

# **THE ART OF NEGOTIATION**

By Frank E. Lamothe, III  
Lamothe Law Firm LLC

## Why is Negotiation Important?

- over 90% of cases settle
  - predominant resolution method
1. Benefits of Settlement
    - certainty of result
    - prudent risk management
  2. Timing of Settlement
    - enough information available
    - losses quantifiable
    - only when fully prepared
    - initiate when case has peaked
    - relative striking power
  3. Preparation for Settlement Negotiations
    - full evaluation of case
    - quantum studies
    - other lawyers
    - mediators
    - court decisions
    - resources such as ATLA or jury research

- quantum range
  - liability factors determine percentage chance of success
  - probability of recovery
  - judgment value
  - style of opponent in negotiation
  - know whether will try lawsuit
4. Determine Desired Settlement Range
    - high-and bottom/line
    - overlap or gap-between plaintiff and defendants' evaluations
  5. Prepare Client for Negotiations
    - perform client needs assessment
    - costs of litigation
    - exposure to litigation
    - capacity for trial
    - capacity for adverse result
    - capacity for delay in resolution
    - expectations
  6. Theories of Negotiation
    - interest determination versus positional negotiating
    - positional negotiation dominant form
  7. Negotiation Plan
    - information will share
    - information will not share

- how negotiations will be initiated
- structured negotiations –judge/magistrate or mediator
- assessment of opponent
- initial offer and target range for resolution
- flexible approach to process, willingness to re-evaluate position
- client preparation for negotiation
- expectation control
- be patient in process
- client with ultimate authority during negotiations
- know style of judge/mediator
- if mediator/judge – educate them – in a confidential letter always present any concern or problem with your case to show that you are being candid and not simply engaging in puffery
- candor will usually inure to your benefit and cause mediator/judge to help you settle your case favorably as a reward for fairness and candor

## 8. Objectives of Negotiation

- settle in desired range
- avoid continued litigation
- finality

## 9. Method of Negotiation

- initial offer based on rational/multiple
- reasons for offer
- show good faith in making offers
- pattern in negotiation position changes

- give signals by movement
- vary amounts to achieve negotiation objectives
- moves must be calculated to reach target position
- do not bid against self
- never go to bottom line right away
- deprives other party of bargaining satisfaction
- never go up, will kill negotiation
- exception would be if significant change in circumstances since prior negotiation
- prepare to explain what it is, show continued good faith, and desire to compromise
- problems with splitting the difference
- withdrawal of offer within time period-be prepared to try case
- judges frown on withdrawals or drop dead tactics
- never use drop dead unless mean it; use as last resort; prior to walk out
- willingness to concede
- listen to mediator if suggest particular resolution process
- study body language and nonverbal signals
- leverage through knowledge; use uncertainty for leverage; creating doubt in opponent and opponent's position
- be repetitive; give opponent time to process information
- soft persuasion; hard persuasion
- selective disclosure
- never disclose blockbuster unless sure will settle case
- can disclose to mediator or judge/magistrate who can reveal that there is significant adverse information

- reach fair settlement as stated goal
- always be aware of creating bargaining satisfaction for opponent
- determine interests of other party and whether his interest can be satisfied
- decide what can be given up
- attorney's fees, punitive damages and interest accrued
- practical considerations
- costs of litigation and delay

#### 10. Negotiation Decorum

- do not interrupt, always listen with patience
- be patient during process
- always treat opponent with dignity
- do not make accusations of unfairness or misconduct
- no personal feelings
- do not argue

#### 11. Ethical Considerations in Negotiation

- false representation of positions
- presenting case in best light

#### 12. Other Considerations

- non-monetary currency in settlement negotiations
- partial settlement
- high-low agreements
- Mary Carter agreements
- group settlements – defendants reserve rights to resolve cross claims/coverage issues after settling main claim
- structured settlements

- medical liens
- outstanding medical bills
- guarantees
- written agreement to conclude negotiation