

Negotiation

Class 5 - Planning

The first stage of negotiation – in the POPINC paradigm we are using – is planning. In the planning stage, you coordinate with your client either in person or through email or telephone in one or more initial meetings or communications. The key objective in the planning stage is to gather information about the transaction so that you and your client can identify issues and begin to determine appropriate strategy for the transaction. Said another way, in the planning stage there are two discrete tasks: subject matter preparation and negotiation strategy preparation.

Who is involved?

The planning stage is generally a joint process between attorney and client. It may be useful, however, at the planning stage to consider talking with other people involved in the transaction. For example, if an attorney is representing a party in a tort action, he or she may need to interview third parties to gather some facts. In a personal injury case, it may be useful to locate witnesses and ask them what they saw happened. In a defamation matter, you will need to examine the circumstances, including talking to people who may have heard the allegedly offending statements. A client looking to purchase a company may be working with an investment banker or other business advisor. These parties may need to be involved early.

What are the sources of information?

Clearly the client will be the primary source of information about the facts of the transaction. And as noted in the preceding paragraph, there may be certain other individuals that should be interviewed or consulted. It may be necessary to actually visit a location, for example, in a real estate transaction.

And no doubt there will be many documents to review. The kinds of documents will be as varied as the types of transactions undertaken. There could be correspondence, business records,

photographs, insurance documents, contracts, and police reports. In a litigation matter, it will also be necessary to advise your client of its obligation to preserve evidence - including electronically stored information.

What are some particular topics that should be covered in the planning stage?

There are certain general areas or topics that legal counsel should cover with the client in the planning stage. These include:

- *What can be accomplished by negotiating?* This is a threshold issue. What are the overall objectives of the transaction. Is there actually anything to negotiate about?
- *What are the client's interests?* Remember, there is a difference between interests and positions (see the handout for Class 2, above). The client's interest is a more accurate expression of what the client really wants, and what it seeks to accomplish in the transaction. It is critical to uncover this as early as possible in the negotiation so that one can develop a plan for how the transaction will turn out. Most of the time the client's interests are reflected in terms of money. But the client's interests may be non-monetary. For example, the client may just want to be validated, and require an apology or retraction from the other side. It may want to avoid certain appearances in its industry. You should work to uncover any of these other non-monetary interests in the planning stage.
- *What alternatives to a negotiated agreement are available? Is trying to work out a deal the best way forward?* It may be that the client is in a situation where negotiation will do no good. For example, the client may be in an emergency situation where the only sensible thing to do is go to court and seek an injunction. Or a client may have come to you after a long period of time in which negotiation already has been unfruitful. Alternatively, you may find that the client is already in the best possible position, and negotiating will only risk diminishing his or her resources or opportunities.

- *What implications does the lawyer's negotiating behavior have on the client?* When a party gets a communication from the other side's attorney, that party usually takes the situation seriously. That can serve as an advantage when leverage is needed. But in scenarios where cooperation between the parties directly has been good or has the potential to stay good, then having a lawyer communicate on a party's behalf may needlessly inflame the situation. Accordingly, in the planning stage, a lawyer should discuss with his or her client whether it would be better for the lawyer to "ghostwrite" communication or otherwise "coach" the client, and let the client communicate directly with the other side.

What kind of strategy will be appropriate?

As we discussed in an earlier class, competitive strategies are more effective in transactions that tend to be merely distributive, problem solving strategies are more effective in transactions that tend to have more integrative potential, and cooperative strategies are effective in transactions in between. During the planning stage, as you are learning about the facts, you will begin to ascertain what type of strategy will be appropriate. This is a key factor in the transaction, and a topic worthy of detailed discussion with your client, so that he or she understands the process, can anticipate how it will go, and can provide the most assistance to you as legal counsel in continued planning and execution of the strategy.

If you have determined that a competitive strategy will be appropriate, an important question you will want to discuss with your client is, *What can be used as leverage?* Are there any smoking gun documents? What information is most harmful to the other side's position, and most undercuts the legitimacy of the arguments the other side is likely to make?

If you have determined that a cooperative strategy will be appropriate, an important question you will want to discuss with your client is, *What objective criteria should we use to measure the fairness of the deal?* In a business transaction this will involve the valuation of the products or services or other assets of the transaction. What is the business worth? What is the fair market

value of the things involved in the transaction? These are things your client may know, and to the extent he or she does not, you should formulate a plan at this stage for learning about these objective criteria.

What is the value of the transaction / what is the “bottom line”?

The lawyer assisting a client will need to know what is really at stake for the client, i.e. what the client stands to win or lose in the transaction. Without losing sight of knowing that the client’s interest is more important than setting out a position, one must work to develop a sense of what an appropriate resolution of the transaction will look like. A purchaser will have a maximum value it is willing to pay. A seller will have a minimum amount it will take. A plaintiff will have a minimum amount it will need to be paid to settle, and a defendant will have a maximum amount it will pay rather than letting the judge or jury decide. At the planning stage, legal counsel and the client should begin to consider where these lines are drawn.

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