THE ART OF
DIVORCE SETTLEMENT NEGOTIATIONS

By

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Any fool can take a divorce case to trial. Only a skilled lawyer can negotiate a settlement which maximizes the client's position without making the opponent feel taken advantage of. Those negotiating skills are becoming more critical as we enter an era where matrimonial disputes are increasingly being resolved in non-courtroom forums. This article is intended to present a conceptual system which allows practitioners to focus their existing skills to produce more positive settlements.

THE IMPORTANCE OF UNDERSTANDING THE PSYCHOLOGY OF DIVORCE.

The first step towards achieving a positive settlement is to recognize that a divorce negotiation is unlike any other legal negotiation. Car accident negotiations, for example, are one dimensional because the accident client wants only one thing . . . money. By contrast, divorce cases often involve a multitude of interrelated issues, all of which are colored by the intensity of the emotions of the parties, their families and sometimes even the lawyers. As a result, divorce negotiations are complex, multi-leveled and require a high degree of understanding the psychological nuances which are in play. Emotion-wrought disputes may arise over seemingly trivial matters, such as the division of furniture and wedding gifts, or even the custody of pets. It is not uncommon for the lawyer to accomplish the client's objective in one area only to destroy his bargaining position in another. Negotiations can also break down because there is no middle ground for settling some emotion-driven assets that the clients perceive as indivisible, such as how does a lawyer divide a beloved pet or a piece of sentimental property?

The lawyer who can understand each case's emotional aspects, its unique issues, the parties, and how they all interrelate can significantly improve settlement results. The successful divorce lawyer must know each of the following before starting to negotiate a case:

1. The law and the facts of her case,
2. The client's goals,
3. The opposing lawyer, and

4. The judge.

KNOW THE LAW, YOUR CLIENT AND YOUR CLIENT'S CASE

A significant step towards a successful settlement is to develop a working knowledge of the law which applies to your situation. There is no quicker way to be taken advantage of or to create a malpractice opportunity than to violate this cardinal rule. Any good divorce lawyer must have a working knowledge of a multitude of areas of law such as tax, corporate, partnership, real estate, options, security devices, negotiable instruments, landlord/tenant, and wills and trusts. It is equally critical to have a working knowledge of non-legal areas of study such as finance, insurance, counseling, abuse, addiction and psychology.

While the divorce lawyer needs a working understanding of many interdisciplinary areas of study in order to frame issues, build client confidence, and formulate imaginative solutions, the lawyer also needs to know when to seek the aid of an expert in one of these fields. Being unprepared on critical matters of law will never benefit your client.

The next step is for the divorce lawyer to familiarize herself with the client and the facts of the client's case. This is accomplished by truly listening to your client. Your wealth of legal knowledge will be wasted unless it can be overlaid and applied to the client's facts. The lawyer can only get those facts by listening. It is amazing how often practitioners neglect the simple yet important task of listening to what their clients have to say.

It is important to accept that we practice in a people-oriented area of law that requires good listening skills to be able to understand the emotional content of the matters in dispute. You should find another area of law to practice if you do not care about people or you lack the ability to listen to their problems.

Listening must begin with the first interview. Your goal is to ascertain the client's concerns, help the client set reasonable goals, and then work to resolve those concerns by accomplishing those goals. Have the client put aside that list of questions he brought with him and start the interview by asking the client what went wrong in the marriage. Remember, at one point your client stood before every friend he had and promised "to death do us part", yet here he is sitting in front of you admitting his failure. Even the most

stoic client needs the opportunity to get it off his chest, with no interruption, comment or criticism. Some clients will be eager to talk your ear off, while others will quiz you as to why this information is necessary. Tell the client the truth . . . . you want to know what is on his mind, what is bothering him, what his issues are. You want to know these things to enable you to help him set reasonable goals and resolve problems.

It is amazing how a client's eyes will light up when given this explanation. "Here is an attorney who cares for something more than the dollar. This is the attorney I want to hire." This approach is successful, however, only if you mean what you are saying. Bluffing interest will not engage the client's trust and that trust is necessary to your ability engage the clients confidence.

