
**PRAGMATIC SUGGESTIONS FOR
NEGOTIATING A GOOD SETTLEMENT**

The last few years have focused attention on the art of negotiations for lawyers—and for good reason. Obviously lawyers have been using negotiation as a prime practice tool since the concept of lawyering began. Holman Law places emphasis on negotiation and tries to find and use alternatives to litigation. Holman Law will litigate aggressively for its clients but is also interested in exploring mediation, arbitration, and in the negotiation of a good and fair settlement for its clients.

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A LEARNED SKILL

These are a number of pragmatic aspects in negotiation that are of special relevance to attorneys and that this article will discuss. But prior to that discussion the reader must recognize that negotiations involve skills and techniques that can be consciously learned. Put another way, simply as people operating in society we have all been involved in negotiating with others since childhood. Nevertheless, the successful negotiator evinces certain skills that raise successful negotiations to the level of a human art form. In fact, a great deal of what we know constitutes successful negotiating skills and techniques is the result of observing how "pros go about it. There is no doubt that some people are innately more skilled than others in negotiating. Yet studies have concluded that the average lawyer can become more adept and more skillful with exposure to formalized knowledge of the personal and environmental factors that go into effective negotiations. Therefore, even if you believe you are pretty good as a negotiator, studying what has been observed and learned about successful negotiators and the art of negotiations is worthwhile.

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THE MINDSET

Studies have clearly indicated that success in negotiating starts with the attitude of the negotiators--the mindset. Negotiations for lawyers involve a desire to reach a consensual agreement. No matter how strong, how much power (to punish or reward) you believe your side has, you still have to achieve the consent of the other side. The mindset of the successful negotiator starts with the concept of yielding a "win-win" situation in which the goal is not obliterating the other side, but rather giving each side enough get it

to consent to an agreement. Egos as well as dollars are involved. But what if the other side is represented by a lawyer who does not even try for the "win-win" concept and has the upper hand in terms of the ability to demand--to punish or reward. Your task then is to convince the other side to move to a "win-win" stance. This movement can usually be achieved because rarely, if ever, is one side completely without power, even if the "power" takes the form of bankruptcy, withdrawal from the deal entirely, or "you may win, but only after a suit involving time, money, etc."

3**PREPARING FOR THE NEGOTIATION**

The linchpin of success in negotiations is conscious preparation for the negotiating session. It involves the realization that just as successful litigation, capped by the trial, involves research and preparation, so the process of negotiation demands preparation. Holman Law emphasizes thorough preparation for all negotiations it conducts.

4**GATHERING THE FACTS**

To prepare adequately for negotiations, Holman Law will gather information from the client to the point where it knows as much about the facts as the client does. This frequently involves consultation with the members of client partnerships, the client's staff, accountant, and other employees. Holman Law will seek out the answer to these questions: o What does the client really want? o How committed is the client to making the deal? o What nonmonetary factors are involved and why? o What range for settlement can be realistically discerned?

5**LEGAL RESEARCH**

Another major area of preparation is determining what legal issues are involved. Holman Law conducts thorough legal research to become familiar with all the relevant legal issues. What is the case law and what statutes impinge on the relationship or controversy between the parties? The process of negotiating is not a courtroom procedure, but to be ignorant of the law relevant to the dispute may endanger the client's cause in negotiating a resolution.

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LISTING STRENGTHS AND WEAKNESSES

Nothing more dramatically emphasizes the problems involved in any negotiation, as well as potential solutions than the procedure of stating in writing just what strengths and weaknesses are evident from the fact gathering and legal research. Laying these out and weighing the "pluses" and "minuses" each side evinces, sharpens the potentials and enhances the possibility of trade-offs. It also focuses on what your side's weaknesses are and demands that you think through how you will handle each of them.

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SETTING PRIORITIES

All of the preceding steps of preparation lead to the setting of priorities among the client's goals. Taking the time to write out just what the client's priorities are will determine what is truly important and what can be conceded or relegated to a position of less importance in the negotiations. This process should also give the client "brackets" within which to work: The highest to be offered, so long as this other point is achieved; but if less is offered in response, what will make the deal feasible because other goals are achieved? Holman Law will take the time to write out these matters in order to force deeper, more concrete consideration and impose a structure on the law firm's negotiating.

