is more likely to agree to solutions that make them feel like they won. The more you know about how the other side sees things, the more likely you can put forth solutions that give the other side that sense of winning.

Know the Person and Context

Although it is beyond the scope of this chapter to dissect the personality and cultural influences of negotiations, it is critical to take into account whatever knowledge you have of the other party and their situation. What do you know about this person? What have you heard? Are they hard-ball negotiators? Do they have a lot of time on their hands? Are there cultural norms that might help you to understand and predict how the negotiation will unfold?

Be sensitive to values, perceptions, concerns, norms of behaviour and moods. Vary your approach accordingly. Recognize that different groups and places have different customs and beliefs to respect, but don't assume a given individual is exactly like the stereotypes of their culture – be careful about assuming too much based on their background.

Dirty Tactics

On occasion, you may encounter negotiation tricks or dirty tactics used by the other party. It is important to recognize these tricks when they occur so that you can respond appropriately. Common responses to such tactics are to either respond in kind, or just put up with it. As you might guess, neither of these responses is the best method.

A more effective approach to dealing with dirty tactics is to do the following. First, recognize the tactic being used and explicitly raise the issue with the other party. Often just naming it out loud is enough to stop it. However, it may also be necessary to question it and argue against it. In doing so, apply many of the same principles you have learned about communication for negotiations in general. Be factual, do not personally attack the other party, remain non-emotional, and focus on the problem (in this case, the dirty tactic) with an eye toward a mutual resolution. In more extreme cases you may have to decide to take a break, suggesting that you resume the negotiation only when such behaviour stops. This more drastic technique can be useful because it does the opposite of what the party using the dirty tactic is hoping to achieve. Next, we turn to a discussion of a few common questionable tactics so that you can recognize them when they occur.

False Authority

False authority involves one party feigning authority to make a decision, agreeing to a solution, but later returning to the table to say someone else – a partner, a boss, a spouse – will not agree to the deal. Sometimes this is related to the use of a “good-guy/bad-guy” routine whereby the individual you negotiate with is the “good guy” and the “bad guy” is in the backroom unwilling to yield. To avoid this trap, it is important from the outset to clarify who you are negotiating with – and only to negotiate with the person who has the ability and discretion to commit to a negotiated outcome. Barring this option, it is important to clarify that any tentative agreement is entirely open to both parties walking away until those with authority agree to the outcome. In other words, you will sleep on the offer and get back to them.

false authority

a negotiation tactic whereby a negotiating party agrees to a proposed solution, but then returns to the negotiation claiming that their partner or superior will not agree to the deal until more concessions are made

Eleventh Hour Throw-In

Occasionally, one party will, just before the deal is signed, ask to add just one more item. Knowing the negotiation is close to settled, and there is a deep desire to conclude the deal, they hope this “one little thing” will be thrown in for good measure. One way to offset this problem is to simply know that it is a common occurrence and be prepared for it. Second, if they want an additional “thing” added to the solution, you must ask for something in return for it; in other words, reopen the negotiation.

Deception

Deception is not only inappropriate, but in many instances, it may also be illegal. Nevertheless, some negotiators cross the line into such behaviour. The defense against deception is to not rely on or assume the other party is being honest. Issues of importance should not rely on the other party’s word or integrity, but upon verification of the facts and/or other assurances of future action. For example, one would not make a purchase of land with the intent to log it based upon the word of a seller that it is permissible. Rather, one would

rely on an objective authority such as an opinion or permit by the relevant regulatory body.

Stress

On occasion, a negotiator will attempt to put undue stress on the other party in order to move the negotiation to their advantage. The form this tactic takes may vary. It might be as simple as creating unnecessary time pressures, making the threat that another buyer is putting in an offer, or it might involve holding the negotiation in an unfavourable location. Ask yourself if you are feeling stressed and regardless of how you came into that situation, suggest alternative arrangements to reduce that stress.

Negative Emotions

Some parties use threats, negative emotions or other forms of psychological warfare to win their negotiation. When confronted with such tactics, your response should be twofold. First, directly point out the questionable behaviour and second, suggest that the negotiation take a break until such times as that behaviour is no longer present. To do otherwise – to continue with the negotiation facing these intrusions – one merely reinforces the other party to continue their tricks. However, by calling a time out, it takes away the reward for such behaviour and usually puts the parties back into a better frame of mind after the break.

