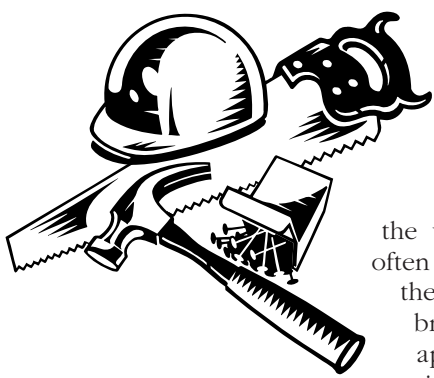
MICHAEL NEWMAN AND FAITH ISENHATH

Effective Negotiation Practices and Strategies

In practicing employment law, as with any litigation practice, matters frequently are resolved outside of court, and they should be. Courts and administrative agencies are extremely busy and the process is time-consuming and costly. From the company perspective, businesses face disruptions and high costs with litigation. From the employee's standpoint, the process may do little to actually vindicate his or her rights. Both the employer and employee can benefit from resolving their dispute outside of the litigation process. Therefore, it is imperative for attorneys representing both employees and employers to develop effective negotiation skills, practices, and tactics for resolving disputes. This column provides practice tips to negotiate resolutions effectively.

Recognizing Issues

Identifying issues and prioritizing them is essential in the negotiation process. Development of strategies and tactics often comes from discussing, defining, and analyzing the issues involved in a dispute. Identifying the issues also involves anticipating the other party's needs, demands, strengths and weaknesses, positions, and version of the facts in dispute. Attorneys must prioritize the issues in light of their clients' needs. Ranking the issues by importance is essential for reaching a mutually agreeable resolution. Failure to prioritize the issues usually forces the parties to resort to slow and expensive litigation. Recognizing the issues involved in a particular matter is essential for effective negotiations.



When an attorney mentions the word "settlement," clients will often refer to the "principles" of the matter or will be reluctant to broach the subject for fear of appearing weak to the opposing side. However, the reality for an employer is the expense of litigation, the business disruption it causes, and the risk of liability. The employee must also consider the slow process of litigation, the disruption to his or her life, and the risk of losing. It is important to recognize all such issues and to thoroughly assess them as an initial step in effective negotiation.

Evaluating Interests

One of the primary considerations in negotiating is the importance of acknowledging the needs and interests of both sides. Attorneys must define and analyze the issues by focusing on the parties' interests, not just the positions they take. Along with defining the needs and wants of both parties, attorneys should identify any areas of common interest between the parties. The first of these common interests should be the successful resolution of the issues that brought the parties to litigation in the first place. Another common interest may be the need to maintain and improve upon an existing business relationship or any other relationship that the parties may have had before the dispute. Whatever the common interests may be, the attorneys should highlight them throughout the negotiation process so that they can further the goal of reaching a mutually agreeable resolution.

The process of evaluating the interests of both parties typically leads to a more mutually agreeable resolution of the dispute. This analysis also helps to develop more creative resolutions as opposed to merely a monetary exchange between the parties. For example, in an employment dispute in which the employee's interest is to find a new job quickly, part of the settlement might be for the employer to provide the employee with a neutral letter of reference or to agree to pay for outplacement services or career training in order to help the employee find another job. In another example, part of the settlement might be for the employer to agree not to contest the employee's unemployment compensation claim. Establishing interests ultimately helps attorneys explore more creative resolutions and agreements that meet the needs of both parties.

Making Legitimate Offers

Beginning the negotiation process with objective criteria for evaluating the facts and the interests of both parties is a powerful tool for resolution of their dispute. Such criteria provide the necessary foundation for considering the reasonableness of making and considering offers and counteroffers and articulating the legitimate basis for the client's offer. In addition, having evaluated facts based on those objective criteria in advance will provide an advantage in the negotiation. Letting emotions and subjec-

tive criteria influence offers is counterproductive and diverts the focus away from the merits of the case and the actual issues. By having objective criteria from the beginning, the opposing party is likely to respond in a similar manner.

