

Answers to self-test questions

Chapter 18: Negotiation skills

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Make a note of the sorts of interests that could be at stake in the following situations for each party. Remember, you need to move beyond an identification of what each party might want in order to discover why they might want it.

1. A husband and wife engaged in negotiations for his access to their children following the breakdown of the marriage.

The wording of this scenario suggests that the children are normally resident with their mother so there are a range of levels of access that the father may have, including telephone contact only, supervised visits, unsupervised access for specified hours/days or a more open and flexible arrangement.

You may have thought of the following interests that would motivate the parties when deciding on access arrangements:

- Feelings of hostility towards their spouse. Although an ideal situation would be one in which both partners put aside their feelings about each other to decide an access arrangement that was based on the needs and well-being of the children, it is often the case that one or both spouse is overwhelmed with acrimonious feelings following the breakdown of a marriage and allows this to colour their behaviour so that access arrangements are used as means to punish their spouse; for example, the mother may restrict the father's access as revenge for his infidelity. Even situations in which one partner seems to be offering generous arrangements may be motivated by negative emotions if it is done in the full knowledge that it inconveniences the other party; for example, if the husband works full-time, an offer of custody all day on a Wednesday and Thursday is not one that he can accept.
- Desire not to miss important events. Both parents are likely to want to spend time with the children on birthdays and at Christmas.
- Concerns about the welfare of the children. If the mother has always been responsible for childcare whilst the father has worked to provide for the family, she may be worried that he will not know how to take care of them if he has access that spans several days or the father may have moved to accommodation that is not suitable for overnight stays for the children. Equally, the father may worry that he is being excluded from daily decisions that affect the welfare of the children.
- Fears about being cut out of the children's lives. The non-resident father may fear that his role is no longer important. Either partner may have concerns about their role in the children's lives if their former spouse has a new partner.
- Financial considerations. Either parent may conflate the issue of access to the children and the level of financial support.

- Desire for reconciliation. If one of the parties wishes to rebuild the marriage, they may seek access arrangements that maximise contact with their estranged partner. For example, the mother may specify that the father can have unlimited access within the matrimonial home but only limited access outside.

2. Negotiations for the sale of a house between vendor and purchaser.

- Financial considerations. Obviously, price is a key issue in commercial negotiations but it is always important to explore the reasons behind the financial position. If you discover why the vendor is insistent on a higher price or why the purchaser is adamant that they cannot pay more, you may find hidden interests that can actually be fulfilled in non-financial ways or by a more flexible approach to the financial arrangements.
- Timing. This may be an issue for either party. Find out why this is the case. Understanding the reasons why one party needs the deal to be completed quickly or cannot complete until a certain date will give you greater insight into the underlying issues thus enabling you to identify situations in which there is no scope for flexibility with regards to timing or to propose more creative solutions that will help you to gain agreement. For example, if the vendor is immovable on the issue of timing, stating that the sale must be completed within three weeks, and you discover that this is because of his need to purchase another property, it may be that there is no flexibility on timing but that this can be used to negotiate other concessions for the purchaser. However, if his urgency to complete is motivated by a desire to avoid the higher rates of tax that come into force in three weeks time, this is something that can be addressed by a proposal to share the costs if this gains other advantages for the purchaser. These strategies cannot be developed without knowledge of why time is of the essence.
- Ownership of household items. There are a whole range of items that the purchaser may want to keep or the vendor may wish to acquire. It would be important to know what items within the house are regarded as part of the fabric of the house that are included within the purchase price and what items are to be considered as a separate issue for negotiation. Again, find out why the other party wants to keep/acquire possession of this item as this gives scope for flexibility in negotiation. For example, if the vendor wants to keep curtains because they were a gift from a recently deceased relative, it is unlikely that the purchaser's desire to obtain them because they are a nice colour and it is more convenient than having to buy new ones is going to prevail. However, if the vendor wants to keep them because they can be altered to fit his new house, there is scope to offer money in return for the curtains to persuade the vendor that it would be nice to buy new curtains that suit the character and decoration in his new home.