Additional Considerations

Up to this point, we have discussed numerous strategies that will hopefully push you toward more effective negotiations; principles to consider within the preparation, communication, exchange and relationship components of a negotiation. There are several additional considerations to effective negotiation, each of which will be discussed next.

Time is an Asset

Do not underestimate the power of time and deadlines on your negotiation process. The party with the most amount of time to burn is typically the party with the upper hand. If you have time constraints, you are at a disadvantage

because it adds pressure to reach an agreement that you might otherwise not agree to, it takes away time to find more optimal solutions, it makes the negotiation more heated and less rational, and it may convey desperation. Therefore, it is important for you to fully appreciate the importance of having time on your side, which gives you the luxury to choose when or where to negotiate.

Post Settlements

After a negotiated agreement has been reached, if you and the other party have sufficient trust in each other and sufficient motivation, you may seek a post-settlement agreement to further improve your arrangement. The idea behind a *post-settlement agreement* is that you use the agreement reached as a “fall back” option and with that in mind, you openly reveal more of your preferences and interests to each other with the hopes of finding a more optimal solution. A more optimal solution is any solution that adds additional benefits to one party and does not cost the other anything. If you are unable to discover a more optimal solution, you agree to stick with the deal you already struck and it will at least give you greater confidence that it was the best you could do.

post-settlement agreement

an optimal solution reached after parties have an initial negotiated agreement, which may be achieved when the parties use their initial agreement as a back-up option

Of course, post-settlement agreements are not easy. Often parties have already invested so much time and energy into an agreement that they are relieved to be finished and have little motivation to continue on. Also, without sufficient trust, there is always the possibility that one party, seeing the revealed preferences of the other, reneges on the initial agreement and the parties are back at square one.

Anchoring Effect

The *anchoring effect* is a psychological phenomenon whereby the first number put on the table – be it a list price, an offer, an appraisal value – “anchors” the negotiation around that initial number because negotiators make insufficient adjustments away from that number. To illustrate, when reading a list price for a condo, a potential buyer will tend to consider an offer in terms of how far from

that list price they can go, rather than making an offer dependent solely upon what they believe is its value. Knowing the power of the anchoring effect can work to your advantage in two ways. First, it is important to recognize it so you don't fall prey to it yourself. How you do so is by ignoring that initial number and focusing upon some other standard to counterbalance the power of that initial number. Second, you can use your knowledge of the anchoring effect to bias negotiations in your favour. When possible, come up with an anchor that sets the tone for the rest of the negotiation.

anchoring effect

the psychological phenomenon where the first number proposed by either side in a negotiation anchors the negotiation around that initial number, so that all future proposals are stated in reference to that initial number

WHEN NEGOTIATIONS FAIL

Despite your best efforts, you may find that you are sometimes unable to reach a negotiated settlement with another party. Some negotiations, by their nature, are more challenging to resolve than others. When the negotiation remains unresolved you may choose to walk away. However, if it is important for you to find a solution with the other party, you may turn to an *alternative dispute resolution* (ADR) procedure.

What is Alternative Dispute Resolution?

ADR refers to a wide range of informal conflict resolution processes that provide an alternative to litigation in a formal court system. They are informal and consensual in nature, making them more similar to negotiations than to court proceedings. Moreover, they are typically seen as faster, cheaper, and more satisfying than going to court when a negotiation fails.

alternative dispute resolution (ADR)

the processes and techniques that parties to a dispute may voluntarily undertake as an alternative to traditional litigation, such as mediation or arbitration

ADR is frequently used to settle a wide range of disputes, whether they are disagreements between or within organizations, government agencies, families, or any other parties to a conflict. It is not uncommon for individuals who seek

recourse in the courts to find the court requiring them to try ADR first. This is because the use of ADR can often lead to a very effective solution while also lessening the burden on the court system.

The most common types of ADR include mediation and arbitration, but there are many other forms and hybrids, ranging from mini-trials, to ombudsperson, to judicial settlement conferences. First, we will look at the nature of ADR in general.

