NEGOTIATING SETTLEMENTS:

Three Steps to Build Stronger Client Relationships and Get Better Results

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I have been a litigator for nearly twenty years. Most litigators I know do not like settlement negotiations. They do not like the ambiguity. They do not want to look "weak" to their clients. They would rather use their litigator's skills to defeat the other side. And of course they were hired by the client—and are paid—to do just that.

This paper will draw upon my focus over the past ten years on how to integrate the litigators' skills into developing a comprehensive litigation and negotiation strategy that always puts the client's interests at the heart of decision-making. Does this mean I am afraid of litigating or unable to litigate? Not at all. It means I advise my clients to look at litigation as part of a decision-making process that considers negotiation and litigation strategy together.

Do clients—even hardnosed clients—resist this approach? No, they do not. They embrace it. Why? Because as you will see below, the three-step process I use to prepare for and implement the optimal negotiation/litigation strategy puts the interests of the client first and keeps it there at all times.

Did I just say something potentially controversial and perhaps even revolutionary? You bet. Let's see why.

Principal-Agent Divergence

What is one of the greatest impediments to settlement negotiations? It is the dreaded *principal-agent* divergence of interests. In plain words, we are talking about when the client suspects you want the litigation to continue so you can obtain billable hours even though the client is hemorrhaging cash and wants the litigation to end. And make no mistake, the *perception* of principal-agent divergence can be as damaging to your relationship with the client as the reality.

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Let's be concrete about this. I was recently at a client meeting where my role was to provide negotiation and overall strategy advice in a major piece of litigation. One faction within the client organization complained bitterly (whenever outside litigation counsel was not present) that the outside lawyer provided litigation advice "tainted" by the self-interest of maintaining billable hours from ongoing litigation. Now, I do not actually believe outside counsel was doing this. But some senior executives within the client organization believed this because the lawyer's interests did in fact diverge on this litigation with respect to his firm's billings.

My point here is not to slam lawyers or rub our faces in an insoluble problem. It is to suggest that there are two ways to address the problem. One way is of course to try to structure fee arrangements in a manner that aligns as closely as possible the interests of principal (client) and agent (attorney) so as to reduce, if not eliminate altogether, the principal-agent divergence of interests. Examples of such arrangements might be 1) a contingent fee agreement, 2) a modified contingent fee agreement, or 3) a flat fee. Even though creatively designed fee arrangements can often reduce tension, however, they cannot generally eliminate altogether the inherent principal-agent divergence associated with the payment of fees for legal services.

So what is the second way to address this problem? Now we are getting to the heart of this paper. (The two ways are not mutually exclusive.) The second way is to use a process-driven approach to providing legal (and strategy) advice that transparently places the client's interests at the heart of the process. The approach is often called "interest-based" negotiation.

Now before you object that this is what you already do, I will agree with you that this is what good lawyers do. I think you will find that what I propose, however, is in fact a departure from even the customary practice of good lawyers. The approach I suggest below is the use of a rigorous *process* with specific *deliverables* that ensures the client's interests are always and transparently driving decision-making with respect to a given dispute.

The Three-Step Process

All negotiations, including settlement negotiations, can be broken down into the following three-step process:

THREE-STEP NEGOTIATION PROCESS

Step One: Who is involved and what do they need?

Step Two: What can we do to meet the needs of others and get what we want?

Step Three: What are the consequences if we do not come to agreement?

The three-step process helps you and your client develop an integrated litigation/negotiation strategy. More important, the process ensures that you are focused at all times on finding ways—either through a negotiated agreement or by pursuing litigation—to satisfy your client's critical interests. A closer examination of each step of the process will illustrate how the process can be used to build stronger client relationships and why it generates superior results.

Step One: Who is involved and what do they need?

This step is the foundation of effective negotiating and decision-making. In this first step, you and your client will develop the basic information you need to formulate a sound strategy for handling litigation and, if appropriate, negotiating resolution of the dispute.

The first thing you must do in Step One is figure out who is involved or affected by the situation. These are the ***stakeholders***. In identifying stakeholders, you should not limit yourself to the parties to litigation. For example, in a typical business dispute, there are generally many internal and external stakeholders, such as employees, Board members, customers and channel partners, who may not be parties to litigation but are nonetheless stakeholders whose interests should be considered.

