The science of negotiation

Follow the mediation of a sexual harassment claim to learn the basic principles of negotiation

By Jan Frankel Schau

An eager trial lawyer is retained by a victim of alleged sexual harassment (I'll call her "Delilah") by some of her co-workers and a supervisor. The workplace is filled with youthful flirtations and the young client finally decides that the whole atmosphere is intolerable. After two different events, (the second ending in intercourse after hours at the office with a manager), she quits, claiming constructive discharge, sexual harassment and sexual battery. The attorneys send a letter to the employer which includes their already prepared complaint and demand for $10 million in damages. The defense lawyer proposes engaging in pre-litigation mediation and the plaintiff agrees.

By now, most litigators have found themselves in the unenviable position of having to learn the art of negotiation in real-time mediation. Most American lawyers have had no formal training in negotiation. In fact, unlike many other cultures, Americans don't really negotiate for much in life. When we purchase houses, we usually do so through an agent. Retail is retail and we typically don't negotiate on price. Even the services we engage are typically not subject to much haggling about price or other material terms. Up until about ten years ago, negotiation was not a course offered in most American law schools and it remains an elective course, not a required one.

Decision-making does not usually follow economic sense. We all hold cognitive biases which cause us to make common human errors in our decision making. Instead of following a predictable pattern, Dan Ariely noted that the human mind is "predictably irrational." So, what can be done to combat that irrationality or harness it towards achieving your goals and those of your clients?

General principles of negotiation learned from economists

Unlike trial, which is theoretically a "zero sum" game (where one party wins and the other loses), people approach decision-making from both a rational and an emotional perspective. On the one hand, the lawyers and clients want to win. Yet on the other hand, they may be coming from a deep place of fear, shame, embarrassment, pride, ego or woundedness. Winning damages can be less satisfying than gaining an apology or an explanation or effecting change in the workplace. Plaintiffs may not be able to tolerate the risk and uncertainty of protracted and unpleasant discovery, motion practice and trial, nor to withstand the cost, public scrutiny and delay.

Negotiation also has a high level of uncertainty, particularly in the course of mediation. In the pre-litigation sexual harassment case, for example, there may be witnesses who will claim that the allegations of harassment were not "unwanted," thereby potentially defeating plaintiff's claim. Proof may rest upon the ultimate credibility of the parties in the absence of "documented evidence" of wrongdoing.

By the time most mediations are conducted, discovery has not been completed. Each side may have witness statements, but seldom does each side know what the other side's witnesses will say. The credibility of the individuals involved is often highly disputed. These conditions of high uncertainty create the perfect scenario in which negotiators are most influenced by cognitive heuristics or other biases. In other words, when we have no certainty, we look for shortcuts to confirm our natural biases, rather than make ourselves vulnerable to new information which may contradict our instincts.

While lawyers like the one representing Delilah may be eager to try cases and make a name for themselves, they are also ultimately driven by a desire to satisfy their clients' interests, even if that means settling the claim before filing the action.

Preparing yourself for a winning negotiation

Donald Trump, Jr. writes in The Art of the Deal: "My style of deal-making is quite simple and straightforward. I aim very high, and then I just keep pushing and pushing and pushing to get what I'm after. Sometimes I settle for less than I sought, but in most cases I still end up with what I want."

As a part of the preparation for any negotiation, we have to start with letting go of the strict concept of "winning." In Delilah's case, "winning" would be a multi-million-dollar verdict. Getting what the client wanted might require settling for considerably less. As is often said, "You will never get what you don't ask for." There is nothing wrong with aiming high, but there is a way to do it that will lead to an early impasse and another way to do it that will invite your negotiating partner to engage with you.

In preparing for a negotiation, the lawyer should always set two points: a reservation point (a walk-away number) and an aspiration point (a "good day" number). That way, you won't stop negotiating when the other side gets to your reservation point and potentially leave money on the table. Discussing these numbers with your client and even writing them down can help to keep them within sights through the course of the negotiation.

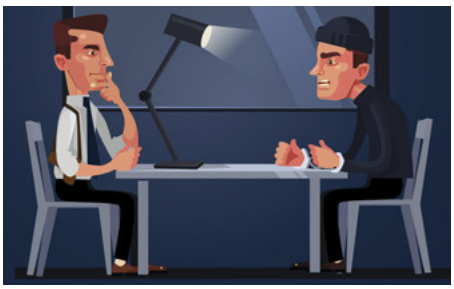
Negotiation professionals refer to the BATNA (best alternative to a negotiated agreement) as your "high side." Consider that point when you develop both your reservation point and your aspiration point, but remember that the BATNA is the net after the factors such as time, expense and risk are considered. And remember, too, that once

you develop what you think of as your BATNA, you may need to build in some flexibility based upon new information you may hear during the course of the negotiation and also based upon our natural tendency to inflate or be overly confident in our ability to win the case at trial.

