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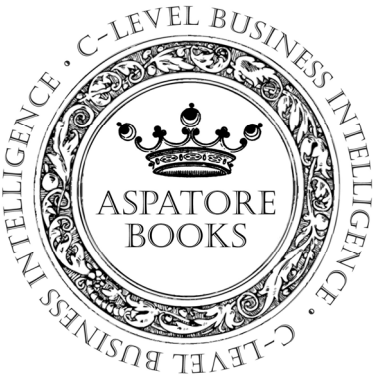
Environmental Law Client Strategies

Leading Lawyers on Strategizing for Litigation, Negotiating Settlements, and Adding the Most Value for Your Client



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Strategies for Enabling Successful Negotiations with Government Agencies and Private Parties

Martin B. Wasser

Partner & Co-Chair, Environmental Law Department

Phillips Nizer LLP

The Role of an Environmental Lawyer

Over the past three decades, increasing public awareness and concern over the need to protect the environment and avoid adverse effects on human health have brought a visibility and importance to the role of environmental lawyers nearly unmatched by other fields of law. When I began my practice, the regulatory landscape was a veritable wasteland. There were very few laws or regulations governing the conduct and behavior of individuals and companies as they affected the environment. In fact, my law school offered no formal course in this subject area.

The federal and state governments, sparked in large measure by the discovery of widespread unregulated and seemingly reckless disposal of hazardous wastes into the environment, jumped into this arena with both feet. Though not sure of their footing—or even where they were treading—they began enacting broad laws regulating all aspects of environmental conduct and compliance.

Environmental lawyers on both sides of the regulatory table stepped up to the challenge. Many of the private practitioners were in fact former governmental lawyers and officials most familiar with the complex set of environmental laws. While initially they had to deal with compliance in the enforcement context, they soon learned the truth of the old adage "an ounce of prevention is worth a pound of cure." Thus, while working on the one hand to extricate their clients from historic problems, they endeavored mightily on the other to create a situation where companies routinely factored environmental compliance and considerations into their planning and operations.

As a result of all of this, an environmental lawyer plays two major roles: First, he or she counsels and advises clients as to what they can and should be doing to comply with all of the environmental rules and regulations to avoid future problems; second, the environmental lawyer must be prepared to defend and deal with existing legal situations, some of which may already have impacted the environment. He must assist clients in coming up with solutions not only to bring them into regulatory compliance, but also to eliminate or minimize any actual damage to the environment that may have occurred.

Adding the Most Value for Clients

Today, most clients are generally aware of the need to comply with environmental laws, but for years, many were not fully versed in the area of the regulatory requirements and procedures that must always be considered. In the past, clients would consider implementing an action without realizing that it called into play certain environmental requirements, such as obtainment of permits or other governmental authorizations, performance of studies to determine environmental impact, or consideration of actual field conditions as they may affect the environment. In all of these situations, the environmental lawyer serves as a watchdog for the client to ensure that the considered undertaking will not result in environmental violations or failure to comply with the applicable law.

When guiding a client toward a successful outcome, my approach is two-fold. My first step is to present to the client all of the environmental concerns that must be considered at the outset of the action or project in order to ensure that both the implications and the costs of such actions are fully evaluated. The second part of my approach is to help the client, in conjunction with technical consultants, devise the most practical and cost-effective solution for carrying out the project in a manner consistent with environmental laws.

The Different Components of Environmental Law

Environmental law has grown in depth and breadth in an unparalleled way during the past thirty years. In the mid-1970s, before there were broad and comprehensive statutory schemes, most environmental issues were addressed under the more general headings of nuisance, trespass, and general tort law. However, that entire playing field changed radically in the late 1970s, sparked in large part by the discovery of hazardous waste emergency situations, such as those prompted by the Love Canal in Niagara Falls, New York, a former disposal area upon which a school and surrounding homes were built in the 1950s and 1960s. When rain and groundwater began to seep in and mix with the disposed chemicals in this historical landfill, the result was migration of contaminated liquids into the surrounding area. The reaction of the public and governmental officials was swift and highly emotional. The governmental sector, however, was ill-

equipped to address this problem, lacking both the statutory authority and the technical understanding of what had occurred.

