
Kluwer Mediation Blog

The Negotiation Campaign

Jeffrey Krivis (First Mediation Corporation) · Tuesday, August 26th, 2014

Negotiations are like political campaigns. It is an organized effort to influence decision makers. “How” and “When” to begin the campaign are fundamental questions to examine before actually engaging in the formal negotiation. Consider the first presidential campaign of Barack Obama. While the election was in 2008, the campaign began before 2004 when the Democratic Party identified Obama as a rising star and selected him to do the keynote speech at the 2004 Democratic National Convention. It was in that speech that he famously set the stage for his own political future by stating: “there’s not a liberal America and a conservative America; there’s the United States of America. There’s not a black America and white America and Latino America and Asian America; there’s the United States of America.” Those were the first words in Obama’s negotiation with the country. A negotiation that took four years to complete, and resulted in the election of the country’s first African American president. This political campaign had the vision to look to the future, and see an opportunity in the party in 2008. It began by creating a narrative of bringing the entire country together toward a common goal of hope for the future.

A Lawsuit Is A Way of Getting Their Attention

Compare the 2008 presidential campaign to the life of a lawsuit. The lawsuit is filed because it is often the only way to grab the attention of the other side in order to negotiate. The whole Donald Sterling fiasco was reminiscent of filing or threatening to file in order to get a better deal with the National Basketball Association. Sterling sought out the advice of the best and the brightest litigators in the state. Yet, he had no intention of long-term litigation because it did not serve his interests. By the time such a case would be concluded, he would be 85 years old and missed out on the privileges of ownership. The abbreviated trial that occurred under a little known probate section that did not permit an appeal actually played well for Sterling, despite the fact that he lost. It allowed him to take a hard line and try to preserve his dignity, while laughing all the way to the bank. Hiring the best lawyers in town was the first move in increasing the value of the negotiation that ultimately allowed him to maximize the reward for the sale of the Clippers.

Create Your Own Keynote Speech

It is axiomatic that the vast majority of all civil actions result in an out of court solution. The fate of a lawsuit meanders through a complex system of information exchange and rules compliance, only to come out with an opportunity to settle or go to court. Just like the original Obama keynote speech in 2004, the first move in your negotiation is to come up with a litigator’s keynote or message that sets the tone for further settlement discussions. The messaging that often appears

from lawyers who haven't given much thought to their overall case narrative might sound like some of these phrases: "This is a policy limits case;" or "My client has really suffered and its going to take a lot of money to get her to settle; or "Unless you are offering extra contractual damages there is no need to talk settlement;" or "I've hired [name of great trial lawyer] to come in if this case doesn't settle to my client's satisfaction." This message is fine if you are consistent and stick with it during the entire litigation. If it is mere posturing, it will have little or no impact.

A message that packs a stronger punch needs to be devoid of threats and obligatory drama, but focuses on the kinds of things that get people elected. Why? Because we are trying to persuade people and get their votes for our case. President Obama got elected twice because of his messaging, not because of threats or scare tactics. His keynote speech was the beginning of the message, and the start of his negotiation with the voters. His support team kept up the narrative throughout both the campaign and his two terms in office by focusing on several key strategies, including but not limited to: 1) Being Authentic; 2) Presenting a vision; 3) Building relationships; and 4) Call to action.

(1) *Be Authentic* – Obama has had no problem expressing his musical preferences, interests in basketball and affinity for the Godfather movies. It has given him the ability to relate to the average voter who then has a reason to connect with him. Both McCain and Romney were not able to show those sides of their personalities, despite the fact that they were each very interesting candidates in their own ways. Similarly, presenting clients and their cases in an authentic light is the first step in gaining the vote of your adversary.

(2) *Presenting a Vision* – Obama focused on hope and change as his vision. He then took action (e.g. the Affordable Care Act) and told to the voters that this is what change looks like. Whether you agree or disagree with his ideology, the process of presenting this vision and delivering on it was effective. The vision of a legal action has to be summed up in a short elevator speech or sound bite that you present to your adversary, the court and whoever else might have an influence on the decision making process that could result in settlement of the case.

(3) *Building Relationships* – We litigators are quick to talk and tell people about our case and what is right with it before listening to the other side and noting the things that might or might not have an impact on them. Asking your opponent simple questions like "how does your principal view liability in this case?" and not interrupting as they answer is one simple way of gaining leverage in the settlement. It helps build relationships that results in goodwill that can be traded later on if parties listened more and asked questions, rather than talking at people.

