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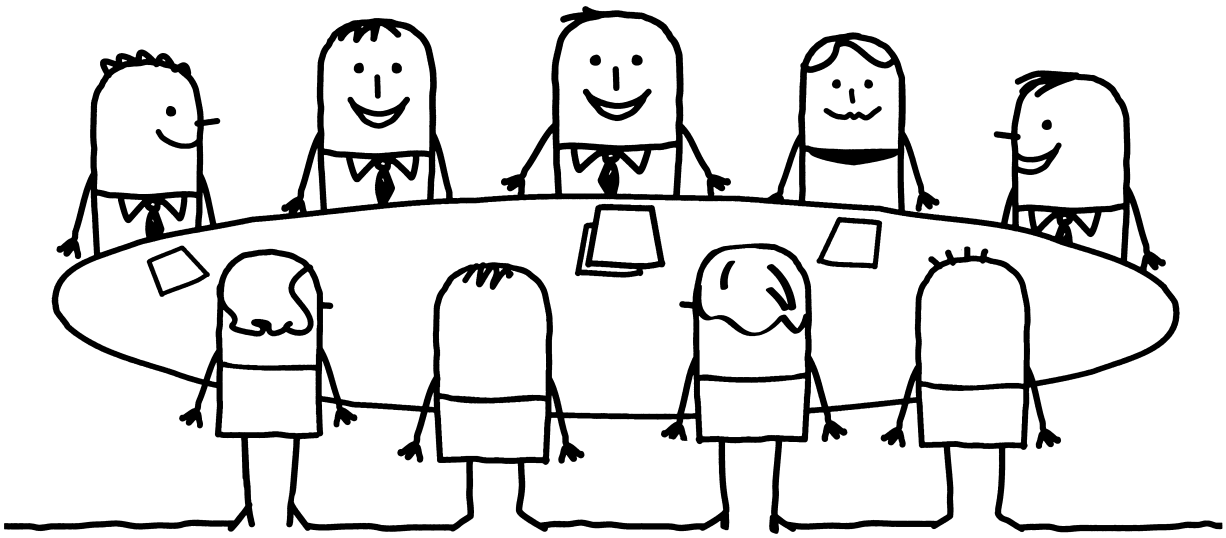

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Negotiating skills: now more important than ever

In this economy, lawyers must learn how to resolve disputes outside of litigation.

BY RUTH D. RAISFELD

In response to the tough economy, businesses have sent a loud and clear message to their in-house and outside counsel: Cut fees, improve efficiency and reduce uncertainty. Similarly, judiciaries facing declining federal and state budgets have led judges to pressure counsel to settle cases earlier, before extensive discovery or motion practice. Indeed, the combination of these trends continues to lead to a decline in the number of traditional trials, a phenomenon characterized as "the vanishing trial." 30 ABA Litigation 2 (Winter 2004).

In light of these trends, attorneys seeking to sustain their practice, build lasting client relationships and contribute to improving judicial economy must hone their negotiation skills, which are critical to resolving legal disputes whether in advance of litigation,

during settlement conferences or mediations, or in direct negotiations. Negotiated results will deliver the cost savings and certainty that clients and courts crave during difficult economic times.

Most attorneys have no formal training in negotiating, a subject that only recently became an integral part of law school and continuing legal education curricula. Yet sophisticated negotiators are aware of their negotiating style and where they fall along a spectrum from adversarial/competitive to collaborative/cooperative. Many attorneys litigate first, talk later. Accustomed to adversarial, competitive bargaining made popular in the mass media, clients have come to expect scorched-earth litigation and bargaining tactics, yet are unrealistic about the expense of such strategies. In contrast, other lawyers encourage their clients to allow them to adopt problem-solving strategies in an attempt to resolve disputes before or without litigation. In the face of competitive negotiators, these collaborative lawyers risk appearing soft and easily dominated.

Usually, a combination of negotiating styles is most effective in representing a client's interests. Whatever style the attorney may use in negotiations, he or she should identify it, study the strengths and weaknesses of the approach, analyze what has worked and what hasn't, and make a commitment to being a

more focused and problem-solving negotiator. What's important is that the style meet the clients' needs in this economic environment.

A STRATEGY FOR NEGOTIATION

Good negotiators are prepared and fully informed, and they have planned a negotiating strategy. Regardless of whether negotiating opportunities will arise on the courthouse steps or in conferences before a judge, magistrate judge or mediator, attorneys should never "wing it." Preparation is power: In addition to the baseline of gathering facts, researching the law, adhering to ethical guidelines and exercising professional judgment, attorneys entering negotiations should not proceed instinctively, relying only on their "gut." Preparing in advance of any negotiation significantly improves one's negotiating position. The following are just some of the issues attorneys should consider in planning negotiations on behalf of their clients.

