

Negotiation and Persuasion: Before the Table

By Robert A. Creo

Coming in the September/October issue: The next column, to be titled *At the Table: The First Course*, will explore best practices for making and responding to opening proposals.

Earlier columns have addressed the lawyer's identity and reputation, exploring self-awareness, perpetual learning, professional growth through civic service, persuasion and emotion, specifically fear and anxiety. This column addresses the preparation and self-control necessary for effective communication and persuasion by focusing on preparing and engaging in negotiations.

One model for conducting the negotiation session is as simple as the proverbial five "W" questions — Why? Where? Who? When? What? — assisted by How?

Why?

As counsel, you, along with your client, should have specific goals and taboos for the negotiation session. If objectives are vague or undefined, your session will be worthless or counter-productive. Don't participate just to hear what the other side has to say. Participate to advance your interests with specific points that advance the theory of the case or transaction. Be conscious of these narrow goals during the entire meeting. Once your objectives are met, end the meeting.

Where?

I generally prefer to go to the other counsel's office whenever possible. Some of the advantages include:

- Opposing counsel is likely to be more hospitable and act civilly in his or her own premises.
- Opposing counsel has access to all of the case files and documents. There are printers and copiers and staff to provide documents to you. Of course, with so many lawyers working from laptops, many lawyers maintain most or all of the case documents on their computers.
- You may get to meet associates, paralegals and other staff you frequently communicate with by email or telephone.
- Opposing counsel or his or her client(s) may feel more comfortable and have less stress on their home turf.
- You may gain insights about opposing counsel by observing his or her office and working environment. Many midsize or large firms, however, now group their conference rooms on a separate floor, so you may not see much and opposing counsel can easily retreat, leaving you alone in a conference room.
- You can terminate the meeting more easily by just leaving.

When I was a young lawyer, I went to opposing counsel's office to negotiate a resolution with the intent not to leave until a settlement was obtained. We started at the end of the day and sat in his personal office. We went into the evening and everyone else had left. We reached an impasse and I made no physical motion indicating we were done or that I was leaving. He calmly got up, turned off the light and asked me to make sure the front door was locked as he walked out! Fortunately, within a few days we addressed our differences and reached an agreement in a mutually face-saving manner.

Who?

I believe that it is rarely a disadvantage to have your principals in attendance, even when you perceive that they are less than impressive clients or otherwise may make a negative impression. Clients are a two-edged sword. Their negatives can be redirected by effective counsel to further





positions or avoid concessions. For example, if your client maintains an irrational position and authentically communicates it during the meeting, you can have a sidebar with opposing counsel and explain that this is the reality and the client is not going to let go of the deal point. You may be successful in obtaining a concession or trading a throw-away issue in exchange for the point. If you have sufficient leverage or if time is on your side, you might just shrug your shoulders and ask the opposition if they have any suggestions for how to deal with the point. Likewise, if your client acts with raw emotion or is rude or otherwise hostile, it may be important for the other team to see this firsthand.

When?

Transaction or case deadlines may drive the timing of meetings. Many negotiators believe they should engage when the other side perceives them to be in the strongest position. This is a good approach, but the other side may avoid bargaining when you are strong and will seek vulnerabilities. I recommend not shying away from an opportunity to meet, regardless of the perception or misperception of leverage, provided that you set specific goals and limitations on concessions. Despite the chest-thumping of trial lawyers, litigation is not war. The analogy only goes so far. No one, including your side, is going to be physically vanquished in a negotiation session. Not every interaction with the opposition is a decisive battle, and even the most dramatic debates or confrontations do not always have clear winners and losers. Attempt to engage at an optimal time and schedule, in recognition of the pres-

ures of other professional and personal commitments. Set the meeting for the time of day when you are at your best.


Research by Robert Axelrod shows that reciprocity and cooperation are enhanced by frequency of interactions. For example, three one-hour sessions are better than a single three-hour session for enhancing relationships. When there is significant ground to cover in the transaction or case, schedule multiple sessions with a set duration for each.

What?

The content and format of information and the designation of speaking roles should follow the plan prepared in advance of the meeting. The nature and order of your presentation and the supporting documents and any props or visuals should be managed just as a litigator would in a trial. All communications should be designed to advance your objectives.

How?

Your demeanor must be your own. I promote authenticity. Effective lawyers speak with sincerity and with measured words. Their language is grounded in legal principles,

procedures or culture/conventions common to the practice area. They do not become rattled by the vicissitudes inherent in advocacy. It is usually counterproductive to react with harsh words or actions aimed at opposing counsel. Insults, wisecracks or snide remarks might advance your case when they mesh with your narrative and your client has significant leverage. If you are thrown a curveball or are feeling stressed, pause to collect your thoughts. One approach is to say that you would like to think about it and confer with the client before responding. I do not advocate speaking in a disrespectful or aggressive manner. Be conscious of your feelings, including the strong emotions of fear, surprise and contempt. My mantra is CCC: Calm, Confident Communications. 

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Pittsburgh lawyer Robert A. Creo has mediated and arbitrated thousands of cases since 1979, including serious-injury and death claims, complex business transactions and cases involving multimillion-dollar settlements. Among other things, he has served as a salary arbitrator

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References and Additional Sources

- Robert Axelrod, *The Evolution of Cooperation*, Revised 2006 (Basic Books)

TAKEAWAYS

- Do not fear going to the home court of the opposition.
- Accommodate client negatives, using them to enhance your theory or narrative.
- Go to the table as often as possible.
- Maintain calm, confident communications.