NEGOTIATING
WRONGFUL DEATH
WITH INSURANCE COMPANIES

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I. Principles of Negotiation (for ALL types of cases)

A. What is a Negotiation?

A negotiation is a group process for reaching agreement with these characteristics: Parties may have different end objectives; parties expect to reach an agreement; no one party has all the information; the outcome is unpredictable; and you must be willing to walk away.

B. What is a "Good Deal?"

Many mediators would say that a good deal is one that all parties like enough that they are willing to make the deal, but all parties walk away a little disappointed. I have heard the phrase "like kissing your sister." A better way to evaluate a deal is to ask if it meets the interests of the parties, resolves conflicting interests fairly, is durable, takes community interests into account and improves (or at least does not damage) the parties' relationships.

C. A Bad Negotiation

There are a number of ways to spot a bad deal. First, there is the Winner's Curse, which may indicate you are settling for too little. The Winner's Curse can occur when one of your initial offers is quickly accepted by the other party. This is usually indicative that you did not ask for enough (and that the other side has superior preparation or knowledge to yours). Second, is the Lose-Lose negotiation where the parties fail to recognize a Win-Win situation (both parties leave money on the table). Third, it was a bad negotiation when you walk away when the terms of a potential deal are better than

any other option you have. Fourth, you have a bad negotiation when you suffer from agreement bias and you settle for worse terms than walking away.

D. Key Negotiation Principles

Probably the most important principle in negotiations is the BATNA (Best Alternative to a Negotiated Agreement). The BATNA is what you are going to do if you do not make a deal. The BATNA is determined by your available alternatives to making a deal. The BATNA defines the most you will pay (buyer) & least you will accept (seller) and is a key source of power in a negotiation: If your settlement option is worse than your BATNA, You Can Walk Away! My formula for a BATNA is:

[A] What is my best case scenario if I walk?
X [B] What are my chances of getting "A"?
[C] Discounted Best Case Scenario
- [D] The hassle of getting to "A"?
= BATNA

[A x B] – D = BATNA

Each side's BATNA is quantified by its Reservation Price. The Reservation Price is the highest (buyer) or lowest (seller) price that one is willing to pay (sell) and it is the point at which one is indifferent to whether he achieves a negotiated agreement or walks away. Beyond the Reservation Price, you prefer no agreement.

The Bargaining Zone is the space between the buyer's reservation price and the seller's reservation price. The Bargaining Zone is the zone of possible agreement (where the parties' positions intersect). The Aspiration Level is the deal that a party (reasonably and justifiably) wants. The Aspiration Level is the party's target and ideal settlement.

E. Horse Trading (Distributive Negotiation)

Distributive Negotiations involve "splitting up the pie." Each party views the negotiation as where one side or the other is negotiating to possess limited resources. If one party gets the resources, then the other party cannot have them. Many legal cases will devolve to this type of bargaining (at least by the end).

You should know your BATNA and know as much as possible about the other party's BATNA. Set your aspirations high, but not unreasonably high. If you are prepared, make the first offer (so that it can be used as an anchor to negotiations). Your first offer should be at the very high end of reasonable. I like to use the mirror smiling test: If you cannot say your offer to the mirror without a smile, then it is too high (or low). Immediately re-anchor if the other party makes an extreme offer. Even if the other party makes a reasonable offer, be sure to watch the magnitude of your concessions. Never bid against yourself. Don't reveal your reservation point early in the process (if ever).

Use emotions, don't let them use you. Think logically, but there are times that you will let the other parties believe you are reacting emotionally. My older brother says I react to things like Spock from Star Trek, so if I am feeling something on the inside it may be a good idea to let everyone see that.

Never lie, ever. Credibility is essential. Show why your position is fair, using your opponents' words against them if possible. Support your positions with facts which are dripped out to them during the entire negotiation process, but always save a few points to move the other side from a "line in the sand" (beware of the "final offer"). Don't fall for the "let's just split the difference," but use it for yourself. Finally, ALWAYS LET OTHERS SAVE FACE!

