

Why You Want to Read This Book

Do you toss and turn the night before an important negotiation? Do you enter into a negotiation afraid you will lose? Does facing one more negotiation make you want to volunteer to do anything but that? If so, this book is for you. It is intended in plain words to give you and architects everywhere the keys you need to negotiate and to profit from your negotiations. Or maybe you're an architect who loves to negotiate and are just looking for some new ways to win. This book is for you also. You'll find lots of tips in it and, I venture to say, a new idea or two.

Or maybe you're like the architect friend I was accompanying on a construction site when we bumped into his client. The client was upset about something—nothing big—and I watched the two work out the client's dilemma. The architect acceded to some items, including one that surprised me. He agreed to do some additional services at no cost to the client. And he stood pat on one item (he didn't want to change a design feature). The client left the negotiation seemingly happy. "It's hard to negotiate on the fly, isn't it?" I asked, guessing my friend felt

forced to agree to provide the free services. “Huh?” he responded. “What negotiation? I wasn’t negotiating. We were just talking.” If you’re like my friend, this book is for you, too. It will help you recognize when you are negotiating and help you find the breathing space you need to think on your feet. If you’re not used to negotiating, though, a few of the concepts may seem difficult to grasp at first, but rest assured, all of them are accessible. So, get yourself a cup of coffee, settle back, and enjoy.

First, some basic insights. You already know how to negotiate. You wouldn’t be where you are today if you didn’t. How else could you get through a day? You negotiate with your spouse (“What do you want for dinner?”). You negotiate with your colleagues (“Any chance you can help me with this report?”). You negotiate with strangers (“Excuse me, but I was first in line.”). You negotiate with children (“Finish your homework and you can watch TV.”). So, the issue isn’t learning how to negotiate. You already do that, thank you. The issue is learning how to negotiate better.

Second, someone may have told you that you have to be a lawyer to negotiate effectively. If that were true, you would be lost already. As a lawyer myself, I say, “Bananas!” Not being a lawyer may even help you be a better negotiator, especially if you put your design skills to good use. Architects are problem solvers, and solving problems is what negotiation is all about. Furthermore, if you are reading this, you probably never wanted to be a lawyer. If you had, you would have gone to law school. In fact, you might not even like lawyers. That is okay, too. Negotiating, especially negotiating owner–architect agreements, has as much to do with design and construction logic as with legal

reasoning—or it should for you in the future after you have read this book.

Third, negotiating can be fun for both you and the “other,” a term I use to reference the other person with whom you are negotiating. This is true only if you use negotiation, not to align words on paper, but to align energies for project success. Project negotiation—whether the negotiation involves you with an owner, a contractor, a zoning official, or whomever—provides you the opportunity to focus with the other on what is necessary for project success. This is true even with respect to negotiating owner-drafted agreements. Contract negotiations provide you and the owner the last best chance to finalize expectations and to make sure that both of you will be working equally hard on the same project to the same end.

Now, you may be thinking, “That’s easy for her to say. She’s not an architect.” That is quite true. I am a lawyer; furthermore, I was brought up learning how to negotiate. Most architects are not taught how to negotiate, in no small part because the National Architectural Accrediting Board and the National Council of Architecture Registration Boards historically have not required negotiation to be taught. But the need is there.

This first came home to me when I was deputy general counsel at the American Institute of Architects (AIA). At that time, I would often walk to work with a colleague, Jim Franklin (now FAIA), who lived around the corner. One morning I told him the story of my niece, Beatrice, who was seven at the time. She had called the night before, crying uncontrollably and beyond consolation. Her mother had refused her request to hold an overnight at her

house. Now this was a real loss to her. Since Beatrice at that time was afraid to leave her mother, she never went on overnights, and not being allowed to have an overnight in her own home meant that she could not be part of her peer group. She just could not stop crying. Finally I said to her, “Beatrice, stop crying immediately. One, I don’t have the power to reverse your mother, so all your tears are in vain. And, two, you are crying prematurely. You have no idea why your mother said no. Maybe she didn’t want it *that* Saturday night; maybe she wanted it *in three weeks*. Maybe she didn’t want *10* girls; maybe she wanted only *5* girls. You have no basis for crying, none whatsoever. Now, go wash your face, brush your hair, go back to your mother, and—not accusingly in any way whatsoever—simply ask, ‘Mama, about that overnight: Why didn’t you want it?’ Find out what your mother’s concerns are, give me a call, and we’ll figure out a negotiating strategy.” Five minutes later the phone rang again. “It’s in two weeks, on a Saturday night, six girls plus me.”

Jim was somewhat horrified and very jealous. He said to me, “This is unfair. No one ever taught me how to negotiate!” And I looked at him and said, “How do you get through *life* not knowing how to negotiate? Architects have to negotiate everything—not only their salary each year, but also projects with owners, school boards, contractors, everybody, all the time. How can you function without knowing how to negotiate?” Right then and there I silently promised myself that someday I would write this book.

