NEGOTIATING THE BEST SETTLEMENT

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I. INTRODUCTION

In the civil justice system, almost all cases are resolved by settlement rather than trial.[1] Therefore, as a lawyer, I need to be skilled in negotiation to obtain the best result for my clients. Despite this fact, few lawyers spend time improving their negotiation skills. My belated recognition of this fact was the impetus for researching and writing this paper.[2]

Before going further, nothing I have written about is new. I have drawn liberally from reading many books and articles on negotiation. To the extent I am contributing anything to the art of negotiation, it is only by taking well-known negotiation techniques and applying them in the context of a civil lawsuit.

A critical difference exists between negotiating a legal dispute and most other negotiations. For example, most business negotiations are voluntary interactions where a win-win outcome is always possible. Either side can also usually walk away from the negotiation without significant risk. However, these outcomes are outside the norm when it comes to legal disputes. This is because the civil justice system is an inherently compulsory and adversarial process. The participants in a legal dispute do not come together by choice. The process has more in common with a shotgun wedding than a traditional courtship and marriage.

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[1] Approximately 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

[2] Most of this paper is written in the first person because it was written primarily as a reminder to myself.

Because of the adversarial nature of a legal dispute, the goodwill present in many business negotiations is missing. Both sides may face significant risk and a catastrophic outcome if a favorable settlement is not reached. For these reasons, the process of trying to settle a legal dispute can become acrimonious and combative. This reality makes it even more important for lawyers to develop skills to help clients navigate the settlement negotiation process effectively.

II. ULTIMATELY IT'S ABOUT $$$

Potential litigants seek legal counsel for a variety of reasons. Sometimes, the potential plaintiff feels mistreated, has unanswered questions, or seeks vindication or accountability in response to a perceived wrong. Conversely, the potential defendant is almost always a reluctant participant. Once the potential defendant faces a legal claim, there may be many reasons for initially refusing to settle -- even in situations where there is at least some degree of fault. Occasionally, defendants will rationalize that their actions were justified or that someone else is to blame. In other situations, the defendant may not have the resources to settle or may not want to do anything that would encourage similar claims. Accordingly, each side will have unique motivations that need to be considered at the outset of any settlement negotiation. These motivations may be a part of the early back and forth. But at the end of the day, the final decision almost always comes down to money. When the back and forth gets to the point where all that is being discussed is money, predictable traits of human nature come into play. I believe that understanding these traits is essential to becoming a better negotiator.

III. THE IMPORTANCE OF LEVERAGE

> *"All you need is a lever long enough, and a place to stand, and you can move the world."* Archimedes.
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> "*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

"*Every reason that the other side wants or needs an agreement is my leverage – provided that I know those reasons."* Bob Woolf

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

Understanding the concept of "leverage" will help achieve the most favorable settlement for clients. As I am using the term "Leverage," it means *situational advantage and its impact on my adversary.* In a legal dispute, leverage is the power to compel the other side to settle on favorable terms. During settlement negotiations, an individual client may have little actual power but significant leverage. For example, an individual or small business with limited resources relative to a large corporation or insurance company can still have the situational advantage simply by being able to compel the larger corporation to appear and have their fate determined by a jury. A plaintiff's situational leverage includes the ability to (1) expose the defendant to the risk of a significant financial loss as well as the costs associated with having to mount a defense; (2) expose the defendant to the risk of copycat litigation; (3) expose the defendant to adverse publicity; and, (4) expose the defendant's decision maker to career risk if the litigation does not go well after passing on the opportunity to settle the case.

Conversely, a defendant's leverage includes the risk that most plaintiffs fear: the risk of getting nothing after being offered something. On a contingency fee case, the plaintiff's attorney also can be counted on to have at least some fear of getting "poured out" (i.e., getting nothing). When the plaintiff's lawyer invests significant time and expenses in the case, the deep-pocketed defendant will always have considerable leverage during any settlement negotiation. Therefore, even when the plaintiff has a claim with substantial damages that could result in a sizable

financial loss to the defendant, the defendant may have more leverage than the plaintiff due to the ability to delay and wait the plaintiff out.

