Charting a Successful Mediation Path

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Preparation is key to a successful mediation. Counsel should attend with a solid understanding of important facts and issues and a clear view of the client's goals. If possible, enlist the mediator in advance to clarify objectives, address potential settlement obstacles, and identify available resources. Preparing an action plan for the negotiation, considering the timing and structure of settlement offers/demands, and outlining desired outcomes can significantly advantage counsel at mediation and steer discussions toward a favorable resolution.

START STRONG

Begin by asking your client: What do you want? What are your goals? Continue discussing these objectives as the matter progresses. Mounting costs, other commitments, and the stress of litigation can often temper even the most aggressive or irate client's views.

With an understanding of your client's goals, develop a range of acceptable outcomes before mediation. Analyze factors that may impact discussions, such as key facts and legal issues, similar deals, previous experiences with counsel or principals, a fast-approaching trial date, anticipated delays, the need for confidentiality, elections, and so on. Consider the realistic range within which the parties might reach a settlement. Additionally, review alternatives to a brokered deal before mediation. What happens if the case does not settle? Assess the point at which your client would be uninterested in making a deal.

With these factors in mind, explore an opening position that allows you to strategically move from offer to offer/demand to demand toward an acceptable endgame. The initial demand and offer basically set the high and low limits of the discussions. Ideally, your opening position should be defensible and leave room for negotiation. However, an unrealistic demand or offer can alienate the recipient and potentially end negotiations.

Timing the service of the initial settlement demand or offer is also important. In business or insured claims, serving a demand four to six weeks in advance of the mediation allows counsel time to obtain authority from their client or insurance carrier. In emotionally charged personal injury or wrongful death cases, it may be best to give the plaintiff an opportunity to share her story before delivering an offer.

BE PROACTIVE

Avoid being completely reactive in settlement discussions by developing a strategy for moving from offer to offer or demand to demand. Before mediation, privately define the outcome you hope to achieve and pencil out a basic negotiation strategy. Counsel might consider anchoring with a settlement demand or an offer backed by an explanation of damages, making moderate, measured moves until the opponent reaches a certain threshold. Alternatively, counsel may begin with aggressive moves and then signal an endpoint with smaller, incremental steps. Past negotiations with the same opponent may help inform your strategy.

Traditional demand/offer negotiations can sometimes lose momentum, leaving each side unclear about the other's objective despite hours of discussion. When preparing for mediation, privately inventory possible tools to further settlement efforts if negotiations hit an impasse.

As one option, your negotiation strategy may include using settlement brackets if the parties are not within a particular range after several exchanges. Bracketing allows negotiators to communicate their settlement ranges while maintaining their formal positions. The proposing party can demonstrate a willingness to advance the discussion with a significant move if the other side reciprocates. If the bracket is rejected, neither party has compromised its formal position. If the bracket is accepted, the bracket numbers become real numbers, narrowing the negotiation range.

For example, the plaintiff might offer to reduce their demand to $2 million if the defense raises their offer to $1 million. The defendant can accept, reject, request a firm demand, make a firm offer, or counter with a different bracket. Regardless of the response, the plaintiff signals a readiness to resolve the matter between $1 million and $2 million. Brackets are one type of

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conditional offer designed to keep parties talking and avoid impasse.

Another conditional offer type involves tying your settlement position to a specific contribution by another party. For instance, a defendant may agree to offer $100,000 if a co-defendant agrees to match this contribution.

An Offer of Judgment might add credibility to a party's position and encourage settlement, or a Mediator's Proposal might bridge the gap between parties.

BUILD COALITIONS

In multiple-party negotiations, ask: "What do the parties want? Who can we team up with to further productive negotiation to our benefit?" Parties with common interests can significantly increase their influence by joining forces with others who share similar goals. Negotiating as part of a single, large group can provide individuals with more leverage and secure better deals for coalition members.

Through joint defense agreements, parties can reduce costs by coordinating strategy and sharing information. These agreements allow the sharing of otherwise confidential information or work product without waiving applicable protections. However, before entering into a joint defense agreement, it is essential to research how the courts in the applicable jurisdiction view such agreements, especially concerning privilege protections and conflict of interest concerns. At a minimum, the joint defense agreement should disclaim any attorney client relationship between an attorney and any signatory to the agreement other than the attorney's specifically named client.

An effective negotiation strategy in multiple party disputes considers both the benefits of joining a coalition and the potential dangers of being excluded from one.

SEQUENCE NEGOTIATIONS

A global settlement in a multiple-party dispute often involves a series of smaller settlements with individual parties and coalitions. To manage the complexity of multiple-party negotiations, develop an early action plan for sequencing the discussions.

In MDL litigation, counsel might want to start negotiations with a focus on resolving claims that present the most exposure or perhaps those that present the least. Pursuing inventory settlements with individual firms or resolving a specific category of injury also may be productive.

In individual cases with multiple parties, peripheral parties often seek early exit strategies. For instance, they might want to know if they can get out early without going through the entire discovery and motions process, especially if their client played a minor role in the dispute. The plaintiff might agree to settle either with a particular individual, parties involved in a discrete issue, or around a "problem" player. Conversely, the plaintiff may be set on a global agreement.

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In construction defect cases, the general contractor or developer typically takes the lead in sequencing settlement discussions.

One approach to sequencing is known as "Pay and Chase." Here, the lead defendant reaches a settlement with the plaintiff and then, with damages capped, confidently issues realistic demands to the remaining parties to fund a global deal. This approach can help preserve ongoing business or personal relationships between the lead parties and minimize costs and exposures. "Pay and Chase" may be especially productive in disputes with underinsured or underfunded parties. However, the downside is that the lead defendant takes on the risk of having to fund a large share of the final settlement.

A more popular approach involves the lead defendant focusing first on raising money before making a global offer. The lead defendant might divide other defense parties into groups, negotiating first with the more liable parties and then moving to the less liable ones, or vice versa. The focus might be on parties involved with one claim or a series of related claims that could potentially be settled separately from the rest of the group. Negotiating first with defense parties benefits the lead defendant by providing a solid understanding of available funding, allowing counsel to approach the plaintiff with funds already secured. The downside is that these sequenced negotiations can be very time consuming. As talks continue, costs soar, potentially diminishing any goodwill between the lead parties. At some point, once the lead defendant has a better understanding of the final settlement range, she might cut deals with particular groups or individual parties. These parties may be more willing to put their best offer on the table in exchange for an early dismissal. As defense parties begin leaving the case, previously recalcitrant parties often become much more interested in pursuing a settlement.

CONCLUSION

The most important lesson here is this: Execute an Action Plan. Effective negotiation strategies that benefit your client require you to start early and be proactive. In multiparty cases, consider building coalitions and strategically sequencing negotiations. By following these guidelines, counsel can navigate the complexities of mediation, ensuring the best possible outcomes for their clients.

Anne Lawlor Goyette

Anne Lawlor Goyette has resolved thousands of disputes involving construction, real estate, insurance, business, employment, product liability and personal injury/ wrongful death matters in California and nationwide. Goyette serves as a court appointed neutral for over two dozen California Superior Courts and acts as special master in national and statewide class actions. After more than twenty five years of full time ADR experience, Goyette recently joined Signature Resolution as part of the inaugural team for the new Silicon Valley office.