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Leave the other side a way to say yes

How to protect your client's interests without requiring humiliating concessions from the other side.

By Greg Derin

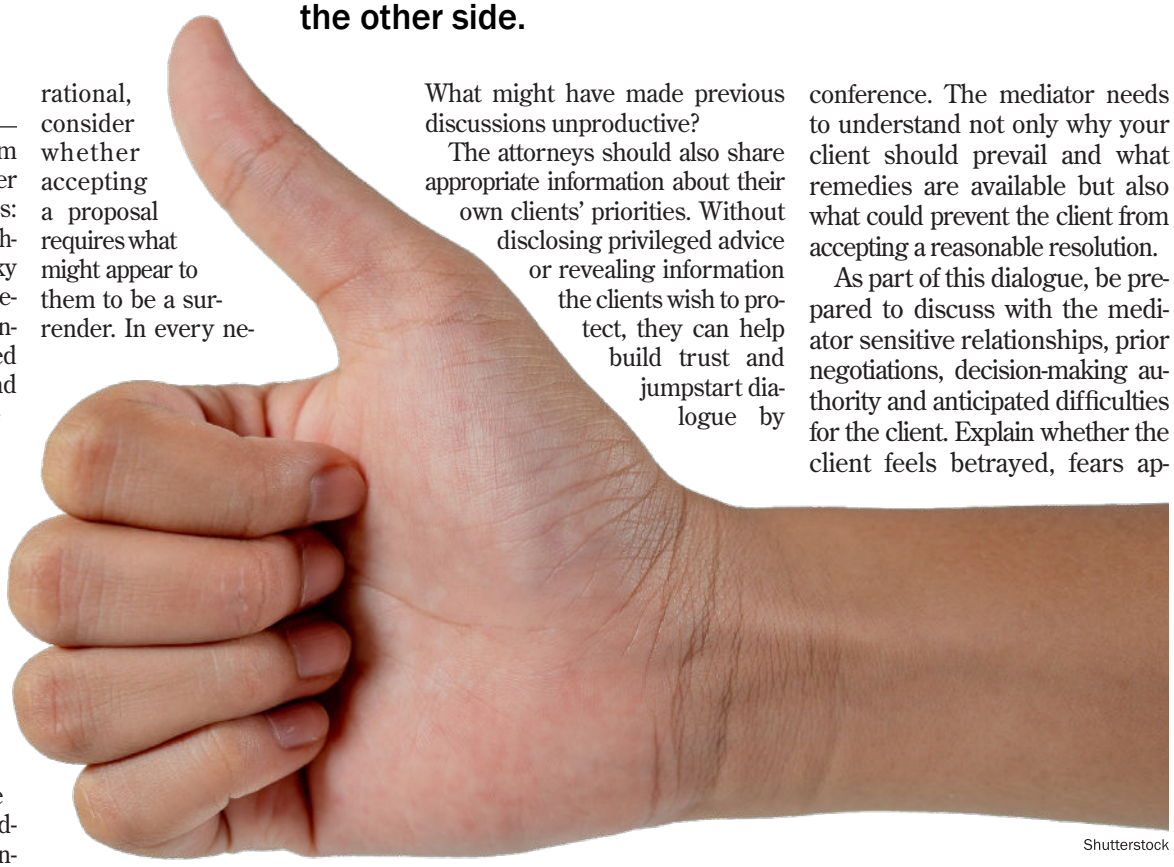
Early in his career, William Ury, co-author with Roger Fisher of "Getting to Yes: Negotiating Agreement Without Giving In," traveled to a Kentucky coal mine with labor arbitrator Stephen Goldberg. Wildcat strikes, injunctions and threats had created a tense conflict; management and union leaders would not sit in the same room.

For six weeks, Ury and Goldberg moved between the two groups, listening and working on possible agreements. The representatives eventually met and signed what Ury considered a peace treaty, subject only to ratification by the miners. The miners rejected it almost unanimously.

Recalling the episode in a 2024 interview, Ury described the prospective agreement as providing better terms than what the miners already had. However, given their distrust of management, they concluded that if management was willing to sign, there must be a trick. Where the negotiators saw an improvement, the miners saw grounds for suspicion.

Rather than simply arguing for the agreement, Ury spent months listening to the miners, even going underground to meet them where they worked. Over time, he reported, trust developed and the strikes subsided.

For mediation advocates, the lesson is instructive: favorable terms do not explain themselves. Before concluding that an adversary is irrational, consider whether accepting a proposal requires what might appear to them to be a surrender. In every negotiation, there is more at stake than distributive bargaining over numbers.



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Before mediation, speak with opposing counsel

The best preparation for a mediation begins with a candid conversation between counsel, not just preparation geared toward overcoming opposing arguments. Ask opposing counsel what matters to their client beyond a disputed amount. Are there continuing relationships, reputational concerns or business constraints? Is there something their client wants or needs to hear? What might have made previous discussions unproductive?

The attorneys should also share appropriate information about their own clients' priorities. Without disclosing privileged advice or revealing information the clients wish to protect, they can help build trust and jumpstart dialogue by straightforward identification of obstacles and opportunities.

A useful opening might be this: "Without debating the merits, help me understand what your client needs in order for this process to succeed." Such a conversation might reveal a need for acknowledgment or a practical concern that could derail an hours-long negotiation focused mainly on adjusting numbers.

Tell the mediator what the brief does not explain

A persuasive brief is not a substitute for a candid pre-mediation conference. The mediator needs to understand not only why your client should prevail and what remedies are available but also what could prevent the client from accepting a reasonable resolution.