When assessing my client's leverage, it is crucial that I objectively analyze the case and not simply see what I want to see. A simple way to do this is to step back and ask which side is most at risk if the status quo is maintained. If the other side's behavior is inconsistent with my answer, I must find out why. Another way to evaluate the relative leverage is by engaging in a thought experiment where I ask myself if I would switch sides if I could. Obviously, if I would prefer to switch sides, either because I want to win or get paid, then that is a sign that I may be reaching too far. There are also times that my client's leverage is only temporary -- such as when I know about a weakness in my client's case that is not yet known by the other side. Likewise, I may underestimate my client's leverage because I mistakenly believe that the other side has a stronger case than they do or because I am unaware that the other side has some reason it needs to settle quickly.

When assessing my client's leverage, I should also be mindful of how money interacts with human psychology. With most people, the desire to avoid losses is stronger than the desire for an equivalent gain. For example, when the plaintiff has not been offered little or no money, the plaintiff has nothing to lose but their time. With nothing to lose, the plaintiff's choice is easy (assuming the plaintiff's lawyer will go forward). Compare this situation to one where a meaningful settlement offer has been made. Once a settlement offer is made that will put money in the plaintiff's hands, that amount becomes fixed in the plaintiff's mind. Combining this with the risk of getting nothing at trial can result in a powerful desire to avoid that potential loss. The psychology of loss avoidance is so strong that it is hard to overcome even when there is a high probability of a much higher recovery at trial.

The "Deal or No Deal" television game show exemplifies this psychology at work. This game show has 26 briefcases, each holding a different cash amount from $0.01 to $1,000,000. The contestant chooses 1 of the 26 numbered briefcases at the start of the game. The contestant then goes through a process of selecting the order that the 25 unchosen briefcases are opened. As each nonchosen briefcase is opened, the potential recovery becomes more certain. Along the way "The Banker" will offer the contestant a specific amount of money to buy the contestant's case before it is opened. The player can accept the offer and end the game. Each time the player rejects an offer, another round is played. The Banker's offer is always less than the average amount of the unopened briefcases.

In practice, the contestants, at some point, usually take a sure thing to avoid a lesser risk of getting nothing, even though the odds of going forward and getting a larger payday is the statistically correct choice. Most players are more cautious about making an early deal. But as the potential outcomes narrow, the psychological pressure to take the Banker's offer grows. This can be fairly analogized to the situation where (1) there is a significant offer on the table, (2) the trial date is near, and (3) there is a risk at trial of getting nothing or substantially less than the offer. If the average outcomes turn against the contestants early because many of the briefcases holding the larger amounts are eliminated, some contestants will throw caution to the wind and keep going. This parallels the situation where insufficient money is offered to the plaintiff to make a difference. When representing a plaintiff, one takeaway is to educate the client about the psychological effects that commonly occur during the negotiation process.

While the fear of loss is often a more effective form of leverage for the defense, there are situations where plaintiffs effectively use fear. To do so, (1) the case must involve at least some risk of a substantial jury verdict, (2) plaintiff's counsel must make a demand that is on the lower

half of the probable verdict range and within the available insurance coverage, and (3) the defense must believe that plaintiff and plaintiff's counsel are ready to go to trial.[3] In the right situation, you may be able to create career risk for the defendant's decision-maker. Career risk can result if the decision-maker fears having to explain why a significant exposure was not eliminated at a bargain price. It is usually not the decision-makers money at risk but their job. The fear of career risk can result in the defendant offering to settle for significantly more than is objectively warranted.

