Settlement Negotiations
Balanced Beats Brazen

DAN A. BAILEY

The author is with Bailey Cavalieri, Columbus, Ohio.

Too often we think that the best settlement can be achieved only through overly aggressive and blustery tactics. The meaner the lawyer, the better the result. That's sometimes true, but not always. While a negotiator who takes firm positions and creates the impression of having limited room to compromise can get good results, there is a big difference between a tough approach and an arrogant, audacious, or emotional "junkyard dog" style. A truly skilled negotiator is far more effective at getting a good settlement than someone who relies merely on bullying tactics.

The single most important element of effective negotiations is being informed. The negotiator should have a good understanding of the relevant law and facts, the strengths and weaknesses of each party's positions, and the litigation goals of each. Knowledge is king. Do you have a strong case or a weak case? How will further litigation of the dispute help or hurt your client or your opponent? What are the risks if you lose at trial? What are the financial and nonfinancial costs to settling as compared with litigating? Consider the impact on each party's reputation, the distraction and emotional toll from further litigating, and the precedent created or avoided by settling or litigating. Also assess the loss of other opportunities by further litigating.

The analysis must be as objective as possible and not be skewed by the natural emotions inherent in most disputes. Clients believe their positions are clearly the correct ones. It takes a skilled—and brave—lawyer to convince them otherwise. Chutzpah has no role in that part of the process.

Being an objective and thorough counselor may sound easy and obvious, but too many lawyers do not properly discharge this important duty to their clients. Most trials occur because one or both of the lawyers involved failed to handicap the likely verdict properly. Two smart and experienced lawyers with the same information should reach the same general conclusion about the reasonable settlement value of the dispute. When the parties have vastly different settlement expectations and therefore proceed to trial, usually one or both of them—or their lawyers—conducted a flawed or emotional investigation or analysis.

So the best approach is grounded in being willing to compromise. By definition, a settlement is a compromise of a dispute pursuant to which each party receives something and gives up something. If one party seeks a complete "win," there will be no settlement. The adage is often true: The best settlement is when neither party is happy with the result.

But a competitive approach rather than a collaborative approach interferes. The focus skews to how to beat the other party instead of how to attain the desired outcome. Instead of trying to pound the opponent into submission, a more productive strategy is to understand the opponent's goals and work toward an acceptable win-win result, rather than a win-lose result.

When negotiating toward resolution, the strategy should be to concede on matters that are less important to the client but more important to the opponent, and to press on matters that are more important to the client but less important to the opponent. Few disputes are purely about money, so effective negotiations usually should not be about just money. When considering possible nonmonetary settlement terms, the party with the most creativity is often rewarded.

Be creative. A dogmatic or bombastic style may well ignore creativity or discourage it, thereby limiting the opportunities. Some matters just can't be settled without a creative structure, so establishing a healthy discussion free of arrogant bluster can be conducive and necessary to finding a mutually acceptable middle ground that benefits the client.

Be patient. Like the making of fine wine, good negotiations usually take considerable time. They should not be rushed. If one is in a hurry to settle, one typically does not achieve the best terms, and nothing can offset the resulting harm. Once one party realizes that a quick settlement is important to the others, the first party gains valuable leverage. So, even if timing of the settlement *is* important to one of the parties, that fact should not be disclosed. In negotiations, perceptions equal reality and are literally as important. Creating the impression that the timing of a settlement is *un*important can be helpful in the negotiations, even if the timing *is* very important.

Patience—or the appearance of patience—is important not only during the negotiation process but also in deciding when to engage in settlement negotiations. Most cases have certain windows of time during which settlement discussions likely will be most effective. For example, the periods shortly before the start of intensive discovery or shortly before a ruling on dispositive motions often are good because both parties are then facing obvious imminent risks if the dispute is not resolved. In addition, one party may want to settle at an early date, to avoid nonmonetary consequences from the ongoing dispute, such as adverse publicity, distraction of management, or the inability to raise capital or finalize a commercial transaction. Defense costs associated with extended litigation may erode the defendant's ability to pay a large plaintiff judgment or settlement, so settling sooner for less may actually maximize the plaintiff's recovery.

