Negotiation
Class 7 - Proposals

After planning with the client and getting oriented with how the negotiation may play out, it is finally time to begin communications with the other party. We have arrived at the proposal stage. Let's start with some essential vocabulary. In the context of dispute resolution, the party making a claim against the other party (i.e. the party that would be in the position of the plaintiff if a lawsuit is filed) generally makes a *demand*. The other party, when it communicates a proposal to the party making a claim, is said to be making an *offer*. These terms are not subject to precise scientific definition, but usually these words are used in this way in common practice.

When Should a Party Make a Proposal?

In certain transactions this is an easy question to answer. For example, a potential customer seeking the services of a vendor may inquire of that vendor as to what services the vendor can provide and how much the services will cost. The potential customer may even submit a "request for proposal" (known as an RFP in marketplace parlance) that contains detailed instructions and a timeline for the vendor to provide information. In these circumstances the timing of the proposals will be precisely established.

In all other sorts of transactions, when the timing for making proposals is not defined or agreed upon, a simple rule applies: a party should not make a proposal unless it has a reasonable sense of what a potential resolution of the transaction should look like. In other words, if a party does not have enough information about the transaction to ascertain how the transaction will be completed in a way that best serves his or her client's interests, that party should seek more information and, in the meantime, avoid making a proposal.

Making a proposal too soon, before there is enough information, carries dual risk. The proposal may undervalue the transaction. A plaintiff may demand too little from a defendant if it is not fully aware

of the extent to which the defendant was negligent. Or a defendant may offer too much, not knowing of facts concerning the plaintiff's conduct that would bolster the defense (e.g., contributory negligence). Or a party may overvalue the transaction. A prospective purchaser of a business may offer too much for the shares in a company, not knowing that the company is not as profitable as it first appeared.

Who Should Make the First Proposal?

There may be strategic advantages to making the first proposal. Making the first proposal too soon puts a party in the sort of risk described in the previous section. And in certain circumstances it may not make sense for a party to be the first to “throw out a number”. An accused tortfeasor, for example, is not likely to be the first to bring up the topic of paying money.

But once a party has enough information to make the first proposal and it is tactically appropriate to do so, it most likely will benefit by being the first mover. There is a psychological force at work here known as *anchoring*. Regardless of where the transaction ends up, the final result is likely to be, in the minds of the parties, understood in relation to the first proposal that was made in the transaction.

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