Twelve Tips for Effective Settlement Negotiations

By Steven H. Reisberg

Here are 12 practical suggestions that can help you achieve a better negotiated settlement of a lawsuit or business dispute.

1. The Most Important Negotiations Occur Before You Meet With the Other Side

A plan based on the principle that we will show up and "negotiate the best deal we can" is not a recommended strategy. Prior to the start of any serious negotiations, you should take the time to meet with your team in order to determine the two objectives. First, what is your "best case" outcome? In other words, what is the most optimistic result that has a realistic chance of being achieved? Second, what is your "bottom line" position, meaning what is the minimum that must be obtained, otherwise you walk away from the negotiations? During the negotiations, be careful not to substitute one for the other.

2. Always Be Negotiating Toward a Specific Goal

Negotiations should not become a series of offers and counter-offers. At all times, you must be negotiating toward a specific concrete result. At trial, we make opening statements, put on evidence, and make legal arguments, all as part of a focused effort to persuade the judge or jury. It is not clear why we fail to follow this same approach of advocacy during negotiations. Effective advocacy and effective negotiations should not be mutually exclusive. You can achieve a better settlement the more you are able to persuade *the other side* of the merits of your position. This means that the process of negotiation should include time for discussion where you explain your position, support and justify it. Being able to present reasoned arguments supporting your position establishes that your request is legitimate. Negotiating toward a specific goal gives your negotiations structure, direction and focus. People who know what they want and why they ought to get it exhibit confidence, strength and commitment.

3. Pay Attention to the Information Being Broadcast by Non-Verbal Communication

A tremendous amount of information is always being exchanged be means of non-verbal communication. And this is a two-way street. You must be "listening" not only to the stated concerns of your negotiating partner but to the non-verbal information being broadcast by others and remain sensitive to the non-verbal information being transmitted from your side of the negotiating table. We know when parties are only half-heartedly asserting an argument, not only because of the words they choose but by the manor in which they are saying them. Confidence, strength and commitment (or the lack thereof) are constantly being communicated by posture, tone, eye contact, and physical behavior.

While you are presenting an argument or making a proposal, the other side is simultaneously giving you a great deal of information—before they say anything. The manner in which we physically react to a proposal while we are listening to it communicates important information in "real time." Please note that this applies to every member of the team in the room. The junior members of your team, while not saying anything, are nonetheless active participants in the conversation. The term "poker face" refers to a skill developed in response to the power of non-verbal communication.

4. Beware of the Moral Imperative to "Split the Difference"

In our culture, there is a strong belief that nothing could be fairer than meeting the other "half way." This statement is as powerful as it is wrong. A settlement is fair only to the extent that we can articulate reasons supporting the result. Otherwise, it is just an arbitrary number. Like the law of gravity, however, the influence of this cultural norm that assumes nothing could be fairer than to "split the difference" must be taken into consideration at all times.

At the beginning of a negotiation, for example, you should be very careful if the exchange of opening offers implies a number in the middle that is unacceptable to you. When faced with such a situation, a better response is to respond by asking questions. Don't make a counter-offer if the "number is the middle" is unacceptable. Instead, ask the offering party to explain the basis of the offer. In the course of this discussion, the initial offer can be exposed as an unjustifiable starting point. One result of responding by asking questions may be the emergence of new starting points.

This is not to say that splitting the difference can never be an effective and efficient strategy. However, use of this technique should limited to situations where it is the final step resulting in agreement on some open point.

5. Successful Negotiations Involve Asking Questions, Not Simply the Exchange of Offers and Counter-Offers

A negotiation is not a ping pong match. The primary interaction between the players should not be offers and counter-offers being swatted over a net. A negotiation is the exchange of information. The primary interaction between the two parties should be a process of asking and answering questions. It is only by asking questions that you can learn how the other party views the situa-

tion, what issues are of more (or less) importance to them, what obstacles exist from their point of view, and what they need in order to reach agreement and why. This is reciprocal. You will also be answering questions and providing both information and reasons in support of your positions. The sharing of information may also open up alternative means of reaching agreement. It is usually a mistake to develop a counter-offer by huddling alone in a conference room conferring only with you own side. Doing so without first asking questions means you are formulating an offer on the basis of incomplete information. The exchange of information is most effective if it can be done in person. However, mediators can also serve this role through "shuttle diplomacy."

One important goal of asking questions is to discover the obstacles which may be limiting the other side's ability to reach agreement, and of which you might be completely unaware. If not identified, these issues can silently interfere with a successful negotiation. Once identified, they become issues to be solved. Finally, by seeking to learn what obstacles stand in the way you will also likely come to a fuller understanding about what the other side stands to lose if there is no agreement.

