HOW TO NEGOTIATE THE BEST SETTLMENT

I. INTRODUCTION

In the civil justice system, most claims are resolved via settlement long before a jury is ever seated.[1] Therefore, in the vast majority of cases you cannot obtain the best result for your client without being skilled in the art of negotiation. Despite this fact, most lawyers spend little, if any, time refining their negotiation skills. My belated recognition of this deficiency in my own training was the impetus for me to research and write this paper.

Before going on any further, I want to be clear that nothing I am writing about is new. I have taken liberally from the numerous books and articles on negotiation techniques that I read while working on this paper. However, the negotiation techniques discussed have been tailored to the legal setting. This is because of the significant differences between negotiating a legal dispute versus most other deals. For example, most business negotiations are voluntary interactions where both sides can win by striking a deal. Both sides can usually walk away from the negotiation table without incurring any significant risk. This is not usually so when negotiating a legal dispute. The civil justice system is an inherently compulsory and adversarial process. The participants do not come together by choice. The process has more in common with a shotgun wedding than a traditional courtship and marriage.

Because of the adversarial nature of most legal disputes, the good will that is often present in other kinds of negotiations is usually missing. Both sides may face significant risks and/or catastrophic losses if they do not win, or if a favorable settlement is not reached. For these

[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

reasons, negotiations involving a legal dispute are more prone to become acrimonious and combative. Therefore, it is important for the lawyers to develop the skills that are necessary to effectively navigate the settlement negotiation process.

II. IT'S ALWAYS ABOUT THE MONEY

Potential litigants seek legal counsel for a variety of reasons. Sometimes the potential plaintiff feels mistreated, or has unanswered questions, or is looking for some form of vindication or accountability in response to a perceived wrong. On the other side, the potential defendant is usually an unwilling or at least reluctant participant in the process. And once involved, a potential defendant has many different reasons for initially refusing to settle -- even in those situations where objectively speaking there is at least some degree of fault. The defendant may have rationalized that the defendant's own actions were justified, or that someone else is more to blame. In other situations, the defendant may not have the resources to settle the claim or the defendant may not want to do anything that would encourage similar claims. But regardless of the underlying motivations, our civil justice system provides on one remedy -- the compulsory payment of monetary compensation.

While the underlying motivations may play a role at the outset of any settlement negotiation, in the end the final decision is always about money. In virtually every settlement negotiation I have ever been involved in a conversion occurs at some point where the back and forth is only about the amount of money to be paid. When the discussion moves to the point where it only involves money, the possibilities for psychological effects on both sides of the table are innumerable. This is because money is power. It holds a very powerful sway over our emotions, personality and decisions. So, regardless of the side of the table you are own it is

important to look for the subtle clues that will give you insight into the other side's willingness to pay much more than their current offer, or to settle for much less than their current demand.

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

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 situational advantage 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 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: (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 actual decision maker to career risk if the litigation does not go well after passing on the opportunity to settle the case.

On the other side, a defendant's leverage often includes the plaintiff's 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, the plaintiff's lawyer in a contingency fee case may encourage settlement to avoid the risk a total loss at trial. Therefore, even when the plaintiff has a claim with significant damages that could result in a sizable financial loss to the defendant, the defendant may have significant leverage because of the ability to delay and wait the plaintiff out.

When evaluating your client's leverage it is important to keep in mind that leverage can be either real or imagined. There are times your leverage may be only temporary such as when you know about a weakness in your own case that is not yet known by the other side. Likewise, there are time you may underestimate your leverage because you mistakenly believe that the other side has a stronger case than they do. But regardless of whether your leverage is real or imaginary, your effective leverage at any point in time depends completely on the extent it is appreciated and understood by the other side.

Because of the role that leverage plays in your ability to obtain a favorable settlement, one of your goals should always be to accurately assess your client's leverage relative to the other side. One straightforward way to do this is to ask yourself which side has the most at risk if the status quo is maintained – or 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 answer, 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.

When assessing your client's leverage, you should take into consideration certain economic principles and basic human psychology. Most people are more concerned with avoiding losses than they are motivated by the potential for additional gains. 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 has been made. In those situations, the plaintiff will often start spending that money in his or her mind. When this happens and there is a real risk that the plaintiff may get nothing at trial, 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.

An excellent contemporary example of this psychology at work can be seen in the "Deal or No Deal" game show. In this game show, there are 26 brief cases which each hold a different cash amount from $0.01 to $1,000,000. The contestant chooses one of 26 numbered briefcases at the start of the game. Each remaining case is opened as it is chosen by the contestant. As the different amounts are eliminated, "The Banker" will make an offer to buy the contestant's case. The player can accept the offer and end the game by saying "deal" or reject it by saying "no deal." Each time the player rejects an offer, he/she must play another round, eliminating progressively fewer cases: five in the second round, four in the third, three in the fourth, two in the fifth. Beyond the fifth round, the player eliminates one case at a time, receiving a new offer from the Banker after each. The ninth and final offer comes when there are only two cases left in play, the one originally chosen by the player and one other. If the player rejects this final offer,

he/she may either keep the chosen case or trade it for the other one, and receives the amount in the case he/she decides to take.

