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## BASIC THEORIES, APPROACHES AND TECHNIQUES OF NEGOTIATION

Many articles approach the study of negotiating techniques from a single-negotiator perspective. This article explores negotiating techniques from the dual negotiator perspective, the most common of which is perhaps the client-attorney team approach.

### I. CREATIVITY.

The negotiation of a matter provides the lawyer with many opportunities to use creative abilities. Some attorneys simply "run through" the issues basically accepting that which the other side is willing to give with respect to each and every issue. However, the good negotiator recognizes that a negotiation often may be likened to a "three act play" with a beginning, a middle and an end, and the excellent negotiator attempts, at all times to be the director.

The good negotiator draws upon his or her entire life's experience together with the substantive knowledge of those areas of the law which impact upon the negotiation. In drawing upon one's life experience, it is just as important to recall an anecdote, joke or "war story" when the circumstances call for such an interjection.

### II. PREPARATION.

There is nothing more important to insure success at a negotiation than proper preparation. What is equally as critical to a successful negotiation as a knowledge of the law is a knowledge of one's client's needs and concerns as well as those of the adversary. Accordingly, one must then think through the alternate and varying positions that might be taken with respect to whatever issues might be considered to be deal points. It is important for the negotiator to "play act" in his or her mind the various strategies and positions that might be employed, in the abstract initially, with respect to any issue or term that the attorney believes may be a negotiation point. By preparing in this manner, the attorney is not preconditioned to the client's needs and is thereby able to "free think" each issue and point so that he or she may be able to provide additional approaches to an issue, additional satisfactory resolutions for the client, and ultimately, the compromise position for both parties to reach consensus and move to the next point. Failing to analyze each point prior to meeting with the client may cause the attorney to deal with the very same "blindness" that the client brings to the table. Therefore, this analysis should be done prior to talking through the issues with the client.

Negotiations, without having first sat down with the client, should be avoided whenever possible. In so doing, the negotiator and the client will at least have a brief opportunity to obtain "a feel" for the other. Since negotiation involves a certain degree of play acting, it is worthwhile for the attorney and the client to get an understanding of the other person's "body language".

Oftentimes, having done the preparation discussed above, it is the attorney who helps the client develop the "final" position on many of the issues since the attorney, if he or she thinks through the issues beforehand, will be able to sit down with the client with an open mind – very often one of the critical reasons attorneys are employed, i.e., to bring intelligent and creative objectivity to a particular situation. It is not infrequent that an attorney will help a client to understand the total picture better and thereby enable the client to rethink that which the client's position ought to be, as well as to help the client re-evaluate the "trade offs" the client is willing to make by better understanding which terms are more important to the client and, equally as important, which terms may be more important to the adversary and not of such great concern to the client thereby providing the client with a better understanding of the client's arsenal of "giveaways".

It is most important for an attorney to help his or her client to maintain flexibility. Flexibility is often the ingredient necessary to enable a party to compromise a position in a manner where that which the client has given up is less valuable than that which the client has been able to obtain from the opposition, thereby allowing the client to realize a benefit and yet cause the parties to reach agreement. In that connection, it is equally as important for the client to discuss and fully understand with the attorney the needs and concerns of the opposition. It is foolish and short-sighted to neglect the other side's needs and concerns.

### III. ARRIVAL AT THE NEGOTIATION.

It is a sign of strength to demand or strongly request the opposition to come to one's office or the office of the client. The setting of the meeting can set the tone for the meeting, and there are many reasons why one may wish to have a formal as opposed to an informal setting – it should be thought through and, if possible, the setting for the meeting should match the intended tone one wishes to create for the meeting. Of course, this may often not be practical.

If the meeting is at the negotiator's office, it is that much more easy for the negotiator to control the meeting.

Control can be obtained by simply sitting at the head of the table, by sitting next to the only phone in that office, or by sitting next to the door. Control may also be obtained by commencing the actual negotiation, as apart from the prenegotiation social amenities to be discussed in the next section.

It is not necessary to maintain control at all times or at any time during the negotiation so long as one understands why one has or does not have control.

### IV. OPENING STATEMENT AS WELL AS PRE-OPENING PLEASANTRIES.

When one enters a negotiation from strength, it is often desirable to keep the humanization factor to a minimum and maintain a strong sense of formality so that the opposition does not get the feeling that it can ask for things it would otherwise not feel comfortable in asking for. Accordingly, it

may be appropriate to seek to expand the pre-opening pleasantry aspect of a transaction when one feels one has little or no bargaining strength.

#### THE SUCCESSFUL NEGOTIATOR IS AN EXCELLENT LISTENER AND A CAREFUL OBSERVER.

The best thing a negotiator can do is to use the pre-opening aspect of the meeting to get a "feel", if possible, of the situation and a general "lay of the land".

