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Précis Paper

Fundamentals of Effective Negotiations

Discussion Includes

- The psychology of negotiation
- The 3 P's of effective negotiation being preparation, patience and perception
- How the steps of a successful negotiation and analogous to the rehearsal and 5 acts of a play
- What the rehearsal and each act involves
- How you will know you are moving from one act to another
- The importance of each act and the order in which they occur

Précis Paper

Fundamentals of Effective Negotiations

1. In this edition of BenchTV, Peter Axelrod (solicitor) discusses the fundamentals of effective negotiation. To complement his video presentation, he provided the following paper.

INTRODUCTION

2. Former US President John F. Kennedy said, "Let us never negotiate out of fear. But let us never fear to negotiate." Our goal today is to make sure that you never fear to negotiate, nor ever negotiate out of fear. A few words about sources. Many of the concepts here are from Professor Charles Craver's 'Effective Legal Negotiation and Settlement'; Fisher & Ury's 'Getting to Yes'; Jim Thomas's 'Negotiate to Win' and many other works on the subject plus my own experiences, both successful and unsuccessful, over 40 years. Taking from one source is plagiarism, taking from several is research. This presentation is based on research..

THE PSYCHOLOGY OF NEGOTIATION

3. I want to begin with a brief discussion on psychology. I am not a psychologist nor do I play one on TV, but there is literature on the subject which is both accessible and useful to negotiators. Most of it written by two Israelis, Daniel Kahneman and Amos Tversky. I commend to your attention Daniel Kahneman's recent book 'Thinking Fast and Slow' which contains a readable summary of their work.

Probable Gain vs Certain Loss

4. Tversky and Kahneman studied human behavior associated with risk and discovered that our tolerance of risk is asymmetric. People will accept a risk to avoid certain loss that they will not accept for a probable gain. Let's make this clear with an example. Would you accept $1000 for certain or a 50% chance of receiving $2500?

5. Most people would take the certain $1000 rather than the chance of $2500 even though it has a higher expectancy of $1250. Expectancy, in its simplest form, is the reward (or loss) times the probability of achieving it. But, if we turn the problem around, and ask as between a certain loss of $1000, or a 50% chance of a loss of $2500 (and of course the 50% chance of no loss), most people take the chance despite the higher expectancy. The decision is asymmetric.

Framing

6. What does this have to do with negotiation? Tversky and Kahneman call it framing. If we can frame an issue so our opponent views it as choosing between a certain gain and a chance of loss, the theory says they will favor the certain gain. Since the only certainty we can offer is that achieved by settlement, we cannot credibly frame offers as certain loss versus chance of gain.

7. But what we have is enough. In negotiation you are much better off emphasizing the certainty available from settlement and the attendant risks of loss from impasse than the reverse. Thus always stress that if we settle your opponent's client will get these benefits whatever they are for sure, yet impasse could lead to losing whatever it may be.

Anchoring

8. Tversky and Kahneman have studied a phenomenon they call anchoring. The introduction of a number, even if it's random (and known to be such, for example produced by the spin of a wheel of fortune) can cause us to unconsciously adjust our thinking toward that number. If a number is suggested we tend unconsciously to adjust our thinking based on that number rather than on information which might be a more reliable basis. We'll discuss how to guard against anchoring later; but be aware it exists particularly when receiving or making opening bids.

Risk Analysis

9. This leads us to risk analysis. Human beings are terrible at this. For some evolutionary reason we just do not assess risk well, and we are hopeless at instinctive calculation of probabilities. Thus gambling has been described as a tax on those who are poor at maths. A quick example.

10. This is my favorite problem and I guarantee that all of you who have not actually already studied it will get it wrong. The facts are simple. We have a game show in America called Let's Make a Deal whose presenter for many years was Monte Hall. The premise was simple. There were three doors and behind each a prize. Two of the three doors had something worthless, say a goat. Behind the third was a fabulous prize, a new luxury car for example.

11. The contestant is asked to pick a door. Say she picks door number 1. Monte, who knows the location of the prize then opens, say, door 2 and shows her a goat. He then asks the contestant, given what I have just shown you do you want to stick with door 1 or switch to door 3?

12. The question is: should she switch? Most people say it doesn't matter, there are two doors and she has a 50/50 shot at either so it makes no difference.

13. The answer is she should always switch. She has a 66.7% chance of winning with door 3 and only a 33% chance with door 1. The reason is that you had an original 33% probability of being right and that has never changed. The other two doors had a 67% and that hasn't changed. So the remaining door no holds all of that 67% since you know the door Monty opened doesn't.

14. If you don't believe me, and most of you won't, Google the Monte Hall problem and you'll find multiple explanations of why she should always switch.

15. Let's look at one last example of poor risk analysis. In the United States a study of students revealed that they believed the odds of dying of homicide, accident or some other dramatic unnatural cause of death was about 53%. In other words they believed that more than half of their fellow citizens died violently. Certainly if you watch the 6:00 news that is the impression you get.

16. What is the true figure? 8%. They missed by a factor of 6. The scary part is that people act on these beliefs. They won't fly a commercial airliner but continue to smoke. In 2002 about 23% of American died of cancer, mostly due to smoking or other unhealthy habits, exactly no one died in a commercial air accident.

17. How does this affect negotiation? If you can estimate the real risks - actually quantify them if only approximately - you then can be the house in the casino. It has always struck me that people who would be embarrassed to say they cannot read, point with pride to their lack of mathematical skills. If you are not math oriented yourself, get someone on your team who is, it will increase your odds of winning.

18. If you have read Malcom Gladwell's book, Blink, and if you haven't you should, you will have learned that we often know things unconsciously without really knowing why we know. While not 100% reliable, if during a negotiation you have a feeling about something, at least try to test it to see if your unconscious has figured out something your conscious mind has yet to realize.

19. One last topic before we get to the mechanics of negotiation – ethics.

THE ETHICS OF NEGOTIATION

The Honest Negotiator

20. Can you be honest and still be a good negotiator? Many people believe negotiation involves lying and deception. This is not entirely true, we absolutely must be honest negotiators. That

said, we may want the other side to believe things that aren't true. We want them to believe that it will take more money to settle the case than it really will, or that we will pay less than we are actually prepared to offer. How can we reconcile these two things?