As a consequence, first Congress and then the individual states marshaled their resources and enacted comprehensive and widespread legislation to address all areas of environmental law. In short order, the Comprehensive Environmental Response Compensation and Liability Act (commonly referred to as "CERCLA" or "Superfund"), the Clean Air Act, and the Clean Water Act all became law. The issue of fault was secondary to placing strict responsibility on those deemed best equipped to "clean up" this mess, which meant corporate America had to learn about the environment and environmental law overnight. Initially, the legislators' intent was to deal with all of the various environmental media that might be affected, including land, groundwater, surface water, and air. Later, as the understanding and knowledge increased, the statutory schemes were broadened not only to address the impacts on the environment, but also to cover the ways in which the initial effect or creation of toxic or hazardous substances could be minimized. Therefore, laws such as the federal Resource Conservation and Recovery Act sprang up around the country, designed to deal with production and disposal of materials containing hazardous substances, manufacturing procedures, workplace safety, warning labels, and other information relating to the components of products, and methods to minimize the creation of hazardous waste that would require subsequent disposal or destruction. In essence, government, through both legislative fiat and regulatory action, sought to adopt a "cradle-to-grave" approach to protecting the environment. It was also recognized at this time that environmental issues had significant impacts not only on the various environmental media, but on human health as well. Humans came into contact with all aspects of the environment and studies demonstrated that exposure to adverse substances could have a deleterious effect on human health. The environmental agencies began working in close conjunction with the federal and state departments responsible for occupational health and safety to ensure that all possible adverse effects were addressed.

Common Client Mistakes with Respect to Environmental Law

In my experience, even the most sophisticated clients get themselves into the most trouble with respect to environmental law by omission rather than

commission. Few, if any, responsible companies or individuals intentionally seek to violate known environmental laws or to ignore such requirements when aware of the need for compliance. Most clients face trouble through their lack of knowledge and inability to factor in environmental compliance when planning or undertaking certain actions. This tends to occur in two general situations. The first is a failure to obtain knowledgeable counsel early on. While the largest and most sophisticated companies have for many years had thorough and extensive environmental departments to deal with every aspect of permitting, authorizations, and continued environmental compliance, many mid-size companies cannot afford to devote resources to environmental issues on a full-time basis and often have to rely on outside counsel and consultants to advise them. Because such counsel may not be involved in the day-to-day operations or decision making, they usually are contacted on an as-needed basis when a particular question arises. Therefore, companies sometimes find themselves in a serious predicament—having moved ahead with a project, they learn in mid-stream that there will be environmental implications because of their planned action. The environmental laws, to a large extent, are broad and complex. The businessperson who is focused on running his or her operations and making management decisions may not normally take into account the environmental concerns. Part of the job of an environmental lawyer is to make sure that responsible business owners and managers are sensitized to the need to think about environmental issues all the time, even if they are not sure what exactly needs to be done. Often, simply asking questions is sufficient to elicit a constructive response that will help the company avoid costly and adverse problems down the road.

A second potential minefield for clients occurs when dealing with new transactions or partnerships. Clients are counseled to be sensitive and cautious when entering into business relationships without taking into account the full scope of potential environmental problems. For example, a client will acquire an ongoing business that has not been thoroughly analyzed and evaluated for its environmental compliance record and past history. The environmental laws are very strict about imposing liability on future owners and operators of businesses, regardless of what may have occurred previously. Therefore, any transaction involving the transfer of a business or property asset must be carefully scrutinized in advance to ensure that potential problems are identified and put into practical context.

