

## RESPONDING TO “THE NIBBLE” IN A WAGE & HOUR CONTEXT

Tom, Esq. was tired.... It'd been a long day as the mediation participants reached agreement at 8:30 pm. He had the foresight to bring a proposed settlement agreement on a thumb drive, so that Tom and Jerry, Esq., plaintiff's counsel, worked collegially in writing up “The Deal.”

The Deal, which would be subject to court approval, had seven substantive provisions: (1) gross settlement of \$400,000; (2) a reasonably broad yet not overreaching class coverage going back four years from the complaint; (3) an agreed upon administrator; (4) reasonably thorough notice provisions, recognizing that many of the class may have given false names and social security numbers and may no longer be in the United States; (5) a guaranteed minimum payout to class members of 60% of the \$400,000 settlement, with the balance, if any, of the funds remaining returned to the defendant employer; (6) the lead plaintiff to receive \$20,000 as class representative and (7) attorneys fees calculated at 30% of the gross settlement.

Tom hit the print button and handed a copy to Jerry for his signature and to procure that of the lead plaintiff. Ten minutes later, Jerry returns with a signed agreement and an apology: “Tom, I am sorry. It's signed, and with one small modification: my lead plaintiff is insisting on \$25,000, rather than \$20,000 so we changed the gross amount to \$405,000 and the class representative's share to \$25,000 and initialed it everywhere.”

Tom and his corporate client were surprised and felt betrayed and manipulated by the class representative's \$5,000 grab – a maneuver commonly known in the negotiating business as “The Nibble.” Negotiating guru, Herb Cohen, author of *You Can Negotiate Anything*, who may have first coined the phrase, describes “the nibble” – as a small demand at the end of the negotiation process to make things slightly better for one party, when the apparent alternative is to kill the deal entirely. (See Craver, Prof. Charles B. “Classic Negotiation Techniques” in *The Negotiator Magazine* (February 2007) [http://www.negotiormagazine.com/article356\\_3.html](http://www.negotiormagazine.com/article356_3.html); visited 03/07/10).

The gambit works because of what game theory calls the “fallacy of sunk costs” – the “greater tendency to continue an endeavor once an investment in money, effort, or time has been made,” (Hal R. Arkes & Peter Ayton, “*The Sunk Cost and Concorde Effects: Are Humans Less Rational Than Lower Animals?*” *Psychological Bulletin* 1999, Vol. 125, No. 5, 591-600).

In other words, Tom is willing to take a worse deal than he agreed to because of the effort he has expended negotiating the original deal. Arkes and Ayton suggest a two-fold reason for this effect. First, we have a general dislike of waste. Second, the negotiator may feel a need to preserve the deal in order to save face.

So, you've been nibbled on. Now what? There are several good responses:

1. The "Fixed Pie" Response. In response to the nibble, be respectful and yet advise Jerry: "I can understand your client wanting more money. As you know we do not feel he is an adequate class representative because of his pending workers comp claim and his pending wrongful termination claim. In the event you feel it is appropriate he be paid more, than simply do so by reducing one of the other cash payout components so that the gross settlement remains at \$400,000."

If the nibble is a result of tension between Jerry, plaintiff's counsel, and his class representative, let Jerry resolve it within the context of a fixed pie. If the additional \$5,000 is really a nibble tactic to get a small additional sum of money after the deal has been agreed upon by counsel, counsel will find a way to regain 'client control' and agree to the deal originally written.

2. The Fixed Pie Response coupled with Face-saving Tactic. Sometimes the "Fixed Pie" response requires softening in order for the nibbling attorney to save face. Instead of responding to the nibble with a slap back, provide a safe road back to the original agreement, stating: "Jerry, would you please speak with your client again. Starting tomorrow, he can be 'a hero' to his co-workers and friends if he simply agrees to the settlement you and I worked out together. We'll each sign it right now, with an added provision that your client can rescind in writing any time during the next 48 hours. In the event he needs more time, we'll give him up to a week to think about it. Let him know how disappointed his co-workers are going to be when it is learned he turned down several weeks extra pay for each of them."

Then, Tom should provide to Jerry the original agreement in hand, signing it as it was initially drafted, including a handwritten provision giving a one week right of rescission. It is a good technique to allow face-saving behavior while empowering the class representative with a sense of respect for his obligations.

3. The "Expanding Pie" Response or Nibbling Back. The alternatives to the fixed pie responses are also attractive. Jerry may be unwilling to reduce his firm's 30% request for attorneys' fee and also may actually have a 'client control' problem. In such a case, one needs to respond to "the nibble" by expanding the pie. So, perhaps Tom would suggest: "Okay, if it is necessary to pay the class representative \$5,000 more, let's agree to do so provided that we broaden the class covered by the settlement; or, if you prefer, we can reduce the guaranteed minimum payout from 60% to 55% so my client stands to receive a greater amount of money back in the event the expected happens and only a small portion of the class respond to the notice of settlement."
4. The "Expanding the Risk" Response. Your opponents have "sunk costs" too, and will be somewhat risk avoidant when looking at the alternative of a signed deal. Suggest that the matter simply be put to the Court which has to approve any class settlement; however, in addition to asking the court to approve the class settlement, defendant and plaintiff counsel will be permitted to ask the court to decide the appropriate level (i.e., higher or lower than the \$20,000 proposed) of the class representatives' premium.

5. Proper Preparation Usually Allows the Response to The Nibble to be Fun! In negotiations, “the nibble” is a tactic used by counsel who is not expecting to be doing repeat business with opposing counsel. In larger urban environments, it may be a safe way to pick up many thousands of dollars before the nibbler begins to pay with a sullied reputation as a negotiating partner. To protect against a nibbler, simply anticipate a “nibble” may occur and tie down all of the terms with each participant, and not just the negotiator, before agreeing to finalize a “price.” In the event the nibble comes anyway, experienced counsel should have composed during the negotiation a shopping list of counter-nibbles that would be offered for reciprocation with the initial nibbler. Sometimes the nibbler backs down; other times the nibbler finds one of the counter-nibbles attractive and a deal is struck on new terms. Getting angry or feeling manipulated when confronted by the nibbler is likely to miss the opportunity for your own client that the nibbler has created.

For other techniques, please see “Combating Hardball Negotiation Tactics” Daily Journal, ADR Supplement p. 4, 12/14/07 by Max Factor III.

link: <http://www.factormediation.com/docs/Combating%20Hardball%20Tactics.pdf>

Focus on these few techniques, and next time you get nibbled, you’ll be able to bite, not bark, back.

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