

NEGOTIATION

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Negotiation is a method of communication designed to reach an agreement when what you want conflicts with what someone else wants.

HOW TO NEGOTIATE

While representing a parent in an AND case may occasionally feel like being in a war, don't treat negotiation as a battle. If you approach negotiating as a battle (*each side attacks the other, each side defends their position, one side advancing causes the other side to retreat and there is a winner and a loser*), your client will most often be the one that loses. It is extremely difficult to 'win' when one side (*DSS*) has all the power; it is even more difficult if the Guardian ad litem (*GAL*) is aligned with *DSS*.

Instead, I suggest that you think of negotiation as a car ride with fellow travelers. In this analogy, there are:

- multiple travelers (parties)
- a common route (the court system)
- obstacles and detours that must be overcome
- a beginning, middle and end stage
- an expenditure of time, effort and strategy
- a mutually agreeable outcome

This type of negotiation is known as Principled Negotiation. The aim of principled negotiation is to find a solution that is acceptable to the parties, and leaves the parties feeling that they've won, in some way, at the conclusion.

How to Use Principled Negotiation in an AND case:

A. Understand your client

1. Never assume you know what your client wants. Learn what your client wants by asking and listening. Determine what is important to your client (*e.g. speedy resolution of trial v. a desire to prolong and challenge allegations, a desire for privacy v. a desire for a forum, a need to minimize or deny responsibility v. a*

desire to correct conditions). Make sure you know your client's tangible and intangible goals before you start negotiating.¹

2. Involve your client. If you negotiate an adjudication and disposition order with the DSS attorney and GAL Attorney Advocate and then take the memorandum of judgment to your client, chances are your client will not approve the settlement or will do so with resentment and doubt. If they are not involved in the process, it will be difficult for them to approve the product.

B. Understand yourself and your role

- Your clients did not get to choose you, do not know you and have no reason to trust you. Your clients do not want you to be their friend; your clients want a professional to help them navigate their legal conflict.
- You are there to help your client avoid unwise decisions, to protect your client from harmful actions by the other parties, and to channel your client's energy in a productive manner.
- You cannot negotiate without your client's involvement. The most common reason for an unsuccessful negotiation is the failure of communication between one of the lawyers and their client.

C. Understand your opponent

1. Get to know your DSS attorney and your GAL attorney advocate. If your county is small enough, get to know the DSS social workers and the GAL program staff. The more you know about their values and their temperament and the more you understand what motivates them, the more effective you will be as a negotiator.

Remember, the aim of principled negotiation is to find a solution that is acceptable to all parties, and leaves the parties feeling that they've won, in some way, at the conclusion.

This is especially important in AND cases where you and your client not only continue to have a relationship with the other parties after the adjudication and disposition, but must rely on those parties for their support and cooperation in getting your client to succeed.

¹ Be aware that your client is in crisis and may exhibit characteristics such as distorted judgment, diminished rational thought and extreme emotions including feelings of alienation, anger, grief, helplessness and anxiety. You need to become adept at distinguishing these normal and temporary reactions from those clients with mental health issues, especially those with personality disorders that reflect a high-conflict personality. The website www.highconflictinstitute.com has some good resources.

2. Negotiating styles can be divided into two categories: the cooperative style and the aggressive style. Approximately 2/3 of attorneys fit the profile of a cooperative negotiator. Within each style, an attorney can be an effective negotiator or an ineffective negotiator.

Understand your style and the style of your opponents. Two cooperative negotiators are very likely to achieve a mutually acceptable agreement; two aggressive negotiators are less likely to reach an agreement but the lowest probability of agreement occurs when a cooperative negotiator is combined with an aggressive negotiator.

What do you do if you are a cooperative negotiator and are dealing with an aggressive negotiator? Research shows that in this situation, the cooperative negotiator must be the one to adjust his or her style and must become more forthright and respond immediately and unambiguously to each aggressive statement. However, the cooperative must also avoid turning the negotiation into verbal warfare.

D. Be prepared

- Negotiation is not a substitute for preparation.
- You must have evaluated your client's case for its strengths and weaknesses. You can only do this by communicating with your client and by conducting discovery.
- You must have developed your case theory in consultation with your client.
- You must have developed your "best alternative to a negotiated agreement" (BATNA). In other words, if you don't reach agreement with the other person, what alternatives do you have? Are these good or bad? How much does it matter if you do not reach agreement? Does failure to reach an agreement cut you out of future opportunities? And what alternatives might the other person have?

E. Use the 4 Getting to Yes principles of Negotiation²

1. Separate the people from the problem.

The people in this tenet are the negotiators. Negotiators are people with egos and unique pressures. Comments made are often taken personally. For example, a DSS attorney may say: *"I have 5 other adjudications set for the same day as your client's adjudication"*. What does the DSS attorney mean by this comment? Is the DSS attorney pressuring the parent attorney to accept a settlement offer? Is the DSS attorney saying that your client's case is less important than the other cases set for adjudication? Or is the DSS attorney feeling overwhelmed by the pressure of having to

² Roger Fisher, William Ury, and Bruce Patton, *Getting to Yes* (Penguin, 2d., 1991)

be prepared for five trials on one day? When the parent attorney fails to separate the person from the problem, they react personally. The parent attorney may reply *"It's not my fault you filed a petition on such flimsy facts"*; a response guaranteed to torpedo any constructive negotiation.

