



At the Table: Dealing, Power and Leverage

By Robert A. Creo

Earlier columns have addressed the lawyer's identity and reputation, explored self-awareness, perpetual learning, professional growth through civic service, persuasion and emotion — specifically, fear and anxiety — the preparation and self-control necessary for engaging at the bargaining table and making opening positions, and the best practices and language of persuasion. This column addresses issues involving power, leverage and relationships in negotiations. Future columns will explore the decision-making process and specific persuasion techniques and tips.

Peace you don't make with friends, but with very unsympathetic enemies — Yitzhak Rabin, former prime minister of Israel.

The Negotiation Dance

Although there are other legitimate viewpoints, my experience is that best practice for obtaining your clients' goals and protecting their interests is to engage in a civil and respectful negotiation process. You can be competitive in a principled manner while still collaborating with the opposition. The analogy of a negotiation dance is common and apt — and that requires some level of cooperative communication.

There are many genres of dance, with the pace, level of contact, duration and expectations varying with the beat and style of the music. Almost all successful dancing, however, is based upon a willing partner and harmony grounded in mutual respect. If you are out there alone, dancing like Elaine on “Seinfeld,” it is unlikely you will be heading toward a verdict, or no deal, as the negotiation spins out of control.

Respecting Roles and Relationships

If the clients disrespect each other, this should not transfer to the counsel disrespecting each other. Zealous representation of clients does not require the counsel to be the alter ego of the client. One side of a case is not the Borg of “Star Trek” that has a collective consciousness and collectivization of behavior and action. Lawyers must “Miran-dize” their clients to manage their expectations and to make them understand that the relationship between lawyers is independent of the case or transaction. Disrespect need not be integral in the bargaining relationship and should not be derivative from the clients.

Respect has been considered to be an internal psychological stance that recognizes the other party's identity and formal role in a matter or the community. Obtaining respect is an incremental process. A person may have a head start based upon his or her title, role or reputation; however, it still takes incremental effort to earn the respect of adversaries. Each and every interaction between counsel has fallout, positive or negative, rarely neutral. Psychological research contends that respect begins with sincere recognition of the fundamental dignity of other participants. When you like the opposing counsel or clients, mutual respect gains traction. Displaying negative emotions, especially contempt, or insulting opposing participants creates a downward spiral from which it is difficult to recover in later negotiations.

Since all transactions end in a contract or no deal, and more than 99 percent of claims result in settlement, the focus of any case or problem should be to obtain a cost-effective resolution within your targeted outcome.

I contend that the majority of the research and negotiation literature supports a cooperative, win-





win approach to negotiations. Only rarely, usually when all participants perceive that a party has much superior bargaining power, leverage or resources, do aggressive and uncivil communications prove productive based upon one party's ability to coerce an opponent into an unfavorable resolution.

Acting with authenticity and engaging the subject matter and questions directly leads to cooperation. Candor is the lubricant that brings trust so that when you take a hard line on a specific point or position, it will stick.

As noted in prior columns, there are differences in negotiating a claim subject to litigation and representing clients in transactions. Entering into a contract creates a legal relationship based upon mutual obligations and relationship expectations. Impasse in transactions results in a termination of the relationship or, when there is an existing contract or legal right, subsequent claims or litigation. Litigation looks only to past rights and facts, while transactions are all about the future. Usually by the time a matter proceeds into litigation, except for a number of categories such as employment claims, landlord-tenant issues or other ongoing contractual relationships, the parties have had enough of each other and are seeking to end or minimize the current and future relationship. Pessimism and mistrust reign in litigation while optimism

about the future relationship should be at the core of new transactional relationships.

Acrimonious or competitive negotiation tactics may negatively impact the launch of the business relationship. It is not uncommon for the two clients to have the key elements of a deal already agreed upon when they approach the lawyer to document it. Many lawyers profess not to be "deal killers," but raise legitimate issues of future risks or gaps in the proposed terms or conditions. Lawyers in specific industries may also seek to insert what they believe are boilerplate terms for the nature of the transaction.

Hardball tactics or harsh communications are generally counterproductive to creating a positive business environment between the two clients. Most transactional lawyers can tell a story about clients forcing the lawyers to the sidelines and re-engaging directly with the other clients in order not to derail the deal or poison the relationship.

Power and Leverage

A brief exploration of power, leverage and bargaining advantage shows us that leverage and power are not the same thing, although either one of them may result in an advantage at the bargaining table.