Every good lawyer will tell you that it is critical to the lawyer/client relationship that the lawyer take charge during the initial consultation. This is true, but too many lawyers believe that "taking charge" means pontificating about her own skills or the great things she plans to do for the client. The successful lawyer takes charge by listening, analyzing and not over promising. Listening to your client at the inception of your relationship builds the foundation from which you will later guide and direct your client through the negotiation process. Reference what you have learned from the client as you begin to guide and direct also gives the client the opportunity to develop a sense that his lawyer heard and cares about his concerns. One of the great mysteries is why clients hire lawyers with poor legal skills. Perhaps it is because those lawyers are good listeners, and work with what they've learned. If you follow these principles it is unlikely you will ever see a client who presented himself with a list of questions at the beginning of the interview leave without having most of his questions answered without ever having had to refer back to the list.

Study after study makes clear that clients look for the lawyer who cares about their case rather than one who is the smartest, the cheapest, etc. So listen and learn. Lawyers are not therapists, but that does not mean that it is not useful to spend part of an hour listening to what is on the client's mind. Listening clues you to what is needed as you begin to offer guidance, direction or redirection. Remember, too, that you may have heard the same story a hundred times, but this is a first for the client. Avoid the temptation to pigeonhole the clients problem into the ready-made scenario that you already have the answers for. Each case is unique and the later negotiations will involve complex,

intertwining goals and concerns with a healthy spicing of emotion thrown in.

"Listening" does not mean that the lawyer should sit quietly through the entire first interview. Depending on the client, you may want to listen for the first ten to fifteen minutes without anything more than an occasional affirmative response to let the client know that you are attentive. A typical statement in the first fifteen minutes would be: "He said what?" "Was that the first or the second time that happened?" "How did you respond?" It is the affirmation that you are listening which is important, not the answer. Gradually insert yourself into the discussion by guiding the discussions to the areas that will make an actual difference in your case. You should be doing all of the talking by the end of the hour. By then you are using what you have heard to "take charge" with guidance and direction. If you are Perry Mason, he is to be Paul Drake, the investigator. After all, who knows more about the case than the client?

Make sure to give the client a few specific instructions (homework assignments) during the first interview so that he leaves your office with a task and direction. The best way to assure the client that you understand the law, that you care about him, and have the skills to do the job is to make the client part of the team which is being formed to handle his divorce. Have the client get a credit report on himself (even though you can easily get one yourself) because it is something the client will feel good about having accomplished. Distribute the boilerplate checklist of records that we each have and tell the client why it is important to start gathering the documents for you and the other side. Suggest a specific book that he might read to educate himself about the process he will soon be embroiled in.[1] Work is a constructive therapy so use it to your clients advantage.

Remember that you are a lawyer and not a puppet. Promise only that you will do your best work for the client, nothing more and nothing less. The distinction is critical

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[1] *The Divorce Handbook - Your Basic Guide to Divorce* by James T. Freidman is an excellent resource for this purpose. It presents the information in a question and answer format which allows the client to zero in on the information he wants without having to muddle through extraneous and perhaps confusing details. Random House. 1999.

because it highlights your role as an advisor. Your job is to meld the facts and the law together in the most advantageous way for the client but you cannot remake your client's facts. The best lawyer is the one who can give the client the bad news in such a way that it is accepted, albeit reluctantly, and then moves on to the next step in the process. Most practitioners never promise the client any specific result other than that you will do your best for the client.

You will never get all of the information you need to understand and settle the case during the first interview, so do not try. This interview merely sets the tone for the relationship as you want (and expect) it to be. It will take several interviews and other information gathering techniques to fully grasp all the details and nuances of the case, and to develop your relationship with the client. Following the theme that this is "your divorce and that I expect and need your help with it," you should send the client the next homework assignment soon after being hired. You want a written history of the client's marriage. This means you need to hear about the good, the bad and the ugly parts. This also a cathartic exercise for the client that can provide insights not drawn from your meetings. A critical part of his "history" is a requirement that the client write out his objectives in order of priority. This will give you a record of the client's own view of the importance of each issue, and will provide a checklist in developing a plan to achieve the important goals. This list can also be used by you and the client to determine what is and is not nonnegotiable.