3. Contract negotiations undertaken on behalf of a professional golfer and a new sponsor.

- Control. What level of control will the sponsor want over the golfer and his activities both in sporting and non-sporting terms? Is the sponsor primarily concerned with lucrative opportunities or is he interested in publicity? How does the golfer feel

about these decisions being made for him? Does the sponsor want to specify where the golfer lives and what competitions he enters? Does he want the golfer to attract media attention and is the golfer comfortable with this? This is a complex relationship with control at the heart of it so there is much to be discovered about the underlying interests of the parties and their feelings about the relationship.

- Financial issues. Obviously, financial considerations are central to a sponsorship agreement but do not forget that some things cannot be purchased. For example, if the sponsor wants the golfer to endorse products that raise ethical issues for the golfer, this may not be something that can be surrendered in return for money. Why does the golfer object to a particular product? Why is the sponsor so keen on it? Can the objectives of the sponsor be achieved without compromising the ethical beliefs of the golfer?
- Duration. How long does each party want the agreement to last? If there is a discrepancy, ask why the other party has a particular length of agreement in mind. The golfer may want a longer agreement to add security if he is nearing the end of his career or a short agreement if he is hoping for a better offer in the future. A sponsor may be reluctant to commit to a long agreement until he has tested the golfer on a short-term basis to see how well he fulfils his part of the agreement.

4. The owner of a hotel and a carpet fitter concerning the supply and installation of new carpets.

- Cost. What is the hotel owner prepared to spend? Try to find out the parameters of the budget to determine how much scope there is for price to be balanced against other factors.
- Quality. If the price includes the supply and installation of carpets, this implies that the fitter is going to choose the carpets. Given that lower quality will increase the fitter's profit margins but make the deal less good for the owner, are there any stipulations as to minimum quality of the carpet that need to be taken into account.
- Colour. This could be an important issue for the owner who is likely to want the carpet to match the colour scheme of the hotel. Specific details will be important here as colour can be subjective; one person's blue is another person's green. The carpet fitter may have a supply of carpet that he hopes to use to minimise his costs so it will be important to ensure that this is of a colour and quality that fits the owner's requirements.
- Timing. Either party may have issues with regards to timing. The fitter may have other jobs booked that he needs to work around whereas the owner may have a particular time by which the carpet needs to be fitted – perhaps for a particular function, for the launch of a new service or during a quiet period.
- Ongoing relations. The carpet fitter may be keen to ensure that there is an ongoing relationship so that he is used for any future work or so that the hotel owner recommends him to others. If this is the case, he may be willing to settle for a less good outcome in terms of cost, for example, in order to ensure that there is goodwill between the parties. However, if the carpet fitter has a full customer list or is not

concerned about his reputation, he may be willing to drive a harder bargain and sacrifice the good opinion of the hotel owner.

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1. What is the legal framework for the negotiation?

It is important to understand the legal context in which the dispute takes place as this will enable you to gauge the likely outcome of the case if it went to court. If you are clear about what your client would get if he was the successful party at court, you may be able to use this as a bargaining tool. A negotiated settlement tends to give both parties something of what they want, unlike the 'all or nothing' outcome of court proceedings so it is possible that your client will have to settle for less than he would receive as the winning party at court but, of course, it also removes the risk of leaving empty-handed as he would if he were the losing party. It is also important to have a good grasp of the law arising from the problem as it will ensure that you take into account all relevant considerations.

The main legal issue here concerns rights of access to children following the breakdown of a marital relationship so falls within family law. The issue that led to the breakdown of the relationship – Rhys' desire to undergo general reassignment surgery – is largely immaterial to the legal issue regarding access, although the views of the children towards their father (for whatever reason) is likely to be a factor that the courts would take into account. You would want to know, by looking at relevant statutory provisions and case law, how the courts approach contested access cases. Can you find any case law involving a similar sensitive issue that might guide your thinking and shape your expectations?