Because financial and lending institutions have become highly aware of environmental compliance issues and the huge costs that can accompany a failure to identify potential problems at the time of transaction, clients must, in dealing with lending institutions, be carefully counseled throughout the process on the environmental issues that are needed to satisfy the lenders.

Personal Strategies to Help Clients Deal with Environmental Related Issues

The sophisticated client will know, almost without prompting, that environmental related issues are critical to ongoing businesses and potential future transactions. For this type of client, my best approach is to continue to keep the client advised of significant changes in the environmental laws and to provide frequent communications to remind the client of the need to regularly review and conduct internal environmental audits and compliance checks and to update environmentally related filings and permits. Through such repetitive actions, I can grow increasingly confident that the client will contact me in a timely manner if it is considering a new action that may have environmental implications.

Dealing with the smaller corporate clients and individuals on environmental issues is more complicated. In those situations, my approach is to make sure that I am at least in the back of the client's mind whenever it is contemplating any type of significant action. Such clients may not have a clear understanding of what, if any, action needs to be taken to address environmental compliance, but if they recall that it is important to check with environmental counsel before undertaking such projects, I have gone a long way toward providing effective representation.

Achieving Success as an Environmental Lawyer

To a large extent, the environmental lawyer must stand in the shoes of the government and the regulators when he or she interacts with clients. In facilitating an ongoing business operation or action, the environmental lawyer must be prepared to advise the client clearly as to what compliance action, in cooperation with the governmental regulators, needs to be taken to insulate the client from future environmental liability. In the short run,

environmental compliance, while ultimately a great benefit to the clients in terms of protecting against future and potentially large liabilities, requires devotion of significant economic resources and attention, which clients normally do not welcome. For example, in contemplating a major acquisition, the client is interested in the growth potential, the expected profit, or the opportunities for expansion rather than what it will cost to correct and eliminate current environmental problems or guard against future environmental problems not yet created. Nevertheless, my success depends, in large part, on convincing clients that I am not the bearer of bad news, but rather their social, legal, and business conscience who is reminding them of their responsibility; this responsibility applies in a larger sense to protecting the environment, and in a much more egocentric sense, to the actions that must be taken to avoid large potential problems in the future.

If I perform my role correctly, the clients will appreciate that their counselor is advising them conscientiously about what they can or cannot do, as well as the costs and risks associated with such actions. Clients must trust your knowledge and judgment in these areas and your ability to evaluate the technical solutions in such a way that cost-effective alternatives can be achieved. Perhaps most importantly, the client must acknowledge and respect your responsibility to insist that something must be done even when the client feels it may be unnecessary or expedient to cut corners.

Different Components of Negotiations

In environmental law, negotiations usually arise in several contexts. The most prominent arena is the regulatory enforcement realm, where a governmental agency or regulator has taken some action to compel your client to comply with one of the environmental laws. Such a proceeding, whether administrative or judicial, can involve other private parties, whether as co-defendants or as parties claiming or being claimed against by your client. The second area of negotiation is more purely business oriented. Parties are interested in acquiring or selling property, businesses, or assets, and the issues of environmental compliance and controlling future risk are properly on the negotiating table. Such negotiations often involve not only the parties to the agreement, but also lending institutions and title companies, as well as governmental agencies in instances where

authorizations, permits, and approvals need to be obtained or transferred and records need to be reviewed.

The Art of Negotiation

Negotiation is clearly more of an art than a science. While there are basic rules that each practitioner has to develop for him or her self, much of negotiation is a question of personal style and maintenance of credibility. For every tried and true rule in negotiations, there are countless exceptions that have proven successful. Anyone who declares, for example, that you should never—under any circumstances—counter your own proposal may be right in theory, but he or she has clearly never engaged in environmental negotiations.

In environmental law, even more than most other areas of legal practice, the negotiations take on both a public and a private character. Non-compliance with environmental laws ultimately brings into play the governmental regulators and lawyers, all of whom will pounce on the unsuspecting client who is deemed responsible for creating environmental problems.

