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Winning The Settlement – Keys to Negotiation Strategy

# Winning The Settlement – Keys to Negotiation Strategy

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## **WINNING THE SETTLEMENT – KEYS TO NEGOTIATION STRATEGY**

While we refer to ourselves as trial lawyers, most civil litigators try very few cases. Approximately 95% of civil lawsuits are resolved through negotiated settlement. Law students are schooled in civil procedure, trial advocacy, evidence, torts, contracts, intellectual property, business organizations, etc., but most have little or no formal training in negotiation strategy.

Legal adversaries have several methods available for resolving their disputes, including mediation, arbitration, and litigation. Negotiation theory and practical strategies can be learned and applied to get the best results for the client. This program discusses some of those methods.

### I. Developing Objectives

Before deciding on a case resolution strategy, it is essential to understand the “big picture” objectives of the client. If the client is facing many similar suits and an individual case has very favorable facts, the client may want to try that case rather than settle it to establish a precedent in that matter from which all future cases are settled. In this circumstance, litigation might be the most prudent course and, in fact, perhaps the only reasonable course for the client to follow in resolving that set of disputes, even though it may be the most expensive, time consuming and risky strategy for resolving that individual claim. Negotiation is always an option and is usually the least costly one in terms of transaction costs.

### II. Principles of Successful Negotiation

Superior knowledge equals greater leverage. Negotiating with a leverage advantage usually results in more favorable outcomes. Certain fundamental principles apply in all forms of negotiation. The first is that information is power, and the party that obtains relevant information without the other side having it gains leverage in negotiation. In order to increase leverage (and thereby the likelihood of a favorable outcome), a party should obtain as much relevant information as possible, as early as possible.

There are two basic types of information to gather when faced with a dispute. Substantive facts that include the who, what, when, and where of the dispute and motivational facts that include the motives, fears, concerns, and interests of the parties to the negotiation. Substantive facts are contained in the documents, witness accounts, investigation, correspondence, e-mails, and computer generated material that relate to the dispute. Of course, witness accounts may differ. A client’s view of the facts may differ from various independent witnesses or the opposition’s view of the facts. Therefore, the best evaluation of the case will come from gathering as many of those stories as soon as possible.

Since a jury or judge is more likely to believe an independent witness’s account rather than that of the parties, such accounts are especially important to “lock in” early. It is also important that the in-house

lawyer, outside litigator, and key players within the client organization get together at the outset, gather and preserve documents, and share their stories. Early meetings with witnesses help to develop discovery response plans, assess the quality of witnesses, minimize impeachment possibilities, and engage employees who may not otherwise be interested in participating in the dispute resolution process.

A second category of facts to gather are the motivational facts -- the objectives and interests of all the parties and their representatives. A corporate employee may have interests that differ from his or her employer's interests. For example, employees within a governmental agency or corporation may be concerned about any mistakes they have made leading up to the case or that they may make in testifying during litigation. They also might wish to avoid adding one more task to a long "to do" list by getting involved with attorneys handling a dispute. Such employees may withhold information, avoid involvement, or be anxious for a matter to "go away" by settling regardless of the amount. Knowledge of these types of motivational issues, as well as individual and institutional comfort with risk, should be factored in, understood, and managed if one is to maximize leverage in the negotiating process. A study out of England revealed that the "most effective" negotiators spent four times as much time investigating the opponent's interests as "average" negotiators.

Once the information is gathered, the negotiator should develop a strategy and determine an objective. For instance, if there is a "smoking gun" document that the client does not wish to disclose, prior knowledge will allow the attorney to negotiate or mediate a case immediately, decreasing the likelihood that the "smoking gun" document will come to light. Alternatively, if one side has limited information and minimal access to additional information independently, then litigation may be the best method for gathering the necessary situational or motivational facts through discovery. The client would thereafter be in a position to assess whether mediation or some other form of resolution is prudent.

A second major principle of negotiation strategy, and a corollary of the first, is to negotiate when your leverage is high. It is important to keep in mind that leverage is a situational advantage that often results from superior knowledge. This advantage can be eroded if the opposing party gathers information over time and the relative "situation" of the parties' changes. Leverage can suddenly diminish.

In addition to substantive facts, it is important to understand motivational facts (i.e. both parties' needs, wants and the costs of the best alternative to a negotiated agreement). For instance, a plaintiff's desperate need for immediate cash could reduce the settlement amount it would accept. Since leverage is situational, and "information is power," disclosing information can increase or decrease one's power depending on which side it favors. As a result, a negotiator wants to gather as much information as possible prior to formal litigation discovery. If it is possible to obtain information through investigation rather than discovery, this is advantageous as the negotiator then has information not possessed by the other side. That is not to say litigation cannot increase one side's leverage. Many plaintiffs' attorneys will tell you they cannot get a decent offer to settle a claim from defendant's insurance company until a case is filed or set for trial. This increases time urgency and decreases "foot-dragging" or other tactics.

