

Standard 7.9 on Negotiation

STANDARD 7.9 ON NEGOTIATION

STANDARD

The practitioner should conduct negotiations when appropriate to further the client's objective, but should enter into an agreement with the adversary only when specifically authorized by the client.

COMMENTARY

General considerations

Negotiation may be used to further the client's objectives in a variety of ways. In some circumstances, negotiation may be all that the provider anticipates doing on behalf of the client. This can be true in circumstances where representation is limited to brief service¹ as well as those circumstances where the provider is offering full representation² in transactions such as leases or community economic development projects.³ In other circumstances, negotiation may be a preliminary stage of the representation to be followed by further representational strategies if the negotiation fails to achieve the client's objective, such as in pre-litigation negotiation. Or negotiation may be just one tactic within a larger overall strategy, such as litigation. This Standard does not apply to settlement negotiations in the course of litigation.⁴

As with other forms of representation, the basic test of the appropriateness of negotiation is whether it is likely to achieve the client's objective without unacceptable risks. Negotiation may be particularly fruitful when the other parties involved have interests that are different from, but not necessarily hostile to, the client's objectives, such as negotiation of a lease. Even with a hostile adversary, negotiations may be successful in achieving the client's objective, particularly if the negotiations are seen as an alternative to costly litigation. Negotiation should not substitute for a more forceful and possibly time-consuming strategy such as litigation, if the more forceful strategy could yield a significantly better result for the client.

Pre-litigation negotiation

Pre-litigation negotiation is most likely to have positive results if the client's case is particularly strong or the risk of the lawsuit to the adversary outweighs the cost of a pre-litigation settlement, and may be a useful way to resolve the issues in controversy without a significant expenditure of provider resources. In other circumstances, negotiation prior to litigation may be a useful way to limit the issues in controversy, obtain information about the opponent's case and potential strategy, and test the adversary's apparent resolve.

¹ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 3.4-2 (on Representation Limited to Brief Services).

² See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 3.1 (on Full Legal Representation).

³ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 3.3 (on Community Economic Development).

⁴ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 7.11-1 (on Litigation Strategy).

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There are circumstances, however, where pre-litigation negotiations are not appropriate, or where it would be unwise to enter into negotiations until litigation has been filed and the client is afforded the protection of the court. Such circumstances may include:

- When advance notification of a potential lawsuit may subject a client to physical abuse or other retaliation from the adversary;
- When premature notification of the intent to sue may cause a defendant to leave the jurisdiction or to transfer assets in anticipation of an adverse ruling from the court;
- When informing the adversary may lead to preemptive action by the adversary that will impair the client's ability to present the case in the most desirable forum;
- When an immediate court order is necessary to protect the client's rights or interests;
- When a client is seeking relief that cannot be legally obtained through compromise and agreement with the adversary, such as when relief may depend upon resolving the constitutionality of a statute and the defendant does not have the authority to admit the statute's illegality.

The appropriateness of negotiation may also be affected by local prevailing customs or legal practices. In some communities, particularly rural ones, negotiation between parties may be the common and expected practice. Such local practice should be taken into account in developing case strategy. A client's interest should not be compromised, however, simply to conform to local practice or to gain acceptance for the provider or practitioner in the legal community.

Negotiation strategy

The practitioner should have a negotiation strategy that is designed to achieve the client's objectives. The complexity of the strategy will be a function of the legal and factual complexity of the case and should be flexible to respond to new information that may be obtained during negotiation.

Before undertaking any significant negotiation, the practitioner should be aware of:

- The strengths and weaknesses of both the client's and the adversary's case;
- The areas of possible agreement between the parties;
- The client's opening position and potential fall back positions;
- The points of leverage that may dispose the client or the adversary to reach agreement, including the personal, financial and other non-legal considerations, such as the threat of adverse publicity, motivating each party.

The practitioner should pay particular attention to any weaknesses in the client's position and should devise strategies to offset any advantage the adversary may derive from attacking those weaknesses during negotiation.

Authorization by the client

Client authorization to negotiate is not authorization to reach a final agreement. The practitioner must seek specific client approval before a final agreement is offered or accepted on the client's behalf.⁵ At the outset of negotiations, the practitioner should identify and discuss with the client

⁵ See Model Rules of Professional Conduct R. 1.2(a) (2003).

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a range of options that the client authorizes the practitioner to accept. Alternatively, the client may wish to withhold authorization until there is an opportunity to review each offer. This approach can have strategic advantages, as it gives the practitioner and the client time to analyze each offer and may prevent hasty acceptance of what could prove to be an inadequate proposal. However, in some situations, a lack of specific prior authority to accept an adversary's offer may undermine the practitioner's effectiveness in negotiation and give the appearance of bad faith. The client and practitioner should determine which approach is most appropriate, given the particular situation.

There may be times when the practitioner succeeds in negotiating a proposed agreement that, in the practitioner's professional judgment, represents the best result that could be achieved for the client. In such circumstances, if a client unreasonably withholds authorization to accept the proposed agreement, the practitioner may be put in the position of having to devote substantial resources to further representation that will be futile or subject the client to unwarranted risks. In such circumstances, if consistent with the practitioner's ethical obligations, the practitioner and provider may justifiably withdraw from representation.

Written settlement agreements

The final agreement should be reduced to a clear written statement that covers all material issues and anticipates enforcement problems that are likely to arise. Where appropriate, the agreement should provide for an enforcement mechanism in the event of non-compliance.