Negotiation & Mediation: State of the Art

The Art of Negotiating Employment Cases

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First Exercise: "Win As Much As You Can"

When negotiating, there are times when most of us take an aggressive or "hard" position and others when we take a conciliatory or "soft" position. There can be a host of reasons for either approach.

We will call an aggressive negotiating move an "X" move and a conciliatory negotiating move a "Y" move.

The exercise calls for a rapid-fire series of consecutive steps in a negotiation between two people, with each making and "X" or a "Y" move. Each participant has two cards, an "X" card and a "Y" card, which are identical on the back. Select the card you will use without the other person seeing the card by placing it face down on the table before you.

You reveal the two cards at the same moment at the signal and score the outcome of each round using the scorecard. Then select the card you will use for the next round *without talking or communicating in any way with the other player!* After we have completed four rounds, we will take a short break and you can speak with the other player for a few moments. Then it's back to the "no talking" routine for the two final rounds.

Your objective is to win as much as you can. These are the only instructions. No questions will be answered. Have a pen or pencil ready to score with, because it moves along quickly.

I. Distributive Bargaining Strategy

Every negotiation is partly competitive and partly cooperative. Each participant seeks a favorable outcome, but is also interested actually reaching an agreement with the other participant or participants. In the bargaining phase, an "X" move symbolizes the competitive, "clean 'em out" approach to negotiation, while the "Y" move symbolizes the conciliatory, "come let us reason together" compromising approach.

The exercise demonstrates the supreme importance of being able to trust your negotiating partner to respond to your offers in a fair and reasonable manner and the universal truth that you *can't* trust your negotiating partner to be fair and reasonable. There is always a risk that your cooperative moves will be exploited, rather than responded to in kind.

The exercise presented what negotiation theorists call a "distributive" negotiating problem, the "zero-sum game." The competitive-cooperative dichotomy in such situations comes within the bargaining, or "horse trading" part of the process. In such situations, when negotiating with someone who pursues a cooperative ("Y") strategy, you can be cooperative and get to an agreement quite readily. But that is not true if you find yourself negotiating with someone working from a competitive ("X") strategy. You can't be a "Y" player in an "X"-style negotiation, unless your objective is to be cleaned out.

In litigation, the process is complicated by the fact that the two sides may have very different ideas about what represents an "X" and "Y" move because we have significantly different views of the litigation. The amount of information we have will usually affect that judgment. The information we need includes not just evidence, but an understanding of what arguments each side will make and what authority and logic will support those arguments. It takes time and money to obtain that information on both sides as litigation unfolds. One important incentive to settle early in the process is to redistribute costs from the litigation process into the settlement terms. Getting the money now is an important incentive to the plaintiff, saving legal fees is an important incentive for the defendant.

In our culture, we begin negotiation by starting at a position from which we expect to move, maybe by a little bit, often by a lot. The more we do this, the more room there is to make concessions and create some confidence from the other side. But an extreme opening position also engenders distrust from the other side—the other side often reads the extreme starting position as demonstrating that the parties have such different evaluations of the case that there is no point in negotiating. Many cases that could be settled on terms acceptable to both sides never get to that point because they are caught in the starting gate this way. It is especially likely where the principal negotiators on each side are competitive ("X"-style) negotiators.

Bargaining With Competitive Negotiators

Repeated simulations demonstrate that there is one strategy most likely to get *some* agreement and also to get the most favorable agreement in light of the fact that the adversary is a competitive negotiator: "Tit For Tat." These are the rules:

- Begin with a conciliatory ("Y") move. Extend an offer to respond in kind. You may be pleasantly surprised.
- If you get an "X" move in response, RETALIATE. Respond with an "X" move of your own.
- Be prepared to forgive. If you get a "Y" move, respond in kind. If you don't, every second or third time, make another conciliatory move and invite a response in kind.
- Repeat as necessary.
- BE CLEAR about what you are doing, especially on the retaliatory "X" moves.

II. Negotiating Range Obstacles

The problem of differing ideas of the appropriate negotiating range is exacerbated by the fact that the assessment of an employment case reflects implied moral judgments about the parties. If the defendant has substantial exposure, it is admitting to itself that it has engaged in anti-social conduct like discrimination or harassment. Job performance or personal behavior of the plaintiff is typically part of the defense of a case, so acknowledging weakness in the case feels like an admission that the plaintiff was not a good employee.

Other factors affect the parties' perceptions of the "reasonable" range for settlement of an employment action, usually driving the parties apart:

- **Perspective**. The sense of what represents a reasonable settlement range may be a function of a detailed analysis of the damage evidence. But it can also be driven by other things:
    - An idea of internal equity, based on what was paid (or is believed to have been) to other persons in like circumstances.
    - A "months of pay" calculation associated with a severance pay mentality.
    - Attorneys and Legal Fees. On the one hand, a quick settlement on a contingent fee basis represents an immediate profit. On the other hand, some see the settlement of a strong case as losing the

opportunity to work on a case with a high probability of ultimately being paid by way of a fee petition. Defense counsel, of course, may be motivated to bring about a relatively quick settlement and gain the employer's favor by resolving a case that could have been expensive to defend, or by a desire to generate the billings associated with the defense.

