LAWYER'S ROLE IN NEGOTIATION

Focus: negotiations, attorney, business, disputes

By **Daniel H Erskine**

I. Utilization of Lawyers in Business Disputes

Retention of an attorney by a business involved in a dispute occurs because of the perceived ability of a lawyer to expertly advise and possibly resolve the matter. There is a perceived need to secure additional assistance in resolving disputes through legal representation on behalf of executives who are themselves thoroughly skilled in the art of negotiation. Simply put, the role of an attorney in the negotiation of a business dispute is to "advocate the interests of their clients and involve them in the process of resolving their dispute."[1] Therefore, an attorney in a business dispute imparts tactical and strategic considerations to the client or utilizes such knowledge as the negotiator.[2]

Negotiations do not take place solely between attorneys for the reason that the interests of the client is best served with the client's presence at each stage of negotiation. The underlying reason for such client involvement is the existent relationship between the parties. The previous investment of time and interpersonal contact between the parties may speed recognition of mutual interests. Of course, decisional authority may be relegated to an attorney for all purposes save the final decision to accept an

[1] Ted A. Donner and Brian L. Crowe, Attorney's Practice Guide to Negotiations 4-7 (2ed. 2003) (quoting ABA Model Rule of Professional Conduct 1.2(a)).
[2] See generally The Results Winning Manager: Wining Negotiations that Preserve Relationships (2004)(collection of essays appearing in Harvard Business Update and Harvard Management Communication Letter advocating negotiation to resolve disputes); Eileen Carroll and Karl Mackie, International Mediation—The Art of Business Diplomacy (2000) (describing business world's acceptance of mediation in the international context to resolve disputes); John Lande, Getting the faith: Why Business Lawyers and Executives Believe in Mediation 5 HARV. NEGOT. L. REV. 137 (2000).

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agreement.[3] Essential to the negotiation process is for counsel not to view opposing parties' attorneys as enemies.[4]

A. Useful Tactics

Attorneys implement strategic thinking and tactical analysis to secure a negotiated settlement.[5] Importantly, attorneys employ the tactic of concessions to create an atmosphere of cooperation.[6] Such concessions are reasoned positional changes occurring through expansive or serial increments during the negotiation for the purpose of securing a final objective.[7] Such concessions shift focus from the conceding party to the other party in an effort to stimulate a negotiated result.[8] Utilization of concessions as a tactic permits the attorney to appear as problem solver without the risk of the client appearing fickle. Additionally, reiteration of a client's objective or interest may occur after a concession is proffered thereby backtracking toward one's desired objective.[9] The tactic "reduces the aggregate concession…, but it makes the other side want to finish the negotiation quickly before [the party] stiffens his position anymore or retracts the concessions he had made."[10]

Perhaps the greatest reason attorneys are employed for negotiation is their ability to exercise control over the discussion concerning the resolution of the dispute. Exercise of restraint through calculated logic and strategy provide the attorney the ability to manage domestic or international negotiations.[11] Control can be exercised through promulgation of the negotiation's agenda, circumscription of the place and time of negotiation, use of technology for negotiation, and personal affect (including verbal and nonverbal factors) at the negotiating table.[12]

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[3] Id. at 4-8 (referencing ABA Model Rules of Professional Conduct 1.2).
[4] Charles B. Craver, Effective Legal Negotiation and Settlement 31 (5ed. 2005).
[5] For practical guide to international commercial negotiations see C. Chatterjee, Negotiating Techniques in International Commercial Contracts 14-144 (2000).
[6] Charles B. Craver, Effective Legal Negotiation and Settlement 172 (5ed. 2005).
[7] Id.
[8] Id.
[9] Harry T. Edwards and James J. White, The Lawyer as Negotiator Problems, Readings, and Materials 138 (1977).
[10] Id.
[11] Xavier M. Frascogna, Jr. and H. Lee Hetherington, Negotiation Strategy for Lawyers 64 (1984).
[12] Id. at 84; Harry T. Edwards and James J. White, The Lawyer as Negotiator Problems, Readings, and Materials 113, 114, 123-124, 129-130 (1977).

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Use of threats and promises permits an attorney to convey to the other parties information about his own perceived evaluation of the other parties' interests.[13] Threats "disclose what the threatener thinks the listener fears," while promises "indicate what the promisor believes the recipient wants to obtain."[14] Successful threats are those that are "low-key and injected into the dialogue tacitly."[15] A subset of threats and promises is brinkmanship, which employs the devices of threats and bluffs to "exploit the burden of negotiation against a side that perceives that it has the burden."[16]

II. Cultural Considerations in International Business Disputes

A tremendous consideration in international business disputes is the participants' cultural acuities. Culture strikingly affects the manner and method of negotiation. Concisely articulated, culture dictates "the manner in which group members interact with each other and the way in which individuals from different groups relate to one another."[17] Thus, investment in learning about the other disputants' culture plays a pivotal role in succeeding in negotiations.[18] Additionally, use of the other culture's language or providing translation must be a consideration in order to conduct a successful negotiation.[19]