F. Principled Negotiation (Integrative Negotiation)

Principled Negotiation is the name given to an interests-based negotiation style termed by Roger Fisher and William Ury's famous negotiation book called *Getting to Yes.* Principled Negotiation searches for a multi-factorial search for a win-win negotiated agreement. The four principles are: 1) Separate the people from the problems; 2) Focus

on interests, not positions; 3) Brainstorm options to generate a variety of possibilities before deciding what to do; and 4) Use objective criteria.

G. Preparing for a Negotiation

You should spend a considerable amount of time preparing yourself for the negotiation. Don't fall into the trap of negotiating before you prepare your case to save time, effort and money. You need to know the value of your case as well as the information that may motivate the other parties to come toward your positions. You should collect all relevant facts, know the applicable law (cases, settlements, values, etc.) and be able to apply your facts to the law. Make sure to find out all you can (talk to others, etc.) about your opponents and their negotiating style.

Make sure to prepare your opponent. Before the negotiation starts, let your opponent know generally how you view the case and (at least) the universe of possible resolutions (from your point of view). You can (and should) hold back some surprises for use during negotiations, but they shouldn't be BIG surprises. Give enough information to your opponent so that they can properly evaluate the issues. But don't give them everything. As mentioned earlier in this paper, save some of your good points to loosen up the other side (for Drip…Drip…Drip) and to get opponent off a line in the sand.

H. Common Errors

You can never assume that the other parties to a negotiation share your values. You should try to climb into their skin to see their values so that you can better understand what will motivate them to come closer to your position. Similarly, you should not assume that the other parties' communication preferences are the same as your own. You should strive to communicate with them in the way they best receive information. If they are a big picture person, don't bother them with details. If stories work, keep telling them. If facts generate movement, give more facts.

Don't fall into the trap of expecting reciprocity. If you have properly evaluated

your case and negotiation strategy and the other side hasn't, then you should not just "meet in the middle" because that is what you are supposed to do. Though you should not let your emotions get the best of you, you certainly should not avoid conflict for avoidance's sake. Don't try to prove how smart or "right" you are by talking. Rather, you should listen carefully so that you can understand what is in the mind of your opponents.

II. What They are Doing: Defense Investigation and Strategy

A. Super Secret Stuff I don't Know About or I have Promised not to Tell

Part of wisdom is knowing that there are things you do not know. Many times, I simply ask the other side what is going on. They may tell me nothing; they may tell me something without any background explanation; or they may let me in on something super secret in confidence. Regardless, it never hurts to ask. You might actually learn a little about the motivations and methods of the other side, especially if you are forthcoming on your own motivations and methods (the cases I have enjoyed the most are the ones I told the other side exactly what I was going to do and then successfully did it).

B. The "Normal" Investigation

In Wrongful Death claims, the Insurance Company does all the usual investigation that it would in other cases. This includes obtaining the accident report, contacting witnesses, obtaining statements, taking photographs of the vehicles and/or the scene, obtaining 911 tapes, and/or preserving evidence, especially if it is helpful to the defense (some believe helpful Plaintiff's evidence seems to get more easily lost). The amount of investigation may increase in more complex cases or those with higher insurance coverage. In medical malpractice and trucking accident cases, there may be a team starting the investigation within hours, or, sometimes, minutes after the death. Throughout the case, insurance companies may use private investigators and surveillance to gather damning evidence against the Plaintiff.

C. Experts

In addition to the regular investigation, insurance companies and/or defendants may quickly hire experts. These can include the experts that ultimately testify as well as consulting experts that the Plaintiff never knows about. Early on, the defense may hire accident reconstructionist, engineers, or other specialized liability experts. After the defense gets medical records, they may hire consulting nurses or doctors to scour through them to find holes in the Plaintiff's case. In large cases, lawyers may be involved early.

D. Quick Hits: Getting Bees with Honey

Many insurance companies will approach the heirs of the Plaintiff fairly early in the process (before the Plaintiff has an attorney). I have seen representatives of insurance companies come to the room of an accident victim (who ultimately died) to talk to family members. In one case of mine, within a month of the death, an adjuster and the Executor of the Decedent's estate had an agreement in principle to settle for a low/mid six figure settlement ("all we want is enough money to put the grandkids through college"). Though the adjuster was smart to get the Plaintiff to a relatively low number, the adjuster tried to get cute and lost the settlement. The adjuster got to the Plaintiff's number by counting the whole payout of a structured settlement, with the present value being pennies on the dollar of what was promised. The Plaintiff Executor got upset and came to me. At trial it settled for seven times the original amount. The lesson for the Plaintiff was to get an attorney immediately and have that attorney send a letter of representation to all possible defendants as soon as the ink dries on the retainer. The lesson for the adjuster was that pigs get fat and hogs get slaughtered.