21. Keep it simple. The shorter and simpler the statement, the more likely it is to be honest. For example, in our opening, we should not say things like "We need X", "X is the least my client will accept", "My client must have X". First of all, none of these are true, or they better not be if they are your opening position. Why not say something like "X makes sense to us" or "We would like X". Both of those are true statements.

22. Lying about facts is also unprofessional. Our rules of professional conduct say we cannot lie to each other about facts or law. However we need not tell all we know, nor answer every question. Likewise, a statement of our current position is honest, that is where your client is at the moment. It does not say you won't go lower or higher as the case may be.

23. The important part of this honesty is that when you really get to your bottom line, and say "This is my bottom line, we will not accept one dollar less", you'll be believed. But don't say it unless you mean it.

24. By the way, you'll be shocked to learn that some lawyers are prepared to lie, both about the facts and the law, as well as their positions. If you do not know the reputation of the lawyer on the other side, ask a few questions to which you know the answer (and they may not know that you know). The answer can be quite revealing. Also, if representations are being made about material facts, be sure the final agreement contains language that the deal is conditioned upon those facts being true.

25. Remember too, an evasive answer is not dishonest, and you should consider evading or not answering some questions. We'll talk more about that later.

26. In general the shorter the statement, the easier it is to keep it honest without disclosing more than you have to. Being a person of few words pays off. Former President of the US, Calvin Coolidge was notorious for his taciturn nature. At a White House dinner a socialite seated next to him bubbled, "Oh, Mr President, I made a bet that I could make you say more than three words." To which Silent Cal replied, "You lose."

<u>What is fair?</u>

27. Lawyers, particularly young lawyers, often say they just want to do what's fair. I submit that none of us knows what is fair. It is sheer arrogance to assume we know what is fair. That said, there are some transactions that are unconscionable, where one side uses massively one-sided bargaining power to exploit the other; but in the usual run of cases it is impossible to know in advance what is fair.

28. If one side has more bargaining power that side can expect to do better, assuming equal negotiating ability. If you negotiate well for your client, the result will be fair.

THE THREE P'S OF EFFECTIVE NEGOTIATION

29. Let's now talk about the fundamentals. The Three P's of effective negotiation are Preparation, Patience, and Perception. If you learn nothing else today, take the Three P's to heart and you will be a far better negotiator.

Preparation

30. There is no substitute for thorough preparation. Know all your facts cold, and also try to learn all your opponent's facts. Visit the scene, talk to the witnesses, research the law, and read all the documents - whatever it takes.

31. Know the law that applies to your arguments and to the other side's arguments. Have cases and statutes at hand. Occasionally, despite your best efforts, something will surprise you during a negotiation, your opponent will throw out the *Jones* case. You've never heard of the *Jones* case. Call a time out if you possibly can - don't try to fake it. Take a break and read the *Jones* case, and any subsequent cases citing the *Jones* case, then resume negotiations.

32. Learn about your opponent, what are his or her strengths or weaknesses as a negotiator, what style does he or she use? Learn about the opposing clients - what problems are they facing, what else is happening in their lives. Also really know your own client's strengths, weaknesses and needs. You should be as prepared for a negotiation as you would be for a trial.

Patience.

33. The most patient negotiator wins. The most patient negotiator wins. I repeat that because it is absolutely true. If you are impatient, if you rush, you will not do as well as a more patient negotiator. The reason is very simple. Substantively only one thing happens during a negotiation, each side makes concessions. So if you feel the urge to do something, there is only one thing you can do - make a concession. If you make more concessions you will give away more than if you don't make concessions.

34. Mediators often ask at the beginning of a mediation "is anyone here under a time constraint?" The answer I give is always "no, I have all the time in the world, and my client has all the time in the world." Is that a lie? Usually, the first of many that will be told in any negotiation. Why do it? Because if the other side admits to a deadline, I will stall around as much as I can till

very close to that deadline so the other side will feel pressure make more and larger concessions to get it over with before time runs out.

35. We'll be talking about patience throughout our time together.

Perception

36. A good negotiator is perceptive. You must pay close attention to everything that happens during the negotiation. This includes what is said and what is not said, whether body language agrees with what is said or contradicts it. We must even try to perceive involuntary reactions like blinking. A good negotiator is a good listener. Too often we treat listening as waiting, waiting for the other guy to shut up so we can speak. In negotiation silence is an effective tool. While listening we are gathering facts, detecting verbal leaks, and best of all, perhaps, receiving a concession. What we are not doing, when we are silent, is giving away information, making verbal leaks or, worst of all, making a concession.

THE ACTS OF NEGOTIATION

37. The key to effective negotiation is confidence. Once we have the Three P's in hand the key to confidence is knowing what is going on in the negotiation, just as having a good map gives you confidence on a bush walk. You need to know where you are and where you're going. Fortunately this is actually quite easy in negotiations as every negotiation is a five act play, and the structure is as rigid as a Greek drama. There should always be a rehearsal and then the five acts and, and the five acts are always in the same order. Each act has a delineation as sharp as the curtain going up or down so you will always know what act you are in and what you can expect to happen in that stage of the drama.

What are the Acts?

38. In a moment I'll discuss each act in detail, but here is a preview:

- **Rehearsal:** Preparation. This takes place off stage, before the play actually starts.
- **Act One**: Introduction. In this act the players (the two or more sides) meet each other, size each other up, exchange pleasantries, and set the tone of the play.
- **Act Two**: Education. Each side tries to learn about the other while putting forward their own version of the facts and law.
- **Act Three**: Competition. This is the act in which the actual bargaining takes place and the settlement, if there is to be one, comes within sight.

- **Act Four**: Closing. In this act the deal is actually struck, or it is determined that no deal is possible.

- **Act Five**: Cooperation. In this act the deal is reviewed cooperatively, so see if it can be improved for both sides, otherwise the deal reached in Act Four remains the deal.

Know What Act You're In.