Leverage is about situational advantage, not objective power. Leverage is not a constant: It changes. Leverage does not depend

strictly on the facts but rather the perception of situation by others. Leverage allows a party to bluff successfully in negotiations.

Power has been considered by researchers to fall primarily within one of these three categories:

- Positive: Needs-based — what the other side wants or needs
- Negative: Threat-based — to make the other side worse off
- Normative: Values — consistency, principle, moral obligations, reputations, self-esteem

Normative power stems from the ability to persuade people to do the right thing. It is based upon an appeal to the superego of a decision maker to take the proverbial high road. When I was a teenager, it was popular to call this approach "reverse psychology," which was seen as a way to propose the opposite of what you wanted in order to win the point or outcome. This is a simplistic view that is nevertheless helpful to keep in mind.

A scene from the movie "Schindler's List" illustrates this complex approach to real power and not leverage in a decision maker. Oskar Schindler, played by Liam Neeson, respectfully confronts the commandant of the concentration camp, Amon Goeth, played by Ralph Fiennes, who faces a very public decision about whether to execute a female housekeeper who violated a rule. Schindler tells him that the exercise of true power is not to do the expected, which is to shoot her, but to spare her. Goeth had been executing Jews the entire time for little or no reason, including for sport and out of boredom. Goeth reflects a moment and sees how his conscious decision to ignore standard procedures further personally empowers him. Oskar's subtle ploy works to save her life.

Assessing Identity, Power and Leverage

There is no one approach or magic formula for assessing the complex interplay of identity and power or leverage. There are, how-

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- Cooperation usually goes further than competition.
- Respect for each participant at the table is a prime goal.
- Authenticity builds trust and credibility.
- Assess power and leverage at each stage of the negotiation process.
- Relationships matter.
- Dance is a collaborative process.
- Prepare documents specifically for the negotiation process.

ever, some basic questions to explore that should provide some insight and guidance. Some of these, in no particular order, are:

1. Which side has the most to lose from no deal?
 2. What are the procedural or market-driven timelines?
 3. Over time, can I improve my alternatives or make the others' worse?
 4. Can I gain control over something someone else needs in the event of an impasse today?
 5. Can I commit others to norms that favor my result?
 6. If I state that my side has greater leverage, is that credible? Can I back it up with some objective facts or reasonable predictions?
 7. How important is it for the opposing counsel or clients to save face?
 8. How important is it for my client to save face?
 9. What is my best alternative to a negotiated agreement today?
 10. If we reach an impasse today, what is the impact for future negotiations of any concessions made or other partial trade-offs?
 11. At the end of the meeting, do I believe that I have treated the opposition with authentic respect and in a manner that furthers the goals of my client?
 12. At the end of the meeting, have I maximized the engagement potential of the meeting in a manner that furthers the legitimate interests of my clients?
- There are numerous other questions or

deal points that may be advantageous to ask yourself, your client or the opposing counsel and clients. As noted in prior columns, preparation is key to successful negotiations, including written questions and role playing. Lawyers would not go without a list of questions, bullet points or other documents to work from when taking a deposition. Yet it is more common for lawyers to not create a list of questions, checklists or talking-points documents when preparing for negotiations. These documents are the tools of the trade for effective persuasion at the table. In addition to creating a potential communication structure for bargaining, they create a negotiation-guideline document with the client or, subject to their review, help focus the goals and reinforce reasonable expectations previously set by you with the client. If the client is not present with you, the guidelines provide working parameters and clarity of instructions from the client on specific deal points.

Summary

My experience, supported by research and the literature of negotiation, has led to a number of tenets of negotiations. How you treat the other party defines you. Two wrongs do not make a right, so going low when they go low is not productive in the short or, especially, the long run. Appropriate authentic empathy does not equate to weakness or vulnerability. Not every sentence need be a competition or a tug-of-war over facts, law or positions. Using

extreme words such as “never,” “always,” “right,” “wrong” or “ridiculous” is unlikely to have any impact on the opposition and may cause a loss of credibility and any perceived leverage held by you. Personal attacks and insults are counterproductive and move the focus from the client or argument to counsel and their own personalities or flaws. Negotiation, especially in transactions, is not trial by combat. Being successful in the negotiation dance requires cooperation and not attempting to lead in a fast and hard manner. ☞



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