The 10 Essential Steps to Legal Negotiation

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Negotiation Mastery for the Legal Professional

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Why Prepare?

Because if you don't, you are likely to make serious and costly errors in your mediation. Research shows that in 15,000 cases in New York and California, plaintiffs' lawyers made the wrong settlement decision over 50% of the time with an average client loss of $75,000. Defense lawyers were wrong 30% of the time, and their error cost their clients $1.4 million on average. Thorough preparation for negotiation in mediation is therefore essential.

Unfortunately, the informality of mediation and its non-binding nature lure lawyers into a false sense of security. "Why prepare when, if we don't get what we want, we can try the case?" is the common ex-

cuse. Time pressures, client pressures, and just plain laziness accounts for most ill-preparedness in mediation.

This gives you a competitive advantage. If you are willing to prepare each of your cases following these 10 steps, you will easily outmaneuver your opposition. You may not always get the settlement you want, but you will not leave money on the table or pay more than you have to. Your confidence will go up and your anxiety will go down.

Preparing a case for negotiation is like anything else in the law. It is mostly common sense. Once you have prepared a few cases with these 10 steps, you will find that a complete preparation in ordinary cases will take a few hours at most. Larger, more complex, and high value cases will, of course, require more time. Even a small slip and fall or rear-end collision can benefit from good preparation. These smaller cases need to be settled, so why not put some effort into maximizing their settlement potential?

Understand Your Client's Real Needs

The first step in negotiation preparation is understanding your client's real needs. Because the law of Remedies reduces injuries to dollars, lawyers tend to forget that money is only a symbolic replacement for much of what has been lost. Cases fail to settle when they should because the lawyers do not always understand their client's underlying needs.

Understanding your clients needs begins in your first interview. A good question to ask is, "If you were to win your claim, what would be all of the good things that would happen to you in your life?" You want the client to not focus on money, but the focus on what the money might represent. Often, claims are not about money, but about a sense of justice and righting wrongs. Whether suing or being sued, most clients feel victimized. Your task is to find out what the client is truly seeking.

Knowing that the clients interests will affect how you go about

negotiating the case for settlement.

From a defense perspective, the client's interest is usually about minimizing costs and risks. However, lawyers are often surprised about deeper needs a defendant might have. For example, a company sued for wrongful termination might be in a major refinancing negotiation. It needs the case settled quickly so that the liability will not affect the refinancing. Knowing the larger picture of your client will help you craft an effective negotiation strategy.

Prepare a Thorough Damages Analysis

You would be surprised at how many lawyers come into negotiation without understanding the law of Remedies or the nature and extent of the damages claim in the case. Failing to do a thorough damage analysis leads to terrible decision-making in negotiation.

A thorough damage analysis includes a review of the law of Remedies as it pertains to the facts of the case. The basic remedial rule is that, assuming liability, the plaintiff is to be restored to his or her rightful position at the least cost. Your damage analysis has to define the rightful position and must take into account the conservative nature of the law of remedies. On the defense side, a thorough damage analysis is just as important . Assessing risks is difficult if the potential loss is not well-understood.

Too often, lawyers rely on expert witnesses for their damage analysis. Since negotiation through mediation usually occurs before

experts are retained, lawyers skip the time and expense of a damage analysis. The well-prepared negotiator has reviewed the law, quantified the damages, and has the evidence to support them. The expert's job is to render that information into admissible evidence.