  - Risk avoidance. On the employee side, this can occur because the employee has pressing, immediate economic needs. On the employer side, avoiding the cost of defense even if the defense wins can be an important consideration. When the defendant is experiencing financial problems, there is usually an element of risk avoidance on the employee side.

- **Informational**. Either side may have information that the other does not have, and in some instances, it may be impossible or counterproductive to share that information. For instance:

  - Either side may have information that it believes will be devastating to the other side's chances, yet be unwilling to disclose it because of the tactical value of committing the other side to an erroneous position, thereby making the evidence more dramatic.

  - The employer may be planning a reduction in force so substantial that it is likely to cut off any back pay recovery—but be unable to disclose it in advance to the plaintiff. A planned reduction can also make the employer more anxious to settle because witnesses in the case will be affected.

  - The employee may be on the verge of re-employment, suffering from a serious disability or faced with other circumstances that will substantially affect the potential damage exposure.

- **Emotional**. Typically, the problems are that the employee is in a state of anger, seeking vindication for reasons unrelated to the legal claims, and that the employer is in a state of denial, discounting the facts and legal exposure by demonizing and dismissing the employee's claim.

- **Magical Thinking**. The employee may be affected by reports of million dollar verdicts. The employer, especially one that has never been in litigation before, can be certain that it will prevail once the facts are out on the table.

An inability to agree about the facts of a case does not prevent the parties from reaching agreement on a settlement; if it did, most cases could never settle. A difference in perspective is not necessarily an insurmountable obstacle to settlement; on occasion, it even helps.

III. Negotiation Process Suggestions

Negotiations go through distinct stages:

1. Convening, or initiating the negotiation and identifying who will participate and the basic ground rules that will apply.

2. Introductory, when the participants establish basic elements of the relationship they will have during the negotiation and the tone of the conversation is set.

3. Information Exchange, during which parties posture, present justifications on their positions on the merits, argue their case and launch verbal artillery strikes intended to "soften up" the negotiating partner.

4. Bargaining, during which offers and counter-offers are exchanged, often with justifications, posturing, threats or the use of other gambits, like the "nice cop-mean cop," "insufficient authority," "Columbo" ("Oh, just one more question. You see, I can't understand how…"), "irrational client" and so on.

5. Closing, where the parties actually reach agreement, hammer out details, usually with a cooperative tone, and rearrange terms that may have been established based on bluffs.

Shortcutting The Process Can Produce Impasse

If negotiations are bogged down at one stage, there is a good chance that the process was not completed at a prior stage. A first step in analyzing why a negotiation is not fruitful is to ask what earlier step was not fully completed, and to go back to complete it. Perhaps someone who needs to be at the table was not invited; perhaps there has not been enough useful information provided to one side or the other. The most likely place for negotiations to break down is at the communication stage, which brings us to our second exercise.

For Heaven's Sake: Listen!

Second Exercise: "It's Like Talking To A Stone Wall"

Pick a subject that gets you excited: the case you just won, your favorite team, your hobby or favorite sport, your pet, child or grandchild, NELA, the prospect of someone other than George Bush being in the White House, whatever. In this exercise, all you need to do is talk about it for one minute. Monitor how you are feeling as you speak.

For the first 30 seconds, your partner's job is to act like a stone wall. A flat affect. No response. No facial expressions. It's as if you are not there. After 30 seconds, at

the signal "switch," the reaction should change to reflect interest and involvement. Smiling, nodding, eye contact, questions, and so on.

Then change places and so that each person has a minute of listening and being listened to.

How does this feel, before and after?

If you have ever been angered by the lack of a meaningful response you were receiving from a customer service telephone call, and asked for the supervisor, you may have experienced this before. A good service person will ask you to explain the problem, will express concern with how you feel about the response you have had, and repeat back what you have said. Without necessarily agreeing with you, the supervisor will (1) apologize and (2) ask what would help solve the problem you are having. Your blood pressure drops, you feel chagrined about how mad you got, and you are in a cooperative and reasonable mood.

What happened? Someone listened, and you knew it.

It was M. Scott Peck, I believe, who observed that the most important gift one person can give to another is attention, so much so that our development as children is profoundly affected by it. Our training as attorneys focuses us on detailed, detached factual analysis of situations and the development of arguments and rebuttals. Since we do it all day long, our mental habit is to catch enough of what is being said by the other side to allow us to launch our verbal counter-attack.

Suppose the opposing attorney, instead of being confronted by this kind of perfunctory listening, actually encountered an adversary who paid close attention, responded in a way that showed that the points and perspective had been heard and acknowledge the value of at least some of the points? Wouldn't it be disarming?