In those situations where one or both sides are not accurately assessing the risks, or seem to be ignoring those risks, nothing is more effective at effectuating a change in attitude than a fast-approaching trial date. With a looming firm trial date, the plaintiff and the plaintiff's lawyer must seriously consider the risk of getting nothing. Similarly, the defendant must consider trial costs, time, and the potential for a worse-than-anticipated outcome. Despite all appearances, the defendant may not be ready for trial or ultimately lack confidence in their case. But, without an approaching trial date, even a defendant with a weak case has little incentive to hand over significant money voluntarily. Without a trial date, the defendant and the insurer often have no incentive to settle for anything more than something on the low end of the probable verdict range. Moreover, depending on the return the insurance company can make on the amount reserved to pay any verdict, there are many situations where it is more economical for the insurance company to delay settlement as long as possible.

One cautionary note to remember is that my client's leverage can disappear altogether for any number of reasons. The wrong answer to a question during a deposition. The identification of a new witness. The death of one of the parties or a critical witness. The discovery of an

[3] There are strategic reasons, which are not addressed, for making demands above the policy limits in certain situations.

unfavorable document. Therefore, at every stage of the litigation, I should ask: "*What is my leverage? What leverage does the other side have? Is there anything I can do to increase my leverage? Is there anything I am thinking about doing that might diminish my leverage?"* Most lawyers have had situations where their case turns dramatically against them. Sometimes, this is unavoidable, but other times, it could be altogether with a better initial or ongoing assessment of the relative leverage between the parties.

IV. THE "GOLDEN MOMENT"

Talking with other lawyers, all seem to agree that "every case has an appropriate settlement value." However, getting both sides to agree on the correct settlement value at the same moment in time is often challenging. In my own practice, sometimes I figure out the appropriate value early on. Other times, I don't figure it out until after wasting significant time and money. In addition, the settlement value for any specific case can fluctuate over the life of the case. All of these variables lead me to the concept of the "Golden Moment." The Golden Moment is the moment in time when my client has the best opportunity to settle on the most favorable terms. So, in every case, my goal is to recognize the most favorable moment to settle before it passes. My challenge is to recognize that Golden Moment before it is gone. With the benefit of hindsight, when I miss the Golden Moment, it is usually because I did not accurately assess my client's leverage.

V. OBJECTIVITY AND SKEPTICISM

When representing clients, the lawyer serves as both an advisor and advocate. When acting as an advisor, my job is to inform clients of their legal rights and obligations and explain their practical implications. As an advocate, I must assert my client's position zealously. Doing the former requires objectivity, while the latter sometimes requires me to ignore unfavorable

facts. Maintaining my objectivity while also acting as a zealous advocate can be easier said than done. As a practical matter, my objectivity can be affected based on nothing more than the side of the table they sit on.

My objectivity can also be affected by my client's expectation that I believe them and show confidence in their case. The psychological term for this is "attitude polarization." Attitude polarization refers to the self-reinforcing activity when people on the same side repeat and validate each other's statements. Other words for this include "partisanship" and "groupthink." When I identify myself with one group versus another, there is a tendency to excuse, gloss over, and justify the actions and positions of my group members while condemning similar conduct when done by the opposing group. When this occurs in the context of a lawsuit, the result can be a false confidence about the case.

When representing any client, I must never forget that there is often at least some motivation for parties and witnesses to, at best, engage in selective recall and, at worst, to lie. Plaintiffs and defendants are equally capable of shading the truth, selectively recalling facts, or lying to protect or further their interests. So, whether I am listening to the defendant, plaintiff, or their witnesses, there is always a chance that the facts are being slanted. Consequently, I must maintain a healthy skepticism. If something my client says does not make sense or is incomplete, then I should note it instead of ignoring or excusing it. This is necessary because, more often than not, the best settlement will be achieved when I accurately assesses all potential evidence and testimony.