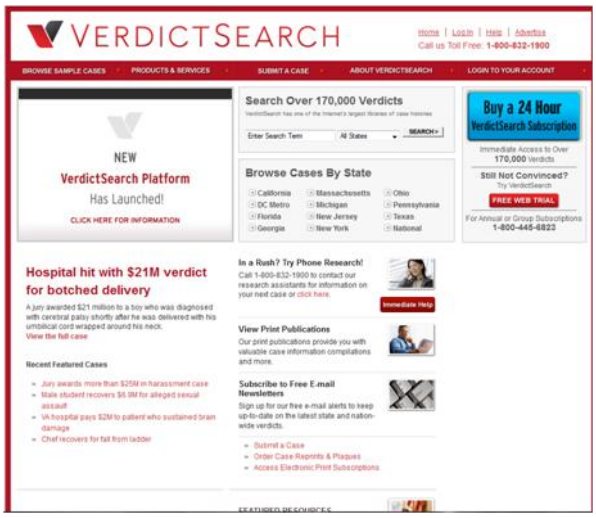
A memorandum on damages should be prepared as soon as practicable in every case. It should include a summary of the facts, a review of the law of Remedies, and categorize the damages from objective to subjective. Objective damages include economic losses that are established by loss of value, medical expenses, and other clear monetary elements. Subjective damages range from opinions of value in appraisals to general damage elements such as pain and suffering. You must clearly distinguish the objective damages from the subjective damages.

Most of the negotiation will be around subjective damages because they are much harder to predict. Don't forget to consider remedial defenses such as the failure to mitigate damages.

Research
Verdict Search

One of the great under-utilized tools is Verdict Search. You can research the "market value" of your case based on similar facts, demographics, and claim. The other side will not be impressed, but you will have another independent source of information that will help you frame the value of the case for settlement purposes.

Verdict Search is an online fee-based service. It collects information about reported settlements and verdicts, puts that information into a searchable database, and makes the information available online. The settlements are skewed towards the plaintiff because plaintiffs' lawyers tend to report big settlements for reputational purposes. However, the verdicts are reliable as they come from official court records.



Using Verdict Search is simple and intuitive. You can perform a range of searches varying your criteria from narrow to broad.

Big data provides powerful analytical tools in preparing for nego-

tiation. By understanding what courts and juries are doing with similar cases, you can maintain a reality check on your client's aspirations.

For the purposes of negotiation preparation, you want to find similar cases. Since each case is unique, similar cases suggest analogous results. Thus, Verdict Search does not provide you with an accurate prediction of the outcome of your case. It does, however, provide with a broad sense of how similar cases have been valued by juries.

The link is http://verdictsearch.com

We have no business or financial relationship with Verdict Search.

Do a Non-Monetary Costs Assessment

The Non-Monetary Cost Assessment was developed by Noll Associates to help lawyers educate their clients about the hidden, non-monetary costs associated with litigation. It is especially effective in cases where there are strong emotions on both sides. It helps clients put dollar values on a variety of burdens imposed by a lawsuit. In addition, the Non-Monetary Cost Assessment helps you and your client avoid errors resulting from decisional distortions caused by cognitive biases.

Examples of the types of burdens revolve around two questions:

How much would someone have to pay you to take on the following costs of your lawsuit?

And

How much would you pay to achieve the following goals?

Clients are asked to put a dollar value on a number of variables

and rank the variables 1-10 in importance to them.

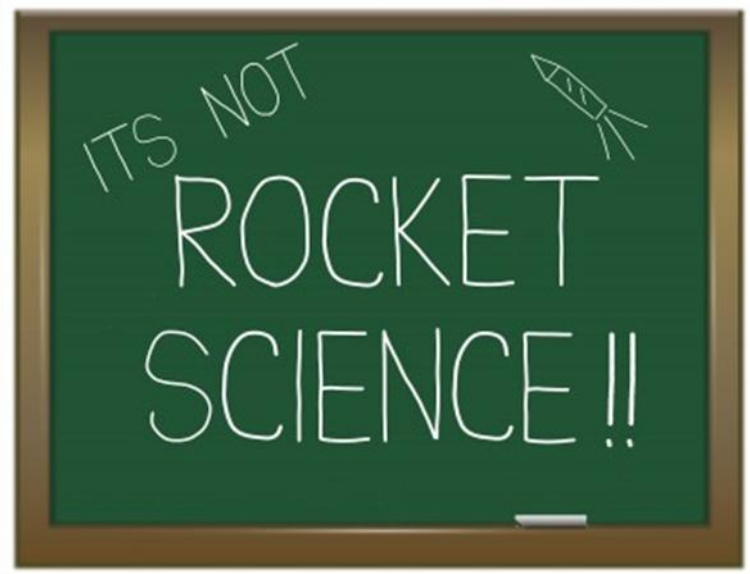
An abbreviated form of the Non-Monetary Cost Assessment looks like this:

Risks How much would someone have to pay you to take on the following costs of your lawsuit?	$	**Goals** How much would you pay to achieve the following goals?	$	Rank in Impor-tance, 0= not impor-tant 10= vitally important
Diversion from important work	$	Focus on important tasks **NOW**	$	
Pay significant legal fees and costs	$	Use the money spent on legal fees else-where.	$	
Continued stress and worry	$	Good health, stress-free	$	
Bitterness until death	$	"A good relationship that went off the tracks."	$	
Have the court decide that you are wrong and the other	$	Craft a solution that works for you	$	
Lose control to the lawyers and court deadlines	$	Gain control of your life	$	

You will learn more about this powerful tool in the Negotiation Mastery for the Legal Professional online course.

Do a Litigation Budget Analysis

Doesn't matter whether you are on a contingency, hourly, blended, or flat fee rate. If you don't have an accurate estimate of the cost of the lawsuit, you are bargaining blind, deaf, and dumb. Many lawyers make excuses for not doing a litigation budget, claiming there are too many unknowns. Those lawyers are lazy and ignorant. Take advantage of them!



A litigation budget analysis can be simple or complex, depending on your needs. Every lawsuit has 14 steps. Each step has a series of tasks. Each task takes time and has an easily defined cost associated with it. When you put it all out in an Excel spreadsheet, you get a budget.

A litigation budget analysis takes less than an hour to prepare once you have the spreadsheet set up correctly. It has a number of im-

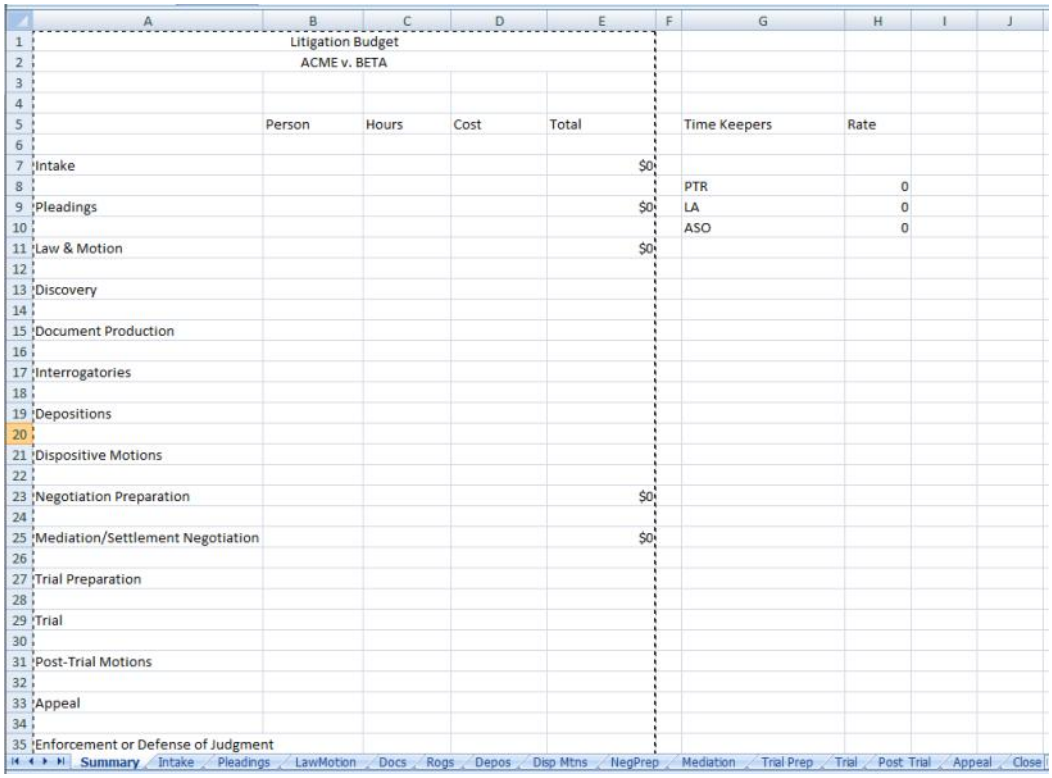
portant functions:

