

A GUIDEBOOK: NAVIGATING CUSTODY AND ACCESS NEGOTIATIONS



**Harvard Negotiators for the
American Academy of Matrimonial Lawyers**

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I. INTRODUCTION

Child custody and access are among the most contentious of matrimonial law issues. Settlements in cases involving custody and access are unique from other divorce proceedings and litigious issues because they must consider the best interests of the child while dealing with the inevitable emotions involved. Through years of practical experience, members of the American Academy of Matrimonial Lawyers have developed and adopted specific techniques for handling the particular challenges of child custody issues in the context of divorce proceedings. This report draws on that experience to offer guidance on how to navigate the particular challenges posed by these issues. By sharing these tips and techniques, the Academy hopes to enable attorneys to yield more fruitful results for parties addressing custody and access issues.

Negotiation offers an attractive alternative to litigation by fostering communication between parties and allowing them to tailor the terms of their agreement. Given that over 90% of divorce cases involving child custody end in settlement, effective negotiation skills are vital. At the request of the Academy, Harvard Negotiators¹ interviewed two dozen Academy fellows with the goal of identifying common practices and creating a guidebook on effective negotiation in the context of child custody and access. The interviews explored how these attorneys define a successful settlement outcome, view custody in relation to other issues within a divorce, and negotiate the challenges posed by custody and access issues. This report illuminates not only what techniques attorneys use, but also how they have developed these strategies and why and in what contexts they continue to implement them.

Although respondents resoundingly agreed that there is no single prescription for successfully handling child custody issues, they did emphasize the importance of understanding the client, preparing thoroughly, and developing successful client-tailored strategies. Below we present strategies culled from some of the most successful matrimonial lawyers in the United States. Granted, the most effective negotiation approach will depend upon many factors, including client expectations, the temperaments of the involved parties, state laws, and an attorney's own personality and preferences. We invite you to consider the following tips and techniques regarding preparation and strategy in cultivating your own approach to negotiation.

II. PREPARATION

Thorough preparation is crucial to a successful negotiation. While specific elements of negotiation preparation will vary based on attorney style and case details, understanding your client and managing his or her expectations are fundamental to providing successful representation.

¹ Harvard Negotiators (HN) is a student organization at Harvard Law School. Using the core concepts developed by faculty and researchers at the Program on Negotiation, HN works with clients to perform negotiation research, design systems for dealing with internal disputes, conduct conflict assessments of complex real-life situations, and provide advice for upcoming negotiations.

A. Understand Your Client

Developing a working attorney-client relationship based on trust and confidence is key to successful representation. The first and most important step is to develop an understanding of the client as a person. This understanding must include clarity about his or her goals and expectations for the case, which can be achieved by inviting the client to share his or her side of the story before addressing legal or strategic issues.

i. Listen Actively

Active listening techniques such as inquiry, paraphrasing, and acknowledgment are an effective way to extract useful information, show understanding, and establish trust.² For example, asking open-ended questions and following up with specific, pointed questions can elicit more nuanced information. Paraphrasing client responses increases the likelihood of understanding and demonstrates to the client that he or she has been heard. Acknowledgment of the client's varied emotions demonstrates understanding of the sensitive nature of the matter and how those emotions might influence his or her decisions going forward. Taking the time to listen also provides an opportunity for the attorney to assess the client's temperament and the strengths and weaknesses of the case.

ii. Understand Client Background

In the context of custody negotiations, attorneys must acquire a firm grasp of the parties' parenting history and the client's viewpoints on important childrearing topics. Depending on the client, issues such as religion, education, medical treatment, and particular activities may need to be addressed in your conversations. In addition to understanding childrearing preferences, knowledge of how the parties dealt with relevant issues prior to the dissolution of the marriage can shed additional light on the operating relationship, the likelihood of reaching an agreement and the feasibility of potential custody arrangements. In this respect, many attorneys interviewed found the development of a parenting chart detailing prior parental responsibilities useful.

iii. Verify the Client's Account

The story as told by the client usually reflects a biased version of reality. Clients will have been adversely affected by the failed marital relationship and will only relate one side of the story—their own. It is the job of the attorney to discern the facts and legal issues from the client's biased and emotional account. After developing an understanding for the client's personality, emotions, history, goals and expectations, effective lawyers constructively address the information imbalance by seeking out other perspectives. Techniques for obtaining other perspectives include asking clients to speak from the perspective of the opposite party as well as asking the client to provide third party contacts that can corroborate or challenge their account. Soliciting verification of your client's account will allow you to approach the case more objectively and better anticipate the issues that will arise during the negotiation.

²DOUGLAS STONE, BRUCE PATTON & SHEILA HEEN, *DIFFICULT CONVERSATIONS* 172-84 (PENGUIN BOOKS 2000).

