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CivilLITIGATION

Can I say that? Tactics for ethical negotiations

This spring, I was invited to present at a symposium on ethics in negotiation. Given recent headlines relating to lawmakers' conduct, it felt like a good, timely opportunity to reflect on the importance of lawyers adhering to ethical and other professional standards.

This article reviews a few schools of bargaining ethics and considers a few alternatives to lying in a negotiation setting.

A Lawyer's Instructions to Settle

Lawyer is defending Seller in an action in which Buyer seeks the return of a \$15,000 deposit made in a purchase transaction. Issue is joined. In Lawyer's analysis, there is an honest disagreement about whether an extension of time to complete an inspection was granted. Seller insists that none was given and Buyer's deposit was forfeited. Buyer insists the extension was requested and granted.

Lawyer has shared with Seller her analysis that Buyer's claim is weak. Lawyer advised Seller that the anticipated legal defense costs will exceed \$7,500. Lawyer also explained that without a prompt settlement and assuming Lawyer wins the best possible result for Seller, which is judgment in favor of Seller in the amount of \$15,000, Seller will, at best, net \$7,500 after litigation expenses are paid.

After consideration, Seller makes a business decision, calls Lawyer and instructs Lawyer that she is authorized to inform Buyer that Seller will agree to split the deposit 50/50 to resolve the matter promptly.

Lawyer hangs up with Seller and considers how best to approach Buyer's counsel with this information. Lawyer has not yet spoken with the other side. Lawyer wonders, is it acceptable to tell Plaintiff's counsel that Seller won't settle for less than \$10,000, when in fact, Seller's counsel knows Seller will accept \$7,500 to end the matter? Lawyer very much wants to act confidently and ethically at the bargaining table. What tactics can

and should Lawyer use?

Ethical Thinking

The negotiation tactics that Lawyer in this hypothetical may employ are likely to align with one of three Schools of Bargaining, which were identified by R. George Shell, Wharton School Professor of Business Ethics and Negotiation. These schools are the Poker School, the Idealist School and the Pragmatist School.

- **The Poker School:** Negotiators who come from the Poker School argue that bluffing and other misleading but lawful negotiating tactics are integral to the bargaining game and those who fail to master the techniques do so at their own risk. Although those who adhere to the "It's a Game" school of philosophy in negotiation admit that poker and negotiations are not exactly the same, they point out that deception is essential to being effective in both arenas.

For the Poker School, negotiations have certain set rules: One side opens with an offer, then the other side responds with each side taking turns proposing terms. Supporting arguments are permitted. One can play or pass in each round. One side achieves a win when the

other side agrees to terms that are as close as possible to terms of one's last proposal.

In this game, each side understands the other may be bluffing. Those with experience know that a key skill is knowing when the other side's alternatives are as good as he or she claims. If your bluff is called, you lose: The final terms will be nearer to the other side's offer than to yours. Fraud is not permitted but there is an expectation that some level of deception will occur.

Here, the very best plays come when one side wins the pot with a weak hand or fools the other side to bet heavily when your side holds the winning cards. While the lawyers following the Poker School's standards believe everyone is supposed to know

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and supposed to follow all of the rules, this is simply impossible and can lead to discord among participants.

- **The Idealist School:** Idealists reject the idea of treating negotiation as a game, but rather treat bargaining as an aspect of social life and believe it should not be treated as a separate activity with its own set of rules. Those in the Idealist School believe that simply because the fact that lying can be defended does not make deception in negotiations right. Idealists find members of the Poker School to be selfish and predatory. Poker School adherents believe idealists are naive or a little silly.

- **Pragmatist School:** Those in the “what goes around, comes around” school have some views in common with the Poker School – pragmatists view deception as a necessary part of the negotiation process. However, pragmatists differ in that they will not use overt lies or misleading statements if there is a serviceable and practical alternative. The pragmatists are concerned about the negative effects of deceptive conduct on present and future relationships and have an unfavorable view on the use of questionable tactics as they can have adverse consequences in the long run (i.e., damage to reputation or credibility over time). Pragmatists tend to bend the truth more so than will an idealist.

Lawyer's Opening Strategies

Here, Lawyer has a variety of tactical options she can employ. She might first ask Buyer's counsel to explain his theory of the case and advise what strengths or weaknesses Buyer sees. In the alternative, Lawyer might ask her client to limit her settlement authority, which would allow Lawyer to perhaps test Buyer's willingness to split the deposit and also measure Buyer's willingness to get bogged down in a lengthy or drawn-out matter in court. Another method to avoid dishonesty might be to rely on a client's

board vote for settlement authority.

Blocking Techniques

If, during the negotiations, Lawyer is on the receiving end of aggressive questioning from Buyer's attorney which, if answered, would damage her leverage, Lawyer would be well served to employ one or more of a variety of blocking techniques. A few techniques that should be relied upon are to postpone (delay the conversation by asking to revisit the matter at a later date), or dodge the question (if pressed for a bottom line number, Lawyer could respond by saying: “the more important question is whether we are going to receive a counter-proposal from [Buyer] -- and when”).

Finally, Lawyer can fall back on limited or restricted authority (Lawyer can have the client restrict her settlement ability to \$10,000 for the initial conversation with opposing counsel; in this way, when Lawyer is asked if she will accept \$8,000, she can truthfully respond “I can go back and ask but I can't agree to accept that number, today”).

Conclusion

There are many ways to negotiate a winning position without relying on dishonest or unlawful tactics. In this hypothetical, Lawyer is fully aware that relationships and her reputation in the community matter a great deal. Lawyer has already taken an affirmative first step to evaluate the likelihood of her client's success early in the case and she has let her client consider its bottom line analysis even in the best case scenario in the early stages. We should be reminded that good results can be achieved when engaging ethical strategies in negotiation.

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