NEGOTIATION STRATEGIES

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INTRODUCTION

1. This paper deals with negotiation strategies at a commercial mediation. Counsel should remember, however, that a mediation is simply a facilitated negotiation. There is nothing in the mediation textbooks that you do not already know at some level. However, in too many cases counsel fail to discuss settlement with each other prior to mediation.

2. This failure to communicate often unnecessarily delays and adds cost to some cases which could have been resolved prior to mediation. In other cases the lack of communication ensures that the mediation is not as productive or as efficient as it could have been if counsel had talked beforehand. Your first strategy therefore should be to call the other counsel, resolve what you can, and at least agree on what cannot be resolved without help. You can at least pick the mediator who is best suited to that particular dispute.

INTERESTS

3. In any principled negotiation one must understand the parties' interests before one can discuss the various settlement options.

4. First, consider your own side's interests. What does your client really want and why? Why is the client's stated position in his or her best interest? How is the client better off?

What is the client trying to achieve in the resolution of the dispute? Where does the client hope to be in five years having regard to this case?

5. A key goal in the mediation process, therefore, is to identify the various interests and come up with alternative options for settlement. Remember that "interests" are the client's wants, needs, desires and goals. The "issues" are the questions counsel wants to resolve. Focus on interests rather than positions or issues.

6. Determining the interests to be considered requires analysis both of your own client's perspective and also that of the other side.

7. A negotiation will usually involve respectful, interactive questions so that each side begins to understand more deeply the interests of the other parties and indeed their own interests. "Be hard on the problem, soft on the people."

OPTIONS

8. Both sides must identify settlement options to satisfy everyone's interests. Some mediators will engage in a brainstorming exercise to generate options for discussion. The objective should be to develop options that each side will agree is better than their respective best alternative to a negotiated agreement (BATNA).

9. In generating options it is most productive if the parties work cooperatively together. The parties ideally should consider the various options having regard to objective criteria so as to assess their fairness. Options which are not seen to be fair will not generally be

productive. Demands for a particular share purchase price will be more compelling if supported by an independent valuation or similar evidence.

10. In advising your client, ensure the client focusses on the future and not the past. The object is to resolve the dispute and move forward.

11. Some lawyers object to early mediation because they believe more information will be available later either to make a more informed settlement decision or to obtain a "better" result by way of judgment.

12. The fact is, however, having regard to the cost of litigation and the opportunity cost for the client, you can and should give your reasonably informed opinion and your risk assessment as soon as possible. You can and should also mediate early in the lawsuit (if you cannot settle directly without assistance) unless it is clear that essential information has not yet been produced, e.g., expert opinions from an appropriate doctor in a medical malpractice case or a personal injury case or a valuation in a shareholder oppression dispute.

13. Be realistic; be cost effective; and do not let your ego interfere with your client's interests. For that matter, do not let your client's ego interfere with his/her own interest.

14. Do take advantage of egos on the other side, if massaging that ego can ensure a better commercial deal for your client.

BATNA

15. Ultimately offers, based on options, should be capable of being justified objectively, i.e., are they reasonable and fair. However, your client should not be assessing the fairness or reasonableness of the offer in a vacuum. The better question is whether the deal being offered is the best alternative to a negotiated agreement, rather than whether the agreement is somehow objectively reasonable or fair.

16. Your client's BATNA may mean going to trial, in which case you need to honestly assess the cost of continuing the litigation, the real risks and the time and executive effort to be expended, as well as the emotional effect on your client and the witnesses.

17. In the right case your BATNA may mean walking out of the mediation, even without necessarily intending to go through with the trial. Cases can always settle later.

NEGOTIATION STRATEGY

18. Textbooks distinguish between the two extremes of competitive bargaining and cooperative bargaining. In competitive bargaining the lawyer focusses on the preferred outcome of the negotiation, tries to make few concessions and manipulates as best he/she can the other side. Often competitive bargainers describes themselves as "tough but fair" but of course fairness, like beauty, is in the eye of the beholder.

19. The cooperative negotiator focuses on preserving the relationship, either between counsel or between the clients, make what they believe are useful concessions and look for common ground with a view to a "win-win" deal.

20. Ultimately, neither of these extremes is advisable. Hence the academic and practical advice to engage in "principled negotiation".[1]

21. Principled negotiation requires the parties to[2]:

(a) consider their alternatives;

(b) determine their interests;

(c) determine the various options;

(d) consider the options using objective criteria to determine their legitimacy;

(e) communicate effectively and persuasively;

(f) maintain relationships without personal attacks;

(g) avoid commitments to positions or options until all options have been explored and the BATNA considered.

CONCLUSION

22. Remember that:

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[1] Fisher, Ury and Patton, *Getting to Yes: Negotiating Agreement Without Giving In*, (2nd Ed), New York, Penguin Books, 1991.

[2] Stitt, *Mediating Commercial Disputes*, Canada Law Book, 2003, p. 37.

"In most instances to ask a negotiator, 'who's winning?' is as inappropriate as to ask who's winning a marriage?"[3]

EXAMPLES

Class Actions

- e.g., mass tort (listeria) or defective drug or defective medical product
    - multiple jurisdictions
    - has the action settled in the U.S.
    - status of negotiations in other jurisdictions
    - has the product been removed from the market
    - is it simply a question of money or is reputation important (for both sides)
    - role of the regulator, e.g., Health Canada or in the U.S. the FDA
    - health insurers in every province, especially Québec and Alberta
    - expert reports and will-says from witnesses
    - internal differences between the lawyers acting on each side
    - BATNA—bad deal may be better than no deal at all—need for realistic assessment
    - possibly make a partial deal, e.g., settle notice issues
    - possibly make a procedural deal, e.g., settle how discoveries proceed

Oppression Remedy Dispute

- is the company in the nature of a family corporation or is it public
- has there been proper disclosure of financial information
- experts and witnesses' will-says
- key contracts and their relationship to the valuation exercise

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[3] *Getting to Yes*, *supra*, note 1, at p. 148.

- which side has the better relationship with key suppliers or contractors or customers
- confidentiality (arbitration *versus* trial)
- is there a continuing relationship

Construction Dispute

- can you have pre-litigation mediation of a specific dispute
- in litigation there will likely be many claims and counterclaim, often involving many issues and raising the possibility of multiple mini-trials
- delay claims
- deficiency claims
- claims for extra work
- warranty items
- role of subcontractors' claims
- continuing relationship or has it broken down irretrievably
- is there need for an inspection or view
- do any "neutrals" need to be present, e.g., consultant or architect
- has the information been properly presented, e.g., a Scott Schedule