39. It is vital to know what Act you're in. As I discuss each Act I'll give you the cues for when it starts and when you are moving to the next Act.

Know What is Expected in Each Act.

40. You also need to know what is expected in each Act, so that you behave appropriately, and most importantly do not skip an Act. The play needs all 5 acts to work.

Know How to Make Smooth Transitions Between Acts.

41. Because there should be a clear delineation between Acts, and this is particularly vital between Acts Four and Five to avoid any misunderstanding, you need to know how to either make the transition or, better yet, recognize when the other side has done so. You will also recognize if the other side is skipping an act, and you can then be a good stage manager and get the play back on course.

Don't Skip an Act.

42. It bears repeating, you cannot safely skip an Act. An Act may be brief, for example if it is a small case and the negotiators know each other well, Act One may be short, but it still must take place.

REHEARSAL: PREPARATION

In your office

43. Learn all the relevant facts and research the law. Talk to the witnesses, visit the scene, above all listen. Listen to the witnesses, listen to your own clients, and listen to whatever you have received from the other side. You should have statements from as many witnesses as possible, hopefully statements you took yourself. If you are not confident about taking statements the College offers a course on it from time to time.

44. Prepare arguments that support your position. Be creative, use your imagination, and remember this is negotiation not a trial so no judge is going to rule on your arguments. Try to come up with arguments the other side will not expect.

45. Anticipate other side's arguments and prepare your counter-arguments. This will improve your confidence and undermine that of the other side.

46. Do not over-estimate your own weaknesses and pressures and remember that the other side has weaknesses and pressures too, even if you do not know what they are.

Be wary of assumptions

47. Do not assume you know your own client's needs and desires. Time spent with your client gaming the mediation is time well spent. It may bring to light objectives you were not aware of. Go over possible offers and counter offers, and find out the client's reaction to each. Many times the issue is not money. People have many needs and it is vital to understand what your client really wants. Your client may not know himself until you go through it.

48. Do not assume you know the other side's situation. They may have issues you are unaware of, but really do try to see things from their point of view based upon what you do know. They too may have non-monetary needs. They may also be under pressures they are concealing. Consider what they may be based on what you know and also plan on how to find out more when negotiations start.

Strategy and Tactics

49. Strategy is your long term plan, tactics are how you get there. Think about both. You must plan ahead - think about what your moves will be and what the likely counter-moves are and then how you will respond to those. While the negotiation will not go the way you planned (no plan survives the first encounter with the enemy) the exercise will be very valuable. Too many people do not think past the next move. Negotiation is as much chess as poker.

50. Be flexible. Be prepared to modify your plan if the other side does something unexpected or if you make a mistake. For example if the other side's opening position is far more or far less than you expected you must be prepared to adjust.

Aim High.

51. Negotiators who aim high, that is have high aspirations, usually obtain better result than those who do not. No one will ever offer you more than you ask for.

52. Lawyers who wish they had done better at end of negotiations have usually aimed higher and done better.

53. Lawyers who usually achieve their goals should aim higher. It is easy to jump over a low bar, but does not achieve the best result.

54. Start by:

    a. Planning your initial position to be high, but not so high that it will cause opponents to lose all interest. Successful negotiators prepare for negotiations by convincing themselves of the reasonableness of seemingly unreasonable positions. If you don't believe in your position you won't sell it to the other side. Your confidence can cause uncertain opponents to reconsider their preliminary assessments in favor of the confident party.

    b. Plan principled positions - positions that can be defended "objectively." Have logical rationales to justify each component of each of your positions. This will increase your confidence and can undermine that of uncertain opponents. Principled positions allow you to explain reasons for starting where you did and why each concession is not greater than it is. It can also allow you to control the agenda by causing opponents to directly focus upon each segment of your position. You can increase the force and credibility of your principled positions by pointing to external standards or data. You can even use your own client's written price sheets or policies - even if they were written 5 minutes before you start negotiation. Computer print outs are very effective. This is where that written opening position can be used to justify your demand.

    c. Plan your "target". This is not your bottom line, but this is the place on each issue where you will be satisfied and you believe is reasonable given all the known circumstances

<u>Plan your final offer - your bottom line</u>

55. You should work with your client to determine what their bottom line is. What is the absolute most they will pay or the least they will accept in the negotiation.

56. That is easy to say, and but only sometimes easy to do. In certain transactions there is a clear limit to the value, but often it is fuzzier. Nonetheless you need to work with your client to figure out, at least going in, what the absolute limit is. You should determine your bottom line based on what you know now. But be prepared to reexamine it if you learn something

new as the negotiation proceeds. But there should be both a good reason for whatever limit you set and a real good reason for changing it.

57. Ask yourself: do I know something now that I did not know when my client and I arrived at our bottom line during the Rehearsal? If so there are three more questions:

    a. Is it really a fact?
    b. Does this fact require our learning other facts? and
    c. Does this fact and the other related facts require reassessment of our bottom line?

58. If all are true, perhaps it is time to take a break to coolly evaluate the effect of this new knowledge.

Know the non-settlement alternatives.

59. You need to fully understand the consequences to your client if there is no settlement. This is what Fisher and Ury call the BATNA. The Best Alternative To Negotiated Agreement. What will your client do if there is no agreement? For example what is the risk of an adverse judgment at trial and what is the cost of achieving even a good result? If you do not receive an offer that is better than what you can get at trial or from another source, you should reject the offer. Likewise you must think about what will happen to the other side if they don't settle. They have a BATNA too. Bargaining power depends in large part on who has the better BATNA.

Define the envelope

60. Your client's settlement envelope is defined by the initial offer (or demand) at one end and the absolute bottom line at the other. Somewhere between those two (not necessarily in the middle) is your target. Settlement is only possible if your client's envelope and that of your opponent overlap.

Think about the needs of the players: both lawyers and clients.

61. What are the opposing clients' underlying interests, and how may they be satisfied? What are the opposing lawyer's underlying interests, and how may they be satisfied? Also think about indirect personal needs such as the need for retribution, ego gratification, acceptance in relevant community, alleviation of internal tension, and so forth. If you can figure out a way to satisfy those needs while achieving your client's goals, you may obtain essentially free concessions. These are the non-monetary considerations I mentioned earlier.