The Nature of ADR

Though there are different types of ADR, all of them share some common elements that set them apart from formal court proceedings. A key feature of all forms of ADR is that each is less formal than a court of law. The rules of procedure tend to be flexible, and unlike a court proceeding, extensive written documentation is not needed.

Another important element of ADR is the high degree of participation and involvement among the parties, when compared to formal court proceedings. In most cases of ADR, the parties in conflict can decide on the process they will use, rather than giving that power to lawyers or judges. It also enables the process to be tailored to the parties and the nature of the particular conflict.

Third, ADR involves much more direct communication between the parties, and more opportunities for them to reach a sense of reconciliation between themselves. Ideally, ADR creates a safe and productive atmosphere for the disagreeing parties to express their viewpoints and ideas, and to be heard. Effective ADR ensures that each party has an opportunity to listen to the other side, rather than arguing, interrupting, contradicting or discounting them. This might explain the effectiveness of ADR because such listening processes are one way to bring about an understanding of how each side sees the situation and what they need in order to agree to a solution.

Finally, ADR shares a similar nature with integrative negotiations. It is a voluntary, participative process that is focused on creative and mutual problem solving. It seeks mutually acceptable solutions through a process of exploring each party's needs and interests in light of the current conflict.

Common Types of ADR

ADR can be divided into two general categories: mediation and arbitration. There are also hybrids of ADR, such as mediation-arbitration, and negotiated rule-making, but we will focus our attention on the two most common forms.

Mediation

Mediation (or conciliation or facilitative systems) is very similar to negotiations, in that it involves voluntary and informal attempts to seek mutually acceptable solutions between two parties. The key difference between negotiations and mediation is that with mediation, the parties identify a neutral third party to assist them with the resolution process. As with all professionals, mediators can vary in their abilities and characteristics, so choosing a competent mediator that both parties trust is a critical and necessary first step.

mediation

a dispute resolution process wherein the disagreeing parties attempt to resolve their dispute by agreement, through negotiations that are facilitated by a neutral third party

It is important to note that mediators do not have the authority to decide or impose a solution. Although they can suggest solutions or push the parties toward finding their own solution, the parties have the option to disagree or ignore any proposed solutions initiated by the mediator.

Good mediators facilitate communication between the parties. They may help direct and structure the route to a settlement. Mediators often lay the ground rules for how the parties will communicate and behave with each other during the resolution process. This is an especially important and valuable role where prior interaction between the parties has been emotional, or where the behaviour and communication dynamics have been inappropriate or dysfunctional.

Mediators typically go back and forth between the parties to help them reach an understanding about how the conflict could be resolved in a way that would make both parties satisfied. If both parties fully trust the mediator, and believe that what they tell the mediator will be held in confidence, then each will share their true priorities, interests and needs with the mediator (in a way that is difficult to do with a negotiation partner). In such cases, the mediator ends up with full information about both parties, enabling the mediator to see potential solutions that parties by themselves may be unable to see.

Mediators may also help the parties to evaluate the issues more objectively, pointing out which facts, arguments or evidence are believable, and which are not justified. For this reason, mediation can be particularly successful when conflicts remain unresolved because of misunderstandings, miscalculations, or unreasonably biased perspectives on the part of one or both parties.

Arbitration

Arbitration is a form of ADR that involves the parties authorizing a neutral third party to decide the outcome of their dispute. That third party may be an individual, but in some cases the third party is a panel of individuals.

arbitration

a dispute resolution process wherein the disagreeing parties authorize a neutral third party (or parties) to decide the outcome of their dispute. The decision is typically binding on the parties

The process of arbitration can be similar to a trial in the sense that each side presents facts and arguments to a decision maker. However, arbitration differs from court proceedings in that it is less formal. The rules of evidence used in court proceedings need not apply in arbitration, and the arbitrators, unlike court judges, do not need to adhere exactly to the common law precedents.

Arbitration can be non-binding, just like negotiations or mediation processes, where the outcome depends on each party's willingness to reach a voluntary agreement. Though the arbitrator may put forth a solution, either party can choose to reject that proposed solution.

