

DISPUTE RESOLUTION CONFERENCE

PAPER 21

The Lawyer as Problem Solver: Advice to Litigation Lawyers on How to Make the Settlement Process Work

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**THE LAWYER AS PROBLEM SOLVER:
ADVICE TO LITIGATION LAWYERS ON
HOW TO MAKE THE SETTLEMENT PROCESS WORK**

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I. A Shift in Approach

Clients come to litigation lawyers because they have problems involving legal disputes that they want resolved. In the vast majority of cases that resolution will come about not in a court-based adjudication but by way of an out-of-court settlement. (Less than 2% of actions commenced proceed to judgment after a trial with witnesses. A similar proportion of cases are determined by a judgment of the court after summary trials.) It follows that, for the competent litigation lawyer, pursuing strategies to obtain a successful settlement is more important than pursuing strategies to win in court, and settlement skills are as important as courtroom skills.

Proceeding on the assumption that a case will likely settle out of court involves a fundamental shift in approach for the litigation lawyer. The chart below seeks to capture important elements in this shift.

Shift in approach from a focus on a Court to an Out of Court Resolution of Disputes

Court Resolution	Out of Court Resolution
Shift of focus from:	To:
Preparing for trial	Preparing to settle
Being right	Mastering the dynamics of settlement
Establishing legal entitlement	Meeting your clients interests
Making the case to the judge	Getting the other side to agree

Court Resolution	Out of Court Resolution
Shift of focus from:	To:
Winning the court case	Achieving an outcome that satisfies all
Confronting the other side	Collaborating with the other side
Playing power games	Sharing power
Being in sole control	Partnering with the client
Solely applying logic	Working with emotion as well
Dwelling on lawyers' perspectives	Acknowledging clients' perspectives
Focusing on facts	Focusing on relationships
Using the left-brain alone	Engaging the right-brain
Preventing "surprises"	Opening up new information
Guarding information	Sharing information
Advocating	Listening
Dividing the pie	Making a bigger pie
Limiting solutions to legal remedies	Broadening the scope of solutions

As a competent litigation lawyer you bring to the settlement process attributes that are crucial in a trial setting—an analytical mind that focuses on the issue(s) at stake, a skill in knowing and bringing out relevant facts, an expertise in the law and knowledge of solutions that will work in a legal context, and an ability to articulate your client's point of view. But in the settlement process, to be effective you must also understand the interests, not purely legal in nature, of your client, and, of the other parties to the dispute and their lawyers. Your role is to assist your client towards a negotiated conclusion by manoeuvring through emotions that need to be managed, relationships that need to be strengthened and interests that need to be brokered.

Traditionally lawyers' training has emphasized the advocacy role of counsel in adjudication. While advocacy has its role in negotiation, the art of deal making at least equally calls for the skills of listening, of understanding, and of diplomacy.

II. Beginning with the End in Mind

A starting place for exploring how to become a master at settlement is to imagine both where you want to be, and conversely where you do not want to be, at the end of the negotiation process.

A settlement is most likely to optimize your clients' interests if, at the time just before the settlement is reached:

- You and your client understand your client's interests and priorities with respect to those interests;
- Your client knows the implications of pursuing the alternative of resolving the matter in court, and trusts your advice with respect to this issue (and others);

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- The key information relevant to assessing your client's alternatives have been uncovered;
- The other party and the other party's lawyer are aware of your client's interests so that they can be taken into account in their proposals for settlement;
- You are aware of the other party's interests and priorities so that they can be taken into account in your client's proposals for settlement;
- A variety of creative resolutions have been put on the table for consideration;
- There is sufficient time to consider the positive and negative implications of various alternative resolutions;
- Your client is not fettered by emotions that get in the way of a rational assessment of the alternative resolutions in relation to his or her interests;
- The other party is not fettered by emotions that cause them to reject reasonable alternatives;
- The money spent on the legal fees to the point of settlement is proportional to the results of the settlement for your client, and the legal work done has been instrumental in obtaining a good settlement.

The best settlements are reached with the assistance of a skilled lawyer focused on reaching this desired state at the time of settlement.

To assist in achieving this, you need to work to avoid the obstacles to a successful settlement that can easily arise from the normal dynamics of litigation. Without the application of settlement skills, it can easily happen that:

- Your client will say "no" to a reasonable offer because he or she is so caught up in the emotional dynamic with the other party or other party's lawyer that your client is unable to think rationally about what is in his or her own interests.
- Your relationship with the other party or the other party's lawyer becomes so adversarial that it generates more heat than light and impedes a negotiated resolution.
- You misunderstand your client's interests because you have not checked your assumptions with your client (perhaps because you think that understanding such interests is not "relevant" to your task as a lawyer).
- Your client rejects your advice to settle because of unrealistic expectations, unsatisfied emotional needs, or lack of trust.
- A less than optimal settlement is reached because the settlement is based on only a partial knowledge of the relevant facts, because you and the other party's lawyer defensively failed to share relevant information.
- The other lawyer and the other party base their assessment of options on wrong assumptions about relevant facts.
- You and your client, the other party and the other party's lawyer are guessing at what interests and motivations are driving the negotiations.
- You fail to get creative options on the table.
- Your client has spent a lot of money funding legal procedures and adversarial techniques that did not advance the goal of achieving a good settlement, and does not want to settle because that money would have been "wasted."