And here it is. This book is my “thank you” to a profession that has made the world a better place because of it. It is meant to level the playing field. To give architects, to give *you*, the skills you need to

negotiate wisely and well with owners, contractors, friends, and even enemies. It is designed to give you the tips, tools, and opportunities to view and do negotiations comfortably and in a different light.

How to Use This Book

Now, how should you use this book for maximum impact? You will read new ideas that may make you question your existing way of doing things, what you know from others and from life, even how you do business. And, of course, you may question the ideas themselves. Question, by all means, question all that you read here. The best negotiators aren't afraid to question everything, so you shouldn't be either. And accept only those ideas that make sense to you personally. You are *you*. Only you know what you are facing both personally and professionally, and only you can judge the usefulness of the ideas presented here.

This book has wide margins and space for you to jot down your thoughts. Feel free to mark it up and make it yours. You will also find exercises throughout this book designed to give you a chance to apply your new knowledge and skills. Do them, not in a haphazard way, but thoughtfully, so you can try new skills on for size in the privacy of your own home. Then, when you take what you have learned onto the construction site, don't try to implement every new idea at once. Pick the one skill you most want to work on and focus on acquiring that one skill until you absorb it comfortably into your essence. Then choose another. Under no circumstances should you try to change everything about how you negotiate all at once. You are not that much of a negotiating mess, but you will be if you take the "adopt everything" approach. You won't be listening to the other.

You'll be thinking, "What should I do next?" or worse, "Why did I do that?" So promise yourself, try just one new skill at a time. Master it and move on to another.

To make maximum use of this book, must you read it cover to cover? No. Each chapter can be read independently, and each chapter is indexed so you can easily access the book that way. You can even use it as a reference tool, looking up key words and starting from there. At the same time, however, you should know that the book was written cumulatively, so that Chapter 2 builds on Chapter 1, and so on. This was done purposely to maximize the ease of learning new skills.

Let me show you what I mean. In the next chapter, you will be learning about what claims data have to teach you, the owner, and the project team that will help you front-end align your projects and become a better negotiator. Chapter 3 translates tough legal concepts into design and construction so you can negotiate as an architect and not as an ersatz lawyer. You are introduced to negotiation concepts for the first time in Chapter 4. What is negotiation? How does the negotiation process work when it works well and when it does not? Does it make a difference if the "other" is an owner? A contractor? Someone you like? Someone who makes you exceedingly uncomfortable? In Chapter 5 you will read how expert negotiators prepare for negotiations, including what they do to get the fees they want. Chapter 6 lets you in on research into how skilled negotiators communicate. What do they do—and do differently from negotiators who are merely good—to make them and their results so special? How can you pick up those skills and make them yours?

Chapter 7 applies what you learned in the first six chapters to some of the most egregious owner-drafted contract language and some of the most common problems. Chapter 8 discusses dispute resolution just in case the first seven chapters don't quite work for you. The final chapter pulls it all together, as final chapters should, giving you the tips you need to incorporate your new knowledge into practice. I have even included an appendix of other sources of information on negotiation so you don't have to rely on this one book for all the answers.

Let me also tell you what this book isn't. It isn't an exhaustive compilation of all the most onerous owner-drafted language edited for reasonable acceptability. No one can ever presage what creative lawyers will do, nor can anyone anticipate all future owner needs in an ever-changing construction world. Besides, every architect's and engineer's insurer has a book just like that available for the asking. (You can find a list of insurer-drafted analyses and aids in the Appendix.) More important, it wouldn't be helpful to write such a book: It would be too prescriptive and neither you nor your practice is a cut-and-paste effort. Worse, over time, it could become a standard of care, a set of rules for you to adhere to, even if they were not in yours or your clients' interests. So don't think of this book as a prescription for you to follow or this year's formula for success. In the negotiation process, as in professional life, success comes from creative critical thinking, not from adhering religiously to someone else's set of rules. You will have to think about what and how you want to negotiate to become a successful negotiator. The purpose of this book is to help you with your thinking.

Please don't think the above paragraph is just the usual lawyer's disclaimer. I learned the dangers of unwittingly setting a national standard of care when I served as legal counsel to AIA's *Handbook* Review Committee for both the eleventh and twelfth editions of *The Architect's Handbook of Professional Practice*. An architect called me up during a recess of an arduous trial. Opposing counsel had just tried to impeach him using the tenth edition of the *AIA Handbook*. "Nobody does it that way anymore," the architect wailed. "But I'm the one who looked like a fool." As a consequence, we took great pains in both the later editions never to set a standard of care. Issues were raised. Issues were discussed. The impact of the various resolutions on the designer, owner, and contractor were explored, but all decisions were left to the parties. That way the *Handbook* could be made equally useful to an architect in a large-firm setting as to the sole practitioner.