III. Preparing for Negotiation

The days where a plaintiff's lawyer's work ended soon after the client walked in the door are over. No multiples or other one size fits all formulas work anymore in evaluating and negotiating cases. Preparing for a good negotiation is hard work.

Considering most cases settle, this phase of litigation may be more important than the trial. Complete your case analysis before beginning negotiations so you can properly evaluate and present the case. If, after reading this section, you think you need to be well along towards being ready for trial by the time you settle the case, then you are right. No attorney can know how to evaluate and negotiate a case if he has not thought about how the case might be tried.

A. Prepare Yourself

1. Facts

Know your facts backwards and forwards. There is really no excuse for an attorney not being well versed in all material facts of a case they are trying to negotiate. If you do not know the facts, you shouldn't try to negotiate. You do not need to present each fact, but keep those facts ready to use in the negotiations.

2. Legal Issues

Ideally, most of the major legal issues crystalize before you file a lawsuit. Make every effort to think about the claims and defenses of your opponent AND have all pertinent legal research completed well before negotiations. Though, until a defense lawyer is involved, you may struggle convincing an insurance adjuster what the law says about an issue and you should be ready to produce key statutes and case law to back up what you say.

3. Evidence

Try to review and organize all the relevant evidence early in the case. Prior to negotiations, hone in on just a few pieces of evidence that will help prove your version of the facts and will help win the legal issues for your side.

4. Witnesses

Know who your best witnesses are and be prepared to reveal what they have to say and how they will present themselves. In a perfect world, you will have interviewed

your witnesses (and possibly even videotaped the interview). I have never tried this myself, but some attorneys will show video of key lay or expert witnesses during negotiations. At the very least, be prepared to summarize what key witnesses would testify to at trial.

5. Case Value

Properly evaluating your case is imperative to fruitful negotiations. You should first identify each element of damages and give values for each element, and then add the total amount together. Next, try to make an educated guess as to a realistic range of probable jury awards. Compare your numbers with other jury verdicts and settlements in similar cases in your jurisdiction. Evaluate the worst case and best-case scenarios at trial regarding damage awards. Use this analysis to come up with a reasonable range of probable jury verdicts if the plaintiff wins on liability. Do not forget to have your analysis include aggravating factors which will motivate a jury to "punish" the defendant (for driving drunk, punching the foreman as defendant walked off the job, etc.).

After estimating your damages' range, try and identify what weaknesses exist in the plaintiff's case. Try and establish a probability of success for the plaintiff on liability. Discount your damages' range by the likelihood that the plaintiff may lose liability so that you can come up with your suggested reasonable settlement range.

6. Establish Your Recommended Bargaining Strategy

If you ask one thousand lawyers how they bargain, you will probably get one thousand different answers. I usually try to come up with the highest number that I can say with a straight face to a jury. This is usually the number I suggest my client offer first during negotiations. Ultimately, I know that my client will pressure me to increase that first offer. Regardless of what the number is, you should have some rational reason for how you came up with the number no matter what the client says. You should also have in mind what your client's "walk away number" should be as well as a strategy for working from your initial offer toward your final number. No matter how you choose to

bargain, make sure you have a plan.

B. Prepare your client

Tell your client what to expect from negotiations. Manage expectations, as you should have been doing from the time the client walked into your office. Enlighten your client as to what the opposing side's arguments will be. Play devil's advocate so that your client can understand what the other side may think about the case. I find it useful to cross examine my client both for practice and so they will feel the merits of the other side's case. They will never agree with their opponent, but they may understand how their opponent (wrongly, of course) came up with divergent positions. Do everything you can to help your client resist letting anger or greed take over their reasoning ability when they evaluate what they should settle for.

