

HOW TO NEGOTIATE THE BEST SETTLEMENT

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I. INTRODUCTION

In the civil justice system today, most claims and lawsuits are resolved through negotiation long before a jury is ever seated.¹ Despite the fact that a negotiated settlement is by far the most common resolution, most lawyers spend many more hours refining their advocacy and trial skills than they do refining their negotiation skills. This paper is an attempt to address that shortcoming.² While the techniques and principles set out are discussed in the context of negotiating a legal dispute, most of them are applicable to any type of negotiation. However, there are several important differences between negotiating a typical business deal or commercial transaction and the negotiation of a legal dispute. Most business and commercial negotiations are completely voluntary affairs where both sides can conceivably win if a deal is struck. In a business deal both sides can also usually walk away from the negotiation without incurring any significant risk if the proposed terms are not acceptable. This option is usually not available when the negotiation involves a legal dispute. The civil justice system itself is a compulsory and adversarial process. The parties are usually forced together by a far more arbitrary process that

¹Approximately 97% of all civil cases are settled or dismissed without a trial. Phoenix Business Journal, Sunday May 30, 2004. bizjournals.com/phoenix/stories/2004/05/31/newscolumn5.html

²In preparing to write this paper, I read numerous books on negotiation and human psychology. The most informative included: *INFLUENCE The Psychology of Persuasion* by Robert B. Cialdini, PHD; *Thinking Fast and Slow* by Daniel Kahneman; and, *Secrets of Power Negotiating*, by Roger Dawson.

has more in common with a shotgun wedding than a traditional courtship and marriage proposal. Because of the compulsory adversarial nature of a legal dispute, the good will and feeling of prospective mutual advantage that is present in a typical business negotiation is often completely absent. Consequently, the negotiations in a legal dispute tend to be far more acrimonious, abrasive, and combative. Navigating this difficult environment is the key to being an effective negotiator.

II. IT'S ABOUT THE MONEY

The parties to a legal dispute initially seek legal counsel for a variety of different reasons. On the plaintiff's side, the initial reason for contacting a lawyer is often to get advice or help with respect to a perceived harm or wrong. While money is usually an underlying issue, there are many situations where money is not the driving motivation, at least initially. Whether an individual or a business, the potential plaintiff may believe that a promise or commitment has been broken; they may feel that they have been misled or mistreated; they have unanswered questions; or they may want accountability or some other acknowledgement of wrongdoing. But regardless of what the initial motivation or driving emotion is, the ultimate remedy that our civil justice system provides is the compulsory payment of monetary compensation where appropriate. So while it is important to understand the underlying motivations on both sides of the table, at the end of the day the final decision to be made in order to achieve a settlement almost always involves the question of how much money the defendant will pay and how much money the plaintiff will accept.

On the other side of the table, once the potential plaintiff retains a lawyer, the defendant usually has little choice but to also retain counsel. Once counsel is retained, defendants have

many different reasons for initially taking a hard line and denying all responsibility or refusing to pay anything. The defendant may either believe or have rationalized that his own actions were justified, or that someone else is to blame; the defendant may not be able to pay; or, the defendant may not want to do anything that might encourage similar claims or make the defendant look weak. But at the end of the day, the defendant's decision is similar to the one faced by the plaintiff. At the end of the day the defendant must also make a decision about money -- a largely business decision that involves deciding how much money, if any, should be paid to avoid further expense and/or the risk of an adverse judgment.

III. KEEPING YOUR PERSPECTIVE

One of the primary benefits of a negotiated settlement is that it avoids the uncertainty that comes with a trial and/or an appeal. In order to obtain the best settlement possible, you must first accurately and objectively assess the risks of not settling. The best way to accurately assess these risks is to have complete command of all the available facts. However, even then being objective can be difficult. Because of the adversarial nature of the litigation process, interpretations can vary widely (even when looking at the very same facts), based on nothing more than the side of the table you are sitting. One side may see gross negligence and reckless disregard where the other side sees no wrongdoing at all.

A lawyer's perspective can also be clouded by a "attitude polarization." Attitude polarization is a self reinforcing phenomenon that occurs when people on the same side of an issue repeat and validate each other's statements. This is also frequently referred to as "group-think." It is commonly observed with emotionally charged issues and in emotionally charged settings. Unrecognized this self-reinforcing activity can lead to a false sense of confidence. The

simple act of taking sides in a dispute further has the potential to degrade our objectivity and make us more partisan. Identifying with a particular group frequently causes people to excuse, gloss over, or justify the imprudent or even bad acts committed by members of the group that they would immediately condemn if done by the other side or a competing group.

Our objectivity can also be adversely impacted by our client's expectation that we agree with his rationalization or assessment of the facts, or an expectation that the lawyer express a high level of confidence in the case, or express an equal disdain and mistrust for the other side. For any number of extraneous reasons you as the lawyer may have a heightened need or desire to achieve a certain result which can impact the way we process what we see and hear about the case. These more subtle pressures can cause the lawyer to miss otherwise obvious warning signs.

