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The 'new lawyer' and the triumph of the soft skills

Hard-nosed tactics don't always serve the client's best interests.

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Special to the National Law Journal

"The best way to settle a case is to prepare the case for trial."

Really? Trial counsel readily accept that axiom. They commonly believe that extended discovery and motion practice in complex commercial cases gets parties to resolution. Make the case bullet-proof and trial-ready, and you'll find an acceptable settlement level.

Do clients feel that way? Some might. But business clients and their in-house counsel really want their outside law firms to be skilled at the alternatives to the adversarial and costly game of leverage that is commonplace in American courtrooms.

Savvy corporate counsel recognize that more than 98% of U.S. court cases settle before trial. Clients seek the best resolution, preferably before substantial discovery or motion practice. In the recent Fifth Annual Litigation Trends Survey by Fulbright & Jaworski, one client explained that the new electronic discovery rules create a "blackmail" hold hostage environment forcing settlement once cost analysis is determined." Fifth Annual Litigation Trends Survey Findings, 48 (download with registration at www.fulbright.com/litigationtrends32).

Most business clients attempt to negotiate a

resolution before filing suit. When the litigation lawyer is engaged, positions already are hostile and entrenched. Attuned to the client's interests, the outside lawyer responds aggressively, interprets success as winning at trial and suggests a strategy built around thorough case preparation and attack. There's nothing wrong with that. Clients need to understand the strengths and weaknesses of the legal arguments; they depend on lawyers to investigate the law and facts and present their analysis. But critical settlement success factors are missed when lawyers employ only the stereotypical litigation formula.

Litigation is commonly described as a war, and conciliatory behavior viewed as a signal of weakness. Most clients, however, prefer their lawyers to possess both the pit bull litigation style and a consensus-seeking style when appropriate. This creates an understandable tension for lawyers trained to define advocacy as adversarial conduct.

The combination of styles has been described as the "new lawyer" who "must wear the two hats of fighter and settler, and understand when to take one off and put the other on. He or she must evaluate when one approach should be preferred over the other, when one approach should be entirely set aside or suspended, and even when both hats need to be worn at the same time." Julie Macfarlane, *The New Lawyer: How Settlement is Transforming the Practice of Law and Society* 119 (2008).

As the Sedona Conference, an Arizona non-profit organization that facilitates dialogue on complex litigation, recognized in July in its Cooperation Proclamation, lawyers owe twin duties of loyalty: zealous advocacy and acting in the clients' best interest to seek cooperative solutions. Accordingly, Sedona calls on the legal profession to create a "culture of cooperation in the discovery process." See www.thesedonaconference.org/content/tsc_cooperation_proclamation/Proclamation.pdf.

In this economic climate, the long list of judi-

cial endorsements for the proclamation, plus client demands to cut unnecessary discovery costs, indicate that the time has come for the bar to adopt a cooperative approach from the outset of a case.

Rather than weakening leverage, approaching a case with a settlement mindset is more likely to create value for the client and, ultimately, superior results. Interdisciplinary and empirical research has consistently shown that fostering collaboration and using problem-solving techniques maximizes gains. See "The Negotiator's Fieldbook," American Bar Association Section of Dispute Resolution (Andrea Schneider and Christopher Honeyman eds., 2006) and "Report for the President on the Use and Results of Alternative Dispute Resolution in the Executive Branch of the Federal Government" (April 2007); see www.usdoj.gov/adr/pdf/iadrsc_press_report_final.pdf. The key is the ability to recognize settlement opportunities during the litigation process.

Litigation's pitfalls

With the typical discovery and motion practice of a commercial case, neither side listens to the other's business needs. Instead, issues are framed strictly in terms of legal rights. The original business problem retreats to the background. Effective settlement is blocked.

Some executives prefer to search for the other side's underlying interests and listen to its perspective.

In a speech to members of the International Institute for Conflict Prevention and Resolution, James Golden, the general counsel of Covenant Transport Inc. of Chattanooga, Tenn., said that he attempts to meet with the family of the injured party as early as possible. He tells them, simply, "I'm sorry." CPR Institute Annual Meeting, New York (Jan. 18, 2007). With the power of the company's face-to-face apology, he is able to more effectively manage his caseload and resolve most matters for less than the company used to spend on defense

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counsel. He listens to the other side's needs and the families leave with a positive impression of the company. Although not easily quantifiable, this is an extremely important business reputational benefit.

U.S. business clients recognize that most commercial cases are mediated at some point during the litigation process. Using the usual trial/adversarial style during a mediation session, however, can reduce commercial alternative dispute resolution to little more than a settlement conference.

When both sides come to the mediation table with their opening statements and advocacy briefs, and with their clients sitting mute at their sides, the opportunity to craft a better solution can be lost. When corporate counsel and business clients don't understand settlement dynamics and fail to understand their best alternative to a negotiated settlement, they often leave the mediation session frustrated and disillusioned with the process.

