

Professor Lande
Negotiation

Self Assessment- Negotiation of the Partnership Agreement Between Casey and Robin

Introduction:

During Casey and Robin's negotiation over the partnership agreement, my role was to serve as Casey's attorney. Ultimately both sides were able to reach a deal, so I was at least effective enough to help my client reach an agreement on terms that were acceptable to him. However, despite our overall success, I realize there are a few areas in particular where I have room for improvement. Simply because it worked out in the end in this negotiation does not mean I will be so fortunate in the future. Specifically, there are two key aspects of this negotiation where I did not feel completely comfortable with my performance, even though I do believe I did some things well with respect to these issues.

One part of the negotiation which will be the focus of my self assessment is how I struggled with setting my client's expectations in our final meeting before the negotiation. How well lawyers handle the balancing act of setting clients' expectations is an important factor in determining how a client thinks you performed, thus I think it is important that I analyze my performance in this area.

The other area I will focus my self assessment on is how well I utilized the various negotiation approaches, and whether the ones I implemented at various times throughout the negotiation were appropriate for the circumstances. Throughout the negotiation we used variations of positional, ordinary, and interest-based negotiation, and I think I could have done a better job tailoring which approach I went with to fit the facts of this matter. There were a few times our negotiation nearly fell apart, and I think a lot of that had to do with which negotiation approach we were using. Thus, I also think it is important to analyze how I can improve my use

of the various negotiation approaches to avoid unnecessary problems in the future. I will first briefly address the relevant facts at issue and how we were able to reach an agreement, before beginning my analysis over my performance in these two areas.

A brief summary of the facts and the ultimate agreement:

The main issues we focused on were how much money was needed initially, what Robin's salary would be, how ownership and profits would be divided, and which party would be able to make which decisions relating to the business. We ultimately were able to reach agreements on every major issue. In terms of initial contribution, we decided that Casey would contribute seventy-thousand initially, Robin would put forth five thousand, and after six months Casey would put in another ten thousand if the account was down to eighteen-thousand. We agreed on a fifty-thousand dollar salary for Robin in year one, and decided to renegotiate her year two salary after the first year was over, as we would then have a better idea how the restaurant was doing. Each party accepted a fifty-fifty ownership split. In terms of profits, we agreed that Casey would get all the initial profits until fifty percent of his initial contribution was recovered (i.e. the first thirty-five thousand), and then after that point profits would be shared equally between the parties. Regarding business decisions, anything over \$3,500 would have to be approved by Casey, but Robin would have the ability to make ordinary day to day restaurant decisions by herself. Thus, while we hit some road blocks at times, both lawyers and clients stayed open to considering creative ideas for how to reach a deal, and enabled us to do so in the end.

Managing my client's expectations:

There is some literature in the legal community about how to approach managing clients' expectations, and I will briefly address that here. In his piece *Focusing on Client Service*, Roy Ginsburg explains that while most lawyers believe their client's happiness depends upon the outcome the lawyer gets for the client, in reality it depends much more on how good the attorney is at managing the client's expectation of the outcome.¹ Ginsburg notes that there are two common problems lawyers have in the expectation setting process. Some lawyers tell their clients what their clients want to hear, or essentially how strongly positioned their client is to succeed in the negotiation.² Other lawyers revert to the opposite end of the spectrum. They tell their clients about everything that could go wrong, or how the client may have to give up much of what they desire in order for a deal to be reached.³ There are problems with both approaches, but also reasonable explanations for why lawyers fall into these traps.

The reason many attorneys tell their clients what they want to hear is often simply to stay on their client's good side, and to appear like they have their client's interests at heart.⁴ At that point in the process, a client is likely to be much happier with their attorney (and stick with their attorney going forward) if the attorney reassures the client how well the client will come out in the negotiation. Thus, this is a simple trap to fall into. The problem is that if the attorney cannot deliver what the client expects, the client will ultimately be upset with the attorney's performance after the negotiation.⁵

Because of this fear, many attorneys take the opposite approach and warn the client about everything that could go wrong, and all the things the client may have to sacrifice.⁶ Attorneys

¹ Roy S. Ginsburg, *Focusing on Client Service*, Bench & B. Minn., March 2006, at 32, 34.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

generally do this to lower the client's expectations, because then the client is more likely to be pleasantly surprised (and thus happy with the attorney) after the negotiation concludes.⁷ And if the result is still not great for the client, at least then the client will not blame the attorney to the same degree if they were warned ahead of time. Attorneys understand that clients will not be happy at the conclusion of the matter if the client has expectations going in to the negotiation that realistically cannot be met.⁸ However, when attorneys take this approach they risk appearing overly negative, and alienating themselves from the client at this stage in the process.⁹ Thus, while this approach can be beneficial in the end in terms of how happy the client is with the attorney, it is certainly not without its risks.

