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NEGOTIATION SKILLS AND TIPS

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A. INTRODUCTION

Negotiation is an essential part of a lawyers' job - whether to establish the terms of a relationship between two or more parties, to agree the daily transactions of a business or to deal with problems, manage conflicts and resolve disputes.

> *"In business, as in life, you don't get what you deserve, you get what you negotiate."*[1]

Or, as that famous legal philosopher, Ben Elton, wrote in his novel *This Other Eden*[2]:

> *"LFS or Litigation Frenzy Syndrome could leave families and communities divided, it could destroy vast corporations, it could leave grand and respected institutions broken in the dust. Studies had suggested that, left unchecked, LFS could eventually develop into civil war. LFS was, however, always checked eventually due to the first law of legal dynamics. The first law of legal dynamics states that litigation will expand to absorb the amount of money available; a corollary of this law clearly being that all litigation will cease when the money runs out."*

Challenging, cynical perhaps; but unfortunately, not far from the truth.

Negotiation skills are required in all aspects of life. It may be anything from working out the terms of BREXIT, to signing the Treaty on the Non-Proliferation of Nuclear Weapons in 1970, to agreeing the split of assets after a divorce, to setting up a new business venture, to asking for a pay rise in your student job at a fast food outlet.

And of course all experienced practitioners know that with most litigation, the costs of running a case are prohibitive, whatever the amount in dispute. All courts and tribunals have strong Alternative Dispute Resolution (ADR) processes now built in to any civil proceeding, by court rules or other legislation[3]. Mediation and other forms of ADR are, in large part, the facilitation of a negotiation process by disputing parties.

How then can practitioners best be effective in negotiating an agreement?

B. THE ESSENTIAL CHARACTERISTICS OF NEGOTIATION

Negotiation is a process of two (or more) parties combining their conflicting perceptions into a single decision. Noted statesman and negotiator Henry Kissinger defined negotiation as *"a process of combining conflicting positions into a common position, under a decision rule of unanimity"*[4].

It is regarded as a "positive-sum exercise", since by definition both parties prefer the agreed outcome to the status quo (i.e. no agreement) or to any other mutually agreeable outcome.[5] Negotiating parties have come to the conclusion, at least for a moment, that they may be able to satisfy their individual goals or concerns more

favourably by coming to an agreed-upon solution with the other side, than by attempting to meet their goals or concerns unilaterally.

Both sides should, in most cases, come off better in the agreement than in the absence of the agreement, or else they would not agree. A decision is usually made by changing the parties' evaluation of their positions and interests in such a way as to be able to combine them into a mutual package, by persuasion, coercion or force. In the process, the parties essentially exercise one of four choices (yes, no, maybe and/or keep on talking). Both sides have some power over each other and are consequently interdependent.[6]

There are many different ways to describe negotiation and researchers have not been in complete agreement about the theoretical frameworks that may apply[7]. The following describes five commonly accepted models of negotiation:

Structural Approach:

This approach emphasizes the structural features such as the number and relative power of the parties. It maintains that outcomes are a function of these structures. In this approach negotiation is treated as a competition between incompatible positions or goals. Power is a central factor and the relative power of the parties affects how parties choose their positions. Although logically a powerful party is more likely to gain a superior outcome when pitted against a weaker party, in fact the range of outcomes can be very wide. Other factors such as determination, persistence, negotiating skill and tactics can play a significant role. The other weakness is that it gives emphasis to position taking and this can undermine a party's ability to identify and flexibly respond to changes in the negotiation so that its own interests are protected and enhanced. The emphasis on "winning" a negotiation can have unsatisfactory long-term impacts on relationships.

Strategic Approach:

The emphasis of the strategic approach is upon outcomes and goals. It has its roots in mathematics, decision theory and economics amongst others. Negotiators are viewed as rational decision makers with known alternatives who make choices guided by their calculation of which option will maximize their ends or "gains." In this sense negotiators respond to incentives and make a cost-benefit analysis of what is happening. They are looking for the best solutions.