A person who is able to clearly recognize what he or she wants and needs will do better in negotiation than a person who does not know what he or she wants. I like to play a game with my clients to ascertain their gut reactions to settlement amounts. I tell the client that I will tell them settlement offers and ask them to quickly say whether they will accept the number. I start real high and real low until I have reached the amounts that are hard for the client. Then I have an idea where their true initial expectations are. In my experience, clients are reluctant to tell you their true expectations as to the amount of money they think should settle the case. The clients want to wait for you to tell them. This does not mean that they will like what you have to say. Once they hear you start with numbers that do not match theirs, they will tune out everything you say regarding how you arrived at your numbers.

For instance, with a defendant in a $50,000.00 +/- case, you may ask how they would feel about paying $1,000,000.00 to settle the claim. They will be offended and say some cuss word and "no." Then you say, "how about settling for $1.00?" They jump out of their seat to say "yes." You continue until you put out a number like $30,000.00. The defendant will say "well... I might be able to pay that much." When you get to the "I don't know numbers" (like $35,000.00 in our example), you will know you have hit your

clients gut range. This number is not usually a realistic number. It just shows you how much work you have to do to help your client arrive at a more realistic number.

Manage your client's expectations. Use the client's gut settlement amount and work backwards from their number, using the case value analysis in IV(A)(5) above in reverse. With plaintiffs, there is usually money left over after you have subtracted all other damage element values. With defendants, the number ends up negative. Both plaintiffs and defendants tend to view the case values unrealistically. It is your job to work with them to have them come up with a reasonable settlement range.

After your "cross examination" of the client to bring them to the real world, educate them about how you analyzed their case's worth as well as your proposed negotiating strategy. Make sure that your client is on board with your negotiating strategy before you start negotiating. Do not wait until mediation, or the trial, to let "the process" decide where your client wants to go in negotiations and how long it will take to get there.

C. Prepare your opponents

As with your client, managing your opponents' expectations is key. If a plaintiff walks into a mediated settlement conference and demands two times a reasonable amount and ten times what the defendant expected, then the defendant may shut down, ruining any chances for meaningful negotiations. Prior to formal negotiations, try to give opposing counsel a clue as to which settlement universe you will be located. After the gasps and righteous indignation, rationally explain your positions on the issues, give your adversaries what they need to properly evaluate the case, and, if possible, give your first offer before the day of a mediated settlement conference, if one is scheduled. It is especially important to let insurance or corporate opponents have the time (and ammunition) to set their reserves and to obtain the proper authority to resolve the case somewhere in your settlement universe.

D. Prepare for your Presentation (if Negotiating at Mediation)

Mediation is a type of negotiation that is supervised and facilitated by a neutral third party. In the last thirty years or so, Mediation has increasingly been used in disputes between multiple parties. Before Mediation was widely used by litigants, a significant portion of cases did not settle until reaching "the courthouse doors," if they settled at all. Some attorneys thought it was a sign of weakness to be the first to contact the opposing party with a reasonable settlement offer. The "fear factor" failed to set in with clients (and attorneys) until the Sword of Damocles of the trial was imminent. Mediation was and is a way to get all parties to the negotiating table well before the case is going to be tried.

Make sure that you match your presentation to the size and complexity of the case. In small cases, we usually put together a small notebook of key evidence, exhibits and charts with a table of contents with tabs for quick access to each exhibit. This helps the attorney stay organized and focused on a short but efficient presentation of the case. A well-prepared client may wish to make a short statement as well.

In larger cases, we sift through every possible way of presenting our clients cases, using anything that will make our positions real to our adversaries. In wrongful death cases, it is essential to watch ALL of the home movies for clips which will illustrate the plaintiff's relationships with his or her family. Even more powerful can be an audiotape of the voice of someone who has died. In one wrongful death mediation, I dumped on the conference table the contents of a "Santa Bag," which had been stuffed with hundreds of condolence letters and cards. After we settled, the insurance adjuster told us that she read the cards during the down time of the conference (sometimes it makes sense to leave your exhibits in your opponents' conference room during closed sessions).

