

The hidden negotiations that decide your employment case

Shaping case outcomes through tactical empathy and strategic framing

By Dan Lyman

Litigation doesn't begin or end in the courtroom. It lives in a network of negotiations most lawyers never see. Too many focus exclusively on their negotiation with opposing counsel, believing that's where the case will be won or lost. But taking a case from inception to resolution is never a straight line. It unfolds across a complex ecosystem of interactions, many of which happen when you're not even in the room.

To bring order – and use it to our clients' advantage – we need to recognize and shape all the negotiations truly taking place. These can vary from case to case, but in a typical employment matter, for example, at least six negotiations usually shape the outcome: client and attorney, attorney and defense counsel, defense and employer, defense and insurer, employer and insurer, and, finally, all parties at mediation.

What follows is a practical guide to managing these negotiations using Chris Voss-style techniques. Voss, a former FBI hostage negotiator, explains in *Never Split the Difference* that negotiation is not about manipulation – it's about using tested methods to uncover what really matters. Success in any negotiation, he teaches, hinges on three core skills: (1) tactical empathy – actively showing you understand others' emotions; (2) calibrated questions – open-ended questions that guide thinking; and (3) strategic framing – presenting options in a way that shifts perspective.

Using Voss-style techniques to thoughtfully manage *all* the negotiations involved in every case – including ones that you are never actively participating in – can temper an employer's ego, turn uncooperative insurers into motivated allies, and leave even the most anxious client feeling genuinely heard and vindicated.

Earning trust: Your first negotiation is with your client

The first negotiation always begins with our own client. Before any outreach to the defense, we must establish trust, manage emotions, align expectations, and gain the client's authority to negotiate. This early process is critical – it sets the foundation for every strategic move that follows.

As lawyers, we're trained to focus on facts and law. But clients don't arrive in our offices thinking like lawyers. They come in raw and emotional, seeking validation for a wrong that feels deeply personal. Their stories spill out as narratives of



betrayal, anxiety about the future, and a longing for "justice." It's tempting to steer them directly into legal analysis. But the first step is showing that we actually *hear* them.

Miss that emotional landscape, and you risk losing your client's trust – and their cooperation – right when you need it most. If your client senses you don't understand what really happened to them, they'll hesitate to follow your guidance later, no matter how sound your legal analysis may be.

So, Voss-style negotiation begins here: with feelings, not statutes. This emotional groundwork builds credibility and allows your client to hear your advice later – especially when outcomes don't align with their ideal.

How do you do it? Start with simple, genuine empathy:

"*I can hear how upsetting and isolating this experience has been for you. Before we talk legal details, I want to make sure I fully understand what you've been through.*"

Use labeling and mirroring techniques to build connection:

"*It sounds like you're worried this will never be over, or that no one will believe your story.*"

Ask calibrated questions that give your client agency and help you understand their priorities:

"*What does justice look like for you at this stage?*"

"*How are you hoping to feel when this is all over?*"

Employ reality-testing to understand and align expectations:

"*If a jury didn't agree with us on everything, would you still feel like this process was worthwhile if you received $X?*"

Then, finally, bridge the emotional and legal worlds with transparency and grounding:

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"*Part of my job is to make sure your story gets told, and the other part is to help you understand how the legal process works, so you know what to expect*."

The goal is simple but critical: Start with emotion, earn trust, then pivot to law. Clients don't care about legal elements unless they feel you actually "get" their lived experience. Only then can you begin to align your client's risk tolerance and expectations with the likely range of outcomes, so you're negotiating from a position of strength and clarity.

If you skip this step, you'll find your client disengaged, or worse, actively undermining the negotiation when the defense finally puts a real offer on the table.

Credibility is currency: Influencing defense counsel

Your second, and, in many ways, most important, negotiation is with defense counsel. And your first task is to establish credibility. Defense counsel sizes you up quickly, deciding whether you're reasonable and trustworthy or just another adversary to tune out. Chris Voss teaches that credibility is built on empathy, quiet confidence, and thoughtful, well-timed disclosures. Done right, your professionalism becomes the foundation for how your case is relayed to others.

Once credibility is earned, your real influence begins: equipping defense counsel to view the case not as a battle, but as a problem to solve. This doesn't mean adopting their frame. It means offering a strong, practical narrative they can carry upstream. The goal here isn't to manipulate or trick defense counsel into echoing your talking points; they won't fall for tricks. It's to build genuine connection and align interests so that your narrative naturally becomes theirs, because your story is about finding practical solutions for everyone involved.

So, show your work, tactfully acknowledge the limits of your case, and treat defense counsel as a potential partner in resolution. The more you model credibility and collaborative problem-solving, the more you guide the entire defense side toward a real, workable outcome even when you're not in the room.

