



THE ART OF NEGOTIATION

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Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser: in fees, expenses and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good person.

Abraham Lincoln, in "Notes for a Law Lecture," July 1, 1850, from Bruce Bohle, The Home Book of American Quotations, Dodd, Mead, New York, 1967, 226.

I. INTRODUCTION

Negotiation is an art form. Like art, negotiation is part instinct and part training. The most common misconception concerning negotiation is that the goal is to force the opponent into an unfair agreement. However, a truly successful negotiation benefits all of the parties involved. A successfully negotiated settlement should exceed the expectations of all parties. If the needs of all parties involved in the settlement are considered during the negotiating process, a quick and satisfactory outcome is likely.

There are several key ingredients to being a successful negotiator. Those ingredients include:

1. **Preparation:** An effective negotiator must be thoroughly prepared. This includes knowing the facts, the law and having an accurate assessment of the value of the claim. A good negotiator should also consider his opponent's view of the facts, law and value of the claim.

2. **Realistic:** Setting an unachievable goal guarantees failure. Setting a realistic goal provides the chance of exceeding ones expectations.

3. **Creative:** A good negotiator must be creative and able to adapt to changing circumstances. As facts are developed over the course of time, one may be forced to reassess their goal. Likewise, changes in the law can necessitate being able to adapt.

4. **Experience:** A negotiator without experience lacks the confidence to negotiate an effective settlement. An experienced negotiator possesses the confidence to guarantee a favorable outcome.

5. **Honesty:** An ethical and honest negotiator will not only have success in the claim currently being negotiated, but will also gain respect that will enable them to successfully negotiate future claims.

6. **Emotions:** A good negotiator should avoid being emotional. This does not mean a negotiator cannot be tough; however, one should avoid unnecessary displays of anger and disgust.

7. **Perceptive:** An effective negotiator is good at assessing his opponents. Assessing ones opponent includes not only assessing the other party, but also the Judge.

II. STAGES OF NEGOTIATION

A. PREPARATION STAGE

- Assemble information
- Identify strengths of case
- Identify weaknesses of case
- Identify strength and weaknesses of opponent's case
- Assess value of case
- Initiate litigation
- Create impression you are completely committed to your position and reveal no interest in settlement.

B. DISCUSSION STAGE

- Define legal issues
- Define factual issues
- Initiate settlement discussions
- Identify areas of concession
- Make concessions

C. FINAL STAGE

- Make final concessions
- Make final offer

D. AGREEMENT OR BREAKDOWN STAGE

- At this stage the parties either proceed with settlement or proceed with litigation

III. NEGOTIATING STYLES

A. COOPERATIVE:

- Objective
- Fair
- Trustworthy
- Concessions

Advantages: A cooperative negotiating style often results in a prompt and fair resolution for all parties.

Disadvantages: A cooperative negotiating style makes you vulnerable to being exploited. You may make concessions, but not receive any.

B. COMPETITIVE

- Aggressive
- Few concessions, if any
- Outmaneuver opponents

Advantages: If successful, a competitive negotiating style will result in maximizing the settlement for your client.

Disadvantages: A competitive negotiator may achieve a favorable settlement, but may have difficulty in future negotiations. A competitive style may also result in your opponent abandoning negotiations.

IV. NEGOTIATIONING TECHNIQUES

A. **EXTREME:** One negotiating technique is to initiate settlement discussions with an extreme initial offer or demand. This may be useful because it could result with the opponent re-evaluating their assessment of the claim. However, this technique can be dangerous since your opponent may believe settlement is impossible.

B. **BOULWARE TECHIQUE:** This negotiating technique is named for Lemuel Boulware. Mr. Boulware was Vice-President for Labor Relations at General Electric. He believed that the traditional "auction" style of negotiating was a waste of time. He would thoroughly investigate a particular issue and then present his best offer which was a take-it-or-leave-it offer. This technique does avoid incurring unnecessary expenses and the wasting of time, but it obviously has some disadvantages. This technique can result in the opponent walking away from the offer believing a settlement is only fair and reasonable if an auction type negotiating process is followed. This technique is also dangerous because you may end up paying more than your opponent was willing to accept.

C. **CAR SALESMAN APPROCH:** This approach utilizes the techniques used by almost all car salesmen. You lead the opponent to believe that you must go to a higher authority for every penny you offer even though your settlement authority exceeds the initial settlement offer you made.