62. Also consider your client's (and your own) underlying interests, and how may they be satisfied? Try to recognize your own indirect motivational forces and those of your client. Try to discern the manner in which your opponent perceives the needs of your side, because this may significantly affect your interaction.

ACT I: INTRODUCTION

The Players.

63. This Act begins the second that you walk into the room where the other side is present. In the first act of the play, you meet and size up the players. This is especially true if you have not negotiated with them before. If the other side's clients are present this may be your first chance to meet them. This is a hugely valuable time, and while you may be chatting about footy, the weather or the latest political scandal you should be evaluating the personalities involved.

64. Often lawyers like to play status games - impress you with the fact they are from a big law firm, or that your opponent is a barrister, or better yet a QC. This is interesting, because a lawyer who relies on acquired status may actually lack confidence in their negotiating ability. It is both amazing and dismaying that so often the most senior highly paid lawyer in the room is the least prepared. Their ego and self-confidence leads them to believe that they don't need to prepare and really learn the case and that you will just roll over and yield to the majesty of their very presence. It so satisfying to clean them out.

65. In evaluating the other negotiator consider:

    a. His or her personal skills.
    b. Negotiating experience
    c. Relevant personal beliefs and attitudes.
    d. Perception of current situation.
    e. Resources available
    f. Degree of preparation
    g. Reputation for honesty or the reverse

The Tone.

66. In Act One the players on both sides set the tone of the negotiation. In my view the tone should always be cordial. There is no excuse for hostility or rudeness and if the other side has a lawyer who is a jerk, you can often defuse it by make gentle fun of his (or her) attitude.

67. You can, and should negotiate the tone of the negotiation. I'll discuss later negotiation styles, the cooperative vs. the competitive negotiator, and friendly vs. hostile. Always try to set a cooperative, friendly tone if that can be done. But if the opponent is relentlessly competitive you must shift to that style as well.

68. The tone can also be formal or informal. Be wary of opponents who normally address you by your first name but formally address you as Mr. and Ms. during negotiations, since this technique permits them to depersonalize bargaining interaction in way that allows them to be more competitive. When opponents depersonalize interactions, take the time to establish more personal relationships. Use warm handshakes and other casual touching, and maintain non-threatening eye contact, to make it more difficult for your opponents to employ inappropriate tactics against you.

69. Be aware of the physical aspects of your location. If you are negotiating in opponent offices and you feel uncomfortable, try to ascertain if opponents have created intimidating atmosphere by placing you in artificially large or small chair or with your back literally against the wall, or by placing themselves in raised position of dominance.

70. The best settlements are "win-win," when both sides are satisfied with the result. To get there begin the process in a cooperative and trusting way. This encourages cooperative behavior and can create mutually beneficial relationships which will be useful in the future.

71. Remember that the negotiation process begins with your first contact with the other side. The party who is allowed to dictate the time, date, and location for negotiations may have a psychological advantage even before real negotiations start.

<u>The style of the negotiators</u>

72. Most negotiators tend to exhibit a relatively "cooperative" or a relatively "competitive" style, with "cooperative" advocates tending to employ a problem-solving approach and with "competitive" advocates tending to use a more adversarial methodology.

73. "Competitive" negotiators tend to act competitively with both "cooperative" and "competitive" opponents, while "cooperative" negotiators tend to act cooperatively with "cooperative" opponents and competitively with "competitive" opponents.

74. Greater percentage of "cooperative" negotiators viewed as effective by other lawyers than "competitive" advocates, while greater percentage of "competitive" persons considered ineffective than "cooperative" individuals.

75. Although "competitive" negotiators are more likely to obtain extreme results than "cooperative" participants, they generate far more non-settlements.

76. Effective "cooperative" and "competitive" negotiators are thoroughly prepared, try to maximize client return, behave in an ethical manner, are perceptive readers of opponent clues, are realistic and forceful advocates, and observe common courtesies. These findings would suggest that the most effective negotiators are "competitive/problem-solving" lawyers who seek "competitive" results, but do so in a seemingly "cooperative" manner.

ACT II: EDUCATION

Listen and learn.

77. You will know Act Two has begun when one side or the other says “What do you want?” or words to that effect. Since you are patient negotiator, that should always be the other side. In Act Two you must try to learn as much information from about the other side as you can while not disclosing harmful or confidential information about your case to them. You must focus on their initial position and try to understand their underlying needs and desires. In this Act you also try to learn (or confirm) what options are available to them if no agreement is reached. This, in part, defines bargaining power. If their non-settlement option is poor and yours is good, then you have more power and vice versa. Obviously you should try to conceal the weakness of your non-settlement options. Patience here is paramount. Be a good and persistent listener. However bargaining power is also psychological, if we think we have power (or the other side thinks we have power) then we have power even if our BATNA is not good. Likewise if we see ourselves as weak then we are weak. That is why it is so important to be a confident negotiator. Confidence can grant you more bargaining power than the external facts would otherwise merit.

This is not cross-examination.

78. Unlike trial; where you are trying to control your opponent’s responses, here you want to ask open ended, information seeking questions. Leading questions do not elicit new information. Broad, open-ended questions elicit the most the new information. Only narrow your questions during final stages of the information retrieval process. Try to maintain good eye contact during the discussion, take as few notes as possible to permit you to focus upon opponent’s verbal and nonverbal signals. In this Act you are not here to argue. You are here to learn. Say only enough to show you are interested in what they are saying - you need not agree, just say that you hear what they are saying. To the extent possible shut up and listen.

79. Some negotiators begin with their most important topics in effort to get them resolved quickly and diminish the anxiety they are experiencing regarding the possibility of no settlement. Other negotiators begin with their least important items -- either intending to make concessions on them in effort to induce opponent to make subsequent concession(s)

on their major item(s) or to obtain early psychological advantage by winning minor items while creating concession-oriented attitude in opponent.

Use active listening techniques.