Negotiation, in my view, is the formal way to achieve the solution to a potential problem outside of formal proceedings. In understanding the goals of *both* parties, which is the first step in a successful negotiation, you can find areas of common agreement almost immediately. For example, a high profile environmental case involving a governmental agency will, of necessity, call into play such factors as public relations, communications with non-parties to the actual dispute, precedents for future cases involving both your client and others, and ongoing relations with the same cast of governmental regulators. Therefore, the negotiator must identify at the outset what the government intends to do regarding press comments, oversight by citizen and other concerned groups, public hearings on the approved settlement, and similar issues. In the first instance, there may be an issue that both parties can resolve, but that the government feels will be more difficult to explain to the public. The environmental attorney must be sensitive to these kinds of concerns and not simply bear down on the governmental negotiators to win at the table only to lose outside the room.

Most governmental negotiators start from a position of strength. The environmental laws are very strict, often no fault, and weighted heavily in favor of the regulators, requiring a minimal showing of initial facts. However, the government usually is also interested in demonstrating a cooperative spirit with private parties, preferring to enlist those who have the superior resources and expertise to address problems and the ability to implement solutions more quickly. Environmental cases involve a spectrum of legal and technical issues, some of which are simply questions of cost or technical approach, others of which are matters of packaging and salesmanship, and still others of which are policy, law, and precedent. In one negotiation in which I participated more than twenty-five years ago, the government had neither the technical expertise nor the legal framework within which to produce viable solutions. Therefore, our role as negotiators was not simply to settle the case, but to educate the government lawyers and consultants as to why they could feel comfortable with and confident in the proposed solution, which included a novel remedial program to address a major hazardous waste landfill. When regulators feel that you are not simply approaching the problem in a one dimensional manner, (i.e., how to save money), but are also interested in coming up with a creative and technically sound approach, they begin to view the process more as a problem solving exercise than an adversarial negotiation. This allows both parties to interact more freely and candidly, particularly the private parties who are usually able to marshal creative technical resources to come up with innovative solutions. The key issue then becomes convincing the regulators that this proposal will be acceptable to their superiors, the general public, and to others who may be overseeing the results.

The Environmental Lawyer's Role on Behalf of Clients in Negotiations

It is often said that the most effective negotiator is the person who is perfectly willing to walk away from the table in the event that a fair result is not achieved. I believe that it is important when entering negotiations first to assess carefully the alternatives to a settlement, such as litigation and trial, unsuccessful resolution of the dispute, failure to achieve the business objective, or loss of a financial opportunity. One should enter the negotiations with a real and pragmatic understanding of the overall benefits and potential losses and risks of achieving a resolution.

Sometimes it appears that the most successful negotiator is the person who is being the most difficult, the most irrational, and the most intransigent. While this approach can triumph on occasion, I strongly urge negotiators not to adopt this behavior as a general strategy; instead, negotiators should take a rational, professional, and practical approach to negotiations, focusing on what their client is genuinely interested in achieving and at what cost. I have been involved in serious negotiations where the lawyers on both sides of the table spent countless hours arguing over a relatively minor legal point or a hypothetical situation, none of which would be of critical importance to the clients whom they represented. In such situations, I often will ask the opposing counsel, "Is this something that your client is really concerned about?" In most cases, the answer is a resounding no, and the resulting exchange of looks confirms that a businessperson or government official would have no patience for this debate. That is not to say that a lawyer as negotiator should not be extremely careful in anticipating and protecting against various contingencies, even if they are unlikely to occur. It simply means that the environmental lawyer should be cautious not to get so caught up in the trees that he or she forgets what the forest represents.

