



Negotiation and Persuasion: Before the Table

By Robert A. Creo

"Plans are worthless, but
planning is everything."

— Dwight D. Eisenhower

Earlier columns have addressed the lawyer's identity and reputation and have explored self-awareness, perpetual learning, professional growth through civic service, persuasion and emotion, specifically fear and anxiety. The focus of this column is on the preparation and self-control necessary for sound decisions and effective advocacy in negotiating a transaction or resolution of a case.

Litigation and Transactions

Although representation in a transaction differs from being counsel in a claim or litigation, my experience as an advocate, mediator and arbitrator has enabled me to recognize the commonalities

between and core skills inherent in both forms of representation. There are, nevertheless, fundamental differences that often dictate strategy and tactics unique to the type of practice or matter.

Legal claims are subject to the jurisdiction of some tribunal where there is ultimately a procedure and a third party authorized to impose an answer or resolution to break any impasse. Claims subject to litigation almost exclusively focus on past transactions or behavior. An aggrieved party, including the state and victim in criminal matters, states a cognizable claim in a formulaic manner so that it is properly ushered through the litigation process. Procedural law and the maneuvering of counsel may be more determinative of outcome than the substantive law. When negotiations fail on a procedural matter, there is a well-understood path to follow for recourse. Many negotiations over process end with "I'll see you in court" rather than in amicable resolution. There is no requirement that you persuade opposing counsel of anything during the course of the matter.

Transactional lawyers, however, operate entirely without the benefit of an external authority to resolve conflict or break impasse. The art of the deal is an apt description since transactions, like art, can be primitive, simple, complex, abstract, layered, textured, impressionist and multi-dimensional, using a wide range of materials, techniques, shapes and sizes. When at impasse in the formation of a deal, transactional lawyers have only one BATNA (Best Alternative to a Negotiated Agreement): Walk. It is often simply a case of deal or no deal. Your client has lived without the deal and can continue to live without it. A bad deal can lead to ruin. The most difficult part for the client may be to abandon the sunk costs, including your fee, and move on. Best practice for transactional lawyers is to immunize the client up-front to the possibility of the deal being killed because of a failure to reach acceptable economic terms or risks within client and lawyer tolerances.

At its core, transactional lawyering is a cycle of obtaining and analyzing information, deciding and then attempting to persuade. The final phase of documenting the deal is in creating the language that expresses the intent of the



parties while allocating risk of future contingencies and events, especially defaults on the contract. In short, litigators live past narratives while transactional lawyers venture into the unknown future. Despite these opposing orientations, there are common ways and means to achieve effective bargaining outcomes.

Structure of the Negotiation

Negotiating with opposing counsel is generally analogized to warfare in that there is significant preparation, reconnaissance, marshalling of resources, foray, propaganda, concession, minor exchange and inconclusive engagement, and, at times, an epic battle that turns the tide one way or the other. The lawyer-warriors generally engage by words, pictures or avoidance. Silence, or ignoring an opponent, is a communication and a position. Words are transmitted orally, electronically (videos, tweets, emails, texts) or in the more traditional way by letter and document. Oral communications may be by telephone, voice message, video, face-to-face or through an intermediary. My experience is that a typical claim or transaction involves most if not all of these communication modalities, although my observation is that most lawyers prefer the basic telephone call over Skype or other visual electronic engagement. I have yet to have a lawyer during a call say, "Hey, let's FaceTime!" My take on this is that most lawyers prefer to remain unseen for a variety of reasons, including not having to be constantly on guard and having the freedom to think and talk in private.

Each stage of the transaction or litigation involves substantive decisions to advance to the next step to further the interests of the client. Here are some things to keep in mind during preparation periods.

Setting Goals

Macro: There is an overall desired outcome that is developed by you working as a team

with the client. Do not over-promise or become overconfident. This should be articulated in writing and serve as the "mission" or theme of the matter. This could be in large print as a title page of the file or binder or in a text box on the top of internal documents, to be revised as the matter progresses.

Micro: There will be an immediate objective or series of objectives that will have to be reached for you to meet the macro goal. These need to be outlined in writing as an agenda or road map to guide the representation.

Fair market value and benchmarks: Assess and evaluate all information and discovery needs in relationship to the market for similar claims or transactions. Attempt to use objective criteria or known benchmarks and how they are supported by the law, procedure or industry culture and practice.

Identity: These are the goals consistent with the identity and core values of the participants.