A similar bias can also occur when a lawyer primarily represents only plaintiffs or defendants. If you primarily represent defendants, there can be a tendency to generalize from past experience that all plaintiffs are lying or exaggerating something or that all they want is money that they don't deserve. Likewise, if you represent plaintiffs only, you can be predisposed believe that all defendants are lying or hiding something. This can carry over to the way you evaluate the witnesses that the other side identifies. However, to my knowledge there is no study showing any difference between plaintiffs and defendants (or their witnesses) when it comes to truthfulness or accepting responsibility for their own actions. For any number of reasons both plaintiffs and the defendants are also equally capable of consciously or subconsciously telling their lawyer what they think or perceive that you (or if a witness then what the boss, friend or family member) want to hear. Unfortunately, in litigation there is plenty of motivation for both sides to engage in selective recall (or worse), or to create a narrative that

leaves out or minimizes important facts. So whether you are hearing the facts from the defendant or the plaintiff, it is always prudent to assume that the facts are being slanted in a favorable way, or that less helpful facts may be consciously or unconsciously glossed over or left out altogether. All of these situations can adversely impact the way you look at the case, or cause you to look at a case far differently than would a typical juror. While jurors obviously see things through the prism of their own experience, they may or may not share the same preconceived notions. Therefore, whether the facts are being recounted at an initial meeting, while giving sworn testimony, or while at a mediation, always keep an open mind with respect to both what is being said, and to what is not being said.

When evaluating witness testimony (as opposed to the testimony of a party), it is also important to keep in mind that not everyone who provides testimony that is harmful to your case has an agenda or is lying or owes some debt or allegiance to the other side. The most prudent course when it comes to evaluating fact witnesses is to maintain a reasonable degree of skepticism while being open to the possibility that the witness is being completely truthful. This is usually the best way to evaluate credibility and avoid unpleasant surprises. More importantly, a favorable settlement will often happen only in those cases where you have taken the time to actually see and understand all of the strengths and weakness on both sides of the table which cannot be done unless you undertake an objective evaluation of all expected trial testimony.

IV. THE INITIAL OFFER AND DEMAND

In settlement negotiations, the plaintiff usually makes the initial demand. Because the plaintiff usually goes first (and can essentially pick a number out of thin air), it is important to understand that your initial “demand” will be less effective at moving the case toward settlement

if the other side does not perceive that it is actually an outcome you have a realistic chance of obtaining at trial. The best starting point is usually a number that represents the high end of the potential judgment range. There is little reason to start at a significantly higher number as few defendants are interested in settling a case at the high end of the potential judgment range.

Another problem occurs when the plaintiff incorrectly evaluates the risks to the other side and makes an excessively high demand. When this occurs the opportunity to settle can be delayed or missed altogether. Similarly, if defense counsel fails to properly evaluate the risks to the defendant, and makes an excessively low offer, the result can be an early impasse that leaves the plaintiff with little downside to rolling the dice at trial.

Avoiding the cost and risk that results from incorrectly valuing a case is best accomplished by preparing a detailed case evaluation. Cutting corners early on almost always costs the client more money and time in the long run. Unfortunately, it is not unheard of for plaintiff lawyers to perform only the most cursory investigation prior to filing suit. Likewise, defense lawyers have been known to bill on the front end for far more preparation and legal analysis than has actually been performed. The result is seen in those situations where the facts seemed to turn dramatically against one side or the other sometime between the filing of the lawsuit and the trial. While this is often unavoidable even with thorough preparation, other times the “unexpected” turn of events could have been foreseen or even avoided altogether with adequate preparation. In almost all situations a thorough and detailed initial case evaluation is the best way to avoid the unexpected and maximize the chances that your client will achieve an early and favorable resolution.

V. THE ROLE OF LEVERAGE

“Give me a place to stand and a lever long enough and you can move the world.”
Archimedes.

“It is not from the benevolence of the butcher, the brewer, or the baker that we expect our dinner, but from their regard to their own interests.” Adam Smith

“If there is any one secret of success, it lies in the ability to get the other person’s point of view and see things from that person’s angle as well as from your own.” Henry Ford

“We talk on principle, but we act on interest.” Walter Savage Landor

“You can get much further with a kind word and a gun than you can with a kind word alone.” Al Capone

Each of these quotes illustrates some aspect of the concept of “leverage.” There is no way to overstate the role “leverage” plays in achieving favorable settlements. Leverage is defined as: *“positional advantage; the power to act effectively; strategic advantage”*. Stated more simply, your leverage is whatever power you have to compel the other side to do what you want. In the context of settlement negotiations, leverage is more about situational advantage than objective strength or power. One party may have very little actual power but still have significant settlement leverage. For example, a single individual or small business may have few resources relative to a large corporation but still have situational advantage by virtue of being able to compel the larger corporation to appear and answer in a favorable venue. Likewise even when there is a legitimate claim which could result in a significant loss to the defendant, if the plaintiff does not have the resources or the fortitude to stay the course, then the defendant has the situational advantage by virtue of being able to delay and wait the plaintiff out.

Leverage can be real or imagined. Your actual leverage at any point in time is based only on the other side's perception of your leverage (which can obviously differ significantly from the actual facts). There are situations where you have an information advantage, such as when you know about a weakness in your case that is not yet known by the other side. In such a situation you will, perhaps only briefly, appear to have more leverage than you actually do. Likewise, you can be at an information disadvantage such as when you mistakenly think that the other side has a stronger case than they actually do. There are also situations where you mistakenly think that your case is stronger than it actually is which occurs when for one reason or another you don't have all the facts, or when the facts have not been accurately relayed to you. But regardless of your actual leverage, if there is no fear on the other side, you have little if any effective leverage.