My role, therefore, on behalf of a client is, in the first instance, to define in my own mind and for the client what I believe a reasonable result looks like (recognizing that this may be quite different from what a client would like to hear). Second, my role is to keep a firm grasp on the real concerns and needs of the client, whether they are monetary, legal, or precedential, and to make sure that those issues are prioritized so that valuable time and negotiating resources are not dissipated on minor victories. Third, my role is to make sure that the client, while not bogged down in the ongoing negotiations, nevertheless is fully aware of the progress, the obstacles, and the remaining outstanding issues. You can best develop, refine, and adapt strategies during the course of negotiations if you know what the client is currently thinking. It is much easier to modify one of your positions if the client has told you in advance that another issue on the table is of greater importance.

Preparing for Negotiations

I have three general rules for preparing for negotiations: First, I need to master all of the facts and details that I anticipate will be raised in the

negotiations so that I fully understand the positions of the other side when they are presented. Otherwise, I believe the attorney will end up taking frantic notes in the hope there will be a later chance to think about this subject. Second, I must appreciate the client's point of view in order to approach the negotiations soundly. By that, I mean understanding the client's *real* goal and how strongly he or she is committed to achieving that. If, for example, the government is considering a regulatory enforcement action solely against my client, who is very much interested in avoiding litigation and the attendant publicity, my approach will be quite different than a situation in which my client is part of a multi-party group of defendants, all of whom share a similar set of circumstances and exposure and will share the burdens and the risks. In the latter situation, there is indeed strength in numbers, and my role may well be to keep my client less visible and prominent in the negotiations. Third, preparing for negotiations involves a great deal of evaluation of the needs and desires of the principals and negotiators on the other side, including their work habits, resources, and objectives. It goes without saying that knowing where your adversary is vulnerable is important, but knowing what he or she needs to achieve and where he or she is most committed is information that is perhaps even more vital to possess. Most governmental regulators would greatly prefer to achieve a technical solution to an environmental problem rather than impose one through litigation, with the attendant disruption of resources and commitment of time and energy. Parties must resist the lawyer's natural temptation to raise the battle cry of "see you in court" at the first sign of impasse. Everyone knows where the courthouse is located. You can always find it later.

Similarly, establishing artificial deadlines for responses or agreement may have some benefit, but this tactic should be used carefully so as not to undermine your credibility by establishing and then ignoring such demands. If you do it too often, the other side will learn very quickly to march to its own drummer. By the same token, calling on an outside unseen influence to put pressure on the negotiators in the first instance, and by extension, the other side, can be a very successful tactic at the right moment. By that, I do not necessarily mean demanding a response by such and such date, but rather indicating that your client is dissatisfied with the pace of the negotiations and has directed you to resolve this matter within a fixed period. Whether you personalize such pressure (e.g., the company executive

refuses to budge on that point) or generalize (e.g., the client has many similar matters in other states and this would establish a bad precedent in those negotiations), the unseen party can be a powerful ally in negotiations.

Deal Killers: Negotiation Points that Are Hardest to Bridge

Environmental negotiations, at least in the regulatory enforcement area, usually involve parties who are trying to avoid more protracted and expensive litigation or parties who have just embarked on litigation but recognize that a settlement would be far preferable for their clients. In my experience, the best negotiators in such situations are environmental lawyers who have significant litigation and trial experience, which dissuades the other side from doubting their ability to try the case. Good negotiators are environmental attorneys who will recognize those avenues that would not best serve their clients in the long run and who are willing to take a broader perspective in their settlements rather than focusing solely on how to win for their clients.

An experienced environmental litigator is trained to look for weaknesses in his or her opponent's case and to recognize the litigation benefits and risks when the parties appear to be at loggerheads. Confident in his or her ability to skillfully litigate the case and recognizing that the governmental adversaries often do not have similar resources or commitment, the experienced environmental litigator views this as staring down the other side. Neither party wants to seem weak, even if both would privately acknowledge their desire to avoid litigation. The result is often a rush to the courthouse, which leads ultimately to a loss of control by the parties of the process soon taken over by judicial scheduling, conferences, discovery demands and the like. My suggestion in such circumstances is to skillfully avoid pushing the parties too quickly down a path that they would prefer not to tread by moving on to other issues where agreement may be easier to achieve. Work on building blocks of consensus. By the time you return to the thorny issue, everyone is more invested in the process. At the very least, you have limited the universe of problems that you may want the court's help in resolving.

