HOW TO NEGOTIATE THE BEST SETTLMENT

I. INTRODUCTION

In the civil justice system, most claims are resolved through settlement long before a jury is ever seated.[1] Therefore, in the vast majority of situations you can't obtain the best result for your client without being skilled in the art of negotiation. Despite this fact, most lawyers spend many more hours refining their advocacy and trial skills than their negotiation skills. My belated recognition of this deficiency in my own training was the impetus for researching and writing this paper. Before going any further I want to clear that nothing I have written is new or novel. I have taken liberally from the many books and articles that I have read while working on this paper.

The various negotiation techniques and concepts discussed have been tailored to the legal setting although they apply generally to any type of negotiation. This is necessary because of the differences between negotiating a legal dispute and negotiations in most other contexts. Most business negotiations are voluntary interactions where both sides can win if a deal is struck. With a typical business deal, either side can usually walk away from the negotiation table without incurring any significant risk. This is obviously not true when the negotiation involves a legal dispute. The civil justice system is a compulsory and adversarial process. The parties are brought together by a more arbitrary process that has more in common with a shotgun wedding than a traditional courtship and marriage proposal. Because of the compulsory and adversarial nature of most legal disputes, the good will that is often present in other types of negotiation is usually missing. The negotiation of a legal dispute tends to be far more personal, acrimonious, and

[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

combative. Navigating this difficult environment is the key to being an effective lawyer/negotiator.

II. IT'S ABOUT THE MONEY

Litigants initially seek legal counsel for a variety of reasons. Sometimes the potential plaintiff feels mistreated, or has unanswered questions, or is desirous of some form of vindication or accountability in response to a perceived wrong. On the other side of the table, the potential defendant does not become involved by his or her own choice. But once involved, a potential defendant has many different reasons for initially denying responsibility and refusing to pay -- even in those situations where objectively speaking there is at least some degree of fault. The defendant may believe or have rationalized that his own actions were justified, or that someone else is more to blame. The defendant may not have the resources to settle the claim. The defendant may not want to do anything that might encourage similar claims or make the defendant look weak. Or, the defendant may feel compelled to try to delay the claim for as long as possible. But regardless of the initial motivations, the ultimate remedy that our civil justice system provides is the compulsory payment of monetary compensation. So while it is always important to be aware of the underlying motivations, at the end of the day the final decision for everyone involved is always about money.

III. THE ROLE 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
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> "*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

It is not possible to overstate the role that "leverage" plays when it comes to achieving the most favorable settlement for your client. "Leverage" is defined as "*positional advantage; the power to act effectively; strategic advantage*". In a legal dispute, leverage is your power to compel the other side to do what you want them to do. In the context of settlement negotiations, leverage is about <u>situational advantage</u> rather than objective strength or power. Your client may have very little actual power but still have significant leverage. An individual or small business may have few resources relative to a large corporation but still have the situational advantage simply by virtue of being able to compel the larger corporation to appear and answer in a court of law. A plaintiff's leverage also includes the ability to expose the defendant to the risk of a significant financial loss as well as the costs associated with having to mount a defense; exposing the defendant to the risk of copycat litigation; and exposing the defendant to the risk of adverse publicity. Also with corporations, the actual decision maker may have career risk if the litigation does not go well after passing on the opportunity to settle the case.

A defendant's leverage typically includes the plaintiff's own fear of ultimately getting nothing. If plaintiff is paying for the costs of the litigation, then the defendant has leverage simply as a result of the potential litigation costs. Likewise, in a contingency fee case the plaintiff's lawyer may encourage settlement to avoid the risk a total loss. Therefore, even when the plaintiff has a claim with significant damages that could result in a sizable financial loss to the defendant, the defendant's has leverage because of the ability to delay and wait the plaintiff out.

When evaluating your client's leverage it is important to understand that leverage can be either real or imagined. In other words, your effective leverage at any point in time is based on the extent it is appreciated and understood by the other side. There are times your leverage is more ephemeral than real such as when you know about a weakness in your own case that is not yet known by the other side. Likewise, you may underestimate your leverage if you mistakenly think that the other side has a stronger case than they actually do -- or overestimate your leverage if you mistakenly think that the other side has a weaker case than they actually do. Regardless of how much leverage you think you have, it is only effective if it is perceived the same way by the other side.

