THE KEYS TO SUCCESSFUL NEGOTIATION AND EARLY DISPUTE RESOLUTION

Scott E. Korzenowski
Dady & Gardner, P.A.
Minneapolis, Minnesota

Benjamin B. Reed
Plave Koch PLC
Reston, Virginia

and

Les Wharton
Coverall North America, Inc.
Deerfield Beach, Florida

October 16-18, 2019
Denver, Colorado

©2019 American Bar Association
Table of Contents

I. INTRODUCTION: WHAT IS NEGOTIATION? ................................................................. 1

II. THE BENEFITS OF A NEGOTIATED RESOLUTION ...................................................... 2
   A. Certainty .................................................................................................................. 3
   B. Time And Cost Savings ......................................................................................... 6
   C. A Fair Resolution ................................................................................................... 8

III. METHODS OF NEGOTIATION ..................................................................................... 9
   A. Direct Negotiation .................................................................................................. 9
   B. Mediation ............................................................................................................. 10

IV. THE OBJECTIVE OF NEGOTIATION ................................................................. 12
   A. Identification Of The Other Party’s Top Line/Bottom Line ................................. 12
   B. Evaluating Risk At Different Stages Of The Litigation ....................................... 14

V. NEGOTIATION TACTICS ......................................................................................... 16
   A. Start Early ............................................................................................................ 16
   B. Never Give Up ..................................................................................................... 17
   C. Identify The Other Party’s Needs ........................................................................ 17
   D. Do Not Make Assumptions .................................................................................. 18
   E. BATNA Concept .................................................................................................. 18
   F. Find Common Ground ......................................................................................... 19
   G. Non-Cash Considerations ................................................................................... 19
   H. Take The Lead .................................................................................................... 19
   I. Use Third Parties ................................................................................................. 20

VI. THE SETTLEMENT AGREEMENT ............................................................................. 20
   A. The Need For A Written Term Sheet ................................................................. 20
   B. The Specific Terms Of The Term Sheet – Continuing The Negotiation .......... 22
C. Double-Checking: Make Sure The Term Sheet Addresses All The Issues That Are Important To The Parties ................................................................. 26

VII. WHAT NOT TO DO ......................................................................................................... 27
A. Ultimatums .............................................................................................................. 27
B. Personal Anger ..................................................................................................... 27
C. Overstating One’s Position ................................................................................... 28
D. Failing To Identify The Client’s Risk ..................................................................... 28
E. Hiding The Ball ..................................................................................................... 28

VIII. NEGOTIATING FROM A POSITION OF WEAKNESS ................................................... 28
A. Certainty .............................................................................................................. 28
B. Cost Of Prosecuting Or Defending Against Claims ............................................. 29
C. Saving Time ........................................................................................................ 29
D. Avoiding Publicity And Damage To The Franchise System ............................... 30
E. Resolving The Relationship Rather Than Fighting About The Relationship .... 30

IX. THE FINAL NEGOTIATION (WITH ONE’S CLIENT) .................................................. 31
A. Techniques for Negotiating With One’s Client ................................................... 32

X. CONCLUSION ........................................................................................................... 33
I. INTRODUCTION: WHAT IS NEGOTIATION?

Most people, even non-lawyers, generally understand the concept of negotiation. Merriam-Webster defines negotiation as “to confer with another so as to arrive at the settlement of some matter.” Black’s Law Dictionary says it is “to communicate or confer with another so as to arrive at the settlement of some matter.”

As important as it is to understand what negotiation is, however, it is probably even more important to understand what negotiation is not. Negotiation is not a competition. No one party wins a negotiation. Rather, both parties get enough to make an agreement valuable enough to avoid the fight. Even Mike Michalowicz, the author of *The Most Effective Way to Win a Negotiation,* admits that his article’s title is a bit at odds, since negotiation is about compromise. Negotiation is about both sides winning. And ultimately the most effective way to win a negotiation is for you both to win. Since, if you are the only winner, the loser in the negotiation will not be pleased. They may exact revenge by never working with you again or posting a nasty blog about you.¹

Negotiation often is not between enemies, especially in franchise disputes where the disagreement is between two parties that often will continue working together after resolution. In these cases, a “win-win” focus is critical, much like disputes between spouses or significant others. As Linda and Charlie Bloom wrote in an article in the December 31, 2014 edition of *Psychology Today,* “trying to ‘win’ an argument by defeating the other person not only fails to address the underlying problem, but generally intensifies it. While one person may appear to win the battle, both partners lose the war.”²

Negotiation is ubiquitous. Pretty much everybody, including non-lawyers, negotiates dozens of times every day. Many of us negotiate when we are purchasing cars, or houses. We negotiate employment terms. We negotiate where we will have lunch. We negotiate with our spouses. We negotiate with our kids. We negotiate with our friends, and perhaps even our enemies. We negotiate with our pets. And we even negotiate with ourselves.

And finally, negotiation is not selfish. Negotiation necessarily requires the “Three C’s”: cooperation, collaboration and compromise. The parties must cooperate with the other side to schedule meetings and exchange ideas, among other things. The parties also must collaborate


with the other party to identify the issues and needs of both parties. And ultimately each party must compromise by giving up some of its wants to get most of its needs.

Likewise, there can be no resolution without the “Three A’s”: acknowledgement, acceptance, and agreement. The parties must acknowledge the other side’s needs, accept that the other party must meet certain of its needs, and agree to give the other party what it really needs.

The purpose of this paper, therefore, is to address:

- The benefits of a negotiated resolution, which include, among other things, certainty, cost and time savings, and a fair, but not perfect, resolution;
- The dynamics of different methods of negotiation, including direct negotiation and mediation;
- The objectives of negotiation, which are to identify what the other party is willing to give and determine if that is enough for your party to settle;
- The tactics of negotiation, including the importance of identifying the other party’s needs and the ability to find common ground;
- The most important provisions to include in a settlement agreement; and
- Negotiating from a position of weakness (“the benefits of begging”).

Finally, this paper will cover perhaps the most important negotiation all lawyers eventually face: the one with their own client when the other side has presented an offer the lawyer believes the client would be foolish to disregard.

II. THE BENEFITS OF A NEGOTIATED RESOLUTION

Parties in a franchise dispute will invariably engage in negotiations to resolve the dispute because they are required to do so, either to meet a pre-filing obligation in the franchise agreement or because, once in litigation, court rules often require formal settlement discussions to occur. In some cases, the parties view forced settlement discussions as a waste of time:

3 See, e.g., C.D. Cal. Gen. Order 11-10 ¶ 5.1 (presumptively referring all cases (with limited exceptions) to Court ADR program); E.D. Cal. R. 270(a) (mandating settlement conference for all cases); S.D. Cal. Civ. R. 16.3 (settlement conference required in all cases); S.D. Fla. R. 16.2(d) (mediation required at least 60 days before trial except in specified cases); D. Haw. R. 16.5(a) (requiring settlement conference); S.D. Ill. R. 16.3 (ADR required in all but certain excepted cases); D. Minn. R. 16.5 (requiring mediated settlement conference before trial); W.D. Mo. Gen. Order, Mediation and Assessment Program § IV.A (Sept. 1, 2015) (requiring all cases, with limited exceptions, to participate in mediation program); N.D. Miss. & S.D. Miss. R. 83.7(e) (requiring use of some form of ADR in every case unless exempted); D.N.M. R. 16.2 (requiring settlement conference except in certain cases); W.D.N.Y. Standing Order in Re: Alternative Dispute Resolution Plan (Sept. 21, 2010) (requiring that court’s ADR Plan apply to all cases); W.D.N.Y. Alternative Dispute Resolution Plan 2.1 (May 11, 2018) (all cases referred to AD, with listed exceptions); W.D.N.C. R. 16.2 (all cases referred to mediated settlement conference); E.D. Okla. R. 16.2(b) (all cases set for settlement conference); N.D. Okla. R. 16.2(b) (all cases set for settlement conference); D.R.I. Alternative Dispute Resolution Plan § III (am. Mar. 1, 2006) (all cases subject to ADR and, if parties cannot agree, case assigned to magistrate judge for settlement conference); W.D. Tenn. Plan for Alternative Dispute Resolution 2.1-2.2 (rev. Oct. 1, 2018) (all cases subject to ADR, unless ordered otherwise based on motion for good cause); D. Vt. R. 16.1 (requiring submission of most to early neutral evaluation).
• “How can we possibly resolve a dispute before the lawsuit is filed when we don’t even know what the other side is claiming?”

• “There is no point in engaging in negotiations until both sides have felt some pain through discovery.”

• “We are so far apart in what we want versus what they are willing to pay, that there’s no point in trying to resolve this.”

That viewpoint is often a self-fulfilling prophecy: if a party is not inclined to negotiate, then a mandatory negotiation is unlikely to succeed.

But forced negotiations or other forms of alternative dispute resolution may be worthwhile – even for parties that are far apart in their positions or prior to or in the early stages of litigation – because of the significant benefits of negotiating a resolution to a dispute, as opposed to prosecuting an action to resolve a dispute. A negotiated resolution has the benefit of certainty, results in significant time and cost savings, and, usually, is a more fair result than the winner-take-all result that is most often the outcome of litigating. In this section, we discuss some of the benefits of negotiating to resolve a dispute as opposed to litigating it.

A. **Certainty**

Perhaps the most obvious benefit to a negotiated resolution is that there is certainty in how the dispute is resolved. If the parties agree to a particular set of terms to resolve issues between them, there are no open questions about the outcome. But there is more to certainty than just knowing the negotiated terms. Because the parties negotiate the terms on which they will resolve their dispute, they avoid the uncertainty of having third parties decide their fate.

Cases often settle before trial because litigants (and lawyers) are wary of a judge, and certainly a jury, deciding whether they win or lose. Juries are viewed as particularly unpredictable.\(^4\) Lawyers, jury consultants, and social scientists spend countless hours undertaking mock trials to attempt to understand and predict what arguments, facts and other aspects of a trial influence jury decisionmaking. But predicting with certainty how a trial will actually play out – much less how a particular group of jurors will render a decision – is impossible for even the most seasoned trial lawyer. Some counsel might view a bench trial or arbitration as less unpredictable than a jury trial, likely because they believe that judges and arbitrators are more educated, and obviously more familiar with the law and the presentation of evidence at trial.\(^5\) The fact remains that parties and their counsel cannot control how the trial or hearing will proceed, what rulings the judge or arbitrator will make regarding evidence, and how the judge or arbitrator will ultimately weigh the evidence and apply the law to that evidence in rendering a decision.


\(^5\) See id. at 377 (“Another source of the greater perceived unpredictability of juries compared to judges is that jurors are widely presumed to rely on their intuitions, personal biases, and values. In contrast, judicial decision making is said to be characterized by a rational approach. However, judges are subject to many of the same psychological tendencies that influence laypeople.”).
Added to the general unpredictability of a trial or arbitration hearing is the fact that juries, judges, and arbitrators base their decisions on the evidence presented and the arguments made by counsel.\textsuperscript{6} The evidence that fact-finders consider is therefore limited, focused on the facts necessary to establish elements of a claim or defense for purposes of proving or disproving liability and damages. The facts that are relevant – and admissible – in particular trial may not be all the facts pertinent to resolving a dispute. Indeed, judges and juries often have no window into how the decisions they reach will impact the businesses of the parties to the case. For example, a ruling that a franchisor cannot enforce a post-termination noncompetition covenant against a former franchisee has the immediate impact of allowing that franchisee to continue operating its business after termination. Such a decision might also impact the franchisor’s ability to enforce that provision in the future or essentially rewrite the agreement. In other words, the decisions fact-finders make in a trial or arbitration are made in the vacuum of that proceeding, often without a contextual understanding of the overall impact of those determinations on the parties or their businesses.