D. **TIME LIMITS:** Using time limits as a negotiating technique is very useful. This not only guarantees a quick response from your opponent, but also conveys confidence in your position. Time limited offers also protect you from changes in circumstances that may develop. You avoid having to urgently withdraw an offer if there is a sudden change in circumstances that is favorable to you, such as a favorable decision.

V. DEALING WITH OBNOXIOUS OPPONENTS

We are all likely to encounter adversaries in the negotiating process that are irritating, to say the least. The key to dealing with such an opponent is self-control. While you may want to simply abandon negotiations with such an opponent, some initial concessions in the negotiating process may result in your opponent being more receptive and easier to handle. Being patient and confident are the best ways of dealing with such an opponent.

VI. ETHICAL CONCERNS

Whether or not you are a lawyer and bound by the Rules of Professional Conduct, an ethical and honest approach to negotiating is a key ingredient to a successful resolution. Being honest and ethical not only promotes a successful resolution of the current claim, but will assist you in negotiating future settlements.

In addition to the general ethical constraints of negotiating, lawyers are bound by the Rules of Professional Conduct. Attorneys must represent their clients competently in legal negotiation. This obligation is not only set forth in the Rules of Professional Responsibility, but is also controlled by the caselaw addressing legal malpractice. While attorneys are obligated to represent clients zealously, they must do so within the bounds of professional propriety. Model Rule 4.1(a) states that "a lawyer shall not knowingly make a false statement of material fact or law to a third person". Estimates of price or value of a claim and parties intentions as to an acceptable settlement are not ordinarily considered statements of material fact. However, when dealing with a judge or a tribunal such misstatements can be considered a violation of Model Rule 4.1(a). Model Rule 4.4 prohibits conduct that has no substantial purpose other than to embarrass, delay or burden a third person. One must avoid negotiating tactics that may violate Model Rule 4.4. Threats of referrals for criminal prosecution for fraud or similar crimes should be avoided as a negotiating tool. Such threats may constitute extortion.

VII. TACTICS AND TIPS

A. Knowledge is Golden.

- Facts
- Law
- Evidence
- Exposure
- Client/Supervisor
- Opposition

B. **Million Dollar Case.**

Such a case is not as rare as you may think. For example, a 32-year old production worker sustains a workers' compensation injury resulting in a compensation rate of \$644. Claimant receives \$644 x 52 weeks or \$33,488 per year. Over the next 30 years, claimant could receive wage loss benefits only in the amount of \$1,004,640.

C. **Negotiate with Leverage.**

Immediately after a litigation loss is not the time to settle the case. Develop evidence/litigation which could reduce exposure and then negotiate.

D. **Get Authority and Initial Offer.**

Negotiations may progress smoothly and effectively when the negotiator has a set initial offer and determined maximum authority.

E. **Start Low.**

Although this sounds self-evident, it is important because the opposition may view the matter very differently.

F. **Explore Settlement Repeatedly.**

The case often has its ups and downs as the case progresses. These variations in the strength of the case provide opportunities to revisit the possibility of a cost-effective settlement.

G. **Clarify What is Being Negotiated**

Clarify side issues and get the money. For example, claimant may refuse to negotiate medicals and may require payment of litigation costs.

H. **Settle Before Litigation**

A valid claim may be amenable to a cheap, quick resolution

I. **Explore Opposition.**

What is the basis of your calculation?

How firm is your figure?

What is the obstacle to a resolution?

Who is the obstacle to resolution?

J. **Build Consensus.**

K. **Elicit Judge Support.**

L. **Be Specific in Offers.**

M. **Consider Presentation of Argument Along with Reasonable Offers.**

N. **Grab Opportunities.**

O. **Consider Mediation.**

P. **Confirm Deal in Writing.**

Q. **Craft Language.**

R. **Eliminate Last Minute Possible Problems.**

S. **Quick Completion.**

T. **Follow up with the Opposition.**

VIII. CONCLUSION

There is no negotiating style or technique that is preferred. It is a matter of personal preference. In fact, most individuals will find that a combination of techniques and styles may be more effective than relying upon a single style or technique. Furthermore, one should be prepared to employ different styles and techniques depending on the opponent and the situation. However, the key ingredient for any style or technique employed is to be thoroughly prepared.

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