Insights: Alerts

Leveraging Trial Strategies To Improve Your Negotiating Skills

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A trial lawyer must make strategic decisions throughout the course of a case that will impact its outcome at trial. Over the years of my practice, I have learned that these decisions have also taught me several important lessons on how to be a better negotiator. After all, given that most civil lawsuits settle before trial, and even though I enjoy the drama and excitement of trial, I recognize that I need to be a skilled negotiator in addition to a savvy trial lawyer to serve my clients most effectively.

Preparing for trial requires thoughtful analysis of the strengths and weaknesses of your case. Equally important is evaluating an opponent's arguments and developing your best counterattacks. Those same strategies can be employed when preparing for a negotiation. The following five tips are a few of the lessons I have learned from being in the heat of battle in trial that have enabled me to become a more sophisticated and skillful negotiator.

Know Your Opponent's Perspective

As you prepare a case for trial, you must look at the case from your opponent's perspective. What are their strengths and what do they perceive to be their weaknesses? How do they plan to tell a story that resonates with a jury or judge? Why are they interested in taking their case to trial? Why should they fear going forward? What would encourage them to pay, and pay more, to stop the litigation process? These same questions are important to ask when preparing to negotiate with your opponent. Understanding their perspective and the reasons they are invested in their side will help you to develop arguments that will resonate with them and persuade them to want to negotiate.

The most effective negotiations occur when you are able to make credible arguments to your opponent about issues that they believe to be most important and relevant. If you fail to address the issues that matter most to your opponent and articulate the reasons why your position is stronger than theirs, you will be less likely to achieve a successful resolution through negotiation.

Timing is Everything

During trial, sophisticated trial lawyers thoughtfully consider the order of the presentation of their case. Facts are revealed in dramatic fashion so that the building blocks are established before more nuanced facts are introduced. Effective trial presentation requires a clear, thoughtful revelation of evidence so a fact-finder can understand your story and see how it fits into the overall dispute. Thus, the timing of how and when evidence is presented during a trial matters.

In negotiations, the timing of disclosing key information or settlement offers is equally important. Making an offer without having revealed some important points in your favor in a dispute will often lead to unsuccessful negotiations. Your opponent wants to know why you think a settlement offer you're making is fair or reasonable.

Yet, offering all of the reasons why your side is right at the outset of a negotiation is likely to be unsuccessful because your opponent has not had time to think about and process the information it learned thus far. Certain information should be revealed with sufficient time for your opponent to discuss it internally and obtain approval for additional settlement funds. Often, socializing the need for additional settlement funds requires justification to individuals who have not had ongoing responsibility for the negotiations but ultimately control the funds. Keep in mind that obtaining additional authority can require multiple layers of approval. Therefore, that process takes time and requires a realistic assessment of one's chances. Just as in trial, offering facts that build on each other over time during the critical stages of the negotiation process can help you provide a more compelling case to your opponent and encourage them to be more receptive, and generous, to your settlement offer.

Develop a Rapport

Even before trial begins, a savvy trial lawyer has developed a rapport with the jury through effective voir dire questions. This relationship-building is critical to success in trial, as a jury that relates to a party's attorney is more likely to be receptive to that side's arguments and factual presentation. The rapport between a trial lawyer and the jury also creates a desire in the juror's minds to relate to the attorney and her arguments more than the side with whom the jury has developed less of an affinity.

This ability to develop a rapport and create an environment where the listener is receptive to the speaker's arguments is critical for success in negotiations. Blatant hyperbole and blustering can therefore be counter-effective. Counsel that can effectively build relationships with the other side and a valued intermediary (such as a mediator) and demonstrate to the other side that they are relatable and trustworthy are much more effective in negotiating a favorable settlement.

Communicate Clearly

Similar to the importance of relationship-building, clear, effective communication with the jury is a fundamental skill for success in trial. A logical, understandable presentation to the jury enables a trial lawyer to tell her client's story in a meaningful and persuasive manner. Just as in an election campaign, having an easily understandable theme is key to a party's ability to persuade its audience. A trial presentation that is disorganized or ambiguous makes it much more difficult for the jury to follow and lowers a party's chances of success.

In negotiations, clarity of communication is essential. It is important to explain the reasons for a settlement overture in clear language at the beginning of the negotiation so that the other side can understand the benefit to settlement. Having a theme that is easily understood and clearly articulates the key aspects of your position is equally important. Likewise, during the negotiations, subtle changes in language can be used effectively to signal a party's ultimate bottom line or willingness to further negotiate. Using clear communications throughout the negotiation process also ensures that if the parties reach an agreement, both parties clearly understand the terms of that settlement. Many times, vague and unclear communications during negotiations can result in the undoing of a settlement because one party misunderstood the terms of the offered resolution.

Evaluate What Both Sides Have Invested and Have at Stake

Litigation is expensive, not just because of the legal fees a party must invest but also because of the distraction caused by the case and interruption to a company's ongoing business. Employees have to be diverted from their daily jobs to assist in the preparation of a party's case, which not only decreases their efficiency but also causes

others within the company to have to be redeployed to fulfill those employees' obligations. Litigation is also stressful, both for witnesses who must be prepared to testify under oath and for decision makers who must decide the strategic approach to the case. These investments, financial and emotional, impact trial strategy as you consider which witnesses to call to the stand and how long a trial may last.

Likewise, understanding the other side's investment, both financially and emotionally, in the case can also help you in your negotiating strategy. If the case is not a substantial financial investment for your opponent but instead seems to be a matter of pride or ethics, then offering a financial settlement without any nonmonetary consideration may be unwise. Knowing your opponent's investment can also allow you to develop a negotiating strategy that will allow your opponent to feel as if their investment is being satisfied through the settlement. Without this knowledge, negotiations can fail because one party's offer does not resolve all of the investment the other party feels it has made in the dispute.

Conclusion

Just as with trial, early and thoughtful preparation for negotiations with an opponent are critical. Thinking through your opponent's perspective, planning for when and how you will reveal key facts during the negotiations, and developing a clear and concise message are important considerations when planning your negotiating strategy. During the planning stages, it is also important to consider both sides' investment in the dispute and to develop a plan for building rapport with your opponent so that your negotiations can be as effective as possible. Using these five strategies will allow you to use effective, proven trial techniques to enhance your negotiating strategy and obtain a resolution that is most beneficial for your client.