

Execute an action plan

Effective negotiation strategies require you to start early and be proactive

By Anne M. Lawlor Goyette

Preparation is key to a successful mediation. Counsel should attend with a good understanding of important facts and issues and a clear view of the client's goals. Enlist the mediator in advance of the mediation session to clarify objectives, address potential settlement obstacles and identify available resources. Take the time to prepare an action plan for the negotiation. Consider the timing and structure of settlement offers/demands and outline desired outcomes. Through thoughtful preparation, counsel can gain significant advantage at mediation and steer the 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 moderate even the most aggressive or irate client's views.

With 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 all these factors in mind, explore an opening position that allows you to strategically move from offer to offer or demand to demand towards 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 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 their story before delivering an offer.

Have a strategy to your demands

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.

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Using settlement brackets effectively

For example, 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 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 for multi-party negotiations

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.

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.

Looking for an early out

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.

In construction defect cases, the general contractor or developer typically takes the lead in sequencing settlement discussions. The lead defense may work to secure a settlement with the plaintiff – either a set number or a total subject to funding. Then, with damages capped, the defendant 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, minimizing costs and exposures. A more popular approach involves the lead defense focusing first on raising money before making a global offer to the plaintiff. Negotiating first with individual defense parties allows lead counsel to gain a solid understanding of available funding and 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.

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.


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