PUTTING A NEW SPIN ON OLD MEDIATION STRATEGIES

By Christine Masters

Conflict has erupted. You and your clients decide to attempt a negotiated resolution with a professional mediator prior to beginning litigation. What follows is a discussion of the traditional, time-honored methodologies, strategies and tactics utilized by counsel preparing for and during mediation, adding a slightly new spin based on recent developments in neuroscience, psychology, and communication. Although this article stems from my experience in employment rights, first as a litigator, and for almost 15 years as a full time neutral mediator and arbitrator, the general principles discussed apply in any type of dispute.

In the end, it is important to remember that you are setting out to obtain a resolution and not to decimate the other side. This mind set differs markedly from gearing up for litigation.

While you must necessarily analyze and evaluate the factual circumstances, applicable legal arguments, and the direct costs of litigation such as attorneys' fees and court reporters, you should also consider indirect costs such as disruption of one's personal or business life and adverse publicity. Equally important is the overarching consideration and identification of the parties' underlying interests and needs. With this information, you are ready to make a realistic assessment of how best the conflict might be resolved in mediation. There are many articles discussing the application of basic psychological principles to legal decision-making which are quite informative in terms of case evaluation and persuasion activities. See for example, the writings of Robert H. Mnookin and Lewis Kornhauser, Richard Birke and Craig R. Fox, and Robert B. Cialdini.

First, try to match the mediator to the dispute and the disputants. There is no perfect mediator, one who can settle every conflict. What settles conflict is the parties' understanding of the interests and needs involved, and their intent to reach a resolution which meets those interests and needs. That said, consider whether you need an evaluative or a more facilitative mediator, one with a firm, domineering approach or one who utilizes more gentle, flexible methods of persuasion, a judicial presence or an expert in a particular experience. While colleagues are a good source for recommendations, direct communication with the mediator regarding his or her style and approach is appropriate and may be ultimately more productive to your decision-making.

Work with the selected mediator to create an appropriate mediation day in light of the identified interests and goals of the disputants. Mediation is not a "one-size fits all" proposition and your input is invaluable. Thorough planning and preparation make the difference in achieving resolution.

Timing of the mediation will vary with the dispute. Often, a mediation is needed immediately, e.g. to ease the exit of a high level executive or where confidentiality is important; in other matters, it makes more sense to develop the evidence, either informally or in actual litigation, prior to coming to mediation. At times, it makes sense to engage in pre-mediation negotiations, either directly with the other side or with the assistance of a mediator; there are times when it does not.

Think carefully about who should attend the mediation. In deciding on who should attend, remember resolution is not just about money; psychological factors play an integral role as well. Discuss with your client the fact that strong emotions may arise during the mediation and provide assurances that the mediator will listen without judging and will attempt to facilitate communications about emotions or disagreements in ways that promote resolution.

Consider and disclose to the mediator any specific emotional needs or obstacles, such as involvement of a spouse or therapist, a party's inability to even be in the same room with a particular individual, or psychological dysfunction or medication use. The opportunity to reach settlement is greatly enhanced by the physical presence at the mediation of the primary decision-makers (including insurance carrier representatives) with appropriate authority. The presence of certain individuals, such as an accused harasser in a sexual harassment case, is not always necessary and can sometimes hinder resolution; at other times, attendance is critical.

The mediator requires thoughtfully chosen and presented information in advance of the mediation day, not a "data dump" the night before mediation. Several days before the mediation, give the mediator the tools and resources to employ to your best advantage with the other side. Instead of a legal primer or conclusory arguments predicting "failure" of the other side, a chronology of events and a persuasive, well-developed theme of the case, supported by reference to selected testimonial and documentary evidence, is most helpful. Instead of sending entire documents, highlight a few key pages. For example, it is generally not necessary for the mediator to be given an entire employee handbook when the at-will language or arbitration provision will suffice.

Often, particularly in pre-litigation mediations, the other side needs information in order to evaluate its position. An agreed exchange of briefs or documents can increase the possibility of reaching resolution at the mediation. Consider including signed witness statements or offering to allow the mediator to contact witnesses during the mediation. Consider sharing financial information, if there will be an issue of ability to pay or threat of bankruptcy; otherwise such a claim made at mediation may be dismissed as a mere negotiating ploy. Whether giving information only to the mediator or exchanging with all participants, it is simply not productive to overwhelm the process with lengthy power point presentations, complex charts or graphs, or obsolete jury verdicts.

Formulate a negotiation strategy in accordance with identified interests. Outline hypothetical negotiations, anticipating probable responses to your proposals. Consider the style of the negotiator on the other side. Decide how much information should be disclosed to the other side to justify each proposal. Review your negotiation plan with the client prior to the mediation session.

In preparing a negotiation strategy or plan, helpful information may be found in the fairly voluminous literature on cognitive bias. Cognitive bias has been defined as the human tendency to make systematic errors in judgment, social attribution, and memory because of factors other than evidence. Several interesting studies involve the concepts of "priming" and "anchoring," which refer to decision-making affected by information and positions asserted by outside influences. Those studies suggest that it can be advantageous to be the first to set the parameters of the mediation discussion, to identify early the issues that favor your side, or to make the first settlement proposal which can "anchor" the negotiation. After the opponent's opening, re-anchor your position with a counter proposal which moves the focus away from the opponent's proposal. (See Wistrich, Guthrie & Rachlinski, 93 Cornell L. Rev 101 (2007); Wistrick, Guthrie & Rachlinski, "Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding," U. of Penn Law Review (2005).)