To attain the desired end state at the moment of settlement and to avoid these enumerated pitfalls, you need, among other things, to:

1. Work with the emotions of the parties to the dispute;
2. Be trustworthy and pay attention to building a relationship with your client, with the other party and the other party's lawyer;
3. Engage collaboratively with the other side; and
4. Let go of the need to try to control the process and treat your client as a partner in achieving a good result.

The rest of the paper will expand on these four pieces of advice.

III. Working with Emotions

We cannot stop having emotions any more than we can stop having thoughts. The challenge is learning to stimulate helpful emotions in those with whom we negotiate—and in ourselves.

Fisher and Shapiro *Beyond Reason, Using Emotions as You Negotiate*, p. ix

Our whole life equips us to know about emotions- anger, fear, disgust, guilt, sadness, affection, joy, pride, and so on. We bring to our daily life a rich repertoire of skills to deal with the emotions of others.

Regrettably, we tend not to employ these skills sufficiently in our legal practice in trying to settle cases. Because our focus tends to continue to be on the ultimate persuasion of a judge, we tend not to pay sufficient heed to the real feelings of the parties to disputes.

Competent litigation lawyers have always been astute about the emotional dynamics in cross-examining witnesses and in presenting evidence at trial. Focusing on the emotional dynamics of settlement calls for a richer understanding of the emotions of the parties, the lawyers and sometimes third parties collaterally involved in the negotiations.

In disputes, one often hears lawyers dismiss the emotions of parties as “irrational” as if that was a sufficient answer to how someone feels. Of course emotions are “irrational.” By their very nature emotions are not “rational.” What lawyers seem to be saying in making such comments is that it is not their job to address such emotions.

This is a view that limits your effectiveness in negotiations as emotions cannot be avoided or wished away. Conversely, acceptance of the validity of people's emotions can clear many roadblocks to the achievement of settlement, and working to build a positive emotional tone in negotiations can positively promote settlements.

This is not to say that you should become psychologists or therapists but it is to say that you should bring to your work at least the understanding that life has given you of people's emotions.

Fisher and Shapiro provide a useful model for understanding and dealing with emotions in negotiations. They acknowledge that the complexity of emotions that can be involved in a dispute makes direct understanding and responses to each emotional state difficult if not impossible for even a trained psychologist. As a practical approach, they suggest that lawyers apply a strategy of attempting to address a number of underlying “concerns” to which the emotions relate. Those concerns are people's desire to be appreciated, to feel affiliation, to have their autonomy respected, to have their status recognized, and to have fulfilling roles in their lives.

To get at these concerns you must become a better listener. Lawyers have traditionally been trained to be very attentive to clarity in expression. A similar, if not greater emphasis needs to be given to clarity of understanding what others are saying, including in particular what they are saying about their emotional state.

“Active listening” is a term from psychological or therapeutic settings that describes a set of key skills to achieve clarity of understanding of what people are saying. The emphasis in active listening is on expressly acknowledging that you have heard what the other party is saying and confirming it back to them in your own words to demonstrate that you have actively processed what they are saying.

Making changes to take emotions more into account in your practice, may involve letting go of old habitual constraints on the manner of your advocacy. The “rules” for advocacy in settlement are different than those for court. Legal relevance, “rationality,” proof, and *stare decisis* do not apply in the same way in negotiations as they do in court.

IV. Developing Relationships and Being Trustworthy

The qualities required of lawyers engaged in problem solving in a settlement context are similar to the qualities required in the traditional litigation context—intelligence, diligence, knowledge of the law, insight and clarity of expression. Many times and in many ways lawyers have been told that such virtues, while important will fail to achieve results if the lawyer lacks a fundamental integrity, or trustworthiness.

Being trustworthy pays particular dividends in the settlement process. For you to win in court you need to persuade a judge; for a successful settlement, however, you need to persuade the other party. Although it may be trite to say it, developing the trust of your client, the other lawyer, and the other party is vital to reaching agreement. Having the trust of the other party and the other party’s lawyer smoothes the way to settlement. Trust is an important currency of exchange in negotiations.

You develop trust in part by demonstrating professional competence, but equally importantly by demonstrating understanding and attention to the interests and emotions of your client and the other party.