VI. THE FIRST TO SPEAK

When studying the art of negotiation, there is one universal law every negotiator should never forget: "*he who speaks first loses*." This truth is similar to the Zen teaching: "Open mouth -

- already a mistake." An excellent example of this law at work was told to me by an experienced large loss claims adjuster. He went to a mediation with one million dollars in authority. He was careful not to give the mediator any indication of his authority. After the joint session and meeting with the plaintiff, the mediator burst into the adjuster's room, exclaiming, "*We are going to get this case settled in the $700,000.00 range*." The plaintiff's attorney had given the mediator information, which ultimately resulted in the plaintiff's attorney leaving hundreds of thousands of dollars on the table. The fear of doing this is why most seasoned plaintiff lawyers err on the high side when making an initial demand that is objectively unreasonable.

When representing a defendant, the situations are few and far between where the client should give away the power to make the plaintiff go first. While it is difficult to do so, there are times when the plaintiff is best served by forcing the defendant to offer first. An example of the advantage of doing this is a case I was involved in where a pedestrian was hit by a car while crossing a four-lane road outside of the crosswalk. My evaluation was: (1) my client probably had some contributory negligence, and (2) the probable verdict range was $60,000 to $80,000.00 before any reduction for contributory negligence. My client did not want to go to trial. My client was willing to settle for $50,000.00. The insurance adjuster requested a demand several times. I was tied up with other matters and ignored the adjuster's request. Then, out of the blue, the adjuster called and made an initial offer of $80,000.00. This initial offer changed the outcome. Instead of making an initial demand of $120,000, the case was settled for $120,000.00.

VII. MANAGING EXPECTATIONS

A common theme in reading about negation techniques is that *people who expect more generally get more*. Negotiators who consistently get the best results usually do so by first setting high expectations. For this reason, the lawyer and client must have agreed to the specific goals

that they are trying to achieve. While they may change during the life of the case, the conversation about goals and expectations should start at the beginning of the lawyer-client relationship.

There is a difference between high expectations and expectations that are either "pie in the sky" or no more than a bluff. Setting high expectations involves deciding what the client is reasonably likely to achieve at trial. Holding firm to a "pie in the sky" number often creates problems. These include causing the client to have unrealistic expectations or a reluctance on the other side to respond. Similarly, a bluff is a show of false confidence that involves taking a settlement position that you have no real expectation of achieving at trial -- and hope that it scares the other side into paying more money than the case is worth. If using a bluff, the lawyer should ensure the client understands the strategy being used and that the numbers are unrealistic.

The key to managing expectations is ensuring the lawyer and client are on the same page. I must give my client the most accurate jury verdict and settlement assessment possible to accomplish this. An invaluable source of information can be obtained by talking to others about how they see the strengths and weaknesses of the case. Taking the time to solicit non-lawyer feedback will help identify positives and negatives I may not have recognized. This type of feedback will also help avoid the confirmation bias trap. An Upton Sinclair quote illustrates the confirmation bias trap: "*It is difficult to get a man to understand something when his salary (or settlement) depends on his not understanding it*." Confirmation bias is the tendency to favor or give more weight to information that confirms one's hypotheses instead of information that refutes it. Confirmation bias can also occur because of the lawyer's financial or professional interest in achieving a specific outcome. I also must remember that my views and opinions about the evidence and testimony are limited based on my personal experience. They may not be

consistent with those of the individual jurors. The confirmation bias trap is best be avoided by soliciting feedback from as many uninterested people as possible.

Setting and achieving a settlement goal cannot be done without involving the client in the evaluation and decision process. When the lawyer and client are on the same page, the lawyer is a more persuasive advocate, and the negotiation process is significantly less stressful than it would otherwise be. To ensure that I am on the same page as my client, I have to take the time to give the client the information that will enable the client to commit jointly to a specific goal and negotiation plan.

