# Optimal Success Through Artful Negotiation

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In the Monty Python video, "The Argument Clinic" the unwitting comic pays five British pounds to engage in an argument with a professional that quickly devolves into a ridiculously funny exchange of "no you didn't, yes I did". Unfortunately, some lawyers have never learned to engage in a winnable argument. Instead, they are accustomed to dealing in the presumption that eventually a Judge or jury will sort things out. In the current budgetary crisis within our courts, however, less than 5 % of cases get to that ultimate "truth finder". The rest get negotiated.

Clients usually hire lawyers not to find "the ultimate truth", but to help them solve their (legal) problems. Every transactional lawyer knows that negotiation is a fine art in getting a deal to completion. For litigators, it is undeniably worth investing some time into studying how to achieve best results through negotiation.

## Preparing for Successful Negotiations

The obvious first step, but one that is often overlooked, is to plan for success. For the lawyer, this requires an honest assessment of your client's objectives, as well as your own. Take, for example, the insurance adjuster who has been terminated from her job while on a long-term disability leave for stress. Though her lawyer believes that she has a credible claim for a large damages award at trial based upon a theory of disability discrimination and a failure to engage in the interactive process, if she has not been able to return to work, she may want to settle long before a jury is impaneled.

In the aftermath of the greatest economic recession in our history, many corporate clients are also demanding that lawyers reach an early resolution that is "fast and roughly right" rather than litigate the case. Increasingly, business students and young Corporate America are reaching the conclusion that if they are to keep up with the fast pace of commerce in the 21st Century, they cannot invest the kind of resources that Companies once did to "prove their point" in Court. Instead, they most frequently want to handle the problem expediently, and lawyers have to accommodate to that objective or risk losing valuable repeat business. The first step in planning for success is finding out what your client's objectives are for the particular legal problem they are facing.

The next step that a skillful negotiator should take in preparing for a successful negotiation is to look at the ZOPA ("zone of possible agreement") and the NOPA ("no possible agreement") before making an initial offer, convening a mediation, or even engaging in a preliminary settlement discussion. This means that before beginning the negotiation, a lawyer should carefully assess the broad field of the possibilities

for settlement and determine whether the timing is right, if both sides are prepared to do business by crafting a deal within the contemplated parameters, and generally make sure that each negotiating partner is at a starting place which signals the possibility of ultimate agreement before the initial negotiation commences. In some ways, this is a broad view of the open-mindedness of both sides of the dispute to reach some acceptable middle ground.

Once each lawyer and her own client have carefully analyzed the parameters of the ZOPA, the discussion about the contours of a possible agreement should be initiated with opposing counsel. This often means a phone call or face-to-face conversation where the lawyer can hint at a range of potential settlement and seek the reciprocal information from his negotiating counterpart. Yes, you can bluff the margins to skew the negotiation towards your goal; however, it is important not to begin the discussion so far out of the ZOPA that you appear to be in the NOPA to the other side. A realistic, though broadly contemplated range of values is the only way to get the other side to the negotiating table.

Not all cases will have an overlap in the ZOPA offered by Plaintiff and Defense. Take heart, because even in those cases, all is not lost! Although as a general proposition, good lawyers will agree on an assessment if it has a broad enough range, occasionally one side diverges wildly from the other. Sometimes, these are cases in which one or both sides are holding key evidence, facts or circumstances which, if exchanged, may serve to change the other side's assessment of damages or liability.

In the example of the insurance adjuster who wanted to settle her wrongful termination suit earlier than her lawyer thought prudent, the Defense lawyer would not have known that she wanted to start a new business and needed an immediate capital infusion of $100,000 if the parties had refused to come together when the Defendant evaluated the settlement value of $10,000 - $50,000 and the Plaintiff articulated the ZOPA was $500,000 to $1,000,000. By bringing the parties together, even after it was known that the ZOPA's did not overlap, a neutral could help both parties to find a "win" in negotiation at something outside of both parties' stated ZOPA based upon circumstances which were not revealed prior to commencing the negotiation.

The last step in planning for success is perhaps the most critical. In the popular TV show, "Pawn Stars", a folksy second-hand merchant can be observed reaching out and shaking the hand of every seller that enters his store. He engages them in a few initial inquiries, and usually complements them on the merchandise. In other words, there is a deliberate effort to create a rapport right from the start of the encounter. After that, if the buyer is unsure of the value of the goods, he invites in an expert in whatever junk or treasure the seller is peddling for an "honest" broker's assessment of the true worth.