B. Manage Client Expectations

Managing client expectations is particularly difficult when those expectations are unrealistic. Two main drivers of unrealistic expectations are emotion and lack of information. Emotions obscure one's ability to analyze situations rationally. If a client's goals are not legally achievable, informing a client of the legal impossibility of their goals is not only an attorney's responsibility, but is also likely to bring the client back to reality. Helping clients identify and analyze the possibly unfavorable non-legal consequences of their demands also casts their original goals in a different light.

Additionally, attorneys should make clear to the client the costs of the legal services necessary to achieve their goals. One attorney noted that negotiations proceed more smoothly after parents realize that the resources they use to stall a custody or access negotiation are the same resources that might otherwise be used for their children's direct benefit. Most clients develop a more realistic set of goals once they engage in a discussion of both the legal and non-legal ramifications of their original objectives.

i. Clients Cannot Have It All

Attorneys gain the trust of their clients by being honest and realistic about their ability to work with client demands. Like doctors, it is irresponsible for attorneys to promise clients everything. Clients should be prepared to make concessions in light of their priorities, especially when their demands are initially unrealistic. In conversing with the client and engaging the opposing party, a useful question to ask is whether the issue at hand is what the parties *really* want to be fighting about. Repeatedly asking this question enables clients to refine and reinforce their priorities and to refocus the conversation on issues of greatest importance to the parties involved.

ii. Explain the BATNA

Many clients seeking a divorce view the opposing party as the enemy and may wish to use the decisions regarding custody and access to the child as opportunities for vengeance. However, clients often do not have an accurate picture of the emotional and financial costs of litigation, nor do they accurately assess the risk that a trial verdict will fail to reflect their preferences. Since all negotiation takes place in the shadow of litigation, clients should have a clear understanding of what outcomes a judge would find reasonable. As such, attorneys should make clear to the client both the influence of equity on court calculations and the risks of going to trial. One attorney stated that even a bad settlement is better than a good trial. In essence, going to trial is often the client's best alternative to a negotiated agreement (BATNA) and rationally, a case should only go to trial when the possible trial outcome is better than one's BATNA.³

³ ROGER FISHER, WILLIAM URY & BRUCE PATTON, GETTING TO YES – NEGOTIATING AGREEMENT WITHOUT GIVING IN, 97-106 (PENGUIN BOOKS 1991) (1983).

iii. Explore the Unpredictability of Trials

Trials can be extremely unpredictable and impersonal. One attorney drives home the point by asking the client whether he or she loves the kids. The client responds in the affirmative, to which the lawyer retorts, “The judge and other lawyer don’t love your children. Settle.” Hence, while attorneys should be prepared to litigate if necessary, explaining these realities helps to temper client expectations. Engaging in a subsequent discussion of what the client *really* wants then paves the way for developing more realistic goals.

iv. Use Outside Resources

Emotional trauma, co-parenting problems, drug or alcohol abuse, mental illness, excessive anger, and other non-legal issues can often pose difficult roadblocks to negotiating custody access by obscuring the client’s view of the legal issues. Where non-legal issues are preventing progress, outside resources can prove useful. To work through these non-legal issues, many attorneys recommend (and some require) their clients to utilize and seek support from personal or family therapists, psychologists, parenting coordinators, custody evaluators, and anger management and communication coaches. These resources may provide additional insight for the attorney as to potential problem areas and appropriate suggestions for resolution. Utilizing these outside resources enables clients to consider the legal issues more rationally and have more realistic expectations regarding the legal proceedings.

C. Prepare Your Client

Having invested the time to familiarize yourself with your client, to understand your client’s goals and expectations and to manage those expectations, the purpose of this additional preparation is to establish and refine your client’s acceptable “bottom lines” on specific custody and access issues. Prior to engaging the other party, your client should understand and be able to clearly articulate his or her personal priorities. Such priorities include, for example, the client’s ideal and less-ideal but still acceptable scenarios for physical and/or legal custody, visitation, schooling and child-specific activities. These bottom lines will provide clear parameters with which to engage in negotiation with the opposing party.

III. STRATEGY

As discussed above, custody presents unique challenges in the actual negotiation between the parties because the inherently emotional nature of the issues often obscures logic as a basis for reaching agreement. Hence, in determining their negotiation strategies, attorneys should prepare for a high degree of emotion between the parties during the negotiation process. The following four strategies have served Academy members well.

A. Acknowledge Emotion, but Avoid Personal Emotional Engagement

To obtain a sustainable and satisfactory settlement regarding custody and access issues, the lawyers involved must remain rational, objective, and focused on real legal issues. While client counseling will involve venting and airing of emotional laundry, lawyers should separate emotion from logic and revenge from reason.⁴ Attorneys adopt different tactics in dealing with clients' emotions, such as allotting a structured time in which the client has free reign to speak, then asking the client to list, in turn, evidence supporting both their and the opposing side of the story. A common practice is also for the attorney to play devil's advocate for a set period of time in order to suggest the other side's perspective. To avoid any doubt on the client's behalf of the attorney's loyalty, these attorneys make clear to their client's ahead of time that they are purposely playing devil's advocate.