To that end, a significant factor in any negotiation is the assurance that each party is presenting a legitimate basis for an offer or counteroffer. If one party offers a figure that cannot be related to the facts at issue, this can frustrate the result. Such a figure may have no relation to any measurable loss or damage but is merely the result of a strong-armed or bullying approach or a subjective and emotional response to the negotiation. Parties who can view the strengths and weaknesses of the case objectively and articulate a legitimate basis for an offer or counteroffer have greater credibility in the negotiation and an enhanced bargaining position.

Offers that lack a legitimate basis are usually those that are not related to the facts of the dispute and are not defensible. Those types of offers appear to be attempts to overreach, and they can set a bad tone for the negotiation. Offers lacking legitimacy also show a lack of commitment to a mutually agreeable resolution and an unreasonable unwillingness to compromise. In considering an offer or counteroffer, it is essential to understand whether a legitimate figure has been offered. Some factors to consider include the following:

- Is the offer defensible?
- Does this offer take into account the positive facts for the client?
- Does this offer take into account the negative facts for the opposing party?
- What remedies did the party seek at the outset?
- How were the remedies quantified?
- Does the offer seek remedies that exceed the value of the harm claimed?

The focus should not just be on the figure that was offered but on the justification for that figure. The issues should be broken down into subissues with respect to the offer. By considering quantitative as well as qualitative factors in evaluating an offer, counsel are made to focus on the merits of the case rather than having success depend on the party's willingness to alter his or her position. Breaking down the issues into subissues also provides an opportunity to explore various workable steps leading to a resolution of the dispute. If the opposing party has solid justifications for some claims but not for others, focusing on the legitimacy of each claim may narrow the issues in dispute and encourage greater flexibility in the process. By closely examining and articulating the substance of each claim, the parties are more likely to think creatively and identify alternative ways to satisfy their objectives.

Considering Mediation

Attorneys should consider mediation to facilitate their negotiations. Mediation is a process whereby an independent third person assists the parties in reaching a mutually agreeable resolution. The mediator is not responsible for deciding the case, but for bringing the parties to a mutually agreeable solution. Mediation, which is often much less costly and less time-consuming than litigating employment disputes, can be pursued at numerous times throughout the litigation process. Administrative agencies, such as the Equal Employment Opportunity Commission, offer mediation before submitting the charge to an investigator, which is often an excellent opportunity to resolve matters early on in the dispute. Importantly, there is typically no cost for the mediator's services. In fact, an increasing number of federal and state courts now offer mediation services provided by volunteer attorneys or, in some instances, with mediators employed by the court. In addition, many trial judges have been trained in mediation techniques and are willing to conduct settlement conferences with the parties to help facilitate a resolution. Again, these services are typically offered at no cost to the litigants.

Along with a possible early resolution before costly litigation, mediation provides other benefits to the parties. Mediation often gives the employee and the company's decision-maker an opportunity to tell his or her side of the story to an independent person who is willing to listen. Moreover, mediation is an opportunity for "free" discovery, which helps both sides assess their cases better. Mediation also helps both parties assess their cases because of the opportunity to evaluate the potential primary witnesses for the matter. If the case does not result in a resolution, mediation still helps both parties understand the claims better for the litigation going forward. Aside from mediation, attorneys should also consider the benefits of having an in-person meeting with opposing counsel and their clients as a negotiation strategy to reach an early resolution of the dispute.

Conclusion

The reality of employment litigation is that cases are often settled outside of court. Therefore, attorneys must develop the most effective means to resolve their clients' disputes. By recognizing the issues, evaluating interests, and making legitimate offers when negotiating, counsel can help facilitate a more beneficial resolution in every case. **TFL**

Author's Note

This is our final Labor and Employment Law column for *The Federal Lawyer*. We have thoroughly enjoyed the opportunity to write columns for *TFL* these past four years and thank the journal, its staff,