80. Restate in your own words important information opponent has apparently disclosed, to verify and clarify information actually divulged. Watch for verbal leaks and nonverbal clues. Evaluate the credibility of information received and the validity of your perceptions of opponent. Verify what you think you've heard: Importantly:

    a. Watch overall behavior patterns.

    b. See if verbal and nonverbal signals are consistent.

    c. Question and probe. Ask neutral questions to understand underlying basis of assumptions, values, personal needs, goals, etc. for opponent's stated positions.

Verbal communication

81. Listen to the phrases used throughout the negotiation. Is the meaning unequivocal: "I cannot offer more" and presumably means what it says, or is the statement equivocal "My client is not inclined to offer any more" or "I cannot offer more at this time." Both mean more will be offered. Those equivocations are "verbal leaks" that tell you what is really meant.

Nonverbal signals

82. Watch for non-verbal behavior, loss of temper open expressions of pleasure, relief, furtive expression, telltale mannerisms, gross body movement, etc. It is often possible to obtain vital information from opponents through their inadvertent nonverbal disclosures.

83. Are nonverbal signals congruent or inconsistent with verbal messages being articulated?

84. Do not ignore your feelings, since they are frequently based upon your subconscious reading of nonverbal signals and are often reliable.

85. Since negotiators tend to look at the faces of opponents more when speaking than when listening, it is easy to understand why many nonverbal messages are not observed while the opponents are talking. Endeavor to observe opponent carefully while you are listening.

Get help in reading non-verbal cues.

86. It is helpful to have a negotiating partner who can concentrate on the nonverbal signals emanating from your opponent(s). You should recognize that your opponent is similarly endeavoring to "read" your nonverbal signs so be conscious of your own actions. I rarely have help, but find it to be wonderful when I do. Try to find a partner who balances your strengths and weaknesses.

Make controlled disclosures.

87. In the Rehearsal you decided what information you needed to disclose to opponent to facilitate negotiation process. While you may want to adjust that based upon the other side's disclosures, keep your answers to opponent's questions short to avoid unintended verbal and nonverbal disclosures. Let them drag your favorable information out of you. They will give more credit to information you provide in response to their questions than what you voluntarily disclose.

Don't answer every question.

88. You don't have to answer every question put to you. Employ blocking techniques to avoid answering opponent's questions about highly sensitive areas. Study politicians for good examples. You can simply ignore apparent inquiry and move on to some other area you would prefer to discuss. Answer only the beneficial part of a complex question, ignoring threatening portions of it. Over- or under- answer the question propounded. Respond generally to a specific inquiry. Respond specifically to a general inquiry. Answer a different question. Respond to one previously asked or to a misconstrued form of the inquiry actually propounded. Answer opponent's question with a question of your own. E.g., In response to "Are you authorized to pay $100,000," simply ask opponent "Are you willing to accept $100,000."

89. Rule the question out of bounds as an improper or inappropriate inquiry. Plan intended blocking techniques in advance by assuming that opponent will ask about your sensitive areas, since this will most effectively prevent unintended verbal and nonverbal leaks. Plan to employ different blocking techniques to keep opponent off balance. Use blocking techniques only where necessary to protect crucial information to avoid needless loss of credibility.

Try to understand how other side views relative strengths.

90. Observe carefully and probe opponent to ascertain his/her perception of situation, because it may be more favorable to own side than anticipated. Explore relevant factual circumstances in an objective, non- evaluative manner. If both sides can agree upon underlying factors in a non-threatening way, probability of achieving make successful result increases substantially.

91. Endeavor to ascertain external pressures operating on the other side, since such factors directly influence their assessment of situation. Specifically focus upon underlying needs and interests of both sides, rather than simply upon expressed positions. Emphasis upon stated positions more likely to generate internecine conflict than exploration of underlying interests. Remember that positions frequently reflect only some of underlying needs and interests. Discovery of undisclosed motivational factors will often enhance possibility of settlement by allowing parties to explore unarticulated alternatives that may be mutually beneficial. For example, you may find that a plaintiff in a defamation action seeking a substantial monetary sum would prefer to obtain retraction and public apology. Parties in domestic case may want to express anger or obtain revenge.

ACT III: COMPETITION

Getting the most for your client.

92. Act III begins when the focus changes from information to actual bidding. From "what do you want?" we go to "what will you offer me?" This Act features each negotiator trying to obtain the most from the other side while giving up a little as possible. This where your chess playing in the Rehearsal starts to pay off - you will have thought out your concessions and have a plan as to both timing and amount. Remember that the settlement range is where what they are willing pay and you are willing to accept overlap. You want to end up as close to your end of that range as possible.

Don't make the first offer.

93. The traditional wisdom is that it is beneficial to induce the other side to make the first offer. If one of you has seriously mis-evaluated the case, the opening bid can disclose that. For example if you evaluated the case at $100,000 and the initial demand is $50,000, your opening offer will suddenly decrease amazingly. That said, it is often the case that one side is expected to start. A plaintiff generally makes a demand, a seller generally has an asking price.

94. However, be certain that you have received the first real offer, since an outrageous proposal is really the equivalent of no offer, but you must be wary of the anchoring effect we discussed earlier. So while an outrageous opening bid might be seen as that, it can still potentially cause an anchoring effect which must be consciously guarded against. One good defence is to ask the opponent to justify each and every element of the offer, in a much detail as possible and it should soon be apparent whether the offer is genuine.

95. If the other side persists, you can counter with an equally outrageous offer, or, in my view more effectively, just say: "If you really think your case is worth anything near that, there is obviously nothing to talk about. If you would like to take a few moments and come in with something sensible we can talk, otherwise have a good day" and walk out.

96. The initial offer may occasionally provide unanticipated information, because it is more generous than you expected. Perhaps opponent knows more about own weaknesses than you have surmised, or has overestimated your strengths, and either occurrence should induce you to contemplate an increased aspiration level. After you receive opponent's initial offer, you can begin with position that places your goal in the middle, since parties tend to move toward center of their opening offers. Party who makes the first offer likely to make the first concession, and studies indicate that the party who makes initial concession tends to achieve less beneficial results than opponent.