I've taken similar pains here. As a result you will never read in this book "the architect must...." You have the power within you to design your own practice. This Honorary AIA is not going to steal that power from you.

Nor are there any rules dictating good client behavior. And even if there were, if your clients are like some others I've met, they probably don't think that *any* rules apply to them. Clients come in all different shapes and sizes. Some are nice people; some are not. Some are smart; some are not. Some know about the realities of design and construction; some do not, and so on and so on. This book starts you out wherever you find your client.¹ And I've written it with the gamut of client types in mind. So, you are

¹ It also applies whatever shape you find the contractor in.

going to want to develop your client selection skills (a skill you will read more about in Chapter 2 on front-end alignment) as much as you are going to want to develop your client negotiation skills. In the interim, if your words fail you, feel free to give a copy of this book to your client. I say the same things to owners (and engineers, contractors, and lawyers) as I say to you.

Now, a bit more about me so you can put everything I say into perspective. You already know that I am a lawyer and that I love your profession. Three more confessions—one you’ll enjoy, two you may not. Here’s the one you will like: I am smitten by most of the architects I have had the pleasure of working with these past many years. Architects, by and large, are good people committed to doing good. I learned this first as deputy general counsel for The American Institute of Architects and later as vice president of Victor O. Schinnerer & Company, Inc., counseling architects on negotiation and risk management strategies. After nearly 20 years, I can assure you that architect-negotiating skills may be lax, but architect commitment to project success is not.

Now for the two other confessions—the ones you may like less. First, I am also an owner. In the last five years, I have had the opportunity to oversee nine projects, some large, some small. All with challenges, all with difficulties, all with varying degrees of success. Most built. One not, and even that was a success of sorts. (It was an adventurous commercial building that went well during the design stages, but was terminated in the construction documents phase due to a change in client corporate strategy.) In the course of doing these projects, I have interviewed lots of architects in the sales setting. I have sat across

the table from architects and negotiated. I have worked with architects as The Client. Through this hands-on experience, coupled with the near 15 years working directly for the profession, I have watched thousands of architects, engineers, contractors, and owners negotiate. These experiences have stayed with me and form the human construct of this book.

Now for my second confession. I am an unabashed believer in what I call “assertive practice.” *Assertive practice is an approach to architecture that combines creativity and risk-taking in a way that provides clients value and puts architects in control of their practices.* It stems from the belief that people have power over their practice lives, if they only choose to exercise it. I know there are meanies out there who will try to throw road-blocks in your path. I know the market is competitive and, as John F. Kennedy once said, “Life is unfair.” Excuses, excuses. You can still position yourself and go for your gold, however you define gold.

If this sounds Pollyanna-ish, I assure you, if you knew me personally, you would be thinking no such thing. I know life is gritty. That is not the point. The point is that society values people who provide value, and if you are not one of those valued, I say, don’t whine about it—whining never helps. Face it. Evaluate what you need to increase your value, and increase your value.

That is a key rubric of assertive practice. Assertive practitioners don’t whine. As I said to the AIA board of directors in the early ’90s, the AIA has to stand for more than “Ain’t It Awful.” Increasingly, it does. Today, more and more AIA architects subscribe to the tenets of assertive practice. Assertive practitioners do not bemoan the rise of construction managers; they improve their construction administration skills

and provide construction management (CM) services themselves. They do not complain about interior designers taking interiors work from them; they expand their practices to provide those services, often hiring interior designers in the process. Simply put, assertive practitioners keep their skill levels high and their knowledge levels even higher. They design their practices with one eye on the market's needs and demands and the other on their own needs and demands. They provide their clients value so that they, in turn, are themselves valued. They take control over their value and over their responsibility for maintaining it.

There are corollaries to these key tenets, and they surface throughout the book, but the primary two are these: One, *assertive practitioners make friends with risk*. They know that in our society people who take on reasonable risks and manage them reasonably make money; people who shy from risk do not. Risk and reward. In architecture, they go hand in hand, in no small part because help in managing risk is one of the values clients expect the architect to provide. "Can you help me bring this project in on time and on budget?" "If things go wrong, will you be there looking out for me and my project?" For many owners today, if you can't help them manage the reasonable risks of design and construction, they will find an architect who can.

Notice I write "reasonable risks." Assertive practitioners know which risks they can reasonably handle and which they cannot. They have a cadre of consultants available to them to fill their competency gaps. They respect what others bring to the table, and they know how to help maximize everyone's contribution, including the owner's and the contractor's,

so that a symphony is orchestrated and not a cacophony of mere sound. Simply put, assertive practitioners may not be easy people; they have boundaries. But they are easy to work with because they are skilled (and work hard) at stepping up to the design plate, both facilitating the group process of design and construction and achieving client satisfaction.