Video productions of a plaintiff's life are also effective if well thought out and not too long. Blow-up copies of key documents or pictures work well as long as there are not too many of them. Some attorneys make very good PowerPoint presentations and project everything from their computer onto a large screen. I have made extensive use of videos which integrate (hopefully into a story) pictures, videos of the parties, video clips of witness statements, deposition segments (video and/or transcripts), television or radio

coverage, 911 tapes, and anything else which helps communicate our case. In one case, we took the audio from a minister's sermon which ended with him singing with the choir and played it while footage from the wreck showed on the screen (music can work if there is a reason for playing it– I am not a big fan of having music there just for music's sake).

An effective presentation takes planning, preparation and hard work. One that is thrown together and not thought out is worse than no presentation at all. Take the time to ensure that nothing is included in your presentation that is not necessary. Treat it like you are supposed to pack for vacation: Start with everything you might want to include, cut it in half, then cut it in half again. Keep it interesting and short. Once you have lost your audience, you are harming, not helping your chances of settling. It does not need to be slick; in fact, avoid slick like the plague (regular people do not trust lawyers and are waiting to be tricked by them do not reinforce their biases against you).

E. Pre-Suit Mediation

There are a number of situations when a pre-lawsuit mediation is appropriate. In rare instances, a client does not believe in suing. I once represented a minister whose father was killed in a car wreck. Due to religious reasons, the minister said that he would not file a lawsuit. We asked the insurance carrier to do a pre-lawsuit mediation and the company agreed. Through the mediation, we were able to present our case and show the insurance adjuster that my client was a sympathetic witness. Though the case did not fetch top dollar, it did settle in a reasonable range (and at a number that I do not believe would have been possible in traditional pre-lawsuit negotiations).

Before filing a lawsuit, neither side can really know that their opponent has really disclosed all discoverable evidence (not all documents have been produced, the experts have not been deposed, etc.). As such, I do not believe that one with a strong case will maximize their recovery in a pre-lawsuit mediation. The contrary also is true: if you mediate and settle before filing a lawsuit, maybe you can resolve the case before a "smoking gun" argument is learned by the other side.

Many times, a bird in the hand really is worth two in the bush. Plaintiffs may need the settlement money immediately. Defendants may need resolution of a case before they can move on to other things. Maybe there are issues not related to money that can be addressed at an early mediated settlement conference.

Sometimes there is enough trust and respect by both sides that a pre-lawsuit mediation can resolve a case for an amount similar to a later post-lawsuit mediation or to a jury verdict. Both sides can save considerable litigation costs if they can settle at mediation before filing a lawsuit. There certainly are times when an early mediation can be a win/win situation.

Make sure to prepare your client for when and how often they will be required to speak, especially in the opening session. If you are going to let your client give a statement, refine their comments and rehearse them over and over. Explain to them to always maintain their cool (avoid anger and bad body language) and to always think about what they are saying (especially during mediation small talk). Let them know that loose lips sink ships and good settlements.

IV. The Mediated Settlement Conference

A. General

1. Tailor

Always tailor what you do at a mediated settlement conference with what you do best. Are you a big picture thinker or better with facts and figures? Do you logically go from one idea to the next without overlap or are you better at integrating multiple ideas into one discussion? Tailor your mediation plans with your strengths in mind. As always in the practice of law: be who you are and do not try to be someone you are not.

2. Adversarial Attacks?

Try to stay away from personal attacks. It is inevitable that when discussions veer toward attacking the individual rather than the problem, the plaintiff's demands go up and the defendant's offers go down. It is hard enough to get the parties to see the other side.

It becomes impossible when an opponent has become even more defensive after being the recipient of an unfair blast. Be easy on the person and hard on the issues. Always treat every participant with respect and courtesy. Stay away from threats and ultimatums unless you are absolutely ready to follow through. Never say you are going to walk away from negotiations unless you are really walking away. Either you will get your way as you walk or you may lose all chance of a possible settlement you can live with.

3. Letting your client speak (or Not)

If your client makes a good impression, let him talk if he wants to say something. If the client makes a great impression, make him talk. If your client is particularly nervous, long winded, angry, or really does not have anything productive to say, then do not let him say a word past hello. In any event, be sure to spend the time preparing your client for whatever they do or do not say.