How do you accurately evaluate your leverage at any given moment in time? First you must understand that your effective leverage is relative to what leverage the other side has. As a practical matter you may think you have a big hammer, but if the other side has a gun then your effective leverage may be zero. One of the simplest ways to evaluate your effective leverage is to objectively ask yourself which side has the most at risk if the current offer or demand is not accepted. You can also simply ask yourself which side you would rather have if no settlement is reached. Or said another way, if you could would you switch sides with your opposing lawyer? Why or why not? Thinking about "why" you would or would not switch sides can help you figure out just how much leverage you actually have. As a general rule the party with the most to lose at any given point in time has the least leverage and *vice versa*.

In looking at the relative leverage between the parties, it is also important to remember that generally people are more concerned with avoiding losses than they are motivated by the

chance at securing additional gains. Said differently, potential losses tend to loom larger in the human mind than do their equivalent gains. This means that when the plaintiff has not been offered any money to settle the case, he or she usually has nothing to lose. But when there is a meaningful time sensitive offer on the table (i.e., one that puts real money in the plaintiff's pocket) that is paired with a credible threat of a loss at trial, then the plaintiff mentally is under a great deal of pressure to take the offer rather than let it lapse. The fear of getting nothing will often pressure the plaintiff to settle even if the existing offer is lower than what it objectively should be. This same psychology can likewise work to a lesser extent against the defendant. This occurs when the plaintiff's demand is at the low end of the probable verdict range.

Unfortunately, too often the relative leverage is not fully understood or appreciated until there is an approaching trial date for a number of reasons. Nothing is better at getting rid of the other side's rose colored glasses come than an approaching trial. From the perspective of the Plaintiff, in the absence of a trial date the defense often has little incentive to spend the money necessary to settle the case. This is particularly true when there is sufficient insurance coverage and/or the potential loss is not significant to the defendant. In many situations the defendant or the insurance company has little incentive to hand over the money that is earning a better return elsewhere. In fact, in the absence of a trial date the defendant and/or the insurer may have no incentive to settle for any more than an amount that is on the low end of the probable verdict range. Depending on the cost of the money, or the time value of money, there are even situations where it is actually more economical for the defense to delay rather than settle. As the plaintiff you want to change that analysis and improve your leverage with an approaching trial date. The closer the trial the more the defense costs go up and the more credible the risk of an unfavorable judgment. When the defendant thinks the plaintiff's case is strong, nothing is better at imparting

a sense of urgency than an approaching trial date. Likewise, when the defendant is ready to go, the plaintiff's desire to avoid a total loss (and more expense) will often make the plaintiff appear much more reasonable.

The actual effect of an approaching trial date on the opposing side may be difficult to discern. Despite all appearances to the contrary, one side and/or the other may not want to go to trial. Most trial lawyers have had situations where they lacked confidence in their case, or had concerns about certain witness, or even were not actually ready for trial, or had some other personal reason for not wanting to go to trial. Obviously, if you can identify an unwillingness or inability to go to trial by the other side, you will gain significant leverage that you can use to achieve the most favorable settlement.

When you have enough of it, leverage is the power to compel a resolution for your client on the most favorable of terms. But always remember that your leverage can be short lived. The facts (or one side or the other's perception of the facts) can and do change quickly. Cases can turn on a dime and your effective leverage can actually disappear altogether with the answer to a single question, or with the discovery of a single document. So at every stage of the litigation you should constantly be asking yourself these questions: *"What is my leverage? What leverage does the other side have? Is now the best time to try and settle the case? If not, then what can I do to increase my leverage?"*

VI. THE "GOLDEN MOMENT"

Most lawyers agree with the proposition that most cases have an appropriate settlement value. However, the difficulty is in getting to the point where the two sides to agree, at the same time, on what that value is. Sometimes the lawyers figure out the appropriate value early on,

sometimes they never do, and other times they don't figure it out until after wasting a significant amount of time and money. But regardless, when looking at your cases with the benefit of hindsight, in almost every one there was probably a "golden moment" where you had the maximum leverage and ability to settle the case on the most favorable terms. The question is did you see it and take advantage of it or miss it altogether.

In the absence of mystical powers, there is only one way to consistently increase your chances of identifying the "golden moment" before it is gone. Like most things in life, the best way to recognize the "golden moment" is by doing the hard work to prepare your case and make sure you have a clear understanding of your client's goals and objectives. This not only increases the chances of a favorable settlement, but it also helps to avoid the expense and waste of time that comes from charging full steam ahead without all of the facts.

VII. MANAGING EXPECTATIONS

When reading books and articles on the subject of negotiation, a commonly repeated refrain is that people who expect more generally get more. Negotiators who consistently get the best results usually do so by first setting high expectations. When establishing expectations, it is important to distinguish between setting high expectations and simply bluffing. A bluff is essentially a form of deception. The definition of a "bluff" is to try to impress, deter, or intimidate your opponent with a false display of confidence. In poker, the objective of a bluff is to induce the other side to fold a better hand. In litigation, a bluff is when the lawyer and client take a position that they have no real expectation of achieving if the case were to go to trial. The hope or gamble is that the other side settles instead of forcing you to trial. While there are situations where bluffing has quickly yielded a favorable settlement, what works best in most

situations is to stake out a high but fully credible settlement position. For this to be effective, you and your client must both be willing to prepare the case for trial, and both of you must have confidence in the prospects of achieving that result at trial.