They are also easy to work with because they do not look at the world through the prism of liability. Prisms tend to distort things, and the prism of liability is no different. Assertive architects know that their best defense against engendering liability is not arguing about words, but focusing on action; in other words, assertively managing the risk. After all, a well-managed risk reduces the probability of harm. *If you can prevent a harm so that there is no injury, no liability can result.*

Assertive practitioners get paid for their abilities to manage risk. It may be a tragedy to the profession that design expertise does not always link to personal success, but the reality of design is that owners expect architects to be able to design well. That's a given. They want more. The purpose of this book is to help you provide that "more."

Now for the second corollary of assertive practice: *Assertive practitioners believe in "no-surprise design,"* and they work hard to put that belief into action. What do I mean by "no-surprise design"? Before I answer that question, I want you to think not about the negotiation process but about the design process. Think back to the best design experiences you have had with your clients. Remember the ones where, when you showed your developed designs, the client said, "That's exactly what I wanted!" The ones where, when the building was built, the client

looked at it and you and said, “I’m so glad I selected you to design the building.” Ask yourself, What happened to make those client statements possible? Was it a matter of pure chemistry? Perhaps. But if you have a long track record of those positive design experiences and many repeat clients, I submit those successes did not just happen. You worked *with* your client to make them happen. And you worked hard because you know that repeated success is not a matter of luck. Nor is it an issue of chemistry or magic. It is a matter of hard work, coupled with solid skill development and application. It is the result of “no-surprise design.”

Now then, what is “no-surprise design”? Research into high-level consultants (and negotiators) shows one characteristic that all these professionals share: At any point in the negotiation these people have a very good idea of what their client needs and expects *and* how their clients will react to the proposals they make and the actions they take. As a result, their ideas, proposals, *and* actions never surprise their clients. Each step they take proceeds smoothly and, from the client’s perspective, seamlessly from the step before.

How do these consultants achieve such consonance with their clients? How do they know what clients are thinking? How can they be so certain of their clients’ reaction? It’s not just from their contract negotiation abilities, although those are one important component of their success. No, top consultants see negotiation as an ongoing process. From the very first moment, they engage their clients strategically and continuously in those communication behaviors that produce mutual understanding and accord. They keep their focus on their

client and their clients' problems as their clients define them. They actively create a comfortable arena where hard concepts can be discussed openly and resolved efficiently and amicably. As a consequence, they earn the trust of their clients so that even when there is a glitch, as there invariably is in even the best of projects, their clients know that the consultants' primary concern will be the enduring interests of the client.

I have one more thing to tell you. As strong as my commitment is to assertive practice, I have taken steps to protect you from my idiosyncrasies. I have asked wiser souls than I to review this book for error. My good friends have given me of their time, and I thank them profusely for their wisdom and their goodwill: Harold L. Adams, FAIA, RBA, JIA, Chairman of RTKL Associates Inc.; Robert A. Odermatt, FAIA, of The Odermatt Group; John M. Laping, FAIA of The Kideney Partnership; Philip G. Bernstein, FAIA formerly of Cesar Pelli's office and now a vice president at Autodesk and still an instructor at Yale University's School of Architecture; John A. Seiler, AIA, a professor emeritus first of the Harvard Business School and later of the Harvard Graduate School of Design and now a principal in BostonSolv, a construction partnering and mediation service; Deborah S. Ballati, Esquire, of Farella, Braun and Martel and chair-elect of the ABA's Forum on the Construction Industry, Michael C. Loulakis, Esquire, of Wickwire Gavin, PC, a lawyer well known for his work on partnering and on design/build contracts, and Howard G. Goldberg, Esquire, of Goldberg, Pike & Besche, P.C., and a founding Fellow of the American College of Con-

struction Lawyers. They have done much to expand the breadth and depth of this book.

Thank yous must also go to the AIA, the American Bar Association, the American Arbitration Association, and Victor O. Schinnerer & Company, Inc. for permitting me access and use of materials that I developed (or helped develop) while I was working with them. Special thanks must also go to Huthwaite, Inc., and its new leader, Tariq Zaidi, for giving me permission to use its intellectual property for the benefit of the design professions.

I also must thank Laura Longley and Lea Harvey who, along with Margaret Cummins, my wonderful editor from Wiley, bled over each word with me, keeping my confidence up when I could no longer see the track. And, most of all, I thank my husband, Neil Rackham, for introducing me to his seminal research on negotiations, persuasion, and sales. If not for him, his 10 books, and the family need for at least one book written by Abramowitz, this book would never have been written.

Now, on to negotiating essentials.