Initial control is taken by the individual who terminates the pre-opening pleasantries which may last from 30 seconds to 30 minutes, depending upon the amount of coffee and tea interruptions, and commences the meeting by making the statement which moves the meeting from the pleasantry stage to the initial discussion stage. This statement can be made by any party at the table and puts initial control into the hands of the person making the statement because that person is then in the best position to create the agenda for the meeting or, at very least, suggest the starting point. A starting point can be critical, and while it may not be agreed to by the others present, it is the individual making the opening statement who has the opportunity to pick and choose the starting point.

#### V. THE BEGINNING OF NEGOTIATIONS.

While negotiations may not always resemble the following anatomy, for purposes hereof we shall break the negotiations into three components: the beginning, the middle and the end.

The first aspect of the negotiation will therefore be the beginning. It is in the beginning that strength is often exercised and weakness is often exposed. Oftentimes, a discussion ensues regarding when the "big issues" will be addressed. Sometimes they are saved for last; other times they are addressed first. It is important during the beginning of the negotiation for the negotiator to assert himself or herself and put forth the positions and concepts that he or she wants to permeate the entire negotiation.

There are many opening tactics that may be employed. One tactic that is used is the so-called "start real hard no matter what approach".

Another approach that is used is the casual "good-guy" approach which is used to camouflage an extremely hard-nosed approach on the actual substantive issues.

Sometimes it may be in the best interests of the negotiator to make sure all the deal points do not get resolved on the same day. On the other hand, it may be in the best interests of the negotiator to force through discussion of all the deal points. Similarly, it may be worthwhile to cover all the deal points but leave certain deal points open. Techniques regarding speed and emphasis are, of course, subject to each situation and a variety of variables.

Another opening technique is to create confrontation on every issue as opposed to providing no opposition on every issue.

As is the case with the entire negotiating process, the initial aspect of negotiation is an orchestration, oftentimes filled with play acting and the creation of impressions. It is at this point that the bromide "first impressions are very important" turns out to be true. Because a skillful negotiator may wish to create impressions and create a tone which may not appear to be in the client's best interest of quickly ending the negotiation in a successful manner, it is particularly important for the negotiator and the client to spend time with each other so the client can learn the negotiator's tactics and discuss the strategy that the negotiator intends to employ. It is very difficult and often impossible to create impasse and slowdown without first obtaining the client's approval. Very few clients are willing to risk a deal. It is important, therefore, for the negotiator to explain to the client (unless the circumstances indicate otherwise) that the negotiator has no intention of killing or stalling a deal. Rather, the negotiator is using techniques to get resolution of issues more favorable to the client than might otherwise be obtained were the negotiator not to take apparently negative positions (without, however, jeopardizing the transaction).

While the opposition should never be under-estimated, most people are generally not willing to spend the time and endure the continual confrontation that can occur with long and difficult transactions. It is the nature of most to look for compromise and to find non-confrontational approaches. It is this element of human nature that the skilled negotiator can exploit by creating confrontation and prolonging negotiations to only, later on in the negotiation, attempt to act as the compromiser and the expediter, but in a manner so as to obtain better resolutions for the client through the device of finally looking for ways of expediting matters or avoiding confrontation. One approach in connection with this method is to postpone the issues where the negotiator has the least leverage so that they are raised at a time when all of the participants are looking for compromise and acceleration. Such an approach may enable the negotiator to lump together issues where he or she is weakest in such a manner so as to obtain better terms for the client either by oversimplification or perhaps by putting the "last six issues on the table and splitting them equally in terms of who gets the advantage", thereby perhaps giving the negotiator better terms on two or three points than would have been obtained were each issue individually negotiated.

#### VI. THE MIDDLE GAME.

The middle aspect of the negotiation comes immediately following the end of the initial tensions – about the time when the participants in the room begin to relax and fall into a type of rhythm in terms of dealing with the issues. It is at this point that the tone has been set, the leverage of the parties has generally been exposed and the strong participants have come to the fore.

The middle aspect of the negotiation is a particularly good time to use the device of contrast. One way which can be successful is to pick a theme as being particularly important to oneself or to the client and fight hard on every issue that touches upon the theme. For example, the theme the negotiator may choose is the speed with which the deal must be done; therefore, every issue dealing with speed is artificially created and made a deal point. Oftentimes simply putting forth these themes as being important

to the client enables the negotiator to fare better in respect of the issues dealing with this theme, particularly when the theme has inherent validity and the negotiator continues to return to it as important to the client. Using a theme as a device is particularly beneficial because the opposition cannot argue the invalidity of the theme. Using a device such as this can become particularly important because not only can the negotiator obtain better terms with respect to collateral security but the negotiator may decide to push quite hard only subsequently planning much later in the negotiation to ease off on the collateral being sought, using that easing off mechanism as a trade off for something else the negotiator really needs or wants. This is a device which might simply be called creating a deal point for the purpose of relinquishing the point in order to trade for something really important to the negotiator. This technique can be extremely useful and there are often several unimportant points to a client which can be raised to a higher level because of their inherent validity only later to be traded for, or perhaps be obtained. In all events, it is a win-win dynamic for the negotiator. However, in order to create and obtain better terms, the negotiator must know and understand the business aspects as well as the legal aspects of his or her client's business so that he or she can create deal points out of lesser points and clearly understand the real points that the client needs to win.