Decision Tree Analysis

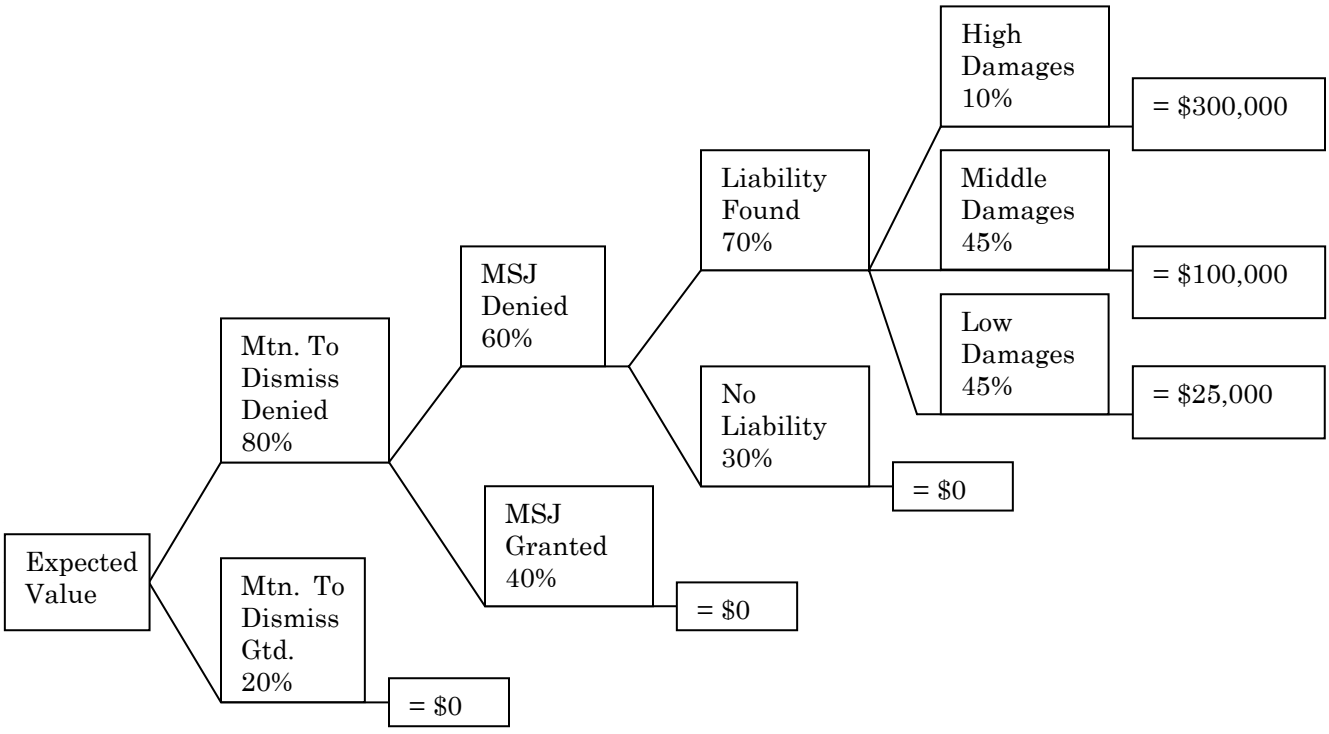
The most logical way to arrive at a sense of a negotiating range for a case is through the use of a decision tree. This is a process which quantifies the predicted outcomes of litigation, working step-by-step through the litigation process. The methodology was devised by the 1970's by the Stanford Research Group and is now a standard part of graduate business school curricula. The process is useful because it provides a more refined analysis of potential litigation outcomes by requiring the evaluator to make separate evaluations at different stage of the process. It works if (and only if) you make your step-by-step judgments in isolation from the final, ultimate projection. When you complete the process, you may well be surprised by what your own evaluation tells you.

Suppose you have a case, ready to file. It has a minor statute of limitations problem—a genuine concern, but not all that troubling (a 20% risk). If the case

survives a motion to dismiss, the next outcome point is the motion for summary judgment. You are in federal court, relying on a *McDonnell Douglas* indirect proof of discrimination model, so the risk of losing at this stage is real (40%). But if you do get to trial, you are confident of winning before a jury (70%). If the client wins everything, the $200,000 cap would apply, and back pay should be around $100,000. But your client has a personality you think could rub the jury the wrong way, and does not come across as being so badly affected by the termination, so you recognize that the jury is not likely to render a generous verdict. Recovering $300,000 is only a 10% probability, with either a moderate ($100,000) recovery or a low recovery ($25,000) equally likely.

The decision tree is laid out in a branching outline form, with the different stages outlined moving sequentially across the page from left to right. At each stage, you estimate the probabilities and consider the values associated with the case ending at that stage. For instance, if the case is going to survive summary judgment, it will likely be because the evidence has developed in a way that also makes the case stronger at trial. But the fact that the judge denies summary judgment does not mean that your client is any more likely to be appealing to the jury.

The decision tree looks like this:



If you were valuing this case without using a decision tree, you would likely come out with a figure between the $25,000 and $100,000 level. But where? If you do the arithmetic, you will find that "expected value" of this claim, according to your own

assessment of the probabilities as outlined above, is only $28,980! Hopefully you can negotiate a better settlement than this, but the point at which you should genuinely be indifferent between settlement and not settling—based on those probabilities—is just that low.

If the damage problem was not present, and you assigned an equal value to each of the three potential damage levels, the expected value would rise to $47,552. This is a greater difference than if you increased the probability of surviving summary judgment to 80%, which would increase the expected value only to $38,640.

Decision tree analysis discloses that the likelihood of any particular outcome is less that what you are probably thinking. In the simulated case above, the probability of a large verdict is just under 3.5%. The probability of either a small or mid-level verdict is just over 15% each. In fact, there is a two-out-of-three probability of coming away with nothing at all. Which seems intuitively odd, since you have a better than 50-50 chance of prevailing at each of the three stages here. Without the decision tree, you would not have recognized that when you risk losing three times, the odds increase that you will lose at one stage or another. And while it is true, you still probably don't really believe it in your heart of hearts.