Behavioural Approach:

These approaches emphasize the personalities of the negotiators. Negotiators are described as "hard" or "soft":

"The behavioral approach derives from psychological and experimental traditions but also from centuries-old diplomatic treaties. These traditions share the perspective that negotiations – whether between nations, employers and unions, or neighbors are ultimately about the individuals involved. … [T]he behavioral approach highlights human tendencies, emotions and skills. They may emphasize the role played by 'arts' of persuasion, attitudes, trust, perception (or misperception), individual motivation and personality in negotiated outcomes. Other researchers from the behavioral school have emphasized factors such as relationships, culture, norms, skill, attitudes, expectations and trust."[8]

Concessional Exchange Theory:

This is a model that sees the negotiation process through which the parties learn from each other. This is usually through the concessional behaviour of the parties.

These concessions structure the negotiation through a series of stages. They serve as signals to each side to encourage movements in their opponent's positions. This model overlaps with the structural approach where power is an important element. In the concession exchange approach the concession making is a way of expressing power through the negotiation. The limitation of this approach, along with the structural approach, is that those engaged in this concession exchange approach will miss the broader mutual options which may be more beneficial to both sides. That is, the creative problem solving of the parties can be limited by this approach.

Integrative Models:

Integrative model approaches, in sharp contrast to distributive approaches, frame negotiations as interactions with *win-win* potential. Whereas a zero-sum view sees the goal of negotiations as an effort to claim ones share over a "fixed amount of pie", integrative theories and strategies look for ways of creating value, or "expanding the pie. It is an approach that emphasizes problem solving, cooperation, joint decision making and mutual gains and calls for participants to work jointly to create win-win solutions. They involve uncovering *interests*, generating *options* and searching for commonalities between parties.

These models introduced the idea of phases or stages to negotiation in which negotiation was viewed as a series of steps, or a *process*. As such, planning for and negotiating over the process itself are as critical for the outcome of a negotiation as the negotiation over the substantial issues themselves. Parties must take time to consider questions such as: Who will be negotiating? What issues will be discussed? How will these be discussed? What should the order and value of the issues be? And how will commitments be decided?. Taking the time to negotiate the process before diving into talks is beneficial to all the parties involved. It might be time consuming, but in the long run *"[negotiating the process] will not only save time, but it also will enable wiser, more robust, and more valuable deals"*[9].

Timing is considered to be another important factor in negotiations. Parties are unlikely to enter talks before a situation is '*ripe for a solution*', a condition that occurs when the parties realize that the status quo "is a lose-lose situation, not a win- lose situation."[10] However, ripeness, while necessary, is not a sufficient condition for successful negotiations. For this, the presence of a '*Mutually Hurting Stalemate'* is also required, a condition of intolerable 'hurting' or mutual loss[11]. This kind of a stalemate arises out of the suffering that results when parties fail to solve an important problem. In general, parties enter into negotiations to escape an unpleasant state of affairs when they believe that in doing so they have a better chance of achieving a favourable outcome, than by any other means.

Integrative negotiation is the most common method used by lawyers and is the premise of this seminar ("*Negotiation doesn't have to be a tug of war. Armed with the right skill-set, it is possible to find a win-win outcome for everyone"*). It is intuitive and effective. So in the balance of this paper I will provide some skills and tips modelled on this approach, which will hopefully be of use.

C. NEGOTIATION SKILLS

The essential element of integrative negotiation is to identify the interests of both your client and also the other party. Once this happens then it may be realized that those interests may align, or at least overlap in part. Once parties gain this insight, splitting the pie is no longer difficult. Getting to this point is the difficult task and there are a number of negotiation techniques that can help.

Listen to your client

What do the clients want: A less-than-ideal deal or no deal at all? Days spent in a hearing in order to discover what the Court believes they are entitled to, or a negotiated settlement that will not be ideal, but might be a better outcome, financially and emotionally? Effective lawyers hear what the client says and also watch body language - the words they use might not precisely convey what they really want. This is especially common if you act for multiple family members or business partners. Needless to say, some deals are better off not being made, and clients do want their day in court. It is vital that they make the decision to settle or proceed with knowledge of the possible consequences.

Get the timing right for the negotiation

In litigation, if there is going to be a counter-claim, it needs to be issued before ADR. If expert advice is necessary to enable settlement, it should be obtained promptly. In business, the parameters for making a successful deal (such as the variables that could affect a profit or a loss) need to be known. In family disputes, are all the decision makers emotionally capable of participating?