Next, you must identify the topics or things those stakeholders care about. I call these the ***issues***. As with stakeholders, you should not limit yourself to the *legal* issues in a case. You should look at all the things the stakeholders you identified care about, including anything that may be affected by the dispute or its resolution. In a typical business dispute, non-legal issues may include things like profitability, relationships, reputation, market share, risk, etc.

Finally, you have to put yourself in each stakeholder's shoes to determine *on each issue* what that stakeholder <u>needs</u> (or wants). These are the ***interests*** that drive each stakeholder's decision-making and behavior. While it may sound difficult in the abstract to develop this information, particularly if the parties are in litigation and do not communicate such information freely, you may be surprised how easy it is to make accurate assumptions about each stakeholder's interests when you use a structured process and format for developing the relevant assumptions.

If possible, you should meet with the client's strategy team responsible for determining how to handle the dispute to develop this data. In a 2-4 hour session, you can build the Step One data into an Interest Chart (see the sample Interest Chart below) that can be used on an ongoing basis to manage and guide the development of an integrated litigation and negotiation strategy. It is important both for obtaining buy-in and for the unique perspectives they will bring to include business representatives (in addition to –in-house counsel) in the development of this data.

I have had numerous client meetings in which the executives and senior managers had very different ideas about how and whether to proceed with settlement negotiations. Step One of the three-step process provides a structured format for a healthy internal client debate about what interests should drive the organization's decision-making. This generally results in all internal players being on the same page about strategy—even if not all are equally happy about a given

strategy, they understand why it is necessary. In-house counsel at one large client said the CEO most appreciated how this process reduced the "back door" lobbying that had previously afflicted most important decisions.

As noted above, when you build this model, you ensure that the client's transparent interests drive all decision-making and thereby reduce any concerns about principal-agent divergence or irrational, imprudent decision-making. Once you have mapped the Step One information in an Interest Chart, you have a solid foundation for proceeding to Step Two of the three-step process, in which you will come up with solutions for satisfying the stakeholder interests you have identified in Step One.

Step Two: What can we do to meet the needs of others and get what we want?

Now that you know who the stakeholders are and what their interests are, it is time to come up with solutions. In Step Two, you want to be both creative and analytical. This means you should divide this step into two parts: a) brainstorming and b) evaluation.

Here is how it works. First, you go issue-by-issue and ask yourself for each stakeholder what actions you can think of that could potentially be done to satisfy the interest of that stakeholder on that issue. You want to brainstorm as many possible actions as you can without evaluating each action at this time. Some of the ideas will be good ideas; some ideas will not. Don't worry about whether they are good or bad – that comes later. If possible, try to get client representatives engaged in contributing their ideas. You can remind them that just because someone suggests an idea does not mean you or the client are agreeing to go ahead with the idea.

After you have exhausted the brainstorming process, you should evaluate the actions on your list. As noted above, some ideas will be good; others will not. At this stage, you can evaluate each action to determine whether it satisfies (or harms) each stakeholder's interests. Your purpose in evaluating the actions is to put together a "best case" package of actions that most effectively satisfies your client's interests and also satisfies, to the extent possible, the interests of others, such as other parties.

If you find that you do not have actions that satisfy the critical interests of stakeholders who are essential to getting a deal, you can do a "mini-brainstorm" and try to come up with more actions. In this way, the process is both iterative and potentially collaborative as you seek input from others on ideas that might satisfy identified stakeholder interests.

You will often find that the process of brainstorming gains a momentum of its own and encourages your client to be more flexible and less positional and potentially intransigent in negotiations. I often remind my clients of a simple, unilateral ground rule for negotiations that encourages flexibility by reducing the "stakes" of any possible idea. The ground rule is "There is no agreement on anything until we have agreement on everything." In other words, we are always negotiating a package.

Step Three: What are the consequences if we do not come to agreement?

Step Three is about risk analysis, which often includes the reality or possibility of litigation. But this step is also about more than litigation. Step Three involves a broader risk analysis than most litigators usually perform, in my experience. I call Step Three "fighting alternatives" to remind myself and my clients that there are often unpleasant and potentially damaging consequences from not coming to agreement. This is not to suggest that litigation should be avoided, but that we should pursue or continue it with open eyes.

In the Step Three analysis, you try to figure out what all stakeholders may do if they are unable to come to agreement. Generally, stakeholders will do two things when they pursue their "fighting alternatives": a) they attempt to satisfy their own interests unilaterally in the absence of an agreement; and b) they attempt to harm the interests of others—they may do so out of anger and retribution, or in order to "soften up" their perceived adversaries.

