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Negotiating with Opposing Counsel

No football team would even think of going into a game without having scouted the opposition. Since most negotiating is done with the opposing counsel present—and sometimes with only the opposing counsel present—it is critical to have a "book" on, or an understanding of, the opposition. Yet lawyers tend to ignore the nature of the opposition and engage in a "one size fits all" strategy. Actually, that is no strategy at all.

The "Book" on Opposing Counsel

Many times, lawyers know the opposing counsel from prior experience. If there are multiple experiences to draw from, you should already know the style of your opposition. If it is your first case with that lawyer, however, you need to consider whether there are unique aspects of that case (an unusually demanding client, for example) that may make the experience with the other lawyer unusual.

If you don't have sufficient experience on your own, the best way to learn the other lawyer's style is, of course, to call other lawyers. Most lawyers don't mind being asked their opinion; in fact, they find it flattering.

If that doesn't work, or if the case is of particular importance, then you should meet the other lawyer one-on-one at the beginning of the

case. As my office generally handles significant estates, we have a policy of meeting any new lawyer face-to-face at the beginning of the action. We find that this meeting generally accomplishes two things. First, it lets us get a reading on the other lawyer. Second, it allows the other lawyer to get to know us. We always suggest that this initial meeting be at the other lawyer's office because we're able to get a feel for the opposition simply by looking around. Is the office well organized? Are there files strewn everywhere? What are the lawyer's personal interests? The pictures on the walls and the trophies in a case can tell a lot.

Definitely in small cities—and even in large ones—lawyers tend to end up conducting business with the same lawyers over and over again. One lawyer that I know, therefore, keeps a copy of all settlement letters that he receives so that they are available to point out inconsistencies. Although I question the effectiveness of this as it is always easy to find distinguishing facts among cases, this lawyer believes that it has value in the right case to embarrass some opposing counsel into tempering extreme positions.

Establishing Rapport with Opposing Counsel

The importance of establishing rapport with opposing counsel cannot be overstated. Of all the reasons to go to trial, one particularly bad one would be that two lawyers cannot get along so they don't talk to each other. An even worse reason would be that the lawyers are behaving like gunmen in the Old West, where their goal is to establish credentials by shooting down the opponent. The lawyer's ego should not—EVER—be a reason to go to trial.

Of course, you cannot go too far to the other extreme. The opposing counsel is your adversary and not your friend—a difficult tightrope to walk in those cases where, outside of the matter at hand, the counsel really *is* your friend (see discussion below of the best friend as opposing counsel). Boundaries need to be established and respected.

The Intimidating Negotiator

Some lawyers have an intimidating demeanor. These lawyers tend to be humorless and use ultimatums. They will settle; but before they do so, they will present unbalanced proposals, and the eventual settlement will usually be on the courthouse steps.

The first rule for dealing with intimidating negotiators is not to try to beat them at their game—unless you are better at it. If you are not

intimidating by nature, don't try to be an intimidator. Unless this is your style, you do not want to get into a contest of who can intimidate whom.

Rather, the best (only?) effective strategy is to maintain your cool demeanor and allow the intimidators to do their thing. They are going to do so anyway. In their own mind, in fact, they need to intimidate as it is the only method they feel comfortable utilizing. So, you need to let them do it. Don't show fear and don't get angry.

Oftentimes, however, no strategy will work on a one-on-one basis as the intimidator is less interested in settling the case than in "winning" the negotiations (see discussion below of the competitive negotiator). It is with these lawyers that mediators can be a godsend as a good mediator will not be intimidated and can neutralize the intimidator.

One colleague of mine calls intimidating negotiators *bullies* and warns that they may be mentally unbalanced. Bad enough if the parties are mentally unbalanced, but the lawyers? Yes, this can happen. Her suggestion for such circumstances is to be firm but not incendiary. She adds that it would be helpful to have your client in counseling to deal with the increased stress from negotiating with this personality type. I would only add that, many times, I feel that I may need therapy as well!

The Unethical or Untrustworthy Negotiator

Some lawyers (fortunately, few and far between) simply cannot be trusted. Their settlement positions are later withdrawn or even denied. Their word is no good.

Although these lawyers are difficult, settlement is not impossible. Several strategies can be employed.

The first strategy is to put all negotiations in writing. If the other lawyer refuses to send a letter or e-mail with his position, then you must send one confirming your understanding of the offer before even sharing it with the client.