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Honors and Awards

The American Bar Association's Commission on Racial and Ethnic Diversity in the Profession presented its 2011 Spirit of Excellence Award to **Judge Denny Chin** of the U.S. Court of Appeals for the Second Circuit on Feb. 12, 2011, in Atlanta during the 2011 ABA Midyear Meeting. Last year, President Barack Obama nominated Chin for a seat on the U.S. Second Circuit Court of Appeals, and the U.S. Senate confirmed Chin unanimously in April 2010. Currently, out of more than 175 active federal appellate court judges in this country, Chin is the only Asian Pacific American who is an active federal appellate court judge. Previously, he served as district judge of the Southern District of New York, a role to which he was appointed by President Bill Clinton. From 1982 to 1986, Chin was an assistant U.S. attorney in the Southern District of New York. … **Katherine "Kacy" Donlon** of Wiand Guerra King has been honored with the George C. Carr Memorial Award, presented to her by the Tampa Bay Chapter of the Federal Bar Association. This award, named for Chief Judge George Carr (1929–1990), is the chapter's highest award and recognizes excellence in federal practice and distinguished service to the Federal Bar Association. The award is presented to a lawyer who exemplifies Judge Carr's characteristics of common sense, integrity, and a lawyer who has made significant contributions to the FBA. Donlon served as the president of the Tampa Bay Chapter in 2005–2006 and represented the chapter in December 2005 in making a presentation at the U.S. Supreme Court Building to Chief Justice William Rehnquist's daughter to commemorate the chapter's admiration after his passing. Donlon has practiced in the area of commercial litigation for the past 15 years; her main concentration has been defending businesses and individuals involved in the securities and financial services industries. … **Richard J. Pocker**, the former chair of the FBA Federal Litigation Section, was selected for inclusion in *Best Lawyers in America*, in the category of Commercial Litigation for 2010 and 2011. He is the administrative partner for the Nevada office of New York-based Boies, Schiller & Flexner LLP. Pocker also passed the 2009 New York State Bar Examination and was admitted to practice in New York last summer. … *The American Lawyer* has named Sedgwick's Austin partner, **Laura Lee Prather,** one of the top "45 Under 45," an Am Law 200 listing of the best young female lawyers in the nation. Prather was recognized for her substantial career as a fierce advocate dedicated to preserving the First Amendment and defending media companies in cases involving privacy rights, alleged defamation, and trademark and copyright infringement. *The American Lawyer* reported that "in the 50-plus cases Prather has led, not only has she never lost one, but she has only lost a handful of summary judgment motions—all overturned on appeal." *The American Lawyer* reported that, in addition to Prather's impressive career in court, her biggest coup was in the Texas legislature, where she spearheaded a broad-based effort to pass a Texas shield law that protects journalists.

Practitioners' News

Two partners in Pietragallo Gordon Alfano Bosick & Raspanti LLP made presentations at the Pennsylvania Bar Institute's "A Day on Health Law" in Philadelphia on Oct. 19, 2010. **Kevin E. Raphael** presented a paper entitled "Crimes and Misdemeanors: The Intersection of Health Care Fraud and Rules of Professional Conduct," which included a discussion of the professional ethical dilemmas that arise for attorneys specializing in legal issues related to health care when they represent health care providers in investigations of fraud, abuse, and waste. **Marc S. Raspanti** co-presented a paper entitled "The 10 Things You Want to Know About Whistle-Blower Suits but Were Afraid to Ask," which provided a unique window into whistle-blower lawsuits as provided by attorneys who have represented whistle-blowers for more than two decades and have helped the government recover $1 billion in taxpayers' funds. **TFL**

FBA Hearsay is compiled by Sarah Perlman, FBA communications coordinator. Send your information to sperlman@fedbar.org or FBA Hearsay, Federal Bar Association, 1220 North Fillmore Street, Suite 444, Arlington, VA 22201.

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Managing Editor Stacy King, and Editor in Chief René Harrod for this wonderful opportunity. We are also indebted to attorney Shane Crase, who co-authored many of the early columns during our four-year tenure. This column is based on our own experience and practice in resolving many employment law cases and also on Michael Newman's experience as a private mediator.

Michael Newman is a partner in the Labor and Employment Department of the Cincinnati-based firm, Dinsmore & Shohl LLP, where he serves as chair of the Labor and Employment Appellate Practice Group. He is a member of the FBA's national Board of Directors as well as TFL*'s editorial board. Faith Isenhath is an associate in the Labor and Employment Department at the same firm and a member of FBA's Cincinnati-Northern Kentucky Chapter. They may be reached at michael.newman@dinslaw.com and faith.isenhath@dinslaw.com, respectively.*