

**NEGOTIATION:
ON AND OFF THE RECORD**

JAY E. GRENIG
ROCCO M. SCANZA

THIRD EDITION OF ON AND OFF THE RECORD:
COLOSI ON NEGOTIATION BY THOMAS R. COLOSI



AMERICAN ARBITRATION ASSOCIATION®

JURIS

Questions About This Publication

For assistance with shipments, billing or other customer service matters,
please email us at: customerservice@jurispub.com

For editorial assistance, please email us at: editorial@jurispub.com

To obtain a copy of this book, please visit:

www.arbitrationlaw.com/allbooks/

To learn more about Juris ArbitrationLaw, please visit:
www.arbitrationlaw.com

COPYRIGHT 2019
American Arbitration Association
JurisNet, LLC

All Rights Reserved
Printed in the United States of America
ISBN 978-1-944825-37-9

JurisNet, LLC
52 Elm Street
Huntington, New York 11743
USA
www.arbitrationlaw.com

— SUMMARY TABLE OF CONTENTS —

Detailed Table of Contents vii
About the Title..... xvii
About the Authors xix
Preface..... xxi

Chapter 1 Introduction to Negotiation..... 1
Chapter 2 Approaching the Negotiation Process..... 17
Chapter 3 The Structure of Negotiation..... 33
Chapter 4 Putting It All Together: Managing the Structure and
Process of Negotiation 47
Chapter 5 Fundamentals of Table Behavior 69
Chapter 6 Persuasion 85
Chapter 7 Approaches to Negotiation..... 99
Chapter 8 Negotiation and Dispute Resolution 111
Chapter 9 Mediation 127
Chapter 10 Effective Mediation 143

— APPENDICES —

Appendix A Time Line Management 161
Appendix B Responsibilities and Tasks of the Negotiator..... 173
Appendix C Mediator Considerations 175
Appendix D The Iceberg Principle: Secrecy in Negotiation 179
Appendix E Bibliography 187

— TABLE OF CONTENTS —

Detailed Table of Contents vii
About the Title..... xvii
About the Authors xix
Preface xxi

Chapter 1 - INTRODUCTION TO NEGOTIATION 1

A. INTRODUCTION.....2
 1. In General 2
 2. Power 3
 3. Win/Win 3

B. FACTORS AFFECTING NEGOTIATION3

C. NEGOTIATION STYLES.....4
 1. In General 4
 2. Distributive Bargaining..... 4
 3. Integrative or Cooperative Bargaining..... 5

D. PLANNING.....5
 1. In General 5
 2. Target Point 7
 3. Reservation Value..... 7

E. PRELIMINARY STAGE.....7

F. INFORMATION EXCHANGE.....7

G. BARGAINING8
 1. In General 8
 2. Saying No 8
 3. Making the First Offer 9
 4. Concession Patterns 9
 5. Closing..... 10

H. AGREEMENT10

I. IRRATIONALITY11
 1. In General 11

TABLE OF CONTENTS

2. Unrealistic Expectations	11
3. Escalation of Commitment	11
4. Fixed-Pie Myth	11
5. Anchors.....	11
6. Frames.....	11
J. COMBATTING IRRATIONALITY	11
1. In General	11
2. Best Alternative to a Negotiated Agreement (BATNA).....	12
3. Reservation Price	13
4. Target.....	13
5. Zone of Possible Agreement (ZOPA).....	14
6. Information	14
7. Interests and Positions	14
8. Fairness	15
9. Trust.....	15
K. TOM COLOSI'S TEN COMMANDMENTS OF NEGOTIATION.....	15
Chapter 2 - APPROACHING THE NEGOTIATION PROCESS	17
A. INTRODUCTION.....	18
1. In General	18
2. Litigation.....	18
3. Transactional Negotiations	18
4. Competition	18
B. BASICS OF NEGOTIATION	19
1. In General	19
2. Negotiation Compared with Other Decision-Making Processes.....	19
C. IMPORTANCE OF GROUND RULES.....	21
1. In General	21
2. Lessons from Process Negotiations	22
D. RELATIONSHIPS AND TRUST	22
1. In General	22

TABLE OF CONTENTS

2. Importance of Trust	23
3. Communication.....	23
4. Education	24
5. Understanding Expectations	24
6. Managing Expectations.....	24
7. Stability.....	24
E. BASIC JOB OF A NEGOTIATOR.....	25
1. In General	25
2. Managing Expectations.....	26
3. Creating Doubts	27
F. FUNDAMENTALS OF THE PROCESS.....	28
1. Assumptions	28
2. Facts.....	29
3. Assertions	29
4. Values	30
G. IMPORTANCE OF PRIVACY.....	31
1. In General	31
2. Revealing Events	31
H. SUMMARY.....	32
Chapter 3 - THE STRUCTURE OF NEGOTIATION	33
A. INTRODUCTION.....	33
B. HORIZONTAL DIMENSION.....	34
1. In General	34
2. Opposing Party's Negotiators.....	36
C. INTERNAL DIMENSION OF BARGAINING	36
1. In General	36
2. Stabilizers (S).....	38
3. Destabilizers (DS).....	39
4. Quasi-Mediators (QM)	40
5. Ratifiers (R)	41
6. Closers	41

