MARKING THE TRAIL
NEGOTIATION

Teaching Note

Marking the Trail is a two-party mostly distributive case, set in a legal dispute but prior to any litigation filing. It's distributive in the sense that its central focus is negotiating payment on sums owed. However, the negotiators can discover and take advantage of different preferences as to timing and perceived risk.

It includes a wide ZOPA, facilitating discussion of anchoring and first offers. The negotiation takes place between two lawyers, with clear settlement authority limits provided by the parties. Each party's circumstances may create the impression that they have less power than the other. Of course, each has substantial power; recognizing that will help them claim value in the negotiation.

The case takes approximately 30 minutes to negotiate. If you haven't already introduced the basics of distributive negotiation, debriefing could take up to an hour – less time if you have.
[in my three-hour negotiation course, I usually have students negotiate two distributive cases in a row: first *Settle for More or Less*, then *Marking the Trail*. I collect and put up the Settle for More or Less negotiation results and permit only VERY limited discussion before moving onto *Marking the Trail*. For further elaboration, see *Settle for More or Less* Teaching Note.]

Stepping aside from teaching only negotiation lessons, *Marking the Trail* also offers raises ethical and emotional lawyering challenges for many students. As discussed below, one party – Syd Willette - has a darned clear legal right to $20,000 in commissions on sales in last quarter working at Pako, Inc., plus all (technically almost all) of his six months "trailing" commissions - $50,000. Legally, Pako owes Willette $70,000 (or awfully close, with some deductions for booked sales that don't result in payment. The facts make clear there would only be de minimis deductions, if any). How does the lawyer feel and what should the lawyer do when negotiating on behalf of a client who seeks to assert power to pay far less than his clear obligation?

Fact Synopsis, ZOPA and All that Jazz

The negotiators are lawyers representing Pako, Inc., and Syd Willette.

Pako, Inc., is a manufacturer of industrial packaging equipment in St. Louis, Missouri. Pako's client representative is Lee Danker, VP of Sales.

Syd Willette was a commission salesman with Pako for five years before a very recent move Cincinnati. Syd moved for family reasons and has a job in an unrelated industry.
An excellent salesman, Syd developed strong relationships with Pako's customers.

Pako doesn't know why Syd moved. Though Cincinnati is too far away to be covered by Pako's standard non-compete terms, they fear Syd could harm Pako's sales from there.

Pako's commission structure is 20% of net sales revenues paid on a quarterly basis. Pako's standard commission sales agreement states that "salespeople who leave the company in good standing will be paid trailing commissions on six months' net sales, after offsets for returns and revocations." Syd completed past quarter sales of $100,000 in net revenues. Thus, $20,000 was due on the quarterly check. (The quarter fell a few days after his departure.)

Syd also claims "trailing commissions" of $50,000 on booked sales of $250,000 over the next six months.

Pako held up payment of the $20,000 due at the quarter when Syd refused to release claims on the booked commissions. Pako took the position that its trailing commission policy looks *back* six months and refused to pay on the $250,000 in booked sales.

Pako's BATNA and Reservation Value

The details are in the full fact pattern; sufficed to say that Pako's arguments are *very* weak, though it's theoretically reasonable to delay the trailing commission payment for six months in anticipation of potential cancellations or defaults.

Pako sees that Syd could take action to reduce Pako's revenues. Syd was well liked by Pako's customers; they would not like to hear that Pako treated him badly. Without directly threatening, Syd said he could make sure those booked sales evaporated, if he didn't get commissions owed.

Pako's attorney informed Pako that costs of defense would be $5,000 for responding to initial filing and pleadings, and $20,000 if the case goes to trial.

Pako grudgingly authorized paying the $20,000 now due plus 20% on net revenues from Syd's sales AFTER the revenues come in and AFTER deducting cancellations or defaults. Due to current cash constraints, Pako doesn't want to pay any more than $20,000 right away; it wants at least three months, possibly six months to pay any more.

From a ZOPA perspective, Pako's RP is $20,000 now and $50,000 (less deductions) in six months.

Syd's BATNA and Reservation Value

Syd feels strongly Pako should pay $20,000 now plus $50,000 in no more than six months. While acknowledging some booked sales could theoretically involve cancellations or defaults, Syd calls it a silly excuse. These sales were almost all to solid companies – extremely low credit risks.

Syd recognizes that he has some power to reduce Pako's revenues by informing some of his former customers of Pako's actions. (Given that it's true, libel and slander claims won't hold water.)

While Syd is angry, he is also cash strapped. The Willettes have been hit with some $10,000 in unexpected work needed in their new Cincinnati house. It would make sense to tie in an additional $15,000 - $20,000 in renovations. They could use access to these funds as soon as possible.

Syd has instructed the lawyer to try to negotiate for as high a number as possible and not to settle for less than $20,000 immediately, and $25,000-$30,000 would be far better. Settling that low doesn't make him happy because Pako really owes $70,000 – $20,000 for the past quarter and $50,000 on future sales revenues. Syd also thinks Pako should pay "some kind of penalty for jerking me around" – at least the attorney's fees thus far.

