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CLARKE & KANN YOUNG PROFESSIONALS BREAKFAST

Customs House
Thursday, 26 May 2005, 7.30am
"The Art of Negotiation"

Thank you ladies and gentlemen for including me this rather early morning: it is a welcome change from orange juice and bran, and it required absolutely no negotiation on the part of Clarke and Kann to lead me to accept the invitation.

Mind you, softening up your target is a well-established negotiating technique. Churchill used it at the Yalta conference just before the end of World War 2. The allies wanted Russia to declare war on Japan. The predatory Stalin wanted to get his hands on some of the German spoils of war. A quid pro quo was in prospect, but before the negotiating passed into top gear, Churchill took to commending Premier Stalin. Proposing a toast to the Russian, Churchill began: "To Premier Stalin, whose foreign policy manifest a desire for peace…"; then turning away from the interpreter and continuing in a low whisper, he said: "a piece of Poland, a piece of Hungary, a piece of Romania…" (http://www.anecdotage.com). Ignorant of the insult and preening himself with the compliment, Stalin gave the allies what they wanted.

Now I hope the fate of civilisation won't depend on your negotiating skills, but a lot often will. I suppose we all have the capacity to negotiate, and we exercise that capacity every day. Some of us are better at it than others. Where it is an important part of our daily professional work, it may help to think about technique. I hope I can offer some useful views, though don't forget my primary business is not negotiation, it's adjudication.

When I went to the Bar in 1971, the culture was strongly directed to court determination. Proposing a settlement was seen as a concession your client's case would fail. The contemporary approach is the reverse. Allowing for cost, inconvenience, acrimony, litigation risk and so on, not to explore prospects of settlement would verge on the negligent.

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I recall one particular instance of negotiation early in my career at the Bar. I was acting for the husband in a contested divorce: a colourful case involving custody of children, lots of property, lurid marital details, the lot. My opponent led this field at the Bar, and he was about forty years older than I was. His approach to negotiating was to summon me to his chambers. Also, unknown in advance to me, he had his instructing solicitor – also a very senior practitioner – waiting there for me. It smacked to me ever so slightly of intimidation. There was no settlement: not the way to negotiate! I can't recall the result in court – though I'm sure I wouldn't have tried to lose.

These days, negotiation is so common place that books have been written about it. They describe particular models, and are full of helpful tips for people like us. The literature talks of three types of negotiation, the competitive, the cooperative and the collaborative. I'll say a little about these models, but there is an important overarching point.

Obviously, you mould your approach to the particular situation. If you have an extremely strong claim, your negotiating stance would be more competitive than cooperative or collaborative. But if your entitlements are fuzzy, you would be more inclined to stroke feathers than ruffle them.

The other point I make at once is that success in negotiating can come at too high a price. I am referring to its impact on your reputation. How do you want to be seen: as a tough shonk, or as firm but sensible? I can assure you, if a professional person is caught out being deceitful, putting a knowingly false position, wilfully departing from the client's instructions, or pitching claims at an unreasonably hight level, the smelly stigma rarely abates.

Now lets go to those models. The competitive model is for tough operators with strong cases. This is more or less a take it or leave it approach with little scope for budging. Well, you ask, why call it negotiation? The theory is that by giving even a little away, this

negotiator may hope to lead his or her counterpart into yielding more than otherwise, and then cashing in.

What is the style of the competitive negotiator?

(a) You may insist on determining the agenda: you thereby determine the order of dealing with the issues.
(b) You may demand that your opponent fulfil a precondition before entering into the negotiation: this tests the willingness of your opponent to make concessions.
(c) You may open with a high demand: this can create doubt in your opponent's mind about his or her assessment of the merits.
(d) You may start with a demand that represents the most your client can hope to achieve.
(e) You may start with an offer accompanied by "take it or leave it".
(f) During the negotiation you could suggest that agreement stands or falls on a particular issue: anxiety may force concessions from your opponent.
(g) You could make use of silence: just remaining silent may pressure your opponent to fill the gap, perhaps revealing valuable information.
(h) You may introduce a fresh demand near the end of the negotiation: your opponent may agree to it because the end is in sight.
(i) You may make clear towards the end that final agreement is subject to your client's approval: this may elicit information about your opponent's position while you retain the freedom to abandon the process.

This is tough and trying negotiation. The cooperative strategy is much more gentle. This negotiator accepts concessions must be made on both sides, and hopes that being reasonable and making fair concessions will induce the other side to follow suit. This would be a preferable strategy where the parties are really interested in maintaining a continuing commercial relationship.