Start with calibrated transparency:

"*Here are some of the strongest emails and texts supporting our client's claims. If your documents tell a different story, let's clarify now*."

" *We calculate our client's economic damages at $X. If there's information you think we've missed or overestimated, I'd be interested to see it – we want a resolution based on the best available facts*."

This straightforward offer sets the stage for productive exchanges. Demonstrating that you understand your case's strengths and weaknesses without posturing helps defense counsel view you as a credible adversary. From there, a collaborative tone encourages them to share critical information and consider early resolution.

Back up your claims but also engage in tactical empathy. Acknowledge, out loud, what's likely swirling in the other side's mind:

"*You're probably dealing with a client who feels blindsided or thinks this is just a shakedown*."

And ask questions designed to bring their concerns to the surface:

"*What would you need from us to feel comfortable recommending settlement*?"

You frame negotiation as a shared problem to be solved:

"*I don't think either of us – or our clients – want this to become a 12-month slog with six-figure legal bills*."

Your professionalism is never performative; it's your lifeline to discovery, candid dialogue, and ultimately a deal that holds. Even when you're not getting what you want, you keep doors open for future progress – never burning a bridge you might need tomorrow.

Behind closed doors: Shaping the employer's risk perception

You're not in the room when defense counsel meets with their client – the third negotiation – but your fingerprints should be all over the conversation. Most employers are in denial, clinging to ego or "fighting on principle," and are almost never willing to admit they did anything wrong, so don't waste your energy trying to force that admission. Instead, while it's essential to be firm about the strength of your case, it's equally important to frame the case as a genuine dispute and a matter of practical business risk, not moral blame. Litigation exists because there's a disagreement to resolve, not because one side has to be proven wrong.

To set the stage, you might say:

"*We may not agree on the facts, but what's clear is that we have a real dispute, and that's why we're here – to find a way out*."

Having already established credibility and aligned goals with defense counsel, your messaging travels, helping to shape the employer's view of risk through a more pragmatic, less defensive lens. This is where clear, concise, executive-ready communications are critical. Provide defense counsel with summaries and language that speak directly to the employer's bottom line, such as:

"*You may find it useful to share the attached damages analysis with your client – it spells out the risks in plain language*."

Reinforce that settlement is strategic, not a surrender:

"*This is a business decision, not an admission of wrongdoing. Settlement now avoids further disruption and distraction to this business*."

If you see defense counsel trying to move their client toward a practical decision, acknowledge and support their effort:

"*It sounds like you've already explained the risks to your client. I appreciate you keeping things realistic*."

Your goal is to position yourself as an ally to defense counsel, helping guide the employer toward rational, business-minded problem-solving. In this negotiation, empathy for the employer is a powerful form of leverage – even if you never speak to the decision-makers yourself. By reframing your talking points with these dynamics in mind, you empower defense counsel to help the employer view settlement as a

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smart, practical response to a real dispute – not as an admission of fault.

Following the money: Speaking the carrier's language

In nearly every insured-employment case, the defense-side negotiation that matters most is the one happening between defense counsel and the insurance carrier. This is where coverage, risk, and settlement authority are weighed, and where a well-prepared plaintiff's counsel can wield enormous influence without ever being present. To shape this hidden conversation, you must equip defense counsel to make your case directly to the insurer: clarify why your claims are covered, frame settlement as the practical business choice, and highlight the real risk of bad faith exposure if a reasonable offer is refused.

Insurance carriers think in terms of policy limits, exclusions, reservations of rights, and burn rates. They're constantly scrutinizing coverage, looking for reasons to limit or deny payment, and keeping a close eye on the rising cost of defense or "burn rate." Looming over every final decision is also the possibility of bad-faith exposure; that is, if the carrier refuses a reasonable settlement within policy limits and the verdict exceeds those limits, the insurer could be liable for the entire excess judgment, not just the policy cap.

To influence this negotiation, your communications must speak directly to these concerns in language that will resonate with the carrier. Demand letters and briefs should be crafted for carrier eyes as much as for defense counsel. Spell out why your claims are covered, cite the policy when possible, and explain why early resolution benefits everyone:

> "*We believe these claims are clearly covered under the EPLI policy – see attached legal analysis. Please share this with your coverage counsel*."

Highlight the cost of delay to keep the burn rate front and center:

> "*Discovery will only increase defense costs and exposure. Early resolution benefits all parties*."

Clearly signaling your awareness of insurance details in settlement correspondence can move the needle:

> "*Our initial demand is within the $1 million EPLI policy limit, addressing only claims clearly covered by the policy*."

