



**Brooks Bruneau**

***Fisher Broyles***

# Pathways to Settlement Negotiation Methods to Avoid Costly Litigation

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# Listen to the Nicky Barnes character

- In the Clip, after being told
  - *“I would have to insist that you change the name”*
  - Nicky says *“I don’t like these words as much as Please, thank you, I’m sorry to bother you . . . These are better words”*

This is the mindset of a demand letter recipient

People want to be treated with respect, even if they do not deserve it (*and they know they do not deserve it*).

# Psychology – The Very Basics

- The 3 hardest things for a human to say:
  - *I am sorry*
  - *I need help*
  - *I was wrong*
- People will fight not to admit being wrong . . . So Do Not Seek an Admission

# Psychology – The Very Basics

- 80 % of the time people will react the same way within the same set of circumstances
- Those are great odds so use them
- Now, conversely, 20% of the time people will surprise you . . . So always be ready for unexpected reactions and the need to change strategy.

# When Peoples' Minds Close or Shut Down

- You cannot make progress dealing with a closed mind (*a scared or angry mind is a closed mind*)
- So, sending a scary demand letter is not productive
  - *The cerebral cortex is the part of the brain that controls reasoning and judgment, **but it is impaired by fear***
- It takes an average of 21 days for an insulted or fearful letter recipient to calm down
- Knowing this, efficiency suggests a different approach to achieve the PRIMARY GOAL – stop the infringement

# Cease and Desist Letters

The goal of the letter is to get the infringer to stop  
The goal is not to complain or tell someone what a bad person they are

- What does not work:
  - Demanding they stop within 10 days
    - The business logistics driven answer is easy: **NO**
      - Even if they wanted to stop, most cannot do so in 10 days, and
      - You are not likely to get an injunction in 10 days so why demand it.

# Cease and Desist Letters

You want the reader's mind to stay open and not become defensive or closed while reading each paragraph.

- Rewording a *Cease and Desist* letter into a **Notice Letter** has a higher chance of ultimate success and faster results.



# Cease and Desist Letters

Write your letter to capture the readers attention to gain cooperation

**Typical first sentence:** *I represent ABC company concerning intellectual property matters and . . .*

- *“I represent” is lawyer language and nobody likes getting a lawyer letter*

**Better approach:** *I am working with ABC company and they asked me to contact you about an issue of concern. . .*

- *The reader is less tense, and their mind stays open*

# Cease and Desist Letters

If you plan to make a proposal, write that in the opening paragraph, meaning let them know an option is coming if they read further. Something like this

*Our client believes there may be an avenue to avoiding an opposition or conflict in the marketplace and we have a proposal for you to consider, outlined further below . . .*

Then proceed with explaining the nature of the conflict, the company's concern, as well as outlining your client 's IP rights.

# Cease and Desist Letters

*Cease and Desist* within 10 days or some other short period does not work . . .

- First, you had time to think about the infringement, give them time to think about it, rather than think about how to avoid the claim or aggravate your client
- I like to give 3 weeks to respond: it sounds like a long time but is less than a month. It reduces pressure and encourages a response
- *We do understand your client will need time to think about this situation. Therefore, I ask that you contact us by \_\_\_\_\_ (date) with your client's decision. Of course, if you or your client have any initial questions about the proposal, I encourage you to give me a call.*
- **I also tell them:** *Finally, please understand that if we do not receive a response, we can only assume that your answer is "no." We would prefer to have a direct response before taking any further action, so we look forward to hearing from you.*

# Cease and Desist Letters

After you have their attention

- *Talk with the other side*
- *Talking is not weakness – it is a strength to show you are comfortable meeting your adversary*
- *Set up an in-person meeting, call or online conference*
  - *This is not to fight or argue*
  - *You have to be able to calmly express your position*
  - *You have to be patient enough to listen to their position:*
    - *Most of the time it is excuses*
    - *Sometimes there are material facts to learn that can help with a resolution.*

# BEFORE A LETTER – Get the Facts

In Any Negotiation – Information is Gold

Learn as much about the other side and its use of the mark at issue (including the product/service) before you engage with them.

They are not going to be factually forthcoming in discussions

They can be factually forthcoming before they know there is a conflict . . . But not to you, your office or an attorney. . . But to an Investigator

# INVESTIGATORS

A good investigator will coax information out of a subject

- They will tell a story and get information you may not even obtain in litigation
- If you do not have a good investigator, ask around among your peers
- In the United States I use this company:

Tony Yarborough  
President - Founder  
Walter Graves, Inc.  
New York, NY  
212-505-7995  
ty@waltergraves.com

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# FACTS are your best friend in a Negotiation

- Always rely on facts that can substantiate your position

- Objective Standards are persuasive:

If the relevant Patent Office agreed with you during prosecution of an application – point that out: an examiner who does not know either of us viewed the matter the same way we view it . . .

- If case law is in your favor provide it to the other side to review

# Speaking with the other side

You ALWAYS prepare for meetings to negotiate

- You prepare to go to Court;
- You prepare for business meetings
- This is no different
- WWII Supreme Allied Commander Eisenhower:  
*plans are worthless, but planning is everything*
- I like to outline all facts, legal arguments, case law references, and ideas for settlement . . . *It is not a script, it is a tool box.*



# Speaking with the other side

What if you have some great information from your investigator that will make the other side vulnerable or feel a sense of risk?