• *Consider client relations.* At the beginning of an attorney-client relationship, the attorney should discuss settlement options with the client before commencing an expensive litigation. Some attorneys advise their clients that they make it a practice of approaching the other side to initiate settlement discussions before starting any litigation; this approach may defuse the tendency to see later settlement discussions as a sign of weakness. If settlement options are discussed in the initial stages of an attorney-client relationship, the client will be less likely to blame counsel for the costs and delays associated with litigation. Furthermore, the attorney will assist the client in developing reasonable expectations, thereby enabling the client to make better-informed decisions about potential outcomes to prepare for later settlement discussions.

• *Consider timing.* Attorneys should be prepared to address settlement at any stage of potential, pending or ongoing litigation. Coming to court unprepared, or without a file, or without having obtained settlement authority, will only breed distrust on the part of an adversary or tribunal. Lack of preparedness also may weaken a client's bargaining position in the short and long run.

• *Strategize for negotiations by identifying leverage.* Some attorneys focus exclusively on law, precedent and predictions of judicial responses to legal arguments. However, sometimes the leverage in a negotiation is not found in case law but in business conditions, changing personal circumstances or other nonlegal considerations. Identifying leverage involves gathering information about and assessing potential economic damages, noneconomic repercussions, costs of litigating, probability of success, availability of appeal, existence of insurance and ability to enforce a judgment. With this information, a settlement range can be estimated; opening and interim moves can be sketched out. Noneconomic possibilities can also be explored in an attempt to expand the pie.

Before formulating initial and interim offers, the attorney and client must consider the adversary's perspective by assessing the strengths and weakness of the adversary's legal and financial position, underlying goals, break points and potential negotiating strategies. By using a decision-tree analysis with clients, the attorney can help to define goals, improve decision-making and reveal emotional triggers that can interfere with success in negotiations.

• *Assemble objective and independent criteria that will both support the client's position in negotiations and provide a reality check.* Clients and counsel are prone to view their cases through rose-colored glasses and may overestimate the strengths of their case, minimize the weaknesses and overestimate the damages that may be recoverable. Similarly, they may underestimate the costs, both actual and opportunity, of litigating. Gathering materials that support or contradict the client's position may help to reveal the advantages of a settlement proposal and the disadvantages of not settling.

HOW AND WHERE

• *Consider the mode of conducting negotiations.* In some cases, it may be appropriate for attorneys to speak directly without clients present; in other circumstances, it may be effective to schedule a meeting with both clients and attorneys present. Should settlement proposals be passed in writing through letters or e-mails, or passed over the telephone? If the discussions are going to be in person, will it be at someone's office, over a meal or at the courthouse? With the increasing reliance on e-mails to conduct negotiations, counsel should consider the nuances of communicating telephonically, in person or via the Internet in order to avoid unintended consequences. Sometimes, merely changing the mode of communication helps to liberate parties from their initial positions and can set negotiations on a better course. Similarly, changing the participants in a negotiating process may improve the lines of communication and present new opportunities for settlement.

• *Prepare for the unexpected.* The adversary may lack the authority originally described; a new attorney may be assigned to the case; a judge may be replaced by a different judge with a different frame of reference. Negotiation strategies should be adjusted to address new contingencies. Similarly, impasse in negotiations due to the passage of time, failure to make a counteroffer or a posture of refusal to "negotiate against myself" are all eventualities that should be expected and should not derail negotiations if a negotiated resolution is preferable to litigation. Litigating just to make the other side "reasonable" may end up costing the client more than persistence in negotiations even after a stalemate.

• *If the negotiations process yields agreement on major terms, don't drop the ball during the drafting process.* Experienced attorneys have settled cases before and should have a file of settlement agreements that can provide a basic template for settling a matter. Attorneys interested in closing a deal should offer to write the first draft so as not to allow delay, poor draftsmanship or second thoughts to preclude wrapping up a deal. Furthermore, attorneys should attempt to put some time limits around exchange of comments and revisions to keep negotiations on track.

Finally, attorneys should consider the full range of alternative dispute resolution procedures if they determine that direct negotiations would not be optimum in a given situation. Most sophisticated litigators know of, and are frequent users of, mediators, third-party expert evaluators and other neutrals who can facilitate negotiations or render opinions that can move parties to a resolution. Further, parties can agree to arbitration or private judging with expedited rules to avoid lengthy arbitrations or delays in judicial dockets.

Difficult economic times are causing dramatic changes in the way attorneys and clients handle legal disputes; negotiated resolution must be viewed as a first step and not a last resort at the end of an expensive, uncertain and frustrating litigation process.

Ruth D. Raisfeld is a mediator and arbitrator, a member of the American Arbitration Association and CPR neutral panels, a Special Master in the Pre-Argument Section of the New York Appellate Division, First Department, and Fellow of The College of Labor and Employment Lawyers. She can be reached at (914) 722-6006 or rdradr@optonline.net.