

PAPER.18

NEGOTIATION AND SETTLEMENT ADVOCACY

By
D.K.Sampath

ROLE:

It has to be clarified at the threshold what role the lawyer is going to play in the context of negotiations and settlements. The lawyer is trained for and is used to adversarial procedures. Different roles need different skills. Is he or she to be an outsider, only helping the parties negotiate a settlement, advising them whenever needed ? Is he himself going to negotiate, keeping his party in the background or even outside the picture ? Is the lawyer going to play the role of a wise counsellor, common to both parties ? or does he figure as a mediator, facilitating a consensual settlement. He may even be an arbitrator. What follows is a brief identification and formulation of guidelines for those who seek to know something about the theory and practice of settlement by negotiations. There are many factors which govern the role of the lawyer as a negotiator. The stage at which he is brought in to the dispute, is it an interpersonal conflict ?, Are groups involved ?, how keen are the disputants on seeking a settlement ? is the lawyer a professional negotiator or not and so on. Thus the approach has to be moulded to suit the needs of the situation. Flexibility.

It has been said that 'there is nothing so practical as a good theory'. An understanding of the concept of conflict and the general framework of negotiations is essential for effective practice. Obviously practice sharpens the theoretical perceptions. Thus any theoretical discussion by practitioners will have an educative value for the participants in training courses. For instance coercion and capitulation have to be avoided if negotiations are to be meaningful. But how to avoid them ? Lawyers know only how to score a success over the opponent in the adversarial process. But that is not the aim of negotiations. Can the lawyer respond to the innovative ways, which, to them as professionals are unusual. Hence those who seek the training as negotiators have to unlearn a few things which they know as lawyers.

WHAT IS NEGOTIATION ?

It is not beating the other party down to what you want. It is not intimidation. It is not dictation. It is not an ultimatum. Initially it is a search for a core of common ground and then, a snow balling of further spots of agreement in to a consensual solution, taking note of the interests of all the disputants. In the give and take, what to give, how and when are the questions.

PRINCIPLES AND INTERESTS:

Negotiation is not a one track activity. If it is to be fruitful, the motivation needed for a settlement has to be first generated. Otherwise the move to settle will be a non starter. For instance parties would not compromise on principles. Hence the first move is to shift the conflict to a clash of interests from a confrontation of principles. Interests are negotiable unlike principles. Give and take is not very difficult in the area of interests. For example in an industrial dispute, right to picket is not negotiable. A worker will never waive it. But if the negotiation is shifted to points like when to picket, how long to picket, at what point near the gate should the pickets stand and in what strength, negotiation would become feasible. The best advocacy is to put the focus on interests and to retain it there. Whenever a

party takes an unreasonable stand, he would shift it to 'principles'. Hence constant effort is needed to retain the focus on interests. Motivation will thus be kept alive.

WHEN TO BEGIN ?:

This is a very important aspect. The whole effort may become jinxed, if you put your wrong foot forward. One way to ensure an encouraging start is to get going early. Do not wait for formalities. The parties' attitude will harden, if further complications set in. So start early. Of course select a neutral place where both parties will be comfortable.

WHO IS TO BEGIN ?:

That is the problem. It becomes a question of prestige. A lot of time will be wasted on this issue, if this issue is not handled imaginatively. For instance, negotiations in motor accident cases never get going as each party awaits a move from the other party. Who is to make the first offer ? Normally the claimant quotes a figure in our courts. But, often the insurance company may not even respond. They would expect the claimant's advocate to come up again with a more 'realistic figure'. That would be difficult for the claimant. The involvement of a third party as a facilitator of negotiations, a mediator, may make things easier in such contexts. He may prompt the other party to respond or may even suggest a figure on his own. To set the ball rolling is a delicate process. To begin, may be to betray your anxiety for a settlement. It may be mistaken as a sign of weakness. Would the other party exploit such anxiety ? That is the thinking which inhibits the first move. Unlike in England, the insurance companies are nationalised in our country. Their officers can be motivated to make a fair and reasonable offer to begin with in accident cases. The claimants are mostly ignorant and illiterate. They cannot be expected to make the opening offer.