- Use it when you feel best, but do not waste it by blurting it out immediately
- Remember the *Doctor Examination Option: pressing everywhere around where it hurts but not on the exact spot . . . Fear builds up*
  - *It lets them know you may investigate or learn about a weak point if talks do not progress (and suggests you do not know about the weak point yet).*

# Speaking with the other side

## Neuro-linguistic Programming (NLP):

- A way of changing someone's thoughts and behavior to help achieve desired outcomes
- It is a fancy way of saying: *Choose your words carefully*
- We already have seen an example by writing a letter that starts "I am working with ABC company" – avoiding lawyer fear
- Other examples:
  - The person is not "Wrong", rather "They may be mistaken"
  - When they say "I do not understand what you are saying"
    - Instead of "You are not listening"
    - The response can be "I am not making myself clear . . ."

# Speaking with the other side

## Neuro-linguistic Programming (NLP):

- You do not want them to “*Stop*”
- You want them to “*Transition to a new mark*”

# Speaking with the other side

## DIPLOMACY :

- The Person contacting an alleged infringer or responding to a claim of infringement must act as a diplomat.
- Diplomats are friendly, cordial, tactful and knowledgeable
- Being friendly is not a weakness, it is productive.
- Arguing, Yelling, Insulting and Threatening will not result in achieving your goal (settlement).
  - Yelling may make you feel better, but your job is to resolve the matter.
  - You must be patient and hold your frustration back

# Express Ideas or Concepts in a Non-Confrontational Manner

Statements about bad conduct or bad actions need to be directed to someone other than the person you are speaking with.

- If talking to an Attorney:
  - it is *Your Client*
- If talking directly to a Person from the company:
  - it is *Your Company*
- People's brains shut down when they feel confronted so address your negative statements to a third party that is not in the conversation

# Speaking with the other side

*If you are not talking . . . You are not negotiating. . .  
And you will not resolve the conflict.*

- Studies have shown if the other side likes you, you will be more successful in negotiations
- You do not have to be their friend, but you should be seen as professional and easy to talk with about the issues. In other words: *Be a Diplomat*

# Talking Techniques

- When another attorney says: *I do not see infringement and states/expresses it like a fact. . .*
- Respond:
  - I have never had defense counsel admit infringement
  - I think that may be malpractice if you did
  - Of course, my client is not going to accept your opinion on the matter

Then Move Forward. . .

# Talking Techniques

- Ask them: Did you (or your client) clear the mark before engaging use?
- It does not matter what the answer is to question because:
  - If No, then they took on the risk
  - If Yes, then they saw your registration and took on the risk
- So nicely advise them – it is the risk they took on that has caused these discussions
- All your client can do is register its mark to put others on notice. . .



# Talking Techniques

- Difficult or Complaining Attorneys or Company Representatives
- Be Quiet, Let them rant/complain, and take notes on any material statements or information they state
- When they eventually ask “Are you listening to me”, tell them yes, and I am taking notes on anything material so I can report back to my client . . .
- In time they stop ranting especially when you do not get angry or intimidated by their talking style.

# Talking Techniques

- Difficult Attorneys
- Sometimes your message gets lost on the desk of the Defense Attorney
  - Defense Attorneys zealously represent their clients, and some like to fight . . . Not seek out resolution
- Put your message in writing every time so it may get to the underlying client . . .
- Think about business to business communication
  - Reaching out to say: *We are concerned our message is being lost in attorney to attorney discussions*

# Talking Techniques: Leave Us Alone and the Game of Chicken

- Often small entities ask to be left alone saying things like – *we do not affect you, you are just doing this because you are big, etc. . .*
- The answer to give comes from a University Analysis of the Game of Chicken

# Talking Techniques: I Will See You in Court!

- This is a classic statement and used to express how adamant the other side is in its position.
- How to change that dynamic:
- Let them know you are the selected communicator:
- *You will not see me in Court, I do not want to mislead you in these discussions . . . You will see the litigators*
- *When I knock at your door, it is because my client wants to seek out an opportunity to resolve the matter in a way that has less impact on your company . . .*

# Talking Techniques: TELL ME “NO”

- When they argue but do not really answer the request to move to a new mark
  - You have listened and you have expressed the reasoning for your position.
- *Tell me “No” so I may report back to my client . . .*
- Why this works ... I am unsure
- It seems to create a mental pause, especially with adverse attorneys as if they suddenly worry they are missing something or are about to be tricked

# Mistakes Can and Will Be Made

- Negotiation and the Strategy of Negotiation is Not an Exact Science – mistakes can occur or strategies will fail . . .
- Adapt to the Situation
  
- Examples of My Personal Mistakes:
  
- Talking Too Much
- Filing a petition too soon . . .

# Thank You

**Brooks R. Bruneau**  
Partner

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**FisherBroyles, LLP**

100 Overlook Center | Second Floor | Princeton, N.J. | USA

direct: +1.609.454.6772

[brooks.bruneau@fisherbroyles.com](mailto:brooks.bruneau@fisherbroyles.com)

# Why Cooperate: John Nash's Equilibrium Theory

John Nash American mathematician who was awarded the 1994 Nobel Prize for Economics for his landmark work, first begun in the 1950s, on the mathematics of game theory.

- He took Adam Smith's theory that the economy is driven by self interested individuals and the economy works best when people do what is best for themselves.
- John Nash theorized the best results can also come when everyone does what is best for themselves and what is best for the group.
- This is why Negotiating with an Infringer and allowing some leeway to them can be best.