Of course, Step Three can help you plan for conflict and litigation (in case you cannot get to agreement). But it can also help you *avoid* conflict and even achieve better settlements by using your "fighting alternatives" analysis to educate yourself and your negotiation counterparts, including other parties, about the costs of conflict. This analysis can help people be more realistic—and more reasonable—in considering a possible negotiated agreement. Unfortunately, I have seen that when lawyers do not advise their clients effectively about the impact of conflict, the clients may come to perceive their lawyers and/or the legal process as deeply flawed. Step Three of the three-step process remedies this defect by giving the client a realistic assessment of what to expect from litigation and conflict.

Implementing the Optimal Strategy

The beauty of using the three-step process is it provides a unitary road map for both the litigation and negotiations. Moreover, the road map you develop has full client buy-in because it was developed with the client's input and is based on a rigorous identification of the client's interests. Thus, even when things get difficult, such as because of adverse rulings, the client understands what must be done in order to pursue the optimal strategy for satisfying its interests. This reduces the internal finger pointing that can damage relationships and undermine our ability to be effective advocates on behalf of the client. Below are some things to think about when you are implementing the three-step process.

- **Isn't this the role of in-house counsel?**

The short answer is yes, it is. The longer answer is the role of in-house counsel involves managing numerous relationships, including relationships with senior executives, management team members, Board members and outside counsel. Depending on the quality of those relationships (often strained by high stakes litigation), you may find either that 1) the three-step process further strengthens the ability of in-house counsel to manage the aforementioned relationships and/or 2) the use of the three-step process (and associated deliverables) by an outside strategy advisor strengthens the perceived value to the organization brought by in-house counsel.

Simply put, we are talking here about transforming the relationship of in-house counsel with the business leaders from legal "roadblock" to trusted business advisor and partner. Now I

am not suggesting that effective in-house counsel cannot do this without the three-step process and deliverables; of course they can and do. But I am saying it can be done faster and more durably with the use of a rigorous, disciplined process that can in fact be adopted by the entire organization (with sponsorship from the legal department) as a core business process for working through challenging decisions and relationships. One prominent General Counsel in a major corporation refers to the three-step process as "quality control for decision-making."

- **Mediators: To use or not to use them (and what to look for if you do)**

Given the requirements of alternative dispute resolution, I am often confronted in my practice with the need to select a mediator at some point in the litigation process. This has proved more often than not to be a frustrating exercise. First, I must agree with the other side on a mediator. Then we go through a "song and dance" about how the mediation should be conducted—or worse yet, we just show up and do what the mediator says (especially if the mediator is a current or former judge). Even when the mediation results in a settlement, in my experience the mediator has rarely played a constructive role in either enhancing the quality of the settlement outcome or improving the relationships (if applicable) among the parties.

So what does this tell me about mediators and mediation? First, that most lawyers do an ineffective job (perhaps because of the aforementioned principal-agent divergence?) of preparing their clients for settlement negotiations. How can I conclude this? Because even with ineffective mediators, the mediation *process* generally facilitates the kind of client thinking that moves parties toward resolution. As noted above, our three-step process of course already pushes this type of thinking as part of development of an integrated negotiation/litigation strategy.

Second, I have come to believe that the *type* of mediator matters a lot. You should look for mediators who use the interest-based approach to mediation, rather than the positional (head-banging, shuttle diplomacy) approach. In my experience, it is far more important to find a mediator who has experience with the interest-based approach than to get hung up looking for a mediator who has subject matter expertise in a given area of law or who was a judge previously.

Finally, I believe you should not rely on the mediator to get your case settled. You will not look "weak" or ineffective to the client if you leverage the mediation process as an opportunity to help your client satisfy its critical interests through a negotiated settlement. Nor should you rely on a mediator to do the work for you. Prepare well using the three-step process and do not be shy about removing or "sidelining" the mediator if he or she proves ineffective. I have done it many times, and each time the result has been a faster, more durable and optimal settlement for my client. (On the other hand, an effective mediator can be an invaluable partner in advancing settlement negotiations, especially when one side is particularly intransigent either because it is receiving bad advice from counsel or because the principals are too entrenched in positions driven by the conflict.)

