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MEDIATING TO WIN???

Be honest with yourself. As a lawyer, isn't that what you go into every mediation wanting to do? You want to *win* every mediation. And since mediation is nothing more than a structured negotiation, the more you understand the art of negotiation, the better equipped you will be to achieve the best results in mediation.

Negotiation is a fact of life: you do it every day with your staff, your spouse, your children and your colleagues. Few things have more impact on the long-term success of your business than your ability to negotiate successful deals with your clients, opposing counsel, landlords, bankers and other key constituencies. However, while most lawyers think they are excellent negotiators, they actually are very poor negotiators. They take the wrong approach to the negotiation process. They only want to *win*.

This article is about how to *win* a mediation or a negotiation through the method of interest-based negotiation – and mutually working out a wise solution to a shared problem. This article will also help you to *win* by showing you a better way to negotiate – one where you no longer argue over positions, but instead focus on interests and creating options for mutual gain.

COMPETITIVE VS COOPERATIVE NEGOTIATIONS SYLE

Right now you are saying to yourself that I must be talking about someone else, because you know that you are an excellent negotiator. Well, let's test your negotiations skills. Have you ever viewed a mediation or negotiation as a kind of mental and verbal sparring session, where the side with the sharpest mind, toughest resolve and most aggressive tactics emerges as the victor? Typically, this competitive and combative negotiation style only results in a win-lose or, worse, lose-lose outcome.

However, if you were to approach any mediation or negotiation as a cooperative and mutual problem-solving process, then the results would more likely be a win-win outcome. This approach may sound "soft" to those who enjoy going toe-to-toe with the other side during a mediation or a negotiation, but if the results are not good for both sides to an agreement, then they are not good for either side.

Thinking about *winning* a mediation or a negotiation is like thinking about *winning* a marriage. If you are thinking that way, you have lost sight of the bigger and more important picture – the one about the way you deal with each other and your shared and differing interests.

The inept negotiator sells himself on the value of his position, sets unrealistic objectives and falls totally and irreversibly in love with that position. The more emotionally attached he becomes to his position, the harder he bargains to achieve it. Pretty soon, that negotiator begins to lose perspective. Yet, if one can avoid bargaining on one's position and instead attempt to resolve the different interests of all the parties, this problem will not occur. Bargaining is competitive – negotiation is cooperative. Bargaining focuses on who is right – negotiation focuses on what is right. Negotiating also creates long-term deals and relationships.

More effective negotiators have more open, cooperative and friendly negotiation strategies. They realize the importance of separating the people involved in the mediation or the negotiation from the issues that are being negotiated. They thus avoid personalizing the issues. Effective negotiators focus on the substance of the mediation or the negotiation, not the people involved. This allows them to be tough on the problem, while being soft on the people. Effective negotiators employ a cooperative style and maintain a good personal relationship with the opposing side. They are as concerned about getting a good result that is *fair to both sides* as they are with maximizing the outcome for their side. When judged in mock negotiation exercises, cooperative negotiators were twice as effective as competitive negotiators. The desire to be competitive must be tempered by the desire to cooperate – in order to achieve a deal. Following these principles will dramatically increase your chances of creating outcomes that benefit both sides and lead to positive long-term relationships.

WIN-WIN MEDIATIONS

By now you have realized that achieving a good outcome in a mediation has nothing to do with bargaining, compromise or competition. To create a win-win outcome, both sides must want to negotiate a good outcome and be willing to allow the mediator to first take the time to build a relationship before getting into the specifics of the deal. The key to most mediations is building communication, relationship and trust, since those elements most often determine the outcome. The mediator builds communication, relationship and trust by exchanging information, active listening, and acknowledging the other person's needs. Mediators should be guided by this basic principle of human psychology: ***People will support what they help create***. Mediators help the parties get what they want by asking open-ended questions to find out what it is they want. To determine their desired outcome, the mediator can simply ask, "What exactly are you looking for in this deal?" The mediator should try to determine if the parties' wants are common, different or opposed. The good mediator should always first find out the complete

list of both sides' wants before they begin the actual give-and-take of the mediation. Then the mediator knows what both sides have to negotiate with and about.

It is important to realize that win-win does not necessarily mean an *equal win*. Often, one party will gain more than the other. But so long as both parties gain more by mediating or negotiating, then a win-win outcome is usually achieved. In order to create a true win-win outcome though, both sides' problems must be solved. That is why the mediator needs to first learn what both sides want. The mediator should be guided by yet another basic principle of human psychology: ***People want first to be understood before they understand***. The mediator should make sure that one side feels that their wants and needs are understood before the mediator tries to get them to understand the other side's wants and needs. During this phase of the mediation, avoid the temptation to bargain and compromise. Instead, listen attentively to identify areas of mutual gain and identify shared interests. Try to be creative about items of value so both sides' needs can be met. Consider whether there are any non-monetary issues that might be available. Consider how you can enlarge the pie of possibilities, rather than by dividing it up. Always aspire to joint opportunity finding, not merely joint problem solving. Remember mediation is a communication process and there is no limit to what you can accomplish as a team, as long as you don't care who gets the credit.

