



The five steps of mediation (and negotiation)

Mediation is a facilitated negotiation. You'll do better adhering to the five predictable stages

BY ALEXANDER POLSKY

Negotiation is an art and a science. When applied to mediation, the science tells us that the process has distinct stages. Negotiators who adhere to the stages do, in fact, obtain better results than those who allow any stage to be managed by the seat of the pants. (Cf: *Alternative Dispute Resolution: The Advocate's Perspective* 2d ed., Brunet & Craver pgs 63-119; 205-211)

But as much as negotiation is an art and a science, it is also a dance between parties. An attorney's proper execution of each step, including those leading up to the dance itself, is important for the entire process to go as smoothly as possible.

These include the preliminary, preparation, information, negotiation and closing steps.

Since mediation is a facilitated negotiation, success hinges on an attorney being well aware of each step and acting to maximize results through sensitivity to proper and full use of them.

Preliminary stage

The first step in the process is the preliminary stage, during which you're deciding whether to mediate. Factors include timing, the need for informal versus formal information gathering, the emotional or business needs of the client relative to resolution, how to suggest mediation to the other parties, the mediator best suited for the task and the time to be set aside to do it right.

More and more cases are mediating early. There are compelling reasons for this trend. Pre-litigation negotiation of

disputes saves time, emotions, business interruption and, of course, money. When the early negotiation does not result in a settlement, it often sets the stage for the parties to agree to informal information exchanges and a return to the table.

When using a mediator for this process, it is important to go to someone who has an established track record as an effective listener, facilitator and communicator. As counsel, you do not want to turn an early mediation into a discovery tool, unless the information is reciprocal and targeted toward resolution. Counsel for each side should have a discussion concerning the goal of the early mediation. Is it settlement at that time, or is it a step in an abbreviated process?

Preparation stage

Following the preliminary stage, attorneys must prepare themselves, their clients and the mediator for the mediation. This is the preparation stage, and the key to success at this step is identifying the interests of both parties.

An interest is a specific need that must be satisfied. An action is an act, deed or item that meets the interest.

For example, if an actor has a big ego fueled by insecurity, recognize the need for validation as an interest during contract negotiations and step up and give away the actions that are easy, such as dressing trailer, name placement, and so forth.

In a death case, recognizing the validation of the loss is an interest, and a simple acknowledgment of the loss is an important action item.

When preparing for a mediation, make a list of your client's interests and

set out action items that you can negotiate to meet those interests. Rank the interests by priority to keep yourself focused.

Next, identify the interests of the opposing party, and set out actions to meet those interests.

Sensitivity to interests and interest-based concessions often produce rewards as the negotiation process unfolds. This approach requires thorough preparation of your client. The client should be prepared for the process through discussions of interests, goals and objectives, anticipated styles of opposing counsel and the mediator, and discussions relating to attire and desired conduct/demeanor of the client.

When you prepare yourself as counsel, you will want to determine whether to adopt a cooperative or competitive style, the best use of delivery choices, and timing of briefs and exhibits.

Joint preparation in the form of a pre-mediation conference call with the mediator, yourself and others participating in the negotiation is a smart practice. In this call, discuss the nature of the dispute, the emotions, the need and timing for a joint session, and any real impediments to settlement.

Early discussions with the mediator are important because mediators tend to care about strange things, such as whether the parties will be together for a joint meeting, should the table be square or round, who will be attending the mediation, and who should not be there. Mediators hate surprises. Our tool is communication and our currency is risk. The more information you can provide to us on those broad topics, the better.



When preparing the mediator, please, please do so early. Pick up the phone, send an e-mail, and supply a brief at least prior to the weekend before the mediation. Your brief should be informative and address your risks, as well as those on the other side. Share real and achievable goals and objectives with the mediator. Remember, the brief is a tool used to enhance the potential for settlement.

Information stage

With the first two stages completed, the information stage represents the initial contact with the other side at the negotiation. This might be a joint session, or it might even be as simple as a quick hello in the hallway. Here, the introductions are made and the actual dance between the parties is about to begin.

If you have a long relationship with counsel, either one or many, do not highlight this fact or become too informal. It tends to cause concern on the part of the other parties at the table.

When in any caucus or meeting, the use of open-ended questions might lead to ratification of the interest-based decisions made at earlier stages of the process. The tone is set during these moments. Consider your words and actions carefully. Do you want to set a cooperative tone, or a tension-filled competitive tone, right at the start? Your initial actions or your reactions to those from the other side will cement a direction that could be difficult to change.