Conclusion

If you use a rigorous, disciplined process to develop an integrated negotiation and litigation strategy that focuses on finding ways to satisfy the client's interests, you will accomplish two critical objectives. First, you will deliver optimal results for your clients.

Second, you will build sustainable client relationships. I have used the three-step process with dozens of blue chip clients and have found that they embrace the methodology and find differentiated value in my services as a result. I look forward to hearing your thoughts and experiences as you use the interest-based approach to negotiate settlements. You can reach me at jshulman@alignor.com.

Additional Resources

You can find additional information about how to implement an interest-based approach to negotiations from a number of sources. A good place to start is the seminal book, "Getting to Yes," by Roger Fisher and William Ury. Another good book written specifically for lawyers is "Beyond Winning," by Robert Mnookin.

The Center for Negotiation and Justice at William Mitchell College of Law, of which I am a founding director, is a good academic resource: www.wmitchell.edu/**negotiation-justice.** Also, the Alignor company website has a lot of practical information about how to implement the interest-based approach to negotiation: www.alignor.com.

Sample Interest Chart (Step One of the Three-Step Process):

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SAMPLE INTEREST CHART

	Plaintiff (Client)	Defendant (Distributor)	Key Customers
Customer Data	**PROTECT**	**PROTECT**	**PROTECT**
Client R/ship w Defendant	**IMPROVE**	**IMPROVE**	**IMPROVE**
Cost of Litigation	**MINIMIZE**	**MINIMIZE**	minimize
Client R/ship w Customers	**MAINTAIN**	**DEPENDS**	**MAINTAIN**
Client Profitability	**MAXIMIZE**	***SHIFT TO DEFENDANT***	**REASONABLE**
Defendant Profitability	***SHIFT TO PLAINTIFF***	**MAXIMIZE**	**REASONABLE**
Exclusivity	**LEVERAGE**	**MAINTAIN**	***END***
Compensation for Client	**MAXIMIZE**	***MINIMIZE***	NA
Timing of Resolution	**ASAP**	***DELAY***	**ASAP**

Color	**Font Style**	**R/ship to Anchor**
Blue	**Bold**	**Same Interest**
Orange	Italic	Opposite Interest
Purple	Regular	Different Interest

Font Effect	**Importance**
CAPS+underline	Critical
CAPS only	Important
no font effect	Unimportant

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President and CEO

John G. Shulman is an experienced attorney, negotiator, entrepreneur and public speaker skilled in the art and science of interest-based negotiation. With an A.B. in English from Harvard College and a J.D. from Harvard Law School, Mr. Shulman has trained with leaders in the negotiation field. He has appeared before the Supreme Court of the United States, federal district courts and the state courts of Minnesota, and his law practice has focused on complex business disputes, civil rights cases, and public policy matters.

In 1999, Mr. Shulman and colleagues with negotiation expertise founded negotiation training and consulting firm Alignor to assist organizations in implementing an interest-based approach to decision-making and negotiation. Alignor's approach is currently used by several large organizations, including 3M, Thomson Reuters, Xcel Energy, Northwest Airlines, the CCIM Institute, and Imation Corp., which awarded Mr. Shulman its prestigious "Chairman's Business Turning Point Award" in 2002.

Mr. Shulman has employed advanced interest-based strategies in negotiation, litigation and conflict resolution with a wide variety of clients in addition to those mentioned above, including AstraZeneca, Blue Cross Blue Shield, HealthPartners, International Dairy Queen, PanAmSat, the Petters Group, Sandoz Pharmaceuticals, Schwan's Food Company, US Bank, the Government of India and the NAACP**.**

Mr. Shulman has provided negotiation and conflict resolution training to United Nations personnel at the UN International Criminal Tribunal for Rwanda, and has provided negotiation training to the United States Department of State. Mr. Shulman has also worked on a project in Israel with Professor Robert Mnookin, Director of the Program on Negotiation at Harvard Law School. The project involved a dialogue among Israeli leaders to address internal conflict over withdrawal from Gaza and the West Bank.

Mr. Shulman has conducted seminars and training workshops for thousands of attorneys, business executives and managers, judges, government officials and community leaders in interest-based approaches to negotiation, sales, supply chain management, leadership development, and conflict resolution.

Along with one of the co-founders of Alignor, Mr. Shulman wrote and directed the critically acclaimed human rights movie 'JUSTICE.'