Parties generally need to be in an informed position before they can make a sensible decision about making or accepting any offers. Their lawyer needs to defer any formal ADR until a party is in that position.

Having said that, there is a competing consideration to mediate early, before massive costs have been incurred, as finding reimbursement for these costs will make settlement harder.

Prepare the case - BATNA, WATNA, MLATNA

Well prepared lawyers have told their clients:

- the best,
- the worst and
- the most likely alternatives to settling,

and are able to give legal and tactical advice upon which the client can rely.

If expert reports have been obtained before a mediation, they need to be exchanged with the other party(s) so that no-one is taken by surprise. It is not uncommon to adjourn a mediation to allow the parties time to obtain further information.

Effective lawyers come to ADR with answers to the questions of which they are aware, or of which they should be aware.

In litigation, consider whether an offer, such as a Calderbank or under the various Court/Tribunal rules, will be helpful - and make it early

Needless to say, the earlier such an offer is made, the earlier lawyers have the opportunity to get their clients to be realistic about outcomes while also protecting their position on costs and – sometimes – settling the dispute at the first opportunity.

Prepare your client

Most commercial clients will have experience in negotiating a deal. However even they may never attended a mediation or compulsory conference before. Like most people, your client will probably have little if any idea what is going to happen. Some litigants arrive at mediation unaware that they will have to make the decision about whether to settle and on what terms. They need to know, before they arrive:

- What happens at mediation. VCAT has a useful mediation video which streams on line on the VCAT web-site.
- How much they have already incurred in costs, how much they will incur to the door of the hearing, how much it will cost per day for the hearing and how long the hearing is likely to run for. Remember to say that sometimes hearings can run for a lot longer than the initial estimate.
- Taking costs into account, your client's best, worst and most likely alternatives to settling.
- The effect of rejecting a formal offer and not beating it at trial.

Consider whether you need to be at the mediation

There are negotiations, particularly concerning business arrangements where the parties are knowledgeable, or where the dispute is small, where clients can attend without a lawyer. In some instances very successful agreements are reached with no legal representation. However, if contemplating sending your client along alone, talk to the other side to find out what they will be doing. Will they have legal representation? If so, does your client need you in order to make a decision? Will talking to you by telephone suffice? Also consider "bullet making" – discussing strategies and outcomes with your client so that they can make the most of the mediation.

Sometimes your client's fees are best spent by appearing alone for most of the mediation and then having you attend to finalise a contract or terms of settlement. This is not the same as having a senior lawyer appear late in the day and turn the negotiation on its head - that person should have been present for the whole of the negotiations.

Attack the problem rather than the opposition

A robust opening that demonstrates to the opposing party that not everyone shares their view of the dispute can be a useful view changer. However, verbal attacks and expressing righteous indignation are rarely helpful. They tend to entrench both parties and can make it more difficult for the other party to make concessions to your client.

Prepare your client about what can be said in front of the other party(s) and when to leave it to the lawyer

Litigants should be given the opportunity to say what they want whenever possible. Some disputes will never settle until the parties get the opportunity to get grievances off their chests. There are exceptions of course. If your client is inexperienced and it is likely that the other party will take unfair advantage, it might be wise to advise them to listen rather than speak in the joint sessions, and say what they need to, to the mediator or member in private sessions.

Keep options open

Range of options - Effective lawyers consider and explore a range of options for settling the dispute. In a building dispute for example, the builder might do work, and the owner might pay money into trust before the work commences, to be paid out after it is done. Or the resolution might be for the builder to buy the house back.

Expanding the Pie - consider adding resources to increase the possible options, so both parties can achieve their objectives.

Logrolling - both parties exchanging information about their preferences and options on the resources to be divided. In this way less urgent or important preferences and options can be traded away or conceded for other preferences and options.

Non-specific compensation - where parties provide incentives independent of the resources that have to be divided in order that one party may obtain his objectives and pay off the other party for conceding. For example, where one party is offered an extra week's leave per year in return for relocating to a more remote office location.

Cost cutting - which one party achieves his or her objectives but reduces the other party's costs in exchange for going along with the outcome.

