

Negotiate – with heart and mind

Claes Ottosson in September 2023*

Introduction

Negotiations are a natural thing all of us do everyday. Because of this, persuasive negotiation techniques are important. For lawyers, they are particularly important because lawyers typically need to negotiate at some point in litigation, given that a huge amount of cases settle before trial. Lawyers tend to approach settlement with different negotiation styles. Some find it advantageous to approach these negotiations with distributive fixed-pie bargaining. With this approach, lawyers often engage in a push-and-pull style negotiation in which they take strong positions and try to grab as many settlement dollars as possible for their clients from the opposition. A dollar gained by one side in distributive bargaining is a dollar lost by the other.

Other lawyers will consider a facilitative, integrative bargaining approach in which they attempt, metaphorically, to expand the pie by asking why the other side is asserting particular positions. They then look for overlapping interests or a trade-off of interests to find creative resolutions. This negotiating style allows for resolutions unavailable through a verdict, such as ribbon-cutting ceremonies, mutual press releases, future business relations, repairs of defective products, performance of contractual obligations, and the like.

Finally, other lawyers engage in a flexible hybrid of strategies, often starting with positional distributive bargaining and moving to integrative bargaining to bridge potential impasses in the negotiations.

Remember that there are many, many tools that can influence people to accept settlement proposals. Do not rely solely on the merits of an argument. Instead, incorporate these different strategies of influence to deliver settlement requests in a way that makes them more likely to be accepted. In doing so, settlement outcomes and client satisfaction can best be optimized.

Persuading others

Regardless of the negotiation strategy employed, lawyers can enhance their settlement results by better persuading others to accept their proposals. Robert Cialdini, a social and behavioural scientist, has done a remarkable amount of research and analysis in the field of influence, some of which he distilled in his books *Influence: Science and Practice*; and *Pre-Suasion: A Revolutionary Way to Influence and Persuade*. Many marketers and business professionals have used his studies to develop strategies to influence customers to use their services and purchase their products.

As examples, they may put clouds on the wall of a furniture store to encourage people to buy the most comfortable sofas, offer free desserts at a restaurant because it results in greater tips for the wait staff, provide free samples of food at a grocery store because it makes it more likely the sampler will reciprocate by buying the sampled item, or play German music in a wine store because it results in more customers buying German wine. Clearly, marketers are consistently searching for more effective strategies to influence consumer behaviour. The legal profession should utilize these same types of influence techniques

when negotiating a settlement because it can enhance the opposition's compliance with your settlement requests. This article will explore various influence techniques and discuss how to best apply them in settlement negotiations.

"Pre-suasion"

Cialdini's elaborate influence work clearly maintains that the psychological frame of a discussion at the outset can carry equal or greater weight than the actual merits of any request. He explains that one should master the art of "pre-suasion," which is "arranging for recipients to be receptive to a message before they encounter it." It would seem that Sun Tzu understood this when he made this famous and historical quote: "Every battle is won before it is fought." Essentially, in the legal context, this means that the best tactic to influence is not arguing the merits of a settlement request alone. Rather, before delivering the merits of your proposal, think about pre-suasion and influence techniques that will increase the likelihood that messages, ideas and proposals will be accepted.

First, focus the attention of the opposition on a strength of the case immediately before making a settlement proposal. Cialdini explains that people can only focus on one thing at a time and, unsurprisingly, they tend to give heightened importance to whatever has their attention. He explains that the factor most likely to determine a person's choice in the situation is the one that has been elevated in attention at the moment of the decision. Use this concept when asking for acceptance of a settlement proposal. Focus the conversation on the strongest points of the case immediately prior to making a settlement proposal. If the case is weak on liability and strong on damages, focus the conversation on damages. Similarly, if there are crossclaims and multiple issues in the dispute, focus attention on the issues that favour the case immediately prior to making a settlement proposal.

Additionally, garner more attention for ideas by speaking quietly, as listeners will need to lean in to hear what is being said. The research shows that people will pay more attention and give heightened importance to things that they move toward. Although these tactics can help bring attention to topics that, when introduced immediately before a settlement proposal, may influence compliance, be mindful to give an audience to the other side's arguments and interests. Failure to do so could anger the other side and make them disinclined to grant requests. Therefore, validate the opposition's feelings and positions, but wait to make a settlement proposal until after turning the opposition's attention to conversations that favor your case.

