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Mediations need a plan of action

By Shirish Gupta

Want to improve your performance at a mediation? Here are seven concrete ways:

1. Have clear, definable goals

One of the first questions I ask each side in mediation is, "What can I help you accomplish today?" Rarely do I hear back a clear, definable goal. But without a goal, you and your client are unable to measure whether or not you've achieved what you wanted.

And by goal, I don't just mean "get $X from the other side." Goals could be as simple as getting a demand, finding out the answer to an open factual question, or seeing if your counterparty is open to a creative solution. They can be as broad as settling all past and future litigation or setting a business process to avoid future suits (aka lasting peace), or as Google and Microsoft recently decided, settling all pending suits and starting to work together.

2. Make the goals optimistic, but reasonable

In my negotiation class, we spend a fair bit of time on goal setting. At the beginning of the semester, the students all aim too low, trying to just get a deal done rather than seeing what they can achieve. They set their bottom line as their goal. A bottom line is the final fallback position, not what you hope to achieve. If your goal is your bottom line, you'll concede quickly and often.

Instead, set your goal at the higher end of reasonable based on each side's perceived leverage.

3. Prepare a give/get/guard information plan

One of the first lessons in my negotiation class is preparing a give/get/guard information plan to determine what information you: (1) want to convey (facts/law favorable to you, risks you recognize but minimize); (2) need to get from them (warts and fears); and (3) don't want to reveal (the smoking gun).

These elements are essential to ensuring a productive negotiation. With an information plan in place, the mediation will be more focused and you can control the tempo and subject matter. Plus, it helps keep your client in check from bringing up extraneous issues.

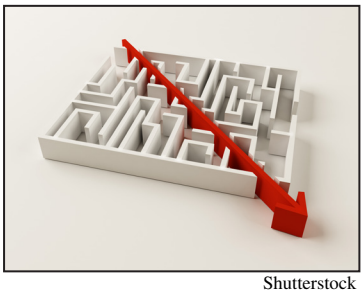
4. Give a rationale for your positions; it's not just about money

Near the end of a negotiation, the reason behind the parties' positions often disappears. It becomes a number untethered to the facts of the case. Instead, the offer/demand is a based on what the parties think will get the deal done.

But jumping to that style of negotiation too early is a lost opportunity to anchor your opponent. For example, in a patent cases or securities class actions, justifying your number based on past settlement percentages suggests that your position has a rational basis and tends to give it credibility. In wage & hour cases, the employee could justify a move by saying she's waiving waiting time penalties or will assume that a higher percentage of breaks were taken.

5. To steel your client, make money tangible

Anyone who has bought a house in the last decade can attest that once you get into negotiations in the six figures and beyond, it feels like play money. We don't carry $10k let alone $200k in our wallets, so our minds have difficulty conceptualizing those figures. If you want to be a tougher negotiator or help your client not make huge moves, convert that money into something tangible, like head-



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count, a physical asset or a project. For example, think of every $100k move as a full-time equivalent or a marketing campaign and how that would affect the client's longer-term finances.

6. Prepare yourself and your client for impasse

Impasse is a normal part of a negotiation. However, it's also disheartening, especially when you've made great progress and are near resolution. In one recent mediation, the plaintiff was making $100k moves while the defendant was making $5k moves. After a few rounds, neither party was pleased with the expected midpoint and wanted the other to make bigger moves. The mood in both rooms turned sour and the clients were dejected, thinking the process was going to fail. After a brief break, one side decided that it needed the settlement and made a move with a face-saving justification and the matter soon resolved.

The moral is that impasse will happen and it is normal to get frustrated by it. With some face saving, the negotiation can soon get back on track. It might not be that day, but it'll happen, especially when the mediator keeps communicating with the parties.

7. Use the joint session to your advantage

One of the biggest lost opportunities in mediation is when parties and their lawyers do not want to be in the same room as their counterparty. Whether because of personality conflict, bad blood or mediation norms, parties often ask not to see the other side.

As lawyers, we're trained on judging sincerity and credibility (aka how the witness would do on the stand). So, avoiding a joint session is a lost opportunity to hear directly from and gauge the principals and key witnesses. And if you're confident in your own witnesses and case, have the other side hear from them directly.

Even post-discovery, joint sessions are a valuable opportunity. You, as a trial lawyer are a master at connecting and communicating with people. Setting aside reactive devaluation, why have an intermediary present your facts/arguments when you're the expert on the case and a master at presentation? Where possible and productive, try to stay in joint session so you can use your analytical, evaluative and persuasive skillset.

Applying these seven tips will make you a more effective advocate and negotiator at your next mediation.

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