Understand how the game is played

Mediations and compulsory conferences work because they give the parties intellectual and emotional reasons to move from their preferred outcome. If parties just want to talk about money, it can be done between the lawyers instead of coming to mediation or compulsory conference. Effective lawyers have considered where the negotiations are likely to get to, and also where to pitch the first offer. They do not entrench their client's "bottom line" and they give him or her room to move on what they hope to achieve. They do not capitulate too quickly, but are prepared and willing to give firm advice on whether a proposed settlement is a good one.

Manage your client

No matter how skilled the lawyer, sometimes they need assistance in managing a difficult client. Try:

Bonding: use empathy, attention and respect (E.A.R.). When the client gets upset, rather than appearing angry with them, criticizing their behaviour or trying to take a decision-making role, try empathy and respect: e.g. *"I can empathize with how difficult this process is."* Instead of *"You're being unreasonable,"* or *"Try to control yourself"*. Emphasize E.A.R. over and over again, and they will usually calm down.

Structuring: difficult clients need more structure, to avoid slipping into their distracting emotions. So structure the process around making a proposal; e.g.: *"Throughout this divorce mediation, we will focus on the future and making proposals. It's natural to slip into talking about the past and what each other did badly. Instead, I will redirect you to just make a proposal. Then, after you hear a proposal, just respond with 'Yes, No, or I'll think about it'. "* Then, throughout the process when they slip into arguing, blaming, and focusing on the past, don't criticize them - instead just interrupt and ask *"So, what's your proposal?"*

Reality-testing: Difficult clients constantly distort information, usually without knowing it. So they repeatedly present the mediator with impossible issues: For

example, a wife says *"I don't believe what he is telling me about his financial position - he is hiding money from me"*. Some options for reality testing include saying to her:
"1) You can stop the mediation and do thorough discovery with separate attorneys, accountants, whatever, and then go to court; or
2) You could do some discovery and then return to mediation and decide what to do next; or
3) You could continue in mediation and ask for more information or work with what you have, and accept the uncertainty of never knowing for sure - and you may never know for sure if you do extensive discovery.
You have a dilemma. What would you like to do now?"

Consequences: Many difficult clients are surprisingly naïve about the self-defeating consequences of their behaviour. Instead of using comments which criticise them, educate by focusing on non-threatening pointers which do not threaten your relationship with them. For example, give external reasons for various consequences of various future options. *"Actually, you may not realize it, but the law does not allow you to do that proposal."*

D. BI-LATERAL AND MULTI-LATERAL NEGOTIATION

The above strategies have been provided in the context of bi-lateral negotiations. Of course you may be involved in a negotiation procedure where more than two parties are involved, such as for multiple clients or against multiple parties. Examples include acting for or against:

- one of several concurrent wrongdoers in a building dispute
- family members debating the future of a business or farm
- an Owners Corporation
- consumers in a class action

Effective strategies include:

Take control: where appropriate, be ready to take control of the group to steer it in your way. That way you keep control of the agenda.

Come prepared: by having thought about the reasonable contribution of each of the parties. As well as calculating your client's BATNA, WATNA, MLATNA, do the same for each of the other parties.

Build alliances: you may find that one or more of the parties have interests aligned with yours - use those to form a united front, even if only on some issues.

Take time: more parties means more time is required.

E. THE ROLE OF THIRD-PARTIES IN NEGOTIATION

In some negotiations, the assistance of an independent person, who is not a party, can be of great value. The most obvious example is the use of a mediator in a dispute that has gone or is about to go to court. The mediator may be appointed by the court or may be chosen by the parties. Their role is to guide the parties to a resolution without making any actual suggestions. Nationally accredited mediators (NMAS) are trained to follow the integrative model, but do have the ability to alter that if circumstances dictate. They are required to follow the NMAS standards[12], which include ethical and procedural requirements, such as:

2.2 Mediation is a process that promotes the self-determination of participants and in which participants, with the support of a mediator … communicate with each other, exchange information and seek understanding… generate and evaluate options … negotiate with each other …

A mediator does not evaluate or advise on the merits of, or determine the outcome of, disputes…

3.2(a) assessing whether mediation is suitable and whether variations are required (for example, using an interpreter or a co-mediation model in culturally and linguistically diverse communities or introducing safeguards where violence is an issue)…

3.2(f) being required, at the preliminary conference or intake, to refer participants, where appropriate, to other sources of information, advice or support that may assist them…

5.1 A mediator may suspend or terminate the mediation if they form the view that mediation is no longer suitable or productive...