Because of the role that leverage plays in your ability to obtain the most favorable settlement, you should work to accurately assess your client's leverage relative to the other side. A simple way to do this is to simply ask yourself which side has the most at risk if the status quo is maintained? If the trial were to start with the current offer and demand, who would have the most risk? If the other side's behavior is inconsistent with your conclusion, then you need to figure out why. Another way to evaluate the relative leverage is in the form of a thought experiment where you ask yourself if you would switch sides with the other lawyer if you could. If you would rather argue the other side at trial, then that may be a sign that you and/or your client are reaching too far and need to reevaluate what is realistically achievable.

Certain principles of economics, probability theory and psychology should also be considered when looking evaluating your leverage. Most people are more concerned with avoiding losses than they are motivated by the potential for additional gains. Said differently, the risk of losing money tends to outweigh the probability for an equivalent gain. This principle can be seen at work in those situations where the plaintiff has not been offered any money, or so little

money that the plaintiff is no better off taking the settlement than going to trial. With nothing to lose the plaintiff's choice is much easier. Compare that situation to one where a meaningful settlement offer is combined with a real risk that the plaintiff may get nothing at trial. In this situation the desire to avoid a losing what has already been offered can be a powerful settlement force. This loss avoidance psychology is so strong that it is rarely outweighed even when there is high probability of a much higher recovery at trial. The best contemporary example of this psychology at work is reflected in the "Deal or No Deal" game show. The contestants almost always take a sure thing to avoid a small risk of getting nothing even though the odds of a much larger payday make that decision an objectively poor one.

While this fear of loss is obviously an effective lever for the defense, in certain circumstances it can also be used successfully by the plaintiff. However, this usually requires the plaintiff to: (1) be ready for trial; and (2) make a demand that is on the lower half of the probable verdict range, and/or below the amount of available insurance coverage. When you do this you put the decision maker for defendant or the defendant's insurance company, in the unpleasant situation of potentially having to explain why a significant risk was not eliminated when they had the chance. The effect of this is seen in those situations where the defendant settles for more than is objectively warranted just to avoid an objectively low probability of a significant jury verdict.

Risk aversion is a powerful tool used by experienced negotiators to settle cases on more favorable terms. To try and minimize the impact of this psychology when representing the plaintiff, you must educate the client about how the other side will try to use their natural risk aversion to obtain a lower settlement. In those situations where one or both sides is not accurately assessing their own risks, nothing makes the rose colored glasses come off faster than

an approaching trial date. With an approaching trial date, the plaintiff and the plaintiff's lawyer must evaluate the real risk of getting nothing. Without a trial date, even the defendant who has a bad case has time on their side. There is little incentive to voluntarily hand over money. In fact, without a trial date the defendant and/or the insurer may have no incentive to settle for anything more than something on the very low end of the probable verdict range. Depending on the return the defendant's money can earn while held as a reserve for the loss, there are even situations where it is actually more economical for the defense to delay settling as long as possible.

When the plaintiff has a good case and is ready and willing to try the case, an approaching trial date is the best way to obtain the most favorable settlement. The closer the trial the more credible the threat of an unfavorable judgment becomes. Moreover, and despite all appearances, the defendant may ultimately lack confidence in the case, or may not be ready for trial, or there may be some other reason for not wanting to go to trial that will only manifest itself with an approaching trial date.

Leverage when properly understood is the power not only to compel an agreement, but to compel one on the most favorable of terms. However, you should never forget that leverage is fluid and sometimes fickle. Your leverage can disappear altogether with the wrong answer to a single question or with the discovery of an unfavorable document. Therefore, at every stage of the litigation you should ask yourself: *"What is my leverage? What leverage does the other side have? Is there anything I can do to increase my leverage? Is there anything that I am thinking about doing that might diminish my leverage?"*

Cutting corners on the front end almost always costs you in the long run. Most trial lawyers have had situations where the facts turn dramatically against you and your client. Sometimes this is unavoidable, but other times the unexpected turn could have been foreseen or

even avoided altogether with a detailed assessment and plan. Without an accurate assessment of your client's leverage -- the chances of a achieving the best settlement for your client drops significantly.