As part of this dialogue, be prepared to discuss with the mediator sensitive relationships, prior negotiations, decision-making authority and anticipated difficulties for the client. Explain whether the client feels betrayed, fears appearing weak or expects to receive an apology. Identify any concerns about the client having direct contact with the opponent while clarifying what may be shared and what must remain private.

It is important to ask the mediator for a strategic assessment of your game plan, not simply their agreement with the plan: "What could make our approach counterproductive?" Candor is particularly important when the client's expectations exceed your evaluation. The mediator should not have to discover that gap after the opening offer produces outrage.

Prepare the client to make decisions, not respond to offenses

Clients may be ready to negotiate money but come into the media_ tion completely unprepared for the experience of bargaining. For them, an unwelcome offer can become a further insult, and they will want to retaliate before counsel has had time to evaluate and synthesize the meaning of a proposal.

Before the mediation begins, explain to the client how proposals should be assessed and how negotiations often progress, getting the client's agreement to assess abrasive remarks in context rather than letting them dictate the response. Ask the client what an agreement must accomplish, and what could make an otherwise acceptable result intolerable.

Perceived threats to a client's image or fear of "losing face" can obstruct agreement and reduce potential gains. In Getting to Yes, Ury and Fisher advised negotiators to separate people from the problem, identify their real interests and seek mutually beneficial solutions. Review intended remarks carefully, framing arguments and delivering analyses constructively.

Change the conversation by changing who is in the room

It is imperative to bring the right participants to the mediation — not only those with decision-making authority but also those capable of finding creative and sustainable solutions for mutual gain. These may be participants with deep knowledge of a business and its plans, family members whose consent or support is necessary, or senior decision-makers who were not involved in the disputed transaction and can assess it without feeling obliged to defend it.

When communications stall, it can be productive to meet with a different combination of participants utilizing a defined agenda. Counsel for all parties can meet with the mediator to narrow a legal issue or develop terms. All participants can meet to directly address a concern or explore a shared problem. The parties, without counsel, can meet with the mediator, with the consent of counsel and with clear boundaries and the ability to pause the discussion to consult with counsel.

Direct contact between parties should not occur if there are safety concerns, or if coercion or substantial power imbalances make it unsuitable. But shared conversation should not be rejected merely because the parties are adversaries.

Consider the power of a private apology

Avoiding humiliation does not mean avoiding responsibility. An apology freely offered may permit movement that a compelled admission could prevent. One preserves agency; the other makes submission a settlement condition.

Privately ask your client whether they genuinely regret any conduct. Then explore with the mediator whether the other party would value an apology and in what setting. A quiet conversation may be preferable to an audience before whom both parties feel obliged to defend themselves.

Ask what your client can sincerely acknowledge, and what can be put right. Never manufacture contrition or make payment contingent on forgiveness. Assess wording, context and legal consequences carefully. Do not assume that simply calling a conversation private will make it privileged or inadmissible; evaluate applicable protections, insurance obligations and related proceedings.

Give both sides a truthful explanation for movement

"When you surround an army, leave an outlet free," Sun Tzu advised in *The Art of War*. "Do not press a desperate foe too hard." Sun Tzu's focus was military, not conciliatory. An opponent who sees no escape may resist more fiercely. The insight also has a useful application in mediation: leave an avenue of retreat that does not require an adversary to abandon self-respect.

Give an opponent a truthful explanation for changing course: new evidence, a change in law, mounting costs, an intervening ruling or changed business priorities. The parties need not agree about the past, interpretations of the facts or law to make a sound decision about the future. New information can make movement easier to explain without requiring a repudiation of an earlier position.

Negotiators value not only economic results but also how they feel about themselves, the process and their relationships. Hence the value of pre-mediation discussions about what each side needs to take home at the end of the process besides monetary consideration.

Before presenting a proposal, ask how the recipient might justify accepting it and how your client would receive it if the roles were reversed. If the only possible explanation is "we were forced to surrender," reconsider the presentation. You may have a workable number attached to an unworkable message.

Know when another victory would cost your client the deal

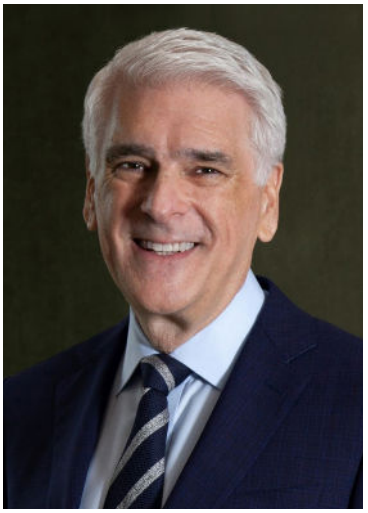
J. Paul Getty is reported to have said, "You must never try to make all the money that's in a deal. Let the other fellow make some money too, because if you have a reputation for always making all the money, you won't have many deals."

As an agreement approaches, ask what further benefit is being pursued, how much it matters and whether the client is prepared to lose the agreement over it. Payment security may justify holding firm. An unnecessary acknowledgment that the opponent's case was baseless may warrant a different level of scrutiny. Counsel should candidly explain the distinction. The client may choose to continue litigating, but should understand whether the remaining obstacle involves a material interest or merely a desire to force the adversary to yield. There is a difference between achieving one's goals and refusing to give up until an adversary is diminished.

Conclusion

In "Notes for a Law Lecture," drafted in 1850, Abraham Lincoln urged law,0yers to explain "how the nominal winner is often a real loser — in fees, expenses, and waste of time." Bring that distinction into the final caucus. Your client needs the benefit of a good agreement, not necessarily the satisfaction of the other side's defeat.

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