6.1 A mediator must be alert to changing balances of power in mediation and manage the mediation accordingly…

7.1 A mediator must conduct the mediation in a fair, equitable and impartial way, without favouritism or bias in act or omission…

8.3 A mediator must adhere to the ethical code or standards prescribed by the professional organisation or association of which they are a member or by whom they are employed…

Another example of use of a third party, is where the dispute involves cross-cultural issues, or particular cultural sensitivities. Extended family or a religious or community leader may need to be involved. If you are advising a client in such a situation, it may be useful to have a preliminary discussion with such people to find the best way to use their contributions. Similarly, a preliminary conversation may lead you to the view that their assistance will be detrimental to a settlement and so you can make arrangements which will avoid the process being derailed.

Sometimes rather than haggling over an amount of money, the parties may agree to pass the difference in their offers on to a third party. For example, the parties may be $50,000 apart after a protracted legal dispute. One party may suggest that the $50,000 be put towards paying both sides' lawyers bills, rather than directly to each other. Another example is for the difference to be paid to a mutually agreed charity. This can sometimes be enough to refocus the parties and move them past this point of resistance.

On the other hand, any settlement which places a responsibility on an absent third party should be avoided.

F. THE ROLE OF SUPPORTED NEGOTIATION - THE LAWYER SUPPORTER

The best lawyer-negotiators are the ones who never forget the people for whom they are acting, who negotiate decisively and fairly and who get a good result for their clients and a fair result overall.

Lawyers are required to comply with the *Legal Profession Uniform Law Conduct Rules*[13]. Relevant rules include the following:

7.2 A solicitor must inform the client or the instructing solicitor about the alternatives to fully contested adjudication of the case which are reasonably available to the client, unless the solicitor believes on reasonable grounds that the client already has such an understanding of those alternatives as to permit the client to make decisions about the client's best interests in relation to the matter.

22.1. A solicitor must not knowingly make a false statement to the opponent in relation to the case (including its compromise).

22.2 A solicitor must take all necessary steps to correct any false statement knowingly made by the solicitor to the opponent as soon as possible after the solicitor becomes aware that the statement was false.

There are examples of lawyers being found in breach of their professional obligations when negotiating on behalf of clients. See for example the decisions of
Legal Services Commissioner v Mullins [2006] LPT 012;
Legal Services Commissioner v Garrett [2009] LPT 12;
Goddard Elliott (a firm) v Fritsch [2012] VSC 87;
Atwells v Jackson Lalic Lawyers Pty Limited [2016] HCA 16.

G. THE SETTLEMENT

Ensure That The Settlement Will Work

Effective lawyers check to ensure that the obligations under the terms of settlement can be fulfilled. For example, a promise to pay will not work if the client won't have the funds by that date. Similarly, if there is a long and bitter history between the parties, a settlement which requires the parties to keep working together might be unrealistic.

Draft Terms Of Settlement – Neither Over-Brief Nor The Great Australian Novel

Effective lawyers usually have draft terms that can be tailored to fit the dispute, and as well as reality-testing the deal, they will reality-test the terms of settlement. What will happen if another party fails to fulfil their obligations? Will your client have wasted the time and money spent in negotiation?

H. CONCLUSION

As Aristotle said 3000 years ago[14], modes of persuasion depend on three things: ethos, logos, pathos - or reputation, logic, emotions. Effective negotiators address each of these areas, by:

- being professional and confident - a credible source is worth listening to;
- being prepared - the best way to convince an audience is by use of logic or reason, facts, statistics, historical analogies;
- building trust - allowing you to appeal to the participants' emotions.

Negotiation doesn't have to be a tug of war. Armed with the right skill-set, it is possible to find a win-win outcome for everyone.

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Endnotes:

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[13] Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 or the equivalent in states not signed up to the Uniform Law
[14] https://pathosethoslogos.com