As a result, many businesses are reluctant to have complex business issues determined by decisionmakers with no background in their business or business relationships other than what they are able to digest during the often truncated and non-linear presentation of evidence during a trial or hearing. A negotiated resolution avoids both the inherent uncertainty of a trial or arbitration hearing and the uncertainty of having an outsider determine important issues for the parties’ businesses. Rather than being stuck with the judgment of a third party that is based on a limited record and meant to address a specific set of claims and defenses presented, parties can undertake a cost-benefit analysis of various aspects of the dispute to determine what makes sense economically and from a business perspective.

In the example above, the franchisor might decide that waiving the noncompete in a particular dispute is more efficient, due to a lack of desire to recapture that market at the time or to avoid a ruling that the noncompete is not enforceable based on a particularly bad set of facts. On the other hand, the franchisee might be willing to pay for the right to avoid the noncompete, rather than risk spending money fighting the issue, only to be enjoined from further operation and destroying the business. Thus, to avoid the uncertainty of how a court or arbitrator will decide their fates, the franchisor and franchisee might be able to negotiate a resolution in which the franchisee agrees to pay some amount both to buy peace and to avoid the noncompete and the franchisor maintains the right to enforce its noncompete in the future.

Finally, even after a verdict or decision is rendered, there is still uncertainty. First, there is the possibility of appeal. Moreover, there can often be issues related to enforcement of a

\textsuperscript{6} See, e.g., NINTH CIRCUIT JURY INSTRUCTIONS COMMITTEE, MANUAL OF MODEL CIVIL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE NINTH CIRCUIT, Instruction 1.10, “What is Not Evidence” (2017 Ed.) (“In reaching your verdict, you may consider only the testimony and exhibits received into evidence. . . . Anything you may [see or hear] [have seen or heard] when the court was not in session is not evidence. You are to decide the case solely on the evidence received at the trial.”); ELEVENTH CIRCUIT PATTERN JURY INSTRUCTION (CIVIL CASES) 1.1 “Preliminary Instructions” (Jan. 2019) (“You must base your decision only on the testimony and other evidence presented in the courtroom. It is not fair to the parties if you base your decision in any way on information you acquire outside the courtroom.”); NEW JERSEY MODEL JURY CHARGE (CIVIL) 1.11C “Jurors Not to Visit Accident Scene or Do Investigations, or Conduct Any Independent research of Any Nature, Including Use of the Internet or Other Electronic Media” (June 2018) (“Your job is to decide the case based solely upon the evidence presented to all of you here in the courtroom. . . . It is the job of this Court to ensure that you are provided with all of the information that you are permitted to have in order to decide this case. Why is this restriction imposed? You are here to decide this case based solely on the evidence – or lack of evidence – that is presented in this courtroom. . . . Our system of justice requires that you, as a juror, not be influenced by any information outside of this courtroom. Otherwise, your decision may be based on material which only you, and none of your fellow jurors, know.”).
judgment or arbitration award. For arbitrations, there can be the added requirement to have the award confirmed.\textsuperscript{7} Issues may also arise in efforts to collect on a money judgment against a party that may have spent its resources on the litigation. This may be particularly true where the litigation results in a determination that the franchise has terminated and the franchisee has essentially lost its business. Having lost the right to operate a profitable business, the franchisee may lack the ability to pay the money judgment that accompanied the judgment that the franchisee no longer had the right to operate a franchised business. The former franchisee has no certainty, as it is faced with liquidity issues, potential bankruptcy, and, if there are personal guaranties, a threat to personal assets. On the other hand, the franchisor, which already paid legal fees to vindicate its rights, is now forced to try to collect money it may never recover, and incur more legal fees that it can likely never recoup. The same holds true with judicial or arbitral resolutions that involve injunctions or specific performance. Because the losing side fought the action that was the subject of the injunction or order of specific performance, that party may be reluctant to comply with the order. As a result, the victorious party may need to seek contempt or other sanctions in order to ensure compliance.\textsuperscript{8}

In contrast, negotiated resolutions are, by nature, final. Both parties negotiate a result they can manage, both practically and financially. Of course, parties breach settlement agreements. But proving a breach of a negotiated settlement is usually a much simpler case.\textsuperscript{9} Such cases will not involve the history of the parties’ relationship that led to the original dispute and is unlikely to involve defenses or counterclaims that were probably released as part of the original settlement. In some cases, a settlement of a dispute will involve setting obligations and requirements for the relationship going forward. Obviously, in those circumstances there could be disputes later about those obligations or requirements.\textsuperscript{10} However, assuming the negotiated resolution covered the matters in dispute and the lawyers properly and clearly addressed how


\textsuperscript{8} See, e.g., Cold Stone Creamery, Inc. v. Gorman, 361 F. App’x 282, 287 (2d Cir. 2010) (affirming contempt order against former franchisee that violated order preliminarily enjoining his use of the franchisor’s marks because the franchisee sold branded items to a third party without consent and assisted the third party in operating the formerly franchised location); Schwartz v. Rent-A-Wreck of Am., 261 F. Supp. 3d 607, 613 (D. Md. 2017) (finding franchisor in contempt of order prohibiting franchisor’s call center from diverting business from one franchisee to other franchisees when franchisor’s employees “systematically informed potential customers inquiring by phone that no franchise existed [in franchisee’s territory] or that [the franchisee] had ceased operating”); JTH Tax, Inc. v. Lee, 540 F. Supp. 2d 642, 646 (E.D. Va. 2007) (finding former franchisee and his wife in contempt because they continued to operate a competitive tax business in violation of the former franchisee’s post-termination obligation not to compete and in violation of the court’s permanent injunction).

\textsuperscript{9} Of course, that is not always the case. The tortured history of Anago Franchising, Inc.’s litigation with its former franchisee, Shaz, LLC is a good example. After originally suing Shaz in 2009 to enforce a termination, Anago and Shaz settled the underlying dispute. See 677 F.3d 1272, 1274 (11th Cir. 2012). Subsequently, Anago attempted to revive the suit to enforce the settlement, alleging that Shaz had violated the confidentiality provisions of that agreement. Ultimately, in 2012, the Eleventh Circuit ruled that in stipulating to dismissal of the case, Anago had foreclosed any ability to “reopen” the matter to enforce the settlement. Id. As a result, Anago was forced to file a new action on its claim for breach of the settlement agreement. That litigation – which Anago ultimately lost, as the court concluded that Anago, not Shaz, had breached the settlement agreement – did not conclude until 2015. See Anago Franchising, Inc. v. Shaz, LLC, 599 F. App’x 937 (11th Cir. 2015).

\textsuperscript{10} See, e.g., Lawn Doctor, Inc. v. Rizzo, No. CIV.A. 12-1430 TJB, 2012 WL 6156228, at *9 (D.N.J. Dec. 11, 2012) (enforcing a settlement agreement that resolved post-termination breach of contract claims and entering a declaratory judgment finding that particular services provided by former franchisee constituted a “competitive business” that was forbidden under the parties’ settlement agreement).
those issues were resolved in the settlement agreement, subsequent disputes should be less likely or more easily addressed by reference to the settlement agreement.

B. **Time And Cost Savings**

A second benefit of negotiated resolutions is the significant savings that parties may recognize related to the expenditure of time, money and other less tangible resources.

Litigation is time consuming – both in the time it takes to litigate a case and in the amount of time it takes away from other pursuits. Recent statistics from the United States Court system indicate that from beginning to trial a case, on average, is pending for between 26 to 27 months.\(^1\) Even in “rocket dockets” like the Eastern District of Virginia, the average time a case is pending is between 10 to 13 months.\(^2\) In other jurisdictions with backlogged cases, judicial appointments outstanding, and less onerous local rules regarding timing, a case can remain pending for over three years.\(^3\) After a lawsuit is filed, the parties are in limbo for months or years while their attorneys engage in motion practice, discovery, and trial preparation, none of which usually resolves the dispute. Indeed, over time, areas of dispute might resolve themselves. For example, if a former franchisee operates a competing business after expiration of a franchise agreement, the franchisor may file suit seeking damages and injunctive relief. Regardless of the claims asserted (and any counterclaims the franchisee may raise), the impetus for the suit was the franchisor’s desire to force the franchisee to cease the competitive operation. However, over the course of the litigation, the former franchisee may elect to cease operating the business for reasons independent of the lawsuit: the business might become unprofitable or the franchisee might sell the business. In that scenario, the franchisor’s main concern has become moot, but the parties are still left to sort out the claims they may have asserted against each other. A negotiated resolution – depending on when it occurs – can cut short the time period in which a dispute can hold the parties, their relationship, and, in some cases, the franchise system, hostage.

Of course, during the time litigation is pending, the parties also spend countless hours prosecuting their claims and defenses. Company executives and lawyers must spend time discussing strategy with outside counsel, responding to discovery requests, being deposed, reviewing motions and filings for accuracy, and, ultimately, preparing for and attending the trial. Those are hours that could be devoted to negotiating a resolution and running the business to avoid future areas of dispute.

Monetary savings include both savings with respect to the ultimate result and to the process of getting to that result. The first category relates to the potential for negotiating a resolution that requires payment of less than the claimed amount. Particularly in cases

---


\(^2\) Id.

\(^3\) Id. For example, in the District of Columbia, the average time from filing to trial in civil cases over the past five years has ranged from 37 months to 55 months. Id. In the Southern District of New York, during the same time frame, the average time for a case to go to trial has ranged from 24 to 35 months. Id. The average time period in the Northern District of Illinois has ranged from 30 to 41 months. Id. In the Eastern District of California, the average time period to trial has ranged from 36 months to 50 months. Id.
involving counterclaims, the possibility of negotiating a payment that takes into account both parties’ respective claims or a walkaway that essentially offsets the two parties’ claims might be preferable to a one-sided award that compensates one party but not the other – particularly when it is uncertain which party might prevail. The other form of cost savings is in the expenditure of legal fees litigating a case.\textsuperscript{14} Given these potentially astronomical costs to litigate, negotiating a resolution before those expenditures are made can result in a significant savings. Moreover, funds used to litigate an uncertain result can instead be applied to a negotiated – and certain – resolution.

There are also less tangible – but no less important – costs of litigating that may be avoided through negotiation.\textsuperscript{15} As discussed above, the business people for a franchisor and the owners of a franchisee must devote substantial time litigating a case. Aside from the simple number of hours that process requires, litigation often causes disruption to the business and distraction to those involved in running that business.\textsuperscript{16} A franchisee engaged in litigation with its franchisor may be anxious that every periodic inspection during the litigation is a pretext to find a way to terminate the relationship as retaliation. That fear could distract the franchisee from focusing on running its business. Similarly, being required to endure depositions in which their business decisions are questioned can distract franchisor executives from making those decisions.

In a franchise system there is also the impact litigation has on a franchisor’s relationships with other franchisees. For example, franchisees may refuse to comply with a franchisor’s demands if another franchisee has challenged the obligation to meet those demands in litigation. In that circumstance, the existence of litigation can impede the franchisor’s efforts to manage the system. Further, parties may take actions that are beneficial for their litigation positions, even if those decisions are not in the long-term best interests of their businesses.