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THE ETHICAL QUESTIONS

To the ethics of the business negotiator is added the special ethical constraints of the legal profession. Holman Law must conform to the Code of Professional Responsibility. Pragmatically, this restriction on the lawyer as negotiator raises the question of how much can or must the lawyer disclose when negotiating. Certain rules reflective of these ethical constraints can be stated:

- o Factual truths are required. The lawyer must not dissemble on a factual matter;
- o Opinions are just that- views of worth. The impact of case precedent interpretation of a statute, and the use of opinions in negotiations is a little different from the use of these items in other areas of legal practice.
- o Successful negotiators can avoid problem areas, or exposure of weakness, by rejecting the question as inappropriate-which may itself be an opinion - or by simply refusing to answer. Clearly, Holman Law as negotiator will be alert to what ethical questions are involved or may be involved as the negotiation unfolds.

THE ART OF PROBING

Good physicians do it; so do skilled lawyer-negotiators. Seeking to know, Holman Law will probe for information and attitudes that give the firm insight into the negotiating posture of the other side. Incredibly, the failure to know is often simply the failure to ask. The other side does not have to answer questions like: Just why does your client want to sell? What did he pay for it? What do you do if we can't meet your demand. It is astonishing, however, how much can be learned, even inadvertently revealed, in response to straightforward questions. Placing the question in the form of "help me to understand . . .," or espousing sheer ignorance: "I've never handled this kind of matter before; what should I be looking for," will often elicit an amazing amount of information. Also, watching for the nonverbal clues when probing for information can indicate where the other side may be weak, bluffing, or uncomfortable because you are getting into a problem area for that side.

NONVERBAL CLUES

A great deal has been written about nonverbal communication. A fuller understanding of what is involved and how to use as well as interpret nonverbal clues will be time well spent by Holman Law. In brief, we all communicate with our bodies, our eyes, our gestures, our physical touching. Remember the lawyer who looked at his watch while speaking. He did not say, "I'm looking at my watch now." but he did communicate a potential time constraint that may be crucial in the negotiating process. Observing with the "third" eye, hearing with the "third" ear, involves awareness that much can be learned about the substance and style of a negotiator and the negotiation. Skilled negotiators can, within a few minutes, sense from nonverbal cues how to break down hostility or when hardline tactics should be used. In all becoming sensitive to the nonverbal side of communication can make the difference in a negotiation session.

THE OPENING OFFER

One difficult aspect for lawyers in negotiations is where to start-what should be the opening offer-regardless of the nature of the case. Furthermore, this problem is more pervasive than might first be believed: even after careful consideration of all the facts, research of the law, and weighing the "pluses" and "minuses" of the positions, the

question of the opening offer may confound the practitioner as negotiator. While obviously no specific answer can be delineated, successful negotiators talk in terms of a "realistically high" opening offer or position. The emphasis must be placed on both words: the offer or position must indeed be realistic-not fanciful-but justifiable. The offer should also be high to provide the necessary room for negotiation, for tradeoffs, and for concessions that will still yield the win-win" situation, In seeking to determine from your knowledge of the facts, applicable law, intangible factors, and experience, what constitutes a realistically high opening offer, it is often worthwhile to run the offer by an associate who has some knowledge of the matter and in turn can play "devil's advocate" to make you justify the offer or position.

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THE NEGOTIATING ENVIRONMENT

Where you negotiate can influence what happens in the negotiation. Generally, the following guidelines should be considered:

- o The lawyer conducting face-to-face negotiations in his office has an edge over the lawyer who comes to that office.
- o Assuming a rectangular table, the lawyer at the head of the table who makes certain the other lawyer is not at the foot, but on the side, has a commanding edge. If an office in lieu of a conference room is used, consider the obvious advantage to the person behind the desk. By all means, make certain that beverages and food are available if you host the meeting. Feeding the other side is one of the most effective ways of breaking down resistance and building a good will attitude toward your side. Conversely, if you are going to the office of the other side, warn your client about the psychological effect of being supplied food or drink.

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CONCLUSION

The investment in studying the art of negotiations and consciously developing negotiating skills has paid dividends of a palpable nature for Holman Law and therefore for our clients. A significant component of good lawyering lies in acquiring the knowledge and skills of a successful negotiator.