TABLE OF CONTENTS

D. RATIFICATION NEGOTIATION	44
1. In General	44
2. Communication with Closers.....	44
3. Communication with Other Party and Its Closers	45
4. Bargaining with Organizational Hierarchy	46
E. SUMMARY	46
Chapter 4 - PUTTING IT ALL TOGETHER: MANAGING THE STRUCTURE AND PROCESS OF NEGOTIATION	47
A. INTRODUCTION	48
1. Generally.....	48
2. Insecurity	48
3. Motivating Hierarchy.....	49
4. Organizational Relationships	49
B. NEGOTIATING WITH YOUR RATIFIERS	51
1. Generally.....	51
2. Sharing Information.....	51
3. Prenegotiations.....	52
4. The CEO and Negotiations	53
C. MANAGING THE INTERNAL DIMENSION	53
1. Composition of Negotiation Team.....	53
2. Understanding Behavior	55
3. Preparation	56
4. Planning for Negotiation Meeting	57
5. Prenegotiating Team Behavior for Active Meeting Phase	57
6. Team Caucuses	57
7. Win/Lose Dynamic	59
D. MANAGING THE HORIZONTAL DIMENSION	60
1. Prenegotiation with the Other Side	60
2. Homework	60
E. NEGOTIATING HORIZONTALLY AT THE TABLE	61
1. Generally.....	61
2. Control of the Process.....	62

TABLE OF CONTENTS

- 3. Avoid Destabilizing 62
- 4. Notify the Other Side of Your Intentions 63
- 5. Conduct the Negotiations in Private 63
- 6. Treat the Other Side with Respect 64
- 7. Have a Good BATNA..... 64
- 8. Manage the Time and Information Variables 65
- F. SUMMARY..... 66**

- Chapter 5 - FUNDAMENTALS OF TABLE BEHAVIOR 69**
- A. TABLE MANNERS..... 69**
 - 1. One-Third Concept of Communication 69
 - 2. Rolling Ball Concept of Negotiation 70
 - 3. Exchanging Information 70
 - 4. Empathize 71
 - 5. Paraphrase Their Statements..... 71
 - 6. Backtracking 73
 - 7. Summarize Often 72
 - 8. Problem Solving 72
 - 9. Ask More Questions 72
 - 10. Problem Solving Emotional Exchanges..... 73
- B. RESPONDING TO TACTICS..... 74**
 - 1. Generally..... 74
 - 2. Take Notes 74
 - 3. Close on Your Words 76
 - 4. Recommendation and Ratification..... 77
 - 5. Destabilizers..... 77
 - 6. Implementation 79
 - 7. Enforcement..... 79
 - 8. Mediation/Arbitration Clauses..... 82

- Chapter 6 - PERSUASION 85**
- A. INTRODUCTION..... 85**
 - 1. In General 85
 - 2. Processing Information 86

TABLE OF CONTENTS

B. CATEGORIES OF THINKERS 87

- 1. In General 87
- 2. One-Stylers 87
- 3. Synthesist..... 87
- 4. Idealist..... 89
- 5. Pragmatist 91
- 6. Analyst..... 93
- 7. Realist 95

Chapter 7 - APPROACHES TO NEGOTIATION..... 99

- A. INTRODUCTION.....100**
 - 1. In General 100
 - 2. Essence of Negotiation 100
 - 3. Decision-Making Process 100
- B. MULTILATERAL NEGOTIATIONS101**
 - 1. In General 101
 - 2. Managing Multilateral Negotiations 101
 - 3. Decision Making..... 101
 - 4. Government-to-Government-to-Government
Negotiations 101
- C. NEGOTIATED RULE MAKING102**
 - 1. In General 102
 - 2. Federal Legislation 102
 - 3. Procedure 102
- D. STEP NEGOTIATIONS.....103**
 - 1. In General 103
 - 2. Procedure 103
- E. FACILITATED NEGOTIATIONS.....103**
 - 1. In General 103
 - 2. Difference Between Facilitated Negotiation and
Mediation..... 104
- F. COMPETITIVE NEGOTIATIONS104**
 - 1. In General 104
 - 2. Federal Contract Negotiations 104