IV. THE "GOLDEN MOMENT"

In talking with other lawyers, almost all seem to agree with the general statement that "every case has an appropriate settlement value." However, the actual settlement value of any specific case is both subjective and changes over time. For these reasons, it is often difficult for both sides to actually agree on what that settlement value is at any given moment in time. In my own practice, sometimes I figure out the appropriate value early on -- but other times I don't figure it out until after expending a significant amount of time and money. This brings me to the concept of the "Golden Moment." The "Golden Moment" is that point in the case where your client had the best opportunity to settle on the most favorable terms. However, the difficulty is in recognizing the "Golden Moment" before it passes you by. When looking back with the benefit of hindsight, the most common reason for missing the Golden Moment is that the lawyer's evaluation of the relative strengths and weaknesses was not correct.

V. MAINTAINING YOUR OBJECTIVITY

When representing clients, the lawyer serves as both an advisor and an advocate. When serving in the role of an advisor your job is to inform your client their legal rights and obligations and explain their practical implications. As an advocate, your job is to zealously assert the client's position. However, maintaining your objectivity while also being a zealous advocate for your client is easier said than done. As a practical matter, your objectivity is affected based on nothing more than the side of the table you are sitting. Your objectivity can also be adversely affected by your client's expectation that you agree with your client's assessment of the facts.

Clients naturally want their lawyer to show a certain level of confidence in the case while also expressing a satisfactory level of disdain and mistrust for the other side.

As an advocate, your objectivity can be further affected in subtle ways as a result of "attitude polarization." Attitude polarization refers to the self reinforcing activity which occurs when those on the same side repeat and validate each other's statements. Other words describing this phenomenon include "group-think" and "partisanship." When a you identify yourself with one group over another, there is a tendency to excuse, gloss over, and justify the actions and positions taken by members of your group while condemning similar conduct when done by the opposing group. This type of self-reinforcing activity can lead you to a false sense of confidence about the case.

When representing your client it is also important remember that there is plenty of motivation for both sides not to tell the whole truth. In my own experience plaintiffs and defendants are equally capable of shading the truth, selectively recalling facts, or just outright lying. So whether you are hearing the facts from a potential defendant or plaintiff, or their witnesses, there is always a chance that the facts that are being recounted are being slanted one way or the other. The best settlement can usually be achieved only when you have accurately assessed the strengths and weakness of all of the key evidence and witness testimony. This can only be consistently be done when you maintain your objectivity.

VI. YOUR INITIAL MOVE

In settlement negotiations, the plaintiff has the disadvantage of going first. Going first in any negotiation is a disadvantage. One of the great truisms in negotiation is – "he who speaks first loses." Along the same lines is the familiar Zen teaching: "open mouth -- already a mistake." An excellent example of this is a case where I represented a pedestrian who was hit by

a car while crossing a busy four lane road outside of the crosswalk. My own evaluation of the case was that the there was significant contributory negligence by my client, and that the probable verdict range was 60,000 to 80,000.00. My client for numerous reasons was willing to settle the case quickly for anything over 50,000.00. I was planning to make an initial demand of $80,000.00. However, before I sent my demand letter, an impatient adjust made an initial offer of $80,000.00. I will obviously never know exactly why the adjuster chose to make the first offer or why our evaluations were so different – but because of the information conveyed when he spoke first, I was able to settle the case for $120,000.00. Another example of speaking first even indirectly and losing came to me from a seasoned large loss regional claims adjuster. He told me about going to a mediation where he had one million dollars in authority. He was careful not to give the mediator any indication as to his actual authority. After the joint session and meeting with the plaintiff, the mediator burst into the adjuster's room exclaiming that he thought the case could be settled in the $700,000.00 range. All the adjuster could do was try not to smile.