Flexibility: As discussed in the first installment of "The Effective Lawyer" (*The Pennsylvania Lawyer*, March/April 2015), being open and not attached to outcome helps manage client expectations to avoid a disgruntled client. Keep a running checklist or questionnaire; some lawyers save the older ones and keep track by the last revision date in a large, bold-face heading.

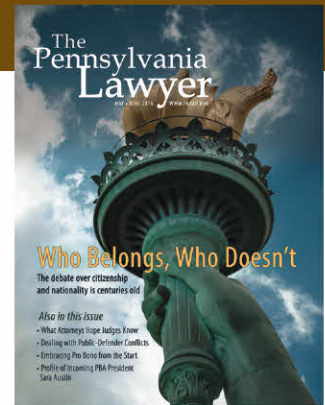
Timing, Leverage and Risk

Identity Issues: Create a running chart of the issues in the case, with a column for when each is closed.

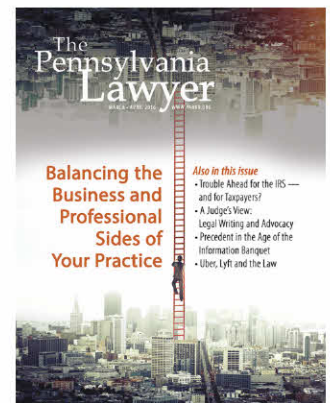
Leverage and risk tolerances: Continually assess and re-evaluate the strength of your client and position vis-à-vis the opposition. Assess the ability for each party to absorb risk on both macro and micro levels.

When: Counsel must be conscious of the pace of the case and how to set the clock to benefit your client. This clock must take into account your own schedule

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and the interference of unexpected events. Finding out about internal deadlines of the opposition allows you to attempt to plan the bargaining to use the time factor to your benefit.

Communicating

You must communicate with opposing counsel based upon cost constraints, ethical rules, negotiating styles and the likelihood of success in meeting a micro goal. This can involve some stressful and unpleasant moments that you may wish to avoid or at least to delay as long as possible. Unfortunately, lawyering is inherently adversarial and this is the life you have chosen, so no matter what you do or attempt, there will be run-ins and impasses with opposing counsel. There are ways, however, not only to survive but to advance the goals.

- Pick the date, time and method of communication. Add every lawyer into your cellphone so that you know who is on the other end of an incoming call. If you are not on your game or prepared, respond later but as soon as possible.

- Respond to every communication within 24 hours. You may respond with an acknowledgment of the communication by email or text suggesting a time frame to meet, talk or send a document. It is counterproductive to ignore communications all together and hope that they go away or to act as if you are protected from them by some type of invisible shield. Pretending not to have received a message weakens your own credibility and reputation.

- Apologize orally for any mistakes or missteps. It should be short and sweet. Telephone probably works best. Do not text or email the apology. It is acceptable to share information about a personal matter that may have affected your schedule. Accept responsibility as captain of the ship even if it was a staff member or client who screwed up. Do not be afraid to ask your opponent for a courtesy or a pass. Research has shown that addressing vulnerability or errors is courageous and strengthens you.

- Choose deliberately when to issue a letter, email or phone call based on the nature of the relationship with opposing counsel, the circumstances and expecta-

tions of the client, and the specific micro goal and task at hand. Do not be lazy and default to the easiest form of communication.

- Avoid long letters or emails. Opposing counsel have a cognitive bias of “reactive devaluation,” as do all humans. The more you say, the more they will discount it. Letters should rarely go beyond one page, and emails should contain no more than three points or asks.

- Posture the negotiations in a manner that will lead to an attempt to resolve all outstanding issues in a final, face-to-face session, involving a mediator when appropriate.

Some research supports performance improvement by “process visualization” where you visualize all the steps necessary to get to the desired goal. Just keeping the goal in mind may also help you concentrate and focus your efforts.

The next column, to be titled Negotiation and Persuasion: At the Table, will address strategies and tactics for in-person bargaining. ♣

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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

for Major League Baseball and the Major League Baseball Players Association, as a grievance arbitrator for the National Football League and the National Football League Players Association and as a neutral for the U.S. Senate Select Committee on Ethics, Office of Fair Employment Practices. He is an adjunct professor at Duquesne University School of Law.

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Takeaways

- Commit to writing the optimal outcome as the mission of the representation.
- Timing is critical. Create and revise timing decisions to further the mission.
- Acknowledge or respond to every communication within 24 hours.
- Admit mistakes and accept personal responsibility.
- Write concise letters and emails.
- Set the stage for a final meeting with opposing counsel.