Finally, a negotiated resolution can avoid the emotional cost of litigation.\textsuperscript{17} Parties to a dispute are often angry at the outset; however, those feelings of antagonism can spiral out of control through protracted litigation as counsel make accusations in court filings and arguments, and stakeholders are challenged in depositions to relive decisions they made that led to the

\textsuperscript{14} See, e.g., LAWYERS FOR CIVIL JUSTICE, ET AL., LITIGATION COST SURVEY OF MAJOR COMPANIES 2 (2010 Conference on Civil Litigation May 10-11, 2010), https://www.uscourts.gov/sites/default/files/litigation_cost_survey_of_major_companies_0.pdf (finding that of surveyed Fortune 200 companies, average outside litigation costs in 2008 were nearly $115 million, up 73 percent from $66 million in 2000); SMALL BUSINESS ADMINISTRATION OFFICE OF ADVOCACY, IMPACT OF LITIGATION ON SMALL BUSINESSES 12 (October 2005), https://www.sba.gov/sites/default/files/files/rs265tot.pdf (finding that survey respondents reported actual legal costs of a litigated matter ranging from $3,000 to $150,000).

\textsuperscript{15} SBA OFFICE OF ADVOCACY, supra note 14, at 12 (“The impact of litigation on businesses goes well beyond the purely financial impact of legal fees and damages.”).

\textsuperscript{16} Id. at 3 (“A small business owner is likely to be extensively involved in all of his or her company’s litigation as investigator, witness, custodian of documents, contact person with attorneys and many other roles. The time the owner spends is time taken away from running the business and such lost time can have devastating consequences.”)

\textsuperscript{17} Id. at 12 (“Because most small business owners are invested in their small businesses, litigation causes not just financial loss, but also substantial emotional hardship, and often changes the tone of the business.”).
dispute. And for parties who view litigation solely as a means to beat the other side, litigation can lend itself to hostility naturally – particularly in franchise disputes which often, like divorces, involve a failed relationship. Attempting a negotiated resolution obviously entails overcoming hard feelings incumbent with a dispute. However, swallowing those feelings to negotiate a palatable resolution might be easier than allowing them to fester over a long period of time, particularly given the lack of certainty of outcome and expense of litigating.

C. A Fair Resolution

One final benefit of negotiated resolutions is that they are often more “fair” than the result of a litigation or arbitration. Awards, verdicts and judgments are often all or nothing: one side may get what it wants while the other gets nothing or is penalized with an unfavorable result. In other words, litigation will deliver a judgment, but it is far less likely to do the parties justice because of the inherently inexact manner in which the legal process resolves disputes through a system of rigid claims and narrow forms of relief. And in some cases, the award, verdict, or judgment may result in a windfall or an unanticipated penalty in a manner that may not accurately approximate the relative fault of either party. A negotiated resolution might not be the perfect result for both parties, much less the result they might attain if they roll the dice and proceed with prosecuting their claims or defenses. But both parties usually get some benefit from a negotiated resolution. Otherwise, they would not agree to it.

Even in situations where the result of litigation or arbitration is some form of split decision, the judge, jury, or arbitrator determines how the splitting occurs. But the allocation may not accurately reflect each party’s true preferences and afford relief with respect to the aspects of the case most important to each party. By negotiating, parties can better ensure that the issues they care about most are resolved in their favor, or at minimum that both parties’ more equally sacrifice with respect to those issues.

Finally, as alluded to earlier in the discussion of certainty, “winning” an arbitration or litigation is not always a win. A verdict or award against a judgment-proof party affords the claimant a pyrrhic victory. Similarly, a resolution that results in the continuation of a franchise relationship (e.g., the franchisor has no termination right but the franchisee prevails on claims of non-material breach by the franchisor) when it is clear the relationship is unsalvageable only portends another confrontation down the road. In contrast, a negotiated resolution can be creative and outside the confines of the limited forms of relief courts and arbitrators can grant on specific claims. In other words, the parties can negotiate a better business solution than having

18 Steven J. Miller, Judicial Mediation: Two Judges’ Philosophies, Litig. (Am. Bar Ass’n Section of Litig.), Spring 2012, at 31, 34 (“During [the litigation], the clients are drawn back to something -- the origin of their dispute -- that’s extremely unpleasant in their lives. Instead of focusing on the present and the future, they’re yanked backwards.”) (quoting Hon. Dan Aaron Polster, United States District Judge for the Northern District of Ohio).

19 Id. at 32 (“A jury trial is a crude instrument. Generally, all a jury can do is decide who is going to get some money, split it up, or move it from one side to the other. Most disputes require something more sophisticated or nuanced that that to resolve. . . . What parties need is either a business resolution or a business divorce; to reframe their relationship so it will work again or to terminate their relationship in a fair way. A jury can’t do that. A jury can’t reconfigure a relationship, nor can it structure a separation.”) (quoting Judge Polster).

20 Id. at 34 (“Juries basically can do one thing -- award money. And that may go a long way towards making the other party whole or feel vindicated, but that’s often not all they’re looking for. So we have to emphasize to them that there’s not going to be a perfect solution even if the case goes the distance, and it’s better to get a certain result now that they can live with.”) (quoting Hon. Jeremiah J. McCarthy, United States Magistrate Judge for the Western District of New York).
a judgment – with all of its imperfections – foisted upon them as the result of spending time and resources in the legal process.21

III. METHODS OF NEGOTIATION22

A. Direct Negotiation

1. Self-Help

In commercial transactions or relationships, disputes occur. “You committed to do that.” “No, we did not.”

The immediate question becomes, unless one party is willing to let the issue go, how to resolve the dispute. In that case, a discussion of some sort must follow.

Before the parties pay someone else to assist them with negotiation they should try to resolve the matter through direct conversations between or among themselves. This can include counsel, or simply by direct discussions without counsel.

A few questions arise as to the best process. Talk over the phone? Emails or other correspondence? A face to face meeting? Who should be involved? If a meeting, where should it be—a neutral spot? One or the other’s offices? Is there a geography issue, that is, are the parties in the same city, or different cities?

While these questions may seem innocuous, they can be very important. For example, a face to face discussion can be helpful under the right circumstances. On the other hand, it may be premature if the parties have not exchanged sufficient information relating the dispute. Has there been an initial conversation to determine whether the parties are close enough together to have a meaningful meeting?

Are the parties on good enough terms to have a face to face meeting? If they are angry at one another, and that is frequently the case, is the meeting likely to deteriorate into a shouting match, resulting in the parties being even further apart than they were at the outset?

They also need to do a little honest self-evaluation. Can they stay on track? Or are they personalities who will start to drift from the original intent of the negotiations? That is, will they need someone to assist in structuring the negotiations?

2. Bring In The Lawyers

If some help is needed, then the parties might benefit by using their respective counsel to conduct the discussions. This gives the parties some standoff to insulate them from the emotional responses evoked in direct conversations. It also permits a “pause” after an exchange of proposals thereby allowing a more considered response.

21 Id. at 32 (“[i]n settlement discussions, there’s a flexibility in terms of a remedy that simply doesn’t exist if the case goes to trial, where the jury essentially is deciding about money. We can do some different things in fashioning a remedy in settlement.”) (quoting Mag. Judge McCarthy).

Counsel can help the parties in their evaluation of proposals, and advise them as to negotiation techniques generally. When a party is evaluating a proposal, it is helpful to have some advice regarding the value of a claim. For example, in the employment law area, it is helpful to have an experienced person with expertise in both the law and litigation of employment law disputes assist in valuing a claim. Counsel can tell the party if the claim is likely to have legal merit. And, counsel can tell the party whether the witnesses proposed will help or hinder a favorable resolution by the ultimate decider—a judge, jury or arbitrator. Counsel can also give the party an idea of how long the litigation will last, and how much it will cost. Each of these factors will affect the party's initial and ongoing position in the negotiation.

Experienced counsel can offer advice on negotiation techniques, such as when and how to respond to offers. Counsel often have been involved in many negotiations, while clients often are relatively inexperienced. This means that the lawyer may be able to better discern the meaning of a particular response to a proposal from the other side, and advise accordingly. The lawyer may also have thoughts as to the pace of the negotiations—when to delay, when to immediately respond—and whether to respond at all. The lawyer can help with the tenor of a response. That is, whether to respond to threats from the other side in kind, or respond more calmly and deliberately.

3. Pros And Cons

Direct negotiation, even where attorneys are used, is less expensive than using a mediator to facilitate the discussions. If it is successful, the parties can move on in their relationship, or part ways.

Direct negotiation can be less effective than mediation, however, taking longer, causing friction in an ongoing relationship, and consuming time and resource that neither party wants to expend.

B. Mediation

If the parties cannot resolve the dispute by themselves, then it may be that a mediator can get the job done. Mediation calls for a neutral third party, a mediator, to facilitate the negotiations. Mediation is not binding—the mediator is not a “decider,” unless you turn him or her into one by agreement of the parties.

Keep in mind at the outset that mediation is generally not going to work unless both parties truly want to settle the dispute. If either party has a “scorched earth, unconditional surrender, take no prisoners” attitude, then only a third party “decider” (judge, jury or arbitrator) can resolve the dispute, and negotiation, whether through a mediator or otherwise, will be fruitless.

The mediator may use his or her offices for the mediation or one of the parties' locations. Normally the process is to put the parties in separate rooms and shuttle between them. Sometimes the mediator will start with the parties together to explain the process and in some cases to enable each party to make an opening statement, either directly, or through their attorney, if attorneys are present.

If there is to be an opening statement, careful thought should be given to who will give it (attorney or client) and the tone and tenor of that statement. It is an opportunity to speak directly to the other party. If the other party is angry, it may be an opportunity to diffuse some of the
anger. But, if the statement is given in the style of an opening argument, or is combative in nature, it may simply ratchet up that anger and make the negotiations more difficult.

On the other hand, the opening statement may be an opportunity to expose the other party directly to the reasoning behind your position, without the filter of their lawyer. That may be the first time the other side has heard those thoughts. Done in a non-combative way, such an explanation can be helpful in getting the other side to a better resolution mind-set.

For a mediation to be effective, each party must prepare. Ideally, the parties will have exchanged information sufficient for each side to understand the strengths and weaknesses of their respective positions. While it may seem prudent to withhold potentially damaging information, the parties should keep in mind that such information will likely come out eventually if the matter is resolved through litigation—in the discovery process or at trial. If the matter is in litigation, the most effective mediation may well be after discovery is complete, and each side knows the determinative facts.

Most mediators will require the parties to submit some type of pre-mediation position statement. That position statement may be shared with the other side or, at the request of one or both parties, kept confidential by the mediator. Either way, the statement is usually written to help the mediator clearly understand what the party considers to be the salient facts and law supporting its position.

The mediator needs to be carefully chosen. Both parties want a mediator who will be effective in getting the negotiation to a resolution of the dispute. Ideally, the mediator is one with whom both parties have previously worked. There is no better way to evaluate the mediator’s skills in facilitating negotiation than to have seen him or her in action. Absent that, one should get a clear recommendation from a trusted colleague who has previously worked with the mediator.

Often, letting the other side choose the mediator will assuage concerns that party may have, and help their comfort level in the mediator facilitated negotiations. Even in that event, however, if the mediator chosen is not one that your side has previously used, you should find a colleague who has used the mediator to confirm that person’s ability to take the dispute to resolution.

For both parties, the decision maker should attend the mediation. If the representative at the mediation does not have the authority to negotiate and agree to a resolution, the mediation is unlikely to be effective. That does not mean that in every case, of course, the CEO needs to be present. But if there is any thought that a final resolution will need the CEO’s approval, the CEO will need to be readily available by phone.

Mediation does have a cost. The mediator has to be paid (other than some court systems that provide some brief “free” mediation as part of court mandated or optional ADR). An effective mediator may be in demand and, as a result, expensive and hard to schedule. There is also the cost of travel if the parties are located in different areas. If there is a pre-mediation statement to be prepared, there will be additional cost.