Second, tether a requested settlement amount to a larger anchoring number so that it seems small in comparison. For example, say "I'm not going to ask for \$2,000,000 dollars today." In doing so, when subsequently asking for \$400,000, it seems relatively small and reasonable in comparison. Lawyers commonly use this anchoring principle in mediation. They start negotiations with an anchoring number that is extremely high or low so that they can make concessions and then conclude with a settlement request that seems reasonable in relation to the anchoring number. However, be cautious when using extreme numbers due to the potential negative impact it can have on the opposition's negotiating behaviour. If the number is perceived as insulting, the other side may terminate the negotiation, present an equally offensive anchor, or engage in poor negotiating behaviour – all of which obstructs an ability to influence. It is best to find the sweet spot when establishing an anchoring. It should be large enough to create the influence of an anchor and to allow for concessions, but not so extreme that it insults the opposition and makes them disinclined to satisfy settlement proposals.

Third, tether settlement proposals to a quality that the opposition would like to possess. For example, Cialdini explains that people are more inclined to fill out a survey after being asked if they are “helpful.” Similarly, people are more inclined to try a new food after being asked whether they are “adventurous.” Use these same tactics in settlement negotiations. To encourage the opposition to work collaboratively to find a creative resolution, try asking them first if they are good at problem-solving or if they are helpful. Similarly, to encourage settlement rather than trial, ask them if they “want to move on” with their lives (rather than spend the next couple of years fighting at trial), or if they are “ready to live without conflict.” Finally, ask questions specific to their individual case as a mechanism for influence. For example, in an employment case, ask whether someone considers themselves a hard worker to influence them to consider alternate employment, or in a family dispute, ask if they value family, to influence them to resolve the dispute. Regardless of the specifics in the case, remember that tethering a request to an attribute that the opposition would like to possess is a strong influence technique.

Don't offer options at the outset

Fourth, do not give a list of options for settlement at the outset. Cialdini explained that a consumer is more likely to buy a camera when the salesperson focuses the consumer's attention only on that one camera and avoids discussion of other options. Similarly, provide the opposition with only one settlement option at a time, starting with the most advantageous option for the client. Doing so will make it more likely to influence acceptance of that settlement proposal.

Fifth, when possible, frame discussions to focus on “danger” or a “new idea” because these concepts create automatic attention. For example, create attention by discussing that it is “dangerous” to not save money, to eat sugar, to err on a tax form, or to go to trial. Mediators often capitalize on this “danger” concept by talking about the costs and risks of trial as a mechanism to influence settlement. Although people have different propensities for risk-taking, these are generally the very types of dangers that people try to avoid. Similarly, make sure to highlight new settlement proposals and ideas as “new” in order to create heightened attention to it. Obviously, what is portrayed as “dangerous” and “new” will vary depending on the case. However, simply talking about ideas in these terms will create the additional attention and influence that fosters a higher acceptance of settlement proposals.

Sixth, preload a request with positive associations to persuade people to accept the information that is about to be delivered. Cialdini explained how viewing photographs of people winning a race can make people more productive in their work environment and that objects illustrating warmth make people feel more warmly toward others. Similarly, preload associations before making a settlement request to influence its acceptance. For example, photographs of people smiling and interacting, or art work showing a handshake, could preload the association of the importance of settling and resolving conflict. Similarly, a round table during a negotiation may preload people with the association of working together, rather than engaging in a competitive negotiation posture. Alternatively, influence acceptance of a settlement proposal for an extended contract or a future business relationship by using photographs showing achievement, businesses working together, or relationships.

Keep requests simple

Seventh, make a request and settlement proposal easy to understand. Cialdini's research shows that people associate more readily with, and are more influenced by, concepts that

they can understand. People tend to avoid exerting effort to decipher complicated arguments and positions. Influence compliance by simplifying complicated concepts prior to making a settlement proposal.

Eighth, use fatigue and rushed circumstances as an advantage. Cialdini explains that when people are fatigued or particularly rushed, they do not slow down to do a deep analysis of a request. Rather, they give a gut response and are more susceptible to influence manipulations and techniques. Therefore, to push through a resolution and benefit from persuasion association and techniques, it may prove advantageous to do it in fatigued or rushed circumstances so that the request is not denied because of the opposition's careful deliberation. Conversely, when a deep analysis of a settlement proposal would be beneficial, then slow down the negotiations, take an extended break, or even pause negotiations until a different day.

Ninth, utilize the very strong social obligation of the rule of reciprocity. Cialdini explains that the rule of reciprocity obligates people to repay a favour with a favour. Interestingly, the reciprocated favour is oftentimes of greater or different value than the initial favour. Use this concept to manipulate your opposition during negotiations. Use positive, respectful, and generous negotiating behaviour to engender it in return and make it easier to influence the other side into accepting settlement proposals. Express a desire to meet the needs of the opposition so that they can repay the favour by meeting your needs. Grant the opposition's request for something less valuable to trigger an obligation of reciprocation before making a settlement proposal. When negotiating in your law office, be a gracious host that provides food and a comfortable room so that when making a settlement proposal, they are more inclined to want to repay the generosity by accepting the proposition. Similarly, grant discovery extensions and show courtesy to the needs of the opposition in litigation prior to the negotiations, so that the other side reciprocates. Simply stated, generosity begets generosity.