2. What does your client want?

You have to know what your client wants otherwise it will be impossible for you to negotiate a settlement that he is willing to accept. Be sure that you look carefully at the facts that you are given in order to pick out all the points that are important to your client. Once you know what your client wants, you will be able to see how much scope you have to negotiate.

Rhys wants access to his children. Although it is not clear from the facts provided, it seems that there he has had no contact with his children at all for some time, possibly for almost three months. He wants to resume contact with them immediately. Ideally, he would like to see the children every other weekend and for two weekday afternoons, after school, each week.

Rhys wants to see an end to the hostility directed towards him by Angharad and her family and to ensure that no negative comments are made about transgendered people in front of his children.

Rhys wants Angharad to stop attending the church that holds strong negative views about transgendered people and to attend the church that they had attended as a family.

3. What are your client's interests?

Students often find it difficult to understand what is meant by the client's interests and how this differs from what it is that the client wants. The best way to understand it is that the client's interests are the reasons why he wants the things that he wants. If you know why he wants the things that he wants, you give yourself flexibility to negotiate an agreement that furthers your client's interests even if it does not give him precisely what he wanted. Try asking 'why does he want this' in relation to the things that your client wants in order to gain insight into his interests.

Rhys seems to want a restoration of a harmonious relationship with Angharad and to have a good ongoing relationship with his children with plenty of contact. He is particularly concerned that the children do not encounter negative views about transgendered people that might damage their relationship with him. This underpins his desire to stop Angharad's family from expressing their views and to ensure that Angharad and his children attend a more moderate church.

This means that you should focus on ways to restore the family relationship and put an end to Angharad's hostility towards transgendered people in general and Rhys in particular, something that might be difficult to achieve as there is likely to be a fair amount of hurt and resentment arising from these facts.

4. What boundaries are placed on the negotiation?

Make sure that you know whether there is something that you must achieve or something that you cannot agree as such boundaries place limitations on what it is permissible for you to agree with the other party. Boundaries might be stated explicitly – for example, 'you must not agree to pay more than £20,000' or 'work must commence within two weeks or the deal cannot go ahead' – or they may be implied in the facts.

There are no particularly pressing boundaries here. You are told that Rhys wants access to his children to start immediately but this does not necessarily mean that he would refuse to enter into an agreement that started in a few days or weeks. Moreover, as he has no contact at all at the moment and wants to re-establish his relationship with his children, it would be reasonable to assume that he would be happy with indirect contact by telephone or even letter provided there was a plan in place to build up to physical contact. It is important to bear in mind that it is not just a case of reaching an agreement that is acceptable to Rhys and Angharad: it must be something that the children are happy with too and they may be feeling alienated from their father as he has left the family home. If that is the case – and we do not know from the facts provided – then immediate physical access might be too upsetting for them.

5. What are the other side likely to want?

A negotiated settlement is one that gives both parties something of what they want. It aims to find a state of affairs that makes both parties happy or, at least, happier than they were before the negotiation took place. To achieve this, you must be prepared to give the other side some things that they want as well as achieving the things that your client wants. This is easier in some negotiations than it is in others. You can start to anticipate what the other side wants from the details that your client has given to you and then try to find out if you are correct by asking questions during the negotiation. It can help you to focus on

each of the points that your client wants to achieve and think about what the flip side of those objectives is likely to be as this might give you insight into what the other party wants.

It is clear from the facts that you have been given that Angharad is unhappy about her husband's decision regarding his gender identity. She has stated that he cannot have contact with his children until he 'behaves like a normal husband and father' which presumably means abandoning his lifestyle as a woman and his plans for gender reassignment surgery. It is likely that Angharad would agree to contact with the children but only on conditions that Rhys might not be keen to accept.