Experienced plaintiff lawyers rightfully worry about leaving money on the table. As a result, most plaintiffs' lawyers will choose to err on the high side when making an initial demand. However, this becomes a problem when the initial demand is so high that it is not effective in moving the case toward settlement. It does little good to make a demand that is not at least a reasonably likely outcome at trial. In some situations, an excessively high demand can be used as an excuse for the other side to refuse to even make a counteroffer forcing the lawyer to bid against himself. Standing on your initial demand when there is no response only works if the lawyer and client are both comfortable with the status quo and proceeding to trial.

When representing a defendant, you should never give away your power to make the plaintiff go first. It is much easier to work toward your number when your initial offer is made in

response to a firm demand from the plaintiff. The only exceptions are when the case has to be settled for some reason and the plaintiff refuses to make a demand, or where the defendant is only going to pay a specific amount and there is no advantage to waiting to conveying that number to the other side. Similar to the plaintiff's decision, the defendant's initial offer can be ineffective if it is so low that it results in an artificial impasse that leaves the plaintiff with little downside to taking their chances at trial.

VII. MANAGING EXPECTATIONS

In reading about negation techniques, 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. For this reason it is important for you and your client to set specific goals and expectations. While these may change during the course of the case, you should start doing this from the very beginning.

In setting and managing expectations, there is a difference between setting high expectations and setting expectations that are nothing more than a bluff. Setting high expectations involves a determination about what it is that you are reasonably likely to achieve at trial. This is different from a bluff which is essentially a form of deception. The definition of bluff is to try to impress, deter, or intimidate your opponent with a false display of confidence. In poker, a bluff is used to try and induce the other side to fold a better hand. Likewise in litigation, a bluff is nothing more than taking settlement position that you have no real expectation of achieving if the case was to go to trial -- and hope that it scares the other side into paying more money than the case is actually worth. If using a bluff, you want to make sure your client understands that the numbers being discussed are not realistic. As a lawyer, if you repeatedly bluff and fold, your credibility as a negotiator will be negatively affected.

The key to managing expectations is making sure that you and your client are on the same page. To accomplish this you have to be able to give your client the most accurate jury verdict and settlement assessment possible. It is often wise to obtain insight from others about how they view the strengths and weaknesses of the case. Taking the time to solicit non-lawyer feedback will help you identify pros and cons that you and/or your client may never have recognized on your own. This is particularly true with jury cases where your own views are unlikely to represent all the potential diverse views and perspectives that will be represented by the jurors themselves. This type of feedback will identify potential problems while also helping you avoid confirmation bias. Confirmation bias is the tendency to favor or give more weight to information that confirms our preconceptions or hypotheses as opposed to information which refutes it. Confirmation bias can also occur as a result of our own financial and/or professional interest in achieving a certain outcome. This is also illustrated by the Upton Sinclair quote: "it is difficult to get a man to understand something when his salary (or settlement) depends on his not understanding it."

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

VIII. THE INITIAL DEMAND PACKAGE

When representing the plaintiff, your initial demand package is often the first impression the other side will have when it comes to claims you are making. So in representing your client,

you should do everything possible to make the most of this initial impression. A well documented and well reasoned initial demand can significantly shorten the litigation process. If your case involves potentially significant damages which will require a substantial settlement, the insurance company can almost always be expected to perform a significant amount of due diligence before being willing to make a meaningful offer. Therefore, 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. When representing the plaintiff, time is money and you rarely gain anything from waiting to provide the necessary information.

IX. EFFECTIVE USE OF THE COMPLAINT

Because at least 90% of all lawsuits eventually settle somewhere well short of trial, the impact of your initial pleadings should maximized. Therefore, you should consider drafting the initial complaint with settlement in mind. While a short notice pleading complaint is sufficient to start the litigation process, a detailed well written complaint can send a stronger message. A complaint by its very nature is a more serious document than is a demand letter. As a result it often has a different psychological impact on the defendant.

Drafting an effective and 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 are common and show 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.

