1
Managing Negotiations in Mediation

Tracy L. Allen

When sitting as a mediator, help the lawyers be the best negotiators they can be to achieve better results for their clients. Learn strategies to improve their negotiation process.

I. Set the proper stage before mediation begins

People need to be emotionally and intellectually ready to engage. If one of these elements is missing, impasse may prematurely occur, leaving everyone feeling their efforts were not productive.

In setting the proper stage, you need to know who the decision makers are on each team. They may or may not be physically present. However, mediators should work hard to get real decision makers with authority to the table. Understanding how each team customarily goes about making decisions, evaluating offers, and making proposals assists effective negotiators in crafting and presenting their proposals.

Lastly, make sure everyone has a common understanding of the state of negotiations as they come into the mediation. Often participants don't have the same recollections about prior offers or proposals—some heard them as actual offers while others intended them to be mere suggestions. If this topic can be discussed in advance of the mediation or at the latest, in joint session, people tend to be more exact about their recollection, as opposed to bluffing or engaging in what turns out to be mere wishful thinking. You'll want to avoid wasting time mediating what they remember about offers and counter offers.

II. Establish a common foundation

There should be a well-developed common foundation of information upon which the negotiation will take place. Even if the mediation occurs early in the conflict, counsel and decision makers need sufficient information in their "wheelhouse" upon which to evaluate opportunity to settle versus the risks of staying in the conflict.

Exploring the "data pool" of information is expedient and diminishes the hurdles that can occur later in the actual negotiations. This is part of the value of having a learning conversation in joint session. If all the information necessary to help decision makers do their job is laid out, regardless of the positions each party takes, at least everyone knows where they agree and disagree.

Participants need to hear and understand the topics or elements in which they are in agreement, and, equally important, they need to comprehend why it is that they disagree. This understanding furthers their ability to evaluate risk and opportunity in the negotiation. Fortunately, they can agree to disagree and still reach a mutually acceptable solution.

III. Identify the elements to be negotiated

Create a checklist, or road map, of topics that can be used for the negotiation conversations. Again, if this can be done in joint session, it is more efficient and avoids mistake. And it enables the participants to focus their energies on something other than their positions.

Such a dialogue also assists the mediator in knowing where to focus attention. Surprisingly, this type of dialogue often has great mutuality and consensus among the participants. For example, everyone agrees no one is arguing about attorney fees, or prejudgment interest, etc., if the case settles. Helping the participants have this type of dialogue fosters trust and serves as the launch pad for the mediation negotiation.

IV. Consider the content and effect of proposals

As proposals are being crafted, proponents must consider the content, impact, and effect on the participants, as well as the process. Proponents must be prepared to respond to probable reactions. A good mediator will ask the proponent to consider the possible reactions likely to result and recommend a change in course if the most likely responses are unlikely to be productive.

For example, reactions to extreme opening offers are fairly predictable. It is common to hear charges of bad faith and threats to leave. Often negotiators get stuck right out of the gate because of these reactions. Participants should be prepared to manage this dynamic and weigh the value of the extreme with the ultimate goal of the negotiation. It may help to remind the proponent that an extreme offer is likely to result in an equally extreme counteroffer. Not everyone is comfortable bargaining in slow, symmetrical steps.

Whether extreme or not, any proposal should be supported with a credible and understandable rationale. The proponent must be able to clearly and sincerely explain why it is a legitimate and credible proposal. Whether the negotiator uses the mediator to carry the message or carries it himself or herself, thinking about the likely reaction and the message that goes with the proposal usually results in a productive proposal that can be delivered and met with optimism and a rational response.

V. Prepare to receive each counterproposal

No one buys a house or a car at the initial asking price. Mediation negotiations are a dance. They have a specific rhythm that needs to play out. This requires patience.

Help the recipients to understand the proposal as well as its terms. Before the recipients respond, encourage taking sufficient time to ask about and to reflect on all the aspects of a proposal. This will produce a more productive response that will keep the negotiation process moving forward. This in turn keeps the participants hopeful and creative in exploring all possible remedies.

VI. Encourage flexibility

An important aspect of negotiation strategy is to encourage flexibility within the context of the negotiator's own plan. The mediator should help each party focus on where they want the negotiations to go, not so much on where they are or where the other party is at any given moment in the negotiation. Many good negotiators like to play out likely offers and counteroffers many steps down the road in the process. If we start with X and they start with Y, where are we likely to end up?

It is much easier to formulate alternative offers or choices for the decision makers if they think about the future rounds and what is likely to occur at each stage. This thinking provides fuel and reasons for people to remain in the process, at the table, working through the difficulties. The objective is to keep the offers and counteroffers going. The goal is to avoid giving one side or the other a reason to stop responding and end the process.

VII. Consider changing the process if impasse occurs

Mediation negotiations ebb and flow. Sometimes it looks like the negotiation has stalled. When this happens, think about changing the process or structure of the negotiation. Perhaps the lawyers only, or the principals only, should meet—with or without the mediator. Maybe a joint session should be held to cover other topics or to review where people are in the negotiation. Have lunch, take a break, take a walk. It may be helpful to focus on the mediation process and discuss how the process might be changed to encourage additional movement.

Doing something different creates space to revisit and reevaluate underlying needs and interests. It can be a chance to reflect on the resistance or what may be causing the stalemate. It is also a time when

participants can brainstorm new or revised options, without ownership or risk if the ideas don't produce movement.

VIII. Understand the cause of impasse

When an impasse occurs, is it strategic or substantive? Is it real, or is it a negotiator tactic? The answer will help the mediator and participants select the right techniques to break the impasse.

If the impasse is strategic, it usually has to do with lack of trust. In these instances, productive proposals stop because people are losing faith in the process as well as the opponent. Most negotiators won't get close to putting a final proposal on the table if they don't think it will result in a final solution. Or, if proposals have been mathematically symmetrical, e.g., one side moved 5 percent so the other moved an equal 5 percent, frustration can build quickly.

When this occurs, it is time to refocus. Perhaps the mediator should remind the parties of the progress achieved thus far or the mutuality of the end goal to work through the jam.

Refusal to settle until "critical" information is obtained, the judge decides a motion or until a deposition is taken is what is known as a substantive impasse. When decision makers lack what they perceive to be critical information necessary to effectively evaluate their risk, the dialogue has to change if the parties still wish to negotiate a resolution. If all the mediator's techniques fail, an adjournment of the mediation may make the most sense. Alternatively, painting the courtroom picture, running through a best and worst alternative to a negotiated agreement (BATNA/WATNA analysis), and considering the consequences of losing the motion can help.

IX. Always give participants avenues of escape

Personal identity and ego play significant roles in negotiation. Allowing the negotiators and parties to save face fosters trust as well as hope.

Many people are competitive by nature, so they feel the need to win. Proposing hypothetical circumstances or setting up a series of choices allows the other party to make a selection. This is also an effective way to brainstorm options. Ideas can be proposed without risk or ownership. This forces analysis and reevaluation while keeping everyone in control of their own destiny.

We all know that as a negotiation reaches its apex, there is usually some small range of numbers or terms of noneconomic importance, any one of which would be right to close the deal. Thus, applying the concept of giving room to move means there is no shame or embarrassment in agreeing to a final proposal.

X. Do not give up

Confirm what's been achieved and where the proposals stand. Then focus on what to do next. Parties don't get into the dispute in a day, and sometimes they can't get out of it in a day. Look for the sources of the impasse and see if future actions or time will be instrumental in allowing the parties to continue their negotiation at a later date. Just adjourn the mediation. And then follow up!