- It tells you whether you can litigate the case profitably or not on a contingency fee.
- It is a reality check for hourly cases.
- It tells the client early on what the real, hard dollar cost will be.
- It can be a tremendous motivator for making the decision to settle.

You start with your best estimates as to time and costs. That is your baseline budget. Then do another budget assuming the worst. Once you have the budgets prepared, you will want to go over them with your client. Even in contingency cases, if your client knows what is really going into his or her case, the client is likely to be appreciative. In all cases, you are reducing billing and payment problems dramatically. Of course, as the case progresses, you can see how the time and costs are comparing to the budget. Again, when you send out that monthly invoice, you can report being on or off budget and thereby eliminate unpleasant surprises. In settlement negotiations, the budget provides

a data point to aid in decision making. If you and your client know the true cost of litigation, a reasoned choice can be made to accept a deal or take the risk of trial with the associated costs. You gain effective client control too.

Negotiation Mastery for the Legal Pro includes a detailed 15 page Excel Litigation Budget Analysis spreadsheet with a complete lecture on how to use it. The summary page of the spreadsheet looks like this:



	A	B	C	D	E	F	G	H	I	J
1		Litigation Budget								
2		ACME v. BETA								
3										
4										
5		Person	Hours	Cost	Total		Time Keepers	Rate		
6										
7	Intake				$0					
8							PTR	0		
9	Pleadings				$0		LA	0		
10							ASO	0		
11	Law & Motion				$0					
12										
13	Discovery									
14										
15	Document Production									
16										
17	Interrogatories									
18										
19	Depositions									
20										
21	Dispositive Motions									
22										
23	Negotiation Preparation				$0					
24										
25	Mediation/Settlement Negotiation				$0					
26										
27	Trial Preparation									
28										
29	Trial									
30										
31	Post-Trial Motions									
32										
33	Appeal									
34										
35	Enforcement or Defense of Judgment									

Summary | Intake | Pleadings | LawMotion | Docs | Rogs | Depos | Disp Mtns | NegPrep | Mediation | Trial Prep | Trial | Post Trial | Appeal | Close

This is what the pleading budget looks like:

	A	B	C	D	E	F	G	H	I	J	K
1			Litigation Budget								
2			ACME v. BETA								
3											
4			Pleadings								
5											
6	Task	Person	Hours	Cost	Total						
7											
8	Prepare Complaint										
9		0	1		$0						
10		0	4		$0						
11											
12	Prepare Answer										
13		0			$0						
14		0			$0						
15											
16	Prepare Cross-Complaint										
17		0			$0						
18		0			$0						
19											
20	File										
21		0	3	0	$0						
22	Serve										
23		0	2	0	$0						
24											
25	File POS										
26		0	1		$0						
27											
28	Total				$0						
29											
30											
31											
32											
33											
34											
35											

Summary | Intake | Pleadings | LawMotion | Docs | Rogs | Depos | Disp Mtns | NegPrep | Mediation | Trial Prep | Trial | Post Trial | Appeal | Close

By assigning hourly rates to a partner, legal assistant, and associate, you can quickly plug in the estimated hours for each task. The spreadsheet will automatically calculate the fee and total it.

If you are interested in obtaining the spreadsheet and the lecture on how to use it, go to Litigation Budget Analysis. You may purchase this lecture separately from the full course.

Do an Expected Value Analysis

Trial outcomes are highly variable and unpredictable. One of the reasons that people negotiate settlements is to manage the risk of loss inherent in the trial process. One of the fundamental roles you play in negotiation is helping your client assess the probabilities of various trial outcomes.

