New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
WWW.NYLJ.COM

An incisivemedia publication
VOLUME 242—NO. 6
THURSDAY, JULY 9, 2009

Outside Counsel

Expert Analysis

Settling Cases: Practical Steps To Becoming a Better Negotiator

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Today's difficult economic environment impacts on the ability to settle cases: individual and corporate clients lack cash; courts are overburdened; litigation is unpredictable; enforceability of judgments is uncertain. In this environment, the role of attorneys in negotiating to prevent or resolve disputes may be as important as the role of litigator. But few attorneys are trained as negotiators, a subject that has only recently been added to law school curricula and continuing legal education programs. Indeed, with the pressure to settle cases, the growing use of mediation, and the desire to avoid trials, all lawyers should seek to enhance their negotiating skills. There are a few practical steps that attorneys can take to become better negotiators and thereby better serve the interests of their clients.

Self-Evaluation

The first step to becoming a better negotiator requires the lawyer to analyze his or her negotiating style. Self-examination is important to gain awareness of how the attorney has negotiated in the past and will enable the attorney to evaluate how to approach negotiations in the future.

Empirical evidence suggests that competitive negotiators may achieve better results, but are also more likely to miss opportunities to reach agreement. On the other extreme, cooperative negotiators are more likely to reach agreement, but may not maximize the potential gains that are possible before reaching an agreement.

Most attorneys are accustomed to adversarial, competitive bargaining, a style that clients have come to expect because of popular media depicting lawyers engaged in scorched earth litigation and bargaining tactics. Yet, leaders of today's bar, like former Chief Judge Judith S. Kaye and many law school deans, have called for lawyers to increase efforts to use "problem-solving" strategies rather than "I win, you lose" tactics.

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Thus, in self-evaluating where attorneys fall on the continuum of negotiating styles, attorneys should assess their approach to such routine dialogues with adversaries as seeking an adjournment, scheduling depositions, and exchanging settlement proposals. Attorneys will recognize that they may have several negotiating styles depending on the circumstances and will use one or more of them at different times and for different reasons. 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 be a more focused and problem-solving negotiator.

Preparation

The next step in becoming a better negotiator is to learn that it is absolutely essential to prepare; regardless of whether an attorney is in a settlement conference, on the courthouse steps, or in discussions before a judge, magistrate or mediator, the attorney should never "wing it." 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 his or her "gut." Preparing in advance of any negotiation significantly improves one's negotiating position.

Martin Latz of the Latz Negotiation Institute, an organization that trains lawyers to negotiate, has stated that the single-biggest mistake made by most individuals when negotiating is negotiating instinctively, not strategically. Thus, the time spent in preparing to negotiate is as important as the time spent in negotiations. The following are just some of the issues attorneys should consider in planning to negotiate.

First, consider client relations. At the beginning of an attorney-client relationship, the attorney should address the question of settlement with the client before embarking on an expensive litigation. Some attorneys advise their clients that they make it a practice of approaching the other side with the option of 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 disappointed and frustrated when settlement discussions do occur at later stages of the litigation. Further, the client may be enabled to develop reasonable expectations and make better informed decisions about potential outcomes.

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Second, consider timing. There are variety of opportunities for settlement during the life of a lawsuit: before commencement, prior to or at an initial scheduling conference, during discovery, before dispositive motions, after dispositive motions, prior to undertaking extensive pretrial preparation, at the eve of trial, during the trial, after the trial, during appeals. In the court system, there are initial case management conferences, pre-argument conferences, mediation panels, and referees who can help with settlement discussions. Attorneys should be prepared to address settlement at any of these junctures. Coming to court unprepared, or without a file, or without having communicated with a client that a settlement opportunity may present itself at a court appearance will only breed distrust on the part of an adversary or tribunal. Lack of preparedness may also weaken a client's bargaining position in the short and long run.

Third, plan a strategy for negotiations. This involves gathering as much information about the potential damages, 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. Similarly, before formulating initial and interim offers, the attorney and client must assess the strengths and weakness of the adversary's legal and financial position, underlying goals, break points, and possible negotiation strategies. Actually using a decision-tree analysis with clients will help to define goals, improve decision-making, and reveal emotional triggers that can interfere with success in negotiations.

Fourth, assemble objective and independent criteria that will both support the client's position in negotiations and also provide a reality check. Clients and counsel are prone to view their cases through rose-colored glasses and may over-estimate the possibility of success and the amount of damages that may be recoverable. Similarly, they may underestimate the costs, both actual and opportunity, of litigating. Gathering materials that will support and explain the client's position and needs will reveal the advantages of a settlement proposal and the disadvantages of not settling.

Fifth, 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, e-mails or 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.

Sixth, attorneys must prepare for the unexpected. The adversary may not have 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 approach. Negotiations strategies may have to be adjusted to address new contingencies. Similarly, impasse in negotiations due to passage of time, failure to make a counter-offer, 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. Good negotiators are persistent and not deterred by bumps in the road.

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Finally, assuming that the negotiations process yields agreement on major terms, a good negotiator will not 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 do the first draft so as not to allow delay, poor draftsmanship, or second thoughts to preclude wrapping up a deal. Further, attorneys should attempt to put some time parameters around exchange of comments and revisions to keep negotiations on track.

In sum, regardless of an attorney's negotiating style, or that of the adversary, there just is no substitute for preparation before entering into a negotiation. The attorney who prepares in advance will feel more confident, be more knowledgeable, and will be more able to shape negotiating circumstances to his or her advantage.

Practice

While it may seem onerous and artificial to go through the self-analysis and preparation phase prior to every negotiation, choosing to be disciplined about this process will improve an attorney's ability to negotiate. Taking the time to write out goals, sketch out an agreement, and attempt to anticipate the best (and worst) case scenarios, really will result in increased confidence and poise in entering negotiations. In addition, practice will also enable the negotiator to recognize and monitor the emotional responses that are always triggered during negotiations.

Patience

Negotiating is like riding a bike: there is no reason to assume that an attorney cannot improve his or her negotiating skills. Analyze strengths and weaknesses, prepare, practice and review negotiating performance, and the attorney will become a more effective and successful negotiator and thereby achieve better results for clients and the legal community.