TABLE OF CONTENTS

G. STRUCTURED NEGOTIATION	105
1. In General	105
2. Development	105
3. Procedure	105
H. CRITICAL THINKING	106
1. In General	106
2. Clarifying the Issues	106
3. Considering Points of View	106
4. Assumptions	107
5. Making Sound Inferences	107
6. Evaluating Information	108
7. Considering Consequences	108
8. Conclusion	109
I. PLANNED EARLY NEGOTIATION	109
1. In General	109
2. Agreement to Negotiate	109
J. ONLINE DISPUTE RESOLUTION	109
1. In General	109
2. Insurance Settlements	110
Chapter 8 - NEGOTIATION AND DISPUTE RESOLUTION	111
A. INTRODUCTION	111
B. DISPUTE RESOLUTION PROCESSES	112
1. Negotiation	112
2. Conciliation	113
3. Ombudsperson	114
4. Mediation	115
5. Facilitated Negotiation	117
6. Factfinding	117
7. Mediation/Factfinding	118
8. Minitrials	118
9. Arbitration	119
10. Mediation/Arbitration	119
11. Med/Arb/Med	120
12. Private Judges	121

TABLE OF CONTENTS

13. Judicial Litigation	121
14. Election Process.....	121
15. Early Neutral Evaluation	122
16. Confidential Listener	122
17. Project Neutral.....	122
18. Special Masters and Referees.....	123
19. Summary Jury Trials	123
20. Partnering.....	124
21. Collaborative Law	124
22. Online Dispute Resolution.....	126
Chapter 9 - MEDIATION	127
A. INTRODUCTION.....	128
1. In General	125
2. Advantages and Disadvantages of Mediation.....	128
3. Distinction Between Mediation and Other Dispute Resolution Procedures	129
4. Effective Mediation	129
B. CONFIDENTIALITY	130
1. In General	130
2. Rules Excluding Evidence of Settlement Negotiations or Compromise Offers	131
3. Attorney-Client Privilege.....	132
4. Statutes Making Mediation Proceedings Confidential.....	132
5. Protective Orders	132
6. Agreements to Treat Mediation as Confidential.....	132
7. Limits on Confidentiality.....	133
C. AGREEMENTS TO MEDIATE	133
1. In General	133
2. Enforcement.....	133
D. MEDIATORS	134
1. In General	134
2. Roles and Functions.....	135
3. Selection	137
4. Certification	138
5. Standards of Conduct.....	139

TABLE OF CONTENTS

E. MEDIATOR IMMUNITY	140
1. In General	140
2. Testifying.....	140
Chapter 10 - EFFECTIVE MEDIATION	143
A. PREPARATION FOR MEDIATION	144
1. In General	144
2. Preliminary Arrangements.....	145
B. MEDIATION SESSIONS	145
1. In General	145
2. Joint Session	146
3. Private Meetings or Caucuses.....	147
4. Initial Statements	149
5. Role of Lawyers.....	149
6. Building Trust and Confidence.....	149
7. Exploring Feelings and Perceptions.....	150
8. Obtaining Information	150
9. Questioning.....	150
10. Determining Needs of the Party.....	152
11. Identifying Issues and Setting the Agenda.....	152
12. Testing Reality.....	153
13. Generating Movement Toward Settlement.....	153
14. Identifying Creative Options	154
15. Evaluating Creative Options.....	154
16. Resolving Issues	154
C. CLOSURE	155
D. MEDIATED AGREEMENTS	156
1. In General	156
2. Authority to Settle.....	156
3. Enforceability.....	157

TABLE OF CONTENTS

APPENDICES

Appendix A - TIME LINE MANAGEMENT	161
I. INTRODUCTION	161
II. THE BEGINNING GAME/PREPARATION PHASE	162
A. Tasks	162
B. Potential Problems and Some Solutions.....	165
III. THE MIDDLE GAME/ACTIVE MEETING PHASE	166
A. Tasks	166
B. Potential Problems and Some Solutions.....	168
IV. THE END GAME/CLOSING PHASE	169
A. Tasks	169
B. Potential Problems and Some Solutions.....	171
Appendix B - RESPONSIBILITIES AND TASKS OF THE NEGOTIATOR	173
Appendix C - MEDIATOR CONSIDERATIONS	175
Appendix D - THE ICEBERG PRINCIPLE: SECRECY IN NEGOTIATION	179
A. CHARACTERISTICS OF NEGOTIATION	179
1. In General	179
2. Analyzing Information.....	180
B. SOME FUNDAMENTALS OF NEGOTIATION	181
C. COMMUNICATING AND CREATING TRUST	182
D. CREATING DOUBTS AND UNCERTAINTIES	183
E. FACTS AND NONFACTS	183
F. THE IMPORTANCE OF PRIVACY	184
G. LEVELS OF DIFFICULTY IN NEGOTIATIONS	185
Appendix E – BIBLIOGRAPHY	187