Is Angharad likely to want to keep making negative comments about Rhys? She is probably hurt and angry so it is possible that she will want to preserve her freedom to criticise his decision and its impact on their marriage.

What do you think that Angharad will want regarding church attendance? It seems that the family were regular worshippers at a particular church before Rhys' revelations but is she likely to want to return there if it means she has to see Rhys dressed as Rhiannon? She might be enjoying the new church community, particularly if their views are more in keeping with her own negative perception of transgendered people.

6. What are your strengths and weaknesses?

It is essential that you are realistic about the strengths and weaknesses of your client's position because this will dictate the way that you negotiate. You can use your strengths to help you gain the things that your client wants but be careful not to focus only on the positive aspects of your case. Areas of weakness should highlight points where you are less likely to achieve the things that your client wants and you will have to think carefully about whether or not to divulge information that discloses your weaknesses to the other party. Remember, though, that you cannot lie or deceive the other party.

One of the greatest strengths of Rhys' position is that he has a legal right to have access to his children. However, that does not mean that he can have the access that he wants as an automatic right. The children are young and may have been very unsettled by the absence of their father from the family home.

It is also a positive feature of the case that Rhys has a small house near to the family home where the children can visit him and he works from home so there are no constraints on his availability to spend time with his children. It also seems that he has financial stability that will enable him to support his family.

The greatest negative factor for Rhys is that the children themselves may not be keen to have contact with their father. If it is the case that one of the children has panic attacks when his father's name is mentioned then it may be that it would not be appropriate for this child to be left with his father at the moment: how will Rhys deal with a panicking seven-year-old and what will happen to the other children whilst he is trying to cope?

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In relation to the access negotiation, calculate:

- 1. Best negotiated outcome.**
- 2. BATNA (best alternative to negotiated agreement).**
- 3. Worst acceptable outcome.**
- 4. WATNA (worst alternative to negotiated agreement).**

If you can establish each of these four things, it will help you to work out a strategy for negotiation and you will have a framework against which to assess the value to your client of courses of action suggested by the other party. For example, if you are offered something that would put your client in a worse position than would be the case if he were the losing party at court then it is probably not worth considering unless, of course, your client has indicated that it is something he would accept as part of his WATNA.

1. Best negotiated outcome.

This represents the best possible agreement for your client. In this case, it would give him immediate access to his three children that would involve alternative weekends and two afternoons during the week after school (he has made no mention of school holiday arrangements but, in the spirit of the overall agreement, you could seek to obtain a favourable access agreement here too or you could establish a preliminary short-term agreement that covers term-time with a view to revisit the arrangement when the holidays are approaching).

In addition to access, the best negotiated outcome for Rhys would involve an agreement from Angharad that she will not make any further adverse comment about transgendered people or Rhys' decision and that she would return to the church that they had attended previously.

2. BATNA

If the negotiation breaks down then your client will need to pursue his claim for access in the courts. This will be a lengthy and costly process (hence the benefit of reaching a negotiated settlement even if it does not give him everything that he wants) but he does have a chance that the court will award him wide-ranging access to his children. However, although this is the best possible outcome if he went to court, it would be wise to remember that this is not necessarily what a court would order.

3. Worst acceptable outcome.

This is an important piece of information as it allows you to identify your client's bottom line or, in other words, the worst possible terms that he would be prepared to accept. It is often the case that your instructions will tell you what the client wants but it does not provide any explicit information on what it is, short of his desired outcome, that he would be prepared to accept.

So, what would Rhys consider acceptable? His overall interest is to restore contact with his children and to end the derogatory comments and hostility from his wife and her family. Perhaps Rhys will have to accept some form of indirect contact initially, particularly as the children themselves seem unwilling to see their father. There is no mention of problems with the youngest child so perhaps Rhys could start to spend time with his daughter and

agree to an exchange of letters or telephone calls with the two older children. If the children are upset by his transgender status, perhaps Rhys could agree to dress in way that is less likely to cause them distress and confusion, initially at least: jeans and a t-shirt is quite a gender-neutral outfit and at least it would mean that some progress is made towards re-establishing the confidence of the two boys.

