Sonoma CLE 2016: Stuff You Need to Know to be a better Advocate in Negotiation, Mediation and Arbitration

INTRODUCTION

Negotiation, mediation and arbitration are the subject of today's presentation. They are the three most common dispute resolution processes in use in the legal field today, outside of litigation. The importance of these non-litigation dispute resolution processes has increased greatly in recent years due in large measure to the expense and time required to effectively litigate a case. The effective uses of these processes can be vital to a client's representation.

Lawyers go through much training, emphasizing discovery and trial techniques. Our purpose here is to provide additional tools to promote better advocacy in the non-litigation dispute resolution processes. We will seek to do this with a mix of theory (i.e., conflict theory, communication theory and dispute resolution theory) and practical, tactical advice regarding each of these areas. One basic assumption we make in this presentation is that the parties involved in these disputes operate under the United States legal system with commonly accepted United States/Western values and the assistance of lawyers. It is very important to understand that cultural differences can have a major impact on how dispute resolution works.

To have dispute resolution, there must first be a dispute. The conflict resolution model attached as Slide 1 shows how this occurs. It begins with differing parties having interests or aspirations that conflict. This alone does not make a dispute. The dispute only occurs when a party actually perceives or realizes an injurious event or experience. Recognizing that a particular event or experience has been injurious is called "naming." The next step in the process is "blaming", where the particular named injurious event or experience is attributed to the fault of another. The next transformation takes place when the party who has "named" and "blamed" actually communicates their grievance to the party believed to be at fault. This is called "claiming." Sometimes, these steps can be separate, distinct and drawn out (i.e., a toxic injury, or asbestosis). Sometimes, they can occur almost instantaneously (i.e., an auto accident). Lawyers have had and continue to have a large role in helping people in the "naming", "blaming" and "claiming" process. In many ways, this is the purpose of "access to justice."

Once the grievance is communicated, the dispute resolution continuum comes into play if the claim is rejected in any manner. At the beginning of this process, there is a decision to be made by the person with the grievance. Does that person or party move forward with the grievance or not? Does he/she accept the rejection (lump it) or proceed? If the decision is to proceed, then negotiation begins.

Finally, the three alternate dispute resolution processes are not exclusive. Negotiation can still be occurring during mediation and arbitration. Mediation can still occur as a required precondition of arbitration or as a part of the arbitration process. The first process to come into play is usually negotiation.

PART 1 -- NEGOTIATION

a. Generally

Life is a series of negotiations. Everyone negotiates daily. Lawyers probably do more negotiating than any other distinct function of their practice. They negotiate with clients, employees, partners and opposing parties and counsel. Yet, relatively few lawyers receive any in-depth training in negotiation. Most get some type of on-the-job training throughout the years of practice in the use of certain tactics that sometimes seem to work. As a result, there is a vast disparity in the ability of individual lawyers to negotiate.

To begin understanding negotiation, it is important to realize that there are two basic types of negotiation: distributive negotiation and integrative negotiation. Distributive negotiation is the type with which many litigators are familiar in their practice. The plaintiff starts high, the defendant starts low and the parties try to dance to the middle. Here, the best compromise is one where neither side is happy with their outcome. Integrative negotiation is the second type of negotiation which seeks a win/win result. *Fisher & Ury*, Getting to Yes (1981), is the classic work providing a popular

explanation of distributive negotiation. Importantly, these two basic types of negotiation can both play a role in a single negotiation. Even in a basically distributive negotiation, there is room for integrative bargaining and vice versa.

b. Distributive Negotiation

In the typical personal injury case, the plaintiff starts the negotiation by offering high, and the defendant counters by offering low. In a successful settlement through negotiation, the parties dance closer together through a series of declining/increasing offers/counteroffers until reaching an agreed-upon amount. Often though, the negotiation is unsuccessfully terminated after one or more offers/counteroffers. While there are facts outside of the negotiation itself that can play a role (i.e., too soon, not enough facts; too much exposure due to similar cases/issues, etc.), the failure often results in one or both parties not having a clear, in-depth understanding of this type of negotiation.

Slide 2, the Distributive Negotiation Chart, provides a shorthand explanation of the distributive negotiation process. To begin with, distributive bargaining has certain characteristics. It is a fixed pie, zero sum process. There is a certain amount of something (money, land, goods, etc.) that is set and is to be divided between the parties. Thus, each party's goal is to maximize self-gain. It is a win/lose proposition. With a fixed pie, when Party A gets a larger piece, Party B gets a smaller one; and, vice versa. Also, the focus is

on positions or amounts, not the underlying interests or the reasons why a certain position or amount is desired.