In addition to being information-gathering opportunities, each subsequent interview is an opportunity for you to build the confidence and rapport with your client which will become so important when the actual settlement process begins. Focus on getting the client's information, including an understanding of what motivates the client's spouse. As you begin to understand what your client's spouse wants you can speculate as to what concessions she would make to attain her own goals. You will gain a greater understanding of the psychological and emotional pressures affecting all members of the family unit each time you t talk to your client. In doing so, you will gain the insight that will become invaluable once everyone is sitting at the conference table.

As you progress through this article you will note that it describes settlement techniques that work only with a client with whom you have built a rapport, somebody you like. It will not work with a client who cannot be dissuaded from unrealistic expectations.

Unrealistic expectations, anger, a need to punish, not understanding the terms of the settlement, perceptions of coercion, or a tendency toward buyer's remorse all characterize the unhappy client which will increase the probability of a malpractice claim or community bad-mouthing of you and your practice.

Being the client's advisor is a reference to the law, not to the client's personal life. Do not become emotionally ensnared in the client's troubles because it is your detached objectivity that allows you to give good legal advise. This control is lost once the client becomes a friend, personal confidant, a buddy. In addition, there are those clients who have an unreasonable or irrational perspective on their case and your role in it. Discharge such clients immediately or the set the case for trial without any further attempt to negotiate a settlement. Such clients will never be happy with the result you obtain, regardless of how favorable that result actually is. Either let some other lawyer disappoint him, or let the judge be the one who shines the stark light of reality into his darkened room.

Providing guidance and direction while maintaining control means that you must always tell your client what he needs to hear rather than what he wants to hear. Help the client develop realistic objectives by being direct, matter of fact, and honest. The more knowledgeable the client is made about the law and the process, the easier it will be to settle. The bottom line is always this: terminate the lawyer/client relationship if you cringe at the thought of picking up the client's file. You will not settle the case, or if you do, the client will not like the result regardless of how favorable it actually was. No lawyer needs the money that badly.

KNOW THE OTHER LAWYER

Negotiating a divorce case is like no other negotiation for a number of reasons, not the least of which is that there are few hard laws or legal rules that apply. The vagueness of asset values, flexible criteria for division of property, and the lack of objective spousal support standards always gives the advantage to the legally and factually informed and prepared lawyer. The next question to answer is whether your opponent is that lawyer.

Who is the other lawyer? Does she know the law? Does she have solid negotiating skills, or does she take unreasonable positions only to back down on the night before the trial? Is she honest and forthcoming with information, or does she "hide the ball"? Is her style so offensive that the best course of action is to have the case set immediately for

trial? Does she get emotionally caught up in her clients' cases? [2] The list is endless. One way to find the answers is to make a few calls and ask questions about your opponent if you have not handled cases with her before. It is critical to know your opposing lawyer's strengths and weaknesses, level of knowledge and working style.

What is your opponent's negotiating style. Is the lawyer a "competitive" or "cooperative" negotiator? Although it is easy to be a jerk it is even easier to be perceived as a jerk. As a result, posturing is rarely helpful and usually counterproductive. Posturing may make the client feel good for a moment if the client's goal is to punish or to gratify his own ego, but it is not conducive to settlement.

"Competitive" negotiators occasionally obtain more extreme results than "cooperative" negotiators but the price for those results is that they settle far fewer cases. It is not worth subjecting your client to this kind of negotiation. "Competitive" negotiators frequently win a battle during a particular confrontation, but they seldom win the war. They forget that the parties are often going to have to deal with each other for a long time and the pleasure of the moment may cause damage that lasts a lifetime.