The Banker's offer is typically a percentage of the average of the values still in play at the end of each round. This percentage is small in the early rounds, but increases as the game continues and can even exceed 100% in very late rounds. In this game show, the contestants often 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. the economists never got in the lab. Thierry Post and his colleagues watched every edition of the show they could get their hands on, versions from Hungary, India, Turkey. They found a pattern they did not expect. When the game starts out well for the contestant and the bank keeps offering more and more money, the players typically are cautious and make a deal early. But economist who have studied the contestants also found that if the numbers go against the contestants, they tended to throw caution the wind and were willing to put more money at risk to escape from being a loser.

Risk aversion is a powerful tool used by experienced negotiators to settle cases on more favorable terms. To protect against the defendant successfully using the aspect of human nature against you, you must educate your client about the negotiation process. While the fear of loss is often a more effective form of leverage 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 the plaintiff does this, the decision maker for defendant is placed in the unpleasant situation of potentially having to explain why a significant risk was not eliminated when they had the chance. When done effectively the defendant may

offer to settle for more than is objectively warranted just to eliminate a relatively low risk of costly jury verdict.

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 as long as the day of reckoning remains remote in time. 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 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 your leverage may be ephemeral. 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 lawyers have had situations where their case turns dramatically against them. Sometimes this is unavoidable, but other times the turn could have been foreseen or even avoided altogether with a detailed assessment and plan.

IV. THE "GOLDEN MOMENT"

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

V. MAINTAINING YOUR OBJECTIVITY

When representing clients, you serve as both an advisor and an advocate. When serving in the role of an advisor, the lawyer's job is to inform your client their legal rights and obligations and explain their practical implications. As an advocate, the lawyer's job is to zealously assert the client's position. 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 something as basic as 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 often 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 what is known as "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 FIRST MOVE

In settlement negotiations, the plaintiff is almost always expected to make the first demand. However, this can be a significant disadvantage. There is a good amount of truth in the

saying: “he who speaks first loses.” Along the same lines is the Zen teaching: “open mouth -- already a mistake.” While it is difficult to do so from the plaintiff’s side, there are times when your client would be well served by forcing the defendant make the initial offer. An excellent example of why this works is a case where I represented a pedestrian hit by a car while crossing a four-lane road outside of the crosswalk. My evaluation of the case was: (1) that my client had significant contributory negligence; and (2) that the probable verdict range was 60,000 to 80,000.00 before any reduction for contributory negligence. My client also did not want to go to trial, and was willing to settle the for anything over 50,000.00. My plan was to make an initial demand of $80,000.00. However, before the demand letter was sent, the adjuster called and made an initial offer of $80,000.00. While I have no idea what I did not know, this offer obviously changed the ultimate outcome. Because of the information conveyed when the adjuster spoke first, I was able to settle the case for $120,000.00.

Another example of speaking first and losing was told to me by an experienced large loss regional claims adjuster. He told of going to a mediation with 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 “we are going to get this case settled in the $700,000.00 range.” The plaintiff’s attorney given the mediator information which ultimately resulted in his client receiving hundreds of thousands of dollars less than was available.

These stories are not unique. They are examples of why most plaintiff lawyers obsess about leaving money on the table. Consequently, the most successful plaintiffs’ lawyers will choose to err on the high side when making an initial demand. However, this is not without its own set of risks. There is always the risk that the initial demand is so high that it is not effective

in moving the case toward settlement. It obviously is counterproductive to make a demand that is not a reasonably likely outcome that might be achieved 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 which may force the lawyer to bid against himself. Standing on your initial demand when there is no response only works if you and your client are comfortable with the status quo and proceeding to trial.

When representing a defendant, the situations are very few and far between where you should give away your power to make the plaintiff go first. As a general rule, it is much easier to work toward your own settlement number when your initial offer is made in response to an actual demand. Exceptions include those situations where the defendant wants the case settled now but the plaintiff refuses to make a demand, or where the defendant is only going to pay a set amount and there is no advantage to waiting to convey that number to the other side.

VII. MANAGING EXPECTATIONS

In reading about negation techniques, a commonly repeated theme 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 pie in the sky or really nothing more than a bluff. Setting high expectations involves a determination about what it is that the client is reasonably likely to achieve at trial. This number 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. Similarly, in litigation a bluff involves 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 worth. If using a bluff, you want to make sure your client understands that the numbers being discussed are not realistic. Of course, if you as a lawyer 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. An invaluable source of information can be obtained simply 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 you identify positives and negatives that you and 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 array of diverse views and perspectives that will be represented by the individual jurors themselves.