In the simulation, I believe I fell too far on the “tell your client about everything bad that could happen” end of the spectrum. Based on the conversation I previously had with my opposing counsel I was not overly optimistic about our chances of reaching a deal (unless we would be willing to give up a lot), so I wanted to prepare my client for what he may have to sacrifice. During our conversation, I pushed my client to find out things he would be willing to give up, and what he would not be willing to budge on. Early on I informed him that he would likely have to make some sacrifices in order for a deal to be reached. Not only was I trying to lower his expectations somewhat so he would be happier with my performance in the end, but I did really believe what I was telling him.

⁷ *Id.*

⁸ See Alistair Burrow, “Achieving the Best Results for the Client, 2008 WL 5689055 (ASPATORE), 1 (explaining that “managing expectations is an important part of the lawyers job”, and that “Lawyers cannot succeed if clients have expectations that cannot be delivered-- clients will only be disappointed.” ; See also Margaret Graham Tebo, *What Do You Expect? Straight Talk and Periodic Updates Help Keep Client Expectations in Check*, ABA J., July 2006, at 25 (stating that “Every lawyer has dealt with clients whose initial expectations about their case and their lawyer's role are out of line with reality. Managing client expectations from the very first meeting is key to keeping the representation on track.”).

⁹ *Ginsburg at 34.*

I do believe my approach ended up turning out okay for me, as when many of their offers were better than I warned him about, he seemed pleasantly surprised. (As I learned in the class debrief, my client was even a little worried that there must be some catch since things seemed to be going so well). Thus, for this reason I would not totally change my approach of leaning on the side of lowering his expectations, but I do believe I went a little too far to the extreme. I believe I should have done a better job of communicating to him that I would strongly represent his interests at all times, and that just because I was pressing him on where he might be willing to budge did not mean I would give in on these things without a fight at the negotiation.

Even simply changing the order of what I told him may have helped. For example, instead of telling him at the beginning that he would likely have to make some concessions to reach a deal, I should have told him upfront how I was going to be a strong advocate for his interests at all times. After I have expressed this to him, gently bringing up the idea that some sacrifices will likely be necessary probably would not have gone over as badly.

Thus, I probably sacrificed too much of my client's confidence in my abilities for the sake of managing his expectations. I definitely got the feeling that my client was worried with what I was telling him (especially early on in our client meeting), and that he was a little nervous as to what type of deal I would be able to reach for him. While this probably did lead to him being pleasantly surprised with the deal we were ultimately able to reach, in the real world a client in his situation may simply leave immediately and find a different, more confident, attorney to represent him going forward with the negotiation. Taking safeguards to ensure a client will not be disappointed with you following the negotiation is certainly important. But so is not scaring off your client before you even get a chance to reach the negotiation stage, which is something I risked. I do believe in choosing between the two, it is better to lean towards

having the client happier with you following the conclusion of the matter as opposed to before the actual negotiation begins, but I could have done a better job of finding a balance between the two extremes. Also, being a little more vague about what he should expect may give me some needed leeway. Going forward, I believe I have a better understanding about how important the managing expectations process is, and I think learning from my mistakes here will lower the chances that I make the same mistake again.

Use of the Various Negotiation Approaches:

There are three main approaches that lawyers utilize in negotiations, although many use some forms or combinations of each throughout a full negotiation. Positional, ordinary legal negotiation, and interest-based negotiation all have their advantages and disadvantages, and a brief explanation of each will be set forth here.

Positional negotiation is the option that most people traditionally associate with negotiation. The opposing attorneys typically open with extreme offers, and each budges slightly toward the middle after exchanging various counter-offers with their opposing counsel.¹⁰ A win for one side means a loss for the other, as it is considered a zero-sum game.¹¹ Many lawyers are most comfortable with this more traditional approach, and it is often a decent approach to use when the parties will not have a continuing relationship following the negotiation.¹² However, positional negotiation often increases the chances that the parties will not reach a deal when the potential for a deal was there, based on the confrontational nature of

¹⁰ See John Lande, *LAWYERING WITH PLANNED EARLY NEGOTIATION: HOW YOU CAN GET GOOD RESULTS FOR CLIENTS AND MAKE MONEY*, 58-59 (2011).

¹¹ *Id.*

¹² *Id.*



this approach and the lack of creative decision making.¹³ Thus, in many cases it simply is not the tactic that will be most beneficial to the parties.