X. ESTABLISHING A RAPPORT WITH THE OTHER SIDE

Regardless of which side you represent, always work to establish a good rapport with the other side. People are much more inclined make concessions to people they like, respect and relate to than they are to people they dislike or distrust. Most people are simply more likely to say "yes" to someone they like than you to someone who comes across as a bully. So rather than yelling at or threatening the other side, the most effective negotiators generally let your case, and your preparation, do the intimidating. Avoid arrogance and threats of sanctiosn unless unquestionably warranted. Establishing a good rapport with the other side can be done while also zealously advocating your clients position.

First impressions matter in any business setting, and ultimately a settlement negotiation is a business setting. After all, settlement negotiations involve the payment of money and the elimination of risk. Therefore, what you say at the start of any negotiation will often set the tone for the entire negotiation. The other side will quickly form an opinion as to whether you 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, it is not always necessary to strongly disagree or respond with an attack of your own. Attacking the other side's positions can intensify the will and desire of the other side to prove you wrong. The last thing you want to result from an attempted negotiation is a reinvigorated desire by the other side to prove you or your client wrong. Therefore in the early stages of the negotiation, it is usually best to avoid confrontation. Effective negotiators 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 harder without having a good rapport with the other side.

XI. NEGOTIATING WITH ADJUSTERS

When it comes to negotiating with insurance adjusters, it is important to remember that you and your client personally have much more at stake than does the adjuster. The adjuster will still get paid if the case does not settle. Despite this, and the fact that people make more concessions to people that they like, some lawyers are unnecessarily confrontational in pre-litigation negotiations. Therefore, you are more likely to reach common ground if you are pragmatic rather than irritated or belligerent in your conversations.

You should also remember that filing suit 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 lawsuit is a catastrophic event that will doom the insurance company or the adjuster. Acting as if the filing of a routine lawsuit is a major event suggests that you are actually an inexperienced lawyer. This is also reinforced by the fact that most adjusters and in-house counsel know that for many reasons plaintiff lawyers much prefer a settlement over a trial. Therefore, the better approach is to effectively communicate the pertinent information about your client's in a professional manner. If after doing that you reach a deadlock with the adjuster, you may try sending a copy of your complaint and initial discovery along with your final demand. If the negotiations go no further after that, then simply agree to disagree and move forward with the filing of the lawsuit. If you have done your best for your client there is no reason to take a failed negotiation personally. The discovery process and a jury trial will ultimately tell you if you were right.

XII. ACHIEVING YOUR GOAL

At the start of most negotiations you should set high but realistic expectations. Your initial offer or demand should reflect a position that you can credibly state and support. Your opening position should be at least 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. Your bottom line is your real go to trial number if you don't get it. Once your goal and bottom line are set, you should proceed with the negotiations as if your goal is actually your bottom line. You do this to avoid the tendency to subtly telegraph your bottom during the negotiations. In order to have a realistic shot at achieving your goal, the other side must ultimately believe that it is in fact your bottom line. In mediation, you should never let the mediator know your goal is not your bottom line.

When responding to the initial moves by the other side, you usually should try to stay close to your opening position until you have divined as much information as possible about what the other side is willing to do to avoid the risks and expenses associated with further litigation and trial. In order to achieve your goal it also very important to condition the other side for what you hope to achieve. Throughout the negotiation process you should strive to give the other side a realistic sense as to what is possible. You want to avoid the problem that occurs when the other side makes the assumption that there is more flexibility and room to move than you actually have. Most experienced lawyers have been involved in mediations where they were surprised to find out that the other side has little if any room to move from their initial position. While this is not always preventable, you want to make it clear going into any mediation what is possible.

XIII. MEDIATION

A. When to Consider Mediation

Mediation is the preferred 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. It is the inherent unpredictability of trial that makes it advantageous to settle rather than try most cases.

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

1. **Help with the client 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 mediate settlement will usually be much less costly than continuing with the litigation.
3. **Control**. The parties and their principals have a much larger 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 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.