Particularly in multiparty cases, large groups of parties tend to have a herd mentality, making it difficult for them to take a multi-perspective approach.

Once embarked on litigation, practitioners spend less time thinking about ways *around* particular issues or problems as opposed to charging through them. Where a number of parties are involved in an environmental case with the regulators, diplomacy and global thinking are critical. Otherwise, you will soon encounter a situation where the holdout or the hardest headed member of the group tends to enjoy undue influence. Again, in such situations, when parties feel they are not making progress, there is a natural tendency to fall back on old tried and true methods of negotiation, such as threats of litigation, unwillingness to revisit previously offered proposals, and egocentric focus, which often extends only as far as the negotiator's own client's needs. Everyone in a successful negotiation must feel at the end of the day that the result is fair and achieves their basic goals. The more the benefits or burdens are spread across the board, the more likely the negotiation will end successfully.

Personally, I have been involved in more negotiations than I care to remember where the private parties engaged in an extensive and ultimately successful allocation of cost responsibility among themselves, only to have the larger settlement fail because a handful of parties have been given such a significant and disproportionate burden of responsibility as a result of the allocation process that they have no choice but to reject settlement. If your individual client achieves an outstanding result in such instance, but others in the group are not satisfied with the ultimate result, then this represents an exercise in futility rather than a victory. Similarly, coming up with a fair and ultimately acceptable allocation formula among the private parties may still not be enough if the total pie that needs to be divided is so large that it cannot be swallowed by the group as a whole. In such instances, negotiations may need to occur on multiple tracks, often at the same time: those with the government involving reimbursement or performance; those with the other member defendants establishing allocated shares; and those with the individual client seeking authorization and approval. Of course, the environmental attorney needs to be careful when pursuing such a global strategy. Negotiations are like a giant spider web. If you pull one strand, the others will also be impacted. Good negotiators need to be sensitive to all of the various pieces of the puzzle when seeking changes in any particular area.

Perhaps more than anything else, environmental deals are killed when negotiators are so committed to achieving the best possible result for their

individual clients that they are not willing to factor in the successful results needed by the other parties in the case. A settlement benefits all parties, ending the need for further litigation or adversarial proceedings. It saves on resources and time, not only of the negotiators, but also of their principals. Therefore, it is not simply a question of what an individual party achieves, but a matter of what is left for the other settling parties. Moreover, there is a psychic pleasure that transcends the individual goals when all parties reach a settlement. Thus, the value of that achievement should not be underestimated.

Achieving Success from a Negotiation Standpoint

All successful negotiations are inherently "win-win" scenarios. It is up to the skillful negotiator to find out of what that result is comprised. As an example, in a federal Superfund multi-party litigation in which I was involved, the government had made a huge demand for response costs connected with the remediation of an historic landfill. At the time that the government lawyers initiated the litigation, they were not aware of the existence of many parties connected to the site, and faced with a pressing statute of limitations deadline, commenced action against only a handful of parties. Traditionally, the response of the defendants would have been to hunker down, form a defense group, undertake concerted action to identify as many third parties as possible, and hope through expenditure of concentrated resources to make the litigation much broader, widespread, and unwieldy than initially envisioned. However, the handful of negotiators representing the private party defendants took a different approach, recognizing that the federal government had filed this case reluctantly and only under the pressure of a statute of limitations deadline. The defendants immediately invited the federal representatives to the negotiating table. Ultimately, over a matter of a few weeks, they were able to persuade the governmental lawyers to significantly reduce the amount of their demand. This initial negotiation was effective, in large part, because the government recognized that it had not positioned itself well to recover its money in a litigation and was now embarked on a protracted process. The government's negotiators also realized that the statute of limitations could derail the entire claim and that there were some real and significant legal and public relations risks for the federal government's case.