In order to fully prepare for your negotiation, you need to learn not only about your case, but about the facts upon which your opponent is relying in the defense. Yes, you should conduct whatever research is available to have a fair idea of the "market value" of your case, but in these days of so many confidential settlements, that is very hard to gauge. Instead, focus upon the emotional aspects of why your client's story is so compelling and compare it to other verdicts or settlements in recent cases.

The prisoner's dilemma

One of the most important ways to prepare for mediation is to carefully consider your own negotiating style. The "prisoner's dilemma" is an exercise used to diagnose the style of negotiators. There, two fictitious partners in crime are arrested and separately interrogated. Kept for several rounds of questioning in separate cells, they have no means to communicate with one another. They have committed a relatively minor offense which carries a maximum of a two-year sentence if both are convicted. However, if either of them testifies against the other, he is assured he will not serve any time.



They are both told that if one turns "states evidence," the other can be convicted of a life sentence, but the one who turns will go free. If both confess, they will each get a 20-year sentence. The exercise requires the participants to either choose to sit tight or defect. Mathematically, it is always in the best interest of each party to defect, but it doesn't usually work out that way. Indeed, most decision making runs contrary to mathematical logic. The cooperative negotiator (the "Y") will typically sit tight; whereas, the competitive negotiator (the "X") will initially choose to defect, hoping that his conspirator will not choose to do the same.

As soon as you can, it's useful to figure out your own approach to negotiation as well as the initial approach of your negotiating partner. After you've done that, developing a scientific strategy will be easier. The optimal results in negotiation are achieved only by those who are prepared to make adjustments to their style throughout the negotiation.

In the prisoner's dilemma, which is played in several rounds, the winning negotiator usually starts out cooperatively and then "matches and mirrors" his comrade unless the opponent defects. If that occurs, the shrewd negotiator will punish the defector by becoming competitive himself. If the opponent then makes a cooperative move, the prudent negotiator will respond with another cooperative move. In negotiation, this matching and mirroring will be required if you are to arrive within the ZOPA (zone of possible agreement).

Skilled negotiators know that you can't be a "Y" (cooperative) negotiator in an "X" player's game without the risk of being exploited. Also, you never want to be more than one move behind your negotiating partner, so if he has "defected," you will need to respond competitively until you get back into the groove of a "tit for tat" cooperative negotiation.

In the example of Delilah, the plaintiff's attorneys took a very competitive approach initially by beginning the mediation with a $10 million demand. Not surprisingly, the initial offer was $100.00, a very competitive response. In order to gain some momentum, the plaintiff's lawyers had to make a substantial concession, (to $8 million) in order to appear to be cooperative. That was met with a more cooperative response, now in five figures, not three (to $10,000) and so on.

Opening offers and demands

Statistically, whoever makes the first credible offer gets the best outcome. When you make the first offer, it should be packaged with language that gives it appeal. In my example, the lawyers initially failed to adequately communicate the "jury appeal" of the plaintiff, who was articulate, credible and sympathetic. They also failed to express what they anticipated would be a jury's indignant response to a supervisor daring to have (even, as he claimed, consensual) sex with a subordinate while at the employer's premises, and the terrible, disabling emotional damage that decision inflicted upon their otherwise stable young employee. Their failure to color and justify their outrageous first offer with an emotional appeal may have tanked the negotiation before it began. Day one of the mediation ended with more than a $1 million gap.

It is always best practice to begin the opening demand with information that makes the first demand appear reasonable. Harvard Business School professor Gerald Zaltman says that only 5-30 percent of decision making is based upon reason or logic and a whopping 70-95 percent is based upon emotion. Companies act through people and if you can appeal to the emotions of the decision-maker, you will have an easier time justifying your big ask when you make it. Of course, the conscious mind will eventually take over to make up reasons to justify the unconscious decisions. Delivering a logical, factual data dump won't have the same effect as a compelling narrative.

Generally speaking, it's acceptable to open with a demand that is on the high side of credible except in two circumstances: where there is an interest in preserving an ongoing relationship or where there is a time sensitivity that makes that strategy inefficient.

When formulating an extreme opening offer, it's important to have a strategy for "walking it back." Therefore, when you open on the extreme side, communicate it

with softness. If you choose to open on a more cooperative side, it's okay to emphasize that you intend to be pretty firm on the range of settlement as you are starting off reasonably.

In my example, the extreme offer was $10 million, and it was communicated firmly. It did not go anywhere. Had they instead immediately conceded that the case may have a value of $2-5 million at the time of trial and then started with a $5 million demand, the opening offer may have been in six figures ($100,000) instead of $100.00 or the next offer of $10,000.