But sometimes the cooperative strategy may be risky. The other negotiator may view your early concessions as signifying weakness, and then adopt a competitive strategy in response. Once made, concessions may be difficult to withdraw.

Some authors mention a third strategy, lying somewhere between the competitive and the cooperative. They term this the collaborative strategy. This employs rational assessment to reach agreement. Information is shared to explore the underlying interests of the parties, with creativity and problem solving to ensure every reasonable option is considered, and finally using some agreed objective criteria to assess the appropriateness of any final position. The goal is to establish a solution which is objectively fair, while meeting the needs of both parties and at the lowest transaction cost.

What is the style of the cooperative negotiator? Well, this actor may do most of these things:

(a) Make concessions early, to create an environment of trust in which your opponent may make similar reasonable concessions.
(b) Where the merits of each party's claim are roughly equal, offer to split the difference.
(c) Rather than dealing with items sequentially, take various options together and come to an agreement by trading off. Even though neither party may leave with the solution put forward, this may lead to a package which meets all needs.
(d) If there is an item on which the parties cannot agree, suggest moving on to others, and return later to the problem area. This ensure the negotiation keeps going.
(e) Make every effort to avoid deadlock. Discuss the reasons for any breakdown, the advantages of settling and the disadvantages of stalemate, look for common ground and offer to make a concession in return for a concession.

But what if all your best efforts fail? What if the barrier to compromise presents as a brick wall? The experts say that even then don't give up. The fog may lift, the ice may thaw. One William Ury, in a book entitled "Getting past no: negotiating your way from confrontation to cooperation" (1991) gives this advice. He says:

(a) Don't react. Don't be afraid of silence. Give yourself time to organize your thoughts and avoid making emotional or impulsive responses.
(b) Defuse your opponent's emotions through conciliation. Acknowledge their position, treat them with respect and express your views without provocation.
(c) Don't reject an offer or demand outright. Reframe it acceptably to you.
(d) Don't push your opponent, but draw your opponent towards you. Try to include your opponent in your proposal, and attempt to satisfy any unmet interests he or she has and take steps to help your opponent save face.
(e) Educate your opponent and avoid a positional power game.

Well, that's what the experts say. It implies negotiation is a subtly refined art. I personally think that goes a little too far.

Where do I stand in all of this? I think effectiveness in negotiation is probably commensurate with the credibility of the negotiator. If you are known as someone whose offer would reflect a reasonable assessment of your case, the other side will more likely take your offer seriously. If you have a reputation for extravagant claims, then not so.

Before embarking on a serious negotiation, you should carefully prepare. Fully understand the ins and outs of your client's case, its factual and legal bases, its strengths and weaknesses. Form a realistic assessment of prospects.

Then first of all, take it to your client. Lay it all out before the client, and work out with the client a bottom line. Then you discuss with the client how you intend to go about the negotiating: how you will raise it with the other side, the agenda, the venue, who will

attend, the tactics. Any serious negotiation should take place in person rather than by telephone.

Come the day, you may care to begin with some brief identification of the issue, with a focus on the strengths of your client's position. But it may help to concede some weaknesses, especially those which are clear – that will enhance your credibility. But then you would explain how the strengths prevail.

Let the other side respond, and be courteous and patient. Don't interrupt unless significantly wrong things are being said, or the other side is being provocative or confrontational. It is better to let the other side have their say, and then top it with some compelling counter.

Then, having set the scene, down to business. If you chose to make the first offer, you would usually pitch it above your bottom line, but not foolishly or extravagantly so. That leaves you room to manoeuvre.

If and when an agreement is reached, confirm it with your client, then document it with the other side.

I began this talk by pointing out how common place negotiation is. To illustrate, more than 95% of all claims lodged in the Supreme and District Courts in this State result in settlement. It forms a large part of the work of many professionals. Styles differ. Model your approach to the particular situation.

What I think absolutely essential are thorough preparation and complete understanding of your client's position; keeping your client informed; advising your client and agreeing on a bottom line; and not making offers which will be condemned by the other side as ridiculous, or, for that matter, patently unreasonable.

And finally, I stress again, appreciate that your effectiveness as a negotiator is commensurate with your credibility. Realize that if you descend to trickery or other misrepresentation or guile, you run the serious risk of either not being taken seriously, or even, simply not being listened too.

And now, at this hour of the day in particular, you've listened to me enough. Thank you!