Ordinary legal negotiation involves the use of legal norms in the community to help the parties reach an agreement.¹⁴ Essentially, the parties are concerned with figuring out what the norm is for that issue in their surrounding legal (or business) community, and this puts the parties in a good starting position to reach an agreement.¹⁵ While the norm can be changed based on other factors relevant to the parties' negotiation, and some interest-based and positional negotiation is often used along with it, ascertaining what result is typically reached in similar situations makes it easier for the parties to reach common ground.¹⁶

Interest-based negotiation involves the parties finding creative ways to leave both sides better off, and takes the view that there is a pie to be expanded, rather than a limited amount of pie to be divided amongst the parties.¹⁷ The parties are more likely to ascertain each sides reasoning behind their stances, and figure out what is best for all parties involved.¹⁸ This approach can be particularly effective when there are multiple issues at stake in the negotiation, as it is often easier to implement creative ideas when there is more for the parties to work with.¹⁹ It is also considered a good approach to utilize when the parties to the negotiation are likely to have a continuing relationship beyond the negotiation itself.²⁰ Even though interest-based negotiation is often the option that has the best chance to leave both parties happy with the result,

¹³ *Id.*

¹⁴ John Lande, *Teaching Students to Negotiate Like a Lawyer*, 39 Wash. U. J.L. & Pol'y 109, 120 (2012).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Lande, *LAWYERING WITH PLANNED EARLY NEGOTIATION: HOW YOU CAN GET GOOD RESULTS FOR CLIENTS AND MAKE MONEY*, at 66. (2011).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

many attorneys hesitate to use it because they are not as familiar with it and they fear coming across as weak to the other side.²¹

In terms of my use of the various negotiation options, while at times I felt I was using the right approach, I felt like I waited too long to utilize the ordinary-legal and interest-based options. The facts in this simulation had many opportunities for us to draw from each of the three negotiation alternatives, and overall we did use elements of each.

Going into the negotiation, I had agreed with Robin's attorney that the best options for our clients would be to primarily use ordinary-legal and interest-based negotiation. However, I felt when we began the negotiation (starting with the issue of the amount of our initial contribution), both parties seemed to be taking more of a positional approach. We weren't necessarily taking ridiculously extreme offers and refusing to budge at all, but we each stated favorable amounts that we would be willing to contribute, and did not move too far from our starting positions. There were not many creative options being thrown about at this time, and not much progress was made at the beginning of our negotiation. In fact, at one point I felt a deal simply was not going to be reached, since we were coming to a stand-still and we were only on the first of many issues that we had to resolve.

Ultimately, both myself and my opposing counsel seemed to realize we needed to change things up and move to a different issue. We figured that if we put more issues into play there would be a better chance for some give and take, along with more creative options to come to light. However, starting as we did risked poisoning the parties' relationship going forward, and I was not happy that I let it get to that point.

In terms of why we began with a more positional approach when this was neither side's plan, I have a few theories for why this occurred. One reason is simply that we both wanted to

²¹ *Id.*

appear like we were being strong advocates for our clients, and were afraid of being the first person to begin using the less common approaches. We both felt more comfortable using the easier and more often used positional negotiation, even though it was obvious after a short time that it was not accomplishing much. Perhaps more importantly, when we began we were only focusing on one issue, and interest-based negotiation is much easier to implement when the parties are not restricting themselves to negotiating one issue at a time. Once we stopped restricting ourselves to tackling the negotiation one issue at a time, this made it much easier for each side to recommend creative options.

I think it would have helped had I made a statement at the beginning reminding everyone that we planned to use an ordinary-legal and interest-based approach (and explaining what that means). This could have made both attorneys less afraid to abandon positional negotiation from the beginning, as our clients would understand we were helping them reach an agreement as best we could even without appearing confrontational. I also think we should have begun by reviewing what interests were most important to each side. This could have enabled us to find common ground earlier, and likely would have set a better tone for the rest of the negotiation.

When we did finally move on, we began to have more success. After our initial struggles, we did begin to follow more of an ordinary-legal and interest-based approach, and I think we had more success because of this. (Technically, what we did may not qualify as an interest-based approach, as we did not begin by listing and analyzing all of our interests. However, we embraced many of the principles of interest-based negotiation, so I feel comfortable stating that we at least used aspects of interest-based negotiation). Each side did discuss their concerns relating to the division of ownership percentage and profits, along with business decision making authority.

Going in, I knew that while my client wanted a majority stake in the business, he was more concerned with gaining a greater share of the profits to make up some of his initial contributions. He felt this was fair based on the greater risk he was taking, and explaining his feelings about his financial risks seemed to help. It was at this point we all began to do a better job of suggesting and considering the other sides' creative alternatives.

Robin's attorney suggested the division of profits idea that we ultimately went with in exchange for equal ownership, and I was pleased with her suggestion. We had been planning to request something similar, and I knew at that time we were all committed to moving beyond positional negotiation. I gained more respect for Robin's attorney at this point, because it was a creative idea that served all our interests, and most of all I believed she was making a fair offer. Once I gained this newfound respect for Robin's attorney, Casey and I became more willing to make concessions that we thought were reasonable. I learned that while it may be tough for one person to step up and put themselves out there, it really can go a long way towards building the trust that can spring the negotiation forward. The risk of appearing weak is often not as high as people fear, especially when the parties plan to have a continuing working relationship.