A decision tree does *not* predict the outcome of a case. The very fact that we are considering probabilities means that we are not looking into a crystal ball. The overall 33% probability of a plaintiff's verdict only means that if we take this case, one-third of the time the plaintiff will come away with a damage award.

This decision tree does not factor in some important considerations. The biggest is that, unlike the company, your client can ill-afford to risk walking away with nothing if some recovery is available. Not considered here are the emotional impact of the litigation on the plaintiff, the discomfort and fear associated with testifying, the harm resulting from abusive legal tactics and the effect that reliving an unpleasant experience for two or three years can have on self-esteem. Also not considered is the possibility of a negative impact on the client resulting from the fact that his or her job prospects are harmed by the fact that the litigation is pending. The lawsuit could leave the plaintiff in a significantly worse position than if no action was taken. A meaningful decision tree would assign values to considerations like this, and they would significantly reduce the expected value.

But the complete decision tree looks different to the employer side. The employer may anticipate spending $10,000 on a motion to dismiss, another $65,000 just to get the case to summary judgment, and an additional $50,000 to try the case. If the employer loses at trial, even with low damages, recoverable attorneys' fees could be another $125,000. This does not take into consideration the disruption and loss of management time associated with defending the lawsuit. Even without doing the arithmetic, you can see that there should be plenty of room to settle this case if both sides are being logical.

IV. Bewildering Defeats: of Biases, Heuristics and Aversions

Third Exercise: Who Has Never Been Surprised?

NELA includes some outstanding trial attorneys who have extensive experience not only with negotiating and litigation, but with the ultimate test of legal judgment: the trial. Trials are the trigger that give life to the employee rights protections built into our law. The knowledge that there is a skilled advocate out there who will file the charge of discrimination, initiate the lawsuit and take the case to trial is the most powerful tool for motivating employers to respect employee rights, or settle disputes over those rights when they are taken to court.

We will ask those who have tried employment cases about their experience with surprise and with defeat.

- Have you lost a case you thought you would win?
- Have you been surprised by the adverse outcome:
    - of a summary judgment motion?
    - of a case you tried?
    - of an appeal you briefed and argued?
- Have you surprised by the favorable outcome:
    - of a summary judgment motion?
    - of a case you tried?
    - of an appeal you briefed and argued?

Defeat is important because it can teach us important lessons. Outside of important precedent-setting cases (e.g., *Brown v. Board of Education*), every case that goes to trial stands testifies to either a lawyer's erroneous assessment of a case or a client's unwillingness to listen to the lawyer, or both. Often, both lawyers have failed to assess the case and make settlement decisions with the best judgment.

In the depths of our souls, we know that we regularly make mistakes in evaluating cases and in negotiating, or in not negotiating. Losing a summary judgment motion or a trial invariably produces about a period of soul searching—perhaps hours, perhaps months. As a principled employee advocate, you feel great disappointment for your client, who has been left without any remedy for something you regarded as a serious injustice. When you can't relieve the feeling by blaming the system, the judge, your opposing counsel and the witnesses, you look in the mirror. It's not a happy moment.

Where did I go wrong? What did I overlook? What might I have done, in case selection, in client advice, in discovery, in briefing, in settlement negotiation, that could have prevented this outcome? We can be our own harshest critics. These bewildering defeats even lead us, for a time, to question our professional competence. Rather than simply wait for the feeling to pass, or rely on self-satisfying explanations for our errors, we should dig deeper to find what could lie behind them, and modify how we practice.

Surprisingly often the bewildering defeat has nothing to do with our professional performance, or with the case selection. The decision tree discussion above touched on one of a number of idiosyncrasies associated with human decision making that affect both you and your negotiating partner.

The easiest explanation to accept is one of the insights suggested by the decision tree. If you try any case 100 times, you will get some aberrational results. You only get to try it once, and so it is possible that some confluence of random factors that affect probability converged to give you the unexpected outcome. If that is all that is at work, then all we need to do is soldier on, and be somewhat less cocky when we win a case—knowing that if we had to do it over again enough times, we would lose.

Another insight from the decision tree process is the fact that we are dealing in uncertainty when we litigate cases. If we want to serve our clients well, our own sense of self-assurance, no matter how many cases we have tried and won, should not substitute for the kind of rigorous analysis that is reflected in the decision tree. We owe our clients full disclosure of the risks of litigation and the benefits of the certainty a settlement brings. This means more attention to detail in giving our clients our advice on settlement than just a general disclaimer that "you can never tell what will happen at trial." Our clients deserve risk assessment as rigorous and thorough as our trial preparation.

We are not alone. A growing discipline called behavioral economics studies how human decision-making strays from that of the rational economic actor on which classical economic theory is based. Recent research has demonstrated that the distortions in human decision-making are substantial and that at least some of them are both predictable and preventable.

Jerome Groopman's recent article in *The New Yorker* described a movement in medical education to address "cognitive" errors in diagnosing patients. It describes incidents in which doctors committed serious mistakes in clinical decisions that, in some instances, placed the patient in grave peril. The mistakes resulted not from incompetence, carelessness or lack of experience, but from human decision-making foibles. No stories of patients who died were recounted, but that plainly happens, and more than occasionally. The mistakes resulted from "the process by which doctors weigh test results in order to arrive at a diagnosis and a plan of treatment."

