

A photograph of several surgeons in an operating room, wearing blue scrubs, masks, and caps. They are gathered around a patient, with surgical instruments visible on a table in the foreground. The scene is lit by bright overhead surgical lights.

VOLUME 1

RESOURCES FOR THE PRACTICING SURGEON

The Employed Surgeon

SECOND EDITION

ACS / AMERICAN COLLEGE
OF SURGEONS

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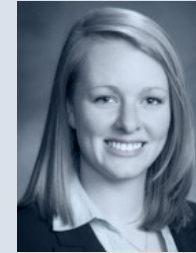
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Volume 1: Resources for the Practicing Surgeon: The Employed Surgeon, Second Edition
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INTRODUCTION

In the current era of consolidation in healthcare, there has been a major shift toward employment of physicians by hospital systems and corporations. Approximately 75% of surgeons are now employed by an institution—49% of surgeons are hospital employed, and 26% are employed by other corporate entities, such as private equity firms and health insurers.* There are numerous factors that may be driving this trend, including (but not limited to):

- Stagnant physician reimbursement rates relative to annual increases in hospital payments
- Substantial overhead costs and administrative burdens associated with independent practice
- High institutional demand for physicians, leading hospitals and corporations to employ surgeons and other specialists
- Market conditions and competition
- Physician demographics and lifestyle preferences

Resources for the Practicing Surgeon: The Employed Surgeon, Volume 1, Second Edition, is intended to highlight some of the important principles of navigating career opportunities and the logistical, financial, and contractual nuances associated with becoming or maintaining one's position as an employed surgeon. This primer begins with an explanation of the various types and settings of employment, a basic understanding of which is essential for any surgeon working in a hospital or corporate environment. The next parts provide practical guidance aimed at helping surgeons evaluate employment contracts and compensation models offered by hospitals and corporations. The primer concludes with tips for strategic contract negotiations, including contract templates and checklists for contracting best practices, among other tools.

Whether starting a new job or evaluating existing contractual relationships with a hospital or corporate entity, surgeons should find a wealth of detailed information within this publication to assist in navigating the current landscape of physician employment and the complexities of ensuring a surgeon's expertise is fairly and equitably measured and valued by their employer.

* Physicians Advocacy Institute and Avalere Health Physician Employment and Practice Trends Research. Specialty Edition. 2019-2022. Key Findings. Available at: https://www.physiciansadvocacyinstitute.org/Portals/0/assets/docs/PAI-Research/Specialty%20Analysis%20Key%20Findings-final.pdf?ver=u7j_OpnUKpOdsVlfi-siA%3d%3d.



PART 4

NEGOTIATION BASICS

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Editor's Note: The author is writing solely in her individual capacity, not as an employee of the Federal Deposit Insurance Corporation, Georgetown Law School or Fordham Law School. She is offering negotiation advice solely as a subject matter expert, not an attorney. This chapter is not intended to provide legal advice about employment negotiations.

As surgeons increasingly become employees of organizations, institutions, and corporations, they find themselves negotiating contracts about duties, benefits, and compensation.

It is strongly recommended that surgeons consult an attorney who has experience negotiating physician employment contracts, and as appropriate, have the attorney negotiate on their behalf. This chapter provides an overview of negotiation principles and practices to guide the employee-surgeon in discussions with their attorney, and in the actual negotiation should the employee-surgeon choose to negotiate on their own behalf.

Negotiation Vitals

Elements of Negotiation: Negotiation is not haggling or selling—it is influencing. It involves elements of Behavior (what we do); Communication (how we deliver and receive information); Relationship (who are the players); and Results (why each party is there). Each negotiation has its own “culture”—timing, approach to conflict, venue and space, relationships, policies, intermediaries, power and authority, and closure rituals. All negotiations involve both process (why and how) and substance (what and when).

