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Looking for interests during negotiations

One of the major differences between good and indifferent negotiators is that the top performers don't make assumptions. During negotiations they take nothing the other party says at face value. They check, they probe and they gather facts.

Demands made by parties at the negotiating table can make one think that a dispute can only be settled by payment of money. Asking questions seeking to establish the parties' real interests can open up different ways to settle.

Another tactic is to encourage the other party to talk. Many people are eager to describe their business, how they feel they have been disadvantaged and why they are adopting their current position. A voluble adversary gives a skilled negotiator the opportunity to look for the person's real interests rather than focus on their stated position. Finding those interests can provide a common ground for reaching an amicable settlement.

What do they really want?

As an example, I would like to share the story of a fish farmer who had a farm near Albury, NSW. On his farm he had a dam in which he kept Murray Cod. On a hill on the next property, his neighbour stored pulp from a nearby paper mill. Unfortunately for the fish farmer, the engineer who had designed the retaining wall for the pulp storage hadn't done an adequate job. One night the wall collapsed and all of the sludge made its way down the hill into the fish farmer's dam. The result was many dead fish.

The fish farmer engaged his lawyer who in turn engaged a forensic accountant. Between them they produced an impressive claim for some \$750,000 in damages. This claim landed on the desk of my client, the claims manager of the neighbour's public liability insurer. He was worried because there didn't seem to be much to argue about on the question of liability. He did, however, suspect that the claim had been exaggerated and made a provision for a payment of \$250,000.

He talked to me about the case and we decided to try an early mediation to see if we could settle the matter on a basis which was reasonably acceptable to the insurer.

On the mediator's suggestion we brought along our farmer client. At the mediation the fish farmer's lawyer presented an eloquent argument on liability. His accountant produced detailed projections of loss of earnings and damages. We seemed to be faced with a substantial claim. While they were talking, I noticed that the farmer appeared keen to talk, so I encouraged him to tell his own story about the damage to his fish farm.

He launched into a long account of his interest in farming Murray Cod. After some time he paused and I took the opportunity to ask him how much it cost to get a licence. His response was: 'No, we didn't have a licence for the farm.' I then asked him: 'Well, how did you manage to sell the fish?' and he said they didn't really sell any fish. They were really very good to barbecue. In addition to having a family barbecue every week, they would donate a fish to the local rotary club. By that time the accountant and lawyer were looking distinctly uncomfortable and called for a break!

Later, the mediator came to see us. Following some frank discussion between the farmer and the mediator it appeared that what the farmer really wanted was a new dam on his farm, on the other side of his property so that he wouldn't face the threat of more sludge falling into it. On hearing this, our farmer client volunteered that he had an excavator with which he would be very happy to excavate a much larger dam for the fish farmer on the other side of his farm. The fish farmer was delighted and we achieved a settlement which cost my client, the insurer, about \$500,000 in total for the cost of replacing the fish and the contribution to the cost of excavating the dam.

The settlement brought home to me the importance of looking for people's real interests rather than focusing on their positions.

Sometimes you have to probe to find out what people really want — it might be very different from what you think, or what they say. By suspending assumptions, you potentially leave options open to satisfy everyone's needs.

Put options on the table

Sometimes one can succeed using this approach when one least expects it. An example of this occurred in a dispute about franchise fees in which I acted for a franchisor that had a computer franchise in Brisbane.

Unfortunately while the franchisee was a very good salesman he was a poor businessman and the franchise was losing money due to its lack of proper financial administration. The franchisee owed my client a large sum in unpaid franchise fees, but had asserted in his defence that my client had made misrepresentations about the franchise. My client didn't want a long-running court battle so we decided to try an early mediation.

In preparing our strategy for the mediation we talked about the arguments we thought the franchisee would make. We anticipated that we would hear that the franchisee had no money, that if my client commenced proceedings he would only receive a few cents in the dollar and that in the end my client would have to close down the franchise and recover what few cents in the dollar he could.

I asked my client what he would like to get if he possibly could get everything he wanted. He explained that what he really needed was a successful franchise in Brisbane. He needed to boost sales in a key market. Of course he wanted to recover his franchise fees, but that was really a

secondary objective. He made the point that it was a pity that this franchisee was such a poor manager because he was really a very good salesman.

Having a better idea of my client's real interests, I went to the mediation with a view to trying to establish what the franchisee's real interests might be. Initially we were presented with the arguments we had anticipated. He complained that my client had misled him. In any event, he had no money and if we commenced proceedings we could liquidate his company and would likely receive a few cents in the dollar.

Probing a bit further I asked him what he would really like to achieve if, hypothetically, his money problems disappeared. It became clear that he was keen on the idea of a much bigger franchise. He explained enthusiastically that he thought there were great opportunities in Brisbane and how if only he could increase the range of his products, he had no doubt that he could build a very successful business. He also acknowledged that he was not very good at financial administration and that he could really do with some help in that regard.

In the light of these disclosures and the discussions I had had with my client before the mediation, we began to explore alternative solutions to winding up the franchisee company. In the end, my client agreed to expand the franchise and took preference shares in the company which allowed it to be repaid its fees via dividends derived from profits. My client also took a position on the franchisee's board. He put his own financial administration skills into the company to ensure it was properly operated and he now has a very successful franchising operation in Brisbane.

The lesson I learned is that by asking questions which look to the real interests of the parties, one can sometimes find the key to settling disputes which appear to be only about money.

Tips for negotiators

- Don't assume that a party's stated position reflects what they really want
- Ask questions which focus on establishing the parties' interests
- Encourage the other party to talk and listen carefully for signals which indicate what they really want
- Never assume that you know what your client wants. Often they have unstated objectives which can form the basis for a settlement if they are put on the table cost my client, the insurer, about \$50,000 in total for the costs of replacing the fish and the contribution to the cost of excavating the dam.