Divorce is a specialized business and as a result, cases tend to be handled by the same group of lawyers. This means you will negotiate case after case with the same opponent. Resist the temptation to make disparaging comments about the other lawyer to your client even if you have worked together and know well her shortcomings. Your grandmother was correct when she advised that you never build yourself up by tearing another person down. Instead, focus on doing your job as well as you can. Let the results speak for you. Just as you must know your opponent, understand, too, the importance of your own credibility in the negotiation process. What is being said about you? Ask yourself the same questions that you ask about the opposing lawyer. You cannot expect the opposing lawyer to encourage the settlement process if your own credibility suffers in the legal community.

Recognize that a lawyer's reputation, sincerity and credibility are tremendously important to settlement. Always covet your reputation. It, like credit, takes a lifetime to

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[2] This last attribute is often a failing of inexperienced lawyers. They listen to the client, but lose the objective viewpoint which is critical to being an effective advocate.

establish but only one day to destroy. For example, until and unless a lawyer acquires a reputation for being well-prepared and willing to try her cases, there will always be opponents who will discount her position.

KNOW THE JUDGE THAT WILL TRY YOUR CASE

Settlement is largely determined by what the lawyers believe is attainable through trial. In jurisdictions where cases are pre-assigned, knowing the judge will allow the lawyer to gauge the credibility of the opposing party's settlement proposals. This is one of the reasons divorce cases are usually handled by local counsel.

The goal is to have a clear understanding of what your client can reasonably expect as an outcome if a settlement is not reached and a third party (a judge) has to resolve the dispute. "Knowing" the judge does not mean that she will cut you any special favors. Rather, it is a recognition that every person, regardless of position, has personal biases and prejudices. A judge with a husband who stays home to care for their children will look at a case differently than a judge who has placed her children in daycare so that her husband can work. An alcoholic judge who has been sober for 5 years is going to be sympathetic to a addictive spouse who has recognized her problem and is seeking treatment. Call more knowledgeable local lawyers and ask for advice if you are not confident in your understanding of your judge.

Gauge your settlement advice to the client on what you expect the judge to do if she ultimately will resolve the unresolved conflicts. Keep in mind that the lawyers can fashion a result which the court would not have the authority to impose upon the parties. This is particularly true in areas involving highly emotional issues. As we all know, judges cut things in half with a rusty knife whereas we have the opportunity in the settlement process to use a surgeon's scalpel.

Knowing the judge can also help you resolve that one stubborn impediment to a resolution of the entire case. Most judges are more than willing to meet with the lawyers (directly or by a telephone conference) for a quick advisory meeting. Each side makes a quick statement to the judge of her "best case" scenario. The judge then explains her read on what the outcome could be. Telling the client how the judge will likely rule on disputed issues often resolves stubborn impediments to settlement because it carries more weight than your own opinion and allows everyone to save face.

PREPARING FOR THE NEGOTIATION PROCESS

Serious negotiations should not begin until the lawyer has all the facts and a clear understanding of the client's goals. Does the client understand and feel comfortable (procedurally . . . almost never emotionally) with the process he is about to go through? Tom Tyler, a psychologist at Northwestern University, reported in an article in the July 1988 ABA Journal that people often care less about how much money they get in a settlement than how they got it. He noted that "clients care most about the process by which their problem or dispute is resolved. In particular, people place great weight on having their problem or dispute settled in a way they feel is fair." Clients who participate in the settlement process are much more accepting of the outcome. Remember the Perry Mason analogy. It is your job to educate the client before the settlement process begins if your client's goals conflict with the law, your ethics or judicial practice. You have an ethical obligation to not allow falsehoods or assert positions to merely harass. You do your client a service by discouraging and preventing emotionally charged and questionable tactics.

Develop a plan for approaching the specific negotiation by examining the big picture pieced together from your knowledge of the law, the parties, your opponent, and the judge. A negotiating plan is your map to settlement and is critical because most people get lost without maps. Objectively analyze the case by questioning everything, including your client's version of the facts and his demands. Clients actually do lie to their lawyers. Investigate and carefully evaluate the facts, the law, and the reasonableness of disputed claims. Make sure you know what your client wants and is willing to relinquish. This is where that written list of priorities will help you guide the client.