VIII. EFFECTIVE FIRST DEMANDS

When representing the plaintiff, the initial demand package is often the first impression the other side will have regarding the court's claims. So, lawyers should do everything possible to make the most of this initial impression. A well-documented initial demand can expedite settlement. If the case involves potentially significant damages, the insurance company can be expected to perform a considerable amount of due diligence before being willing to make a meaningful offer. Therefore, the sooner all the necessary information is provided and a credible demand is made, the faster you will reach your ultimate goal. Time is money, and rarely is any advantage gained by waiting to provide the necessary information.

IX. MAXIMIZING THE COMPLAINT

Because at least 90% of all lawsuits eventually settle at some point before trial, the impact of your initial pleadings should be maximized. Therefore, you should consider drafting the initial complaint with settlement in mind. While a short-notice pleading complaint is sufficient to start litigation, a detailed, well-written complaint can send a better message. By its

very nature, a complaint is a more serious document than a demand letter. It often has a different psychological impact on the defendant.

Drafting a compelling and persuasive complaint requires setting out the specific facts and claims in a manner that conveys that you have thought the legal theories through and are ready to take the case all the way. It should also make the consequences clear should the defendant elect not to try and settle the matter.

At the other end of the spectrum is a vague, cursory, rambling, or poorly drafted complaint. This is more common and shows 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 as you are much more likely to have correctly pled and supported all possible causes of action.

X. ESTABLISHING A RAPPORT

Regardless of which side I represent, I must work to establish a good rapport with my adversary. People are more inclined to make concessions to people they like than those they dislike. I am more likely to say "*yes*" to someone I like than to someone who comes across as a jerk. So rather than yelling at or threatening the other side, the most influential negotiators generally let the facts and preparation do the intimidating. Avoid arrogance, righteous indignation, and threats of sanctions. Establishing a good rapport with the other side can be done while zealously advocating your client's position.

First impressions matter in any business setting; ultimately, a settlement negotiation is a business setting. Therefore, what I say at the start of any negotiation will often set the tone for the entire negotiation. The other side will quickly form an opinion about whether I am working

for a mutually beneficial solution or looking to win at all costs. As a result, carefully consider the substance and tone of my initial conversations.

If the other side takes a position I strongly disagree with, it is not always necessary to respond with an attack. Attacking the other side's position can intensify the will and desire of the other side to prove me wrong. The last thing I want to result from an attempted negotiation is a desire by the other side to prove my client or me wrong. Therefore, it is usually best to avoid confrontation in the early stages of the negotiation.

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. Doing this is much more challenging without having a good rapport with the other side.

XI. ADJUSTERS

When negotiating with insurance adjusters, it is essential to remember that my client and I have much more at stake than the adjuster if a settlement is not reached. The adjuster will still get paid if the case is not settled. Despite this, some lawyers are unnecessarily confrontational in pre-litigation negotiations. Common ground is almost always more likely to be reached by being pragmatic rather than belligerent. Filing a lawsuit is not a declaration of war. Most adjusters and claims professionals do not fear the filing of a lawsuit. So, there is no reason to act as if the filing of your suit is a catastrophic event that will doom the insurance company or the adjuster. Acting as if filing a routine lawsuit is a significant event suggests inexperience – or even worse, a need to settle the case. This is also reinforced by the fact that most adjusters and in-house counsel know that plaintiff lawyers usually prefer a settlement over a trial for many

reasons. Therefore, the best approach is to professionally communicate pertinent information about your client. If that is unsuccessful, then the only options are to file suit or make one more effort at settlement by sending a copy of your complaint and initial discovery along with the final demand. If that fails, then agree to disagree and file the lawsuit. The discovery process and a jury trial will ultimately prove who was right.

XII. ACHIEVING THE GOAL

At the start of most negotiations, I should set out high but realistic expectations. My initial offer or demand should reflect a position I can credibly support. My opening position should be at least a possible outcome at trial. The goal is the settlement number that I realistically hope to achieve. My bottom line is the go-to trial number.