Once the governmental and private negotiators reached a conceptual agreement on the amount to be recovered by the government, it was then proposed that the government would step aside and let the direct defendants identify and persuade additional parties to fund the settlement. The private parties volunteered to take the lead on this matter and, marshaling their resources, in short order identified well over a hundred additional parties who appeared to have a connection to the site. The negotiators then contacted those parties, advised them of the potential for third-party litigation if this matter was not settled, and offered them the favorable settlement which had already been accepted by the federal government. They were invited to participate in a global settlement that would cost far less than a litigation result. Generally, in a multi-party case of this character, the biggest unknown is the ultimate cost of settlement. Whether it is the cost of a remedial program or payment to the government, parties fight to minimize their exposure to the unknown. However, when the size of the pie has been significantly reduced and everyone is aware of the amount of savings, it presents a much more attractive prospect to potential settlers.

That being said, because of the number of parties involved, it still took nearly one year to fund the settlement satisfactorily and finalize a consent order. It required patience on the part of the government and steadfastness on the part of the private parties who were willing to pursue a settlement. It also required a commitment to litigate with those who chose not to settle, as well as diplomacy, especially when parties wanted to test the resolve of the settling parties to pursue them in court. To hide in the proverbial weeds requires a certain amount of faith that the other parties will be unwilling to litigate with you at the end of the day because of the relatively small amount of return for the resources devoted. However, when a group of parties commits to this and makes its position very clear and credible, while offering a very attractive alternative, it is more difficult for an entity to remain outside of the settlement scope.

Achieving Success from a Settlement Standpoint

In large measure, a successful settlement is gauged not so much by what is gained as by what is not lost. When there are only two parties involved in the settlement negotiations, this is much easier to determine. Each party can tally up its results, see what it had to give to the other side or was able to hold on to,

and determine that the end result provides each entity with enough to feel satisfied. When a settlement involves numerous parties, it is much more difficult to make such a calculation. The mere fact that a settlement has been achieved offers a symbolic and psychic reward; the value of that achievement, while difficult to calculate, is significant. Even a bad settlement has some virtues in terms of what the alternatives might have been. Parties must be mindful of their own gains and loss avoidances but must also be careful not to make direct comparisons with other parties to measure their own success. For example, in a recent negotiation involving numerous municipal parties, as well as private industrial parties and the federal and state governments, many of the private parties felt aggrieved because the municipal parties appeared to have struck a much more favorable settlement than was afforded the other defendants. However, in the context of the overall proceedings, this would be a mistaken impression. First, governments, as a matter of policy, do not proceed directly against municipalities in hazardous waste cases unless the municipality is the owner or operator of the subject landfill. For obvious reasons, municipalities enjoy a privileged status in the eyes of the regulators. Second, the government would not have settled with the other parties unless the municipalities participated, so they were an essential element of a global settlement. Third, while the municipalities may not have paid what would be their "fair share," they did contribute a substantial amount toward the overall cost, thereby reducing the burden on the other parties. Fourth, the governments were willing to give the private parties additional concessions in the settlement because they recognized the difficulty of dealing with the municipal parties and similarly did not want to get into a protracted litigation in which the municipalities and the local governments were required to participate. Therefore, when presenting this settlement to my client, I emphasized the global nature of the settlement, the relatively fair terms given to all the parties, the number of participants, and the finality of the settlement. To have made individual comparisons with other parties in the case to see who had come out most successfully in terms of dollars contributed would have been a misapprehension of an otherwise favorable settlement.

