Negotiation
Class 2 - Overview of Negotiation

Vocabulary: "Transactions"

In this class we will talk about the resolution of *transactions*. In ordinary conversation, and indeed in most legal contexts, we think of transactions as those things that happen outside the litigation context – for example, a corporate lawyer will refer to herself as a transactional attorney. When we are talking about transactions being negotiated, however, the context is broader. In our discussions, a transaction refers to the overall interplay between one or more parties involved in negotiation, regardless of what is being negotiated. It could be a dispute that is being resolved. It could be a commercial deal. Keep this in mind when we use the term transaction throughout the course.

Negotiation as a Legal Mechanism in Dispute Resolution

The vast majority of litigated matters do not make it to trial. Some are dismissed beforehand, but the majority of cases settle by agreement of the parties. A critical element in how these settled cases are resolved is the manner in which the parties – or their attorneys – conduct the negotiation. From this perspective, then, negotiation becomes one of the most important legal mechanisms in our judicial system. The manner in which negotiations are conducted has a great impact on the outcomes of a substantial number of situations.

What are the potential benefits to the parties in a dispute in having their case settle rather than go to trial? Among them are:

- Reduced direct costs (attorney's fees, court costs etc.).
- Faster resolution.
- Greater opportunity for privacy (a settlement agreement can be confidential, as opposed to a judgment which is part of the public record).
- Greater control over the outcome. It is difficult to predict how a judge or jury will decide a case.

What is Negotiation?

The word “negotiation” means literally "lack of leisure," from “neg-” (meaning “not”) + otium (meaning “ease, leisure”). The combination of these terms could have a couple of different connotations. When one is negotiating, he or she is “doing business,” “engaged in transactions” or otherwise involved with the affairs of the world and commerce. In this sense, that activity is different from just sitting at home in tranquil enjoyment. Another sense could refer to the way in which two or more parties in communication with one another concerning a transaction (i.e. while the transaction is being negotiated), have a certain tension between or among them. This tension is a lack of relaxation (or lack of leisure). That tension gets resolved if a deal is struck.

We use the term negotiation frequently – in law, in business and in life generally. But what is a good definition to capture what does, and should go on in the process we refer to as negotiation? Professor Gifford offers the following definition:

> *Negotiation is a process by which two or more participants attempt to reach a joint decision on matters of common concern, where they are in actual or potential disagreement or conflict.*

This is a useful definition, and from it we can extract a few key principles:

- *Negotiation is a process.* It is ongoing, and goes through stages.
- *There can be different numbers of parties involved.* A lot of negotiation is one-on-one, but many transactions involve three or more parties.
- *There isn’t always a deal struck.* Notice how the definition refers to negotiation as an *attempt*. Sometimes the parties stop negotiating and either walk away or seek other resolution.
- *The subject matter is of common concern.* This does not mean that all parties want the same things, but often those things of which the parties are concerned relate to the same thing, albeit from different perspectives. The disagreement may be actual,

or merely potential (i.e. they may actually have the same things in mind.

Successful Negotiation

A negotiation is more likely to be successful for a party if that party (1) has the appropriate *knowledge* for transaction, and (2) selects and executes the appropriate *approach* for handling the negotiation. Much of the content of the remainder of the semester is comprised of elaborating on those two areas.

When we talk about having the appropriate kind of knowledge for the transaction, we mean both *substantive knowledge* and *knowledge about the facts* of the transaction. In advising clients in a legal negotiation, the substantive knowledge includes knowledge about the applicable law and any other similar factors that may be relevant. For example, if a client is seeking counsel in negotiating the resolution of a personal injury case, the attorney will need to have substantive knowledge about the law of negligence. And the attorney should also have a deep familiarity with the court system and how to deal with insurance companies. These are examples of substantive knowledge.

Factual knowledge about the transaction is, as its name suggests, knowledge about the particular situation in which the client is negotiating. These should be uncovered as early as possible, as they help the attorney in advising his or her client to develop the right strategy in the negotiation.

A key task for legal counsel in uncovering the facts is to ascertain, and help the client articulate, what the client's *interests* are. We will talk more about interests later in the semester, but for now remember that knowledge of what the client's real motivations and objectives are – that is, the clients interests – is critical information to know.

Special Attributes of Legal Negotiation

There are many things about negotiation that are common to all transactions, whether the parties are negotiating as lawyers, business people, government officials, or otherwise. Any negotiation will involve, for example, fact gathering and strategy-making. But there are a few things of which we should take note that are specific attributes

of legal negotiation. In other words, these things are unique to the lawyer's experience in advising and representing clients.

- *Legal negotiation involves special knowledge.* Helping a client know how to proceed, what risks to take, and what positions to hold requires insight and experience that legal counsel should possess.

- *The negotiation is for the client.* Legal counsel assisting a client in a negotiation is of course serving as that client's agent. The lawyer should use appropriate wisdom to understand the role he or she is playing. It is a very different dynamic to negotiate on behalf of someone else than it is to negotiate for oneself.

- *The lawyer serves as a buffer.* Similar to the previous point, the lawyer can serve to neutralize particularly aggressive sentiment between and among hostile parties. Legal counsel that has foresight into the broader perspective of his or her career and role in the community will remember to maintain appropriate civility in negotiation. Shakespeare articulates a good approach in Act One of *The Taming of the Shrew*, through the words of Tranio, who says that one should "do as adversaries do in law, strive mightily, but eat and drink as friends".

- *Legal negotiation is bound by the rules of professional conduct.* We will take a closer look at the rules of professional conduct later in the semester. It is worth highlighting at this point, however, that legal negotiation is subject to certain rules that do not apply to everyone else. These rules apply with particular force to the obligation of being truthful to others.

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