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PERSPECTIVE

How to move mediation forward

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Mediation can be the pièce de résistance on the legal dispute resolution menu. Parties voluntarily bring their issue to a neutral third party whose sole responsibility is to guide them toward resolution. They share as much or as little information as they choose, they negotiate through their attorneys, and they enter into a settlement agreement only if and when they are completely satisfied with the outcome.

The two sides select the mediator, they pay his or her fees, and they control the final product of the proceeding. They are required to do nothing more than listen to each other's positions and negotiate in good faith. How can this not be a win-win?

Alas, mediations are rarely smooth sailing. Parties sometimes come to the process with unreasonable or unrealistic expectations. They may be entrenched in their beliefs and demands, ignorant of all the facts, or simply unwilling or unable to listen to and appreciate other perspectives.

For the mediator, this can present a real challenge: How to arrive at a mutually satisfactory resolution when one side appears incapable of moving toward the middle? These are my top five strategies for breaking a mediation stalemate.

1. Break it up

Sometimes, a break is all that's needed. When there are many issues, or a single issue with many angles, I might break a case into chunks and tackle portions of it separately. Imagine, for example, a dispute between business partners that involves rights to intellectual property. They may disagree about authorship, licensing, royalties, valuation, derivative works, and other aspects of their creation.

Instead of trying to tackle the whole case at once, I might focus on just the first issue: Who came up with the idea? What was the parties' understanding about whose name would be on the copyright or invention? How did the partners intend to share or benefit from their work?

Besides breaking up the issues into manageable pieces, I may also look at breaking up the mediation process into manageable segments. Refreshment and mental health breaks lower the tension and maintain the flow of negotiations. When everyone feels that they have room to breathe, they are more open to sharing with and listening to each other.

2. Picture it

People take in information differently. Not everyone can effectively process information that is verbally explained to them; this requires the ability to actively listen. Many people are visual learners and process information best when it is presented to them in a graphic or tangible format. Mediators need to cater to different learning and listening styles, and litigants may need someone to actually show them – visually – what is at stake in their case.

To make things as clear as possible, I sometimes write things out on large pieces of poster board and affix them to a wall in the mediation room. I can then walk the parties through their case by referencing visual representations of the costs and benefits of pursuing different approaches. When a

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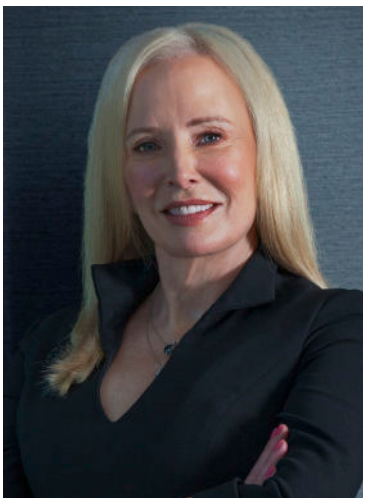

party that is locked into a position during mediation sees a graphic time frame with an associated cost for each step, he or she may grasp the situation in a way that words cannot convey. A simple picture may be enough to move them toward compromise and settlement.

But there may be situations in which a party needs to be shown other issues at stake in the litigation. In one mediation I managed, for example, one party owed the other party a set amount of money at a certain interest rate, but he had paid a lesser amount over the course of several years at a far lower interest rate. Because I wrote the debt and payment terms out on pieces of poster board, I was able to visually walk the paying party through a mathematical calculation of the difference between what he thought was owed and the amount actually due under the agreement

When the payor saw the calculations in a large format on the wall and looked at the loan documents backing up the interest rate and amount borrowed, he was able to write down his own counter calculations. He quickly realized that, rather than owing the opposing side nothing, he in fact owed them a great deal of money.

3. Articulate the opposing viewpoint

Pictures may sometimes speak louder than words, but words can be powerful. As a neutral mediator, I am privy to the fears, concerns, and back stories behind both sides' positions. I'm in a unique position to parlay my knowledge for the benefit of both sides.

A mediator must listen carefully to the parties' stories, observe facial expressions, and body language, and ask a lot of questions. Without divulging sensitive or confidential information, a mediator can then try to provide each side with a rational basis for the settlement position of the other side. When I mediate cases, I will go back and forth as many times as needed to hear the hot-button issues, and then I will ask each *side to explain to me the other side's position.*

When a party gives voice to what the other side is saying or feeling, he or she may actually hear it. This may be the tool that finally breaks the ice.

4. Suggest a joint session

When parties, or their attorneys, are forced to sit with each other in the same room, there is always the chance that the level of hostility will increase. Attorneys may worry that their clients who participate in a joint session might unwittingly betray their settlement positions while listening to or answering questions from the other side.

Yes, emotion can affect judgment, but it can also be an important catalyst for interactive dialog. Instead of remaining detached and disengaged from the process, parties who sit across from each other in a joint session may be more inclined to work cooperatively to find solutions when they truly understand how the other side views the dispute.

Joint sessions tend to work best when they are focused on discrete issues for which the mediator believes there is a good chance of settlement. The mediator may recommend a joint session after he or she has listened to each side's position and identified common ground between the parties or a misperception that could be addressed through a joint session.

A skillful mediator will make sure that neither party misuses the process to engage in counterproductive tactics. He or she can help both sides feel more comfortable with the process by sharing his or her reasons for suggesting the joint session and explaining what he or she hopes to accomplish with the session. By carefully listening to the parties' concerns, the mediator should be able to structure the joint session in a way that respects their hot-button issues and allows them to feel comfortable about the scope and objectives of the session.

Although parties are never obligated to participate in a joint session, they should at least be willing to consider it. Sometimes a party's willingness to consider a joint session, even if it is not reciprocated by the other side, will be enough to communicate to the other side an openness to listening to their position and considering creative solutions.

5. Create a mediator's proposal

When parties have reached an impasse in their negotiations, they may need a different vehicle to move them forward. They have already invested significant time and money, and they truly want to resolve their dispute.

For parties who have reached a standstill but are not too far apart in their monetary positions, a mediator's proposal might help them resolve their differences. Upon the parties' mutual agreement or in response to a request from the parties, the mediator can evaluate the case and suggest a number he or she thinks both parties will accept.

This often can work to break a stalemate, because the mediator knows more information than either of the parties do and he or she will have a good idea of whether there is hope of a meeting somewhere in the middle that will turn the tide. But there are limits to this approach.

The mediator's proposal is not open for an indefinite period of time – usually just long enough for each party to discuss the issue with those who have the real authority to settle, such as the insurance company representative – and until a final binding agreement is signed by both parties, the mediator's proposal has no legal effect.

Either side may accept or reject the mediator's proposal. Obviously, if they both accept it, the case is settled. However, if one side turns down the proposal the case will go forward as if nothing has changed. Neither side will know if the other party has accepted the proposal unless both sides have agreed to it. Even if the mediator's proposal is ultimately turned down, it may nevertheless provide the parties with enough insight and information to help them reach their own mutually agreed upon settlement.

Conclusion

The goal of mediation is for parties to find common ground and arrive at a mutually agreeable settlement. When there are roadblocks, such as an unmoving party or an intractable issue, mediators have a great toolbox at their disposal. By being thoughtful, creative and strategic, a good mediator can help litigants overcome obstacles and reach the finish line.