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TOP FIVE NEGOTIATION TIPS

Attorneys negotiate every day in every type of law practice. But, "[t]he art of legal negotiating includes skills rarely taught in traditional law school curricula. Since practicing attorneys constantly encounter situations that require various forms of negotiation, the lack of formal education in these skills is unfortunate." CHARLES B. CRAVER, EFFECTIVE LEGAL NEGOTIATION & SETTLEMENT 1 (LexisNexis 5th ed. 2005). Happily, this is changing for younger lawyers. Most law schools now offer courses in Negotiation and ADR, and some – like Texas Tech – require practical skills training in these topics. In addition, most of the Texas law schools offer intra-school and interscholastic opportunities in Negotiation competitions that are as enthusiastically greeted as moot court and mock trial.

Every experienced attorney could probably come up with his or her top five or top ten lists of negotiation tips, but here are mine.

TIP #1: PREPARE! PREPARE! PREPARE!

Good litigators prepare for trial. Often over-prepare. Good office practitioners prepare for closings and even for client meetings. Yet all too often, good lawyers do not engage in the same type of preparation for negotiation sessions – much less for mediations. Inadequate preparation can result in a missed opportunity to serve a client's interests. Adequate preparation includes:

- Preparing the client – what are the client's needs and wants? What are the client's expectations? How realistic are those expectations? If you are about to attend a mediation, does the client know what to expect?
- Knowing the case or transaction – what are the facts? What is the controlling law? What are the strengths? What are the weaknesses?
- Assessing the value of settlement – what are the benefits of settling for your client? What is the value or benefit of settling for the opposing party or parties? What are the costs of non-settlement for all involved?
- Choosing the right mediator for your case. Do you want/need an evaluative mediator? Do you want/need a shuttle diplomat? Do you want/need a dominating or passive mediator?

- Choosing the right process for your case. Would settlement opportunities be advanced by selecting a different form of ADR such as a moderated settlement panel, binding or nonbinding med-arb, a summary jury trial, or some other format?
- Exploring settlement mechanisms. Would resolution of your case be facilitated through the use of a bracketed settlement agreement in conjunction with an ADR process? Have you thought about options such as a structured settlement?
- Doing your homework prior to a mediation. Have you prepared your client? Have you prepared your opening statement? (Do not miss out on that opportunity!!) Have you discussed with your client the likely or anticipated give and take offer/counter-offer process of a mediation?
- Negotiation Styles. What style do you normally use? What style is right for this case? Consider, for example, the following styles: *Adversarial, Problem-Solving, Competitive or Hardball,* and *Cooperative*. What style does your opposing counsel favor? Have you discussed your style and your opponent's likely style with your client?
- The opening offer. Who will make it? When will it be? What will it be? Will it be a "real" offer?
- Ensuing offers. What are the client's target points and resistance points?

For a more detailed discussion of Negotiation preparation and styles, see Craver, *supra*, at 72-138, and G. NICHOLAS HERMAN, ET AL., LEGAL COUNSELING AND NEGOTIATING: A PRACTICAL APPROACH 151-65 (LexisNexis 2001).

TIP #2: USE, RECOGNIZE & RESPOND TO TACTICS

Whether by design or just by happenstance, we all employ certain negotiation tactics. You have also encountered many different tactics in your negotiation experiences. A good lawyer should be cognizant of various tactics and employ them when they can facilitate the progress of a negotiation. Perhaps even more importantly, the good lawyer should be able to recognize when opposing counsel is employing different tactics and be in position to respond. The following sets forth a list of 34 different negotiation tactics. These are drawn from sources such as Craver, *supra*, at 191-215, Herman, *supra*, at 181-203, and JOSEPH G. LEVY, SECURING FULL & FINAL SETTLEMENT 31-60 (Superior Court Press 1995). There are, of course, other resources and numerous other tactics, but here are the basics:

1. The school of wanting to make the first offer
2. The school of avoiding making the first offer
3. Excessive Demand/Low-ball offer
4. You'll have to do better than that
5. Little ol' country lawyer
6. Good cop/bad cop

7. Wincing
8. Lack of authority/limited authority
9. The call to the home office for more authority
10. Abdication
11. Anger or feigned anger
12. Have to catch a flight
13. Blaming
14. Bluffing
15. Br-er Rabbit
16. Teaming up – the coalition
17. Company policy
18. Deadlines
19. Dodging questions
20. Pre-drafted settlement document
21. False demands
22. False emphasis
23. Bogus concessions
24. Nibbling
25. Personal attacks
26. Conditional proposals
27. Divide and conquer/slicing the "salami"
28. Publicity/confidentiality
29. Snow job
30. Splitting the difference
31. Take it, or leave it
32. Tit-for-tat
33. Walking or threat of walkout
34. Generating options