Remember these well-known communication tools:

- Try to understand their point of view; this is not the same as agreeing with them.
- Don't make assumptions; ask questions.
- Don't react to emotional outbursts; allow the person to vent. If they cannot get control of themselves in a reasonable period of time, suggest a recess.
- Don't talk to persuade; talk to get them to understand your point of view.
- Listen. Don't be thinking of your next comment. Write down what the other person is saying as a means of focusing on the content. Interrupt to recite back what you think you heard to see if you understand the other person.
- Pay attention to non-verbal cues. Is the person showing signs of anxiety, fear or anger? Talk about your own emotions or the emotions of your client and invite the other side to do the same.
- Speak about yourself or your client; the statement *"my client is very upset that she won't be able to do her daughter's hair for the first day of school"* is far more likely to lead to a solution than *"your social worker won't even let my client see her child this week"*.

2. Focus on interests, not positions.

Your interests are what led you to your position. People will argue over positions, rather than interests.

Example: a parent has hit their 14 year old son with a belt leaving marks over his body. The parent has done so in a fit of frustration after finding the child with marijuana and a tattoo that appears to be a gang symbol. DSS is insisting on an adjudication of abuse while the parent attorney is equally insistent that there be no abuse adjudication. However, if each party looks at their interests instead of their positions, they will usually find many shared or compatible interests. For example, both DSS and the parent may want:

- *a cooling off period between the parent and child,*
- *the child to receive substance abuse treatment,*
- *the parent to learn non-corporal means of punishment that are effective,*
- *the child to be involved in activities that will counter a gang's influence; and,*
- *the child to receive after school tutoring.*

Once the parties can identify and talk about their interests rather than their positions, a solution via principled negotiation is much more likely.

An effective technique to figuring out interests in an adjudication and disposition is to talk about the disposition before talking about the adjudication. What does DSS want to happen before the first review hearing? What does the GAL want to happen before the first review hearing? What does the parent want to happen before the first review hearing? Looking forward will often expose common interests among the parties.

3. Create options for mutual gain.

Be creative! Boilerplate language and solutions are too common in AND cases. Almost every disposition order requires a parent to complete substance abuse treatment and parenting classes, receive a mental health evaluation, obtain stable housing and income and attend weekly supervised visits

It will likely be up to you to try and expand the options that are available. You will likely meet resistance from social worker supervisors too worried about policy and money, social workers too worried about their caseloads, DSS attorneys too worried about catching up on their orders and GAL attorney advocates too worried about their time.

If you bring a solution to the table that helps your client's interests as well as the other side's interests, you have invented options for mutual gain. If you draft a proposed adjudication and disposition order as a basis for negotiations, you have saved the DSS attorney valuable time and helped your client by softening the facts. If you can find a person who can supervise your client's visits, you have saved the social worker valuable time and allowed your client more contact with their child than DSS could have provided.

4. Insist on using objective criteria.

Use objective criteria to assist in reaching agreements. When negotiating over how many consecutive drug screens your client must have before she can have unsupervised visits, use the recommendations of a qualified substance abuse counselor. When negotiating over frequency of visits, use recommendations from an established child development specialist.

WHAT TO NEGOTIATE

N.C.G.S. 7B-902 states “Nothing in this article precludes the court from entering a consent order or judgment on a petition for abuse, neglect, or dependency when all the parties are present, the juvenile is represented by counsel, and all other parties are either represented by counsel or have waived counsel, and sufficient findings of fact are made by the court”.

****Practice Tip and Warning****

Generally, a consent order does not require findings of fact or conclusions of law.³ Since the juvenile code specifically requires that there be findings of fact and since the court cannot make its own findings without competent evidence being presented⁴, it is highly recommended that any consent order be signed by all parties and contain language similar to the following:

“This order is entered into by consent of the parties who are present, represented by counsel or have waived counsel and is based upon the following stipulated facts.”

Remember however, that while judges usually appreciate the amount of court time saved by stipulations and a consent judgment, the judge is never required to accept stipulated facts or a consent judgment.

When negotiating an AND case, break down the case into its components:

1. There must be facts that support adjudication of the child’s status. These findings are not fault-based.
2. There must be conclusions/judgment about the child’s status.
3. There must be facts that support the disposition judgment for each parent and DSS. These findings must discuss the role of each parent and the role of DSS.
4. There must be dispositional conclusions/judgments for each parent and DSS.

³ “[A]ny judgment by consent is the agreement of the parties...entered upon the record with the sanction of the court. It is not a judicial determination of the rights of the parties and does not purport to represent the judgment of the court...this type of judgment does not contain findings of fact and conclusions of law because the judge merely sanctions the agreement of the parties. *Buckingham v. Buckingham*, 134 N.C. App. 82, 89, 516 S.E. 2d 869, 875, *disc. review denied*, 351 N.C. 100, 540 S.E.2d 353 (1999).

⁴ See *In re D.Y.*, ___ N.C. App. ___, ___ S.E.2d ___ (1/19/10)

Any of these can be the subject of negotiation. For example, there can be a contested adjudication hearing but a negotiated disposition or a negotiated adjudication and a contested disposition.

Whatever is being negotiated, consider the following tips:

- Volunteer to be the 'scribe' and ultimately, the person who prepares the consent judgment for signature.
- Start with the findings that are easily agreed upon by all parties.
- Then work on the findings that are supported by objective evidence.
- If a finding is positive for your client, incorporate documentation in the finding. Example *"Christi Clay has received a substance abuse evaluation that is incorporated herein. Christi Clay has not substance abuse diagnosis and no need for treatment."*
- If the finding is negative, try to keep out documentation and try to soften the language.
- If you have reached a consent judgment, the DSS and GAL reports do not have to be admitted into evidence. If DSS and the GAL insist on having their reports admitted as evidence, make sure that the reports are consistent with the stipulations. Don't allow your hard work to be torpedoed by the admission of reports that are full of negative information about your client. These reports can and should be redacted before being admitted as evidence.

Hopefully, these suggestions will help you in your negotiation practice in AND cases and in achieving outcomes that are fair to all sides.