Immediately, there is trust built into the relationship even before the negotiation of the selling and purchasing price begins because the buyer has taken the time to

gather information about the widget and then deliberately builds trust by bringing in a neutral third party to assess the value. In legal negotiations, it is absolutely worth the time and investment to develop rapport and trust before any numbers are negotiated wherever possible, even if it is through a trusted third party.

The Negotiation Process

Lawyers are sometimes frustrated by the length of time it takes to reach that critical moment in a negotiation or mediation when the initial demand or offer is made. Yet the information gathering, which occurs prior to the 'moment' when actual bargaining begins, is often as critical to a successful negotiation as the bargaining itself. Rushing the first demand or offer without taking the time to understand the interests and justification behind it is always a mistake.

Consider the example of a young couple that is house hunting in Southern California. Young professionals, they are looking for a home that is large enough to accommodate a future family, but reasonably enough priced to be affordable to them in a neighborhood that is both family friendly and "hip", freeway close and has a suburban feeling. Before they begin making offers, they need to gather a lot of information about the area, the home, the interests of the sellers (Is price more important or ability to close in a short time frame? Do they need to sell or are they just testing the market? How much will they need to motivate them to sell the property furnished?)

Harvard Negotiation tips refer to this concept as "unbounded awareness", or using peripheral vision to get to interest-based negotiations that are not limited to the obvious. In this simple example, there are many variables at issue, not just price. Taking the time to ask probing questions directed towards understanding the interests of each negotiating party will help to craft an ultimately satisfying agreement.

Another useful tip that is seldom appreciated is known as "anchoring" the negotiation by putting out the first offer or demand, rather than waiting for your opposing counsel to set the tone for further negotiation by making that first offer.

Psychologists have found that if an individual throws out a random number (say the 1st three digits of your social security number) and then asks you to guess a date from a random fact in history, you will more likely guess a date that begins with 3 digits (before 1000 A.D.) than if you are primed with a number with 4 digits,

In relation to negotiation strategy, this means that if the Defendant (in the example of the insurance adjuster's wrongful termination lawsuit) puts out an offer of $10,000 before the Plaintiff puts out her demand at $1,000,000, the negotiations may tend towards a discussion of a five figure settlement rather than six figures. Of

course, if that is outside the realm of Plaintiff's ZOPA, then the discussion will likely hit a stalemate. If, on the other hand, the Plaintiff would consider a settlement between $50,000 and $150,000, the Defendants will have learned that potential range of value much sooner and grounded the negotiation towards a range they would find acceptable. Negotiation is like a good game of chess: a skillful negotiator is planning each move with a view towards the response and the next move. If you begin by anchoring the negotiation and then continue to move looking at least two steps ahead, you will find success through negotiation in most instances can be achieved.

As much as we are trained to be adversaries, we intuitively know that simply being paid to engage in an argument, a la Monty Python is not what our clients want us to do. It is wise to strategize at least two moves in advance. Before making an offer or demand or counter-offer, consider what the likely response to your adversary will be, and how you will respond to their counter-offer before you make it. If you know that this move will set you up well for the next move, go ahead and make it. That way you can control the negotiations as a winner.

Negotiators can take a few lessons from Improvisational actors. Just as in a contract, improv acting involves offers and acceptance. One member of the acting team throws out a concept (say, "Let's make spaghetti") and the other member picks up and builds upon it by saying "Yes, and let's invite the whole neighborhood to eat it."). The "yes and" concept (as opposed to the "no" or "yes, but") serves to build the narrative, without shutting down the conversation.

In the example of negotiating to buy a house, as used above, the seller may choose to say "no, I won't accept a 90 day escrow for $1 million as the sales price" or he may say instead, "Yes, $1 million is a good price, and I need to move sooner than 90 days, so let's discuss a shorter escrow period". Rather than shutting down the negotiations, the clever negotiator is now working in collaboration towards building a mutually agreeable narrative. In a negotiation over a litigated case, the "yes and" technique can be useful when one side is claiming they will be successful at knocking out a particular claim or cause of action, but other causes will invariably remain. Another example of how this may be a useful concept is where one side is claiming there is no liability and the other can rely upon the "yes, and" exposure to continued costs of litigation and minimal risk in cases where large damages are a possibility and costs are at a minimum at the time of the negotiation.

Improv actors also resist the urge to ask questions without a purpose, lest the other member of the team be made to do all of the "heavy lifting" in the scene. So, for example, instead of beginning the scene with "What do you want to make for dinner?' and then, in response to "Let's make spaghetti", the offeror asks another question: "Who shall we invite?" the accepter is quickly made to carry the whole scene on his shoulders. Not only that, but he has also been given all of the power in the dynamic between them, which is a bad idea for any negotiator. By asking a series of purposeless questions, the unskilled negotiator cedes all of the power to the one who gets to answer. In the spaghetti dinner example, if one player invites the other

player to decide what they are having for dinner, who to invite and where to hold the party, that player is controlling all of the party, a situation a good negotiator would not want to be put in.

