

## **Negotiation**

### **Class 8 - Information Exchange**

#### **What is information exchange?**

In the context of negotiation, information exchange can mean a number of things. Most obviously, it refers to the disclosure of information from one party to the other, and vice versa. It also pertains to the tactical decisions a party makes concerning what information to disclose right away, as compared to information it may wish to release at a later time. It can refer to when and how to use information that is of particular importance to the transaction. There may be reasons to disclose information at a particular time, so that it has the maximum effect of furthering the disclosing party's interest, or minimizing the negative impact on the disclosing party's interest. We can put these various ideas into three categories: (1) information gathering, (2) information concealment, and (3) information disclosure.

#### **Why is information exchange important?**

Information exchange (or as it is sometimes called, information bargaining) is one of the most important stages in the process of negotiation. It is important for at least a couple of reasons. First, the back and forth of information between or among the parties allows the parties to articulate their own interests in the matter. In the same way, a party learns of the other side's interests, and that gives the party a better perspective into what may be needed to bring the transaction to a close.

Another reason why information exchange is so important is because it goes on throughout the process of the negotiation. As more information comes to light in the transaction, the parties can exchange this information, and it helps them recognize when a particular transaction is coming to a close, and what that resolution may look like.

#### **Information Gathering**

When a party considers information gathering, it is evaluating the type of information that it wishes to learn from the other parties in

the transaction. Among the particular categories of information that a party gathering information should seek include:

- What are the other parties' requirements or expectations for the transaction?
- What might be the other parties' best alternative to a negotiated agreement? (This gives an idea of how motivated a party may be to accept a certain proposal or outcome.)
- Other information related to the transaction, but not directly pertinent to the subject matter, including the other parties' experience and comfort level in the transaction, the amount of attention they are giving to the transaction, their level of tolerance for risk, and any time pressures that could be at play.

There are a number of methods for information gathering. In the litigation context, obviously the formal process of discovery is critical to information gathering. In other types of transactions, direct questioning is important. Another source of information is the conclusions that one can draw from other information gathered. If there is a news report that your counterparty has filed for bankruptcy, that will likely impact that party's interests in the matter.

### **Information Concealment**

The key to information concealment is striking the right balance between (1) full disclosure (honesty) and (2) mitigating the damaging effects of information that is harmful to your client's interests. If you are in litigation, you will be required to turn over all information required under the rules of civil procedure. But if you are exchanging information informally, particularly in the context of direct question-and-answer with the other side, you can be quite artful in disclosing information in ways that do not highlight its harmful effects. For example:

- Don't answer the question being asked, but shift to another topic.
- Answer a different question than the one asked.
- Answer incompletely.

- Answer only if reciprocated.
- Delay.

### **Information Disclosure**

In most circumstances, a party will want to turn over information helpful to the party's interests right away. This is to get the other side to recognize the strength of the party's arguments or the reasonableness of its position. Consider, however, that there may be circumstances where a party may not wish to disclose helpful information right away. Particularly in a situation where a party is using competitive tactics, it may be helpful to allow the other side to expend resources before disclosing information. That will undermine the confidence that the other side has in its position. A party may find it useful to disclose its "smoking gun" document that determines the outcome of the case only after the other side has invested and spent resources pursuing its position. The other side may be under more pressure to agree to proposals, seeing that it is bargaining from a position weakened by the prior expenditure of resources.

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