HOW TO KEEP GOING ?:

The negotiations may often be stalled on collateral issue. While exploring the shared interests, differences of opinion should not be lost sight of. The main objective in negotiating is to iron out the differences. If they find it insurmountable, the parties may be nudged by the negotiator to change track. Multiple step negotiation is another way to skirt the impediments. If the negotiating persons at the lower levels find themselves in a stalemate, take the dispute to a higher level. This should be possible in labour - management dispute or conflict between two companies with hierarchical management structures. Lower level people may be obsessed with day to day problems and if negotiations are resumed at middle level, these may not loom large.

Should one approach fail, there should always be another track available. Thus multiple points of entry promote the chances of a fruitful negotiations. For example a grievance can be taken to the class teacher or vice principal or principal in a student dispute. Experience shows that a student may find one level more receptive than another. But this should not become an excuse for lower level people not pursuing the negotiation with commitment. In matrimonial disputes, the negotiator has to look for shared interests. The child may serve as a bridge instead of being a bone of contention. The lawyer has to look for such factors which would promote conciliation.

OTHER FACILITATORS:

In the course of negotiations, the involvement of a third party may be found useful to resolve many delicate questions of prestige, for instance. Mediation is the most feasible method in such contexts. He can act as a conduit between the parties when communications break down. But it is not everybody that is agreeable to the intervention of a mediator. They may prefer a third party who stays

on the sidelines and is not involved in the process. For such contexts, 'wise counsellors' are more acceptable. They will promote a more detached view with a larger perspective, hopefully. In the U.S. this has been tried with some success. Their role is to inject some sobriety whenever a party flies off at a tangent during negotiations.

AUTHORITY TO NEGOTIATE:

Any lawyer negotiating a settlement has to ensure that he/she has the authority to resolve it. The parties to the dispute should have confidence in the lawyer. But the lawyer should guard against the negotiations becoming an adversarial process. He is used to it and would be tempted to bat on his home ground. The negotiating lawyer should begin and remain a conciliator. He must eschew all retaliatory vocabulary which create a conflict environment. A lawyer has to avoid the temptation of threatening the other party with taking the matter to court whenever there is a road block in the negotiations. If both sides are represented by lawyers, they can at a preliminary meeting explain the scope of their authority and other ground rules. This will clear away misunderstandings that either lawyer is dragging his feet when he seeks time to consult his clients at a later stage.

ARBITRARINESS:

It is open to the negotiating lawyers to advise their clients about any possible result, should the matter go to trial in a court of law. It will make the negotiation more realistic. It will also approximate the consensual solution to a contested result. This may be a useful device particularly when the negotiating parties are unequal in their bargaining power. The lawyers concerned may themselves negotiate or allow the parties to negotiate, helping them along and advising them to ensure fairness and mutuality. Follow-up is essential. The lawyer should ensure prompt implementation.

SKILLS:

Negotiation is an essential skill. A lawyer needs it. It has to be acquired by a knowledge of theory and practise. To handle a dispute effectively and cooperatively, the lawyer should have at his command more than advocacy, Empathy, restraint, an assessment of the limits of his clients ability to offer concessions without hurting his interests, an ability to sense how far the other party would move in the direction of a settlement, an ability to clinch firmly at the opportune stage and a sense of fairness are not usually in the repertoire of lawyer's skills. As a negotiator he/she needs an integral and innovative approach.

NEW HORIZONS:

As a negotiator, a new career awaits the lawyer. Effective negotiation calls for an understanding of broader issues. He should avoid a petty fogging attitude. His creative efforts will make him a better marriage counsellor, labour negotiator and environmental mediator. Interpersonal, inter group, inter governmental and inter national conflicts can be resolved by a wise use of negotiation strategy.