Strategies for the dance that is negotiation

Timing and taking turns are important features of negotiation. Once the negotiation begins in earnest, we generally see some form of "tit for tat" – with each side "matching and mirroring" the other's moves. Some mediators refer to this as "the zipper" effect, as each side responds to the other's moves within the zone of possible agreement. Parties will find that there is a natural reciprocity that evolves where each "good move" is reciprocated by an equally meaningful concession. However, prudent negotiators are on the lookout for a change in this pattern. If the other party fails to reciprocate, you should be ready to once again adjust your negotiating strategy to slow down.

There are, of course, exceptions to this rule. If it is a strategic move designed to get a more meaningful concession later, keeping up the pace as against an unreciprocated concession is acceptable. Also, if, as is sometimes the case, the relationship is more important than the stakes of the negotiation, another concession may be appropriate even against an unreciprocated move. Finally, when the negotiation threatens to hit a stall and you are still way above your reservation point, a gesture of generosity may provoke a reciprocal generous response in those middle hours when negotiation can hit a stall.

The prudent negotiator is mindful of both the size and timing of the concessions being made throughout the negotiation. Pacing so as to avoid moving any faster or farther than your opponent is key. As each side approaches their reservation point, the size of the concessions gets smaller and smaller (and often takes longer and longer to make).

Clouds get in your eyes – cognitive biases that may derail the negotiation

Throughout the negotiation, there are minefields of cognitive heuristics that may frustrate the dance. One is "cognitive dissonance," better explained as a wholesale disregard of any information that differs from your view of the case. Unless you are on the lookout for cognitive dissonance, you will not thoughtfully evaluate the new information or perspectives offered throughout the mediation, and you will not be able to objectively respond to critical offers or to adjust your goals. Instead of explaining away, minimizing or ignoring adverse evidence, the wise negotiator will listen, consider and then adjust his negotiating strategy as necessary.

Another cognitive heuristic is "competitive arousal." When you perceive someone as your rival (a competitor), your own competitive nature may be provoked, shutting down the prospect for productive negotiation before it has a chance to begin. This happens frequently when the provocation takes place in front of a client, or when it is driven by an artificial pressure of time. This can be avoided by thoughtful preparation and, where indicated, delivery of hard messages through a neutral mediator.

It is wise to beware of the concept of "reactive devaluation" – a kind of automatic discount attributed to any proposal coming from your rival. This can also be overcome by engaging your mediator to propose a given offer as a hypothetical, instead of an idea originated by you where you are concerned that it will be so discounted by your opponent because of this heuristic shortcut.

As an example, in the sexual harassment negotiation, rather than begin with a (still beyond the credible zone) opening offer of $5 million, if the mediator had conveyed to the opposing party that it was her idea for plaintiff to come down from the originally articulated $10 million to $5 million as an opening offer, it may have been met with a more cooperative response than the reactive devaluation that occurred when plaintiff began the negotiation by demanding $10 million in an angry confrontational meeting directly with the Human Resource Director (who had hired the outside investigator) and the company lawyer present.

Finally, be aware of the sometimes irrational attachment known as "advocacy bias." An objective analysis of the value of the case can easily be obfuscated by the attorney's initial reaction to the client at intake where the lawyer has a personal stake in the outcome (such as a contingency fee arrangement). Without listening to the other side's position, you may be at a disadvantage in making the adjustments necessary to end up with what you and your client want.

Strategies for closing

There is a strategic advantage to creating the first draft of a settlement agreement. Heuristically, presenting a draft agreement even before the terms have been fully agreed upon creates a "commitment bias," where the parties want to justify the long day and many hours they've invested into settling the case. By coming prepared with a draft agreement, you can psychologically cause both sides to commit that the case is likely to settle on the day of the mediation and begin to negotiate the fine points even before the damages have been determined.

There is also a strategic advantage in making the last concession, so that your adversary has the "peak-end" result: one where they remember only that you were a consummate professional who treated them fairly throughout. Avoid gloating, lest they have doubts about the deal they have just entered into. If you have prepared yourself and your client to achieve your goals, you have won when you close the deal.

ADR is a tradeoff. All parties come to it knowing that the process itself is an imperfect series of decisions based upon incomplete information. Yet it offers

confidentiality, avoids the expense, risk and publicity of trial and is much less expensive and can usually take place much sooner than a trial. The psychic toll of a trial is immeasurable on both clients and their lawyers. If it can be avoided through good negotiation, you and your clients win.

Jan Frankel Schau, ADR Services, Inc., *has been a mediator for over 15 years in Los Angeles. She learned her diplomacy skills at Pomona College in Claremont, where she majored in International Relations and her skills as a litigator at Loyola Law School. Practicing on both the Defense and Plaintiff sides of the aisle, she devoted herself to becoming a full-time neutral after 20 years of practicing law.*


Schau

Specializing in employment, tort and business disputes, Jan is also Adjunct Faculty at Pepperdine University's Straus Institute of Dispute Resolution, where she teaches "Mediation Skills and Theory."