Once you have a good understanding of the facts, the most effective way to objectively validate your settlement position is to solicit the input of non-lawyers. While it is often easier to discuss cases with your professional peers, you should look for opportunities to objectively present the facts to those outside the profession who are more likely to think like your potential jury pool. From these interactions you will often get questions and reactions that you had not considered. While many cases don't warrant the expense of a focus group or mock trial, taking the time to solicit non-lawyer feedback early on will help identify pros and cons that you may never have recognized on your own. Obviously, in the right case you should also consider more formal methods for obtaining outside feedback including focus groups and mock trials. A primary benefit of obtaining independent feedback early and often is to help avoid a phenomenon known as confirmation bias. Confirmation bias is the natural tendency we have to subconsciously search for confirming evidence and give more weight to information that confirms our own positions and initial beliefs. In order to be effective as a lawyer, it is critically important to be on guard for the tendency to selectively gather and interpret information in a way that confirms our initial beliefs about our clients and their cases.

In setting settlement expectations, the goal is to set them high enough to present a real challenge while being realistic enough to keep the other side fully engaged in the settlement process. Ultimately to be effective, both the client and lawyer must be on the same page when it comes to expectations. When there is consensus, the lawyer is almost always a more persuasive advocate and the negotiation process is significantly less stressful than it would otherwise be. In

order to get on the same page, the lawyer must take the time to meet with the client to outline the strengths and weaknesses of the case and answer all questions. Only after that has been done will the client be in a position to commit to a specific and justifiable goal. Ultimately the more confidence you and your client have in the evaluation, the more likely you are to achieve results that are much closer to your expectations.

VIII. THE PLAINTIFF'S DEMAND PACKAGE

When representing the plaintiff, once you have done your initial case evaluation, the next step is to either file suit or send a settlement package. The settlement package is often the first impression that the decision makers will have when it comes to the seriousness and validity of the claims the plaintiff will be making. As the saying goes, “you never get a second chance to make a first impression.” So in all but the most straightforward or minor of cases, the lawyer should do everything possible to make the most of this initial impression. When the case involves potentially significant damages that will require a substantial settlement, the insurance company can almost always be expected to perform a substantial amount of due diligence before being willing to make a significant offer. The best way to speed up this process is with a well documented settlement package. The sooner you provide the insurer with all of the necessary information, and a credible demand, the faster you will get to your ultimate goal. As the lawyer for the plaintiff, always remember that time is money, and you will rarely recover the money that is due the client faster by waiting to provide the necessary information. So as soon as possible, the lawyer should send the other side a well documented settlement package which should include all of the following documents where applicable:

- (1) Copies of medical bills;
- (2) Copies of medical records;

- (3) Wage loss documentation;
- (4) Estimate of future medical bills;
- (5) Life care plan;
- (6) Graphics, photos and/or video showing injuries and harms;
- (7) Heirship determination;
- (8) Guardianship/conservatorship;
- (9) Lien reimbursement/waiver letters;
- (10) Comparable settlements and verdicts in similar cases;
- (11) Venue demographic and verdict research;
- (12) Treating physician statements or letters;
- (13) Liability and damage expert reports;

IX. ESTABLISHING A RAPPORT WITH THE OTHER SIDE

Regardless of which side you represent, one of the objectives should be to try and establish a good rapport with the other side. People are more inclined make concessions to people they like, respect, and relate to rather than people they dislike or distrust. From a psychological standpoint, most of us are more likely to say “yes” to someone we know and like than to someone who is trying to bully, badger, or intimidate us. So rather than yelling at or threatening the other side, the most effective negotiators generally let their case and preparation, rather than their words, do the intimidating for them.

First impressions matter. Therefore, what is said at the start of any negotiation process often sets the tone for the entire negotiation. The opposing side will quickly form an opinion as to whether you and your client are working for a mutually beneficial solution, or looking to win at all costs. As a result, give careful thought to the substance and tone of your initial conversations. If the other side takes a position that you strongly disagree with, don’t abruptly disagree or respond with an attack of your own. Attacking the other side’s positions often intensifies the desire to prove you wrong which is obviously counterproductive to a negotiated settlement. Therefore in the early stages of the negotiation, try to avoid confrontation.

Effective negotiators also often exhibit the ability to see the world from the other party's point of view. To achieve your goals, you must find out or anticipate the reasons why the other party may not agree to what you want. Only when you figure out why they will not agree can you effectively address the reasons for disagreement. Moreover, you can most effectively address the points of contention when you are on friendly, or at least civil, terms with the other side

X. ACHIEVING YOUR GOAL

Your initial offer or demand should reflect a position that you can state and support with a straight face. Your opening position should be something that you can credibly argue would be a reasonably probable outcome at trial. Somewhere below or above your opening position (obviously depending on which side you are on) is your goal. Your goal should be the settlement number that you realistically hope to achieve. Somewhere below or above your goal is your actual bottom line. Your bottom line should be your take it or go to trial number.

