

# Successfully Negotiating with the Self-Represented Party

## Build rapport, keep rapport

BY JOSEPH W. BOOTH

Leading negotiations between family law litigants when you represent only one party can be an excellent way to broker a good-faith consensus. When reached properly, such consensus will survive the scrutiny of the court and the test of time.

### Efficiency is a huge advantage

A common request from clients is for the attorney to work with both of them together in an effort to defray costs, maintain a nonadversarial resolution, and provide an expedient result. Negotiating with an unrepresented individual sometimes requires unique skills and presents unique impediments; but offers opportunities and rewards.

Keep in mind that one of many tensions in this situation is that attorneys have a higher ethical standard of candor when dealing with unrepresented litigants. Conversely, the unrepresented litigant, when participating in court activities, is held to the same standards as an attorney. This tension is difficult to navigate. It often is wise to set a few ground rules with the client first and the unrepresented litigant later.

Attorneys are usually more comfortable dealing with other attorneys: the rules are clear, and there are social norms to follow. No matter who plays the music, everyone knows the dance.

### Important conditions

Negotiating with family law unrepresented litigants is most effective when the following criteria are set:

1. The continuing assurance that both parties are willing to negotiate in good faith.
2. Objective standards or guidelines set by your court. When the courts provide objective standards and outlines, they can be used as the best alternative to a negotiated agreement (BATNA) in that the court or law sets general guidelines in which general outcomes are fairly certain. An example would be child support guidelines that leave little room for negotiation in many jurisdictions.

### Preparation is key

The key to successful negotiations in any context is preparation. You must prepare yourself, your client, and the negotiations.

For an excellent review of technique, as well as a host of resources to assist in dealing with the unique set of challenges, see Gregg Herman's book, *Settlement Negotiation Techniques in Family Law* (ABA 2013). Consider the chapter on planned



Published in *Family Advocate*, Vol. 37, No. 3, (Winter 2015) p. 36-39. © 2015 by the American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

early negotiations and their benefits. See also Lande, page 12.

Mediation training and collaborative law training also provide excellent practical skills. Interest-based negotiation, along the lines of the model established in *Getting to Yes*, provide a framework for productive discourse.

Negotiations with anyone is best summarized as reflective communications designed to get at the core issues and develop a consensus.

Studies have shown that the best negotiators (in all contexts) possess these qualities: they are (1) civil and start with cooperation; (2) keep things from getting too complex; (3) provokable, e.g., when someone is out of bounds, they call them on it; and (4) willing to forgive previous defections.

### **Build rapport**

The preparation next involves your own client. Your client must understand that negotiations are somewhat inevitable and are required. Some level of negotiations must occur to prevent every case involving an unrepresented litigant from going to trial. It also prevents unnecessary strife for the family in the midst of turmoil. If the parties are willing to get along and earnestly try to resolve the problems themselves, competent lawyers can be effective facilitators. The client needs to know and needs to help participate in decisions as to how much time and effort will be spent discussing the matter with an unrepresented litigant.

### **The importance of introspection**

This step includes preparing for the negotiations themselves by fully evaluating the elements of the dispute. If you are dividing property, what objective data do you have and what do you need? If you are negotiating child custody, then who are these kids, how does the family work, to whom do they look for support? Just as important is an empathetic review of what the other side may want, fear, have, and need.

### **Consider an early written offer**

Perhaps one of the most “arm’s-length” and efficient ways to negotiate with an unrepresented litigant is simply to write a proposed settlement agreement and offer it to the other side. Then encourage the unrepresented litigant to determine whether he or she wishes to obtain independent counsel to review and approve the agreement. All communication is in writing and easy to review later, including counteroffers. There is no need to meet when the resolution appears to present itself.

In such a situation, advise your client to stick to three responses: (1) This is in there because it is important to me, how else can we accomplish what needs to be done? (2) I don’t know why that is there, I will ask my lawyer and report back. (3) Damn it! I told them to take that out!

### **Civility and honesty are required**

When dealing with an unrepresented litigant, chief among the concerns is whether he or she is willing to negotiate in good faith. Indicators, such as domestic violence, the litigation history, and how the person has dealt with past disputes are fairly telling as to whether the litigant is trying to expediently resolve the issue or simply taking advantage of his or her unrepresented status and the lower costs of self-representation while increasing your client’s costs. If the case is on file, look at the litigation history and stance. Sometimes doing a lot of work and handling important changes before the meeting is advisable. Both client and counsel should be concerned that the unrepresented litigant could waste time and make the case more costly than it needs to be. When that happens, the attorney’s leadership is questioned and the problem set is deepened.

---

**Though the lawyer controls the meeting, the parties each have ultimate control over an agreement reached. Neither one has an upper hand, and rapport is maintained**

---

Your client needs to know that you must proceed with great candor and openness, but, conversely, cannot provide legal advice to the opposing party. This often means discussing some of the alternatives that are present to resolve the problem, comparing guidelines or standards set by the local court, and then describing why one choice or another is preferred. External resources can be considered, such as appraisers, counselors, and others. The represented client needs to understand that proposed agreements must be objectively equitable. The unrepresented party will likely seek review by independent counsel, and unexplained, striking inequities found in that review can destroy trust and credibility. Most courts are required to review agreements and make an independent determination of the equities as well.

## Set ground rules

It helps to set ground rules for working with unrepresented litigants, clarifying to all participants what protects the rapport.