A second strategy is to utilize a mediator. That way, it is more difficult for this type of negotiator to go back on his word or to deny prior proposals. The type of mediator is important. You want a mediator who takes careful notes and is good at details.

A third strategy is to never trade all points too quickly. You need some additional points to trade off (or give up) when the other lawyer tries to pull the rug out from under you. This is a difficult strategy to engage in if the case is rather simple and involves few issues, but there may still be some small item to hold in reserve, even if it is only

personal property. The key to this strategy is preplanning, i.e., knowing ahead of time that the other lawyer cannot be trusted and understanding that any agreement is therefore fragile.

The Cooperative versus Competitive Negotiator

A colleague of mine believes that almost all opposing counsel can be classified as one of two types of negotiators: those who negotiate in a cooperative style and those who negotiate in a competitive style. The former understand the concept of compromise, while the latter are trying to "win," similar in many respects to the intimidating negotiator (discussed above). Since you don't have any choice in your adversary, you will have to accept the style of your adversary and adapt your strategy accordingly.

In dealing with the cooperative negotiator, little accommodation is necessary as that lawyer is working toward compromise. However, when negotiating with the competitive negotiator, you must be careful, as with the untrustworthy negotiator (discussed above), not to make too many concessions too soon. It may be helpful with this style of negotiator to keep certain concessions until the end because part of the competition for competitive negotiators is last-minute maneuvering. It is important that you are aware of this style ahead of time: forewarned is forearmed.

The Best Friend as Opposing Counsel

Especially in smaller jurisdictions, the opposing counsel may not be the intimidating, crazy monster but a friend—maybe even a good friend. This is good in the sense that you know what to expect, but it presents other challenges.

Some clients want a lawyer who is their advocate, not in the sense of advocating for their long-term interests but in terms of verifying their emotions. It satisfies a need for certain clients to see their attorney getting in the other attorney's face and even being highly unprofessional.

Of course, good professional attorneys don't do this and will explain to clients why it is not in their best interests for them to do so. Rather, good attorneys, when they sense a client who is looking for what used to be called *zealous advocacy*, explains to clients why that is not their style.

The other extreme is not a good idea, either. It's one thing to be professional, cordial, and even friendly with the opposing counsel. But moderation, as in all things, including this, is usually wise.

Several times in my career, I have received calls from parties who want to change lawyers because they felt their attorney was too friendly with the other lawyer. Sometimes it seemed the party was simply paranoid. Other times, the party simply did not understand that a friendship with the other lawyer is not inconsistent with effective representation.

There is an urban legend that divorce lawyers conspire to run up fees by engaging in unnecessary tactics during representation. Perhaps it does occur on occasion. But in my experience, what is far more common is for attorneys who are friends to "conspire" to resolve cases and save fees for their clients.

Attorney Gerald Babbitt of Columbus, Ohio, noted,

> When counsel are friends, the entire discovery process is easier and ultimately less costly to the litigants. In theory, the discovery process is intended to encourage the free exchange of information between counsel without the necessity of court intervention. In practice, however, discovery in domestic cases is difficult. A friendly relationship with your opponent limits those difficulties.[1]

The key to managing this situation is discussion with the client. If the opposing counsel is a friend, reveal that to the client at the outset. Explain to the client how it can benefit him by avoiding misunderstandings and suspicions. I sometimes pose the issue to the client in this way:

> If I have to get certain information, would you prefer if I bring a motion that costs time to draft, prepare for, and go to court and draft an order afterward—or simply pick up the phone and call the other lawyer? Either way, I end up with the same information. The former may be three to four hours of time. The latter is ten minutes. Your decision.

Another risk is jeopardizing the friendship. A frank discussion between friends may help to alleviate any fears or concerns. I will say to a friend, "I promise you that I will never stab you in the back. If I'm

1. Interview by Gregg Herman with Gerald Babbitt, Attorney in Columbus, Ohio (2012).

going to use a dagger, the stab will be in the front where you can see it and are fully aware of it."

And in a similar vein, a final risk is that the friendship will jeopardize your judgment. If you're unsure of the effect of what you are doing, Babbitt advised, "[s]tep back from the case and analyze it without regard to who is on the other side. If the offer fits within the overall theory and parameters of the case, then extend the offer and do not worry about how your friendship has affected it."[2]

Summary

You don't get to choose the lawyer on the other side, so you need to accept who that person is and adapt your strategy accordingly. Being familiar with that attorney's personality and style, either through experience or research, is key.

2. *Id.*