Taxonomy of Negotiation: The first step is Diagnosis: is the negotiation Investigatory or Deal-Making?¹ Investigatory Negotiation explores whether or not a deal is appropriate or even possible. In essence, you negotiate about whether to negotiate. If you proceed, the negotiation moves to Deal-Making: Developing Options, Mapping the Space, Identifying Zones of Possible Agreements (ZOPAs), and creating and claiming value.

Styles of Negotiation: Good negotiators are not “one-trick ponies” —they do not use the same style in each negotiation. Rather, they use the same principles and practices, but vary approach depending on the importance of Outcome (merits/results) and/or Relationship (ongoing/one-off). Possible styles are:

- **Avoiding:** Rate both relationship and outcome low, will avoid confrontation in negotiation
- **Accommodating:** Rate relationship high and outcome low, will concede/concur to get a deal
- **Collaborating:** Rate both relationship and outcome high, will give and take to get a deal
- **Competing:** Rate outcome high and relationship low; will negotiate aggressively

Principled Negotiation: This approach to negotiation focuses on parties' interests, not positions:²

- Separate the people from the problem
- Focus on interests (needs), not positions (wants)
- Invent options for mutual gain
- Insist on using objective criteria

The seven factors of Principled Negotiation are:

1. **Interests:** Identify your needs in the negotiation (salary, schedule, benefits) and rank them; do the same for the employer (timing of onboarding, oversight/supervision of others, expertise).
2. **Alternatives:** Calculate your BATNA (Best Alternative to a Negotiated Agreement—another offer you already have) and your WATNA (Worst Alternative to a Negotiated Agreement—having no job at all). Do the same for the employer to the best that you can. Notice that your Best or Worst Alternative is to a Negotiated Agreement, it is not your best alternative or dream outcome. This helps you decide whether to stay at the table: if your BATNA is better than their offer, walk and take your BATNA; if your WATNA is worse than their offer, stay at the table.
3. **Options:** Have more than one option. Prioritize them; plan your moves and design a concession strategy to give up certain options. Create “packages,” but remember that once you package or link something, it is difficult to unbundle or decouple those components later.
4. **Legitimacy:** Provide objective criteria to support your options, such as cost of a benefit or professional membership; average salary for a particular area of surgical expertise; years of experience; collateral duties/committee memberships/teaching load. Ask the employer to do the same.
5. **Communication:** Who will take the lead in the negotiation: you or your attorney? If both of you are at the table, how will you interact? How formal/informal is the process: in person, written, virtual? How can you use each different communication channel to your advantage?
6. **Relationship:** Who do you expect to take the lead on the other side: Head of Human Resources, Vice-President of Operations, Medical Director, or another party? Do you have any pre-existing relationships with others at the institution: medical school, professional affiliation, recruitment? How

important is it to preserve a long-term relationship with those with whom you will be negotiating?

7. **Commitment:** This is commitment to the negotiation process, not to an agreement. Each negotiation goes through six stages, explained below. Commit to the process and be patient.

Dissection of a Negotiation

The six stages of negotiation are not a linear process. Skipping the first three stages and proceeding directly to the Options stages too early will reduce your opportunity to maximize value. The stages of a negotiation are:

1. Gathering Information and Preparation

Prepare yourself and know what you truly need. Then prepare with your attorney and/or any other representatives working on your behalf. Map out the roles of all the parties: those at the table, behind the scenes, and the decision makers. Figure out who has power (can influence) and who has authority (can decide) on the other side.

Don't forget to prepare on both **process** (roles, strategies, approaches, concession plan, impasse, and closure issues) and **substance** (interests, creating and claiming value, options, aspirational value, reservation value, packages, and linkage). Know when you will walk away based on your BATNA/WATNA, and identify in advance why you will walk away (and how).

Develop an Information Management Plan: what you have, what you need, what you are willing to share, and when and what reciprocal information you will expect. Identify your “known knowns,” your “known unknowns,” and “unknown unknowns.” Prioritize information, both yours and theirs: is the information critical/necessary, not critical but helpful, conditional on other information, or just a curiosity?