Once the goal and bottom line are set, proceed with the negotiations as if the goal is the bottom line. Doing this avoids the tendency to telegraph the bottom line. To have a realistic shot at achieving the goal, the other side must believe it is the bottom line. In mediation, the mediator must believe the goal is the bottom line.

When responding to the other side's initial moves, stay close to the opening position to obtain as much information as possible about what the other side is willing to do to avoid further litigation and trial. Throughout the negotiation process, strive to give the other side a real sense of what is possible. Most experienced lawyers have been involved in mediations where they were surprised that the other side has little room to move. While not always preventable, before going into a mediation, make it clear what is and is not possible.

XIII. MEDIATION

A. When to Consider Mediation

Mediation is a common method for resolving cases. In cases where discovery is completed or where most of the essential facts have been disclosed, there is usually little reason why it is not advantageous to attempt to settle the case. Even where one side or the other is confident that they will prevail at trial, there is a reason most lawyers are unwilling to guarantee a win. The inherent unpredictability of trial makes settling rather than trying most cases advantageous.

There are many reasons why the parties often agree to mediate. The most common are:

1. **Help with the client's expectations**. One or both sides often need help managing client expectations. As a lawyer, you must walk a fine line when it comes to advising your client about the risks while at the same time conveying the sense of confidence that the client expects. A mediator can provide a neutral evaluation of the case and help temper unrealistic client expectations.
2. **Cost savings**. A mediated settlement will usually be much less costly than continuing litigation.
3. **Control**. The parties and their principals have a much more significant role in the outcome of mediation than they will have if the case goes to trial. Mediation is also the best way to resolve a dispute involving parties who may have a continuing relationship.
4. **Confidentiality**. There are no newspaper or internet headlines. Mediation generally allows the parties to construct a settlement that can be as private as desired.

While mediation is usually most effective when a trial date is approaching, mediation is also an effective way to settle cases early on. Nothing is better than mediation at getting everyone to focus their attention and energy on settlement in the absence of an upcoming trial

date. Without an impending trial date or mediation, the key decision-makers are rarely sufficiently focused on the case simultaneously to make a settlement likely. An agreement to mediate gives everyone a specific date and time for all parties and representatives to get up to speed and gather together in the same building. As the day progresses and more time is invested in the mediation, the parties become more invested in achieving a settlement.

B. Mediation Preparation

In preparing for mediation, remember that it is my client's case. It can be easy to lose sight of the fact that it is my client's life, business, or future that is at stake. Lawyers on both sides must guard against letting their desire to win and financial interest interfere with or shade the decision-making process. When I consistently focus on the client's needs and objectives, the client's best interests are protected. To facilitate a successful outcome, I should meet with the client well before the mediation to identify the client's goals, expectations, needs, and objectives.

Because of the client's emotional involvement in the case, it is not unusual for them to have flawed liability assessments or unrealistic expectations about the probable outcome. This manifests itself in unrealistic settlement demands or conditions. Unreasonable offers and demands often produce equally unrealistic and hostile responses from the other side. For these reasons, developing a negotiating plan is the most critical step in preparing for mediation. In talking with mediators, it is apparent that many lawyers do not prepare much for mediation. Mediation's informal structure and non-binding nature frequently lead to a casual attitude about the process and the need for preparation. This is unfortunate for two reasons. First, the client relies upon the lawyer to be prepared and guide them through the mediation process. Second, mediation is often the best, and sometimes the only, opportunity to settle the case on favorable

terms before incurring the expense and facing the risk of trial. Getting the best settlement is difficult if the other side has more information and is better prepared.

One of the principal advantages of a well-thought-out mediation plan is that the lawyer and the client will be less reactive as the mediation unfolds. In formulating the negotiation plan, I should:

1. Talk candidly to my client about what can realistically be accomplished;
2. Set optimistic but specific goals;
3. Be committed to those goals;
4. Commit to a specific walkaway number;
5. Decide on your initial offer/demand;
6. Plan your first 3-5 moves.