(4) *Call to Action* – Notice how most everything that occurred in the Obama campaign was designed to get people to vote. YouTube channels were set up to bring information about their positions to people that might not always vote; Social Media sites were developed to present a human side of the candidate to a younger generation that doesn't always vote; Campaign sportswear was deployed so that it became cool to wear Obama tee shirts and hats. What is your call to action in a litigated case? Could it involve presenting information about your client and her situation without having to be formally asked through discovery? How about doing a short video interview of a witness on your iPhone and emailing it to opposing counsel with no strings attached? The list could go on and on.

The Campaign Continuum

Depending on where you are in the negotiation campaign, there is a continuum of opportunities to move the message forward. Recognizing that this generality might have exceptions, this is what you can expect during each stage of the campaign:

(1) *Pre-suit* – The settlement value is usually (but not always) discounted. It usually takes monumental efforts to wage a campaign that results in full value to the case. After all, there has been very little messaging that involves presenting an authentic vision of the case, building relationships and a call to action. That said, the opportunity to settle will be presented but is likely to lead to disappointment unless the client understands and expects a lower case value.

(2) *Early litigation* – Value can be generated in utilizing limited discovery such as abbreviated depositions and document exchanges. This does help the decision makers reassess risk and shows strengths and weaknesses of each side. It could also lead to a commitment to better understanding of the issues at stake and more monetary value. This occurs because the parties will have a better vision of your case.

(3) *Middle of Discovery* – By the time discovery is started but not finalized, settlement results can be all over the board. This moment in the campaign sometimes leads to more questions about the case vision and authenticity of the parties than answers. Yet, this is the “typical” moment in our judicial system when settlement efforts begin either through mediation or informal negotiation. The negotiation campaign can be best utilized by pre-qualifying settlement efforts with your adversary before actually diving into a formal mediation. By that I mean it is often helpful to float trial balloons to get a sense of where the other side is placing its settlement markers, even if they disclose in code their value of the case (“this is not a seven figure case;” “you need to get your client on the boat for a low value;” etc.)

(4) *Late In The Discovery Process*– The campaign has been simmering for quite some time and you have presented a vision of the case many times. The closer to trial clearly puts pressure on both sides to understand each other’s case vision and come to conclusions about client authenticity, likelihood of success and how a jury might respond to a call to action. The timing of this portion of the case creates the best opportunity for settlement.

(5) *Eve of Trial* – This negotiation campaign looks more like a “winner take all” approach. Someone will blink because the voters have to decide on a horse to ride to the finish line.

Mastermind the Campaign

In order to determine when on the continuum it is in your client’s best interest to utilize the keynote speech to resolve the case, there are three things to consider:

(1) *What is my target goal?* – If this is really the policy limit case that was threatened in the beginning, and the other side has declined to pay, then plan on playing the long ball game. The client should be set up for a lengthy and expensive process that will present little opportunity for settlement. On the other hand, if you select a fair market case value that realistically considers risk factors that your opponent would likely take into consideration, it is fairly easy to come up with a target price for the case.

(2) *Are critical decision makers informed of the risk?* – Most companies have layers of bureaucracy that must be mapped and understood before a case can be properly evaluated. Issues of whether insurance is available or not begin the conversation. This leads to an understanding or

inquiry into authority levels and identification of key players that need to be involved in the case analysis and negotiation.

(3) *What impediments will prevent resolution?* – Knowing the barriers to settlement depends on the relationship developed with opposing counsel. Just like Obama developed relationships with his constituents, opposing counsel is always the best champion for settlement. Building that relationship early will help identify the impediments toward resolution and help you navigate around them.

Summary

A considerable amount of analysis must go into a successful negotiation campaign. Wayne Gretzky said “I skate to where the puck is going, not where it has been.” Like the Great One, it is critical to look at the entire field of play and decide where you want to be and when. If it is going to take a number of moves to get the right constituents to understand the case value, then it would be a poor use of time to negotiate early. On the other hand, if you can aggregate the information on the case into a vision and narrative that is supported early on with back up documents and evidence, a shorter negotiation campaign will give rise to an early resolution, though it will likely be at a discount. In sum, don’t just throw a case against the wall and hope the other side gets it. Mount a negotiation campaign that is strategic and considers who might be needed to vote for your side and what they will need to solidify their vote.

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