



## Good Negotiating Practice

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### Some general principles and some reassurance to start with:

Few topics in research collaboration strike more fear into people's hearts than the prospect of having to negotiate something. So let's start straight away with a piece of reassurance: you don't have to do it alone! In fact, you would be well advised to negotiate together with a colleague, perhaps one who has more experience of negotiating or who does it professionally. There are a number of reasons why a negotiating **team** works better than a single person. Later, we will touch on these but for now it is enough to be aware that you are not alone.

Secondly, it is reassuring to know that good **preparation** for negotiation makes life a lot easier and will usually save time and hassle. How you set about this is another topic of these guidelines.

There are of course negotiating **tactics** to be aware of and to make use of, within the boundaries of what is ethical. Tactics can be learned and good preparation and getting to know the other party will help to steer a path.

So let us now look at the entire negotiating process in more detail.

### Preparation

Prior to the actual negotiation there is usually an orientation process in which the parties get to know each other and look at what they might achieve through collaboration or transaction. This phase should be about exchanging information rather than negotiating. It is very important to obtain as much information as possible about the other party's objectives, resources and needs, and to present yourself as an attractive potential business partner.

Try to keep the process of information-gathering in this phase separate from discussing forms of cooperation or transaction. In other words, leave negotiation till later, and make this clear from the outset.

Discuss internally everything learned about the other party. A good approach is to write a position paper which combines information from various sources such as:

- Information provided by the other party in discussions
- Publications, web site content, patent applications
- Press releases, public financial information such as annual reports etc.
- Experience gained through earlier contacts between your organization and the other party, such as previous contracts signed or discussions held on other topics

Regrettably, the last bullet point is often ignored, particularly in universities and medical (research) centres. It makes good sense to check within your organization, including other departments, the technology transfer office and subsidy desk, the history of contacts with the other party.

In preparing for negotiation you will have to try to put yourself in the other party's shoes and assess what it is worth to him to do a deal with you. Difficult to do! Some approaches are given below to help you.

### Exchange of information prior to negotiation

Almost certainly the parties will sign secrecy undertakings, if not already done. They may also prepare documents making initial proposals. So-called term sheets are one example of this, in which the main elements of a deal, usually financial elements, are outlined.

There are pros and cons to this. It can be useful to start talking real business proposals, but many elements need to be considered together, not split up and taken one by one (so-called *salami tactics*). It is important to emphasize to the other party that the main aspects of importance to you in a good deal are interdependent and should be negotiated together. Avoid making isolated concessions early in the proceedings, unless these are relatively unimportant points. Mark documents as "Draft, subject to contract". This serves to underline the fact that, while the negotiating team has a mandate from its management to negotiate in good faith, the result will have to be approved higher up and there may be issues which prove unacceptable.

### What is it worth to the other party (or to me)?

First let us look at a few common misconceptions, as perceived from the perspective of the "seller".

- I expect to recoup a substantial fraction of the development cost.

*Possibly, but your customer is not interested in how much it cost you to develop, only in what he can earn from it.*

- My financial gain should be related to the capital cost of implementation.

*There is no logical reason why this should be the case. A small add-on at low cost which substantially improves a process or product should be worth far more than the ratio of capital costs. Conversely, a large capital outlay which brings about only a small incremental improvement in the economics will be worth far less than based on capital costs.*

- I estimate that the customer's business is worth amount  $x$ . A fraction of  $x$  should accrue to me as benefit for my product or technology.

*Only if the fraction takes account of the **incremental** gain your product or technology confers as well as the risk entailed. Note that royalty payments are based on these factors, and that the risk element for the end user invariably restricts the percentage royalty payable.*

Whether seen from the perspective of “buyer” or “seller” the value assessment involves the combination of incremental benefits, risks and alternatives (e.g. competitive offerings, but sometimes simply the “do nothing” option).

- How much does the other party stand to gain from what I have?
- How much risk does it entail for him/her?
- What alternatives does he/she have and how much would they cost?
- What is my minimum ambition in terms of financial or other gain?
- What alternatives do I have, and at what cost?
- How much risk is at stake for me?

These considerations apply equally in situations where direct monetary value is not at issue but the parties stand to benefit from the collaboration in other ways (e.g. research synergy, development, prototyping, (clinical) trials etc.).

Prepare for the negotiation by meeting with colleagues in your organization to assess the points shown above. Take the time to do this thoroughly. When you have looked at the problem from different perspectives, preferably with people present who will challenge your perceptions and think out of the box, you should consider the likely value(s) for both buyer and seller as a starting point for negotiation.