In common with legal evaluation and negotiation, the decisions arise in the context of uncertainty.

For decades, the field of cognitive psychology has studied and tried to make sense of human decision-making. In the 1970's and 1980's, Amos Tversky and Daniel Kahneman explored the things that distort our decision-making and lead to less than optimal choices. They developed "prospect theory," and explored what psychologists call "heuristics," which refers to the *usually* accurate hunches or rules of thumb that someone with experience relies upon. The CIA trains it intelligence analysts in this, because what *usually* is accurate is by definition wrong *some* of the time, as anyone following the news in the past decade has seen, sometimes with disastrous consequences.

Humans naturally discount the probability of unexpected outcomes and assume that what *usually* happens will *invariably* happen. Or at least that it will happen in the current instance. This is a "*representativeness*" error. It is driven by our native human discomfort with uncertainty. Our minds latch onto whatever will allow us to be sure about an inherently uncertain matter.

One example noted by Tversky and Kahneman involved a group of trainers of fighter pilots who given up on positive reinforcement for good performance of a maneuver as a motivating tool. It seemed to them that each time they complemented a pilot on a particularly good performance, the next time out the pilot invariably did worse. What Tversky and Kahneman realized was that the trainers were encountering a probability phenomenon called "regression to the mean," which holds that after an outcome that falls far from the "base rate" at which something typically occurs, the next outcome is likely to be closer to the base rate. In other words, when get a great result in one case, rather than recognize that you had an especially fortunate outing, you may assume that all the other trials will turn out the same.

Another natural tendency we all have is to jump to conclusions—anyone who has studied jury behavior knows that most jurors have distinct opinions about a given case by the time the opening statements have been completed. While their minds may be changed by what happens thereafter, their scope of inquiry is limited because they are looking for evidence that will support and reinforce the conclusion with which they started. Surprise—we lawyers do the same thing as we are sizing up a dispute, and overlook things that contradict the limited range of possibilities we have in mind. Our ability to spot problems with cases, or take them as seriously as we should, is affected by this tendency. It is called "*cognition bias*." Lawyers who do not think back on past experiences when they were surprised by unexpected issues are suffering from this, and their clients will ultimately pay the price.

Then there is "*availability bias*." This refers to our tendency to take the information most readily at hand and construct a hypothesis or prediction. In its

simplest form, if we only pay attention to what we learn early in the case, we will underestimate the problems. More subtly, our ability to call to mind the outcomes in similar situations, the number of such instances that come to mind and the emotional power of those experiences will influence our judgment. We may more readily forget that which is inconsistent with our self-image, and thereby lose access to information that would help us make better choices.

"*Loss aversion*" is another human blind spot. This refers to the fact that we will risk more to avoid a loss than we will risk to achieve the corresponding gain. The gambling industry thrives on this error, but when we have an investment, a "sunk cost" in something, we are much more likely to cling to it beyond the point where it is rational to do so. Studies have confirmed that this has an impact on human decisions across the board, demonstrating that even sophisticated and well-educated investment bank portfolio managers (and their portfolios) are prone to this error.

This is a problem not just because we are more attached to what we have than to what we want, but because our sense of what is a loss or a gain is readily and unconsciously manipulated. The plaintiff who believes the case is worth a given amount will resist beyond the point of reason settlement at an amount lower than that, because it will be experienced as a loss. The "reference point" at which we perceive something as a gain or a loss will have an unreasonable affect on how we negotiate once we approach that point. It's just a number, it concerns a matter that is inherently uncertain, and is generally arrived at in a less-than-rational manner. But it prevents settlements in a great many cases.

Then there is "*affective error*." This is a fancy name for allowing our emotional wishes to get in the way of our professional judgment. The client who we like and who wants or needs to hear good news may not get the cold blooded assessment of a case so that the lawyer can avoid causing disappointment. The client who persistently articulates a sound basis for a case and argues it effectively to the attorney will alter the lawyer's conclusions in a way the client who listens to and accepts the attorney's judgment will not. The client who we care about as a person will distort our judgment because we want to achieve the favorable result the client so sorely needs. This leads us to try to impose our will on the legal system, with predictable results.

These tendencies can and do affect our judgment as attorneys, just as they affect diagnosis and treatment given by doctors and assessments made by intelligence officers and the selections made by investment bank portfolio managers. We will be of better service to our clients if we educate ourselves about them and keep our eyes open for their appearance in our own professional judgments.

V. Collaborative Negotiation

While not present in a typical case, it is always worth considering whether there is room for a different form of negotiation. Here are three examples from real life:

- A bank financed a professional practice that went bankrupt. Six months before, it had required that the partners put up the equity in their homes as additional collateral. Afterwards, they fought the bank's effort to foreclose on various grounds. It appeared at first that the case was about money. It wasn't. The bank was concerned with satisfying the bank regulators that they had a performing loan on the books. It was willing to provide very favorable terms to the professionals in exchange for breaking the balance due into individual loans. Which is just what the professionals needed to be able to finance the new practices they were opening.

- A partner at another professional firm went on leave for a disability and shortly thereafter, learned that a wholesale reorganization was underway. Convinced that it was a smokescreen to terminate his employment, he initiated legal proceedings. He was now able to resume work. The first offer was for a small sum (the employee had received disability pay) and to return to work. The employee was convinced that this was a Trojan Horse tactic—get him to admit that his claim had little value, then justify a low-price "buy-out" because he was "at will." Four offers later, he realized that the firm actually wanted him to come back, and an easy settlement resulted.