The chart sets out the various zones and points that impact the distributive bargaining process. First, zones which are unrealistically high or low value areas based on the facts of the case, are defined as the insult zone. Offers in these zones can cause the other party to get up and walk out, shut down negotiations or refuse to counteroffer. The credible zone is the realistic value area given the facts of the case. Within the credible zone are aspiration points. This is a party's best realistic result -- the homerun. It should be high in the credible zone for plaintiffs and low in the credible zone for defendants. The chart also sets forth reservation price/points. This is the party's walkaway number. Plaintiff A would not accept any less than A's reservation price, and Defendant B would not pay any more than B's reservation price. Within the reservation price/points is the zone of possible agreement -- the sweet spot of distributive negotiation.

The point of all this is for the negotiator to realistically assess the case and make an educated guess or estimate as to the insult zones, the credible zone, the aspiration points, the reservation price/points and the zone of possible agreement to better calculate where offers and counteroffers make sense to reach agreement. Certainly, these numbers can change during the course of the negotiation as more facts are revealed. However, the structure

provides a handy guide to avoid mistakes and maximize one's chances of a successful distributive negotiation.

c. Integrative Negotiation

Integrative negotiation differs from distributive negotiation in a number of significant ways. It evaluates interests rather than positions. It is collaborative not competitive. It seeks mutual gain where possible; not a win-lose fixed pie result. It is harder to do. It takes more time. It is not suitable for every case. Its results are most often more satisfying to the parties than results from distributive negotiation.

Slide 3 illustrates the seven elements of integrated negotiation: communication, relationship, interests, options, legitimacy, alternative and commitment. The slide actually assumes that one knows the facts of the case. Each of these elements plays a role and impacts the next element. The approach is as follows:

1. Identify and evaluate the facts/variables of the case;
2. Prepare an effective communication strategy;
3. Develop relationships;
4. Determine interests;
5. Discuss (and negotiate, if necessary) options;
6. Assess alternatives;

7. Agree on legitimacy of the option meeting interests; and

8. Reach commitment.

These elements are used to separate the people from the problem, focus on interests not positions, develop options leading to mutual gain, base these options on objective criteria and lead to a win-win result.

The first step in the process is obvious but critical. Know the case. Know not only the strengths of one's case but also the strengths of the opponent's case. Do not let your advocacy role override your counselor role so much that you drink your own Kool-Aid.

Next comes the development of an effective communication strategy in order to build a relationship with the other party. Open-ended interest-based questions obtain more information than yes-no cross-examination style questions. Tone of questioning is important as well. Aggressive questioning (not to be confused with persistent questioning) increases resistance and usually becomes counter-productive. Timing is important as well. When asking sensitive or important questions, consider the best time in the context of the conversation to do so. For example, a particularly sensitive question right at the beginning of the conversation is probably not a good idea.

Further, communications theory has identified a number of concepts which can enhance effective communication. They are perception,

emotions, core concerns, heuristics/bias, and principles of influence.

Use of perception involves things such as putting oneself in the other's shoes; not guessing the other's intent from one's own fears; not blaming the other for one's problems; giving the other a stake in the outcome through participation; and making proposals that are consistent with that perception. One should also look for opportunities to change negative perceptions by acting in a way contrary to that negative perception.

Use of emotion includes recognizing and understanding one's own emotions as well as those of the other; making explicit acknowledgment of the legitimacy of the other's feelings; allowing venting of emotion; and using symbolic gestures to create positive emotion.

The five core concerns are appreciation, affiliation, autonomy, status and role. These address the following questions:

1. Can one understand the other's interests?

2. Does one have common interests, background, friends, and relationships as the other?

3. Does one respect the other and their freedom of choice in the process?

4. Does one treat the other as an equal, a superior or an inferior?

5. What parts do the parties play in the process?

The answer to these questions can enhance or detract from the process.