One of the major challenges that attorneys face in these negotiations is their own emotions and frustration. While empathizing with one's client can be valuable, it is important to remember that one's own professional reputation is also at stake. The role of an attorney is not to support a client's will for revenge, but to understand clients' goals, manage their expectations and facilitate the communication and interaction between the involved parties.

B. Gauge the Interests and Prioritize Accordingly

Attorneys should gauge the other party's interests and priorities prior to engaging in negotiation and incorporate these considerations when developing a specific negotiation strategy. Initiating dialogue with opposing counsel as soon as practical can provide essential insight to the other party's interests and positions. Having an idea of both parties' relevant interests enables attorneys to evaluate their own positions, develop responses, and anticipate where the parties are likely to agree and where more effort and strategic thinking will be required to reach a mutually satisfactory outcome.

The structure and sequencing of the actual negotiation can take a variety of forms, depending on attorney preferences, the nature of the relationship between the parties, and local law. Many attorneys prefer to deal with the question of custody before addressing any other issues. First, working through the more controversial elements of divorce proceedings provides a basis of agreement from which to address additional issues. Second, resolving custody issues prevents custody decisions and the interests of the child from being overly entangled in other parts of the settlement negotiation. Resolving the custody and access issues eliminates what is often the most emotional component of the divorce settlement, enabling the parties to address subsequent issues without the cloud of emotion. Additionally, many jurisdictions have rules governing the order of divorce proceedings, often placing custody first and separate from other issues.

However, where the relationship between the parties is particularly strained, attorneys may decide to resolve other, less controversial issues first in order to build goodwill between the negotiating parties, especially if they expect custody to be hotly disputed. If simpler questions can be settled, this goodwill paves the way for a more productive dialogue between the parties before turning to more difficult questions.

⁴ For more on emotions in negotiation, see ROGER FISHER & DANIEL SHAPIRO, *BEYOND REASON: USING EMOTIONS AS YOU NEGOTIATE* (VIKING 2005).

C. Consider Degrees of Client Involvement

Many attorneys who participate in both custody negotiations and mediations comment that negotiation over custody and access issues often demands a mediation-like approach. This approach recognizes that parties more often than not need to vent at each other before they can constructively address more substantive issues. Attorneys have found it constructive to allow for venting and to accommodate this time in their negotiation planning and proceedings. Several attorneys noted that when negotiations begin first thing in the morning, the parties do not reach substantive solutions until well into the afternoon. During this time most attorneys let the involved parties do most of the talking, intervening primarily to steer the conversation or to act as a calming influence if argument grows particularly intense. By speaking during the negotiations, clients gain a sense of agency and ownership over the proceedings. Additionally, this approach may allow for more sustainable outcomes because the parties themselves have a more nuanced sense than the attorneys of what would be best for the child and what outcomes they themselves would prefer. This client-dominated negotiation is most constructive when the attorney has invested the time in helping the client to clarify his or her interests and discern reasonable bottom lines. See “Prepare Your Client” above.

D. Depersonalize Disagreements by Finding Objective Criteria

One of the most useful approaches to actually resolving custody and access disputes is getting the parties to look at issues objectively and from the child’s perspective, rather than through the lens of their own personal preferences. Usually, both parties are competent parents who genuinely care about the child’s well-being, though it can be difficult for them to acknowledge the competency of the other party in the midst of divorce proceedings. Attorneys can enable clients to reach sustainable custody and access agreements by helping them depersonalize disagreements and find objective criteria on which to focus.⁵ For instance, instead of arguing about which parent is better at taking care of the kids, reframing the discussion into one about the differences and implications of their respective schedules can refocus the conversation on how the parties might best provide for the child. Instead of fighting about with whom the children should live, a discussion of the relative advantages of the two different environments, such as educational and extra-curricular opportunities, safety, and whatever other objective characteristics may be relevant, is often more productive.

Pointed questions, as opposed to declaratory statements, are often the best means of getting parties to discuss issues in productive, amiable terms because they lead parties to draw their own conclusions. For example, claims such as “You’re always working, so I need to have full custody” are unlikely to be as useful as posing the question, “Can you explain the effect that your working schedule will have on the kids under this arrangement?” Since the custody and access arrangement is about what is best for the child, not about the parties’ own personal gripes, this line of reasoning usually has traction.

⁵ For more on using objective criteria, see FISHER & URY, GETTING TO YES – NEGOTIATING AGREEMENT WITHOUT GIVING IN 81-94 (PENGUIN BOOKS 1991).

IV. CONCLUSION

As is evident from the varied responses we received, there is no one-size-fits-all approach to custody negotiations. It is our hope that the recommendations outlined above will help to mitigate the distinct challenges posed by custody and access issues in divorce proceedings and lead to more efficient and sustainable outcomes for the parties involved.