With regards the adverse comments, perhaps an agreement should be reached that nothing derogatory is said in front of the children.

How important is Angharad's choice of church to Rhys? He believes it is contributing to her negative attitude towards his desire to undergo gender reassignment surgery but she may not agree: perhaps she just wanted to attend a new church so that she was not surrounded by people who knew about the circumstances surrounding the breakdown of her marriage. If Angharad gives assurances that there will be no more negative comment about Rhys and transgendered people made in front of the children then the issue of church attendance will not need to be resolved. Alternatively, might Rhys be prepared to attend a different church if, in return, Angharad returns to the family church. These are all options to explore. They might not give Rhys his preferred outcome but they will at least give him something of what he wants and it could go some way towards securing an agreement on the most important point: contact with his children.

WATNA

What will Rhys get if the negotiation breaks down? Given that it appears that Angharad is unwilling to allow him access to the children, it is likely that he will have to go to court. As discussed in relation to that BATNA, it is possible that a court will award him the access that he seeks. However, in view of the circumstances of the case and, in particular, the feelings of the two boys, it is possible that a court will not award any access at this point in time or will order something far short of what Rhys desires; for example, he may be limited to two hours contact at a supervised centre once a month. Of course, this would be better than not having any contact with his children at all. Given that the outcome if the case went to court is difficult to predict and could give Rhys no contact whatsoever, it certainly seems as if this is a situation in which it would be preferable to reach a negotiated agreement. With that in mind, it is important to conduct this negotiation with a view to persuading Rhys that any contact is better than his current situation.

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1. Rank the issues in the access negotiation in order of importance to the client. Note that this may well differ from the order in which you decided to negotiate the issues.

The most important issue here is access to the children followed by the need to end the hostility between husband and wife, at least in the presence of the children. The issue about church attendance may seem trivial by comparison to these issues but it is clear that, in Rhys' mind at least, it contributes to the negative views held by his wife.

2. Calculate the boundaries of each of the issues, i.e. work out the best and worst outcome on each issue to determine how much bargaining scope there is on each

point. Bear in mind that even your worst outcome must still be acceptable to the client.

It is always useful to set out the best and worst acceptable outcome on each of the issues but it is not always straightforward to do so as it is unlikely that you will encounter a set of facts that states ‘you client wants x but, at a bare minimum, he will accept y’ in relation to every issue. It is therefore up to you to read between the lines and to make a sensible guess at what the client would find acceptable within the spirit of your instructions. Remember that you are not binding yourself to an agreement during the negotiation but getting a tentative set of terms that you can take back to your client. It is also important to remember that any offer that exceeds your client’s best outcome is likely to be acceptable provided it is not so far in excess of what is wanted that it might cause problems. For example, in the access negotiation, Rhys has stated that he wants contact on alternate weekends and two evenings a week. If Angharad were to offer him alternate weekends, three evenings a week and two weeks during the summer holiday, this is somewhat better than he had hoped to achieve but still in the same pattern of access so it is likely to be acceptable. However, if Angharad were to offer full custody of the children, even though this gives him the immediate access he seeks and more, it is so different that it would be necessary to check with your client before accepting such a suggestion.

Issue	Best Outcome	Worst Outcome
Access	Rhys has asked for alternate weekends and two afternoons each week but would presumably be happy with anything that exceeds this.	There is no stated alternative to Rhys’ preferred plan for access but we are told that he is anxious to resume access immediately so it is reasonable to assume that he would at least consider an arrangement that could start immediately even if it was not of the frequency he has suggested.
Hostility	Rhys would like an immediate end to the adverse comments made by his wife and her family.	Again, we can only make inferences from the facts but it seems reasonable to assume that he would find a cessation of adverse comments in front of the children to be agreeable.
Church	Ideally, Rhys would like Angharad to attend the same church that he attends.	Rhys’ is keen to ensure that Angharad stops attending the new church. Perhaps he would find it acceptable if she agreed to stop attending church altogether or if she found another church that did not have such strong opposition to his chosen lifestyle.