While a trial is often described as a battle, mediation should be approached as more of an exploration where I seek to learn what is essential to the other side. Even if the case does not ultimately settle, I can use the mediation process to gain information that will help evaluate my case's strengths and weaknesses.

C. Success

When it comes to bringing the mediation to a successful conclusion, instead of having a game plan for responding to the other side's moves, lawyers often overreact to small moves by threatening to walk away or demanding that the other side bid against themselves or by reciprocating with equally ridiculous moves. Certain reactions can impede the progress of the negotiation. Examples of generally counterproductive responses include:

"*I'm not going to bid against myself!*"

"*I'm not even going to dignify that number with a response!*"

"*I'm out of here!*"

"*They're just not here in good faith!*"

Left to their own devices, the lawyer and client may remain reactive until movement stalls. However, a skilled mediator will help avoid an impasse and keep the mediation moving.

One of the biggest "mediation killers" that deserves special attention is when the defendant does not have the actual decision-maker at the table. Even when requesting mediation, it is not uncommon for the defendant to show up without the real decision-maker present. When representing the plaintiff, this situation should be avoided at all costs. If the decision-maker is not physically present, the leverage that comes from the time invested in the mediation is lost. While the plaintiff and his or her lawyer are sitting all day waiting for responses, the decision maker is insulated from the action. In almost all situations, I should avoid going forward with the mediation without the decision-maker being present.

Once the mediation starts, and assuming the client would prefer a settlement to a trial, make every effort to keep the other side at the table. The best way to accomplish this is to respond to every move by the other side. Leaving the ball in the other side's court is preferred if mediation is unsuccessful.

XIV. NEGOTIATING TECHNIQUES

In reading about negotiation and talking to other lawyers about their own experiences, there are many techniques and practices to consider using. The client should also be educated about these techniques to understand how the other side may try to manipulate them.

THE FLINCH: Showing some degree of shock, anger, or disappointment at the other side's initial proposal. When people make a settlement proposal, they instinctively watch for the client's and lawyer's reaction. Never let the other side (or the mediator) see a reaction that conveys relief or excitement.

REFUSING TO GO FIRST: When representing the plaintiff, usually, the only way to make the defendant go first is to convince them that you are not going to make a demand until they make an offer. If the other side must settle quickly or is at significant risk, they may give in and make the first move. But you may end up at trial if you refuse to go first.

THE HIGHER AUTHORITY: It is not uncommon for the plaintiff to show up to mediation and find that the defendant does not have the real decision maker present. When the real decision maker is removed from the face-to-face process, this can give the defendant a significant advantage. First, the defendant knows the plaintiff is present and has the final say. They only have one person to convince. They can judge the plaintiff's reactions firsthand or through the mediator's direct observations. When the defendant's decision maker is not present, it is much more challenging for me to convince them of the merits of my arguments. I also lose the ability to make a firsthand assessment.

When one side has to answer to a higher authority, there are also more people that I have to convince. Real or fictional deference to a higher authority is even more challenging because there is a vague group or committee as opposed to a single specific person. Having or pretending to have a call with a higher authority during mediation is particularly effective. The representative at the mediation can appear sympathetic and compassionate to the plaintiff while blaming others who are removed from the process. This technique is best countered with patience and a firm commitment to your goals.

THE WHISPER NUMBER: A *whisper number* indicates what the client might be willing to settle for or what the client can be convinced to accept - if there is a firm commitment from the other side to get to that number. "*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 WALKOUT: Walking out is the ultimate way to let the other side know you have made your last offer or demand. However, walking away from mediation is inherently risky and can destroy your credibility if you must initiate a settlement call later. So, before you walk away, ensure your client fully understands all the potential consequences of doing so.

THE DEADLINE: Retailers create the appearance of scarcity to try and close a deal. If I believe that something for sale is in scarce supply or that it will not be available in the future at the current price, I am more likely to jump at the deal. Retailers create the appearance of scarcity by doing things like limiting the visible stock and counting down the time when the sale ends.