This sentence alone can motivate a carrier to act responsibly and avoid the risk of bad faith. And if the carrier has issued a reservation of rights, carefully acknowledge the tension this creates for the employer:

> "*We understand your client's insurer is providing defense under a reservation of rights – potentially leaving the employer with uncovered exposure. Settlement now avoids escalating costs and uncertainty for both sides*."

When you use carrier-friendly language, you're not just stating your position – you're aligning the carrier's financial motivations with your client's interests, making them far more receptive to meaningful settlement discussions. Ultimately, by using the right language and focusing on the right things, you are equipping defense counsel to make the most persuasive case possible to the real checkbook in the case: the insurer.

When allies clash: Managing the employer-carrier divide

Some of the most important – and fraught – negotiations in employment litigation are those between the carrier and the employer. When coverage is limited, disputed, or there's a hefty self-insured retention, employer and insurer can quickly become wary allies, each anxious about shifting liability and control.

You, as plaintiff's counsel, can shape this dynamic through careful, strategic signaling. Your objective is to subtly highlight the inherent tension but gently push both sides toward common ground. Without ever threatening, you remind both parties how much worse things can get if settlement stalls.

Chris Voss's calibrated questions can highlight the underlying tension productively:

> "*At mediation, will all parties with full settlement authority be present, or is someone else needed to close all potential exposure?*"

This question ensures that both the carrier and the employer recognize their mutual dependence on swift resolution.

Acknowledge split exposure, showing flexibility to structure a deal that works for both sides:

> "*We understand some claims may be subject to exclusions, but our core claims for [retaliation/discrimination/etc.] are covered, and we are willing to structure settlement accordingly*."

Escalate bad-faith risk only as needed, always with supporting evidence and a paper trail:

> "*If the carrier refuses to settle within limits despite clear liability, we are prepared to raise bad-faith concerns*."

Explain these dynamics directly and plainly, sometimes offering memos for internal use:

> "*We're happy to provide a formal written memo outlining exposure and evidence to assist with internal evaluation*."

Ultimately, you're always reminding both employer and carrier that delay only increases risk, that if mishandled, could expose both to greater liability than they bargained for.

Mediation as synthesis: Converging interests for resolution

If the first five negotiations are the gears that drive your case, mediation is the moment when all those gears finally mesh. This is where every stakeholder sits, literally or figuratively, at the same table – client, defense counsel, employer, carrier, and mediator – each with their own agenda, anxieties, and blind spots.

Your strategy starts before the session. You prepare your client for the emotional rollercoaster ahead, setting expectations about the process and reminding them that first offers are rarely meaningful.

> "*I know their first number might feel insulting. Remember, mediation is about*

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testing waters, not immediate offers. We'll guide this carefully to a realistic range."

You treat the mediator not just as a neutral but as a strategic ally. You brief them with a clear, carrier- and executive-friendly summary of your leverage points, and equip them to carry your story into rooms you'll never enter.

"*Our strongest leverage point is the text messages. Make sure the employer understands clearly that a jury could easily interpret those as retaliatory.*"

You also use the mediator as a sounding board, testing ideas and offers before they hit the other side:

"*Do you think the other room would be receptive to a structured payout if we raise it?*"

Their feedback helps you refine your approach and avoid pitfalls before they arise.

Throughout, you practice tactical empathy, not only with the other parties but with the mediator:

"*I appreciate that you have to juggle competing demands. How can I make your job easier communicating our perspective to the employer and carrier?*"

You direct the mediator to strategically test the defense's risk tolerance:

"*How does your side handle the scenario where the jury sees this emotional testimony firsthand?*"

"*What's the carrier's position if the coverage issues remain unresolved past today?*"

Authority is always in focus:

"*Is there anyone else we need involved to close out all potential exposure today?*"

Most importantly, you enable the mediator to frame settlement as a shared success, not a defeat:

"*Settlement doesn't mean admitting anything – it just means both sides chose certainty over unpredictable trial risk.*"

Mediation is not the endgame; it's the culmination of every negotiation that came before. If you've laid the groundwork, the sixth negotiation becomes not a last-ditch effort, but a carefully orchestrated finale.

The takeaway

Cases don't hinge solely on pleadings or deposition testimony. They turn on a web of conversations – most of which you never attend. By applying Voss-style tactics – tactical empathy, calibrated questions, and strategic framing – you shape not just your direct negotiation, but the hidden dialogues that drive case value.

And these negotiations – turning on employer fears, carrier calculations, and client emotions – all respond to the ripple of your communication. Master those, and you stop reacting to offers. You start shaping them.



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