So imagine this problem:

There is a 15% chance of a defense verdict.
There is a 50% chance of a $25 verdict.
There is a 20% chance of a $50 verdict.
There is a 10% chance of a $75 verdict.
There is a 5% chance of $100 verdict.

What should the case settle for?

This calls for the determination of the *expected value* of the case.

The expected value of the case is simply what we would expect to happen if the case were tried many times. Over many iterations we would begin to see an average result. Just like flipping a coin hundreds of times will lead to a 50-50 chance of heads, trying a case hundreds of times will give us a probability and an outcome.

We can compute the expected value of the case very simply. It is nothing more than the product of the probability of the first outcome multiplied by the value of the first outcome added to the probability of the second outcome multiplied by the value of the second come and so forth for all the outcomes.

So in the problem above, the expected value calculation would be as follows.

Probability	Outcome	EV
15%	$0	0
50%	$25	$12.50
20%	$50	$10.00
10%	$75	$7.50
5%	$100	$5.00
100%		**$35.00**

The expected value is $35.

The expected value is not necessarily the settlement value of the case. It is derived from a best guess at probabilities and outcomes.

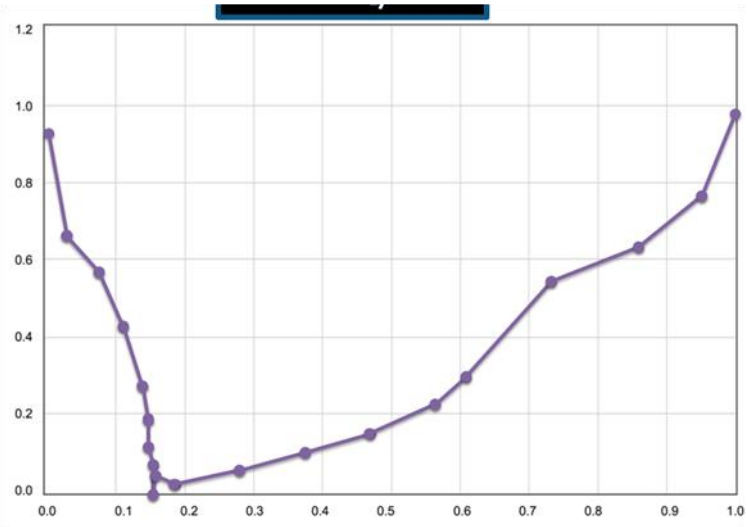
Like the litigation budget analysis, working with expected values quantitatively allows you to model various scenarios to see how the case outcomes change as probabilities and individual outcomes change.

This tool is useful for helping clients understand litigation risk. If a client asks, “What’s the likelihood of winning?” you can produce an expected value analysis to show that various outcomes have associated probabilities.

Likewise, this analysis is useful in preparing for negotiation. Prepare an EVA based on your sense of the case. Then prepare an EVA based on the other side’s sense of the case. The spread between the two EVAs can provide useful strategic guidance during your negotiations.

Do Concession Pattern Modeling

A concession strategy is nothing more than a blueprint of how you are going to move step-by-step from your opening demand or offer to your aspiration level and then to your reservation level. Many lawyers believe that a concession strategy is a waste of time because the behavior of the other side cannot be predicted. This is a myth.



As Don Philbin's research has established, lawyer concession decisions are very predictable. In fact, lawyers are so predictable in their concessions that a good mediator can tell you when and where the case is going to settle usually by the third round of concessions.

Now, we have software that can predict the settlement number and when it will be reached in the negotiation. Therefore, you can prepare a very realistic concession scenario and predict how the other side is going to respond to each of your moves with significant accu-

racy.

More importantly, if the other side deviates from your prediction, you will have anticipated that deviation and understood the reasons for the deviation. In all cases, you are completely prepared for whatever the other side throws at you. Instead of wasting cognitive resources on trying to decide what to do next, you can spend your precious mental energy managing the auction rather than reacting to it.

There are four fundamental questions that you need to answer in developing a concession strategy:

Whether to concede?
When to concede?
What to concede?
And, how to concede?