The Rule of "Liking"

Tenth, use the rule of "liking" to influence the other side to accept a request. Cialdini explains that the more that the other side "likes" you, the more they can be influenced. Increase the chance that the opposition "likes" you by treating them respectfully and, when possible, trying to accommodate their scheduling and discovery needs during the litigation. Additionally, during a settlement negotiation, become more "liked" by validating their needs and proposals, showing empathy, listening actively, speaking respectfully, avoiding character attacks, expressing an interest in meeting their needs, and looking for trade-offs to satisfy their needs on matters that are of low value to a client. It can be particularly valuable to be "liked" to counter-balance some of the dislike that the opposing clients naturally have due to the litigation. Therefore, use positive and "likeable" behaviour to make it more likely that the opposition will accept settlement proposals.

Eleventh, use the concept of authority to influence acceptance of a settlement request. Cialdini explains that people are more inclined to listen to people who have expertise in a subject, so long as they trust the expert. When selecting a mediator, pick one who is trustworthy, an expert in the subject matter, or just an expert at mediating, so that they can exert influence over the opposition when trying to shift perspectives and move the parties closer to a resolution. In fact, it is often wise to let the opposition pick the mediator for this very reason. When no mediator is present, consider using a well-respected expert in the field to render an opinion about the relevant subject matter, a particular aspect of the case, the law, settlement value, likely trial results, comparable verdicts, and the like. Similarly, consider

hiring a prominent lawyer who is an “expert” in the field to represent a client’s interests in settlement or at trial because his or her opinions and requests may have additional influence on the opposition.

Twelfth, use the concept of social proof for influence. People are more inclined to feel, believe and act like others, especially comparable others. When others behave in a similar way, people feel that their position is valid and feasible. Therefore, before making a settlement proposal, gain influence by showing comparable statistics and discussing how similarly situated people have accepted and enjoyed the benefits of the same type of proposals.

Thirteenth, use the concept of scarcity to influence people to accept settlement requests. People are more inclined to accept an offer when there are not other offers readily available because we inherently value items that are scarce. This explains why a ticket to a concert is more likely to be bought if it is the last remaining ticket. Negotiators can make exploding settlement offers that expire after a set time. If an offer is only available for a day or for a set time, the pressure from the scarcity effect may make the opposition more inclined to accept the offer.

Fourteenth, use the concept of “consistency” for influence. People want to act consistently with their previously held views and positions. Cialdini found that people who pray every night for their wife’s well-being were less likely to cheat because it would be inconsistent with their daily prayer. Use this need for consistency to create influence by highlighting the opposition’s positions that are consistent with a settlement position. However, be aware that this need for “consistency” can also hinder settlement because people do not want to appear inconsistent. Help combat this obstacle to settlement by avoiding steadfast positions. Frame valuations and expectations in the case in a fluid or flexible way so that, as the litigation unfolds and there needs to be compromises for settlement, there is an ability to do so without appearing inconsistent to the client or the opposition. Similarly, if clients have taken a strong position as to fault or blame, avoid these discussions during settlement negotiations so that they will not have to take an inconsistent position that would prevent settlement. Instead, move conversations to solutions so that the strong concept of consistency will not hamper settlement.

Fifteenth, accompany a request with explanations. Studies reveal that people are more inclined to acquiesce to a request when information is provided. This is why mediators often ask for concessions after delivering information. Do the same when negotiating without a mediator because the more explanations given about a request, the more inclined people will be to grant it.

The power of “unity”

Finally, utilize the powerful feeling of “unity” to influence people into accepting settlement requests. Cialdini explains that people are more likely to be influenced when they feel that they have something in common with the person making the request. This includes family members or people with whom they feel connected by geography, political views, religious views, organizations and the like. For example, Warren Buffet’s investors bought more shares in his company once he explained that he gave the same investment advice to his own family members. Similarly, if a doctor reveals that he or she gave the same treatment plan to a spouse, a person would be more inclined to follow the prescribed treatment. Try using the same type of tactic in your negotiations.

Also, to better create “unity,” be mindful of word selection. Studies have found that using words like “we,” “us,” “brother” or “sister” can make people more susceptible to influence because it engenders the warm, trusting, and positive feelings typically found in familial relationships. The trust component can be key because the studies reveal that people are more influenced by those they trust. Also, consider asking the opposition for advice about settlement because it can create a feeling of collaboration, thereby unifying the parties. Similarly, phrases, such as, “we can get this problem solved” creates the same collaborative and unifying feeling. Finally, small talk designed to create connections and commonality can allow for more influence. Look for commonalities in friends, religious institutions, neighbourhoods, children, organizations, and the like. These types of shared experiences allow for more influence when making a settlement proposal.

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