Scarcity can also be used effectively in a legal negotiation. The same psychological effect can be created by making the other side believe that the opportunity to resolve the case is about to disappear. There can be a tendency to push the panic button when it suddenly appears that a chance to settle is about to disappear. In litigation, the scarcity effect can be accomplished by the existence of fake or real deadlines. The effectiveness of any deadline is only as good as the concern it causes the other side of the table.

FULLY INVESTED: The more time invested in something, even as simple as standing in line for an amusement park ride, the more painful it is to walk away empty-handed. Likewise, the more time and energy invested in mediation, the more committed everyone becomes to getting the deal done. Because of this tendency, one side may string the mediation out solely to get the other side so invested in the process that it becomes harder to accept failure later in the day. When used effectively, the other side may be willing to make more significant concessions late in the day that they would never have agreed to earlier.

THE SCRIPT: A script involves pre-planning most, if not all, of your settlement moves. This can be as simple as deciding the most you will accept or pay and then writing out 6-

10 moves until you get there. Making offers or demands using a script can cause confusion and frustration on the other side as they spend mental energy trying to figure out a rationale behind moves that mean nothing. Using a script eliminates the mental gymnastics of deciding what to do next. At the same time, it also prolongs a mediation and gets the other side mentally tired and fully invested.

SPLITTING THE DIFFERENCE: In talking with mediators, the most likely settlement is close to the midpoint between the opening demand and the opening offer. While most lawyers quickly deny that any move is intended to telegraph the midpoint of their settlement authority, everyone still pays attention to the midpoint. Because of this, the most frequently used closing technique is to offer to "split the difference." In cases where there have been multiple moves back and forth, one side often proposes simply meeting in the middle. This process appeals to our general sense of fairness and reciprocity.

CONCESSIONS: Conceding anything without asking the other side for something in return is usually unwise. There are several reasons for this. First, what one side may not value at all, the other may value dearly. Second, any voluntary concession immediately loses its value. It is also better to make concessions because it encourages reciprocity and gives the other side the feeling that they have won something. It is partly through your concessions that the other side will feel that the agreed settlement is a good outcome. There is also little value in acting like you have crushed the other side.

INFORMATION GATHERING: Always use the negotiation to obtain as much information as possible about the other side's needs and interests. My client is better served in most negotiations when I listen more than talk – at least early on. Ask questions and listen to get more information than I give to the other side. Probe first and disclose later.

APOLOGIES: Defendants often fail to take advantage of the fact that many plaintiffs are reluctant litigants. Therefore, when a plaintiff believes that the defendant is genuinely sorry for what happened (even if not admitting fault) or has acknowledged at least some responsibility for the harm suffered, the plaintiff is more likely to accept less money to settle the case. Even if the defendant does not believe a mistake was made, they can also improve their position by expressing sympathy and explaining how specific problems occurred and certain decisions were made.

XV. PAYMENT DELAYS

In a perfect world for the plaintiff, once the case is settled, the plaintiff's lawyer could pick up a check the next day. However, defendants and their insurers rarely hurry to pay anything. Therefore, discussing the terms and time for payment of the settlement should be addressed well before the final number is agreed upon – and never as an afterthought. When representing the plaintiff, do not wait until after the number has been decided upon to ask when the check will be ready. The date the settlement must be consummated should be a material part of the settlement agreement.

XVI. CONCLUSION

Negotiation principles have been around as long as people have bartered over goods and services. Based on my research, I can confidently say that effective settlement negotiation comes down to two things. The first is preparation. Being prepared means preparing the client and preparing an actual negotiation plan. The second is accurately identifying and then maximizing my client's leverage. If I don't effectively use my client's leverage, the opportunity to settle on the most favorable terms will be missed. These two things are the cake; everything else is icing.