The decision whether to make a concession or not is really the decision whether to enter and or continue the negotiation process. Timing the negotiation is important. If you attempt negotiation at the wrong time in the case, you will more likely reach impasse.

So how do you create a concession strategy? It is really quite easy. Take out a piece of paper, or open up a document or Excel document and set up some columns. In the left column, put in the header saying "We Offer" and in the right column put in the header "They Respond."Underneath your column, put in what you think would be a smart opening demand, if you are plaintiff. If you are defendant, you will not have anything in the first row, but you will anticipate what you think the plaintiff's opening demand will be. Put that in the "They Respond" column.

Think about concession patterns, your aspiration and reservation levels, and plot out a scenario of concessions back and forth and see what happens. You can now go back and look at this first draft scenario and think about things like:

- What information am I conveying here?
- Is this a good response to what the other side is doing?
- Should I change a concession here to see if I can induce a change in behavior on the other side?
- What happens if the other side does not respond in the way that I predicted at this point?

- What sort of factors will make this whole concession plan completely wrong?

By engaging in this sort of analytical thinking, you can anticipate a lot of what is going to happen in the negotiation.

Perform an Intangibles Assessment

A significant amount of social psychological research has established that jurors form opinions about the case very early in the proceedings. Jury selection and opening statements are the two most important parts of the trial. If you have not convinced the jury by the close of opening statements of the righteousness of your cause, you will probably lose. For the rest of the trial, each juror is going to use the confirmation bias to seek facts that support his or her initial belief. Therefore, you have to assess what kind of story you can tell, and how that story compares to the story that the other side is likely to tell.

You also have to assess how likable your client is and how likable the other guy is. You have to be brutally honest in this process. You want to believe your client and think that he or she is going to be liked. However, any warts are going to be magnified intensely in the court-

room.

You also have to assess your experience and opposing counsel's experience. Do not be surprised if you are up against a more senior lawyer who has had little trial experience. Experience does count, however. So if your opponent has a lot more trial experience than you do, you have to take that into account. That does not mean that you will lose just because you lack experience. You simply have to factor in that the more experienced trial lawyer is less likely to make mistakes that you are.

You can find out a lot about opposing counsel on the Internet. It is amazing what people disclose about themselves in social media, on blogs, in podcast, and videos. It is much more likely that you will get this kind of information about younger lawyers.

Another factor concerns the type of typical juror found in your jurisdiction. You need to think about your best jury and your worst jury. Some cases lend themselves well to jury trials, while other cases would put a jury to sleep. Think about the kinds of people that live in your community, their political beliefs, their ethnicity, their religious

beliefs, their interests, and their hobbies.

You also have to consider who the trial judge might be. If you have a judge assigned for all purposes, as is usually the case in federal court and in some state courts, you will have a pretty good idea of what you are facing. Make a few phone calls to colleagues about their experiences with your judge and learn as much as you can about his or her background, beliefs, biases, and attitudes. Judges are human just like everyone else and are not immune from cognitive biases and decisional distortions. The more you can understand how your judge processes information, the better you can assess what might happen in that court room.

All of these intangibles need to be written out as part of your negotiation preparation.

Talk It Over with Your Client

Client expectations defy logic, and your job is to manage those expectations back to reality from day one. The best way to do this is to talk to your client a lot. Many clients complain that they never hear from their lawyers. Many lawyers complain that clients waste a lot of their time. Keeping open communications, status updates, and progress reviews flowing toward your client is just part of the business of the practice of law.

As you work with your client, help separate legally viable claims from morality, injustice, disrespect, and other identity injuries. You will have to explain the rudiments of the law of Remedies to your client multiple times. Many clients have a naïve belief that because they have been injured, they are entitled to great compensation. This is simply wrong, and you have to spend time reeducating your clients on the reality of life. They will not like to hear it, but

that is your job. In these conversations, it is a good idea to go through the risk analysis worksheet.