6. The Best Negotiators Are Problem Solvers

The best negotiators recognize that a negotiated settlement can only be achieved if the issues to be addressed are clearly identified and solutions can be developed that are acceptable to both sides. Negotiators do not need to be overly adversarial in order to achieve outcomes that can legitimately be viewed as a success by both parties. Seeking to understand and help resolve the other side's problems is in your self-interest. It is certainly the case that you sometimes will be involved in negotiations where one side is as acting in a completely irrational, hostile, bullying and unreasonable manner. This, however, is not a valid excuse for a failed negotiation. When faced with such a situation, the more skilled negotiator must act as the problem solver for both sides in order to guide the parties to a successful result.

7. Explore Alternative Forms of "Currency"

Money is often the only valuable consideration that can be exchanged, but not always. Consider whether the other side has a need for something that you can provide that is not monetary. A simple illustration is where one side can provide services to the other, instead of cash. This form of "consideration" is particularly valuable because the value to the person receiving the service is much higher than the cost of providing it. Similarly, explore whether there is a third party that both sides have in common. This "neutral" party can be of assistance in appropriate cases.

8. Find and Identify Shared Goals

A set of common interests will exist in even the most contentious situations. One important type of conversation to have is where you seek to identify and articulate the advantages that a settlement will have for both parties. For example, both sides will save money if litigation expenses can be stopped or avoided. The very process of seeking to identify common goals also helps build a foundation of trust, which is key to lasting resolutions.

Remember also that negotiators are people too. You should explore common social or business connections. If you were negotiating a commercial transaction where a long-term relationship was expected, you would take time to learn about your future business partner, including his or her personal history. There is no reason why similar conversations should not take place during the negotiation of a settlement of a dispute. These types of conversations can also help break through initial barriers and build trust. The more we see each other as individuals seeking a solution to a common problem, the more effective the negotiations.

9. Take Advantage of Natural Negotiation "Windows"

Negotiations often work best when there is an upcoming event or deadline. In litigation, this may be after a decision on a motion to dismiss, after exchange of expert reports, or during the time period a dispositive motion in pending. Of course, many settlements occur "on the courthouse steps" when a case has finally been called for trial. There may also be business-generated deadlines, such as the upcoming end of a fiscal year, a proposed sale of the business or other major transactions. The upcoming event serves to place an external deadline on the process. Everyone works harder in the face of a deadline. These natural windows also make it easier for each side to agree to discussions without any implied admission of weakness.

10. Package Bargaining

Where there are a number of issues on the table, it may be best to start with a general discussion of all of the issues before the exchange of any settlement proposals. This allows for the development of a settlement package. In the subsequent negotiations, you can then make bigger moves on your less important issues. You can also "trade" concessions on different issues.

Be careful to avoid any bargaining style that seeks to reach final agreement in isolation on one issue one at a time. Some issues are more important to one party than the other. When multiple issues need to be resolved, the opening ground rule should be that no issue is closed until all issues have been decided. In this way, both parties retain a higher degree of flexibility when faced with future obstacles. If an impasse is reached later in the process, the parties have the ability to go back and explore different alternative settlement combinations.

11. Who Has the Most to Lose?

Take an inventory of what you and the other side realistically have to lose in the absence of a negotiated resolution. This can help determine your relative leverage in the negotiations. The more leverage you have the more you press the other party to agree to your terms. An objective of the process of exchanging information with the other side during settlement discussions is to try to identify the other party's bottom line. What is the minimum they need from a settlement. This also is where your "bottom line" comes in to play. It helps you identify what you have to lose by walking away. Being committed to your "walk away" position makes you a stronger and better negotiator.

12. Don't Leave the Room Until the Agreement Is Recorded in a Written Document

Do not forget the wisdom of the old saying that a verbal contract is not worth the paper it is written on. Particularly at the end of an in-person negotiation or settlements reached in the context of a mediation, the material terms of the settlement need to be written down and signed by the parties. Such settlement document should always recite that the parties intend such document to be a legally binding and enforceable contract. It many cases it may be that the parties further agree that they will enter into a more formal settlement agreement. While this raises the risk of litigation in the event that the parties fail to agree on the terms of the more formal agreement, this risk can be minimized if the written settlement agreement sets forth all the material terms and expressly recites that the parties intend such agreement to be legally binding and enforceable. In mediation, the parties can also provide that the mediator will have the authority to resolve any disputes that may arise in the context of negotiating the more formal settlement agreement.

Conclusion

All agree that the ability to succeed at trial is built on a foundation of careful preparation; the same is true for the ability to achieve a more favorable result through a negotiated settlement. Indeed, as shown above, many of the skills used at trial are readily transferable and applicable to the settlement conference room so long as the changed audience is recognized. But other skills are also needed. The twelve tips set forth above should assist each of the parties in achieving a more successful negotiated resolution of their dispute.

Steven H. Reisberg is a partner at Chaffetz Lindsey LLP in New York whose practice focuses on dispute resolution, including court litigation and international arbitration.

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