Partly because I felt Robin's attorney made a generous offer with respect to the division of profits, I was more willing to agree to Robin's salary request without putting up a big fight. We used some ordinary-legal negotiation when we discussed what the average salaries for chefs were in the area, as they noted it ranged from fifty to ninety-thousand dollars. I was relatively happy with how I handled the part about Robin's salary. Essentially, after discussing the average salaries of chefs in the area, Robin's attorney requested a salary of fifty-thousand dollars. (While I was not aware of this at the time, part of the reason for this offer was that Robin wanted a much higher salary in year two, but we ultimately agreed to re-negotiate for that salary later, and this

did not turn into a major issue). When she made the fifty-thousand dollar request, I was happy to hear it, as we were readily prepared to give Robin that much (if not more) for her first year salary.

For a moment I was tempted to put my positional hat on. I figured I should try to bargain Robin's salary down into the forties, if for no other reason than I thought that is what I was supposed to do. However, I ultimately decided that would not be the best approach. My gut feeling was that Robin's attorney was making a fair and reasonable request, and that she did not start with that number as some sort of positional tactic where she really was willing to accept much less. Thus, instead of bargaining with Robin over the fifty-thousand dollar salary, I decided to agree to her request after a brief consultation with my client. I believed this would be a show of good faith on my part, and that doing so would be more beneficial for my client going forward. I was also afraid that trying to move her down from fifty-thousand would come across as an insult, given that fifty-thousand was at the low end of chef salaries in the area. The good will that agreeing to her salary bought us probably ended up being worth more to us going forward than potentially saving a couple thousand dollars at best. It also showed Robin that we were concerned with a fair deal being reached, rather than only looking out for our own interests.

It is possible I blew a chance to save my client some money here, but given the good will that arose from my decision, this is one move I made that I do not regret. I learned that there are times in a negotiation where just because you can start a fight over an issue does not mean it is always best to do so. Once I battled past the feeling of what I was expected to do, I was able to make the move that I believe helped my client the most.

After we had reached agreements on some of the issues mentioned above, we found it much easier to return to the issue of how much capital was needed upfront. At this point we

were all open to more original ideas. My client and I decided to offer that in addition to putting forth seventy-thousand up front, we would add an additional ten-thousand six months down the road if the account was reduced to a certain amount. This gesture helped get Robin to agree to contribute five-thousand upfront, so we would be closer to the amount of capital we wanted to start with.

While we technically could have reached this agreement at the beginning (showing that even interest-based approaches can sometimes work when negotiating only one issue), neither party was in the right state of mind when we first started. Once we had gained trust stemming from our interest and ordinary-legal based negotiations for the other issues, we were all much more willing to think of alternative options in terms of the initial capital issue.

Conclusion:

I believe I am more prepared to handle a similar negotiation in the future based on my analysis of what worked well and what was problematic for me in this negotiation. Next time, I would be more balanced in how I approach setting my client's expectations. While I still would lean towards lowering my client's expectations, I need to be more careful not to go too far to this extreme. Otherwise, they will lose confidence in my abilities, and I will risk scaring them off before the negotiation begins. As stated above, simply reassuring my client that I will fight for his interests and that I believe we can be successful may make it easier to then tell him that we may have to give some things up. I would also tell my client that just because I am asking where he has some flexibility, this does not mean I won't fight for his interests in these areas as well. Additionally, being a little less specific may be helpful when I am in the process of managing my

client's expectations. Instead of being too concerned with lowering my client's expectations, I need to make sure I balance this with ensuring I retain the confidence of my client at all times.

With respect to my use of the various negotiation approaches, in the future I would not hesitate to utilize an interest or ordinary-legal based approach from the very beginning in a similar factual scenario. I would do so even if it requires putting myself out there and overcoming feelings of vulnerability. Both attorneys' initial failure to do so here nearly impeded our ability to reach a deal in this simulation. Thus, I believe I have a greater understanding of just how important it is to pick the right negotiation approach to fit the situation. Here, the facts made it so an ordinary-legal or interest-based approach could be very beneficial, and once we got away from our positional approach we immediately began to have more success. We were fortunate that we abandoned our positional based approach before it was too late, but there is no need to cut it that close again in the future. I learned that a non-positional approach is something you have to really commit to, as when you try it half-heartedly you risk sliding back into positional negotiation.

Thus, going forward I know not to sacrifice my client's confidence in me for the sake of lowering his expectations, and that I need to make sure I am utilizing (and fully committing to) the best negotiation approach for the individual circumstances. While I was pleased with the final agreement we reached, I believe if I remember these lessons going forward I could reach a similar deal without all the risks I encountered along the way.