Negotiation
Class 9 - Narrowing the Differences

In this stage of the POPINC process, one continues to exchange information and make and respond to proposals. There are two complementary goals at this stage: (1) to induce the other side to agree to terms that are favorable to your client, and (2) to determine what terms are acceptable to the other side. Continuing in this direction will hopefully bring the matter to closure (which is discussed in the next class). In many ways, just like some of the other stages in the negotiation process, narrowing the differences is not so much a distinct subprocess itself, but rather a continuation of information exchange and the making and responding to new proposals.

Tactics for Narrowing the Differences

Convincing the other side that alternatives to negotiation are not as favorable as the other side believes. In a commercial transaction, this could be done by getting the other side to see that if they don't enter into this deal, they are going to miss out on a great opportunity. This is perhaps even more applicable in dispute resolution, and can be accomplished by persuading the other side to believe that if they are to go to court and trust a judge or a jury with the outcome, it's going to be not as good for them as it would be if they were to resolve the case with you now.

Make very few concessions. A simple definition of concession is "modifying one's own proposal to make it less advantageous". When you are using competitive tactics, your objective is to get the other side to lose confidence in the strength of its position. Modifying your own position is contrary to that approach.

Get the other side to make as many concessions as possible. You can attempt to do this by being definite in the way that you communicate your most recent offer or your response to another offer. It is advisable to communicate to the other side in response to an unfavorable proposal something to the effect of, "if you insist on that, it will be a dealbreaker." Or "that proposal is a non-starter". You should be aware that many times parties that have greater power

(whether that power is real or just merely apparent will be unlikely to make many concessions, if any at all. If you're negotiating with a big party like IBM or General Motors or Walmart, they are not likely to feel the need to make a lot of concessions in the course of a negotiation.

Making threats. A threat is any conditional commitment by a negotiator to act in a way that appears detrimental to the other party unless that other party complies with the negotiator's request. Tha is a convoluted way of communicating that if the other party does or does not do something, the negotiator will do something unfavorable to that party's position and interests. Threats can serve a number of different functions in negotiation. First, they can induce the other side to concede. Second, they can serve as a means for you to communicate to the other side your commitment to a particular position. You should use threats sparingly. Otherwise, if you make a bunch of threats and you do not follow through with them, you will lose credibility with the other side. In other words your threats may become hollow. Threats do not always have to be obnoxious or aggressive. There is this idea of "balming" the thread by communicating it in a calm manner.

Making reciprocal concessions or promises. When using cooperative tactics, remember that you are often looking for objective criteria, and there is a desire for a sense of fairness in your dealings. A party can agree that if it makes a concession, the other party will make an equal concession. Similarly, a party can make reciprocal promises with the other side. For example, you could agree to pay a particular amount if the other side agrees to keep it confidential.

Common Barriers to Resolution

There are certain things commonly occuring that keep parties entrenched in their positions, and unable to move toward one another to narrow the differences. Here are some examples.

Hiding one's true interest. Throughout the process of negotiation, a party may not reveal what it truly wants. The parties in defamation litigation may go back-and-forth for months, only to settle on the eve

of the trial because the plaintiff finally revealed that all he or she wants is an apology.

Linkage. This is a concern on the part of one party that if they do negotiate a resolution of this particular situation, other parties will come forward to make a claim against that party. One often sees this in intellectual property situations involving patent trolls. This is a party that doesn't actually manufacture anything but owns a patent. It will threaten to sue or actually sue parties for infringement of that patent. Those parties who are being threatened may not want to give the appearance that they are willing to pay what others might see as an extortionate amount. The solution for this problem of linkage is to make sure that if there is a resolution, the agreement contains a confidentiality provision that makes it clear that no one else will know about the resolution.

Boundary-role conflict. This is a common barrier to settlement. This happens, for example when the other side's attorney is multiplying the litigation needlessly, making it more complicated, because of what he or she stands to get out of the representation. It could be that the lawyer on the other side is charging his or her client by the hour, so he or she does not want to settle the matter, because that would be the end of those hourly fees. Or it could be that the lawyer has a contingent fee arrangement, and he or she wants the settlement amount to be as high as possible, to get the highest percentage of the settlement. One good solution, if this is happening to you, and the lawyer on the other side is needlessly prolonging the litigation, is to try to get the parties to talk directly. Sometimes, especially if it is a business dispute, the parties talking together can effectively come up with a resolution.

Too high client expectations. Another common barrier to settlement clients having expectations that are too high. If your client's expectations are too high, the simple antidote is frequent communication with your client.

Institutional clients' positions and approaches. Certain institutional clients may have approaches to negotiation that often present barriers to settlement. For example, a governing body may not want to agree to a particular resolution because of the public policy

outcome of that resolution. An insurance company may not want to pay a claim because of larger financial problems that would cause. A pro bono attorney working on a particular matter may be so focused on the principles underlying the outcome of the case that it does not want to see it resolved, no matter what you offer. If that is the case, then you may try to get the court to admonish that party, if possible.

Various psychological barriers to settlement. Some simple psychological obstacles may get in the way of settlement, and you as counsel should try to help your clients get around these:

- Loss aversion - a party is concerned about missing the big payout.
- Reactive devaluation - a proposal is not considered valuable simply because it comes from the other side, who is held in disdain
- Sunk costs - a party will be reluctant to settle if it has invested a great deal in the litigation and the resolution would do little more than recoup those costs (if at all).
- Simple emotions

Recognizing these barriers to settlement is necessary to avoid having them wreck or prevent a good resolution of a transaction.

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