This type of feedback will also help you to avoid falling into the confirmation bias trap. The confirmation trap is well 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.” 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 because of your own financial or professional interest in achieving a certain outcome. Avoiding the confirmation bias trap can be accomplished in difficult cases by making sure you get feedback as many uninterested people as possible.

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. MAKING AN EFFECTIVE DEMAND

When representing the plaintiff, your initial demand package may be 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 is one way to 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. 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 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 that you have thought the legal theories through and are ready take the case all the way. It should also make the consequences clear should the defendant elect not to try and settle the case.

At the other end of the spectrum is a vague, cursory, rambling and/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 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, righteous indignation and threats of sanctions. 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 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 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 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 if a settlement is not reached. The adjuster will still get paid if the case does not settle. Despite this, some lawyers are unnecessarily confrontational in pre-litigation negotiations. You are almost always more likely to reach common ground if you are pragmatic rather than irritated or belligerent in your discussions.

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 – or even worse, that you really want to settle the case. 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 out high but realistic expectations. Your initial offer or demand should reflect a position that you can credibly support. Your opening position should be a reasonably possible 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 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. 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 NEGOTIATING TECHNIQUES

In reading about negotiation and talking to other lawyers about their own experiences, there are many 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 being used against you.

THE FLINCH: Showing 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 or that gives away your bottom line.

REFUSING TO GO FIRST: In negotiations, there is truth in the old saying: "he who speaks first loses." Therefore, whenever possible try to get the other side to make the initial offer or demand. 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 wants the case settled bad enough, they will often give in and make the first move. But if you refuse to go first, or if the defendant does not fear the case, then you will probably end up in trial whether you really want to or not.

THE ABSENT HIGHER AUTHORITY: It is not uncommon for the plaintiff to show up to a mediation and find that the defendant does not have the real decision maker present. When the real decision maker completely removed from the face to face process, this can give the defendant a significant negotiating advantage. First, the defendant knows that the plaintiff is present and has the final say. They only have one person to convince and they can judge the plaintiff's reactions first hand or through the mediator's direct observations. When the defendant's decision maker is not present, it is much more difficult to convince them of the merits of your arguments. You also lose the making your own first-hand assessment. When one side has to answer to a higher authority, there are also more people that you have to convince.

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. Having to have a conference call with a higher authority during a mediation is particularly effective. The representative at the mediation can appear sympathetic and compassionate to the plaintiff while

blaming others who are far removed from the process. This technique is best countered with patience and a firm commitment to your goals.

THE WHISPER NUMBER: A "whisper number" is nothing more than giving an indication of what you think your client might be willing to settle for, or that you think you could convince your client to accept -- if there is a firm commitment from the other side that they can 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 that that you have made your last offer or demand. However, walking away from a mediation is inherently risky and can destroy your credibility if you later must 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: Retailers often create the appearance of scarcity to try and close a deal. If you believe that something for sale is in scarce supply, or that it will not be available in the future at the current price, then you are 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 go away. 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 you invest 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, 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 to get the other side so invested in the process that it becomes harder to accept failure later in the day. When it is used effectively, the other side may be willing to make bigger concessions late in the day that they would never have agreed to earlier.

THE SCRIPT: A script involves pre-planning most, if not all, 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 what actually means nothing. Using a script eliminates the mental gymnastics of trying to decide what to do next while it also prolongs a mediation and gets the other side both mentally tired and fully invested in the litigation.

SPLITTING THE DIFFERENCE: 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. While most lawyers are quick to deny that any move is intended to telegraph the midpoint of their settlement authority, everyone is always paying 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, there often comes a time where

one side proposes simply meeting in the middle. This process appeals to our general sense of fairness and reciprocity.

MAXIMIZING YOUR 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 value dearly. Second, any voluntary concession you give immediately loses its value. It is also better to make concessions to give the other side the feeling that they have won something. It is partly through your concessions that the other side will feel that they have reached a good deal if a settlement is reached. There is also little value in acting like you have crushed the other side.

GATHERING INFORMATION: Always 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 when you do more listening than talking – at least early on. Ask questions and listen to get more information than you deliver to the other side. Probe first and disclose later.

REJECTING THE FIRST OFFER: While this should be self-evident, rarely should your client ever accept the first offer. Accepting the initial offer also 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 people have bartered over goods and services. After reviewing many articles and books about negotiation, I believe that I can say with some degree of confidence that effective settlement negotiation basically comes down to two things. The first thing is preparation. Being prepared means preparing your client and preparing an actual negotiation plan. The more prepared you are the better settlement results you will obtain. The second thing is accurately identifying, and then maximizing, your client's leverage. Without leverage you are simply left to take whatever the other side offers. If you don't effectively use your leverage, then you will miss the opportunity to obtain the most favorable settlement terms. These two things are the cake, everything else is icing.