

Effective Negotiation Techniques

Negotiation is a skill that can be developed. As with trial, experience is essential. And also, as with trial, perceptions are important. This means credibility is, once again, a factor.

I believe fear is the most powerful motivator, and that most negotiations are driven by fear. As a general rule, the party who perceives him or herself as weakest, or with the most to lose, will give in first. Keep in mind that our perceptions of our own strengths are relative to how we perceive the strengths of our opponent.

Understand that negotiation is a dynamic process. A good mediator can certainly facilitate the process. But the parties and their attorneys need to understand the process, and what typically motivates parties to reach an agreement.

In simplest form, a negotiation consists of offers and counter-offers. At the same time, there is posturing, arguing, explaining, calculating, and all manner of outpouring of emotions.

Clients need to be prepared for this. They need it explained that they may be insulted by the initial and/or subsequent offers or counter-offers. They need to appreciate that the other side may be feeling them out, or sending a message. In the best and most transparent of negotiations, it can be hard to determine what your opponent's strategy may be. Imagine how your client feels.

Start above (or below) your final number, but don't be so high (or low) as to lose credibility. You need to be taken seriously or the other side won't seriously deal with you.

Remember that once you give something away (by changing your position) you probably will never get it back.

Argue your strengths and your opponent's weaknesses. Avoid falling into the trap of discussion about the weaknesses of your case. Redirect the focus.

Understand that the parties may genuinely differ in their perceptions of the facts and the relative values of the case. You can lead a horse to water (mediation) but you can't make him drink.

Know your client's bottom line (or acceptable settlement range) before the negotiation begins. I call numbers in this range the "sweaty hands" numbers because when that range is being discussed, and hands begin to sweat, then it's a sure bet you, or the client, is approaching a place of fear. That is an important recognition, and a time when posturing begins to fall by the wayside.

Quite often the most movement in a negotiation happens in the last 5% - 10% of the time allotted. Time considerations do matter, and a good negotiator will take advantage of every consideration. Whether attorneys, clients or insurance representatives, people do get tired or anxious and want to get things over with.

Don't negotiate on an empty stomach.

Don't negotiate unless your opponent has authority to settle in a range that you believe represents fair value.

Keep in mind that all movement represents progress.

Understand that a case might still settle later on, even if negotiations fizzle.

Keep in mind that the mediator's job is to settle the case, to bring the parties to common ground. The mediator's job is **not** to represent you or your client. The mediator is human too. He or she may not like your case or your client very much. Or the mediator may want to get home at a reasonable hour; avoid traffic; catch the ferry; or make another appointment. Some are better than others.

Finally, always maintain your credibility, and treat everyone fairly and with respect. We all have our jobs to do.

Settlement Letters and Statements

Settlement letters come in all shapes and sizes. Every case may have its own set of special needs, requirements or considerations.

There are letters to insurance adjusters, letter to opposing counsel, and letters to mediators. But in every case, where settlement is concerned, you are seeking to persuade or convince the other side of the rightness or validity of your position. Do this by highlighting your strengths.

In some cases, it may be appropriate, in a letter to a neutral mediator, to talk about the weaknesses of your case. But unless the mediator specifically asks it of me (and even then I may not provide it) I prefer to make little or no mention of the weaknesses of my client's case, for several reasons. First, the other side is almost certainly going to educate the mediator on those issues. Let them do the work and heavy lifting. Second, mediators have been known to let it slip to the other side that you consider a particular issue, element or aspect of your case as a weakness. Why give that up if you don't have to?

In letters to insurance adjusters, the length and complexity of your settlement demand will vary considerably depending on the complexity of the case, and the amount of discovery (if any) done by each side. There are no hard and fast rules here, however you may find it helpful to simply ask your opponent, or the adjuster exactly what he or she needs in the way of documented proof and discussion of the issues.

In smaller cases, some adjusters are happy with just the records, so long as they provide all the documentation needed to satisfy their supervisor.

In larger cases, you will still need to provide the records (or documentary proof or testimony), but it can be helpful to carefully reference every important item of damage, treatment, harm or loss, as well as factual liability considerations. Liability is the starting point for all negotiations anyway.

The bottom line is that you have to acquire, present, and document all of the necessary proof for someone else's consideration. Do that professionally and accurately.

A word about effort and creativity: Effort and creativity are wonderful things. Where would we be without them? Work hard, and don't hesitate to be creative. But keep in mind that with every endeavor there is a point of diminishing marginal returns. To that end, keep in mind the adage of working smarter rather than harder.