If the dispute can be resolved through mediation, it is normally worth the time and expense. And there may be some value to the process, even if the mediation is unsuccessful. For example, the pre-mediation statement may form the basis for litigation documents—complaints, answers, memoranda in support of motions, briefs, etc. In the course of
discussions, each party’s position, and the legal and factual basis for that position, will likely be revealed, at least with more clarity than in the previous direct negotiations.

IV. THE OBJECTIVE OF NEGOTIATION

Many attorneys believe the objective of negotiation is to get their clients what they want. But such an objective can be self-defeating and oftentimes may be self-limiting. The reason is that no matter the negotiation, one party can control only what it does; it cannot control what the other party does. Such a focus on your client’s desires, therefore, may be self-defeating. For example, if your party wants to settle at no more than $500,000 but the other side will never go below $1,000,000, your negotiation will end in defeat. Alternatively, if you focus only on getting your client $500,000 but the other side actually is willing to pay $700,000, you might end up negotiating a resolution for your client that is below value.

The better objective, therefore, is to focus your negotiation on identifying the opposing party’s top line or bottom line as the case may be. This section will address techniques to first identify the other party’s top line or bottom line, and then work with your client to decide whether to accept the other party’s position and settle the case or move forward with the dispute.

A. Identification Of The Other Party’s Top Line/Bottom Line

1. Understand Your Party’s Best-Case Outcome And Worst-Case Outcome

The starting point for determining your party’s best-case scenario is to analyze the likely recoverable damages or other value of the relief sought. Whether you are seeking damages or defending against damages (or otherwise facing equitable remedies such as an injunction), you must fully understand before embarking on negotiations what the case could deliver or cost.

This requires attorneys for both parties to analyze the types of damages being sought and to become fully aware from the very beginning of the case of the facts that will either support or defeat such claims for damages. Failing to fully understand the best case and worst case for your client prior to negotiation is like betting on a hand of poker without ever looking at your hand.

If you are the plaintiff’s attorney, you must review all financial statements and other supporting documents. Often, clients will say they lost millions without having any factual basis for their claims. It is absolutely essential to have a firm understanding of the documents that will support your claim.

Likewise, if you are the defense attorney, it is important to understand the damages to which your client would be subjected should it lose. If you don’t have the documentary or other evidence necessary to evaluate the plaintiff’s claim, then ask for the documentation during negotiations. And don’t be afraid to tell the other side that you will consider the plaintiff’s damages to be zero until proven otherwise.

2. Analyze The Likely Outcome

Most clients think they have great cases. Yet in almost every instance, every case has weaknesses. It is incumbent on both sides, therefore, to understand whether their client’s case is strong or weak. If the plaintiff’s case is strong, then it is obvious that the settlement number
will be closer to the best-case outcome, and the defense should be prepared to respond to that. But even if the plaintiff's case is weak, that doesn't mean either that the plaintiff cannot seek a reasonable settlement or that the defendant should not offer some reasonable payment to resolve the case, especially if the plaintiff's best-case outcome could result in a large damages award.

It becomes critical, therefore, to understand the interplay between expected value and game theory. Game theory "involves extending the theories of individual decision making to circumstances involving two or more competitive participants. It has been applied widely in the law and in dispute resolution contexts from apologies to bananas, from gambling to divorce." This paper is not intended to be an in-depth examination of these two very complicated valuation methodologies. Rather, a general understanding of the two is useful to attorneys in helping their clients analyze the risks inherent in their cases.

Expected value is basically the probability of a certain outcome. If, for example, a plaintiff can prove $1 million in damages, but has only a 30% chance of winning the case, the expected value will be $300,000. But if the plaintiff's damages are solid, and the case will turn on a single legal ruling, then the only two likely outcomes will be a verdict for $1 million or a verdict 30% of the time, or $0 verdict 70% of the time. This is where game theory comes into play.

In this example, a plaintiff just might accept the certainty of, say $100,000, rather than pursue the case where seven out of 10 times the plaintiff will receive nothing, rather than hold out for the expected value. The defendant on the other hand, might be willing to offer more than the expected value of $300,000 to ensure that it won't be subject to a $1 million verdict in three of the seven expected outcomes.

NBC demonstrated this interplay on a nightly basis from 2005 through 2009 (and later during the daytime on CNBC) in the game "Deal or No Deal." The contestant chose one of 26 numbered briefcases at the start of the game. These cases each held a different cash amount from one cent to $1,000,000. The stage had a video wall that displayed the amounts still in play. The contestant's chosen case was then brought onto the stage and placed on a podium.

The contestant then began eliminating one or more of the 25 unchosen cases. In the first round, the contestant chose six cases for elimination (leaving 19 unchosen cases). The models holding each of the eliminated cases then opened the cases and revealed the amounts inside. NBC updated the video board by removing those amounts from the screen. After the sixth pick,


25 See, e.g., Mark A. Glick, David G. Magnum, Ted Tatos, The "Book of Wisdom" Contains Little Wisdom and Creates Significant Risk of Bias, 27 Fed. Circuit B.J. 1, 44, n. 16 (2017) (explaining that "Th[e] expectation by the parties would be the result of a formal or informal expected value calculation. The expected value represents the present value of various probability-weighted possible income streams. For example, if the patent had an 11% chance of generating $50 million, a 22% chance of generating $20 million, and a 67% chance of generating only $200,000, the expected value would be equal to 11% times $50 million, plus 22% times $20 million, plus 67% times $200,000, which equals $10 million.").
“The Banker” (visible only as a silhouette) would make a cash offer to the contestant. The contestant then could say, “deal” or “no deal.”

Each time the contestant rejected the offer, he or she would have to play another round by eliminating progressively fewer cases: five in the second round (leaving 14 cases), four in the third round (leaving 10 cases), three in the fourth round (leaving seven cases), and two in the fifth round (leaving five cases). After this round, the contestant would have to eliminate one case at a time, receiving a new offer from the Banker after each. The Banker then made the ninth and final offer when only two cases remained: the one originally chosen by the contestant and the one remaining unchosen case. If the contestant rejected this final offer, he/she then had the choice to either keep the chosen case or trade it for the lone remaining unchosen case. The contestant then received the amount in the chosen case.

Although fans cheered wildly upon each decision of the contestant, the game provided a simple and unremarkable example of game theory. If, for example, the contestant had only one “big money” case remaining on the board but still rejected the Banker’s offer, the contestant was risking getting nothing. If, however the contestant had more “big money” cases on the board than the contestant had to eliminate, the contestant would be wise to keep eliminating cases because at least one “big money” case would remain.

Although “Deal or No Deal” is an overly simplistic example of the interplay between game theory and expected value, the lessons it provides are applicable to negotiations in franchise cases. When a plaintiff has a very real possibility of receiving nothing, a plaintiff should go forward only if he or she is willing to take the risk of getting nothing. This situation presents a good opportunity for a defendant to resolve the case by making an offer less than expected value. If a defendant, however, knows that a possible, even if unlikely, outcome could lead to a disastrous result, the defendant might want to consider making an offer greater than the expected value.

B. Evaluating Risk At Different Stages Of The Litigation

Clients often ask how long litigation will last and how much it will cost. The best answer typically is, “it depends.” The reason, of course, is that litigation is not like a trip to the grocery store. Rather, it is more like a quest complete with starts, stops, and detours with no certainty about when, if ever, you will find what you are seeking.

Litigation, therefore, gives attorneys many different points during this quest at which to seek and resolve the dispute. Each of these points is unique and provides counsel an opportunity to leverage the uncertainty of that point into settlement opportunities.

1. Filing And Service

An underutilized settlement pressure point in any litigation is the actual filing and/or service of a complaint or demand for arbitration. Item 3 of the FDD obligates franchisors to disclose whether “the franchisor, a predecessor, a parent, or affiliate has pending against them an administrative, criminal, or material civil action alleging a violation of a franchise, antitrust, or securities law, or alleging fraud, unfair or deceptive practices, or comparable allegations.” Thus, a franchisee counsel who files and/or serves a complaint or demand for arbitration without first attempting to engage the franchisor in settlement discussion (assuming there is time prior to the running of the applicable statutes of limitation) has wasted an opportunity to give the franchisor
a chance to resolve a dispute prior to having to disclose such legal action for as many as 10 years.

Franchisee counsel can notify the franchisor of its claims by sending a demand letter or a draft of the complaint. Franchisee counsel should, however, before sending such demand or draft complaint, secure a tolling agreement and covenant not to sue from the franchisor. If the franchisor is unwilling to do so, then the franchisee should immediately file the legal claim.

2. **Motions For TROs And Temporary Injunctions**

When the dispute involves termination of a franchise agreement, a pending motion for a temporary restraining order and/or a temporary injunction provides an excellent opportunity for the parties to seriously engage in settlement discussions. A franchisor might be hesitant to defend a motion for such relief even when the odds are on its side because losing such a motion not only can create bad precedent, but also can mean that a franchisee the franchisor wants to terminate will remain in the system for what could be several years.

3. **Motion To Dismiss**

When, as is often the case, franchisors reasonably believe they can eliminate a lawsuit or arbitration on a motion to dismiss, they typically will not engage in serious settlement discussions prior to giving the court or arbitrator the opportunity to dismiss the claims in the pleadings or demand. But there are other times where the franchisor will be open to settlement right after the filing of the lawsuit or arbitration simply because the franchisor does not want an adverse ruling that might create a harmful precedent. Or, a franchisor may simply want to avoid the hassle and expense of costly litigation. As such, it is wise for franchisee counsel to seek settlement prior to the court deciding such motions.

4. **Discovery**

Discovery is expensive, time consuming and often a major inconvenience for some of the most senior executive and officers in franchisor companies. That being said, parties (both franchisees and franchisors) often have such different perspectives on the facts that realistic settlement negotiations cannot commence until some facts are discovered. Even then, it certainly is possible for both franchisee and franchisor counsel to leverage pending depositions as a pressure point for settlement. Likewise, the conclusion of certain key depositions often will so favor one side against the other that heretofore stalemates can break.

5. **Summary Judgment**

Because the franchisor is the party most often relying upon legal defenses related to the contractual provisions it drafted or statutes of limitations and the like, it is the party most often seeking summary judgment. If the franchisee avoids such a motion, settlement becomes highly possible, whether the dispute is heading to a judge, jury or arbitrator. Other times, however, the franchisee may seek summary judgment based upon the franchisor’s alleged violation of statutory rights. For example, some states have franchise acts that obligate a franchisor to provide a cure period prior to termination. If the franchisor has failed to provide the franchisee with any cure period prior to termination, then the franchisee may seek summary judgment in order to assert its statutory (as opposed to contractual) rights.
If both parties are confident they will prevail on summary judgment, settlement is highly unlikely. But in most cases, both parties are concerned whether the judge or arbitrator will rule in their favor. In these cases, it might make sense for both parties to “split the baby” and resolve the dispute prior to getting an “all or nothing” ruling from the judge or arbitrator. Thus, this is often a time when counsel can, and should, make strong attempts to settle the case.

6. **Trial (Or Arbitration)**

Even if summary judgment did not resolve the case and the parties could not reach settlement, neither side should give up. The additional cost, stress and uncertainty that counsel and clients begin to experience as everyone approaches the proverbial “courthouse steps,” creates yet another ripe opportunity for settlement. Indeed, there are many opportunities with which the parties could ultimately reach a settlement, whether those will be during trial preparation, during court-ordered pre-trial discussions, and even during the trial itself. The mantra here is to never stop talking settlement.