Your client needs to feel that you are a person who can be trusted with the safe expression of his or her feelings about the dispute. (You should be mindful that you might be the only person that your client can trust in this way.) It is very important that you understand your client’s interests and motivations. Only then can you pitch your advice so as to meet these interests and help your client manage his or her own emotional reactions and understand other perspectives on the problem.

Your client will be looking at your responses as a guide to the “appropriate” manner to react to situations arising in the negotiations. Thus in giving your advice it is not just what you say that will be valuable to your client, but also the emotional tone that you bring to your advice and that you demonstrate in your dealings with the other party and the other party’s lawyer.

You should assist your client to understand the interests and the emotions of the other party. Even though you may have an imperfect understanding of these issues, you have the major advantage of having a more objective viewpoint than your client and a more informed understanding of the applicable law and procedures for dealing with the case.

You need to be conscious that developing trust takes time with other parties and particularly clients should be attentively pursued. This takes the investment of time, including the time to develop a personal connection with the other party’s lawyer. One test of that connection is the test of humour—the presence or absence of shared laughter is a helpful indicator of the emotional tone of the relationship.

V. Engaging Collaboratively with the Other Side

The trick to initiating a problem solving approach with the other party's lawyer is that there is no trick. The process is as simple (and as difficult) as putting aside concerns about litigation for the moment and exploring with the other party their interests in a settlement. You need to put the matter plainly to the other party's lawyer. You need to say that it makes sense to you and your client to explore whether such an approach may be helpful, but that you and your client recognize that such an approach has to make sense to them too, or it will be difficult to make progress. You need to ask them how they see the dispute. The general laws of co-operative endeavours apply—"it takes two to tango."

Your initiative may be rejected or ignored. Don't let this bother you. Sometimes the other party is not yet ready to make a decision about what is the best approach for them to take. The best course then may be to ask them if they need some time or more information from you to decide how they want to proceed. Ask them if there is anything you can do which would help them make up their mind, and say that you expect that you will speak to them again about the possibility of having some useful settlement discussions. And then plan to raise the matter again.

It is not always easy to maintain the focus on settlement. The power struggle that goes on in litigation often impedes problem solving approaches; triggering onerous, time-consuming and expensive tit-for-tat litigation obligations—demands for discovery of documents or examination for discovery often run up costs of proceeding, and cause the postponement of meaningful discussions between the parties.

Partly the triggering of reciprocal litigation responses is habitual or situational—that is they are generated by the dynamics of competitive litigation. These habitual and situational responses are however reinforced by a widely held "defence" perspective that it is often to the advantage of well-financed defendants to let litigation run its full, expensive, and onerous course.

It is difficult to get a problem solving approach going where the other party's lawyer is well-funded and his or her client has every incentive to make the bringing of claims difficult, not just for your client but also for others who might want to bring a claim. Businesses and insurers often take approaches to litigation which are calculated to be in their self-interest and which require the plaintiff to "go the distance" to make their claim. The defendants' demonstrated willingness to engage in lengthy expensive proceedings is calculated to enhance their bargaining position. A plaintiff and his or her lawyer facing such a situation, and seeking to engage in a problem solving approach, must face up to the reality that it may be difficult in such situations to persuade the defence to give up the tactical advantages available to the well-funded defendant to force the matter through the litigation process or at least to threaten to do so.

To engage the other party in such a situation, realities must be acknowledged. Any invitation to engage in problem solving, needs to be framed in terms that the option of discussions has at least the chance of giving the defence a better outcome than they may be able to achieve by proceeding through litigation. One approach is to say to the other party's lawyer, "If there is even a 25% chance of settlement from our discussions, I would have to recommend that we see how far we can get. Maybe the chances are no higher than that, but the investment of our time makes sense to us. How do you see the options from your client's point of view at this time?"

This is when you need to listen to the other party and the other party's lawyer. Listening is more than thinking of your reply as you wait for the other person to finish talking. "Active listening" demonstrates that you have heard what the other person is saying, that you understand what they are saying, that you understand where they are "coming from" and that you understand how they see your case. You will find it difficult to make progress in settlement discussions, until you and your client demonstrate that you have understood what they are saying. You will certainly not be able to effectively discuss solutions to the problem until this happens. Attempting to "sell" a solution to the problem to the other side before an understanding of their position has been demonstrated is likely to be an exercise in frustration.

The necessary problem solving process is one that invites the opening up of the flow of information that may enhance the understanding of each other's perspectives.

The exchange of differing perspectives sets the stage for the possible integration of perspectives or looking at the problem from points of view that may be different from what either side has considered. The encouragement of this "re-framing" of perspectives opens up fresh possibilities of finding sufficient common ground to achieve settlement. You need to free yourself to look at and to discuss the situation not just from the perspective of an analysis of the legal merits, but from the perspectives of the economic and emotional interests of the parties.