Heuristics/bias is a concept that recognizes the mental shortcuts/assumptions people make on a daily basis in dealing with decision-making. These are non-rational (not necessarily irrational) unconscious patterns dealing with complex decision-making. There are any number of them and they can definitely impact decision-making. For example, the "availability bias" refers to a known tendency of people to make judgments based on how mentally available possible results are to them. For instance, a plaintiff might overestimate the possibility of winning a large verdict because of news coverage of a separate case in which a large verdict was rendered. Another example is that most people incorrectly believe that homicides and car accidents kill more Americans than diabetes and stomach cancer, presumably because of the media coverage of homicides and car accidents. Another example is the "overconfidence bias". Simply put, most people believe that good things are more likely to happen to them on average and that bad things are less likely to happen to them on average when compared to others. Another known tendency arises out of "framing". People are generally willing to take more risks to prevent a loss than they are to obtain a gain. So, if the problem can be framed as a potential loss for one of the parties, they will generally be more willing to take a risk to prevent that loss.

The next concept is principles of influence which are liking; social proof; commitment/consistency; reciprocity; authority; and scarcity. Liking is the concept that we are more influenced by those who are physically attractive, with whom we share something in common and with whom we are familiar. Social proof is the tendency to more likely behave in a certain way after seeing others do so, particularly in a condition of uncertainty and when the "others" are similar to us. Commitment and consistency means that once one makes a choice, there is personal and interpersonal pressure to behave consistently with that choice. Reciprocity is the concept of the Golden Rule: do unto others as you would have them do unto you. Authority is the tendency to comply with the wishes of those in real or perceived authority. Finally, scarcity is the concept that opportunities are more valuable when they are less available. Utilizing all these concepts as part of the communication strategy really enhances the quality of communication.

The whole point of developing and executing a communication strategy is to build relationships. The initial decision here is how good does one want or need the relationship to be in order to explore interests, develop options and agree on legitimacy of the result. This will differ depending on the complexity of the case, the preexistence of a relationship, the desire for a continued relationship as well as the level of the relationship desired. Developing the relationship is enhanced by separating the people from the problem and negotiating hard on the problem but soft on

the people. One should bargain hard for his or her interests but respect the other's right to bargain as well. Utilizing objective elements or standards to support one's interests is one way to bargain hard without making it a personal attack. The goal is for the relationship to have a sufficient amount of trust and respect to allow for the additional elements of integrated negotiation to take place.

The interests phase is designed to explore and discover the underlying interests of the parties to the dispute as well as any third-party interests which may impact resolution. These interests can be present or future interests which are shared by the parties or which differ. In exploring interests, it is important to differentiate interests from positions. A position is the thing one currently seeks. Interests are the reason why one is currently seeking the particular thing. A helpful illustration is an iceberg floating in the ocean. The 1/5 of the iceberg showing above the waterline is the position while the 4/5 of the iceberg below the waterline represents the interests which support the position.

Once the interests are identified, the next phase is to create, prioritize and choose an option or options that best meets the interests of the parties. One of the best ways to do this is to "brainstorm" the problem. The parties initially develop any number of options. Then they rate the most likely options and prioritize. There is no sacramental form to this practice. This process can be

done together or separately. The key is to be open and creative as well as to communicate.

After the options are developed and prioritized, the next step is to agree on one option which best meets interests if at all possible. As part of this process, the parties have to evaluate the best alternatives if no option is selected. This is called the BATNA (Best Alternative to Negotiated Agreement). The stronger or better a party's BATNA is, the harder that party can bargain because there is less downside risk of failure. In the distributive negotiation framework, improving your BATNA will improve your reservation price/point thus shifting the zone of possible agreement favorably to you.

If both parties agree to an option, then the next step is to get commitment in the form of a written settlement document which sets forth the ultimate steps the parties are to take. Without an enforceable mechanism, the negotiation is not complete. Sometimes this is easy. Sometimes it is hard due to contractual, indemnity and other details which can derail any agreement. Obviously, if the parties cannot agree on an option, the negotiation fails.

d. Conclusion

As set forth at the outset, negotiation is everywhere in our daily lives and particularly in our law practices. This fact makes the relative lack of formal training in negotiation practice for lawyers all

the more surprising. This presentation hopefully will help lawyers approach negotiation with a better appreciation of the dynamics. The models of negotiations set forth here are not set in stone. They are models which represent an experienced approach grounded in an organized research-based methodology. They are designed to help order a lawyer's approach and way of thinking about negotiation. Remember again that rarely is a negotiation all distributive or all integrative. There is often a distributive bargaining role within integrative bargaining models particularly on peripheral issues. There are also often opportunities for integrative bargaining in a basically distributive bargaining setting. The point is to understand both and apply them appropriately.

Finally, slide 4 is a helpful tool to plan for a negotiation using the methodology discussed herein. I find it helpful and hope you do too.