<u>Start from a principled position.</u>

97. You have to be able to explain and defend your initial position both to reinforce confidence in your own position and to induce opponent to reassess their position. This should have been worked out in Rehearsal. Likewise you can deal with an unreasonable offer, as I've said, by asking for its objective basis. Asking for a detailed breakdown of an outrageous offer is a very effective way of getting concessions without making any.

<u>Make only principled concessions.</u>

98. Do not make inexplicable jumps. One inexplicable jump is like another, so the other side can ask "why not make it more?" You want to convincingly explain why a particular concession is being made and why a larger concession cannot now be provided. As the negotiation progresses concessions should be made more slowly, and as you get farther along they should be slower and slower (remember patience) and also smaller and smaller. More about that in a minute. Concessions must only be made in response to concessions from the other side – never bid against yourself.

Concession size

99. What size should your concessions be? You use concessions to communicate. You want to communicate that you are bargaining in good faith but there is a limit to what you'll accept. A good rule of thumb is that each concession should be roughly (not exactly) half the size of the preceding one, and the first should be about halfway to your target.

The Krunch

100. Jim Thomas calls this technique the Krunch, with a "K". It is also called the flinch or the wince. You should both be comfortable in using it and wary of it being used on you. It is simply an invitation for the other side to bid against themselves (or for you to bid against yourself).

101. For example, if you're the buyer, when the seller makes his opening demand, always Krunch. "That's really high, can you do better than that?" Depending on the circumstances the Krunch can be gentle and polite, "I appreciate that, but X (whatever they offered) is more than I wanted to spend" or very aggressive and sarcastic "Are you out of your mind?" Generally the former is better than the latter. If it works, the seller will lower his price without you having offered anything. Keep Krunching till the other side demands an offer. Obviously, an experienced negotiator should not rise to the bait, nor should you. Your response to the Krunch will always be, "Well, what will you pay?" Insist on a concession in return for each concession you make.

Imagination

102. Don't fear to be creative. Don't be limited by constraints that are not really there. Think outside the dots. There is a famous puzzle that contains 9 dots in a three by three array and the task is to connect the dots with four straight lines without lifting your pencil or going over a line twice.

103. Most people can't solve it because they impose a condition that isn't there – that the vertices (where the lines meet) must be on a dot. If you connect the dots but make the vertices outside the dots, it's easily done: https://www.youtube.com/watch?v=fqWIfPTM5v8.

104. Another use of imagination is to get past barriers that initially appear intractable. William Ury tells a wonderful story about the old man in the middle-east who left his three sons 17 camels, with instructions that one son would get half the camels, one son a third of the camels and the last one-ninth of the camels. 17 is a prime number and none of 2, 3 or 9 divide 17 evenly, and a fraction of camel is of no use. What to do? The sons ask a wise old woman in village, she says that she doesn't know, but if it would help they can have her camel. Now

it's easy: ½ of 18 is 9, 1/3 of 18 is 6 and 1/9 of 18 is 2. 9 + 6 + 2 is 17 and they gave the old woman back her camel.

Competitive tools.

105. You will both face and use many of these tools during Act III.

a. **Patience.** The Second P. In my view the most powerful weapon since many negotiators will make concessions simply to end the process. Time pressure can be effectively used against opponent who has a time constraint. Silence is wonderful. You cannot make a concession if you are silent. If this class was three seconds instead of over an hour I would teach it in two words: shut up. The other side may make a concession just because they are uncomfortable with silence. Likewise tolerate the small talk, chit chat and other conversation that goes on between concessions. It may seem like a waste of time but it is not, it keeps the process moving and gives you something harmless to do while you wait for their next concession. If you must say something, talk about nothing.

b. **Argument** - Where P number One - Preparation - pays off.

Arguments should be rational and objective, though focused on your strengths. A good technique is to fully acknowledge the argument of the other side, and then refute it. Preparation here really pays off.

Argument should always be logical, orderly, comprehensive, and articulate. Never emotional.

Argument should be innovative, beyond what the other side is expecting. This forces them to re-think things on the fly.

c. **Threats, warnings and promises**

Threats and warnings must be carefully communicated so as to be understood. Threats should be used sparingly as they are very polarizing.

Threats and warnings must be proportionate to the situation and be believable alternatives to settlement.

Never issue empty threats. Don't threaten something that won't or can't happen.

Promises are often better than threats. They are more likely to yield a concession and are less disruptive than threats. Threats are ego challenging, while promises are face saving. Even if you have the power to make a serious threat, if you can, make it indirectly. It may have a better effect as the other side can yield without appearing weak.

Emotional appeals. Do not underestimate the emotional content of negotiations, sometimes there is a place for an appeal to the hearts of the other side.

Humor can be used to gently ridicule unreasonable positions being taken by opponent or to reduce built-up bargaining tension. You have to realistically assess your own ability to use humor. If you are not good at it don't try it. If you make a joke, it should at your own expense or totally neutral, never aimed at the other side.

d. **Control of agenda (its content and order of items)**. If you set the agenda you can emphasize your strengths.

e. **Intransigence.** Sheer stubbornness is often effective, but can lead to early breakdown if not measured.

f. **Honesty.** I've heard this is sometimes used in negotiations, and can be effective if used very sparingly and only under certain conditions. For example if there is some aspect that truly is not-negotiable it often helps to put it out there right out front. Also insist or agreement on the underlying facts, and if a fact is disputed identify it and the basis of the dispute. Likewise statements of the law should always be grounded in statutes or cases or a valid argument why an existing adverse case is wrongly decided or distinguishable.

g. **Flattery.** Egos are wonderful things, and an opponent with a big ego may trade his client's position for a few strokes. They are cheap enough so be generous. Do not give up your client's position just to be flattered. If you are young and inexperienced be wary of bullying or undue flattery by older more experienced lawyers - be confident about what you are doing and ignore both.

h. **Manipulation of time and location of negotiations.** This is gamesmanship, and I consider it a sign of weakness by those who play it, but if the other side starts it you will have to play too. However there are legitimate times when some place or another is to be preferred. Ideally hold it at your office or neutral territory.

i. **Creation of guilt or embarrassment**. Such feelings often precipitate concessions.