7. **Post-Trial (Or Arbitration) Motions**

So the judge, jury or arbitrator has spoken. One side most likely feels like the winner, and the other side feels like the loser. It’s all over right? Not necessarily. The winner might still be concerned about potential legal rulings the underlying court made and might be willing to provide the loser with a significant discount to avoid standing in front of an appellate court. It goes without saying that the reasons driving the winner to avoid standing in front of an appellate court are endless and depend upon the facts, circumstances, and desires of the winner and the underlying situation itself. When in doubt, keep trying.

8. **Appeals**

If the loser is dissatisfied with the lower court’s decision, the loser has the ability to appeal the lower court’s decision to the court of appeals. Although it is unlikely that either party would seek a review with state supreme courts, or the United States Supreme Court following an appellate decision, it is not impossible. If the case presents a rare issue of first impression that a supreme court might review, settlement negotiations should continue.

V. **NEGOTIATION TACTICS**

A. **Start Early**

It is in neither party’s interest to let a dispute fester. Just as the term applies in the wound context, a “festering” dispute only gets worse, and more difficult to resolve.

A party, therefore, should reach out to the other party, establish communication and begin to confront the issues, all with the goal of early resolution. This can be a phone call or a personal meeting. The key is talking about the problem.

---

26 Such a settlement opportunity is not likely going to be available for the loser of an arbitration given the limited rights to appeal arbitration awards.

27 *See Fisher, Ury & Patton, supra note 22.*
And for an aggrieved party claimant, whether it is called a “demand” or a request, make a “demand” early. Be direct. Tell the other party what is needed to resolve the problem. Sometimes the recipient of the demand will immediately see its logic and simply say, “ok.” One never knows until the ask is made.

B. **Never Give Up**

When the other party “just says no,” do not end the discussion. Keep the lines of communication open. Let the other side know that the communication opportunity remains open. Even in a “best and final” case, express a willingness to continue to talk. That may take the form of a statement to the effect that, if the other party comes up with a creative idea, your party wants to hear it.

Do not fail to respond to an offer. Even if the response is “no”. And if the response is “no”, it is useful to state why that is the case. Not responding sends the message that the discussion is over, the lines of communication closed, and that further offers are useless. Responding, on the other hand, sends a different message—we cannot do what you want, but we can continue to talk.

In the event the parties are engaged in a mediation, it is often the case that once the parties are tired, they become more amenable to a resolution, even on terms that may not seem “fair”. Thus, simply keeping the talks going can lead to resolution. If the parties have flown in, the closer the discussion presses against flight times, frequently the parties get more flexible in their respective positions.

C. **Identify The Other Party’s Needs**

Directly ask the other party: “What will it take to settle this matter?” Then listen. Ask questions. In the conversation, explore what the other party needs. Avoid contradicting the other party, or diminishing or belittling the other party’s statement of what they need. There is always the opportunity to make a counter at a later time, even in a later conversation. There is normally nothing wrong with listening, questioning, understanding, then telling the other party that you will think about what has been requested or discuss the ask internally, then get back to them.

Try to think from the other side of the table. Conceptually, you slide around the table to try to see the matter from the other party’s perspective. Perhaps even bullet point their issues and concerns, then likewise bullet out their ask, or potential ask, based on the facts (and the law) that is at hand. And try to see the facts (and the law) from their perspective.

In your preparation, ask your decision makers what they are willing to do for or give to the other party to resolve the matter. Probe your folks for their rationale. Make them explain it to you, even when it may seem obvious. In that explanation, you may hear something that will trigger an alternative that you nor they had considered. If they have not heard the facts and law relating to the dispute, explain it to them as appropriate to help them consider different proposals that might be made.

Relate to your decision makers your “thoughts from the other side of the table,” then ask them what they think is “fair” to resolve the matter. Again, probe them for their rationale. Make them respond, as you may hear something that will assist in the discussions. And in the course of discussions, they themselves may hear something that will make them move in their position.
D. **Do Not Make Assumptions**

Do not make assumptions as to what the other party is thinking or how they may respond to a proposal. Often parties assume that the other party will react adversely to a proposal and go into the discussion regarding to that proposal predisposed to make a lower offer or avoid some aspect of a settlement, when the reality is that the other party would have agreed to pay substantially more, or take certain actions that would have helped the party making the proposal. Opportunities can be lost simply because a party assumed a reaction that does not materialize.

A variation of this is the fear that the other party either knows of a fact when they do not, or that the other party gives great significance to a fact or legal position when they do not. This can skew the proposal that the party is considering. The thinking may be that we should offer less because of this fact that is damaging to our case. Or, we should offer less because they understand, as do we, that the law on the issue is against us, so we are likely to lose at trial/arbitration. Meanwhile, the opposing party is not even considering that fact, legal precedent, statute, or regulation.

So making assumptions can lead you to give away more than is necessary or not get everything you could otherwise get. It is crucial to listen carefully to the other party to ensure that you truly do understand what they are thinking and why. Do not presume that they know something, or that they are going to take a certain position. Then you can make your proposals accordingly, and achieve a better result for your company or client.

E. **BATNA Concept**

During the course of negotiations, keep the best alternative to a negotiated agreement ("BATNA") in mind. When parties start to get close to an agreement, they sometimes hit a point beyond which they psychologically feel they cannot go—"I cannot go above $900K for this claim. It is not worth that. We did nothing wrong. We can win in court."

In this example, say the other side is at $1.1 million. If there is not a negotiated resolution, let us say the exposure is $10 million, and trying the case is going to cost $200,000. The question becomes whether it makes sense to try to get a resolution that is perhaps somewhat less than an additional $200,000 above where you are, or spend the money trying the case, with a possible loss of $10 million plus the $200,000 in legal costs.

The example can be flipped—the offer to settle is $900,000 to the claimant. The claimant wants $1.1 million. The claimant can go to trial with the risk that it gets nothing, or perhaps negotiate for something less than $1.1 million, maybe even take the $900,000 now, and have the cash in its pocket.

In each case, the negotiator must decide what the BATNA is for them, then think about whether it makes sense to draw the proverbial “line in the sand” at their respective “can’t go over/less than” number. The $200,000 difference in each case may look different if they consider where they end up if they cannot reach an agreement today—$10.2 million or -0-, depending on which side of the table they are on. In that case, $200,000 may not look quite as large, the “line” may not seem quite as important.
F. Find Common Ground

As mentioned above, in the course of the conversations around resolution of the dispute, a good listener will pick up hints that may help resolve the matter. What are the needs of the other side? Not, what are the facts that will support my claim, or whether my legal position is rock solid, a no-lose proposition.

Examples are as follows. Does one of the parties need cash? Is a goal for one of the parties an exit from the business/system? Is there a non-cash item that will work for one party? Each of these facts and others like them may be heard in the course of discussions, either directly or indirectly.

A variation on the search for common ground is the concept of momentum in the discussions. If the parties can find corollary points upon which they agree, one point at a time, they can gain agreement momentum and circle agreement on all points as they come closer and closer to the goal of overall settlement and resolution.

G. Non-Cash Considerations

While cash will settle many disputes (“Money Talks”), there are a host of non-cash items, especially in franchising, that the parties might use to settle a matter, or bridge the gap. Again, focus on the other party’s needs.

For example, can a royalty reduction help solve the problem? While that may clearly help, will that cause an issue with other franchisees? Would it need to be permanent? Or would a temporary reduction fill the need? How about a contingent reduction? That is, a reduction conditioned on the occurrence of some fact, such as a failure to exceed a certain sales number, or inability to hire a certain number of people at a set compensation number?

What about a territory change—expanding or changing the territory? More rights within a territory—additional sites? Term extension? Additional renewal rights?

Such non-cash proposals may be discovered as the parties talk over time. The key is creativity combined with listening. And, on occasion, the concept of moving to the opposing party’s side of the table may identify something that can help bridge the gap, even when the other party has not considered it.

H. Take The Lead

From time to time, the attorney or other representative may step out in the course of conversations and float what is, in essence, a “trial balloon.” That is, a concept or proposal for which the representative has no authority, but may bring some response that will be helpful in identifying the position of the other party. The representative will be careful to tell the representative of the other side that he/she has no authority to make the proposal or to introduce the concept; rather, they are inquiring as to whether the idea might be of interest to the other side. In effect, it is an “off the record” conversation to explore the viability of a concept.

Not only can lawyer representatives step out to explore concepts, the business people can use the same technique. The business person making the overture need not be the decision maker. In fact, there may be some value in the conversation being further down the
chain of command—no one is likely to take the proposal as being something that is an official offer.

I. Use Third Parties

In the course of conversations, it may be helpful to bring in third parties. For example, in a franchise dispute, the head of a franchisee association or advisory council may be helpful as a facilitator. That person may simply have a fresh perspective and can provide useful advice. Or the person could serve as an unofficial mediator, shuttling between the parties.

Another choice might be another franchisee that has no official position. That franchisee might be a longtime franchisee with a host of experience in the system—think a “Yoda” in the system, well respected among their peers.

Finally, there are attorneys or consultants who specialize in giving only “settlement” advice. These are advisors, not mediators. Their role is to advise one side or the other on how to negotiate and assist them in evaluating settlement offers.

VI. THE SETTLEMENT AGREEMENT

The result of a successful negotiation is ultimately memorialized in a settlement agreement. But the settlement agreement is more than just the result of negotiating; it is an integral part of the negotiating process. There have been whole programs at Forum meetings devoted to settlement agreements. This section highlights why the written expression of the parties negotiated resolution is important. Discussed are the terms that, if possible, should be agreed upon prior to writing up the settlement agreement, as opposed to those terms that are essential to ensure that the deal does not fall apart during the papering process.

A. The Need For A Written Term Sheet

Critical to a negotiated resolution – whether in mediation or more informal settlement discussions – is enumerating the essential deal points in writing prior to drafting a more formal settlement agreement. The best means to achieve this is through a written term sheet that all parties execute. This procedure is fairly standard in mediations, with the mediator blessing the written terms of the deal, and the parties’ counsel left to draft the contract after the conclusion of the mediation session. However, a term sheet – even if just a summary of the substance of negotiated terms in a series of emails to which both sides confirm they agree – should be part of any negotiation of a dispute.


A written term sheet has several functions. First, it prevents the parties from attempting to renegotiate the deal as the attorneys attempt to prepare the formal settlement agreement. This is particularly true of monetary issues. Specifying the terms of a settlement payment in an agreed upon term sheet precludes one or both of the parties from attempting to renegotiate those terms. A term sheet should specify the amount of payment, the timing of the payment (and whether in a lump sum or through installments), who will be making the payment (or guaranteeing the payment), and the form of payment to avoid later wrangling over those elements of the negotiated payment. Neglecting to address those details of the payment in the term sheet can result in significant disagreements in what the parties believed they had negotiated. In his book, *Crafting Effective Settlement Agreements*, Brendon Ishikawa points to the example of the divorce settlement between Johnny Depp and Amber Heard:

What may seem like mere details of payment can make a big difference. Celebrities Johnny Depp and Amber Heard repeatedly landed in the tabloids over their disagreement on how Depp would pay a $7 million settlement that Heard intended to donate to various charities. Depp seemed to have discovered too late that if he directly made the donations, he would get a large tax deduction. Heard, in contrast, wanted to make the donation in her own name. What should have been a simple transfer of funds turned into high-profile gossip fodder.

Memorializing the key terms of the negotiated resolution also limits the impact of intervening circumstances or unforeseen events. For example, if the principal negotiator for one party leaves her company to take another position before advising her executive team of the negotiated terms, the absence of a written term sheet may result in the need to start negotiations anew. Similarly, as happened to one of the authors, after negotiating a settlement with an attorney in New Orleans but failing to document the terms, Hurricane Katrina struck the city and opposing counsel never resurfaced. Once new counsel appeared, the author was forced to begin the negotiations anew because the previously agreed upon terms had not been recorded in writing.