At this stage (and subsequently) there are two approaches you can take.

### 1. Principled negotiation

In this approach the respective **interests** of the parties are taken into account, on the basis of an outcome which is expected to yield the best chance for an open, productive and sustainable business relationship. In respecting each other’s interests, all relevant aspects, not just financial, deserve attention and there should be balance and fairness on both sides.

### 2. Positional negotiation

Here a **position** forms the starting point for negotiation, usually with a substantial margin built in from the outset to allow maximum negotiating space.

Principled negotiation offers arguably the best prospect of a balanced, harmonious relationship but it requires a degree of mutual understanding and transparency. There may be situations where these criteria are not met and the positional approach is chosen. The negotiating process may follow the “positional” path from both sides and end up being a “hardball” contest, from which it is often difficult to break out.

=> There are some good publications on principled negotiation including:

[https://en.wikipedia.org/wiki/Principled\\_negotiation](https://en.wikipedia.org/wiki/Principled_negotiation)

Getting to Yes: Negotiating Agreement Without Giving In, Roger Fisher and William L. Ury, published by Penguin Books.

Suppose your internal discussions fail to reach a consensus, perhaps because you simply lack sufficient information on the other party's business or activities to make an adequate assessment. Nothing wrong in that, it can happen. You could declare your ignorance and invite the other party to supply information on his business and the potential value of a deal. This often works, but it may be tactically better to approach it by first making an unrealistic proposal leading to a highly critical response in such words as "*you clearly have no conception whatever of our business!*" - "*Okay, then please help us by explaining where we are going wrong...*" Often in negotiations, if all else fails, you have to ask the other party to tell you what something is worth to him.

### The negotiation process

Having done your preparation and agreed internally a mandate from your management you are ready to start negotiation proper. Agree a schedule of meetings in person or by telephone with the other party. Propose an agenda and a venue for the first meeting, and be prepared for further meetings. The process can sometimes be completed in a single session but be prepared for it to take a long time.

Decide who will be in your negotiating team and exchange this information with the other party.

### The team

A negotiating team comprising two or more members is good practice for a number of reasons. It can bring different types of expertise to the table, for example technical, legal and financial. The team members together have more eyes and ears for what is going on and can back each other up, take turns to debate points with the other party, and fill in details which might otherwise be missed. A team also gives the opportunity for role play, which we will discuss a bit later.

Suggestion: Sometimes it is possible to have someone from your organization present as an **observer**. This must of course be acceptable to the other party and the person observing must refrain strictly from taking part in the discussions. An observer sees the entire process, watching for body language and reporting back later internally. The author has experience of being an observer on a few occasions and can vouch for the benefit both to the negotiation itself and to learning in general.

### Setting up the negotiation

Make sure to exchange beforehand the agenda for the meeting, who will attend – including brief resumes – and the location or telecommunication details.

Make travel plans to ensure your representatives arrive in good time and well rested.

The agreed agenda should reflect the objectives for the meeting, including expectations for the ground to be covered.

It is important to write a summary of the discussions and points agreed (or disagreed), to serve as a record. Agree beforehand who will draft this and when it will be brought to the table. Ideally these notes should be agreed each day before proceeding. If one of the negotiating parties

persists in re-opening points which have already been dealt with, the negotiation is likely to fail, or, worse, the end result will be unsatisfactory.

### **Mandate to negotiate**

There should be clarity that the negotiating teams have a mandate (from higher management) to negotiate. If this appears doubtful (or the process looks merely like a “fishing exercise”) then a polite challenge should be made.

A mandate does not necessarily imply binding decisions being taken at the meeting. It is normal that a negotiating result be referred to higher management (authorized signatories) for ratification. There may also be proposals which fall outside the internal mandate and need to be discussed “back home”. This can be done either by telephone or messaging during a time-out, or discussed later before the next negotiating session. It is no shame to state during the meeting that subjects raised or proposals made fall outside the scope of what the team can agree to now and must be referred back to management. This gives the team a safety valve to pause and reflect.

Calling time-outs from time to time is good practice anyway, as it gives the opportunity for the negotiating teams to review progress and discuss internally any issues which arise.

### **Practical matters and comfort during negotiation**

Meeting facilities should be comfortable and spacious, preferably with natural daylight and without undue distractions such as strong sunlight, traffic/aircraft noise or building/repair work in progress.

There should be appropriate breaks for sanitary stops, coffee, tea and meals. The sessions should be limited in time to a (fraction of a) normal working day.

Informal networking such as going out to an evening dinner can be good for relationship-building and as light relief from the hard negotiating but anything lavish or excessive must be avoided. Everyone must be fit for the next negotiating session.