2. Identifying Interests

Map out both your interests and theirs. Ask WHY: for example, why do they have a certain timeframe for onboarding, why do you need certain benefits. Identify

conditional interests, mutually exclusive interests, and changing interests. Are there interests both parties share? Rank your interests and theirs. Don't skip this step—it can create options.

3. Developing Options

There is tension in negotiating between claiming value (most usual in an outcome-focused negotiation) and creating value (more common in a relationship-focused negotiation). Ideally, a successful negotiation is a combination of both creating and claiming; just remember to create first and not begin to claim too early in the process.

Claiming Value² focuses on variables we think of as objective: money, time, quantity, and risk:

- Focus on the other party's BATNA and reservation value
- Avoid making unilateral concessions (map your moves and get something in return)
- Be comfortable with silence
- Label your concessions
- Define what it means to reciprocate (both for you and the employer)
- Make contingent concessions
- Be aware of the effects of diminishing rates of concessions near the end of the process

Creating Value focuses more on interests and can be used to expand the ZOPA:

- Identify multiple interests, especially non-monetary, relationship, and future engagement
- Prioritize your interests and theirs (create a scoring system)
- Determine a range of options that meet at least some of their interests
- Negotiate in packages, add issues, use contingent offers
- Develop and execute a concession strategy

4. Narrow Options

Here, parties may become irrational, make quick (but poor) decisions not in their best interest, get impatient, or rush the process. Some strategies that can help:

- Aggregate asks (requests); disaggregate gives (concessions)
- Make conditional proposals (if/then)
- Have a pre-planned concession strategy—what to let go, why, when, and in return for what
- Avoid splitting the difference (good negotiators know how to set this up and game it)
- Watch out for cognitive biases: ego depletion, confirmation bias, agreement bias, and diminishing rates of concession near the end
- Know when to walk away and why—and stick to it!

If you are at impasse, a differential diagnosis is helpful. If you are stuck on Substance, create additional objective value, package/bundle offers, unpackage/fractionate offers, give or ask for additional information, change the risk-sharing formula or time frames, or use contingent offers.

If you are stuck on Process, you can take a break, change the pace or the tone, remove/disengage difficult parties from the table, go to a different medium (virtual, in person, written) assign “homework” to parties to get and share additional information, set deadlines, do a piecemeal deal (a short-term employment contract), or use a third party such as a mediator.

Difficult behaviors often escalate at this stage. In response, you can *model* the behavior you want, *mirror* their behavior and/or do the following: ignore, reframe, name the behavior and request a change, or pivot to another topic. Take care that you do not get caught up in their chaos or their drama.

Negotiators sometimes find it difficult to say “no.” Using the Power of a Positive No³ can be useful. Serve up a “No Sandwich”: Say “yes” to something you have agreed on so far (Past); say “no” to something on the table (Present); and say “yes” to your commitment to the process (Future).

5. Closure

Leave time for this stage; it takes longer than you think. Anticipate multiple closure behaviors: *repression* (they “forget” what they agreed to); *regression* (they go “backwards” and resort to earlier proposals); *repudiation* (they withdraw offers); *reluctance* (they become “commitment-phobic”); *nibbling* (“just one more thing”); *cratering* (intentionally blowing up the deal); *gambling* (staking the entire outcome on one item); and *raising new issues for the first time*.

Don’t forget to “pocket the deal” and say “yes” to each individual term. Remember that the parties must also reach agreement on the Agreement, which is the written contract. Some terms may be boilerplate and non-negotiable, so be sure to ask about these in advance so you are not surprised at the end. If negotiating on your own, it is **strongly recommended** you seek legal advice before signing any documents.

Be willing to walk away particularly if your BATNA is better than what is on the table, and if your WATNA is better than what is on the table. Explain your reason and then take your exit.

By planning and executing a deliberative, well-planned strategy and understanding the science behind the art of negotiation, you can increase your influence over the result and maximize opportunities to create and claim value.

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