While mediations are usually most effective when a trial date is approaching, mediation is also an effective way to settle cases early on. In the absence of an approaching trial date, nothing is better than mediation at getting everyone to focus their attention and energy on settlement. Without either an approaching trial date or mediation, the key decision makers are rarely sufficiently focused on the case at the same time to make settlement likely. An agreement to mediate gives everyone a specific date and time where all parties and representatives will get up to speed and gather together in the same building. As the day progresses and more time is invested in the mediation, the more the parties are invested in achieving a settlement rather than walking away.

B. Effective Mediation Preparation

In preparing for mediation, remember that it is your client's case as opposed to your case. It can be easy to lose sight of the fact that it is your client's life, business, and/or future that are at stake. Lawyers on both sides have to guard against letting their desire to win, and their own financial interest, interfere with or shade the decision making process. When you consistently focuses on the client's needs and objectives, the best interests of the client are best protected. To facilitate a successful outcome, you should meet with the client well before the mediation to clearly 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 assessment, or unrealistic expectations with regard to 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, the most important step in preparing for mediation is developing an actual negotiating plan. In talking with mediators, it is apparent that many lawyers do not do much to prepare for

mediation. The informal structure and non-binding nature of mediation frequently leads to a casual attitude about the process and the need for preparation. This is unfortunate for two reasons. First, your client is relying on you to be prepared and to guide them through the mediation process. Second, mediation is often the best, and on sometimes the only, opportunity to settle the case on favorable terms before incurring the expense and facing the risk of trial. If the other side has more information, and is better prepared, it is difficult to get your client the best available settlement terms.

One of the principle advantages of a well thought out mediation plan is that you and you're your client will be less reactive and more proactive as the mediation unfolds. In formulating your negotiation plan, you should:

1. talk candidly to your clients about what they really want to accomplish;
2. Set optimistic but specific goals;
3. Be committed to those goals;
4. Commit to a specific bottom line or walk away 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 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 help you evaluate the relative strengths and weaknesses of your own claim and further prepare you for trial if necessary.

C. Bringing the Mediation Process to a Successful Conclusion

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 many lawyers 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 actually 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 continue in reactive mode until movement stalls out altogether. 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 make at the table. It is not uncommon for the defendant even when requesting mediation to show up without the actual decision maker present. When representing the plaintiff this situation should be avoided at all costs. If the decision maker is not actually physically present – you automatically lose some leverage. While the plaintiff and his or her lawyer are sitting all day waiting for responses, the decision maker is essentially insulated from the action. In almost all situations you should not agree to go forward with the mediation without the decision maker being present.

Once the mediation starts, 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. If mediation is not going to be successful, it is almost always better to leave with the ball in the other side's court.

XIV. SPECIFIC NEGOTIATION TECHNIQUES AND PRACTICES

In reading about negotiation and talking to other lawyers about their own experiences, there are many standalone techniques and practices that you may want to consider using, or that you should at least be aware of so that you can identify them when they are used against you.

THE FLINCH: Show some degree of shock, anger or disappointment at the other side's initial proposal. When people make a proposal, they instinctively watch for your reaction. You never want the other side (or the mediator) see a reaction that conveys a relief or excitement.

WAITING: As previously discussed, there is much truth in the old saying: "he who speaks first loses." Therefore, whenever possible you should try to get the other side to state their position first. When representing the plaintiff, usually the only way to make the defendant make the first move is to convince them that if they want the case settled, then they have to go first. If you are not comfortable with the status quo, or if the defendant does not fear the case, or fear going to trial, then you will probably end up in trial whether you really want to or not.

THE HIGHER AUTHORITY: The other side may have an advantage when the person doing the negotiation is also the ultimate decision maker. When the other side knows that you have the final authority, they only have one person to convince. However, when you have to answer to a higher authority, at least in appearance, 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 there is a vague group or committee as opposed to a single specific person. This technique is particularly effective when used by the defendant. It can help avoid confrontation by allowing the negotiator to appear sympathetic and compassionate. This technique is best countered with patience and a firm commitment to your goals.