Next anticipate what the opponent wants and why. It bolsters your own confidence and undermines the opponent's confidence if you understand where the hot buttons are. Define your parameters by identifying both parties' goals. For example, does the husband need a quick divorce so he can marry his girlfriend? Does a mother need joint custody to save face although she does not desire to be the primary parent? Does a cheating spouse feel generous to assuage her guilt? Learn both parties' weak spots. Learn if either client (or lawyer) is adamant about not going to trial. Watch for any health problems or age considerations that may affect a client's goals. Discover if there is an asset that has sentimental or emotional value that will be a stumbling block to settlement. Look for

“secrets” that no one wants revealed at trial.

Be a problem solver instead of a problem creator. There is no better way to win the trust of the opposing party than by finding solutions to her issues. Consider innovative formulations. For example, if mom wants the house to raise the children and dad merely wants his portion of the equity, consider deferring payment until the youngest child graduates from high school. This gives mom a chance to find an alternative source of money to pay dad while making dad feel good about not disrupting the children's lives. If the parties cannot agree on an asset’s value that no one wants, sell it and let the market establish the value. If a party does not want to pay support “on principle”, offer extra tax-free property of equivalent after-tax value. The settlement possibilities of each case are limited only by your imagination. This is where your knowledge of the law and the facts of the case make you the better negotiator because you understand the parties’ priorities and how to help each get there.

A good negotiator must separate the people from the problem. For example, your opponent will not appreciate a lecture on the law, but would appreciate receiving a citation to a controlling case which could then be passed on to her client, especially if it is not given in the client’s presence. After all, nobody wants to look bad, either by being, or appearing to be, uninformed about the law in front of the client. Harassing letters or comments reciting in detail the immoralities or other bad personal conduct of a spouse is seldom effective, so why do it? Do not let your client’s complaint become yours. Nasty threatening tactics destroy the kind of atmosphere that is conducive to settlement. A charge of misconduct should be related as just that -- unless or even if its truth has been verified (i.e., “My client reports that . . . “).

Be thorough, remembering that it is all in the details. Try to negotiate agreements which leave nothing dangling. Peripheral matters that usually are relatively easy to dispose of as a part of an overall settlement can be the source of bothersome problems if left unresolved. Pesky details such as who will assume responsibility for paying any tax deficiency due on a previously filed joint tax return, division of tax refunds, who is going to pay which credit card, division of dependency exemptions, division of the family photos, who will provide visitation transportation, where the support check will be sent, etc. can and should be anticipated and resolved before they arise after entry of the judgment.

In learning how your client thinks, you should also determine if your client is strong

enough to be an active partner in the negotiation process. Clients capable of holding their own can often resolve minor disputes directly with the other party. Spouses know each other far better than the lawyers do. However, it is critical to monitor such direct negotiations to circumvent intimidation, subsequent misquotation of statements made, or an unintended revelation of tactics and strategy.

UNDERSTAND YOUR ROLE IN THE SETTLEMENT PROCESS

Shakespeare said “to thine own self be true.” You cannot enter the settlement arena without knowing your own limitations. Understand when to call in a specialist. Other professions and occupations call in specialists for the difficult problems. Do not let your client suffer because of your own ego.

Protect yourself by writing the client in advance to advise what you think will be the outcome at trial. Understand the nuances of genuine communication with your client. There must be "real communication" between the client and lawyer throughout the entire case for the negotiation process to succeed. Your goal is a client who is happy with the result not only on the day of settlement, but two years later as well. Explaining the process, the dynamics, how you will work, and what you “plan” to concede will build confidence.

Your client should respect your advice before, during and after settlement if you have cultivated the proper working relationship. Once this has been achieved the client will heed your instructions as to what should or should not be done during the case. Effective communication is be the key to developing this level of trust and rapport. As stated above, this relationship begins at the initial interview and builds with each contact the client has with your office.

