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### Negotiator's Nook: The Ins and Outs of Effective Negotiation

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**BY DAVID H. SPRATT**

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# Negotiator's Nook

the ins and outs of effective negotiation

**I**n my Winter 2010 column, “The ‘Ins and Outs’ of Good Legal Writing,” I jumped on the end-of-the-year bandwagon and published an “in and out” list extolling the virtues of exciting new trends in legal writing. I promised to provide a “sporadic” series of columns that continued with the “in and out” theme in an attempt to banish long-held (and what should have been long-dead) notions of what constitutes effective legal writing. Subsequent columns have certainly ripped the cover off of numerous, seemingly ill-conceived ideals of the eloquent esquire. But this is the first time that I have specifically revisited the “in and out” theme, albeit in a different context: negotiation strategies. We’ll return to writing in the next column. Let’s call this column “Negotiator’s Nook.”

I am currently teaching a family law elective; as one exercise, my students conduct a mock property distribution settlement conference. Prior to the conference, we discuss

basic negotiation techniques and strategies, which got me thinking that many of these techniques are (unfortunately) not used in actual practice as much as they should be. This column seeks to impart the same knowledge to real negotiators who might have lost their footing or simply need a reminder on how to negotiate effectively, yet cooperatively.

## **In: Cooperative Negotiation**

## **Out: Wholly Competitive Negotiation**

Many years ago, after a family law settlement conference on New Year’s Eve (fun times, fun memories!), I received a wonderful compliment from opposing counsel. She told me that I was able to zealously and effectively represent my client’s interests because I thought holistically about the case, calmly and thoroughly considering each issue from each party’s perspective. As a young lawyer, this comment reso-

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*In every negotiation, a good lawyer should place herself in the other party's shoes and understand the other party's positions and needs. When a lawyer does that, she can more effectively present her own client's position and creatively develop solutions that appear to be serving both parties.*

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nated with me, and some 20 years later, I still remember her words and try to use the same skills (when appropriate) each time I negotiate.

As with legal writing, however, there should never be a cookie-cutter approach to negotiation. Before each settlement conference, you need to decide which negotiating approach will best serve your client: cooperative, competitive, or a combination of the two.

The wholly competitive lawyer makes an initial high and often unreasonable offer, keeps the pressure on the other side, and is reluctant to make concessions. The atmosphere is adversarial, and the threat of litigation looms visibly in the forefront. Settlements, if reached, tend to be very favorable for the client of a wholly competitive negotiator, but fewer cases settle with this approach (or if they do ultimately settle, the process is financially and emotionally draining for the clients).

The cooperative lawyer emphasizes the parties' shared interests, shows a willingness to make concessions, and makes a more realistic first offer. The atmosphere is one of good-faith negotiation, and attorney egos are kept in check (at least publicly). The cooperative lawyer is confident and ready for trial, but the threat of litigation hides in the background. More cases are settled using a cooperative approach, but the settlements are usually a result of give-and-take and might not be as one-sided.

In my humble opinion, a combination of the cooperative and competitive approaches is most successful. In every negotiation, a good lawyer should place herself in the other party's shoes and understand the other party's positions and needs. When a lawyer does that, she can more effectively present her own client's position and creatively develop solutions that appear to be serving both parties (even when they

are fundamentally designed to protect her client's exclusive interest).

In many cases, particularly family law cases, one side is almost always suspicious of the other side's attorney. This suspicion leads to many attorneys treating each other unkindly and unprofessionally when they internalize the anger and emotion understandably being experienced by their clients. I never found this approach to be helpful (although many clients mistakenly think that it is). To combat this perception, and to lay the groundwork for cooperation, I am friendly to the other client and the other attorney. I begin a settlement conference by discussing ground rules about respect, cooperation, availability for breaks, the fact that we are both demonstrating good faith by coming to the settlement table, and that everyone has a job to do (and the positions we take are not meant to personally disparage the other side).

This does not mean, however, that I do not vigorously and successfully represent my clients. I prepare thoroughly, know the facts, what my client wants, what the law will provide, and I am willing and able to go to trial if settlement negotiations fail.

In short, you catch more flies with honey, but sometimes flies need to be eaten by spiders. ■

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**Your comments and suggestions are welcomed at [dspratt@wcl.american.edu](mailto:dspratt@wcl.american.edu). If you send me too many, however, we will cooperatively negotiate a reasonable number that benefits both of us. If we can't reach a number, see you in court!**