Illustration by Darren Gygi

If those incentives to settle apply to only one of the parties, then the other party has important negotiation leverage and should seek to negotiate while that additional leverage exists. In other words, a party should strive to negotiate a settlement when that party has maximum leverage over the other party. How a party negotiates can be less important than when a party negotiates.

Be civil and measured. If a party or its lawyer antagonizes the opposing party during negotiations by an overly aggressive style, unnecessary emotion results that can hinder productive discussions. The parties may become more entrenched in their positions or may increase their dislike and distrust for each other, thereby reducing their flexibility and making successful talks more difficult. That harm can linger throughout the remainder of the dispute and diminish their future prospects.

In any event, lawyers should not jeopardize their personal reputation or ethical integrity by applying overly aggressive or unethical tactics in settlement negotiations for a client. Client disputes come and go, but a lawyer's reputation lasts forever and can be irrevocably harmed by over-zealousness during the negotiation process. No perceived short-term benefit can justify a permanent blemish to the lawyer's reputation and integrity.

Be client-focused. Lawyers often take emotional ownership of disputes and, consciously or subconsciously, make decisions and client recommendations based on their own interests rather than the client's interests. Inevitably, lawyers have certain inherent conflicts of interest with their clients regarding settlement decisions. Lawyers who are being compensated at hourly rates benefit from further litigation and are harmed by a settlement. Lawyers on a contingent-fee arrangement may benefit from an earlier settlement that obviates uncompensated further litigation activities. To ignore or overcome those self-interests, lawyers need to develop the discipline to focus exclusively on the client's best interests when addressing settlement issues. That is counter to certain human instincts and often is not easy.

In addition, lawyers typically view litigation as an opportunity to demonstrate their advocacy skills and strong competitive spirit. Settlement deprives the lawyer of a public platform and opportunity to bolster his or her ego and reputation. These inherent conflicts can be further aggravated if the lawyer's negotiation style is driven by the need for control, attention, or self-gratification, rather than the client's best interests. A highly emotional or theatrical approach by the lawyer may indicate that the lawyer's inherent conflict is interfering with the ability to pursue a truly client-focused strategy or solution.

Use mediators effectively. Large or difficult disputes are often settled through a mediation process in which each party communicates primarily with the mediator rather than directly with each other. That can be helpful in several respects. An experienced mediator can provide a more balanced and independent evaluation of each party's positions, can more easily determine each party's true settlement goals and positions, and can remove some of the natural emotion or tension that otherwise infests direct negotiations. Those benefits can be achieved, though, only through dispassionate and informed discussions with the mediator, not overly aggressive tactics.

The mediator should be properly trained and experienced, and should have a patient and conciliatory personality. But, equally important, the lawyers in the dispute should know how to use the mediator for maximum benefit. A mediator is not the adversary, so being blustery does little good and can be harmful. Help the mediator to help you, by providing to the mediator useful information and perspectives in a timely, collaborative, and non-adversarial manner. Soliciting suggestions of the mediator and following those suggestions whenever possible can help create important credibility with the mediator and a sense of ownership by the mediator in your negotiation positions.

> Few disputes are purely about money, so effective negotiations usually should not be about just money.

Remember, though, that whatever is said to the mediator can influence both the mediator's perceptions about an acceptable settlement and the mediator's messaging to the opposing party. So a delicate balance is needed between being open and candid with the mediator and being somewhat guarded in dialogue with the mediator. Advocacy is important in mediation, but substantive positions are much more important than theatrics.

In the end, an informed and objective settlement strategy that reflects the unique interests of both parties to a dispute, and the patient and measured implementation of that strategy, are far more important and effective in the negotiation process than pure force of style. Sophisticated parties rarely are persuaded by arrogance and aggressiveness. They instead base their negotiation decisions on the perceived merits of the claim and other associated attributes. And less sophisticated parties often are just put off or offended by an overly aggressive approach. Thus, the role of chutzpah in the settlement process should be modest and carefully considered. ▪