TIP #3: CLOSE THE DEAL (OR LEAVE AN OPENING)

Unfortunately, some settlement discussions and mediations do not end in settlement. And, some litigation matters probably should not settle and should go to trial. But, we all know that the vast majority of cases will settle prior to an ultimate court resolution. If you cannot "close the deal" at mediation, then leave an opening. This can take various forms. For example, one can provide a time window for your last offer. Even if the offer has been rejected at the mediation, one can renew the offer with a stated time prior for acceptance of, e.g., 3 days, 7 days, 10 days, etc. Alternatively, the lawyers can agree to give the mediator some continuing authority to serve as an intermediary for an ensuing period to exchange offers by telephone, e-mail, or fax. Or, the parties can offer to engage in an additional mediation session at a later, specified date. Most lawyers recognize that even though a case does not settle initially at a mediation, enough progress or understanding has resulted that a later settlement is often achievable.

TIP #4: DON'T FORGET THE WRITING (OR TO KEEP WORKING!)

If the matter is pending in civil litigation, much if not all of the negotiations will take place at mediation. All too often, once a deal is reached at mediation, the parties, lawyers, and mediator are relieved that a settlement has been achieved. As a result, and as is normal, they relax and perhaps let their guard down. Good lawyering must continue, however. It is very important to craft an enforceable memorandum of agreement – even when, as in most cases, formal settlement documents are to be produced at a later date. In the event that one of the parties later decides to back out of the deal (or otherwise has "buyer's remorse"), the memorandum of agreement can serve as a final agreement under TRCP Rule 11. It is also enforceable as a contract under the Texas ADR Procedures Act. TEX. CIV. PRAC. & REM. CODE Chapter 154.

Accordingly, ***do not stop*** working at a mediation once an agreement is reached orally. This is not the time to congratulate each other and rush out the door. Take part in the crafting of the written memorandum of settlement. Do not leave it up to the mediator. In fact, most sophisticated mediators will decline to draft the agreement. Indeed, take the initiative and start drafting the Settlement Agreement. If opposing counsel does the initial drafting, review the draft carefully and take time to make needed changes. Finally, make certain that your client agrees that the writing is faithful to the terms reached, and assure that all necessary parties and counsel sign the agreement. Then, make certain that copies of the signed agreement are made and distributed before you leave.

TIP #5: BE AN ETHICAL NEGOTIATOR

Whether you are practicing in Houston, Dallas, Tahoka, or Plainview – in some ways we all practice in "small towns." Your reputation is generally well known within the bar regardless of the size of community that serves as the primary home for your practice. We should always be mindful that a reputation which has taken many years to cultivate can be lost in mere minutes. We should all strive to be ethical negotiators.

Rule 4.01(a) of the Texas Disciplinary Rules of Professional Conduct states that "in the course of representing a client, a lawyer shall not knowingly make a false statement of material fact or law to a third person." How does that apply in a negotiation or mediation? Comment 1 to Rule 4.01 states the following, in pertinent part:

> Whether a particular statement should be regarded as one of material fact can depend on the circumstances. For example, certain types of statements ordinarily are not taken as statements of material fact because they are viewed as matters of opinion or conjecture. Estimates of price or value placed on the subject of a transaction are in this

> category. Similarly, under generally accepted conventions in negotiation, a party's supposed intentions as to an acceptable settlement of a claim may be viewed merely as negotiating positions rather than as accurate representations of material fact.

To determine how an ethical lawyer (or mediator) might view this provision, consider the following hypothetical situations developed by Prof. Longan at Mercer Law School:

> You represent the plaintiff in a breach of contract action. You are seeking lost profits. What can you say in negotiations about the lost profits if:
>
> (a) Your expert has come to no conclusion about their cause.
>
> (b) Your expert has told you the breach did not cause the lost profits.
>
> (c) Your expert has given you a range between $2,000,000 and $5,000,000 for the lost profits.
>
> (d) Your expert says the maximum lost profit is $2,000,000.
>
> (e) You do not have an expert, but your client says the loss was $5,000,000.

Patrick E. Longan, *Ethics in Settlement Negotiations: Foreword*, 52 MERCER L. REV. 807, 813 (2001).

> Professor Longan then continues with the following hypotheticals:
>
> In the mediation of this breach of contract action, can you:
>
> (a) tell opposing counsel that you will not settle for less than $3.5 million when you have authority to settle for $2 million?
>
> (b) tell opposing counsel that five major buyers stopped buying from your client after the breach, knowing that they stopped buying for other reasons?