

Planning for Settlement Negotiations: The Big Picture

BY H. LEE HETHERINGTON

Good negotiators, like good lawyers, are prepared. They know where they are going and how to get there. As any successful lawyer will tell you, superior preparation can often spell the difference between winning and losing the case, especially in hard-fought, complicated cases.

The same is true with negotiation. Even in the simplest matters, preparation is what allows you to weave relevant information and applicable negotiating principles into a winning result. Unfortunately, preparation takes time, a scarce commodity in any busy law office. However, not spending the necessary preparation time often results in a rushed or ill-conceived performance and a loss in the courtroom or at the bargaining table.

While most everyone readily concedes that preparation takes time, too many lawyers unnecessarily spend that time reinventing the wheel in the name of preparation. Others never even get around to inventing the wheel in the first place.

Following are some suggestions for streamlining your preparation to make the most of the time you have, and, above all, to help you know exactly where you are going and precisely how to get there.

What is it?

Negotiation is the means by which one changes the status quo through consensus. In terms of family law, the alternative is a costly, time-consuming lawsuit in which there are no clear winners. Studies have shown that 95+ percent of all litigated disputes are ultimately resolved by consensual agreement. Fortunately, everything you need to know to conduct a successful negotiation is contained in the answers to four simple questions:

1. With whom am I dealing?
2. What do I want?
3. How will I go about getting what I want?
4. What are the unique circumstances of the case?

Obviously, the answers will vary from one negotiation to the next, but the questions provide a quick summary that should guide your preparation.

A family law setting

Negotiating a divorce proceeding or a child custody dispute is especially challenging. The client's emotions often get in the way of rational goal setting. For this reason, spending the necessary time preparing the client for negotiations is likely to lead to the best possible result. That said, let me offer a systematic approach to preparation that will help you and your client formulate realistic goals while selecting an effective strategy and tactics designed to achieve optimum results.

What your client wants

The first area of inquiry for all lawyer-negotiators is identifying the client's self-



Published in *Family Advocate*, Vol. 37, No. 3, (Winter 2015) p. 9-11. © 2015 by the American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

interest in very specific, concrete terms. In other words, what exactly does your client want from a particular negotiation? Unfortunately, determining the client's true wishes often is difficult and, in some cases, a never-ending process. Nonetheless, the heart of any negotiation is getting the client what he or she wants. Thus, your first task is to ask the question and get a highly specific answer.

Categorize objectives

To help categorize your client's objectives, divide your client's goals into three types: Deal Points, Secondary Points, and Trade Points.

"Deal Points" are those the client *absolutely must have* to make the negotiation worthwhile. Put another way, if the client cannot obtain the deal point(s), there is no compelling reason to pursue the negotiation. It would be better to move to the next best alternative or to accept the status quo. Because a deal point merits the highest priority, there will be very few of them in any negotiation.

Once you have identified the deal points, do not compromise on them. If your client is willing to compromise a deal point, there is a very good chance it is not a deal point at all, but rather, a secondary point. When it comes to classifying objectives, pay special attention to what is and is not a legitimate deal point because it will affect everything you do during negotiations.

"Secondary Points" involve goals and objectives that are important but not necessarily vital to the client. A secondary point can be compromised if necessary to obtain a deal point.

"Trade Points" are everything else in the negotiation. Trade points can range from lower priority goals the client would like to achieve—but that will not play a substantial role in his or her overall perception of success or failure of the final agreement—to matters that have little or no value to your client but could have great value to your bargaining counterpart. From a tactical standpoint, trade points are extremely important to a skillful negotiator. While having little worth to your client, they often represent valuable secondary or deal points for an opponent. The best application of the leverage of opportunity is to use these trade points as concessions or as a quid pro quo for secondary or deal points your counterpart would be willing to relinquish.

Two key questions reveal objectives

During the initial client interview, give your client the opportunity to tell the complete story before you start asking specific questions. Once all relevant facts have been elicited, focus on your client's specific goals. This information can be obtained by asking two questions during the interview:

1. If you could have everything you want in this negotiation, what would you desire in the final agreement?
2. If everything goes against us in this negotiation, what would be the very least you would accept to conclude an agreement?

Based on your client's answers to these questions, complete the form below.

Deal Points	Secondary Points	Trade Points
1. _____	1. _____	1. _____
2. _____	2. _____	2. _____
3. _____	3. _____	3. _____
		4. _____

Your negotiating strategy

The next step in the preparation process is selection of the particular strategy that will be followed throughout the negotiation. Strategy decisions should answer the question, "How will I achieve my client's objectives?" For instance, in a divorce case, some lawyers adopt a strategy of filing the lawsuit before commencing negotiations. Others employ just the opposite approach by immediately entering into negotiations and using the threat of a lawsuit as leverage throughout the discussions. Strategy is the direction in which one moves toward one's goal. The actual mechanics of taking specific action will be embodied in the tactics you employ to reach your bargaining objectives.

Strategy is determined by a number of factors, including your negotiating style and that of your adversary, specific facts and circumstances of the case, and relative leverage positions. All of these factors should be analyzed and catalogued. Essential facts and leverage positions should be simplified and condensed to outline form. This visual overview will be a great aid when developing an overall strategy and specific tactics.