PHASES OF NEGOTIATION

There are four phases that should be followed in every negotiation. It is important to follow each phase in order and to remember which phase you are in during the process.

1. Preparation – Every negotiation requires preparation and planning. The better prepared you are as a negotiator, the better the results you will achieve. Being unprepared surrenders initiative to the other side. A well-prepared negotiator can narrow the issues for agreement, formulate detailed options and evaluate tentative offers far more quickly and wisely than a negotiator who is not prepared. Your preparation should consist of more than creating a wish list of what you want and what you are willing to take. All that allows you to do is state demands and make concessions, which is exactly the kind of positional bargaining you want to avoid. That type of limited preparation sets you up for an adversarial zero-sum kind of negotiation.

To be well prepared, concentrate on four elements. The better you prepare for each element, the better the outcome of the negotiation. These elements are:

   a. Interests – Determine what the interests are of you and all other parties to the negotiation.

b. Options – Determine as many pieces to as many agreements as possible.
c. Alternatives – Determine what alternatives you have to negotiating an agreement and what you are willing to take at the end of the negotiation.
d. Legitimacy – Determine what external standards to use to judge for yourself and to persuade others that everyone is being treated fairly.

2. Discussion – Take time to build a relationship and find common ground before diving into the specifics of the negotiation. The key to most negotiations is building rapport through communication, relationship and trust. Give the other side an opportunity to tell you what their interests, needs and wants are. Until you learn this information you will not be able to solve the other person's problem, much less your own. This is also the time to state your interests, needs and wants so the other side can start thinking about areas of mutual gain. This is **not** the time to start talking terms and numbers. The more you know about the other side's interests, the better your chances of reaching a win-win conclusion. The rationale behind the numbers always counts more than the actual numbers.

3. Proposal – All discussions are still hypothetical at this time, but both parties are starting to explore options, send signals and make tentative proposals to each other. These proposals take the form of an "if-then" presentation – such as, "if I do this for you, then could you do that for me?" These non-binding trial balloons allow you to explore options for mutual gain and open the door to the final phase.

4. Bargain – This is where the actual negotiation of terms and numbers takes place. Based on everything that you did in the preparation phase, everything you learned in the discussion phase and the tentative offers made in the proposal stage, you are now ready to exchange actual firm offers. Be prepared to open or respond with a realistic offer and be prepared to engage in two-way movement. If you followed the previous three phases properly, working out the terms and numbers becomes almost a formality and you should be rewarded with an outcome that satisfies all parties' interests.

ETHICS OF NEGOTIATION

Although a number of ethical issues may confront a lawyer who is negotiating on behalf of a client, the most troubling is the extent to which a lawyer may engage in deception. The common-sense approach is to never deceive. It has nothing to do with morality or ethics. Honesty is just good business. However, as lawyers we must be aware of and adhere to the State Bar Rules as well as the common law rules of contracts. If a negotiated agreement – a contract – is entered

into by fraud or deceit, it is subject to being set aside. If the lawyer who negotiated that agreement was aware of the fraud or deceit, could he be in violation of the State Bar Rules?

Under Texas State Bar Rule 1.05, a lawyer shall not knowingly reveal confidential information of a client to a person that the client has instructed is not to receive the information; or anyone else other than the client and the client's representatives. Yet Texas State Bar Rule 4.01 provides that in representing a client, a lawyer shall not knowingly make a false statement of material fact to a third person. What do you do in the situation where your client tells you that he wants you to negotiate the sale of his factory for $7.5 million, but also reveals that he will allow you to go as low as $6.75 million for a quick sale? The Rule on confidentiality says you can not disclose that the client will go lower than his initial asking price, but the Rule on truthfulness to others says you cannot make a false statement of material fact to a third person. What do you do? Fortunately (or perhaps, unfortunately), the comments to the Rule on truthfulness allow you to lie. Small wonder that the public does not trust lawyers when we have created an exception to our own disciplinary rules that allows us to lie. The comment states that certain types of statements are not ordinarily taken as "material" fact because they are viewed as matters of opinion or conjecture. Estimates of price or value placed on the subject of as transaction are in this category.