On the other hand, be professional, and ensure that the client does so as well. Demonstrate commitment to the client, case and mediation. Prepare exhibits; even simple exhibits demonstrate commitment. If the case is fact- and time-intensive, use a timeline, which is very effective, instead of a ten-page written overview.

Negotiation stage

The dance with the other side officially begins with the negotiation stage, even though you might have been

preparing for this moment well in advance. There are three basic approaches to negotiations.

The competitive bargainer is often referred to as a “hard” bargainer or a “positional” bargainer. This negotiator wants to “win” and often at *all* costs. Winning is defined in a unilateral sense and may often come without full regard to the costs. Arguing over “positions” endangers relationships, increases costs in litigation and often produces inferior results.

The cooperative negotiator, sometimes thought of as “soft,” wants to get along with everyone and produce an easy outcome in what is often a difficult situation. This technique often succeeds, but frequently leaves the cooperative negotiator asking the question, “What did I leave on the table?”

Then there is interest-based negotiation. The Harvard Negotiation Project deserves credit for coining this concept. In actuality, smart negotiators have been doing it throughout history. This process focuses on basic interests, mutually satisfying options and fair standards wherever possible.

In this process there are four key points: (1) separate the people from the problem (2) focus on interests and not positions (3) create a variety of possibilities before negotiation or deciding what to do (4) focus on objective standards.

A close cousin of interest-based bargaining is the concept of what I call *risk-based facilitative negotiation*.[®] This technique, which I merged into my mediation practice 15 years ago, focuses both on interests *and* on risks. The risks, however are the risks secondary to the *failure* to achieve a negotiated outcome.

The topic of every negotiation is different. The personalities vary while the issues and interests are as numerous and distinct as grains of sand in an hourglass. However, combining the principles of interest-based negotiation with the concept of risk is an effective tool to move the parties across the finish line of settlement.

The negotiator wants to WIN. That’s right – WIN. The lawyer-negotiator is often trained to focus on WIN in the context of money. That is a monetized outcome. The lowest price for the project, the highest dollar value settlement – the list goes on.

Sometimes, the lawyer-negotiator in a business dispute will WIN from a monetized point of view but LOSE for the client in the form of excessive attorney fees, substantial costs, outsized risks and in certain situations, negative publicity or the loss of a lucrative, ongoing business relationship. The idea of winning-at-all-costs often produces a net loss. Risk-based facilitation permits the potential for mutual gains by balancing each side’s potential WIN with risk or cost associated with the failure to achieve a negotiated outcome.

The risk-based approach analyzes the adverse verdict potential (AVP): What happens if the trier agrees with 100 percent of what the other side argues? It then considers the compromise verdict potential (CVP): Assume the trier of fact accepts some aspects of each side’s case. It then considers the costs by considering the costs of litigation, plus the costs in regard to interests of the parties. Win or lose, the interests are charted to analyze the various ways they are impacted by litigation.

This process yields a present settlement value (PSV): The risk of losing, measured by the potential of compromise, and balanced with consideration of the costs/interests of both sides, is the goal of risk-based facilitative negotiation.

The negotiator’s style might be distributive (offer followed by counter offer, etc.) or facilitative (mediator talks privately and facilitates movement of issues, terms and numbers until agreement is reached.)

The back-and-forth of distributive negotiation is hard on the parties. Emotional experiences tend to feel as impersonal as negotiating for a commodity.

In a facilitative negotiation, the mediator does not deliver offers as much as



concepts, wrapping into the discussion an interest-based analysis through the use of open-ended questions. In this way, the parties themselves can come to their conclusions in an objective manner. It's not who is right or wrong, it's what the jury says, and how the process impacts one's life or business. This is well used in emotional cases. It is driven by issues, and can be much easier and softer on the parties.

Closing stage

The deal is done, the dance has almost come to an end. Everyone is tired. Time to go home, right? WRONG! Not until the closing stage is complete and the essential terms of the deal are reduced to a writing and signed by all

parties or, if all parties are not present, all participants. This reduces confusion at best and might lead to an enforceable agreement depending on the rules of the jurisdiction. Even if not strictly enforceable, it is best to put pen to paper and draft a memorandum of understanding.

The takeaway

Create an interest chart for each side. Identify actions that can be matched to the interests. Examine the reason behind positions being asserted, in terms of the interests identified. Ask "what and how" questions to validate your assumptions. Invent and consider all possible options for all sides and look for mutual gain. Consider mutual loss if a negotiated outcome is not produced.

Doing so will help you best leverage the five steps of negotiation to you and your client's advantage, helping to ensure that your dance with the other side is as successful as possible.



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