Finally, preparation of the term sheet is often done jointly, with all parties and counsel in the same room. That interaction itself can be beneficial to facilitating ultimate agreement. As Brendon Ishikawa notes in *Crafting Effective Settlement Agreements*:

The promise of crafting a settlement agreement in joint session is that a free and frank exchange of information will identify party preferences about particular terms, yield creative

---

31 *Id.* ("It is important to memorialize a mediation settlement promptly, in order to avoid any ‘buyer’s remorse’ or misunderstanding of the terms agreed to during the mediation."); Klarfeld, Lewis & Silverman, *supra* note 28, at 23 ("Many mediators believe, however, that the greatest strength of a term sheet may be that it acts as a psychological barrier to participants who wake up convinced that the deal they struck the evening before is not a good one. Seeing one’s signature at the bottom of a clear term sheet tends to reduce the next-day second guessing.").


33 *Id.* at 183-84.

34 See id. at 81.
solutions and acceptable compromises, and result in agreements with greater value than could otherwise be crafted merely exchanging drafts by email. Many lawsuits begin where the parties’ discussions end. By contrast, there is usually a great deal of important information that can come to light during a productive conversation and which can greatly enhance the quality of the parties’ settlement. Even when parties have exchanged information early in the mediation, the content almost never concerns their preferences regarding potential terms for a settlement agreement. Discussions about scope of a release, confidentiality clause, choice of law, and enforcement mechanism seem premature in light of uncertainty about whether any deal can be reached as to primary term, usually the amount of money to be paid.35

Thus, preparing a term sheet can have the added benefit of facilitating further negotiation and truly defining the contours of the agreement.

B. The Specific Terms Of The Term Sheet – Continuing The Negotiation

During the negotiation, the discussion will likely focus on resolving big picture questions: how much will one party pay the other; are the parties ending or continuing the relationship; what obligations will the parties have to each other going forward; what are the parties restricted from doing going forward; and what prior agreements or terms are being replaced or removed?36 However, the term sheet should surround the big picture agreements with as much detail as possible.37 For example, if the parties reach an agreement that the franchisee will cease operations and de-identify the location, the parties should attempt in the term sheet to specify the details of that process: What signage and trade dress must be removed to satisfy the obligation to de-identify?38 When must those actions be completed and can the franchisor inspect to ensure compliance?39 Must telephone numbers, email addresses, web sites and social media accounts be transferred to the franchisor or simply be disconnected/cancelled?40 Should signage be returned or destroyed?41 These details may take little time to negotiate once the agreement is reached on de-identification. But without memorializing them as part of the term sheet during the negotiation, they are unresolved issues that could become points of

35 Id.

36 See id. at 71-72 (“Quite often mediation participants equate initial agreement on payment amount with a settlement agreement. . . .During the rounds of back-and-forth offers, the legal merits subside into the background, and other critically important terms of a settlement agreement – such as choice of law, enforcement mechanism, and scope of release – probably go unaddressed.”).

37 See id. at 74 (“[A]ttorneys and mediators should understand that the moment of initial agreement represents only the midpoint in the process of settling a case. The work of agreeing on the remaining issues and memorializing a set of terms acceptable to everyone may be substantial.”).

38 Lokker & Schumacher, supra note 27, at 6.

39 Id.

40 Id, at 30

41 Id. at 28.
contention later. Similarly, when the relationship is ending as the result of a negotiation, the parties should clarify in the term sheet what obligations and rights continue, such as indemnification obligations for acts and omissions prior to the end of the relationship or obligations to refer future customer contacts to the franchisor (or franchisee, if it will continue to operate a business).

Counsel and negotiating parties should also attempt to agree upon certain common and “boilerplate” provisions in crafting the term sheet. Otherwise, when preparing the formal settlement agreement these terms – which might seem less significant during the original negotiation – may become significant. Some provisions that parties should consider addressing and reaching agreement on in the written term sheet include:

1. **Releases**

Perhaps the most valuable term in a settlement agreement is the release. Parties should not assume, however, that they have negotiated for a release and should include that as an agreed term in the written term sheet. Indeed, in some cases, the parties may negotiate a standstill, where they agree to take certain actions over a period of time in an effort to resolve the pending dispute. In those circumstances, adding the boilerplate release of liability in the written settlement agreement could very well be contrary to the proposed standstill, where the parties contemplate retaining their claims and defenses pending the completion of the actions contemplated during the standstill. If one or both of the parties intend to obtain a release from liability – or expressly refuse to give a release -- that should be discussed and memorialized in the term sheet.

Assuming the parties do intend to give a release, simply providing for “releases” in the term sheet may not be enough. First, the parties need to specify if the release is mutual or solely in favor of one party or the other. For example, if a franchisee is negotiating a voluntary termination agreement in the face of a significant financial default and the franchisor is agreeing to waive collection of the full amount owed if the franchisee cooperates in de-identifying and complying with the post-term noncompete, the franchisor may be unwilling – and the franchisee may agree to forego – a release in favor of the franchisee, even though the franchisor will no doubt condition any such deal on a general release of all claims by the franchisee.

The parties should also specify who is being released and who is granting the release. In a case involving alleged pre-sale disclosure violations or unauthorized earnings claims, a franchisor will likely want to include officers of the company and employees involved in the sale process to avoid the possibility of later claims against those persons under state laws permitting claims against the agents of the franchisor involved in the sale. Similarly, a franchisee will

---

42 See **ISHIKAWA, supra** note 31, at 74 (“Having a clear perspective on the importance of reaching agreement as to all material terms makes clear the importance of continuing to work directly toward a complete agreement in order to avoid slogging through the remaining issues in piecemeal fashion via e-mail or telephone over the weeks to come.”).

43 **Lokker & Schumacher, supra** note 27, at 34.

44 See **ISHIKAWA, supra** note 31, at 209 (“Unthinking reliance on overbroad language should not substitute for careful identification of claims actually intended to be released.”).

45 **Lokker & Schumacher, supra** note 27, at 34.

likely want its owners and any guarantors included in the franchisors release of liability. Moreover, in multi-party actions involving more than a single franchisee, the parties will need to clearly specify which franchisees are granting and/or receiving a release in the event all the franchisees do not agree to the negotiated result.  

Finally, if possible, the term sheet should specify what claims are being released. In the event the negotiated resolution does not contemplate the relationship ending, the parties may not wish to enter into a broad general release. Instead, they may wish to limit the release to those claims that are in dispute at the time, leaving open other potential unknown claims they might have based on prior conduct. Alternatively, if the relationship is ending, the parties may need to carve out certain claims from the release to address future claims that might arise out of conduct prior to the release. As discussed above, a franchisor will want to preserve claims for indemnification that might be asserted after the settlement is finalized but are based on acts or omissions of the franchisee, or occurrences at the franchised business, antecedent to the settlement.

2. Confidentiality

There are multiple reasons why both the franchisor and franchisee might want to ensure the confidentiality of both their negotiations and, perhaps, the terms of the negotiated resolution. Indeed, “for many parties confidentiality of a settlement agreement is critical to their reputational interests.” If litigation has commenced, the franchisor may not want the settlement terms known to a franchise system that is likely following the litigation for fear that the negotiated result may signal weakness or some indication of being at fault. Similarly, if a franchisee had trumpeted the wrongdoing of the franchisor in seeking significant damages but settles the matter with the franchisor paying nothing or very little – or worse, paying the franchisor – that franchisee might prefer that those terms not become public.

Aside from the reputational concerns, there is a more practical reason why franchisors might want negotiated settlements to remain confidential between the parties. The inherent nature of a franchise system – using the same contract to govern a relationship with multiple parties – creates the potential for the same issue or dispute to arise on multiple occasions between the franchisor and different franchisees. Because of the high probability that a franchisor will be faced with the substance of a particular dispute more than once, it is likely that the franchisor will be involved in negotiations with different franchisees regarding similar claims. However, although the nature of the conflict might be similar, how the franchisor chooses to resolve a specific dispute may vary. A franchisor may be willing to waive enforcement of a post-termination noncompete in agreeing to mutual termination with a struggling franchisee in a remote market that the franchisor has no near-term plans to develop. But the same franchisor may demand strict compliance with the noncompete when negotiating an exit for a franchisee that is located in the franchisor’s largest market with numerous other successful franchise locations. Ensuring that settlements are confidential curtails the possibility that a franchisor will be forced to negotiate against terms to which it previously agreed in resolving a similar dispute under different circumstances and with different contexts.

47 See ISHIKAWA, supra note 31, at 214-16.

48 Lokker & Schumacher, supra note 27, at 34.

49 ISHIKAWA, supra note 31, at 80.
However, confidentiality is not automatic. And because confidentiality does have value, if one or both parties desire to keep the negotiated resolution private, they should make that known and include that in the term sheet. If possible, the parties should specify what they expect to remain confidential and, if they intend to negotiate (in connection with drafting the settlement agreement) a prepared, neutral statement that can be used when asked about how the dispute was resolved. The other details of the confidentiality provision can be addressed in the drafting stages.

3. **Non-Disparagement**

Even if the parties have agreed to resolve their dispute, they may continue to harbor ill-will towards each other. A franchisor in particular may be leery of a franchisee speaking negatively about the franchisor to other franchisees in an effort to foment discontent in the system or incite other franchisees to sue, to leave the system, or to negotiate better terms. A franchisor might also be concerned that the franchisee will disparage the franchisor if contacted by prospective franchisees, which might impact franchise sales. The franchisee, on the other hand, may be concerned about, for example, a franchisor’s employees sullying its reputation by claiming that the franchisee didn’t pay what it owed, was a scofflaw that violated health codes, tax obligations, or other laws or regulations, or simply ran a substandard business.

An agreement that the parties will not disparage each other in the future addresses those issues, and should be raised in connection with preparing the term sheet if either party desires such protection. Like agreements to maintain confidentiality of the settlement, agreements not to disparage have independent value and may not be something that can be added as an afterthought once the formal drafting begins. The details of the non-disparagement clause to which the parties ultimately agree will need to be carefully considered to ensure it is not too vague (what is considered “disparaging”?), is legally enforceable, and is crafted with an appropriate remedy to avoid further litigation about breach of the provision. Ultimately, as a practical matter, such clauses may be impossible either to comply with (due to the size of the franchisor’s organization and the inability to control what each employee says) or to enforce. Still, franchisors may want to secure an agreement not to disparage solely for the potential _in terrorem_ effect such a provision might have on curbing a franchisee “from airing the franchise system’s dirty laundry.”

4. **Attorneys’ Fees And Costs**

Most parties approach a negotiated resolution with the view that they are responsible for their costs, including counsel fees, incurred in the negotiation. But franchise agreements often specify that either the franchisee will reimburse the franchisor for its expenses, including

---

50 Id. (“If parties want the terms of their settlement agreement to remain confidential, they must provide for confidentiality in their agreement.”).

51 See ISHIKAWA, supra note 31, at 244 (noting that the IRS and federal Tax Court have deemed confidentiality and non-disparagement clauses in settlement agreements to have value for purposes of assessing tax liability on settlement payments allegedly made solely as compensation of physical injury).