Syd's lawyer explained that litigating this case would cost $5,000 for filing and pleadings, and $20,000 through trial. Complications include: the lawyer would need access to Pako's records; suit would require local Missouri counsel; Syd would have to travel to St. Louis, a distraction from the new job. Syd agrees: NOT worth it.

For the alert reader, this makes the ZOPA $20,000 - $70,000, with room for wriggling over timing.

Differences for Exchange

The parties' differing interests, preferences and sources of power can be used to advantage. For example:

- Pako would value Syd's agreement not to contact former customers about Pako's treatment as it may reduce future sales. Syd would likely agree, if treated fairly in settlement.

- Pako doesn't know Syd has no intention of staying within the same industry and would value an extended non-compete. That has no cost to Syd, who didn't intend to do so.

- Pako would pay $20,000 now. Syd's agreeing to delayed payment on trailing commissions increases the likelihood of Pako's agreement to less (or no) discount on $50,000.

- Pako insists trailing commissions include deductions for cancellations or defaults, etc. Syd should agree under the operative clause. He predicts no more than de minimis deductions. This term would address Pako fear of cancellations and defaults serve as a Pako face-saver.

Teaching Plan

If possible, I pre-assign student roles and require that they prepare for the negotiation outside of class. As discussed in the *Settle for More or Less Teaching Note*, I often teach both cases in the same class. If so, I suggest starting with *Settle for More or Less* – precisely because it's not as strictly a legal context. After putting up the *Settle for More or Less* results, with very minimal time for discussion, I move to *Marking the Trail*. (With regard to the *Settle* results, I might ask: "Any

thoughts about why such differences in negotiated agreements?" And I might suggest they consider what led them to their own agreement in the *Settle* negotiation.) If the class period did start with *Settle*, then I give the students ten minutes or so to refresh on the facts, re-orient, to the context, and reconsider their approach to *Marking the Trail* before beginning the negotiation.

I should note that in pre-assigning roles, I try to make it so that whoever was the payor in one case – Quality Quarry or Pako – is the payee in the other case – Branam or Willette. I think it's useful to have students experience both perspectives. In fact, I try to balance that aspect through at least the first half of my course.

After Marking the Trail negotiations are done, I post the full set of class results on a PowerPoint for all to see. The case has always generated most or all the ZOPA range and posting all the results can be quite a moment, a student realize how well or how poorly they did on behalf of their client, relative to other lawyers in the same role.

I debrief the distributive aspects of both cases together, using them to illustrate the meaning of BATNA, ZOPA, RP or RV (Reservation Price or Reservation Value), and the power and perils of anchoring.

As mentioned above, this problem describes sources of power the students may not have seen: Syd has power to influence Pako's customers and to compete in the same industry in Cincinnati. He doesn't intend to compete – his new job is in an entirely different industry. But Pako doesn't know that.

Pako's power to delay ALL payment (using the legal system for that purpose) can cause significant harm to Syd, who needs an absolute minimum of $10,000 now to pay for unexpected expenses. Getting less than the $20,000 early would also make desired renovations difficult and more costly later. In short, it's not pretty, but delay inherent in the legal system enables Pako to squeeze Syd to discount settlement to an amount far lower than what he is owed under the contract. Fortunately for Syd, Pako doesn't know this.

Though it comes with delay, the legal system does give Syd a strong chance of winning the full $70,000 and costing Pako an additional $25,000 in legal fees. However, that same legal system means that, even if Syd is awarded $70,000, his attorneys' fees would bring Syd's net down to $45,000. (Arbitrator's note here: I don't see a court awarding Syd attorney's fees in the American system. Perhaps I'm wrong? However, as an arbitrator, I would certainly consider awarding Syd some or all the arbitration costs and attorney's fees.)

At some point during the discussion, I will ask the Pako attorneys in the class if they felt at all uncomfortable negotiating hard on their clients' behalf? Did some of the Pako attorneys intentionally or unintentionally stay away from strong distributive bargaining tactics – decline to drive the deal as low as possible – despite their client's wishes? Why? If the lawyer sees that,

legally, Syd is entitled to $70,000, or darned close, and "goes easy" in the negotiation, is that a breach of responsibility to the client? Say Syd's lawyer asks for the full $70,000: can you counter at $60,000 and shake hands without guilt when Syd's lawyer accepts? Is it wrong to try to drive a hard bargain in the negotiation when the law is on the other side? What if Pako made it clear that they wanted to pay as little as possible? What if they want you to be tough because Pako suspects Syd might be desperate for money now? If you don't feel comfortable with that approach, should you let Pako know?

This always generates robust discussion about lawyers' obligations to clients, respect for the legal rights and obligations, recognition of the way cost and delays in the legal system affects the parties and negotiations…and no doubt more.