- A long-term, 45 year-old municipal employee fired by a politically volatile mayor, now out of office, had a strong claim for political discharge and there was EPLI coverage—but for only some of the claims. The municipality was in financial condition so dire that it was laying off police and firefighters. When the carrier offered more than its exposure in an attempt to settle the case, it still was not enough. Why? As it turned out, the employee's husband was 10 years older than she, and their plan had been to retire when she was 55—which was now impossible under the municipal pension plan. The municipality could commit to a future stream of modest payments that did not even start for ten years—long after the current administration and at a time when the present financial crisis was likely to have abated.

These elusive "win-win" solutions cannot emerge from positional bargaining based on dollar amounts. It is necessary to get beneath the demands and offers to understand what people are actually after. The problem is that people will not tell you that. It can make them vulnerable. They fear it will result in a less favorable outcome. Most of all, they cannot imagine any way to get what they want other than through their stated position, which is generally a dollar figure. The reason for this is that as the conflict began, the participants lost trust in one another, and

thus cannot conceive of any flexibility on either side to work out a mutually beneficial resolution. "Thinking outside the box" is psychologically impossible.

People will not tell you what they want. They will tell you what they think will get them what they want. They don't just do this with adversaries, they do it with their lawyers. Every experienced lawyer has been in a situation with a client in which the client agreed to something proposed by the other side shortly after telling the lawyer she or he would never accept such a thing.

Mediators are specifically trained to look for these "win-win" solutions. They can occur any time either side has something other than the elements already on the table, which are generally a release and a check, from which the other side could benefit.

The first part of the process is to look for new options. To find them, employ lateral thinking. Consider whether you can vary any of these elements:

Time	Words	Secrecy
Place	Apology	Release
Quantity	Control	Reinstatement
Quality	Persons	Assurances
Size	Nature	Procedure
Context	Structure	Opportunity
Distance	Types	Guarantee
Responsibility	Volume	Publicity
Rate	Proportion	Security
Space	Exchange	Share

If you are in a situation where there could be some room for a collaborative outcome, the first key question to ask is: "What does each side have, or what could each side do, that would have value to the other side?" Such outcomes are possible most often where there is some potential for a continuing relationship. The lack of trust associated with a conflict is usually the largest obstacle.

Once options are generated, the next step is to evaluate them carefully and identify any elements that could suggest something practical. In settling any dispute with a collaborative strategy that means the parties will remain in a relationship, there are two key elements that should always be included in the package: (1) an accountability process, so that there is redress when either side does not live up to its commitments and (2) an exit strategy, which recognizes that where there has already been a dispute serious enough for lawyers to be involved, a future relationship is at best an uncertain proposition. The exit strategy should not be so attractive as to encourage sabotage, but should be something that each side would be comfortable living with as an outcome.

VI. Client Emotional Roadblocks

Here are the kinds of things employees say when asked what they want:

- "I just want my life back."
- "I want to teach them a lesson." or "They need to pay for what they did."
- "They should suffer like I've suffered."
- "I want to be vindicated, and I don't see how that can happen without a trial."
- "I want to make sure that this does not happen to someone else."

You rarely hear someone say, "I have a cause of action because of what they have done. It has a value. I'm just here to value that asset and collect on it."

All of the responses listed above reflect the emotional element to the dispute. All your instincts reject the notion of trading emotional satisfaction for money. All it means is a cheap settlement for the other side, which is not sincere. But emotional needs *can* be satisfied without money. Addressing them may be critical to allowing your client to resolve the dispute with a sense of satisfaction, especially if price the defense is going to pay is not going to make your client happy, even if it is reasonable.

Why do clients get so emotionally attached to their positions? What is so important about some arbitrary round figure that makes it impossible for your client to let go?

They are human, that's why. What has generally happened is the escalating cycle of conflict, which begins with resources, moves to personal condemnation and eventually attaches core values to the dispute. It begins when we begin demonizing our adversary. It's what is going on when I call a driver who cuts me off an "idiot." We are seizing the moral high ground by dehumanizing the opponent; we all do this and parties in lawsuits are no different. The effect is to make it much more difficult to work out a reasonable resolution because, given our moral judgment about the other party, we cannot possibly trust him or her.

Then it gets worse. Next we attach an important core value that we have to the dispute. It may be that people should be accountable for their actions ("They need to be taught a lesson") or it may be "an eye for an eye, a tooth for a tooth" ("They should suffer like I've suffered.") Whatever it is, it justifies our intransigence in the face of a reasonable offer to compromise. It may be voiced this way: "It's not the money, it's the principle of the thing."

One approach that can break through the resistance created by these mental gymnastics—which we all go through—is simply to *listen.* This is the most powerful

tool for defusing emotional obstacles. Few of us are really prepared to resolve a dispute until we feel that we actually have been heard. This is done by the attorney representing the plaintiff and by a mediator. It helps even more when the employer side shows enough respect to listen to your client.

True reconciliation between two people usually occurs when each reveals vulnerability to the other. For instance, a married couple ending a quarrel may have an exchange like this:

> "I shouldn't have said what I did about you. I was just feeling so hurt by the way you were ignoring me."
>
> "Well, I should have paid better attention. I guess I was too wrapped up in my own feelings to do that."