Once the lawyer and client agree on both the goal and the bottom line, the lawyer should proceed with the negotiations as if the goal is actually the bottom line. This helps avoid the natural tendency in negotiation to telegraph your bottom line. In order to have a realistic shot at achieving your goal, the other side must ultimately come to believe that it is actually your bottom line. When the negotiations are taking place in the context of mediation, never let the mediator know that the goal you are telegraphing is not your bottom line. The mediator must also believe that your goal is actually your bottom line in order to convincingly convey that to the other side.

Leading up to any mediation you should strive to give the other side a realistic sense as to what is possible and what your client hopes to achieve. Nothing is worse than starting a mediation with high hopes only to find out many hours later that the respective positions are so far apart that there is no realistic hope of bridging the gap. The best way to avoid such a result is to try and get the other side to candidly discuss their evaluation. As the plaintiff's lawyer, you would ideally prefer to know in advance if the defendant is coming to mediation with something significantly more than nuisance value authority. Likewise, as the defense lawyer you would like to know that the plaintiff is going to be reasonable. While actual settlement authority is rarely candidly discussed, that should not stop you from aggressively pushing the other side for their settlement value and verdict ranges. There is little downside to going so far as to push for a commitment from the other side with respect to a minimum or maximum settlement number if that is what it takes to get some meaningful insight into what the other side is willing to do. The other side's response to such a request may provide you with useful insights that you would not otherwise have had while sending a clear message as to where you think the case should be resolved.

When representing the plaintiff, it is advisable to at least attempt to get an agreement up front that the defense will pay the costs of mediation even if the case does not settle. The willingness of a defendant to agree to this on the front end is often a good indication of the defendant's commitment to settle the case during mediation. Likewise, the lawyer for the defendant should almost always expect the plaintiff to pay their respective share of the mediation to ensure that they are equally serious.

When it comes to responding to the initial moves by the other side, generally speaking you should try to stay close to your opening position as long as possible to allow you to ascertain as much information as possible about what the other side is willing to do to avoid the risks and expenses associated with further litigation.

XI. PRE-LAWSUIT NEGOTIATIONS

When it comes to negotiating with adjusters, it is important to remember that both the plaintiff and his lawyer usually have much more at stake than does the adjuster. For the most part, adjusters get paid the same whether the case settles or not. Yet plaintiffs and their lawyers (and even defense lawyers who take the occasional plaintiff's case) are often unnecessarily confrontational during pre-litigation negotiations. While it should be self evident, adjusters are no different than anyone else when it comes to how they respond to people they like versus people they dislike. The chances of actually persuading them to change their position or increase and offer are much higher when the tone remains at least respectful. You are also more likely to reach common ground if you also convey the impression that you have fully considered both sides in making your arguments.

As the lawyer for the plaintiff, you should also remember that filing suit is not a declaration of war. Most adjusters and in-house claim professionals do not fear a routine lawsuit. So there is no reason for the client or the lawyer to act as if the filing of your lawsuit is a catastrophic event for the adjuster or the defendant. Often the bigger the show you make, and the more you personalize the dispute, the more likely it is that your threat to file suit will not improve your settlement position in any meaningful way. Most adjusters and in-house counsel

are experience enough to know that for many reasons plaintiffs and their lawyers much prefer a settlement over a trial.

If you do reach an apparent deadlock with an adjuster, you should almost always send a copy of your complaint and initial discovery to the adjuster along with your final demand. If the negotiations go no further, then simply agree to disagree and move forward with your lawsuit. If you have done your best, there is no reason to take a failed pre-suit negotiation personally. The discovery process and a jury trial will ultimately tell who was right.

XII. EFFECTIVE USE OF THE COMPLAINT

Because at least 90% of all lawsuits settle somewhere short of trial, the impact of your initial pleadings should be maximized. You should consider drafting the initial complaint with settlement in mind. While a short notice pleading complaint is sufficient to initiate a lawsuit in most state courts, a detailed well written complaint is much more likely to accomplish your goal of an early settlement. While a detailed complaint will cover much of what was in your demand package, the sending of the complaint to the defendant and/or adjuster is often the last chance to resolve the case before another attorney becomes involved.

A complaint is by its very nature a more serious and formidable document than is a demand letter. As a result, it can have a different psychological impact on the defendant. Drafting a persuasive complaint requires setting out the specific facts and claims in a manner that conveys both your readiness to take the case all the way and the potentially serious consequences should the defendant elect not to try and settle the case. On the other hand, vague, cursory, rambling or poorly drafted complaints indicate a failure to appreciate the importance of making the strongest impression possible. Even where a settlement does not result, a well drafted

complaint will often save you time and stress down the road as you are much more likely to have properly pled and supported all possible causes of action.

As with all other stages in the litigation process, it is necessary for you to have a good grasp of the facts and applicable law in order to draft the most effective complaint and initial discovery. In certain circumstances, you will be well served by including your initial discovery along with the complaint if it is likely to add additional pressure on the defendant. You should consider not accepting an offer by defense counsel to waive service of process. If you take the time to draft what you believe is a serious and intimidating complaint, the best way to ensure that it is read by your target audience is to have it served.