It is perhaps the middle aspect of the negotiation in which all of the devices coupled around human nature can become important. It is here where life's experience, and the negotiator's ability to recognize that the negotiation is a stage, becomes important. Very often a quip, a joke, a war story or some other similar technique, is just what is needed to break the ice or reduce the pressure that may have been created for a number of reasons.

Important techniques which often arise in the middle of negotiations but of course can be used at any of the ends, whether the front or the back, are the devices of antagonism and compliment. However, antagonism should not be directed toward the other person; rather, it should be directed toward that which the other person is saying. It is generally a mistake and frankly "bad faun" to attack the other person directly. It is much more effective to attack the statements of the opposition. By the same token, a well-placed compliment can often be disarming to the opposition as well as making the one giving the compliment look like the "regular guy" to all participants.

Another device which when appropriately used can be quite effective is that of humility; similarly effective, is the device of self-assuredness. These antithetical devices can each disarm and/or intimidate the opposition.

#### THE END GAME.

The final third of the negotiation can end with a whimper or with a bang. Very often the mode of the negotiation has turned into one of quickening pace in order to work through all of the remaining issues so that the parties can adjourn with a feeling of completion. It is during this aspect of the negotiation that many seemingly small points are easily given away by the negotiator who is tired or the client who has become somewhat bored, lost interest or is more concerned about getting home for dinner or catching a plane. It is the aspect of the negotiation where the skilled negotiator strengthens his or her resolve and takes the time to win the important points. Very often simple "stick tuitiveness" can win a multiple of points since the

side with greater resolve can often cause greater compromise from the other side. Quite often it is nothing more than the side with greater resolve that wins the points.

There are many other end play gambits. When a negotiator finds that the client is weakening his or her position, it is not uncommon for the skilled negotiator to simply end the meeting by saying that the balance can be worked out by the negotiators via telephone. Another approach for the negotiator who has the obvious strength as the meeting winds down is to announce in whatever way that is not offensive to the group that the meeting cannot adjourn and no one should leave until the deal is either completed or dies.

One of the advantages to the negotiator, regardless of leverage, in connection with deferring issues that could not be resolved during the meeting and raising them again at the end of the meeting is that it gives the negotiator the advantage of obtaining much more information and feel for the issues by virtue of having discussed many issues subsequent to the issue creating impasse.

It is not uncommon for the skilled negotiator to be able to take a weak overall position and nevertheless win a point at the end of the negotiation which could not be previously won. This can be accomplished through a variety of techniques, perhaps the simplest of which is to announce that since the other side won all of the other big issues, this one has to go to his or her client.

In general, it is always best to make the other side feel that it has walked out with "a win", and has done well, regardless of reality. It is always appropriate to give the other side a sense of success with respect to a negotiation. One way to accomplish such a feeling for the other side is to have cogent and rational reasoning for the positions being taken by one's client. Another way to provide the other side with a sense of victory is to allow the negotiation of a particular point to be won by the other side after the other side has made a presentation of the reasons why it should win, with the negotiator supporting those reasons and agreeing with them, thereby giving the other negotiator the sense of having won the point on the merits through intelligent negotiation.

Regardless of how bitter or difficult a negotiation may have been, it is always appropriate to try to end the negotiation on an upnote or with a sense of cordiality. In the final analysis, negotiations are composed of people and human relations are critical to move deals forward.

#### VIII. CONTROLLING THE PAPER.

It is not enough to negotiate well and leave a room after having "won the negotiation" unless the fruits of that negotiation are properly drafted into the particular document for which the deal calls. The only lasting memory of a negotiation is the written words which document that negotiation. In general, the side that controls the drafting of the paper always has the advantage because many sub-issues, as well as sometimes major issues, arise as the paperwork is being drafted. Since certain issues and sub-issues may not have been discussed in the negotiation, it gives the draftsman the

license to approach it from any perspective he or she may desire. Obviously, the person drafting the document will lean the approach toward his or her client. In addition, drafting allows the draftsman to create nuances and inferences in favor of the draftsman's client as well as to draft the points won by the other side in such a manner so as to limit them to the greatest extent possible or perhaps even undercut them.

While, of course, the other side may have comments and/or objections to approaches taken by the draftsman, it is nevertheless true, although perhaps a bromide, that "once begun is half done" and therefore the bulk of that which is put on paper will tend to remain close to the manner in which it was initially drafted.

#### IX. SURPRISE.

It is not uncommon for skillful negotiator to be surprised or to be confronted with a question to which he or she does not know the answer.

A bluff under such circumstances is foolish. It is generally far better to admit surprise and simply ask for the opportunity to confer with one's client privately or, in connection with a question to which the answer is not known, to admit that fact and ask for a recess, during which the negotiator can perhaps call the office to obtain the answer.

It is far better to feel uncomfortable about wasting five or ten people's time for 5 minutes than to err on a critical point that could have been handled correctly had one taken the time to do so.

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