In the context of negotiating a litigated case, what this means is to avoid allowing your opposing party to control the dialogue or narrative by asking questions such as: "what do you want for this lawsuit? How do you evaluate damages? When do you need to get paid?" Instead, the skilled negotiator would control the narrative by engaging in the more conventional offer and acceptance mode once the critical underlying interests are discovered through the initial information session.

Another lesson from improvisational acting is to make direct eye contact with your negotiating partner and listen earnestly to what he says. Lawyers are usually trained to avoid eye contact and direct confrontation, instead referring to one another in the third person (as "Counsel") and referring to the parties with titles such as "Plaintiff and Defendant" or "the witness". Yet when it comes to negotiation, deep listening and earnest attention to your negotiating partner (aka adversary) may be just what is necessary to understand their interests and unlock the conflict.

Lawyers are also trained not to ask questions to which they don't know the answer and always to be anticipating what they will say next. However, in improv acting, just the opposite is advocated. The actor needs to listen carefully and genuinely to what his partner says in the moment of the scene in order to be open to building upon whatever narrative is developing in response. For lawyers, this means refraining from working out your anticipated response to whatever the adversary is saying and suspending your own plans to respond for that moment so that you can look your opposing party in the eye and genuinely hear what they are expressing.

As an example, when the actor declares "we should invite the whole neighborhood for spaghetti" instead of responding with "we can put cheese on top" (based upon the immediately prior and perhaps anticipated response), the other actor may instead better appreciate that the important feature is not what is for dinner, but who sits at the table. In that case, after deep listening, perhaps the response would be "I'd like to send a personal invitation to the President to attend, too."

In the context of litigation, if the opposing party begins to discuss a payment plan, for example, you don't want to be prepared to simply counter his offer with the same global demand which you were prepared to offer before the concept of a payment over time came up. Like an improvisational actor, a good negotiator has to be adept at changing the conversation depending upon the moves of his negotiating partner at all times.

It sounds simplistic, and, of course, it is not. When impasse is looming, a skillful negotiator, like an improvisational actor will have a toolbox filed with ideas for strategic collaboration, too. For example, when the dialogue about money gets too intense, the negotiating partners may want to turn to a discussion of pending

deadlines, outstanding discovery or critical motions. Once both negotiators are on the same page as to their desire and intent to keep the dialogue alive, re-focusing on numbers can appear much easier.

The Open Door

Not all negotiations result in settlement of the critical disputes or issues at the immediate date set for such conversation. Back to the house purchase example, once it becomes clear that the seller wants to move out in 30 days and is willing to accept the $1 million offer, the buyers might keep the dialogue alive by asking some questions about the great patio furniture on the upper deck, and the precious art on the wall of the entry way. Neither are germane to the sale, but because they are unique pieces, the seller may soften on his resolve once he sees that the buyer has an earnest interest in art and modern furniture. Again, this may be just the distraction that is necessary to keep the dialogue open about the timing and the price.

In an article written about Amazon founder Jeff Bezos, his right hand man, Rick Daizell, observed that Jeff has a unique approach to decision making: he tries to find the best truth at the time. While lawyers are often classic "maximizers", looking for the evidence and proof of the absolute "truth", business people and clients are sometimes more expedient and less concerned with absolute truths. Nobel Laureate economist Henry Simon calls these people, "satisficers". They are the people, like Jeff Bezos, who will, at the end of the day, look at all of the options available and choose the best truth or option available at the time.

The interesting thing is that studies have demonstrated that satisficers are usually more satisfied with their choices in hindsight than maximizers, because they are not busily engaged in second guessing themselves and castigating themselves when the ultimate result comes out worse than they expected. They have already moved on to the next challenge!

While skillful negotiation begins with strategic planning for the right moment to engage in talks, it ends with a similar internal dialogue. When all hope appears to be lost (as in the Federal government of the U.S. shutting down) there is always a window of hope towards revisiting negotiations before war or unrest breaks out in earnest or our government's economy fails altogether. What it may require is suspending the hostile negotiations for some time until some new trigger arises (a trial date, falling out of an accepted escrow, overcoming a critical motion).

The key is to re-evaluate your objectives in a fresh way at that time, take care to maintain the trust and rapport of your negotiating partner and then re-engage. Just like an improv actor, lawyers need to act creatively, respond to the needs and objectives of clients and never close the curtain until the final act is over.

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