Attorneys offer an expertise in researching and identifying cultural differences. Importantly, lawyers may assimilate actual experience with foreign cultures against the backdrop of foreign law. Comparative legal practitioners possess an advantage in the realm of international business negotiation because, through study of a foreign nation's law and its meaning to foreign nationals, the comparative practitioner glimpses into the cultural ethos for the codification of such law. A full discussion of the utility of

[13] Id. at 198.
[14] Id. at 199.
[15] Bernard A. Ramundo, Effective Negotiation A Dialogue Management and Control 172 (1992).
[16] Bernard A. Ramundo, Effective Negotiation A Dialogue Management and Control 172-173 (1992).
[17] Charles B. Craver, Effective Legal Negotiation and Settlement 430 (5ed. 2005).
[18] J. Salacuse, The Global Negotiator 110-115 (2003).
[19] The problems associated with using translators is beyond the scope of the current work. It is sufficient to draw attention to the problem, but reserve further discussion of the dilemma to scholars.

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comparative legal analysis is beyond the scope of the present short article.

III. Ethics In Negotiations

Ethics in negotiations refers not to normative ethical behavior or the type Thomas Aquinas spoke of in his Summa Theologica (i.e. reasoned deliberative action selecting the ethical for the purpose of effectuating the good).[20] Ethics are those rules applicable to a negotiation through mandate of local statutes or rules governing the conduct of lawyers.[21] Excluded from the present analysis is the ethical behavior of business participants absent lawyer involvement.

Simply put, ethical conflict in negotiation results from the necessity for counsel to fulfill his obligation to his client, while also "behaving honorably toward others involved in the negotiation and [securing his] self-interest in preserving reputation and self-esteem."[22] Nonetheless, the misleading and value maximizing tactics of negotiation are ethical and legal because such tactics are "'an integral part of the [bargaining] game."[23]

Looking toward the ABA Model Rules of Professional Conduct, one finds that Rule 4.1 mandates truthfulness in an attorney's statements to others.[24] Yet, a lawyer has no "affirmative duty to inform an opposing party of relevant facts."[25] Importantly, the rule speaks of "false statement of material fact and law."[26] These precepts must be revealed in order to comply with this ethical rule. Essentially, an attorney may not assist a client in fraud or criminal

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[20] See generally Thomas Aquinas, Summa Theologiae, trans. Cardinal Michael Browne and Reverend Anticeto Fernandez (1967).
[21] See Michael J. Chapman and Paul J. Tauber, Liberalizing International Trade in Legal Services: A Proposal for an Annex on Legal Services Under the General Agreement on Trade in Services 16 Mich. J. Int'l L. 941, 950-951 (1995).
[22] Roger Fisher, A Code of Negotiation Practices for Lawyers in What's Fair Ethics for Negotiators, eds. Carrie Menkel-Meadow and Michael Wheeler 23 (2004).
[23] G. Richard Shell, Bargaining with the Devil without Losing your Soul Ethics in Negotiation in What's Fair Ethics for Negotiators eds. Carrie Menkel-Meadow and Michael Wheeler 65 (2004).
[24] See Rule 4.1, Professional Responsibility Standards, Rules & Statutes, ed. John S. Dzienkowski 69 (2004).
[25] Id (comment 1 on misrepresentation).
[26] Id. Rule 4.1(a).

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activity that would result in "substantial injury to the financial interests or property of another."[27]

Attorneys, and all rational negotiators, intuit before a negotiation begins that the other side will act to maximize its gain. In order to accomplish this goal tactics must be employed to breakthrough stalemate and induce further gains. Thus, recognition of the purpose of negotiation delineates applicable ethical rules.[28]

Ethics in negotiation on the part of attorneys circumscribes an advocate's actions to the extent that civil or criminal liability is contemplated. Attorneys are bound in the same manner as their clients by the prospect of criminal or civil liability. As a result, ethics are a final consideration for an attorney in negotiation to ensure that professionalism is maintained and appropriate tactics are employed to the benefit of the client.

IV. Summary

Business disputes involve consideration of a number of factors outlined in this short article. In summary, the method necessary to approach these types of negations is to consider:

(1) the lawyer's role; and
(2) appropriate tactics to use during the negotiation in light of cultural and ethical considerations.

This model of negotiation appropriately infuses a lawyer into a business dispute, and permits an attorney to counsel business clients in the method of negotiating such disputes.

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[27] Id. at 18 (Rule 1.6(b)(2)).
[28] See Robert E. Lutz , Ethics and International Practice: A Guide to Professional Responsibilities of Practitioners 16 Fordham Int'l L.J. 53, 69 (1992).

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Practice Summary

Daniel H. Erskine, a New York and Connecticut admitted attorney and solicitor of England and Wales, represents U.S. individuals, companies, joint ventures, foreign businesses, and foreign nationals on complex legal matters under U.S. and U.K. law concerning general corporate matters, sale of goods and services transactions, software licensing agreement, executive and general employment matters for public and private companies, general service contracts for highly skilled personnel and craft labor workers, contract bid processes, union labor activities, as well as subcontractor arrangements (including special employment and employee leasing arrangements).

Generally, Attorney Erskine represents U.S. individuals, businesses, joint ventures, foreign businesses, SME (small and medium-sized enterprises), and foreign nationals.

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