Skilled mediators complain that lawyer-advocates often impede the process and, worse, sabotage the mediation and prevent successful resolution. Just as clients want their lawyers to be zealous trial advocates, they also want their lawyers to be effective in preparing and representing them in a mediation session. Mediation advocacy rarely is taught in law school. Most trial lawyers have long believed that their usual adversarial positioning remains the most effective way to be a mediation advocate, just as it is in trial work. Nothing is farther from the truth.

Mediation isn't concession

Too often, lawyers and clients alike approach mediation with a "split the baby" or a "conceding" mindset and fail to prepare adequately. Mediation should be approached with vigor similar to a court of appeals argument—but using different skills. Mediation advocacy may include employing a different lawyer/client partnership; strategizing with the mediator; and using heightened listening skills.

In a trial context, the client looks to the lawyer as skilled in the procedure, possessing the facts and the law of the case, and as the client's spokesman. These conventions don't encourage mediation settlement. Instead, ideally, the client should take the lead in mediation.

In a discussion on mediation dynamics at a CPR Institute committee meeting recently, an in-house litigation counsel of a large manufacturing company described his mediation role as "running the whole shebang." He often asks his lawyers to remain silent, or even leave the room. This company lawyer "owns" the process. He comes fully prepared with a settlement strategy worked out with the business in advance; a businessperson with authority who has been coached regarding how the process works (and who has been instructed to be patient); and his outside counsel on standby to provide insights, information and help with strategy—when asked.

The irony is that attorneys' bad behavior

frequently involves the way they treat their clients. Neutrals often face a lawyer who is not acting in the client's best interests—refusing to let clients speak, for example, or rejecting offers without consulting them and bullying clients into accepting settlements. These are extreme examples, but they reflect the fact that many lawyers feel that they, rather than their clients, own the mediation process. That's the wrong way to go.

The best mediators apply psychological techniques honed through practice to help parties uncover new solutions. They probe into emotional territory and seek information way beyond the rights-based legal arguments presented to them. And they are doing this to everyone involved in the conflict.

Most important, they are neutral and can be trusted. Lawyers who insist on "hiding the ball" and keeping information from the mediator do themselves and their clients no favor.

When lawyers and clients are willing to work with the mediator and share their insights about the parties, the case's strengths and weaknesses, and so on, the mediator has the information he or she needs to explore alternative solutions. Without that level of sharing and trust in both the mediator and the process, mediation may not live up to its potential as the problem-solver that clients want and businesses need.

Lawyers need to wear the 'two hats of fighter and settler.'

Attention to nuance

Lawyers are taught in oral argument to listen carefully to the judges' questions for the nuances so that they can accurately address all underlying concerns. The same is true in mediation—only more so. Body language, tone, overall demeanor and personality play huge parts. Although business mediation generally purports to be about financial issues, these issues play out against the backdrop of business politics, power struggles, ego and challenging personalities. Emotion plays a part in every conflict.

The joint mediation session has tremendous power to release the emotional issues buried in the dispute and allow the parties to accept new solutions. Authors Robert Mnookin, Scott Peppet and Andrew Tulumello advocate using active listening skills in a negotiation. That means not only understanding the perspectives, but also expressing views in a nonjudgmental fashion. Robert Mnookin, Scott Peppet and Andrew Tulumello, *Beyond Winning: Negotiating to Create Value in Deals and Disputes* 46-48 (2000).

Trial lawyers may think that such soft skills

could undermine their authority in the eyes of their clients. Anyone who has watched a skilled mediator succeed when countless other adversarial approaches failed would disagree. In mediation, clients appreciate the result, which is incontrovertibly enhanced by overcoming psychological biases and listening to the opposing parties' needs. See Russell Korobkin, "How Neutrals Can Overcome the Psychology of Disputing," 24 *Alternatives* 83 (May 2006).

The last word in successful mediation advocacy is choosing the proper mediator. The last decade has seen a contentious debate regarding whether mediators should be "facilitative" or "evaluative." In commercial mediation, the debate is over.

Recent work by the American Bar Association's Task Force on Mediation Quality demonstrates that most attorneys representing business mediation clients want neutrals to possess all the skills necessary to get the job done, including evaluative pressure—when appropriate and with permission from the client. Sophisticated in-house lawyers consistently agreed. ABA Section of Dispute Resolution Task Force on Improving Mediation Quality (2008), available at www.abanet.org/dispute/documents/FinalTaskForce-Mediation.pdf.

An ongoing controversy revolves around the mediator's level of substantive skill. In many areas—particularly in construction, intellectual property, financial services, securities and labor and employment—clients express a strong preference for a mediator who has advanced degrees in the area or a proven record of success in mediating disputes in that substantive area. Top mediators counter that highly developed mediation skills trump the need for substantive expertise.

Clients who believe their work is highly specialized tend to feel more comfortable with mediators who speak their technical language. Aside from the top nationally known mediator-generalists, most clients express a preference for a local mediator specialized in the substantive area.

However that question is resolved, settlement is here to stay. Zealous advocacy now includes negotiation and mediation prowess. **NLJ**