However, unlike negotiations or mediation, some forms of arbitration can be binding. This means that the arbitrator(s) can devise a solution that both parties must follow even if they do not agree with it. Such a procedure leads to an outcome that is more similar to that made in a court of law.

Advantages of ADR

There are numerous benefits to using ADR, which is why you should consider using ADR when a negotiation fails. First, ADR can minimize the costs of seeking a solution to your conflict with another party. Because it is less formalized than the court process, there is less written documentation and prior preparation required. Taking someone to court can be a very expensive

endeavour. You can save money if you can resolve the conflict without having to incur the legal expenses of trial preparation.

Second, ADR can produce more efficient solutions. As you know, most courts are backlogged. If you seek litigation, it can take a very long time for your particular case to make its way through the system. Binding arbitration is perhaps the fastest solution, but all of the methods of ADR lead to more expedient outcomes than litigation.

Third, ADR can provide you with a greater sense of privacy than going to court. This is because ADR records are not made public as they would be in the case of litigation. In some cases, that confidentiality may be beneficial for you. An example of such benefit might be avoiding possible negative publicity that would be brought to your business if you went to court.

Fourth, putting a dispute before the courts may involve putting the matter before a judge who has no particular experience in the industry or with the parties involved. ADR usually allows the parties involved to select a mutually agreeable arbitrator or mediator, who can be an expert in the field and who can appreciate the practical consequences or complexities in the industry.

Another benefit to ADR is that it may provide you with a greater sense of control than going to court. Because procedures tend to involve a lot of participation on the part of the parties, disputants usually feel they have more control over the entire process. In addition, because many of the ADR options involve non-binding agreements, parties prefer them because it increases their sense of control over the outcome. If a conflict goes to court, you must live with the consequences of the outcome as determined by a judge. You may not want to risk such a negative consequence of litigation.

Finally, ADR is typically more effective for maintaining relationships than traditional dispute resolution through a court of law. This is because ADR processes facilitate more interaction among the parties, and therefore, more opportunities for reconciliation. The process tends to be integrative in nature and thus, like integrative negotiations, it is more likely to improve rather than destroy the relationship. Because ADR processes are less adversarial by nature, they are less likely to create ill will between you and the other party. This feature of ADR procedures is especially important if you must continue to work with the other party in the future.

Given the many benefits of ADR procedures, it should come as perhaps little surprise that disputants tend to have greater satisfaction with the process and the outcomes of ADR than they do with traditional court proceedings. In addition, compliance is much higher with the solutions that emanate from ADR than those that come from litigation in court.

Despite these benefits, and the fact that ADR is an effective option for many conflicts, there are some situations where it will not be a good choice. As with integrative negotiations, ADR simply will not work if both parties are not committed to the good faith use of ADR. For this reason, ADR may not work until it is clear to both you and the other party that the negotiation is not going anywhere, and yet you are both disadvantaged until a settlement is reached. Under such conditions, the motivation and desire for a solution is great, and therefore ADR is going to be more advantageous.

In summary, even after an unsuccessful negotiation, there is hope. A failed negotiation does not necessarily involve the parties going to court. Indeed, there are numerous, effective integrative avenues available to you to resolve your conflict before you have to consider the costly, intensive, and potentially threatening route of a lawsuit.

CONCLUSION

Becoming an effective negotiator is an important and achievable, but challenging, goal for mortgage brokerage professionals. In this chapter, you have learned numerous principles to consider en route to improving your negotiation effectiveness, and even some considerations to keep in mind when your negotiations fail. Improvement in your skills will come about through the adoption of the “integrative negotiation” mindset and through the adoption of specific negotiation principles. The goal of this chapter has been to introduce you to this mindset and principles, a mindset and principles that research has shown to truly enhance negotiation effectiveness. However, keep in mind that it is not enough to read about negotiations – you also have to internalize and practice what you’ve read in order for it to be useful to you. In your upcoming negotiations, sit down with paper and a pen and prepare your negotiations very methodically and thoroughly. After each negotiation, analyze what you did

well, what you did not do well, or what you forgot to do, and make notes on what you will try to do differently next time.