52 Id. at 250-51.

53 Id. at 251-52

54 Lokker & Schumacher, supra note 27, at 33.
attorneys’ fees, in enforcing the agreement or that the prevailing party in a dispute is entitled to recover its attorneys’ fees from the other party. As a result, one or both parties might have an expectation that their recovery of attorneys’ fees is part and parcel of the bargain, even if that issue is not expressly discussed during the negotiations. This is particularly true if the negotiations are occurring after the parties are already engaged in litigation and have incurred litigation-related expenses. To avoid the possibility that one party is expecting an additional payment that the other has not contemplated, the parties should address the issue of attorneys’ fees and expressly state their agreement on that issue in the term sheet.\footnote{See Ishikawa, supra note 31, at 79-80 (noting that a settlement agreement that does not address attorneys’ fees “invites further litigation because one or both sides will likely file motions to recover such fees and costs, even after an agreement has been signed”).}

5. Venue/Choice of Law/Dispute Resolution

In resolving a dispute, questions about future litigation over the terms of the resolution are not typically something that either party wants to address. In many negotiated resolutions, the parties will simply default to the venue selection, choice of law, and other dispute resolution provisions that were included in the franchise agreement, particularly if the relationship is ongoing. However, if the parties are ending their relationship, the franchisee may be disinclined to subject itself to being hauled into court in the franchisor’s home state (where there would not otherwise be personal jurisdiction given the ending of the relationship with the franchisor) or being required to arbitrate claims that the franchisor breached the settlement agreement. If either the franchisor or franchisee desires to deviate from the franchise agreement provisions on those issues, that matter should be raised during the negotiation and any agreement on that subject memorialized in the term sheet.

* * * * *

There are certainly other provisions that will likely find their way into the final written settlement agreement. Those too may subject to further negotiation, and may be appropriate matters to address during the initial negotiation and term sheet. However, the boilerplate tail should not wag the resolution dog. If a boilerplate term is not critical to a party, there is no reason to fight over such terms and potentially undermine an otherwise acceptable deal.

C. Double-Checking: Make Sure The Term Sheet Addresses All The Issues That Are Important To The Parties

The foregoing discussion centered on the need for a term sheet to memorialize the key aspects of the deal reached as well as particular boilerplate provisions that might also be an important area of negotiation. The other key element to consider in preparing a term sheet is ensuring that it encompasses every issue that is important to the parties. Certainly, in preparing to negotiate, counsel will have explored areas that the client wants addressed and resolved.\footnote{Banks, et al., supra note 28, at 9; Klarfeld, Lewis & Silverman, supra note 28, at 19; Lokker & Schumacher, supra note 27, at 5;}

However, because unforeseen issues can arise during a negotiation, counsel should make sure those issues are addressed as well. For example, suppose in negotiating its exit from a service-based franchise system, which includes a waiver of the post-termination noncompete, the franchisee raises for the first time during the negotiations its desire to retain
the right to use customer testimonials and pictures of completed jobs on its website for its new business. Assume also that the franchisor is willing to waive the noncompete for a payment from the franchisee because it will receive the customer list as part of the resolution and has made plans to operate a company location in the market immediately. The franchisor agrees to the franchisee’s demand to use the pictures and testimonials, which the franchisee had provided to the franchisor to post on the franchisor’s hosted website for the franchisee’s business, without giving in much thought. The franchisee is concerned about retaining rights to its pictures and the franchisor is concerned about the right to use the franchisee’s customer list. To address this, the term sheet simply affords the parties the right to use “information and materials” related to the franchised business after termination of the relationship.

While the parties are memorializing the settlement agreement, the franchisee discovers that the franchisor plans to use pictures of the franchisee’s prior jobs to market its own business, the franchisee complains. But although the term sheet addresses the franchisee’s right to continue using those pictures, it did not expressly contemplate the franchisee having an exclusive right to use those pictures or foreclose the franchisor’s right to continue using those pictures. Because the franchisor’s right to use the pictures was not addressed clearly in the term sheet, the parties now have a new dispute to resolve. Had this issue been fleshed out more clearly—either in negotiating the term or specifying more particularly the rights retained in the term sheet—the parties might have avoided a subsequent dispute that might threaten the negotiated resolution.

VII. WHAT NOT TO DO

Sometimes it is useful to understand what not to do in negotiations. There are things that simply push the conversations in the wrong direction—driving the parties apart, rather than closing the gap. Often these acts may be gratifying in the short term—feel really good, or seem really clever—but they are dangerous if the ultimate objective is resolving the dispute.

A. Ultimatums

Ultimatums are not usually helpful. In our dreams, the good guy (always us) offers up an ultimatum, and the bad guy (whoever is on the other side of the table) is so cowed by the demand, he folds—matter resolved. But somehow it does not normally work that way in the real world. The ultimatum just causes the other side to react emotionally, and dig in to their position. The conversations regress, maybe simply stop.

B. Personal Anger

Anger usually draws anger in response. We live in a time when “outrage” is the popular emotion. If something we do not like happens, we are expected to react with outrage. Just look at Facebook or Twitter.

But “outrage” or personal anger, is not normally effective in negotiations. There are times when staged anger as a negotiating tactic may be effective. It can show that the negotiator has reached his/her limit and some change needs to occur, or the party is out of the negotiation. But it is a tactic that cannot be used over and over—the other side either sees through it, or reacts with anger of its own.
C. Overstating One’s Position

Another tactic that is problematic is overstating one’s position or case, or refusing to give the other side’s position any respect or credit. Everyone thinks their case is the strongest or best, but exaggeration will not bring a favorable reaction from the other side. They are likely to be dismissive of the position and back away from productive negotiation discussions, especially if the other side does this continually. The negotiators on both sides normally include professionals, and will quickly point out the overstatement or exaggerations to their teammates.

D. Failing To Identify The Client’s Risk

Yet another no-no is to fail to point out to the client or teammate the issues and risks with their positions, regardless of how small they might be. This is not done with the other party, or even a mediator present, but in private conversation. But the weaknesses need to be pointed out, or the client or teammate cannot make a properly considered decision as to proposals made.

E. Hiding The Ball

Withholding a key strong fact or legal argument until summary judgment or trial usually is counterproductive to settlement. The better approach is to get the cards on the table, so the other side can factor them into their decision-making. There are times to hold back, then use the key fact or argument to finesse the position of the other side, but those are few and far between. Gamesmanship, being really clever, is not normally the best approach.

VIII. NEGOTIATING FROM A POSITION OF WEAKNESS

The above discussion of methods of negotiating assumes, in large part, that both sides have strengths and weaknesses to their positions in either the negotiation or in the pending or potential litigation. Often in franchise relationships, however, one party finds itself with no compelling legal or factual support to offer in defense of meritorious claims against it. For example, when a franchisor terminates a franchise agreement without cause in a state that only permits termination for good cause, there is likely little defense to the franchisee’s claim for wrongful termination. Similarly, if the franchisee has intentionally underreported sales and underpaid royalty fees, there may be little to forestall the franchisor’s termination of the agreement. Because there is even less upside to litigating a dispute when there is an almost certain chance of losing, negotiating a resolution is even more imperative to a party with a weak position. However, the party with the weaker position usually has much less – or no – leverage in such negotiations. This section addresses arguments beyond the substantive merits of the claims that counsel can use to negotiate a resolution in such circumstances.

A. Certainty

If the other side is confident it will prevail, that party may have little concern about the certainty of the outcome sufficient to make a negotiated resolution possible. However, there is no absolute certainty in litigation. Moreover, certainty as to the ultimate result does not equate with certainty as to how the litigation will progress. Damaging facts may come to light during discovery that might not impact the instant case but could be the basis for other claims. For example, a franchisee might have a victory on its fraudulent inducement claims but, in the course of discovery on its damages, it might be revealed that the franchisee has intentionally failed to make payroll tax payments or improperly reported and paid for overtime. There might
also be rulings in the case that are tangential to the ultimate outcome but have other ramifications. For example, a court might rule that a franchisor failed to include required disclosures in its FDD provided to a Virginia franchisee but that the franchisee’s claims under the Virginia Retail Franchising Act are barred by the very short statute of limitations for claims under that Act. However, the ruling that the FDD was deficient might collateral estop a franchisor from disputing that issue in a case brought by Maryland franchisees asserting claims under the Maryland Franchise Law. A negotiated resolution provides certainty that these types of issues will not arise, regardless of what the ultimate outcome of the litigation might be.

B. Cost Of Prosecuting Or Defending Against Claims

As discussed above in Section II.B, a significant benefit of negotiating is to avoid the cost of litigating claims. The cost savings of reaching a resolution can also be a point to make as part of the negotiations, especially if there is a question whether the prevailing party can recover its attorneys’ fees. If the other side is simply focused on the fact that it is likely to be the victor, it may not have considered the cost of obtaining that victory. Pointing out in detail to the other side the potential costs that will be incurred to prosecute or defend against the claims at issue can have a very sobering effect on a party that is bullish on likely success. Even in the face of a prevailing party attorneys’ fee provision, the prospect of spending the resources required to obtain the desired result – particularly in a fact-intensive case that will involve significant discovery – could be a factor that compels the likely victor to negotiate a resolution that avoids that capital outlay. This argument may be particularly compelling in situations where either the franchisor or franchisee is in a financially precarious position, rendering the collectability of any ultimate judgment or award – including an attorneys’ fee award – questionable. Convincing the other side that victory could come at a significant, non-recoupable cost is a worthwhile negotiating strategy when faced with the likelihood of an unfavorable result.

C. Saving Time

Like cost savings, saving time is both a benefit of negotiation and a potential argument to make to the other side in attempting to reach a resolution. As detailed in Section II.B, litigated cases that proceed to summary judgment or trial are not resolved quickly. Faced with a weak case, counsel should point out to the other side that, regardless of their confidence in prevailing, it could take a year, two years, or longer to obtain that result. Faced with the prospect of a delayed victory, the other side might be more willing to consider a negotiated resolution that is not a complete victory (or which requires concessions) to have immediate relief. This is particularly true in cases involving both equitable relief and damages. For example, a franchisor might be willing to forego a claim for past-due fees in exchange for immediate compliance with deidentification obligations and a post-termination noncompete. Similarly, a franchisee might forego rescission damages in exchange for the franchisor agreeing to broker a sale of the franchised business to a third party to allow the franchisee to exit the system immediately rather than continuing to operate during the course of the litigation. In raising this point, counsel should be careful not to suggest that it intends to take affirmative steps to prolong litigation (or have an actual intent to do so). Instead, counsel should be clear that as a practical matter, a disputed matter will not be resolved quickly by a court or arbitrator.

D. Avoiding Publicity And Damage To The Franchise System

Although the authors do not countenance litigating a case in the media, litigation filings are public record and it is possible local or industry media will report on a case, particularly one with salacious facts, an exorbitant damages claim, or involving a well-known community figure.
Raising the prospect of negative – or any – media attention is another strategy counsel might employ when faced with a weak case. A negotiated resolution might preempt such potential publicity about the dispute. Even if the media does not report on the matter, for franchisors, it is highly likely that other franchisees will learn about the dispute, and counsel for the franchisee can certainly point out that their client is very likely to discuss the dispute with their peers. Similarly, counsel for a franchisee can point out that the franchisor might be obligated to report the dispute in its franchise disclosure document, making it known to prospective franchisees and potentially having an impact on franchise sales. Negotiating a resolution prior to suit being filed alleviates both of those concerns.

Counsel should also raise that other negative publicity can arise during the course of litigation. For example, if the franchisor obtains a preliminary injunction to enforce a termination and prevent a franchisee from ongoing operation, the franchisee’s reputation in the community – and its relationship with its landlord, vendors, and employees – may be damaged. Similarly, if the franchisee decides to shutter an unprofitable location during the course of the litigation (regardless of the potential legal claims that might create), the franchisor might suffer a loss of goodwill and reputation in the market from the unexpected closure. However, a negotiated resolution – perhaps the franchisee proposing a sale to a third party or the franchisor stepping in to operate the location – might avoid the reputational damage that would result from the location being closed. Counsel should point out the risks of such negative publicity that might arise if the case is not resolved through negotiations.