### III. The Stages of the Negotiation Process

#### A. Assessment Stage

There are three stages to the negotiation process. The first is the assessment phase. The second is the persuasion phase. The third is the bargaining phase. The assessment phase is the information gathering and planning stage. The persuasion phase involves the strategic sharing of information to persuade the other side to settle and resolve the dispute in a way most favorable to your client. The bargaining stage involves the actual exchange of offers in the negotiation process. One can even consider a fourth stage being the drafting and negotiation of terms.

The assessment phase usually takes the longest amount of time and yet is often not considered part of the negotiation process—a common mistake. During the assessment phase, a party seeks to gather information and to delay disclosure until one has gathered enough information to know which information is advantageous to disclose. Rapid assessment is possible in cases where one has superior information and has dealt with the same or similar types of disputes on repeated occasions.

It is important during the assessment phase to quantify both sides' interests. Interests include not only the amount a party might be willing to pay to settle, but also the parties motivating factors that may encourage settlement. For instance, a plaintiff who has suffered a personal injury may be emotionally

upset and desire an apology from an opposing party. Knowledge of this type of non-monetary interest is helpful to formulating a strategy. The defendant could satisfy that interest with a letter as part of the settlement process with no cost. Yet, this simple act could drastically reduce the monetary demand of a plaintiff. For a plaintiff's attorney on contingency fee, the lawyer has an incentive to settle early especially if the percentage fee is the same if he or she settles early or in the case as opposed to later in discovery or during trial. Therefore, the attorney's fee arrangement might motivate him to influence the client to accept less, if the opportunity arises to settle the case early on.

Once goals are set, a negotiator should seek to control the agenda. Consider such issues as whether to make an offer face-to-face or by offer of judgment, letter, telephone or during mediation. Do you try for an early mediation or wait until all discovery is completed? Consider the location of the meeting. Most parties feel more comfortable in their own offices and they are usually less demanding in locations other than their own turf. Consider the order of issues in persuasion and who makes the first offer. All of these are planning issues that can be developed at the conclusion of the assessment phase.

#### B. Persuasion Stage

The second stage of the negotiation process is the persuasion phase. Persuasion may be accomplished through argument, appeal (a request for concessions), threat (which can be especially effective or ineffective depending on an opponent's interests and concerns), or a promise to do something in the future in exchange for a bargained-for outcome. During the persuasion phase, it is important to utilize the characteristics of an effective argument. The structure of the argument is critical. Since mediation usually involves both persuasion and bargaining, it is important to be prepared with a detailed argument with exhibits, and convincing proof.

A persuasive argument includes the use of accepted norms to support a position, i.e., criteria that appear fair in comparing the negotiated situation to objective criteria. For instance, when negotiating the purchase of a house, one could use the price per square foot of other houses sold in the neighborhood and argue that the market value of square footage of any house in that neighborhood is "X" dollars per square foot. While this may appear to be "fair" using market value of other homes sold in the neighborhood, this

is not necessarily so. The house being negotiated may have some positive or negative unique characteristics that others in the neighborhood do not have and, therefore, the so-called “objective” criteria might not be “fair” but only appear to be. For instance, the house under negotiation could have a larger lot size, a swimming pool, remodeled kitchen and bathrooms, whereas the other houses in the neighborhood may not have these features. Nevertheless, “objective” criteria can be useful in persuading one’s opponent. Other “objective” criteria include precedent, expert opinion, cost-benefit analysis, and professional or industry standards.

In deciding how to persuade an opponent, it is important to understand what information to disclose and what information to avoid disclosing. Even in litigation, this can be done in an ethical manner that complies with the rules of procedure by objecting on various grounds to requests for information or through a variety of other litigation strategies. Also important in the persuasion phase is to decide when it should occur. In the litigation discovery process, information is disclosed over time. If information will eventually be revealed that is damaging, it may be favorable to do the persuasion and bargaining phase prior to that disclosure, when possible. During the persuasion stage, use a detailed argument based upon evidentiary support. Use emotion sparingly. Emphasize the main points first and last. Lead with indisputable facts and build around them. Balance your argument, and address some of the opponent’s strongest arguments.

### C. Bargaining Stage

The third phase of the negotiation process is the bargaining phase. Inexperienced negotiators often rush through the assessment phase to the persuasion and bargaining phase. It is very important to exercise patience, to understand when one’s leverage may be served best by entering the second and third stages of the negotiation process. Of course, the optimal situation would be to bargain when your side has all the information it needs and the opponent does not have all the information that might benefit it. It is important, prior to entering the bargaining phase, to decide on an offer and concession strategy and have a target goal range within which to settle as well as concession points along the way. It is also important to prepare the client thoroughly prior to the bargaining phase. If an attorney is going into mediation with a

client, the client needs to be fully apprised of the strategy, so that he or she does not give away information through gestures, facial expressions or words that diminish leverage.

