

Negotiation

Class 6 - Orientation

What do we mean by “orientation”?

Among all the subprocesses or stages represented in the POPINC mnemonic, the orientation stage is the most challenging to define. Simply stated, in the orientation stage, counsel works with the client to develop tactics to create the first (few) impressions, and identifies and evaluates potential problems. It is the tail end of planning, and extends into the first contact with the other side in the transaction. At this stage, it is important to remember that one of the main objectives in the negotiation is to get the other negotiating party to agree to something that satisfies your client’s interest. Accordingly, as with any stage, keeping the interest in mind is key.

Particular consideration - Where to conduct the negotiation?

During this stage, you may want to discuss with your client the topic of *where* the initial meetings will take place with the other side. Of course, not all negotiations require in-person meetings with the other side. Many transactions do not require meetings of the parties. But in those circumstances where meeting is a good idea, it is important to consider advantages and disadvantages of different locations.

There are obvious “home turf” advantages of meeting at your own office. The biggest advantage may be psychological. You are comfortable in your own environment. And there are practical advantages too - you do not have to take the time to travel to another location. Your staff will be present to assist you. And you will have better access to documents.

There are, however, certain advantages to meeting at the other side’s location. If you are asked a difficult question that you do not want to answer, it is easier to blame the absence of access to documents. And if you need to make a dramatic exit when cutting off discussions, it is much easier to storm out of your opponent’s office than it is to storm out of your own office. The latter is awkward!

Planning the agenda

While preparing to have an initial discussion with the other side, you may wish to develop an agenda, or order in which you will discuss certain issues. There are a number of approaches. For example, if you are discussing a draft agreement with the other side, you could just do a “page turn” and discuss the issues in the order they appear. Or you could select difficult issues and discuss those first. Or you could discuss issues that appear most important first, such as the price or other commercial terms.

Here is a useful order in which to discuss the issues:

- Least contentious but important issues first
- Most contentious, most important issues second
- Least contentious, non-important issues third

By discussing first certain issues on which you are likely to agree, you set the tone for the remainder of the discussion in a positive way. If you launch right into the most contentious issues first, you are likely to get bogged down and not make much progress at all. If you discuss non-important issues first, you’re wasting your time, essentially procrastinating. In any event, during the orientation stage, the order of discussion is something to consider.

Be on the lookout

Finally, during the orientation stage, there are certain things about the other side’s conduct you should consider, i.e., to be on the lookout for once the discussions start. For example:

- The other side may send too many negotiators to the discussion - this could indicate it is trying to intimidate.
- Sending not enough, or inexperienced negotiators - is the other side actually taking this seriously?
- Is the other side trying to “bargain with credentials” - e.g., boasting about other successes?
- Are artificial deadlines being imposed to create a rush, and thereby put pressure on you?

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