You won't often get this kind of personal exchange between parties in a lawsuit. Lawyers are skeptical by nature and professional training, the client will be skeptical as well because of the loss of trust. An apology can still be effective to diffuse the hostility that impedes settlement, but only if it is freely offered, unconditional and genuine. Our culture expects forgiveness after repentance and this impulse is not easily suppressed.

VII. When To Mediate

When does it makes sense to mediate and when not? There is no general rule.

Some say to mediate only when you have enough information to realize that there is exposure and some sense of the order of magnitude of the potential recovery. There is a lot to say for the view that one needs sufficient information to know whether the deal one is making is a good deal or not. But as sensible as it sounds, this approach can be totally wrong! One cannot always know, and the adversary process can prevent us from finding out, if conditions are favorable for a good settlement through mediation.

- Suppose the other side is anxious to settle quickly for reasons you do not know—like a desire to clear a contingent liability off the balance sheet before year-end? This may be the only chance for a relatively favorable settlement.

- Suppose the other side has information you don't have that makes the case much more dangerous than it appears? Isn't it better to find this out immediately, not after a year of litigation?

- Suppose you know things that could help the other side? Why litigate when you will only be educating the other side about it? Wouldn't it be wiser to settle when they still have uncertainty?

Information, then, is not the key to deciding when to mediate. Information can be acquired in the mediation itself, and at a much lower cost. A lack of information means that the person or persons making the decision will have to accept that part of the choice is based on probability and guesswork. But that's true of most business decisions.

Three factors must always be considered. First, you must have everyone at the table who is necessary to achieve a resolution that would be acceptable to each side. Second, you must be prepared to consider alternatives to the outcome on which you insist, and some reason to think that the other side is flexible as well. Third, consider whether the resolution can be brought about just as effectively through direct negotiation with no intermediary.

VIII. Prepare For A Successful Mediation

Know Your Case. The first step to preparing for mediation is to know the facts and law. There is no substitute for knowing the evidence cold and completing research of *all* significant legal issues. New factual information is usually uncovered in the mediation, and knowing the record is the way to know whether someone is trying to snow you and confronting you with a problem you had not considered. Because the mediation often represents the first full-fledged confrontation of the opposing viewpoints on the case, the decisive legal point may not be obvious until the mediation is actually underway. Often one side has worked out a twist on one of the legal issues in the case that the other side needs be concerned about but does not recognize as a problem before the mediation. Come armed with your precedents, because the other side will discount everything you have to say about the law, but may modify its view upon reading the cases themselves.

Assess Settlement Incentives. There is always more to the settlement decision than just the merits of the case. Assess your own, and the other side's, risk profile. Consider also any other factors that could affect the incentive to settle. Then turn the analysis around: what factors unrelated to the lawsuit should affect our side's willingness to settle?

Know Your Negotiating Partner. It is important to know what to expect from the players around the table. Most negotiators are fairly consistent in how they respond in a negotiation. It pays to educate yourself about the negotiation style and habits of the opposing party and counsel through a review of how they have behaved in past negotiations, regardless of what the negotiations have been about. Don't ignore the need to know the mediator, his or her usual *modus operandi*, and how flexible the mediator will be in modifying the approach if things are not going well.

Identify The Employer's Interests/Emotional Issues. The next consideration is the most important one, but also the most difficult to uncover. Do everything you can to

figure out what it is that the other side is *really* after. Think hard about any clues you have about this, and do not hesitate simply to ask opposing counsel. What you hear or do not hear may be useful.

Some individuals and some attorneys need to put on a show of aggressiveness. If so, don't take the bait, prepare to listen respectfully. Some people simply have a need for some drama before they are able to accept a compromise. Do all you can to figure these emotional needs out, so that you can address the issues they present, so you can educate the mediator and so you can ensure that your negotiating plan does not exacerbate the problem.

Be Able To Prove All Significant Assumptions. In about half of the cases that are mediated, someone comes into the mediation with firm beliefs and expectations about the case or the negotiation that will need to change if the case is to settle. This possibility must be anticipated. The preparation for such a confrontation consists of identifying the key assumptions (about facts, law and negotiating situation) on your side and on the other side. Prepare to back up each assumption about the case with hard evidence or case law, and prepare to shatter the illusion under which you believe the other side is laboring. On the critical points, where the assumptions of the two sides are direct contradictions, be prepared to support your position, and your fall-back position, convincingly.

The key is not proving a case that will convince the judge or jury. Nor is the object to convince the mediator, although that can help. The purpose is to convince your adversary or at least induce uncertainty. Focus on the argument that will be easier for the other side to accept. That is the one where you might actually do some meaningful convincing.

Do The Damage Calculations. Analyze and calculate the "hard" and "soft" numbers on the damage side of the case. You should arrive at the mediation having already crunched the numbers in a credible way, not just with a view to coming up with the most favorable totals possible. Numbers are powerful persuaders, but far less likely than legal issues to provoke emotional responses. It is surprising how often parties are so focused on liability issues that the importance of the damage calculation has been completely overlooked. A detailed spreadsheet showing reflecting all relevant factors can become the starting point for negotiations for the other side, thereby defining the negotiating range.

