
Time Problems

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Possibly no issue is as important as timing in settlement negotiations. What lawyer has not had the experience of a client changing his or her mind—either wishing that he or she had accepted settlement or wanting to withdraw from an agreement. Timing may be financial, emotional, just pure luck, or a combination of these factors and many, many others.

Mark E. Sullivan examines the effects of the timing of negotiations and how a lawyer can better understand timing and use it to advantage.

When the opposing side is putting pressure on your side to settle, do your best to reduce its impact on negotiations. Make your client aware of the danger of settling a case when time or other pressures are against you. Do your best to put time and finances on your side. Letting the other side pressure you often leads to unsatisfactory settlements that the client will regret. A rushed bargain is no bargain at all, and few people make good decisions under pressure.

In his book *You Can Negotiate Anything*,¹ Herb Cohen gives a good example of how time and pressure can be brought to bear in negotiations. Cohen was sent to Japan to negotiate a certain business deal on terms favorable to his company. He was given a week to conduct and conclude the negotiations.

He spent the first day recovering from jet lag. Each day after that was spent with his Japanese hosts visiting shrines, natural wonders, and monuments. His hosts served sumptuous meals, but whenever the discussion came close to business topics, they gently guided the talk in other directions. By the seventh day, Cohen was exhausted, lonesome for his family, and completely frustrated. He had not been able to get his negotiating opponents to agree on even one major item.

Finally, in the car on his way to the airport for the flight home, his hosts began to discuss in earnest the topics he had been assigned to negotiate. As Cohen listened to them, by now sitting at a table in the airport lounge, he realized how well his opponents had analyzed the dynamics of negotiation and used his weaknesses. He had to return with a deal! He missed his family. His boss expected results, not an empty briefcase. His plane was going to leave in the next half hour. He had gotten nowhere with his hosts for the past week, but now they finally were beginning to sharpen their pencils and propose a few agreements—mostly on their terms. What should he do? Leave without an agreement and try to explain things to his boss? Work on a deal until his plane was ready to leave? Cancel his flight and stay?

Cohen's experience demonstrates vividly how time and other pressures can prey upon the unwitting negotiator.

The same thing happens time and again in family law practice. Your client, Mr. Jones, wants to get divorce before year end so that he can file his taxes as single instead of married-separate. His wife's lawyer first gets an extension of time for the answer, and then, instead of an answer, files a motion to dismiss. The clock is running. Whenever you talk to opposing counsel, he somehow dodges the question of how (or whether) to arrange the divorce before December 31. Finally, on December 20, the opposition responds: Mrs. Jones will have to get the Lincoln Towncar, completely paid off, if she is to consent to the prompt divorce Mr. Jones is requesting. What should your client do? Stick it out another year as married-separate? Give Mrs. Jones the car?

Another taxing problem arrives about April 15 for many family law practitioners. Mr. White has had withholding all the previous year on the basis of the taxes and tax rates available to him as married-filing jointly. He earns much more than does his wife. When his lawyer calls you on April 1 to ask you to bring Mrs. White over to the CPA's office to look over and sign the joint return, what should you do? Respond right away? Wait? Be unavailable for the next ten days? By then, things will be approaching critical mass. What better time than now to inquire about the "cash advance" on her settlement that Mrs. White needs now . . . possibly to help pay your bill or other litigation expenses. Should you agree to an extension? Never! More time to file the return will only remove the pressure on Mr. White for one or two months; a deal now, not then, is what you need. Make sure that the pressure of an April 15 deadline stays on your side. Feel free to explain to the other side, "My client doesn't need to file jointly. She's had enough withheld from her paycheck for separate filing. We're sorry that your client finds himself in such a bind. Maybe if we both make some concessions, we'll be able to benefit both of our clients."

In another example, Mrs. Green is about to get remarried. She needs her divorce fast. Opposing counsel has been stalling; she has not returned your last three phone calls. Now that you finally have her on the phone, she informs you that Mr. Green will need to have joint custody written into the final agreement if the divorce is to be granted without his objection or further delay. What should your client do? Cancel the wedding plans to remove the time pressure and the leverage applied by her husband? Accede to joint custody?

The ultimate time pressure for a lawyer is a contested trial. What happens when Ms. Smith, your opponent, waits to talk about settlement until the morning of trial, a trial that you are less than fully prepared to undertake? What kind of additional incentives and pressure will you bring to bear on your client to let this case pass by without a contested hearing? The pressure of time and litigation can lead to last-minute deals at the courthouse, usually by lawyers who are not really prepared for trial. The settlement executed on the courthouse steps is the one clients resent most.

Letting time pressures take control of the negotiations almost always leads to trouble. No deal is well negotiated when serious time pressures are present. Consider these questions as you evaluate your practice:

- Are you under time pressure to settle a case? Who is applying the pressure?
- If it is your own client, what can you do to relieve the pressure?
- Can you convince the client to be patient so that you can negotiate a better deal? Can you sit down and discuss with the client the unfavorable results that are likely to occur if time is your enemy instead of your ally?
- If the other side is applying pressure, how can you change the scenario to remove the pressure?

Time pressures are the worst enemy of the skilled negotiator. Counsel for one of the spouses should think long and hard about timing and time pressure when making a deal. Time is of the essence applies to negotiations, too.

Notes

¹ Herb Cohen, YOU CAN NEGOTIATE ANYTHING.