- The unrepresented litigant can bring anyone, except children of the relationship, into negotiations at any time. The represented party can always object and choose to end the meeting.
- Reasonable alternatives should be discussed, and the attorney should not mislead the unrepresented party by failing to disclose a reasonable option. For example, courts have great discretion in awarding alimony. If alimony is a reasonable outcome, alimony must be discussed and a learned decision made. On the other hand, the attorney and client have a right to expect similar candor from the unrepresented litigant.
- The unrepresented litigant would never be required to sign anything without allowing adequate review time for independent counsel.
- An unrepresented litigant's use of independent counsel must be clearly defined, and if that attorney is acting as the legal representative, your direct communication with the unrepresented litigant must stop.
- Stopping one sort of negotiations (such as face-to-face meetings) still allows for other solutions, like discussions through newly acquired counsel. The hard work that has been done can be saved and used later.

Once the ground rules are set, a meeting can be scheduled. Again, the first agenda item of the meeting is to review ground rules again and agree on how to discuss a solution before discussing the solution.

## Attorney as director

We all have an "in-box" of e-mails from unrepresented parties pleading with us to require our client to behave. We are not hall monitors, pseudo-parents, or arbitrators.

Initially and repeatedly, state emphatically that you represent your client only—and not the unrepresented party. These discussions use many of the same skills and methods of mediation, but the attorney is an advocate for his or her client, owes the client confidentiality, and does not owe confidentiality to the unrepresented party. On the other hand, the retained attorney can then take an agreement and draft documents and present them for approval to the court. Mediators cannot act as an advocate or represent either party in subsequent proceedings.

The attorney leads the discussion. Although others may have the floor, the specter of professionalism is supported and enforced by the lawyer's overall control of the process. Like a good chair of any meeting, counsel asks guiding questions, offers resources, makes suggestions for the parties to consider, and keeps the discussion on point.

---

**Often "give away points" are used to build rapport, such as conceding that the court is going to divide marital property equally and the parties just have to decide how best to do it**

---

## The client as final authority

Though the lawyer controls the meeting, the parties each have ultimate control over an agreement reached. Neither one has an upper hand, and rapport is maintained. It is important that the parties leave the process feeling like they, not counsel, created the agreement. The parties' ownership of both the process and the results is key to maintaining rapport.

By guiding the discussion first with key issues, supported by objective data, the decisions are easily participant centered. For example, the parties are encouraged to bring income data and find property values, loan payoffs, possibly credit reports, account statements, and other objective information. Those are immediately logged into a spreadsheet and projected on a large monitor for all to see. Then, and only then, does the discussion turn to what to do about distribution. (If your client deeply wants to keep the residence, that may happen easier if the other party presents that idea first.)

The parties generally appreciate gentle humor in acknowledging such things as minor inconveniences or typographical errors. A light self-deprecating humor allows counsel to manage the mood, reduce tensions, and build rapport. Remember, however, that this is not a "show." There is a palatable and dangerous difference between self-deprecating humor and self-defeating humor!

When discussing kids, list what is important, such as work and school schedules, unique needs or opportunities, etc., before deciding on a parenting plan. A boilerplate parenting plan, presented to and critiqued by the parents, means that neither party is required to expend goodwill by having to propose their own plan upfront.

Often "give away points" are used to build rapport, such as conceding that the court is going to divide marital property equally and the parties just have to decide how best to do it. Or getting everyone to agree right off that after the divorce Mom will still be Mom and Dad will still be Dad—nothing will ever change that! Neither parent can do it all, and the kids need something from each of their parents.

All jurisdictions presume that parents will share equally in decision-making for the kids. Saying so builds rapport without either party losing ground. Build rapport by articulating the mundane and obvious. Common fears, such as of losing vital contact with the children, will be alleviated.

## Give credence to emotional issues

Sadly, most severe conflicts have at their heart the desire to react in anticipation to what one fears the other will do, not in response to current circumstances. These conversations, when face-to-face, take time and can be very difficult. Recognizing the emotions and validating their importance demonstrates empathy and builds rapport. Breaks are important, as is calling the meeting to an end before fatigue raises tensions. These meetings should generally last only about an hour to an hour and a half.

At the end of each meeting, two closing issues are important: (1) to define the parties' expectations and set "home work" or goals to achieve them and (2) to schedule the next meeting. A summary or minutes of the meeting is helpful and should be distributed by e-mail later. This maintains rapport.

Meetings culminate in a draft agreement. If other documents, such as decrees or journal entries are needed, send those drafts out to the parties for review as well. Once the parties have had an opportunity to evaluate, consult, and just plain mull over the terms, they will likely be ready to sign on. Afterwards, rapport is preserved by always coordinating hearing settings, providing notice, and/or distributing copies of approved orders.

## The key to success

The key to family law dispute resolution is the framing of dispute resolution itself in a new way so that the parties will need fewer and fewer external resources to resolve future conflicts. By building and maintaining rapport between the parties today, the relationship may evolve to support whatever cooperation will be needed tomorrow. **FA**

---

**Joseph W. Booth** has been an active member of the ABA Family Law Section for several years and currently serves on the Publications Board. He practices family law, ART, and does considerable appeal work in northeast Kansas. His practice has an active interest in ADR. Booth is a fellow of the American Academy of Matrimonial Lawyers and the International Academy of Matrimonial Lawyers. He has represented the ABA FLS in drafting projects for the Uniform Law Commission and is an adjunct professor for Washburn School of Law.