A truly effective problem solving approach is a process that moves forward successively through stages—from the mutual engagement of the parties and their lawyers, through the sharing of information, to the consideration of different ways of looking at the situation. Only then do the appropriate optimal solutions emerge.

VI. Let Go of the Need to Control and Make Your Client a Partner

A good trial lawyer seeks control of the courtroom and what goes on in it. At trial, you want no surprises—no new evidence, nothing out of place. As a competent litigation lawyer, you prepare your client to say what you want said and no more. The maxim holds sway in the courtroom that no question should be asked on cross-examination to which the answer is not already known. The judge needs to be clearly instructed of the limited available options for resolution – any creative thinking on the judge's part is to be discouraged.

In the settlement process, however, too much control over what is said is likely to be counterproductive and limiting. To be a competent settlement lawyer you need to learn to let go of the need to control. This letting go can be disconcerting at first, but ultimately it is liberating. It is an acknowledgment that the responsibility for solving your client's problem does not rest entirely on your shoulders. It is a shared responsibility, shared with your client, the other party's lawyer and the other party.

In the courtroom process, the adversarial clash of opposites is designed to elicit the Truth and the Just solution. The collaborative approach is less concerned about Truth and Justice, and more about truths (that is perspectives on the truth) and interests. When the settlement process works well, it widens the scope of the interests, issues and solutions to be identified and considered. A collaborative process works best when all participants are empowered by the process to express their thoughts, to share information, to listen to and acknowledge the other side and to brainstorm about solutions.

When you are engaged in a settlement process, to make it effective you need to share power and responsibility with your client. The courtroom is the lawyer's domain. The goal of a trial is to establish legal entitlement or lack thereof, and you are the expert. In a settlement process, knowledge of the law is helpful in considering the best and worst alternative to a negotiated agreement (BATNA and WATNA), and the viability of settlement options; it is secondary, however, to the importance of understanding your clients' interests. Your client is the "expert" in his or her own interests, and therefore, needs to be a full partner with you in the negotiations.

When the moment of settlement comes, your client must be fully engaged. This only happens if your client is engaged throughout the process and sees himself or herself as a full participant in it. In a settlement process, you are no longer the "hired gun" paid to do battle on behalf of your client, while the client watches on the sideline. When you focus on success in settlement, it is prudent for you to become a partner with your client in making the process work to the clients' advantage. True partnership involves giving up some control.

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When you engage in a settlement process, you also need to be prepared to share power over the process with the other party and the other party's lawyer. That is what collaboration is about. Paradoxically, it is only when all parties to the process feel they have some power to effect the outcome that they are able to engage with each other in a full exploration of collective interests and creative solutions can be undertaken.

Someone once said that information is power, so it follows that sharing power means sharing information. You will be better off at that end moment of settlement, if there has been a full exchange of information. Only then will the interests of all parties be understood so that they can be taken into account in the settlement. You may find the idea that an opening up of information will improve the outcome for your client counter-intuitive. Litigation lawyers are used to strategizing for a win in court. Until you get used to it, it will take a conscious effort to ask open questions of the other party, not knowing what the answer is, instead of closed, cross-examining questions designed to control the answer. Also, in the settlement process, you need to get used to the idea that your client will answer open questions from the other party's lawyer, and that important things can be learned from the answers that will assist the settlement process to the benefit of the client.

Perhaps the hardest thing for the litigation lawyer in the role of settlement lawyer is the recognition that a collective effort will generate better, more creative resolutions than you can come up with on your own. We are used to seeing our job as coming up with the solutions. But there is more than one way to solve a problem, and complex problems require creative solutions that rarely come from one person alone.

So when you engage in the settlement process (which we know is the prevailing process in almost all legal disputes), you need to take a deep breath and accept the paradox that you are most likely to influence a favourable outcome for your client by giving up your need to control.

VII. Conclusion

Given the reality that most legal disputes end in settlement, being a competent litigation lawyer involves making the settlement process work for your client. This, in turn, requires a conceptual shift in your self-image from knight in shining armour doing battle on behalf of your client, to member of a problem-solving team that includes your client, the other party and the other party's lawyer.

A problem solving approach may run counter to your legal training and traditional experience, and require skills that you have not fully developed. It likely involves you in considering matters that you might otherwise have treated as beyond the scope of your interest or responsibility. Addressing the full range of interests that are at play in disputes (legal, economic, relationship and emotional) requires more than an analysis of substantive legal issues or trial tactics.

Pursuing a problem solving approach may be particularly difficult when the other party or their lawyer seem not prepared to engage collaboratively. Nevertheless, even without cooperation from the other side to the dispute, you must practice the art of settlement, or risk adversely affecting your clients' interests and not fulfilling your professional responsibility to assist your client in solving their problem.