If you have done the litigation budget, you can use that and the risk analysis worksheet to help your client really grasp the nature of litigation and what he or she can reasonably expect in settlement. Likewise, discussing the litigation budget early on, especially if this is an hourly-based the agreement, is important. Clients have a right to know what this litigation adventure is going to cost, even if it is an estimate. You will save yourself a lot of grief down the road by preparing clients for the huge expense of a full-blown lawsuit.

As you prepare your client for negotiation, be sure to set clear boundaries of responsibility. Who needs to be in the decisional loop? In many cases, the settlement decision affects more than just the direct client. Make sure that you know who has to participate in the decision early on. Have all decision makers and influencers been thoroughly informed about the case, the negotiation, and a range of reasonable outcomes?

Spouses and business partners can easily be forgotten about. It is your job to make sure that they are fully informed, consistent with protecting attorney-client privilege. At the very least, you must inform your client to keep influencers up-to-date on case developments and the negotiation strategy. Again, a letter outlining all of this can be an important protection for you.

Who will be present during the negotiation? Generally speaking, you want all of the decision-makers at the negotiation if the negotiation is in the form of mediation or some other group conference. Sometimes, for strategic or tactical reasons, certain decision-makers might not be physically present. They should be available close by or available by telephone or Skype for consultation as a negotiation unfolds.

Who will have to be present to make a settlement agreement binding? Settlement agreements made during mediation are not binding unless all of the parties have signed the settlement agreement. Therefore, you must take great care to make sure that you know who will have to be present to bind everyone to a deal.

What will be the role of the client during the negotiation? This one is overlooked all the time. Most of the time, you want your client to be an active participant in the negotiation. Sometimes your client will take the lead; sometimes you will take the lead. This should be discussed ahead of time so that there is no confusion over roles during negotiations.

Another related problem has to do with personal accountability. Very few people have the courage to take personal responsibility for their actions. Many times, people will come to lawyers, hoping to shift responsibility for their actions away from themselves. In negotiation, clients are often confronted with the need to take personal responsibility for their actions for the first time. This can be a difficult pill to swallow. A conversation about personal accountability well before negotiation begins is therefore a good idea.

In short, your negotiation preparation must keep your client in the loop early and often.

Prepare a Written Negotiation Strategy

The final step in negotiation preparation is to put together the information in a way that is immediately usable. By writing out your negotiation strategy, you are committing to a rigorous intellectual process. As you review the information you have gathered, the "how" of the negotiation will become clear.

Your briefing book can be something as short as a 2-3 page memo or a binder with detailed analysis and appendices. The amount of time and effort you put into a written negotiation strategy will depend upon the nature and size of the case, the litigation case budget, and your time constraints. when you do this. The briefing book should contain all of the elements that we have discussed so far. In addition it should have a blank concession strategy plan that can be filled out by you and your the client as the negotiation unfolds.

Execute!

You have done your homework. Now it's time to execute. If you have followed the Ten Steps in Negotiation, you find that your mediations and negotiations will be smooth and anxiety-free. You will be control at all times. You will predict with confidence what the other side will do next. You will have a good sense of whether the case will

settle and for how much early on. You can afford to be patient because you have a game plan. Your client will be amazed at how well you have predicted the course of the negotiation. If you have to settle for something less (or pay more) than you expected, you will know why. You will balance the risks and costs of trial against settlement, grounded in real data, not guesswork. At the end of the day, you will out perform those who do not have the discipline to prepare for negotiation.

Final Words

Negotiation is all about preparation. The better prepared lawyer will generally outperform the unprepared lawyer by extracting a better settlement for his or her client. Clients recognize a well-prepared and executed negotiation and will reward you with business and reputation. Over the long term, being acknowledged as an excellent negotiator is just as important as being a good trial lawyer.

Please feel free to share this e-book with your colleagues and clients.

Douglas E. Noll, JD, MA has a variety of online course offerings. He conducts live negotiation trainings for private firms, bar associations, and corporate clients. He can be reached at doug@nollassociates.com.

For more information about online legal negotiation training, visit www.legalpronegotiator.com.