Consider Both Parties' "BATNA." Assess your "Best Alternative To A Negotiated Agreement" (BATNA) and that of the other side. Developments during the mediation may prompt you to revise this calculation, which identifies the point at which you are indifferent between settlement and no settlement.

The employer's BATNA number may be considerably higher than it would ever consider going in negotiations, just as the employee's BATNA will likely be

considerably lower than the employee will actually accept. But the exercise provides several things. First, it helps you to stop and think about what is going on if the negotiations seem to be approaching your BATNA. You may be getting too eager to make the deal and need to take a more recalcitrant posture. Second, when you come down to making a final decision on a settlement and you are preparing to walk away, review this calculation, as revised by developments during the mediation, and ask if you are acting logically.

Prepare And Distribute A Mediation Statement. It is virtually always best to prepare a mediation statement summarizing your view of the case. The statement speaks to the merits of the case, sets out your negotiating posture and calls to the mediator's attention the weaknesses and unreasonableness of the other side's approach. Lay out the damage side of the case in detail and provide any appropriate technical materials, addressing tax questions, regulatory provisions, or other items that are of special importance to the case.

Give the mediation statement to the mediator and GIVE IT TO OPPOSING COUNSEL. It is a widespread practice *not* to do this, and it is a mistake virtually every time. Even if the defense won't share their mediation statement, send your to them.

The phenomenon of "reactive devaluation" means that when you make a powerful point or present strong evidence at the mediation that the other side has not considered before, the reaction is not likely to be the "shock and awe" that you are hoping to induce. The reaction is usually denial or at least extreme skepticism. Sometimes there is a powerful answer to your point and you are the one caught off-guard. The attorney is likely to disbelieve your evidence or legal argument simply because there is no opportunity to verify or critically analyze it. It is thus crucial to permit the other side, especially the attorney, to think your arguments over in a calm setting for a time and come to the realization that there is no good answer to your strong points. At most, keep one or two points (on which you have ironclad proof) in reserve—and be sure the mediator knows what they are. Those you can try to use during the mediation as circumstances dictate.

Your mediation statement begins the process of educating the most important and hard-to-educate audience: the opposing party and lawyer. If there is information you do not want shared with the other side, you can put that in a separate confidential submission that the mediator agrees not to disclose without your prior approval. The only way you can be sure that a particular revelation will be taken seriously by the other side is to make sure that it does *not* come as a surprise.

Get Your Best Case To The EPLI Carrier A Month In Adavnce. If EPLI coverage is in the picture, it is critical to educate the carrier about the dispute well in advance of serious settlement discussions. Settlement authority is usually set by a committee or through consultation, and the participants in those discussions can

only operate on the information they have. This means that employee's counsel, regardless of the schedule set by the mediator, should provide employer's counsel with a mediation statement three weeks to a month before the mediation.

Make A Negotiating Plan. The first few steps of the negotiation can usually be choreographed in advance, although there is a need to plan different second and third offers depending on the counteroffer. Doing this is important to unify your approach, at least in the early going, by forcing you to establish an objective. Studies consistently show that negotiators who have an objective going into negotiation achieve better outcomes, although they usually do not achieve that objective.

Your plan should identify intermediate points after your first offer and provide rationales for why each makes some sense as a compromise offer. There is some value with even the most cynical negotiator of providing a rational basis for an offer. Plaintiffs complain that "I came down $100,000 and they only came up $10,000. That's bad faith negotiating!" Defendants say "We went from $10,000 to $20,000—we doubled our offer. They came down from $1 million to $900,000, just 10%. That's bad faith negotiating!" These arguments are meaningless and not worth making. Far better to be saying, "Hey, the chances of summary judgment here are not good and I'm prepared to settle below $150,000—which you will spend, win or lose—it's a generous offer."

Don't Fall In Love With Your Plan Or Objective. No war plan survives first contact with the enemy, and no negotiating plan survives the first exchange of offer and counteroffer. To negotiate effectively, it will be necessary to maintain flexibility to meet whatever develops.

Most important, do not talk yourself into an advance "bottom line." This is a huge trap. Half the time, one side or even both will find out things that *should* significantly alter their assessment of the case. THAT'S ONE IMPORTANT REASON WHY YOU GO TO A MEDIATION! You are very unlikely to come out of the mediation process with a more optimistic view of your position than the one you started with. But it is in the nature of the process to affect the thinking of at least one side fairly frequently, so you should expect to have a less optimistic view of things as the mediation progresses. If your thinking is focused on a predetermined bottom line, it means you will not take into consideration what you learn in the mediation. So why bother to show up?

A "bottom line" is an arbitrary, emotional figure. Once you reach it, you will be affected by "loss aversion." A predetermined "bottom line" establishes a point at which you begin to experience concessions as losses, and thus accept more risk of loss than is prudent under the circumstances.

Believe What You Are Saying. Convince yourself of your opening position. Sincerity is effective.

IX. Conclusion

Mediation is partly a setting in which negotiation can take place. It is partly an opportunity to get a look at what the risks of a dispute are and select options that would not otherwise be presented. It is partly an opportunity to find a collaborative solution, or a collaborative element of a solution, that is beneficial to both sides. It is partly an opportunity for healing wounds inflicted in the workplace or courtroom. Working within the process presents both employees and management with a powerful tool for disposing of disputes in a cost-effective and satisfying manner.