XIII. MEDIATION

A. When to Consider Mediation

Mediation as opposed to trial has become the preferred method for resolving cases. The popularity of mediation is based at least in part on the fact that it is extremely effective. In cases where discovery is completed, or where most of the essential facts are not in dispute, there is little reason why it is not advantageous to attempt to settle the case. While mediations are usually most effective when a trial date is looming, mediation can still be effective in settling cases well in advance of trial, or even when no trial date is set.

In the absence of an approaching trial date, nothing is any better than mediation at focusing the attention and energy of the key decision makers. Without either an approaching trial date or mediation, all of the key decision makers may not be sufficiently focused on the case at the same time to make settlement likely. It can be difficult for everyone to focus on a case at the same time when it isn't going to come up for trial for many months or even years. An

agreement to mediate sets a specific time where all parties and representatives will get up to speed and gather together in the same building. This singular focus at a specific point in time is one of the primary reasons mediations are successful.

There are a number of reasons that the parties often agree to mediate. The most common are:

1. **Help with the client.** One or both sides need help with client expectations. Lawyers must walk a fine line when it comes to candidly advising clients of the risk of an unfavorable result while at the same time conveying the sense of confidence that the client expects to see from their lawyer. A mediator can provide a neutral and objective evaluation to help temper overly optimistic expectations. Lawsuits also usually generate strong emotions in the parties. A mediator can lend an ear where one or more of the parties need the opportunity to vent their frustrations. Mediators are also trained to restate antagonistic statements in a more constructive fashion.
2. **Cost savings.** Mediation, if it results in agreement, in most situations will be less costly than continuing with the litigation.
3. **Control.** The parties and their principals typically have a much larger role in the outcome of mediation than they will have if the case goes to trial. Mediation is also almost always the best way to resolve a dispute that involves parties who will possibly have a continuing relationship.
4. **Confidentiality.** There are no newspaper or internet headlines. Mediation generally affords the parties the opportunity to construct a settlement that can be as private as desired.

B. Effective Mediation Preparation

Lawyers should always guard against letting their own egos and/or financial interest interfere with or shade the decision making process. Only when a lawyer consistently focuses on the client's needs and objectives are the best interests of the client protected. Therefore, to facilitate a successful outcome, the lawyer should meet with the client prior to the mediation to clearly identify and understand the client's goals, expectations, needs, and objectives. Once these are identified, the lawyer must analyze the facts of the case without emotion, and incorporate that assessment into the negotiation plan.

Because of the client's emotional involvement in the case, it is not unusual for the client to have a flawed liability assessment or unrealistic expectations with regard to the probable outcome at trial. This manifests itself in unreasonable and unrealistic settlement demands or conditions. Unreasonable offers and conditions often produce equally unrealistic and hostile responses from the other side. While the lawyer must be passionate about the case, you best represent the client when you maintain an objective view of the big picture

The first step after agreeing to mediate is to agree on a mediator. This requires striking a balance between a mediator who is likely to sympathize with your own client's position and who is likely to have the credibility to persuade the other side to agree with your point of view. The more your opposing counsel trusts the mediator, the more likely your message will be heard during the caucuses.

The second step is to take whatever amount of time is necessary to make sure that your client has realistic expectations. Always identify and explain to your client what you think the best and worst alternatives are to a negotiated settlement even if it is not what they want to hear. Educating your client in this way will minimize the chances that you lose client control and end up with an unfavorable settlement. An injured plaintiff should be made to understand that there

is no magic wand to make what happened go away. Mediation cannot change what took place in the past or undo much of the damage that has been sustained. But mediation will allow both sides to use dialogue to explore some appropriate remedies that may, in some ways, compensate the injured person.

The third step in preparing for a successful mediation is coming up with your negotiating plan. In talking with mediators, it is apparent that many lawyers do not actually prepare much if at all for mediation. The informal structure and non-binding nature of mediation can result in a casual attitude about the process and the need for preparation. This is unfortunate for two reasons. First, our clients rely on their lawyer to be prepared and to guide and advise them through the process. The decision to settle a case is a very significant decision for your client. If the other side has more information and is better prepared, it is difficult to get your client the best possible settlement. Second, mediation itself is often the best, and sometimes the only, opportunity to settle the case on favorable terms.

In coming up with your negotiation plan, it is critical that you and your client reach an agreement in advance with regard to the goal and the bottom line. In formulating your negotiation plan, you and your client should:

1. Talk candidly about what can reasonably be accomplished;
2. Set an optimistic but specific goal;
3. Agree on the bottom line or walk away number;
4. Be committed to achieving the goal and not going below the bottom line;
5. Agree on the initial offer or demand;
6. Outline at least 3-5 subsequent moves.

You should be flexible and adapt your negotiation plan as the mediation progresses. However, until you have a pretty good idea of where the other side is trying to go, and what the other side thinks is fair and reasonable, you should keep your own eyes firmly on your specific goal when making moves. It is important to remember that nothing is more unnerving to the other side than the quiet confidence and commitment that is exhibited by a client and lawyer who know what they will and will not take, and why they ought to get it. The more prepared you are, the more in control you will be, and the less stress you and your client will feel no matter how the mediation process unfolds.

C. The Mediation Process

As part of your mediation preparation, you should always fully educate your client about the process itself. While this is usually more important when you represent the plaintiff, it should not be neglected even when representing a defendant. A full understanding of the process, and the overall negotiation strategy, will help reduce everyone's anxiety.