If you are taken ill do not be afraid to postpone the negotiation session (or provide an adequate substitute if that is possible). Similarly, if some personal misfortune should arise at the time of the negotiation (for example illness or bereavement in the family), explain the situation and ask for postponement. Generally people are understanding in these situations, and it is even said that events such as these can have a positive influence on the progress and even outcome of the negotiations (when resumed).

### **Role play**

The team members have individual areas of expertise, e.g. technical, financial, project management, and it is natural that these should be reflected in who takes the lead in which topics of the negotiations.

Role play, however, extends into the realm of personality. Although it is never wise to allow one’s emotions to take control, there is an area in which personality differences subtly influence the tone of the exchanges, without control being lost.

Perhaps the most common example of this is the so-called “good guy-bad guy” duality within a negotiating team. This can be a deliberate tactic, these roles being decided in advance of the meeting. But the situation often arises quite naturally, as if by some subtle dynamic of nature!<sup>1</sup> The difference of approach between two members of the negotiating team generates a certain tension which can work positively (but if the opposite party feels uncomfortable or hassled this can backfire, so one needs to be sensitive to that).

### “Dirty tricks” and how to react

Most people behave responsibly in negotiations and stay well within ethical boundaries but occasionally you may come across someone who does not.

Unacceptable behaviour includes:

- Deliberately unpleasant or uncomfortable surroundings
- Comments directed at the person not the subject matter
- Lies and deliberate misinformation or fogging
- Reneging on items already agreed upon
- Playing off several potential deal partners without declaring it

The first two categories can be countered more or less immediately by calling for a change of behaviour or surroundings. The three others are more problematic since it may be some time before you start to suspect dishonesty or are confronted with a party going back on earlier concessions. But they still call for a challenge in the form of questioning information given, requesting clarity where information is (suspected of) being unethically withheld or asking for clarity on the negotiating process the parties agree to.

With respect to the last category, in some legal jurisdictions problems can arise if agreement is unreasonably withheld or withdrawn because of undisclosed parallel exchanges with another party. If situations exist with more than one potential candidate (competitive playoffs) it is wise (and sometimes legally required) to state this from the outset. This can be done without disclosing the names of parties, but it is important for a third party to be aware that there are other “suitors”.

If agreement depends upon other factors outside the scope of the negotiation it is ethically good practice to make this clear from the outset. This can arise if, for example, the matter being considered is dependent on materials or resources from other sources, e.g. materials to be licensed in from a third party.

### Some legitimate tactics (in the author’s opinion)

#### Have alternative proposals at the ready

Experienced negotiators prepare alternative proposals to introduce if the negotiation process appears to be stuck. Generally these are put forward towards the end of a session, for the other

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<sup>1</sup> The author has been continually amazed at how “naturally” a team seems to settle into these roles, and by the fact that sometimes the roles are reversed! A negotiator whose natural style is to be empathetic and constructive may suddenly find himself in the role of the bad guy!

party to take away and consider. This can be a useful tactic but it is essential that the party making the proposals has a mandate from management to do so, and care is needed not to make the process unduly complicated, as this can rise rather than remove obstacles.

#### Have some additional items on your wish list ready if the situation arises

Generally there will be some (minor) items outside the main core of requirements which nevertheless are desirable results from the negotiation. It can be a good tactic to raise such small items as you are about to shake hands on the core deal, or as a point of clarification in the negotiation process: “*May we assume that the license will include...?*” A condition is that these are indeed minor embellishments which do not interfere with the core.

Another situation can (occasionally) arise if you are suddenly surprised by a significant unexpected concession from the other party. Control of body language is then required so that your relief (joy) is not too apparent and embarrassment is avoided. In such situations it is very useful to have some (minor) additional points to immediately bring up in negotiation and which you claim to attach importance to.

#### People and relationships always matter

Buying an object such as the proverbial second-hand car seldom involves more than a fleeting encounter between buyer and seller (although even in this case the personal element may be very important). Deal-making around research collaboration, transfer of materials, licensing of (intellectual property) rights, however, constitutes a long term commitment in which personal relationships are key. However tough the core negotiation may be, there should develop in the course of time a genuine personal interest and understanding between the negotiators (especially if they will be the people working together to make the project ultimately successful). It is therefore important to take time to develop the relationship and to be aware of gestures from the other side of the table to achieve the same end.

In conclusion, negotiation is about obtaining a good result, fair to all parties, but equally about establishing an understanding and a framework which offer the best chance of being sustainable in the future.