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Negotiating When You Can't Back Down

By Alan Bush
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You've found yourself there. Again. You're in the middle of a negotiation, and you can't back down. Sometimes your client might draw the line in the sand, sometimes you do. Either way, your hands are tied.

I lived there for five years. I collected local property taxes. Local government has no discretion to bargain away public tax dollars. Nor can the government use penalties or interest as a bargaining chip. Every dime must be paid. Collection counsel can only dicker over how long the payment plan lasts. That can frustrate closing a deal.

You can work your way out, though. As you do, keep an eye on your legal and ethical boundaries.

Courtesy photo

Alan Bush of Bush Mediation

Mediation Order

Texas court orders that refer a case to mediation by statute are bland. They tell the parties to go mediate. But a court can spice things up by ordering the parties to mediate in "good faith."

Good faith seems innocuous, but it isn't. If your bargaining position can't move from the start, you're not negotiating in good faith. Draw that line in the sand with a good faith mediation order, and you'll risk sanctions.

The Texas Department of Transportation found out the hard way. In *Pirtle*, the trial court ordered the parties to mediate in good faith. TXDOT showed up at the mediation, but "refused to participate." TXDOT explained that, by policy, is did not settle disputed cases. At trial, TXDOT won a defense verdict.

The trial judge, however, awarded court costs and attorney's fees against TXDOT. The court pointed to TXDOT's failure to negotiate in good faith. On appeal, the sanctions stood. The appellate court gave a nod to a trial court's authority to allocate costs as it pleases when a party neglects to object to the mediation order.

If you have no room to negotiate from the start, you have two options. One option is to object to the mediation referral order. Another is to ramp up your opening offer, so you have some room to negotiate.

Just Salute and Execute?

When a client won't budge in negotiations, it's tempting to check out. Just go along to get along. The client pays the bills, right? Getting sideways with the client risks unpaid bills and a client who walks out the door. Don't give in.

Our ethical rules expect more. Lawyers owe every client our "independent professional judgment" and

"candid advice." Up, down or sideways, counsel owes the client an honest assessment. Counsel gets no free pass when a client could find the advice "unpalatable."

That makes for some tense conversations. Lawyers have an ethical duty to give the candid advice a client doesn't want to hear. Giving it takes finesse, especially when your client has drawn a line in the sand.

Smart litigation counsel uses the mediator as cover. Because the legal profession thrives on ambush, new twists routinely pop up at mediation. A good mediator doesn't pull punches in showing both sides their risks. Let the mediator be the first to break the bad news. Then soft echo it. Tell the client that, although you don't like it, you see the wisdom in it.

Keep an Open Mind

Other times, your own case evaluation commits you to a firm bottom line. You can't back down there, too. All the same, keep an open mind to new information.

Lawyers must pivot. New information added, new independent professional judgment owed. It never ends.

So carefully communicate your advice to a client. Make sure to leave yourself an escape route for when you learn something new. If you don't, you may find your client unwilling to listen to you when something changes your mind.

Honesty

With little room to negotiate, counsel can feel like he's backed into a corner. Fight instincts hit high gear, and out comes the hard sell. Honesty can suffer as counsel tries to force a deal.

Remember the boundaries. Disciplinary Rules 3.03 and 4.01 ban "knowingly" making a "false statement of material fact or law." But the comments explain that "circumstances" guide where a lawyer's statements step out of bounds. In negotiations, it's a fair ball to bluff. Counsel can bluff away on his intentions in the negotiation or his estimate of the deal's value.

Careful estimating value. Although the estimate or an opinion can be bluffed, supporting facts cannot.

It's one thing to say that "withdrawing $250,000 won't hurt the business." That's an estimate. It's another to say that "withdrawing $250,000 won't hurt the business because it will still have $200,000 in the bank." Adding the factual statement about a remaining bank balance moves the statement into fraud territory. Check out *Maness v. Reese*. Because the Disciplinary Rules use the same terms, the statement would probably also run afoul of them, too.

Tip Your Hand?

The typical lawsuit has warts. They're the facts that hurt you, and you'd rather the other side never know. Negotiations sometimes happen while the other side is still in the dark. No lawyer wants to voluntarily cough up that bad fact.

Although counsel must normally keep bad facts close to her chest, disclosure might be required. Think crime-fraud exception to confidentiality. A lawyer must disclose a "material fact" only when "necessary to avoid" a crime or fraud. Because a client typically has no duty to disclose, neither does the lawyer.

Fiduciary duties, however, can force disclosure. When one party at the bargaining table has an active fiduciary duty to another party, full and fair disclosure forces the fiduciary's hand. The fiduciary must cough it up. Keep an eye out for fiduciary duties in partnership disputes and in disputes with executors.

Reality Check

Disciplinary Rules aside, I often need a reality check. Just because I can do something, does not mean I should. Back when I was an advocate, a pair of questions helped guide me in mediation. One was: "If opposing counsel did ____ to me, how would I react?" Another was: "If my client watches me do ____ to my opponent, what happens when I need my client to trust me?" Both questions put the ethical spotlight where it ought to be—on the other folks at the bargaining table. And practically, nothing gets done without them.

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