The Opening Session: Mediation typically starts with an "opening session" where all parties are present. Each party will have the chance to briefly present their case before retiring to separate rooms. The tone of your opening presentation should strike a balance between showing an interest in settlement and demonstrating a willingness to litigate. Beyond that basic statement, there is no consensus as to how detailed and elaborate your initial presentation should be or as to whether you should even make any presentation at all. Many lawyers say that by the time the case is ready for mediation, there is little if anything to be accomplished a formal presentation. You just need to tell the other side you are there to negotiate in good faith and move straight to the private caucuses. Some of these lawyers are also concerned that saying too much risks revealing your trial strategy. Others believe that failing to make a presentation is almost the

equivalent of waiving your opening statement at trial. These lawyers see the opening session as often being your one chance before trial to speak to the other side. Therefore, to not say anything substantive is to miss an opportunity to help the other side appreciate their risks of proceeding to trial.

If a presentation is made, you should set out a cohesive story or theme as clearly and concisely as possible. Demonstrative evidence, such as videotapes and graphics, can be very effective in educating the other side about what you will be able to prove at trial. The initial joint meeting provides you and your client with what may be your only opportunity to speak directly to those who have a real stake in the outcome. So while the failure to adequately plan a presentation can be a missed opportunity, it is difficult to see how doing one will decrease the chances of settlement.

Shuttle Diplomacy (Caucuses): Most of the communication during mediation occurs in caucuses where the parties are in separate rooms and the mediator shuttles goes and forth between them carrying information. During these caucuses when there is information that you want kept confidential, you should specify such items for the mediator and request that they be kept in confidence. During these caucuses, it is also important for advocates to consider any information the mediator may have conveyed that you had not previously understood or appreciated. Sometimes the analysis of new information gained from the other side results in changes to both your goal and bottom line.

Throughout the mediation process, both the lawyer and the client should avoid reacting reflexively to unsatisfactory moves by threatening to walk away, or demanding that the other side bid against themselves, or by throwing back equally unrealistic proposals. These reactions

can actually impede the progress of negotiation as well as drain your own energy. Examples of these emotional and counterproductive responses include:

“I’m not going to bid against myself!”

“That’s insulting. Is that what they think my leg is worth?!”

“Who do they think they’re dealing with?!”

“Go tell them to give me a realistic number or we leave!”

“I’m not even going to dignify that number with a response!”

“They’re not here in good faith!”

These emotionally charged responses can often begin a downward cycle. Left to their own devices, lawyers often continue in reactive mode until the mediation process dies. However, in almost all situations, and assuming you and your client would actually prefer a settlement to a trial, you should make every effort to keep the other side at the table. The best way to accomplish this is to respond with a move of your own in response to every move by your adversary.

Whether the case settles or not, throughout the mediation process you should always try improve your client’s current position. While a trial is often described as a battle, mediation should be considered more of an exploration where you are seeking to learn what is important to the other side. Even if the case does not ultimately settle, you can use the mediation process to gain information that will both help you evaluate the relative strengths and weaknesses of your own claim as well as assist you in learning where the other side is coming from further prepare you for trial if necessary.

XIV. MISCELLANEOUS TECHNIQUES AND CONCEPTS

There are a number of negotiation techniques and concepts that are frequently used by experienced negotiators. These include:

THE FLINCH: Show some degree of shock and/or surprise at the other side's initial proposal. When people make a proposal, they instinctively watch for your reaction. Don't let the other side (or the mediator) see a reaction that conveys a sense of excitement or relief. As a plaintiff, you want to appear to be reluctant to settle your case. As a defendant, you want to appear similar to an unmotivated buyer throughout the process. If done properly, this technique can help adjust the other side's expectations and result in better subsequent moves.

THE APOLOGY: Defendants frequently fail to take advantage of the fact that many plaintiffs are actually reluctant litigants. If the plaintiff believes that the defendant is genuinely sorry for what happened (even if not admitting fault outright), or acknowledges at least some responsibility for the loss (which can be done confidentially during mediation), the plaintiff is more likely to settle for less money. Even if the defendant does not believe a mistake was made, the defendant can benefit from expressing sympathy and explaining how certain problem occurred and how certain decisions were made.

MAKE THE OTHER SIDE GO FIRST: There is an old saying in negotiation that the loser is the one who speaks first. Whenever possible you should try to get the other side to state his or her position first. There are a number of reasons for this. The other side may be more concerned about the case than you anticipated or realized. The other side may have something to hide. To make the other side go first you have to be content with the status quo (i.e. no settlement). When the status quo is fine, and you are willing to go to trial, then there is no pressure to make an offer or demand. In the right case, be bold enough to wait for the other side to approach you and then respond with: "I am comfortable with the way things stand. If you

want to discuss a change of course then you will have to make a proposal to me” (or other words to that effect).

DEFER TO THE HIGHER AUTHORITY: The negotiator who is also the ultimate decision maker can be at a disadvantage. When the other side knows that you are the sole decision maker, they only have one person to convince. However, when you have to answer to a higher authority, there are more people that have to be convinced. Real or fictional deference to a higher authority is even more difficult to deal with when it is a vague group or committee as opposed to a single person. This technique is particularly effective when used by the defendant. It helps avoid confrontation by allowing the negotiator to appear sympathetic and compassionate (i.e., the good cop bad cop routine).