Consider asking variations of these key questions to determine the client's real goals. Repetition is the key to gaining this important information. The client's response to these questions will provide you with a negotiating target. If your client's goals are unrealistic, take the necessary steps to moderate his or her expectations. Share unfavorable statutes, case law, verdict expectancy statistics, and your overall judgment as to your client's chances for success. Then help your client refocus on more realistic goals.

If this is necessary, it is especially important to do it at the outset of the lawyer-client relationship, before your client develops an unrealistic, rigid, and uncompromising mindset. On the other hand, if your client has low expectations, you may want to reinforce this position to insulate him or her from possible disappointment. If it turns out that the final result exceeds expectations, all the better.

After a thorough interview and analysis of your client's response to these key questions, three categories of goals will emerge.

STAY FLEXIBLE AS GOALS CHANGE

A word of caution—goals can, and often do, change.

Just because you accurately perceive your opponent's objectives today does not necessarily mean they will not change over the course of the negotiation. The longer a negotiation is drawn out, the greater the likelihood that one party will change objectives. This is why delay is such a successful tactic.

Protracted negotiations frequently cause adjustment in one party's expectation levels. Even though everyone is susceptible to change, i.e., altering objectives, completing the goal analysis at the outset will, at the very least, provide you with the parameters of the negotiation.

Identifying the goals of all parties is analogous to drawing the boundaries of an athletic playing field before the game. Knowing where the game will be played is always preferable to looking for the stadium and never finding it.

—H.L.H.



Goal formulation

Once you have identified the client's goals, you are in a position to organize them in order of importance. Strategy is important in negotiation because it gives shape and direction to the isolated moves you will make. Strategic planning facilitates tactical decision-making designed to move you to your final objective. On the other hand, negotiating without strategy usually results in random selection of tactics that bring hit-and-miss results.

For instance, in the example above, the lawyer who withheld filing suit as long as negotiations were ongoing would not threaten a lawsuit at every impasse. Instead, the subtle threat of suit would be interwoven into the entire pattern of the negotiation. On the other hand, lawyers adopting the "sue now, talk later" approach are in a better position to use the threat of suit at the initial meeting with the opposition.

Size up the opposing party

To a great extent, strategy and tactics will be determined by your opposing party's objectives. Accumulate sufficient information in your opening moves to identify, or at least shed light on, your opponent's goals. Then chart this information as follows:

Opponent's Deal Points

1. _____
2. _____
3. _____

Opponent's Secondary Points

1. _____
2. _____
3. _____

Opponent's Trade Points

1. _____
2. _____
3. _____
4. _____

After completing an analysis of your opponent's goals, compare the objectives of both parties and proceed with your strategy decisions.

Client's	Opponent's
Deal Points	Deal Points
Secondary Points	Secondary Points
Trade Points	Trade Points

Formulate a walk-away position

One last bit of essential prenegotiation contingency planning will be your insurance policy against disaster, that is, devising a strategic walk-away position. In their classic book, *Getting to Yes*, Roger Fisher and William Ury refer to this final phase of preparation as BATNA (Best Alternative to a Negotiated Agreement). It requires identifying all viable alternatives to a negotiated agreement. After doing so, rank them in order of priority from the most attractive to the least attractive. If, at any time during the give and take of bargaining, you suddenly find that the negotiation, for whatever reason, has fallen below the absolute minimum acceptable position as represented by your deal points with no hope of returning, it is time to invoke your BATNA and walk away from the deal. No exceptions. Period.

The benefits of BATNA

This process ensures that you will never end a negotiation in a worse position than when you started. If you accept the premise that for a negotiation to be successful, any final agreement must result in a net gain over the existing status quo as represented by your deal points, it follows that anything short of obtaining your basic objectives should be a clear signal to abort discussions and walk away from the negotiation. By identifying your goals as well as your BATNA at the outset, you effectively insulate yourself from having to identify alternatives in a pressurized situation. You also avoid the common trap of substituting your objective goals for the more subjective and less rational alternative to make a deal for the sake of the deal without regard to whether your interests are advanced. By developing a BATNA or strategic walk-away position before the negotiation begins, you are completely protected from a bad deal. Additionally, when you decide to walk, your BATNA will ensure that you walk to your next, best available alternative to a negotiated conclusion, whatever that might be.

The best BATNA benefit

Negotiations, like trials, never totally go your way. There will be setbacks, surprises, and disappointments. However, BATNA guarantees that when things begin to go bad and pressure mounts, you will have already made the tough decisions.

Can the same be said of those sitting across the negotiating table? If they are smart and prepared, the answer is yes. But human nature being what it is, how many negotiators actually take the necessary time to do it right? This translates into a tremendous advantage for you and your client, provided that you *both* have taken preparation seriously. **FA**

H. Lee Hetherington is a professor of law at Mississippi College School of Law. He is the author of four books and numerous articles. *The Lawyer's Guide to Negotiation* 3rd edition (co-author Frascogna) was published in 2010 by the American Bar Association.