4. While the Other Parties Speak

There is nothing more embarrassing and destructive to a mediation than a client who cannot control themselves at a mediated settlement conference. Clients (and attorneys) who roll their eyes, sigh loudly, interrupt, continuously rub their injured body parts, or otherwise act rudely are like scraping a nail across a chalkboard. This is especially true if they are rude while others are speaking. Some clients feel like people will think the client agrees with a speaker if the client does not show his or her disapproval somehow. Usually it has the opposite affect at a mediated settlement conference: the speaker usually gets upset and does not want to deal with the rude client. It sets the wrong tone from the very start of the conference and can torpedo the process before it has begun.

B. Presentation by Plaintiff

1. Dog and Pony Show?

To go all out or not? A lot of the decision depends on the complexity and size of

the case. Every medical malpractice case should be large and complex enough to put on a reasonably timed production. A $10,000 claim on a promissory note probably does not merit much sizzle. I do think that a plaintiff needs to take this opportunity to show that his or her counsel is capable of presenting the case in a way that jurors understand and will respond to. Similarly, this may be the only time the decision makers for the defendant will see plaintiff's points without the shield of defense counsel. As we were walking out of a mediated settlement conference, an insurance adjuster stopped us at the elevator. He said that he wanted to accept our last offer. The defense attorney was behind the adjuster saying "this is against my advice." We settled because the adjuster saw something in our case that the defense attorney could not see. This really is a true story and I can think of none better to illustrate the point that a mediated settlement conference may be your only shot at directly convincing the person with the pocketbook to pay a reasonable settlement. Do not trust that the defense attorney (or plaintiff's attorney for that matter) is willing or able to communicate your client's position as well as you.

2. Keep in mind:

Do not ambush defense counsel with a three hour presentation with all the bells and whistles when he has prepared for a two minute speech. Let the attorney know ahead of time (to some degree) what you plan on doing. The defense attorney can be an ally in pulling a reluctant defendant toward a reasonable settlement. An embarrassed attorney may end up trying to discredit what you have done in order to save face with his or her client. Similarly, limit your presentation to (as much as possible) a nonpersonal, respectful, and professional explanation of your version of the issues involved. You want to move your opponents toward your world view, not move them away in disgust.

C. Rebuttal

Each side has a chance to respond to their opponent's presentations. I usually refrain from another presentation on how the other side is wrong. I usually use the

mediator to respond to my opponent's presentation. Wait until a private session and tell the mediator your responses and let the mediator decide what to do with them.

D. Discussion

If I can refrain from "cross examination" mode, I may ask a few questions about what the opposing party's counsel has said. These questions should only be used to find out answers, not to prove a point. If all lawyers decided to interrogate each other at mediation, no mediated settlement conference would ever end.

E. Responding to Mediator's Questions

If I have confidence in my client's ability to respond in a positive, respectful and brief manner, I allow him or her to answer the mediator's (or even the opposing party's) questions. This can be a good time to show how well your client will be perceived by the jury at trial. Or it can show what a jerk your client can be. If I am at all concerned with what will happen, I will quickly tell the mediator that we will respond to his or her questions in the private session.

F. During the "Break Out"

After the group session, a mediator will probably separate the participants into separate rooms. The mediator will then bounce back and forth from room to room. Usually this involves each side giving their whole (down and dirty) version of the parties and the case. After working through preliminary issues and questions each side may have, the mediator at some point starts to take numbers back and forth (in 99% of mediated settlement conferences). This is when you implement the negotiation strategy you prepared before the mediation.

You should hold some points or evidence back to drip out when the opposing party has declared they have gone as far as they can go. Give them a reason to change their mind without looking like they are going back on what they said. It is not usually a good idea to hold back major evidence. Don't drop large bombs at mediation unless you

are planning for multiple conferences.

G. Get That Agreement in Writing

You have spent hours negotiating and now you think you have settled. Don't believe it until everybody has signed the paperwork. Get as detailed as you possibly can in your written settlement agreement and have it signed by as many people as possible. Many times you will find out that the terms of the written agreement open up a whole new mediation. Take the time to get the agreement in writing before you leave or you may have wasted your time.