USE A WHISPER NUMBER: A “whisper number” is nothing more than an indication of what you might be willing to push your client to accept if there is a firm commitment by the other side that they will get there if you do. “My client hasn’t agreed to this, but if I can get him to x, will you go there?” The “whisper number” can be an effective way to close the gap.

THE WALK OUT: In the end, two numbers will ultimately determine whether the mediation or negotiation is successful: (1) the amount the defendant is willing to pay, and (2) the amount the plaintiff is willing to accept. If these numbers don’t overlap somewhere, then your best option may be to walk away. Walking out of the mediation is the ultimate action to convey to the other side that you have given your bottom line. However, walking away is inherently risky and can destroy your credibility if it is simply a bluff. So before you walk away, make sure your client has a full understanding of doing so.

THE DEADLINE: In a typical business or commercial negotiation, the existence of a limited amount of time can facilitate a quick agreement or sale. There is a natural tendency to

want something more when we think that the supply is limited or that an opportunity is about to pass us by. Marketers and retailers use this psychology with regular success. Retailers try to create the appearance of scarcity with statements like “today only” or “only two left at this price.” In the context of a legal negotiation, the same effect can be created by convincing the other side that for some reason the opportunity to resolve the case is about to go away. This technique is particularly effective when the other side would accept the deal that is on the table but is holding out for a better bargain. There can be a tendency to push the panic button when it suddenly appears that the opportunity to settle on acceptable terms is about to disappear. Ultimately, the any real or artificial deadline is only as effective as the resulting concern and/or anxiety on the other side. .

GET THE OTHER SIDE FULLY INVESTED: The more time someone invests in an activity, the more committed they are to seeing the process through. Likewise, as we invest more time and energy into any negotiation, there is a tendency to become more committed to closing a deal. This is particularly true when it comes to the time we invest in a particular mediation, and it affects both the client and their lawyers. To take advantage of this psychology, one side may string the mediation out solely for the purpose of getting the other side so invested in the process that it becomes harder to accept failure. The result is a willingness late in the day to make bigger concessions.

SCRIPTING: Some negotiators effectively use a script when negotiating. This is when you pre-plan some or all of your moves. Using a script can make it confusing for the other side to get a good read on where you are going. It can also be used to artificially prolong the mediation to make sure that the other side is fully invested in reaching a settlement.

SPLIT THE DIFFERENCE: The most frequently used closing technique is to offer to “split the difference.” Regardless of what people say, everyone looks at the midpoint. In talking with mediators, the most likely settlement in any case is somewhere close to the midpoint between the opening demand and the opening offer. In cases where there have been multiple moves back and forth, there often comes a point in time where one side proposes simply meeting in the middle. This process appeals to our general sense of fairness and reciprocity.

BRACKETING: Bracketing is similar to splitting the difference. When the parties move toward the midpoint of the opening positions, the concept of “bracketing” often comes into play. Generally both sides are trying to bracket their desired settlement amount between the offer and demand. Proposing a specific bracket is an often used move to try and close the gap by proposing to go to X if the other side will move to Y number. Any proposed bracket should also be specific as to which side has to make the next move if the proposed bracket is accepted as this can alter the midpoint.

MAKE THE OTHER SIDE THE WINNER: In any negotiation it is important convey the impression that your adversary has won significant concessions from you. This can only be accomplished by initially asking the other side for more than you expect so that you can grudgingly make as many concessions as possible. By conceding little at the outset you also have more room to negotiate later. You can always make larger concessions later but you cannot take back what you have already given away. It is through your own begrudging concessions that the other side will feel that they have reached a good deal.

MAXIMIZING CONCESSIONS: Along the same lines as letting the other feel like a winner, you should never make any concession during a negotiation for free. Any concession you make without a reciprocal concession quickly loses its value. Therefore, when giving up

anything you should usually ask for a reciprocal concession. Most lawyers have seen situations where the client is willing to pay more for you to solve a problem on the front end than they will pay once the problem has been solved. This is because psychologically the value of a service performed tends to diminish rapidly after you have performed the service. Likewise, once you drop something without a reciprocal concession, there is no subsequent good will or value to be obtained.

LISTENING: One of your goals in the negotiation process is to obtain as much information as possible about the other side's interests, issues and perceptions in the event the case does not settle. In most negotiations your client will be better served early on when you do more listening than talking. You should focus initially on asking questions as opposed to delivering information. Most skilled negotiators try to focus more on receiving rather than delivering information. Probe first and disclose later.

XV. CONCLUSION

Effective settlement negotiation basically comes down to two things. The first is preparation. The more prepared you are beginning with the early stages of the litigation process, the better settlement results you will inevitably obtain. Or at the worst, you are better positioned to avoid getting bogged down in a case that you either should not have filed or that you should have resolved much sooner. The second is identifying and maximizing your own leverage. If you understand and utilize your leverage effectively, you will be much more likely to achieve your goals or recognize those situations where no deal is better than a bad deal (and vice versa). Focusing on these two things while gaining a better understanding of the psychology of negotiating legal disputes will invariably serve both you and your client well.