Create an environment where you can educate your client. The lawyer must be realistic with the client and be able to define what is a good settlement. Explain what probably will happen if the case goes to court. As the case progresses, keep the client fully advised of developments, including a reassessment of goals as needed. An educated client will be a true partner in the settlement process

THE MECHANICS OF SETTLEMENT NEGOTIATIONS

Many lawyers bargain by telephone because they prefer to avoid a face-to-face

situation. Statements can be made over the telephone which would make many lawyers uncomfortable to say directly. The telephone is primarily useful for short interactions where procedures are established for the exchange of information, to exchange tidbits of information, or to resolve isolated issues. Using the telephone gives you the opportunity to not take the settlement call if you are not yet prepared for it. Be straightforward and tell the opposing lawyer if you are not yet ready to talk settlement. Such a call makes clear that you have enough self-confidence and knowledge of the settlement process to avoid a situation where you could have been taken advantage of. It also saves your client money. Keep in mind that this is a short time solution. Using the telephone also gives you the opportunity to gauge your opponents responses and correct misunderstandings before they grow out of proportion. It also provides the opportunity to defer any settlement call if you are not ready. Calls do not involves a great expenditure of time or the client's money.

Some lawyers prefer to bargain by mail, fax or E-mail. These mechanisms are also frequently used to establish procedure and to exchange larger bits of information. As with telephone contacts, these mechanisms are very popular with lawyers who do not like face-to-face meetings. Some disadvantages are that they do not provide the instantaneous ability to read a response or correct a misunderstanding. And too often, the lack of immediate response allows the recipient time to read too much into what was said. On the other hand they can provide a measure of protection against misunderstanding as to specifics since there are written memorializations. Letters help summarize what has been resolved and identify what remains in dispute. Copies of letters will also keep the client advised and can be used as a checklist in preparing the final agreement. Some disadvantages of letters are that they are time-consuming and can be expensive for the client.

Fax transmissions create their own issues. Faxes provide the instant gratification of the telephone without a face-to-face meeting. Faxes seem to get immediate attention -- unlike regular mail. On the other hand, faxes are often abused: beware the "scud mail" fax or the after 5:00 P.M. fax man.

The use of E-mail is rapidly becoming a popular method of client-lawyer and lawyer-lawyer communication. It is a wonderful tool but, like all tools, it can be dangerous if mishandled. E-mail transmissions between lawyers are often quick, short notes that are mistyped and are as casual in style as telephone conversations. This is especially true in

divorce work since, as noted above, the same lawyers often work together. Do you know that your opponent is forwarding your E-mail message directly to her client? Did you intend it to be forwarded? What if it goes to the wrong person? Protocols need to be developed as to how email will be used. Develop a clear understanding with those with whom you correspond that E-mail is to be forwarded to the client only if it says "cc: client" at the bottom, or prepare your E-mail with the same level of care that you would a letter. This mutual professionalism may save you some embarrassment when your casual note to your "good buddy" opponent is forwarded to her client, who in turn forwards it to your client. It is just as important that you be circumspect when communicating with your own client by E-mail. While clients can copy your letters and send them to others, they seldom do. On the other hand, your E-mail message to the client is easily forwarded to parents, friends, members of the client's support group and even the spouse with only a keystroke.

There is no better way to communicate directly with the other party than by face-to-face negotiation. You have the power to present yourself, and your position, in any manner you wish (i.e., confrontive, supportive, a conciliator, a problem resolver, etc.) and since the negotiation process begins with the first contact with the opponent, everything that you do or say will make a difference.

With this in mind, initially consider whether your client should even attend the settlement conference. Some clients should not for a variety of reasons, most of which have to do with temperament, demeanor or a history of abuse. If your client does attend, decide whether it is appropriate for the client to actively participate, be present but non-participatory, or to be in another room available for immediate consultation.

There are many advantages to having the clients present. You have the opportunity to impress the other party with your reasonableness without opposing counsel being able to filter what you say. You have the opportunity to gauge the parties' reactions to proposals and gain insight into their driving emotions. There is an opportunity for the negotiations to evolve in a natural give-and-take atmosphere with all parties present.

There are also disadvantages to having the clients present. Your client may misinterpret posturing by your opponent which is designed primarily to impress her client or intimidate yours. There is also a danger that your client will compare you unfavorably with the opposing lawyer. A client may seek to control or interfere with lawyer-to-lawyer discussions. Your client may be intimidated either by opposing counsel or their spouse.