3. Consider ways in which you could offer concessions on one issue in order to gain something beneficial for the client on one of the other issues.

Offering a concession on one point in order to gain ground on a different point (usually one that is more important to your client) can be a valuable strategy. However, some negotiations offer better scope for doing this than others: for example, you could have a negotiation for repayment of a debt in which one party will pay a greater overall sum provided the payment period is extended and the other party is prepared to give way of timing of payments in return for a greater overall figure.

In this negotiation, Rhys' principle concern is to obtain access to his children but probably not at the expense of gaining an agreement from Angharad to stop making negative comments because he wants the children to stop hearing adverse viewpoints about transgendered people and, ultimately, this hostility may make his relationship with his children difficult. Perhaps if Angharad was set on attending her new church but was prepared to concede on details of access then Rhys would be happy.

Go back to the access negotiation scenario and review your analysis of it. Can you think of any other creative ways in which the needs of the parties can be fulfilled that are not immediately obvious? Try to focus in on what your client has identified as a potential difficulty: regular contact with his children. Your client is prepared to agree to any financial demands to achieve this but will that be acceptable to the other party? Assuming that both parties would ideally like incompatible outcomes, are there any other ways that this could be achieved? Think about the interests of your client and think of potential interests that could be motivating the other party.

Rhys wants regular contact with his children but, as this is not happening at present and we know that two of the children are not comfortable with the thought of spending time with their father, it is likely that this is problematic.

Think about the issue from Angharad's perspective: after twelve years of marriage, her husband has left her and she has discovered that he wants to undergo gender reassignment treatment. She is likely to be hurt and upset: perhaps this is affecting her attitude towards contact between the children and their father. What could be done to address this situation? Perhaps you could suggest family therapy or marriage guidance for the couple to assist in re-establishing cordial relations within the family. It may be that Angharad will be more tolerant of Rhys' position once she understands it better so counselling could be a useful tool.

Moreover, Angharad is probably worried about how the children will react to spending time with their father. It isn't unreasonable for her to have this concern given that the seven-year-old has panic attacks when his father's name is mentioned: it is probably not very realistic of Rhys to expect overnight contact in his new home in these circumstances. What measures could be useful in establishing some contact between the father and his children? Perhaps Rhys could visit the children in their own home: at least then they are in familiar surroundings and they would be able to withdraw from his presence if they were upset and they would be able to turn to their mother for reassurance. Alternatively, contact by telephone, letter or email might be a useful first step at rebuilding the relationship.

One issue that you could consider here is how Rhys would be expected to dress and behave during any time spent with the children. The children are young and have had quite a lot to deal with as a result of Rhys' actions: not only have their parents split up but

they have had to face the realization that their father wants to have a sex change – a very difficult situation for such young children. Whilst your task is to represent Rhys and this would obviously including having respect for his lifestyle decisions, it would not be unreasonable in the circumstances to ask Rhys to dress as a man for the initial period in which contact with his children is re-established. More complex issues such as their acceptance of his new gender status can be dealt with at a later point in time when the children are more comfortable in his presence.

It would be advantageous for the children and for Rhys' attempts to build a relationship with this if amicable relations could be restored between Rhys and Angharad. Perhaps part of this could involve attending church together: this would rebuild a sense of family and it would deal with Rhys' problems with Angharad's current church. It may be possible for the priest or others in the church community to provide support for the family. If this is not acceptable to Angharad (who has had an enormous shock and who is likely to be very hurt and confused) then perhaps Rhys could consider staying away from church so that Angharad and her children can attend. Possibly they could agree to attend church on alternative weeks. These are all possibilities that can be explored if you focus on the bigger picture of what Rhys wants to achieve.