THE 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 WALKOUT: Walking away is the ultimate action to convey to the other side that you are actually at your bottom line. Walking away can be done with or without making your own best offer or demand. However, walking away is inherently risky and can destroy your credibility if you later have to initiate a settlement call. So before you walk away, make sure your client has a full understanding of all the potential consequences of doing so.

THE DEADLINE: In many retail settings, the seller uses the appearance of scarcity to close a deal. If you believe what is being sold is in scarce supply or that it may not be available for long at the current price, it can create an artificial sense of urgency in the buyer. Retailers create the appearance of scarcity by limiting the visible stock and by counting down the date and time when the sale ends. In the context of a legal negotiation the same effect can be created by making the other side believe that the opportunity to resolve the case is about to go away. This is particularly effective when the other side would accept the deal that is on the table but is holding out for a better deal. There can be a tendency to push the panic button when all the sudden it appears that an opportunity to settle is about to disappear. In litigation, the scarcity effect can be accomplished by the existence of real or artificial deadlines. However, the effectiveness of any deadline is only as good as the concern it causes the other side of the table.

GETTING EVERYONE FULLY INVESTED: The more time someone invests in an activity, the more committed he or she is 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 mediation, and it applies to the both lawyers and the clients. 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. This psychology can also result in a willingness to make bigger concessions later in the day or to gain relatively small concessions at the end of the day like shifting the costs of mediation.

THE SCRIPT: A script involves pre-planning most if not all of your 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. This can cause confusing and frustration on the other side as energy is spent trying to figure out the rationale behind what is not anything more than random preplanned moves. Using a script eliminates the mental gymnastics of trying to decide what to do next. It also can be used prolong a mediation to get the other side both mentally tired and fully invested in the litigation.

SPLITTING THE DIFFERENCE: The most frequently used closing technique is to offer to "split the difference." Regardless of what people say, everyone is aware of 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.

LET THEM WIN: Not really but at least in their own mind. It is better to give the other side the feeling that they have won concessions than it is to act as if you have crushed them. This can be done by initially asking the other side for more than you expect so that you can grudgingly make as many concessions as possible. It is partly through your concessions that the other side will feel that they have reached a good deal.

MAXIMIZE CONCESSIONS: It is usually unwise to make a concession without asking the other side for something in return. There are several reasons for this. First, what one side may not value at all, the other may consider value dearly. Second, any voluntary concession you give immediately loses its value.

GATHER INFORMATION: Use the negotiation to obtain as much information as possible about the other side's needs and interests. In most negotiations your client is better served early on when you do more listening than talking. Ask questions and listen to get more information than you deliver to the other side. Probe first and disclose later.

REJECT THE FIRST OFFER: While this is self evident, always make sure your client is prepared to say "no" to the first offer in order to get the best settlement available. Accepting the initial offer usually triggers two thoughts by the other side: (1) "I obviously could have done better"; or (2) "Something's wrong."

THE APOLOGY: 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 that the defendant 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, defendants can also improve their position by expressing sympathy and explaining how certain problem occurred and how certain decisions were made.

XV. AVOIDING PAYMENT DELAYS

In a perfect world for the plaintiff, once the case is settled the plaintiff's lawyer could just pick up a check the next day. However, defendants are rarely in a hurry to pay anything. Therefore, discussing the terms and time for payment of the settlement should be discussed well

before the final number is agreed – and never as an afterthought. When representing the plaintiff, do not wait until after the number has been agreed to ask about when the check will be ready. The date by which the settlement must be consummated should be a material part of the settlement agreement itself.

XVI. CONCLUSION

The principles of negotiation have been around as long as humans have bartered over goods and services. After reviewing many articles and books on both legal and business negotiation, I believe that I can say with some degree of confidence that effective settlement negotiation basically comes down to two things. Like most anything, the first thing is preparation. This includes preparing your client and preparing an actual negotiation plan. The more prepared you are the better settlement results you will inevitably obtain. The second thing is accurately identifying, and then maximizing, your client's leverage. Focusing on these two things while gaining a better understanding of the psychology of negotiating legal disputes will serve both you and your client well.