E. Resolving The Relationship Rather Than Fighting About The Relationship

Often in franchise cases, the underlying issue is whether the relationship between the franchisor and franchisee is salvageable. In those cases, counsel should also try to persuade the other side that a negotiated resolution is preferable because it addresses the most important issue: the relationship.

For example, in a case where the franchisee has failed multiple operational audits of its business, the franchisor’s right to terminate and potentially to obtain injunctive relief to enforce the termination might be beyond dispute. However, if the franchisee’s business is otherwise profitable, the franchisor might actually prefer to keep the location in the system. Rather than waiting for the franchisor to terminate the agreement and file suit to remove the franchisee from the system, the franchisee might be better served to propose a resolution that salvages the relationship by agreeing to retain new management, to pay for supplemental training, and to follow an agreed timeline for obtaining positive audit scores. In that way, the franchisee can offer to address the franchisor’s concerns – substandard operation – but salvage a relationship that is otherwise profitable for both parties.

Lawyers are, of course, restricted by ethical rules as to their ability to make public comments about pending litigation. See Model Rules of Professional Conduct r. 3.6(a) (Am. Bar Ass’n 1983) (“A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.”). See also Michael Downey, Ethical Rules for Litigating in the Court of Public Opinion, Ethics & Professionalism Committee News., (Am. Bar Ass’n Section of Litig.), Summer 2012, at 2-11 (describing limits ethical rules and courts have placed on lawyers litigating cases in the media).

See 16 C.F.R. § 436.5(c)(1).
Similarly, a franchisee may have numerous legitimate issues with the franchisor’s operation of the system in derogation of the franchise agreement that have gone unaddressed, despite the franchisee’s repeated complaints. In those circumstances, the franchisee may simply be disenchanted with the franchisor’s management and see no positive future to the relationship. Rather than attempt to defend against those claims, the franchisor might be better served to approach the franchisee about a negotiated exit from the system, which the franchisee would not be able to obtain as relief in suing for breach of contract. In that way, the franchisor and franchisee avoid the expense of litigation – with a result that is likely not preferable to the proposed alternative of the franchisee and franchisor parting ways on mutually agreeable terms.

In sum, a party with little to gain from litigating and much to lose may be better served by focusing on and proposing a resolution that addresses its potential opponent’s issues with the relationship as opposed to the legal claims themselves.

IX. THE FINAL NEGOTIATION (WITH ONE’S CLIENT)

When discussing negotiation of a dispute, most attorneys focus on those negotiations between the parties. But often the most difficult negotiations any attorney experiences can be those with the attorney’s client after the opposing party has made an offer the attorney strongly believes represents the best outcome under the circumstances.

Rule 1.2(a) of the ABA Model Rules of Professional Conduct states that a “lawyer shall abide by a client’s decision whether to settle a matter.” But two other rules at least suggest that if the lawyer strongly believes the current offer is the best the other side will make at the current time, and in light of the risks the client faces, it is the most-likely best outcome for the client, then the lawyer may be left in a difficult position. Rule 1.3 states that a “lawyer shall act with reasonable diligence and promptness in representing a client.” And Rule 1.4(b) states that a “lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”

A. Techniques for Negotiating With One’s Client

1. Point Out The Weaknesses In The Client’s Case

It’s always a good idea for attorneys to point out the weaknesses of clients’ cases at all points during the representation, but it becomes especially critical when a valuable settlement

59 MODEL RULES OF PROF’L CONDUCT r. 1.2(a) (AM. BAR ASS’N 1983).

60 MODEL RULES OF PROF’L CONDUCT r. 1.3 (AM. BAR ASS’N 1983). See, e.g., Attorney Grievance Comm’n of Maryland v. Brown, 44 A.3d 344 (Md. Ct. App. 2012) (stating that “a lawyer may violate MLRPC 1.3 if the lawyer fails to protect against expiration of the statute of limitations regarding his/her client’s claim.”); Attorney Grievance Comm’n of Maryland v. De La Paz, 16 A.3d 181 (Md. Ct. App. 2011) (finding attorney violated rule 1.3 of the Model Rules of Professional Conduct by failing to do anything to advance the client’s cause or endeavor); Colvin v. Comm. on Prof’l Conduct, 832 S.W.2d 246 (Ark. 1992) (finding attorney violated Rule 1.3 of the Model Rules of Professional Conduct by failing to respond to requests for admissions and interrogatories, resulting in the client’s case being dismissed with prejudice).

61 MODEL RULES OF PROF’L CONDUCT r. 1.4(b) (AM. BAR ASS’N 1983). See, e.g., Attorney Grievance Comm’n of Maryland v. Stinson, 50 A.3d 1222 (Md. Ct. App. 2012) (finding attorney violated rule 1.4 of the Model Rules of Professional Conduct by failing to adequately explain to the client that the scope of the attorney’s representation of the client did not include annulment of the client’s marriage).
offer is on the table. Clients need to know that they can lose and the reasons why. Not only do the Rules of Professional Conduct require that, your conscience (yes attorneys have consciences), and, if applicable, the insurer demand it.

A client needs to know he or she could lose, and they need to understand clearly the risks involved with turning down a valuable offer. Clients also need to know the full costs of losing. Clients might be aware that a loss will mean receiving nothing or paying too much, but do they know that they might have to pay the other side’s attorneys’ fees? Do they know they could lose their franchise? Do they understand that an adverse finding or ruling could change the very way the franchisor does business? If they don’t, then the attorney has not done their job.

2. **Compare All Likely Outcomes**

Attorneys may think their clients truly understand the risks they face in heading toward trial versus the reward they have sitting right in front of them, but often clients do not fully understand. An example is where clients have their mind set on receiving a certain amount, or paying only so much. The offer in front of them might be for a little bit less than the client’s bottom line, or a little bit more than the client’s top line. In this case, a good technique is the Las Vegas example.

Suppose a client believes the least amount it will accept to settle the case is $1 million, and the opponent has made it clear that the most it will offer is $850,000. Also suppose that the case outcome is all or nothing. If the client wins, it will receive $3 million, but if the client loses, it will get nothing and pay the opposing party’s attorneys’ fees, which are about $250,000.

Clients often will focus on the mere difference between the $850,000 that is on the table and the $1 million dollars they are willing to accept. But that is a fake comparison. The real difference is that between the $850,000 they could have right now, versus the $250,000 they would have to pay if they lose.

Under this scenario, an attorney could ask, “would you put $1.1 million on the red at the roulette wheel in a casino (the $850,000 the client could have, plus the $250,000 it would have to pay if the client loses the trial) to win $3 million (the amount the client could get at trial)?” Some might say “Yes,” and that’s okay because the attorney shall have explained the matter to the extent reasonably necessary to permit the client to make an informed decision regarding the risks. But many clients who are adverse to risk will change their minds when faced with this risk versus reward assessment.

3. **Share Past Experiences**

Many attorneys also can share their past experiences regarding rejected settlement proposals. For example, if your experience is that none or perhaps very few of your former clients that have rejected your advice to accept an offer have done better at trial, you should say so. Stating that “in the past all (or most) of my clients that have rejected my settlement advice have come out worse, and that if you reject it, I hope you are the first (or second or third) to prove me wrong,” is highly effective.
X. CONCLUSION

Studies have concluded not only that 95% (or more) of all civil cases settle prior to trial but that parties who pursue resolutions in courts or arbitrations often times are dissatisfied. Negotiation, therefore, is a crucial skill for litigators and transactional lawyers alike. This paper certainly isn’t the last word on what often is described as more “art than science,” but the authors hope the perspectives, strategies and tactics presented herein will provide lawyers with a few more tools to help them help their clients achieve results that deliver both parties not only an acceptable resolution of their disputes, but a feeling of satisfaction in knowing they resolved the dispute amicably.

62 See, e.g., Government survey shows 97 percent of civil cases settled, Bizjournals (May 30, 2004, 9:00 PM), https://www.bizjournals.com/phoenix/stories/2004/05/31/newscolumn5.html (referencing statistics from a U.S. Justice Department study of state courts which provide that 97% of civil cases are settled or dismissed without a trial). See also U.S. ex rel. Yankton Sioux Tribe v. Gambler’s Supply, Inc., 925 F. Supp. 658, 666 (D.S.D. 1996) (noting that “over 95% of all civil cases are resolved prior to trial, therefore adequate representation becomes a very important practical consideration during settlement negotiations.”).


AUTHOR BIOGRAPHIES

SCOTT KORZENOWSKI

As a partner at Dady & Gardner, P.A., Scott Korzenowski exclusively represents franchisees and dealers in their disputes with franchisors and manufacturers. Scott graduated from the University of Minnesota with a Bachelor of Arts degree in Journalism. He then wrote sports columns for about seven years until he no longer could stand interviewing prima donna athletes, so he enrolled at the University of Minnesota Law School, where he graduated magna cum laude. Scott now has the burden of dealing with prima donna franchisor counsel such as Les Wharton and Ben Reed. Scott learned to care for the little guy while clerking for The Honorable Esther Tomljanovich of the Minnesota Supreme Court, and watching first hand as his father struggled with a difficult franchisor. Scott also hosts a radio show (mostly about sports) from 8-9 a.m. Sundays on KFAN in the Twin Cities.

BENJAMIN B. REED

Ben Reed is a partner at Plave Koch PLC, a franchise boutique in Reston, Virginia. He is a litigator who has practiced in the field of franchise law for almost 20 years, providing counsel to franchisors in a variety of industries, including restaurants and food service, dry cleaners, hotels, retail, business services, and product distribution. Ben has represented franchisors in franchise litigation and arbitration matters throughout the United States involving breaches of franchise agreements, trademark and service mark infringement, franchise terminations, tort claims arising out of the franchise sales process, franchise law claims, and enforcement of post-termination obligations. He also regularly advises franchisors in compliance with state franchise sales and relationship laws.

Ben graduated magna cum laude from the South Carolina Honors College at the University of South Carolina. He received his J.D. from the University of Virginia School of Law, where he was an Executive Editor for the Virginia Environmental Law Journal.

Ben has spoken on panels and conducted roundtables on numerous legal and business issues related to franchising. He is an active member of the ABA Forum on Franchising, serving on the Litigation and Dispute Resolution Division Steering Committee as a member from 2015 to 2017, and as the Division Director from 2017 to 2019. He has authored articles for the Forum’s publications, the Franchise Law Journal and The Franchise Lawyer. He is also active in the International Franchise Association, having previously served on the IFA Legal Symposium Task Force and currently serving on the Legal and Legislative Committee.

LES WHARTON

Les Wharton is the Chief Legal Officer for Coverall North America, Inc. Coverall franchises commercial cleaning businesses. Les joined Coverall in March 2012. He has been a franchise attorney for more than 35 years, as inside and outside counsel.

Les is a frequent speaker on franchise related topics, and is a published author in the area as well. He has served in leadership positions in various franchise groups, including the Corporate Counsel Committee of the ABA Forum on Franchising, the State Bar of Georgia’s Franchise Law Section and the Southeast Franchise Forum. Les has chaired the IFA Legal/Legislative Committee twice, turning over the gavel the second time in February 2019, and he chaired the IFA Legal Symposium Task Force for 3 years.
Les taught Franchise Law as an Adjunct Professor at the University of Georgia School of Law, and he is an arbitrator and mediator for the American Arbitration Association, handling primarily franchise disputes. He is a member of the ABA Litigation Section’s Taskforce on Early Dispute Resolution.

Les graduated from the United States Military Academy at West Point, NY with a concentration in National Security Affairs, and cum laude from the University of Georgia School of Law, where he was Editor in Chief of the Georgia Journal of International and Comparative Law.