Or more likely, your client will not be able to keep his mouth shut, thereby destroying even the most carefully crafted negotiating plan.

A face-to-face negotiation is the forum where a lawyer's negotiation skills are at their highest premium. Like trial, there is no margin for error. You cannot take back verbal statements or nonverbal cues once they are given without losing considerable "face" and negotiating strength. This unforgiving atmosphere is why many lawyers dislike face-to-face meetings. If you do your homework, however, this is the arena where you can utilize all of the above concepts to obtain the most satisfactory result.

STRATEGIES FOR FACE-TO-FACE NEGOTIATION SESSIONS

Now that you understand the actors, the law and the facts and you have planned your objectives and your methods, it is time to establish the strategies by which you will accomplish your client's goals. For example, there is a split of opinion as to whether it is useful to make the first offer. Your initial offer may have been substantially better than expected and may spur settlement while creating a sense of fairness. However, it is likely that the party who makes the first offer is also likely to make the first concession. That will not be a problem if the concession is preplanned.

Put your negotiating plan into effect by setting the stage and selecting the venue. Outline all areas to be addressed before the session begins. One method is to work from a proposed stipulated judgment which is written exactly as you would want the judge to rule on your behalf. Send it to the opposing lawyer well in advance of the meeting so that she and her client have a chance to review and discuss it. This document takes advantage of the old adage that it is easier to edit than it is to create. In addition, using the judgment assures that you will not forget an issue nor argue about language after the settlement. Usually the lawyer who starts the document gets to draft it in final. This also allows you to fine-tune the language the way you think it should be.

Start the meeting by going through the document page by page to identify where there are disagreements. Never make concessions at this stage because the one concession you really need to make may be on the last page. You will no longer have anything to "bargain" with if you made all of your concessions as you went through the document for the first time. Negotiations will really begin as everyone goes through the form of judgment for the second time during this face-to-face meeting.

One of the fringe benefits of this approach is that, while a full settlement may not have

been reached, you have reached an agreement on all of the language of the proposed judgment which is not in dispute. This may sound sophomoric, but how many times have you and your opponent argued for weeks over how the judge's two-page opinion letter should be set out in the ten-page final judgment? One of the chief benefits of holding the settlement conference in your own office is that your secretarial staff can bring in revised versions as the negotiations progress. For example, pass along the first four pages with handwritten corrections to be retyped while negotiations continue on through the remainder of the judgment. This can also be done with a laptop in the conference room, but lawyers usually cannot type as fast as their secretaries. More importantly, it distracts from your ability to focus on the settlement process because you are so busy typing. The goal of using a proposed judgment in such a meeting is to have the participants leave the negotiations that day with a signed agreement. This prevents litigants from taking a few days to develop "buyer's remorse" and reneging on the deal.

A disadvantage to using a proposed judgment is that it may send a message of inflexibility or create a perception that you are controlling. Some lawyers feel intimidated by this approach and may actually be more combative because of it. These fears can sometimes be allayed by calling the meeting with the purpose of resolving final "tough" issues after counsel have been "jointly" working on the form.

Throughout the process be aware of what is happening around you. Always keep in mind the opposing counsel's personal skill, negotiating experience, personal beliefs and attitudes, the negotiator's perception of the current situation, and the resources available to her client. Do not make an offer that causes the opponent to lose all interest in settling. Instead you should present your offer in a confident manner so that your beliefs set the stage and your assumptions form the basis from which the negotiations will proceed. At the same time try to be aware of false issues which they are prepared to "give up on".

Prepare your client ahead of time by explaining the process and the need to make concessions. Explain that your goal in presenting issues to be conceded and making more valuable concessions is to create a concession-oriented attitude in your opponent. Even false issues which are obvious to the opposing lawyer help elevate the opposing party's confidence in his own lawyer. He feels good about the result when the opposing lawyer is convinced to give up on other issues. Making a concession (even a red herring) builds an atmosphere which is conducive to the opponent "giving up" on items about which you

care.

