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WIN-WIN DIVORCE BY JORYN JENKINS

Interest-Based Negotiations¹ ©

It may feel unnatural to negotiate your interests, rather than your positions, especially during a stressful period in your life, when you want to put up walls. But position-based negotiation is adversarial, only considering the needs of one side, and limiting good alternatives that might be satisfying, so it stymies the negotiation process.

In contrast, focusing on interests rather than on positions enables people to negotiate reasonably without threats, intimidation, or ultimatums. It avoids a deadlock and allows discussion of each person's underlying interests, which leads to uncovering different outcomes. Brainstorming multiple options for goals can lead to satisfaction for both parties.

Identify Your Interests

Thus, in collaboration, the first step is to develop your interests. Identifying goals allows for more bargaining room and helps spouses discover more than one way to resolve each issue. It's also important for you both to prioritize so that the team can work towards achieving your most important goals and allowing you to compromise on your less important ones.

Later, you will pay attention to your spouse's interests, as well, as they are also key to creating a successful settlement offer.

Gathering Your Information

The second step is gathering information from both people. Unlike adversarial discovery in litigation, transparency and confidentiality reduces stressful concern that information will become public. The neutral facilitator or, in the two-coach model, the two coaches will meet individually with both of you to discuss your goals, your issues, your concerns, and your relationship history. She will then prepare a report of your interviews and her perceptions and provide it to the entire professional team so that everyone has a better understanding of both of you, your personalities, your strengths, and your weaknesses. She will advise them on how to avoid pitfalls in the process based on your individual personality traits and histories.

The neutral financial professional will also work with you both to compile your financial documents. By reviewing the documents provided, he should be able to determine whether an important document was concealed. If it's determined that one party isn't being transparent, the

¹ The incisive work on this subject is *Getting to Yes (Negotiating Agreement Without Giving In)*, by Roger Fisher and William Ury. Although originally published well over 30 years ago, this practical primer on the fundamentals of negotiation remains the leading work in the field of conflict resolution today.



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team will encourage that client to be more open. It may be necessary for the team to address some temporary issue in order to facilitate this.

If not, the collaborative process must be terminated.

Discuss the Law

The third step is to discuss how one might apply the law to the facts. Lawyers have very different and often quite adamant views on what role the law should play in the collaborative process. Some believe that it should have absolutely no role and that it should not even be discussed. They feel that to do so would undermine the goal of collaborative practice, that is to say to help clients reach the best settlement agreement possible for them and for their unique families, regardless of what the law says.

Other attorneys ardently believe that our job is to educate our clients about the law so that they may make informed and educated decisions. They consider it legal malpractice not to tell the client what might happen if their case went in front of the judge.

It's possible that one or both of you have previously discussed "the law" with other lawyers, as well as with your friends and family. You may therefore have misconceptions as to what the law is, and/or how it may be applied to your situation. Once both clients have signed the collaborative participation agreement, it will be important for your collaborative professionals to uncover and correct any erroneous beliefs. If not, they're likely to affect how fairly and reasonably you or your spouse are able to negotiate, infecting the process.

On the other hand, it may be helpful to use the law to strengthen any settlement agreement you may have reached, safeguarding both your agreement and you, the clients, against future legal challenges.

Further, you look to your lawyer for guidance. Don't be surprised if he reminds you that, regardless of what "the law" might say, it's always applied by a person, a judge who doesn't know you or your kids, or share your values, and who might be having a bad day, the day he makes the decision. Or it may take him so long to get back to considering your case that he's forgotten some of the details "proved up" in trial.

Except in extreme circumstances or with respect to certain legal issues regarding the rights of minor children, you should both work towards an agreement that is in your families' best interests, regardless of what you might believe the law requires.

Brainstorm Your Options

The fourth step is to problem solve, to generate options. By defining each client's goals first, your team can then generate multiple settlement options to accomplish those. Brainstorming



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provides a free and open environment in which everyone on the team participates. The team actively listens when brainstorming, but the process should have a relaxed and casual feel.

Everyone will be encouraged to think outside the box and discouraged from criticizing any ideas at this stage. Additionally, you'll notice that the team avoids rewarding ideas because people may focus on those suggestions and close their minds to possible alternatives. Judgment and analysis at this point will stunt idea generation and limit creativity. By exploring as many alternatives as possible, you'll enjoy the best chance of reaching a settlement that addresses your most important interests.

Negotiate Agreement

The fifth step is reaching an agreement. Once you have brainstormed as many ideas as the team thinks possible, you'll tweak and trade options until a final settlement has been reached. Evaluate ideas *after* you conclude your brainstorming session; this is the time to explore solutions further, using conventional approaches. Determine how your interests can be met by the many possible solutions. Discuss the cost and benefit to each of you for each proposal.

The team may ask each of you to step into the other's shoes and analyze whether you would be happy with the proposal if you were your spouse. Brainstorming enables participants are able to explore many scenarios in pursuit of an effective settlement agreement.

Draft Your Agreement

The final step is to formalize the agreement. One or both of the attorneys will draft the agreement for the rest of the professionals to review. Once they've approved it, the attorneys will each discuss it with their clients. Additional negotiations may take place at this stage, as you or your spouse remember details forgotten during the team meetings, or identify issues suggested by the written draft agreement.

Celebrate Your Success

Once both of you approve the agreement, you'll sign it. Many collaborative teams hold a celebratory signing meeting at no charge for their clients. Many teams will bring champagne, cake, or some other festive treat. They'll praise the clients and the team for working together to come to the agreement.

Once the agreement is signed, in many jurisdictions, one or both of you attends a five-minute hearing at which your attorney "proves up" the agreement. The judge will enter a final judgment ratifying the terms of your agreement and granting your divorce.



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Contact Open Palm Law now. We can help you resolve your disputes.

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