Playing poker.

106. Those of you who play poker know the value of a bluff. But to be effective the other side cannot know that you are bluffing or that you always bluff in certain situations. Thus it is important not to be too consistent as word will get out. That said, it is often good to try a bluff walk-out early in the proceedings to flush out severe pressures on the other side that you are unaware of and that they have thus far concealed.

ACT IV: CLOSING

The end is in sight.

107. You know you have begun Act IV when the other side has made an offer you can accept, or you sense you have made one that they will take. This is a critical point because the parties realize that an agreement within their respective settlement ranges is likely and they become psychologically committed to that result.

Patience is more important now than ever.

108. Parties who become overly anxious about settlement move too quickly and concede too much. If one party is more anxious to close than other party, they will make more numerous concessions causing poor result. Remember, in Act IV you are already within the settlement zone, so be patient as you have already achieved your goal and you are just going for the bonus points. By definition, if you have accurately assessed that you are within the other side's settlement range you can become much firmer.

    a. Stick with your plan. Be patient and use the concession plan and the tactics that got you to where you are.

    b. Never make unilateral concessions. Never bid against yourself. Both sides need to close the remaining gap. However, if the other side is willing to make all the concessions, you should very graciously allow them to do that.

    c. Don't make bigger concessions than you need to in order to keep the process moving.

    d. Continue to use principled concessions. It ain't over till it's over, so keep negotiating with the same techniques and same focus as you did before you got within settlement range.

There are important adjustments in Act IV

109. Face saving is now very important, allow the other side to look good and save face while giving you what you want.

110. Avoid threats, make promises instead. The ultimate promise is the offer to "split the difference." Again patience is the watchword, let the other side make that offer if that will be acceptable to you. It is always better to be in the position of being able to accept an offer to close the deal, than to have made an offer which is rejected and thus may require further concessions.

111. Slow down. Once you recognize that your opponent has become psychologically committed to settlement, evidenced by such closing behavior as more rapid and more generous concessions, do not move too quickly. Be patient and encourage your opponent to close the rest of the remaining gap

112. Emphasize your prior concessions to generate guilt that may induce your opponent to be more generous now.

113. Be supportive of opponent's position changes. Praise that party's reasonableness and indicate that an agreement is certain if they can provide you with just a few additional items you need to satisfy your client's goals.

114. Test for closure. It is worth seeing if the other side is just trying for bonus points too. Never say "Yes" without first saying "No". Try saying no, what I call the soft walk out. You're not really going to walk out, but you want the "no" to be convincing enough so that the other side will take what's on the table rather than allow failure if they are within their settlement range. If they don't take the bait, you can always have a change of heart.

Avoid auction fever.

115. Do not become so caught up in the negotiation "game" that you find yourself compelled to achieve a final settlement no matter the cost. Recognize when you are engaged in a losing endeavor and attempt to minimize your losses using information obtained from the negotiation process.

Remember your external options.

116. Except in rare circumstances, you will have external alternatives to settlement, your BATNA. Negotiators must determine at outset the options available to then if no agreement is obtained. When external alternative is preferable to terms necessary to achieve a negotiated agreement, a non-negotiated solution is the preferable option. Negotiation efforts have not

been wasted. You had to find out if settlement possibilities were better than the external alternatives.

Know when it's time to quit.

117. Never continue a negotiation merely because you have expended a substantial amount of time and/or resources, particularly if you are doing so in an effort to "punish" your recalcitrant opponent. Know when to cut your losses and take the most advantageous external option. Simply inform the other side that their current offer is unacceptable. There is always the chance they will reconsider situation and provide you with more beneficial proposals. Thus always leave the door slightly open to future talks.

Use your BATNA.

118. Don't be afraid to reject settlement offers that are worse than your BATNA, your non-settlement alternatives. A lawyer who has a reputation as a person who always settles is at a huge negotiating disadvantage. For example most of the lawyers who know me, know I adore trying cases - thus the threat to "see me in court" is music to my ears and not an effective lever to move me from my last position. If you know a lawyer is afraid of trials, you know you just hold out till it's time to go to court and he'll fold.

ACT V: COOPERATION

We have a deal - let's make it better.

119. Act V starts after the handshake, after the deal is struck. In some negotiations there will not be an Act V, for example the simple injury case where a sum of money will be traded for a release of all claims and dismissal of the action. Act V will happen in non-zero sum negotiations in which one party can enhance his or her position with either minimal cost to opponent or perhaps even some benefit to the other party. Remember that what may initially appear to be a zero sum transaction might be converted to a non-zero sum negotiation, if parties explore alternative options that may prove to be mutually beneficial. In the personal injury case, for example, perhaps payments over time are better for both parties than a lump sum.

Let's trade.

120. After reaching a settlement, explore alternatives that may enhance the interests of both sides. While some candor is required during this part of interaction, parties must recognize

that even Act V continues to have a competitive aspect, since each side is still endeavoring to obtain as much as possible from opponent.

Be very clear about what you are doing.

121. Be absolutely sure the other side realizes Act IV is over and you are in Act V, that you are now engaged in cooperative bargaining since your proposed alternatives may be less beneficial to than your tentative agreement, and if the other side does not realize that you are simply exploring possible alternatives, claims of bad faith or deceit may arise. You must be clear that if improvements cannot be made in Act V, the deal struck in Act IV will stand.

WHEN THE DEAL IS DONE

Draft the agreement.

122. When the negotiation process concludes with a mutual accord, it is beneficial to draft the final agreement. While no attorney should contemplate the deletion or alteration of any term agreed upon or the addition of new provisions, since such behavior would be unethical and probably constitute fraud -- he/she should seize the opportunity to draft provisions that best reflect his/her understanding of the negotiated terms. Do not leave the room without a signed written summary of the deal, if not a full settlement agreement.

Did you win?

123. One of the profoundly unsatisfying aspects of negotiation is that you will never know if you "won." You won't know if the other side had more to offer that you left on the table. It is vital that if the other side left some of your money on the table that they never find that out. Always make the other side think they won, even if you privately feel you did way better than expected.