Working the psychological nuances of the process is where it all comes together. Focus on areas of interest, not on a position -- (i.e., refer to the children's needs, not to the custodial label). Choice of language is just as critical. President Clinton in his 2000 state of the union address was skillful in describing each new spending proposal as an "investment" in the future rather than an expenditure. After all, everyone thinks investing is good whether or not they believe spending is bad.

There are many nuances that often affect the tone and pace of a negotiation. Consider injecting an emotional element into the negotiating strategy. The welfare of the children and their need to enjoy the same standard of living. A reluctance to involve the children in a fight over support or custody. Loss of the children's respect. Past practices of the spouse. The wife's initial financial investment in the marriage and her role as a homemaker. How a wife assisted in her husband's career. The wife's inexperience in the business world. The husband's business reverses. The poor health of one of the spouses. An affair and the attendant negative reaction of family and friends.

Another effective technique in lowering settlement barriers is to personalize the negotiation by calling the opponent (and sometimes the parties) by first name. Other common techniques are argument (legal or nonlegal), flattery (genuine or not), silence (people often talk to fill a silent void, thus inadvertently disclosing information) and patience (good things do come to those who wait).

Humor can be an effective negotiation technique, but it is very difficult to use because the situation is not a humorous one for the clients. Stay away from humor unless you are a very good negotiator with a good feel for people. Clients seldom think you are as humorous as you think you are.

The most important thing is to demonstrate that you are willing to work at being a problem solver. You can do that by talking directly to the clients and not just to the lawyer. Focus on issues without attacking or defending. Recognize that mild threats can sometimes be effective if carefully communicated and completely understood by the opponent. Major direct threats, however, will break down the communication. "If you do this, I'll do _____." Try to create opportunities for the parties to "save face". Even ask for criticism of your own position. "This is my solution, do you have a better one?"

Client preparation will ensure that your client does not lose confidence in you as you solve the other side's problems.

Listen to the opposing lawyer, the other party, and the clients. Try to discern what is really being said. Listen to verbal signals where the meaning is apparent on its face (i.e., "I cannot offer more.") or where the meaning is equivocal (i.e., "My client is not inclined to offer any more.").

Observe nonverbal signals. Some obvious examples are the loss of temper or open expressions of pleasure or relief, etc. Careful observation may disclose more subtle varieties such as furtive expression, telltale mannerisms, gross body movements, etc. Try to make good eye contact throughout the negotiation. This helps you focus on the opponent's verbal and nonverbal signals. In your own actions try to use questions rather than statements to avoid resistance to your words. Learn to restate in your own words the opponent's position as a means of verification and clarification. Also, questions will get answers and information from the other side which can be used to effectuate settlement.

CLOSING THE DEAL

Now that the process is near its end you should aim for a total package, not a piecemeal disposition of some issues, though support or custody can easily be bifurcated. Creating a win-win atmosphere encourages cooperative behavior and increases the likelihood of a successful negotiation. Demonstrate your willingness to "tell" your client to "give" on an issue. Doing this in a negotiation is often a critical component of making the other side feel that you truly are interested in resolving disputes. It also helps you project an image of honesty and candor.

Save larger concessions to be the deal clincher made at the end of the negotiation meeting rather than at the beginning. By the end of the session the opponent has, hopefully, forgotten her carefully planned out concession pattern and thought out tactics. At that stage, the posturing is over and everybody sees what really is going on. Excessive demands have fallen away and the party is going to lose face if he backtracks.

Use the computer to get the agreement finalized. If you have worked from a form of stipulated Judgment, get it printed and signed while everyone is still together. If you have any doubts that an agreement will be signed call the court and put the settlement on the record by telephone.

If there is a problem bigger than the lawyers can solve try to seek out an

independent third party such as a mediator or judge to insert some reality.

CONCLUSION

Never forget that this is likely not a one-time interaction between the parties. Winning a battle will not always win a war, and a major coup will be later discovered and used to punish the client in other areas in the years to come. If you remain conscious of the emotional dynamics of settlement, you will have a happy client who will pay your bill and tell all their friends for years that "they were happy with the result and you were worth every penny."