Advice for Clients with Respect to Negotiations and Settlements in Environmental Law

My best advice to a client in an environmental case is never to be timid about expressing its strong desire to avoid litigation by pursuing a

negotiated settlement. Particularly in the environmental area, where the laws are so stringent and weighted in favor of the governments, any private defendant faces an uphill battle just to even the playing field. The governments know that, but they also recognize that they can be much more effective working with cooperative defendants in achieving practical solutions to problems that may have existed or may continue to exist for years to come.

I also tell clients that they cannot view each case or negotiation in a vacuum. The regulatory agencies, not to mention the key governmental personnel, have long lives and even longer memories. A successful negotiation and settlement builds up credibility, trust, and good faith among the parties. It redounds to the benefit of the client in its future dealings with the same environmental regulators and actors. A government lawyer who has developed a healthy respect for you will look forward to the opportunity to continue the professional relationship in future cases. Good will goes a long way to allowing future cases to resolve themselves along cooperative and creative pathways.

Traits that Make a Successful Negotiator

I believe that the three traits that have served me best in my career as a negotiator are preparation, politeness, and perspective. There is no substitute for preparation, knowing your facts, and being able to answer the questions posed quickly, decisively, and correctly. It is equally important to accurately assess a situation and never attempt to misrepresent or misstate the details. Politeness is a euphemism for a sense of respect and a reasonableness that should color all of the attorney's dealings in a negotiation, whether with the adversary or co-defendants. Too many lawyer negotiators feel that a negotiation is "won" by the person who commands center stage, the person who does the most speaking, the person who dominates the arena. While such individuals get a lot of attention in the process, I have learned over time that successful negotiators are often the people who listen most carefully and who try to understand clearly what the other side is saying. No one ever lost ground in a negotiation by simply sitting and listening. It is a dangerous mistake for a negotiator to start thinking before the other side has finished speaking or to be more concerned with how to rebut the argument than with how to distill and

understand the adversary's position. Often, the most effective response is simply, "I hear what you are saying and I will give it some further thought." In such instances, you have not agreed to anything other than to consider the other side's points, you have not ceded any ground, and you have demonstrated a willingness to work through the process as well as you can.

Ultimately, perspective is key to a successful negotiation. Whether it is the point of view of your client, the goals and objectives of your adversary, or your own sense of what can be achieved, all depend on applying a practical filter to the discussions and evaluating the issues without excess baggage or emotion. Factors such as personality conflicts, ego needs, and unreasonable demands can all contribute to a breakdown in the negotiating process. A good negotiator must continually remember to avoid these temptations and traps and stay focused on the real objective, which is to achieve a fair, reasonable, and beneficial settlement for both the attorney's own client and the others involved in the process.

Martin B. Wasser is co-chair of the Environmental Law Department at Phillips Nizer LLP. Mr. Wasser has been involved in a national and international practice encompassing all aspects of environmental counseling and regulatory enforcement. He has written and lectured extensively on environmental law and served on the board of editors of both the Environmental Compliance and Litigation Strategy *and* Hazardous Waste and Toxic Torts: Law and Strategy *newsletters.*

Mr. Wasser served as a law clerk to Justice Robert C. Williams, New York State Supreme Court, from 1974 to 1975. He was special assistant to the commissioner of the New York State Department of Environmental Conservation from 1975 to 1977.

Mr. Wasser received his B.A., summa cum laude, from Yale University and his J.D. from Harvard University. He received his Honors Diploma in Historical Studies from Cambridge University, Cambridge, England.

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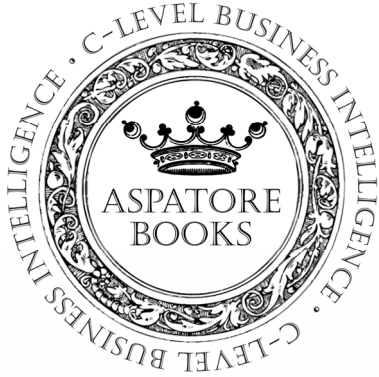
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