124. In a trial you measure success by the result - the judgment that the judge or jury reach. You and the other side will, for the most part see the case the same way, as trials tend to be zero sum games. This is not always true, you may win more than you thought you would while the other sides loses less than they expected and both place the case in the win column. That is rare. In a negotiation you will never know how the other side views the result, so you can only measure against your goals and expectations. But, as I said earlier, be careful of this because it is easy to jump over a low bar. You will certainly get better results by aiming high and just missing, than aiming low and achieving the modest goal.

NEGOTIATION ISSUES

Never fear to negotiate.

125. The vast majority of cases are going to be settled, thus there is no reason not to raise the possibility of settlement discussions early in litigation. I don't see it as a sign of weakness, particularly these days where every client is sensitive to the cost of litigation.

Keep your client away.

126. It is better not to have one's client attend negotiating sessions or at least to be in the same room.

127. Client presence makes it difficult, if not impossible, to employ such effective bargaining techniques as "Authority" and "Good Cop, Bad Cop". Clients will make unintended verbal and nonverbal disclosures. In emotionally charged situations, it may be beneficial to permit opponent to cast aspersions on your client at outset of a negotiation. These cathartic expressions may relieve festering animosity and enhance the likelihood of an accord. If your client were present when these statements were being made, you would feel compelled to defend the client before the cathartic process was completed. If clients must be present during bargaining sessions to provide needed expertise or because of personal insistence, they should be carefully prepared beforehand. They should be instructed to speak only when asked to do so by their own counsel. They should be cautioned about the substantial risk of inadvertent nonverbal disclosures. Bound and gagged is good. Duct tape is very useful.

Dealing with an inflexible opponent.

128. When opponents are committed to unfavorable positions, it is preferable not to challenge them directly but to use a "face saving" approach. Focus on their expressed needs/interests instead of on own stated positions, and try to convince opponents to reassess their positions in light of non-threatening needs/interests analysis. Explore alternatives that might be mutually beneficial. Emphasize areas of mutual interest, rather than areas of disagreement. Be a problem solver.

The end of the world

129. Where one side threatens havoc (e.g. mass layoffs) and then offers to prevent the dire consequences if other side accepts its draconian demands (e.g. salary reductions). This technique is used to precipitate unilateral concessions from parties striving to avoid the threatened devastation. Here are two counter-measures:

130. Carefully evaluate the likelihood that the threatened disaster will actually occur, often it is highly unlikely.

131. Determine consequences for the threatening party if it does occur-- Situation might be worse for threatening party than for you, in which case you might indicate willingness to accept the dire consequences if opponent does not provide appropriate concessions.

Good cop, bad cop

132. Situation where "reasonable" opponent sympathizes with your "generous" concessions but emphasizes need for greater concessions by you to satisfy his/her "unreasonable" partner or client. A single negotiator can use "unreasonable" absent client to effectuate this technique.

133. Do not make the mistake of directing all of your arguments and concessions to the unreasonable party in an effort to achieve his/her acceptance. If you can satisfy the "reasonable" opponent, you may be able to divide opponents and force the "unreasonable" person to accept an offer viewed as acceptable by the "reasonable" partner. If the "reasonable" person indicates that he/she must defer to their partner's opinion, it is clear they are using Good Cop / Bad Cop.

MEDIATION

134. Mediation is now very popular and a great deal of our negotiation will now occur during mediations. Everything I have said here applies to mediation but there are a few additional rules that you should know:

Treat the mediator as the other side.

135. The mediator is not there to help you, he or she is there to settle the case. If you are willing to make all the concessions the mediator will be happy to let you. Never tell the mediator anything you would not tell the other side and never make a concession to the mediator unless you would have done so to the other side.

The brief to mediator

136. One side or another is usually tasked to compile the brief to the mediator. My wife who is a mediator, often complains that the briefs are too late not sufficiently helpful. If the mediator

requests a brief a number of days before the mediation, try to meet that deadline to give him or her a chance to prepare. Likewise only include the relevant documents and provide a cover letter which sets out who the parties are, who their representatives will be, and in broad outline what the case is about and for bonus points the key points of contention.

The mediation statement.

137. The mediation statement is nothing more than a highly principled opening position. It is often a useful tool to marshal your facts and the law and put them both in the best light. It also is a good way to justify the amounts you are demanding or willing to pay by attaching extrinsic supporting materials as exhibits. If there is a case or statute on point, make a copy and attach it. If there is a particularly damning witness statement (that you are willing to disclose) this is a good place to put it out there.

Time is vital.

138. Be sure to allow enough time for the mediation. Mediation is slower than face to face negotiating. I never schedule less than half a day and in all but the simplest cases a full day. It cannot be done in an hour or two, particularly for us patient negotiators.

Client control.

139. Never ever let the client talk to the mediator any more than you would to the other side. The client is likely to make more concessions faster than you are, and mediators try to exploit this by asking clients direct questions. If you can't get your client out of the room, at least train the client to sit impassively until you are again alone.

Use the mediator.

140. Mediators can ask questions like, if I could get you X would you take it? If you can get the mediator to ask the other side that sort of question you can often get a concession or two for free. On the other hand you should never answer a question like that, respond with - are they offering X? When the mediator says no, then say, well if you can get a firm offer for X we will consider it. That way you have made no concessions and placed the burden on the other side to make an offer.

CONCLUSION

A. Use the Three Ps

B. Follow the script of the 5 Acts of the Play

C. Enjoy the process. It can really be fun when you know where you are, what you are doing and best of all watching the others make mistakes that you can use to your advantage.

BIOGRAPHY

Peter Axelrod

Admitted to practice in the US and Australia but resident in Australia since 2001, Peter has acted here in numerous case arising from aircraft accidents and aerial application. He has also assisted clients during inquests arising from aircraft accidents in the US, he appeared in more than 100 jury and court trials arising from aviation incidents, was an adjunct professor in aviation law at the Embry-Riddle Aeronautical University and an arbitrator for the San Francisco and Marin County judicial arbitration programs. He remains on the Legal Advisory Council of the Experimental Aircraft Association in the United States.

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