THE LAWYER'S MIND: NEGOTIATION AND PERSUASION

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"Plans are worthless, but planning is everything."

- Dwight D. Eisenhower

Although representation in transactional work 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 the victim in criminal matters, must state 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 an impasse. The art of the deal is an apt description since transactions, like art, can be primitive, simple, complex, abstract, layered, textured, and multidimensional, using a wide range of materials, techniques, shapes, and sizes. When at an impasse in the formation of a deal, transactional lawyers have only one "best alternative" to a negotiated agreement: Walk away. 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 sunken 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. This article will address the preparation and self-control necessary for sound decisions and effective communication in negotiating a transaction or resolution of a case.

BEFORE THE TABLE

Structure of the Negotiation

Negotiating with opposing counsel is often 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 with words, pictures, or avoidance. Silence, or ignoring an opponent, is a form of 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 meetings or through an intermediary. A typical claim or transaction often involves most (if not all) of these forms of communication, although 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

Within every case, the parties should set goals and benchmarks.

On a macro level, the lawyers and the client should develop and articulate an overall desired outcome, based on the client's goals and the lawyer's understanding of the applicable law. Do not over-promise or become overconfident. This goal 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.

On a micro level, there will also be an immediate series of objectives 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.

Develop 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.

Along with the substantive goals, the parties must also articulate an "identity." These are the goals consistent with the identity and core values of the participants.

Being open and not attached to a specific outcome helps manage client expectations and 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, boldface heading.

Timing, Leverage, and Risk

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

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

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 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 delay as long as possible. Unfortunately, lawyering is inherently adversarial, 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 your 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 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. An apology should be short and sweet. The 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 the captain of the ship even if it was the client or a staff member who made the mistake. Do not be afraid to ask your opponent for 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 expectations 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.

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 see the desired goal. Just keeping the goal in mind may also help you concentrate and focus your efforts.[1]

AT THE TABLE

One model for conducting the negotiation session itself 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 opposing counsel's office whenever possible. Opposing counsel is likely to be more hospitable and act civilly on their home turf, where they have access to all of the case files and

documents, their printers and copiers, and their 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. You may gain valuable insights about opposing counsel by observing how they interact with staff, as well as their working environment. Finally, 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 when everyone else had left. When we reached an impasse, 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?

It is rarely a disadvantage to have your clients or principals in attendance, even when you perceive that they are less than impressive or otherwise may make a negative impression. Clients are a double-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 issue. Likewise, if your client acts with raw emotion, is rude, or is 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. 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 or losers. Attempt to engage at an optimal time and schedule, in recognition of the pressures 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.[2] 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 you would in a trial. All communications should be designed to advance your objectives.

How?

Your demeanor must be your own. Be authentic. Effective lawyers speak with sincerity and with

measured words. Their language is grounded in legal principles, be thoughtful and confer with the client before responding. Do not speak 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.

Notes

1 For further information, see Max H. Bazerman, Margaret A. Neale, Negotiating Rationally (The Free Press, New York, 1992); Brene Brown, Daring Greatly: How the Courage to be Vulnerable Transforms the Way Live, Love, Parent and Lead (2012); Randall L. Kiser, How Leading lawyers Think (Springer, 2011); Randall L. Kiser, Beyond Right and Wrong: The Power of Effective Decision Making for Attorneys and Clients (Springer, 2010); Kennon M. Sheldon, Sonja Lyubomirsky, How to Increase and Sustain Positive Emotion: The Effects of Expressing Gratitude and Visualizing Best Possible Selves, l The Journal of Positive Psychology, No. 2, 73-82 (2006); Richard G. Shell, Bargaining for Advantage: Negotiation Strategies for Reasonable People (Penguin Books, New York, 1999); Shelley E. Taylor, "Envisioning the Future and Self-Regulation," in Predictions in the Brain: Using Our Past to Generate a Future, Moshe Bar, ed.,134-143 (Oxford University Press, 2011); Shelly E. Taylor, et al., Harnessing the Imagination: Mental Simulation, Self-Regulation and Coping, 53 American Psychologist No. 4,429 (1998).

2 Robert Axelrod, The Evolution of Cooperation (Basic Books 2006)