Similarly, what do you do if your client tells you that there is toxic waste on the property which has not been discovered by the potential purchaser? The comments state that paragraph (b) of Rule 4.01 relates only to failures to disclose *material facts*. Generally, in the course of representing a client, a lawyer has no duty to inform a third person of relevant or material facts, except as required by law or by applicable rules of practice or procedure (such as formal discovery). However, a lawyer must not allow fidelity to a client to become a vehicle for a criminal act or a fraud being perpetrated by that client. Consequently, a lawyer must disclose a material fact to a third party if the lawyer knows that the client is perpetrating a crime or a fraud – and knows that disclosure is necessary to prevent the lawyer from becoming a party to that crime or fraud. However, failure to disclose under such circumstances is misconduct only if the lawyer intends to mislead. The comments go on to state that when a lawyer discovers that a client has committed a criminal or fraudulent act in the course of which the lawyer's services have been used, or that the client is committing or intends to commit any criminal or fraudulent act, other of these Rules require the lawyer to urge the client to take appropriate action. See Rules 1.02(d), (e), (f); 3.03(b). Since the disclosures called for by paragraph (b) of this Rule will be necessary only if the lawyer attempts to counsel his client not to commit the crime or fraud are unsuccessful, a lawyer is not authorized to make them without having first undertaken those other remedial actions. See also Rule 1.095.

My point in all this is to demonstrate that it is a shame that we even need to have this discussion – what it all comes back to is that ***honesty is just good business.***

NINE NEGOTIATIONS "NO NO'S"

Now that you have learned what to do to be a successful negotiator, let me suggest to you what you need to learn **not** to do.

Do not possess partisan perceptions – The attitude of "I am right, they are wrong" will never allow a mediation or a negotiation to achieve a successful result. Try to view the situation from the other side's perspective and see it through their eyes. You do not have to agree with the other side's position; you just need to be able to see it.

Do not rule out reasonableness – The attitude that the other side is being unreasonable limits you to believing that only your side is reasonable. This prohibits any possibility of generating options for mutual gain. Always try to foster brainstorming of ideas and available options.

Do not lower your aspirations – Always go into a mediation or a negotiation with the highest view of what you can reasonably expect to accomplish. No offer is too high provided you can present valid justification that it fairly meets the underlying needs of all parties. Therefore, you must be prepared to support this view with legitimate and reasonably criteria.

Do not make unreasonable opening demands or offers – The quickest way to lose all credibility and any rapport that may have been established is to make a demand or an offer that is not supported with legitimate and credible criteria. This will often shut down the mediation or the negotiations altogether. Always view any demand or offer from the other side's perspective. Just because you view it as reasonable does not mean that the other side will. It is important to remember that their perception is often their reality.

Do not overestimate your case – Always know your Best Alternative To a Negotiated Agreement (BATNA) before going into any mediation or negotiation. That way, you will have a reference point by which to judge your progress and position at all times. Define your goals in the mediation or the negotiation so you have a clear view of what it is you hope to accomplish. Conduct a risk analysis of your case by examining all of its weaknesses.

Do not underestimate the other side's case – Always calculate what the other side wants to achieve in the mediation or the negotiations and be prepared to discuss this. Calculate the other side's BATNA as well as your own. Conduct a risk analysis of your case by looking at all the strengths of the other side's case.

Do not give up something without getting something in return – A cardinal rule in negotiation is to never negotiate with yourself. Always make sure that you get a concession in exchange for every concession you make. These concessions do not necessarily have to be equal in value, but they do have to be in exchange for each other.

Do not value your offer in your own terms – Always value your offer in the other person's terms. Just because something means a great deal to you does not mean it will mean anything to the other side. Remember, people do things for their reasons – not your reasons. Whenever possible, a good negotiator will trade what is cheap for him and valuable to the other side.

Do not ignore the other side – Listen carefully to what the other side is saying to determine their needs and what it is they really want to accomplish in the mediation or the negotiation. Find out what is of high value and low value to them so you know what to trade for. The better you understand the other side, the more flexibility and creativity you will have to generate options.

A GOOD RESULT IN A MEDIATION OR A NEGOTIATION IS ONE THAT:

1. Satisfies the interests of:
   a. the client – very well;
   b. the other side – acceptably (enough for them to agree to follow through);
   c. third parties – tolerably (so they won't disrupt the agreement).
2. Is legitimate – no one feels taken.
3. Results in an enhanced working relationship, so the parties and/or their attorneys can deal with future differences.

CONCLUSION

This is only a glimpse of what a good negotiator knows and does intuitively in every mediation and negotiation. Whether in face-to-face negotiations with your opposing counsel – or through the assistance of a mediator – the basic rules are the same: the key to a successful win-win result is preparation and commitment to a cooperative mutual problem-solving style. There is nothing more enjoyable than when the parties successfully conclude a mediation feeling like they have both won.

This article is in large part a reprint of a paper originally written by Trey Bergman, a very fine lawyer-mediator-arbitrator with **BERGMAN ADR GROUP** in Houston, Texas. Trey and his firm can be reached at Trey@BergmanADRGroup.com.