#### IV. Strategy for Negotiating in Mediation

Mediation – negotiation through an independent third party to facilitate settlement -- is growing in use. Some advocates enter mediation with a casual approach and little preparation. This is not advisable. Mediation can involve all three stages of negotiation but should at least involve the last two. It cannot be done effectively without adequate preparation, prior information gathering, and detailed knowledge and analysis prior to the mediation. The client should be cautioned against non-verbal communication that can undermine the overall strategy.

##### A. Non-Verbal Communication

Research has indicated that 50% of communication is non-verbal. Therefore, when a negotiator enters a mediation room where an opponent is present, it is important to keep in mind that he and his client will send signals through body language. This is why the common practice in mediation of separating parties into caucus rooms is less than optimal because the parties cannot see each other's non-verbal reactions to various offers and cannot work together in a problem-solving mode. As a strategy for dealing with this, it may be beneficial to present your offers face-to-face to the opponent, even if the mediator has placed the parties in separate caucus rooms. You can then "read" the opponent's reaction. The opponent would not have the same opportunity to view your client because the opponent remains in their caucus room and transmits counter offers through the mediator.

During the bargaining phase in adversarial negotiations, parties often are concerned with who goes first. Assuming the parties are knowledgeable regarding the value of the subject under negotiation, research has revealed that there is no correlation between who makes the first offer and the outcome. An exception is if you are uncertain of the general value, then it is best to let your opponent make the first offer.

Another item for consideration is how reasonable an opening offer you should make. There are generally three choices: (a) a fair opening offer, (b) a moderately unreasonable opening offer, and (c) an absolutely unreasonable opening offer. Which type of offer will bring the best result? Studies reveal that for cases

that are settled, the “absolutely unreasonable opening offer” is likely to bring the best result for the offering party. However, there is a caveat. The “absolutely unreasonable opening offer” is also more likely to result in an impasse. If you sense that your opponent is very motivated to resolve the dispute and avoid the alternative to a negotiated settlement, which is often a trial, your client may benefit most by starting with an absolutely unreasonable opening offer. Yet, if an impasse is a significant possibility, a modestly unreasonable offer may be best.

#### B. Problem-Solving Negotiation

There is an alternative to adversarial-type negotiation. Problem solving negotiation focuses on addressing as many of each party’s needs as possible rather than focusing on a zero-sum win-lose type of negotiation. In this method, the parties inventory their needs and wants, classify and compare them, and search for win-win solutions. The problem solvers are less concerned with the negotiation offer or bargaining strategy and are more interested in an expansive attempt to find a negotiated outcome that serves as many of each of the party’s interests as possible. This is often a negotiation strategy that is used when the parties are interested in maintaining a relationship after the negotiation. The potential benefits of this win-win approach are often not appreciated by those trapped in the adversarial mindset.

Negotiation research suggests that the presence of a respected third party increases the impetus to agree. If the mediator is not respected by both parties, the impetus to agree is not necessarily increased by having a mediator. Also, as one would expect, an imminent trial date or similar deadline reduces negotiation tactics and encourages resolution of the dispute.

#### C. Negotiating Terms of the Settlement Agreement

Finally, it should be noted that determining the terms of a settlement agreement might be considered a fourth stage of the negotiation process. Preparation for this stage, which is often a second thought, can turn a mediocre result into an excellent one. Attending mediation with a draft agreement on a laptop is one way to incorporate favorable terms or encourage the adoption of those terms. Payment over time, confidentiality, and obtaining a release for other matters are all possible terms to be incorporated into the agreement.

#### D. Control the Mediation

If you seek to resolve a dispute through mediation, it is important to come prepared to support the persuasion phase of the negotiation with evidence, exhibits, PowerPoint presentations, and other materials that will convince the other side that you are ready to try the case, if necessary. It is important for an effective negotiator to control the agenda, to determine the best method of resolving a dispute, and to influence the choice of that method. A mediator is hired by the parties to facilitate negotiation and is, therefore, working for the parties. Inexperienced negotiators often defer to the mediator as if he or she were deciding the matter. This is tantamount to allowing an “employee” to control the “employer.” The mediator usually has little or no independent power with the exception of reporting to the court whether everyone attended. The remainder of the power that a mediator exercises is conceded by the parties. An effective negotiator should attempt to control the agenda regardless of the mediator’s desires. This can often be accomplished by discussing the structure of the mediation process with the mediator prior to the mediation.

#### V. Conclusions

Most civil cases are resolved through negotiation. Negotiation strategy can provide many insights to help lawyers “win the settlement.” Advocates often foolishly wait for a judge to mandate mediation rather than strategically choosing the best time to negotiate. The effective use of negotiation strategy is crucial in dispute resolution, as is the willingness to invest the time to assess the situation effectively and to develop a negotiation strategy. The effective advocate moves through successive stages in the assessment, persuasion, and bargaining phases only when prepared for the next stage. Persuasion requires detailed strategic disclosure and a balanced argument. Bargaining should be planned with ultimate goals and concession points in mind. Controlling the disclosure of information and the agenda leads to obtaining maximum leverage in the negotiation process and the best results for the client.