Consider some sort of a "joint session." The mediator can start the day in a number of ways: joint session with everyone present, meeting of counsel only, or separate meetings with each side. Many lawyers automatically reject the idea of a "joint session," believing it to be a waste of time, or worse. In some cases, that may be true, but remember that social scientists and psychological and behavioral business studies regularly demonstrate that first impressions, verbal and non-verbal, can be critical in achieving resolution.

Work with the mediator to decide what, if anything, might be accomplished in joint session in any particular dispute. Frequently, it is enough that a joint session take place, allowing the parties to meet and shake hands, listen to the mediator talk about the ground rules and confidentiality of the process, and agree they are present to explore possible resolution. The mediator might also seek commitments from the participants that they keep an open mind and avoid stereotyping the other party or attorney with whom they disagree.

In some cases, a detailed opening statement from counsel about the dispute, or a particular issue, is appropriate and productive. While some lawyers may be (rightfully) hesitant about letting a client speak, there are occasions when participants speaking directly with each other can be incredibly impactful, especially where there will be a continuing relationship between them. Parties should be coached on non-judgmental communication and compassionate listening techniques. These are dynamic processes, which involve noticing one's own judgments and putting them aside temporarily in order to truly hear what is being said. Among others, Dr. Marshall Rosenberg at The

Center for Non-Violent Communication has written about the importance of "non-violent" language in transforming conflict into a mutually agreeable outcome.

Be mindful of your negotiation style: competitive "hardball tactics," a cooperative attitude, or a combination of styles. Which style is best, and when to use it, depends on the circumstances of the particular dispute. What has worked in cases in the past may not work with the current case. Moreover, contrary to the notion that a hard, competitive negotiation style translates into better settlements, there is indeed a scientific basis for the old adage "you catch more flies with honey than vinegar." As a negotiating tactic, empathy might actually increase the likelihood of achieving one's goals for resolution.

Most counsel present their cases in a civil, professional manner, setting a tone conducive to open communication, mutual respect, and resolution. However, there are those, often at the instruction of their clients, who choose to engage in *ad hominum* attacks or "war is hell" negotiation tactics with the goal of leaving the other side devastated and begging to settle. Some scientific studies have shown that empathy raises the level of oxytocin in the brain and that it was positively associated with increased monetary reciprocity toward the person who initiated the empathy; other studies have shown that increased testosterone actually decreased generosity. (See "Empathy toward Strangers Triggers Oxytocin Release and Subsequent Generosity," by Jorge A, Barraza and Paul J. Zak). Thus, you might mollify threatening or condescending arguments, and avoid communicating in terms of "right" and "wrong."

I hold with the view that diplomacy is the art of letting someone have ***your*** way. Indiscriminate use of hardball tactics can frequently result in the opponent becoming totally resistant to settling a matter, even on terms which meet their own interests. The question one must answer in developing a negotiation strategy is "do you want to settle or do you just want to make a point." Hardball tactics are best used, if at all, only in private caucus with the mediator to allow him or her to convey the strength of an offer or a demand to the other side.

Stay engaged with your clients and the mediator. The dynamics of mediation change throughout the day as more information is exchanged and settlement negotiations develop. Most mediators do not follow any set regimen and welcome suggestions from counsel regarding process. Frequently, a face-to-face meeting with counsel outside of the clients' presence may result in concurrence as to next steps or possible ranges of resolution so long as the disputants understand the reasons for it. In an article from the Harvard Law School Program on Negotiation, Harvard Business School Professor Deepak Malhorta postulates that negotiators tend to feel pressured when they're performing in front of an audience (e.g. clients). The negative effect of an audience is especially strong when the consequences of a failed deal are extreme.

Prepare your client for the separate caucus with the mediator. Mediation is a process which takes time. Lay people look to the mediator to hear their story, to give them "their day in court." They often have little grasp of the complexity of the law or the difficulty of prevailing in a lawsuit. Most mediators will utilize the separate caucus to engage in reality testing and risk analysis of the likely outcomes of potential litigation. Disputants should be prepared to talk to the mediator without giving away strategic secrets such as an inability to pursue litigation or showing negative personality traits that will not further the identified goals. Much of a mediator's time and energy is spent helping the parties understand the risks of losing and that even a "win" at trial may not achieve intended results.

Keep careful track of each offer or demand, including the length of time it takes to get each new proposal. During the day counsel should be comparing the actual negotiations with the negotiation plan, assessing and reassessing new information and proposals. Based on the size of the change in each new proposal and the time consumed in obtaining it, a significant move may be required in order to kick the negotiations into a higher gear and to see whether the other side responds in kind. At times, giving something the other side considers important which is not as significant to you can move the negotiation along, especially when couched as a "win" for the other side. Indeed, in their study, "Prospect Theory: An Analysis of Decision Under Risk," Nobel Laureate Daniel Kahneman and his partner Amos Iversky found that when confronted with what is perceived as a "loss," most people will tend to become [less] risk averse, making the gamble of trial relatively attractive.

If negotiations appear to impasse, counsel and participants are wise to remember that no one can predict the outcome of litigation with any certainty, other than that one side will win and one side will lose. Attorneys and parties are frequently victims of their own "confirmation bias," or the tendency to bolster a hypothesis by seeking evidence consistent with that hypothesis and minimizing inconsistent evidence or assumptions. In other words, notwithstanding the mediator's "reality testing," people tend to process information in a way which supports their basic beliefs, fail to appreciate information supporting an alternate conclusion, and are simply reluctant to revise their initial expectations.

Attorneys and parties are often overly confident that their predictions of outcome are accurate. In a 2008 study researchers found that more than 60 percent of the time, plaintiffs would have been better off accepting the last settlement offer rather than proceeding to trial; defendants would have been better off 25 percent of the time. While the average cost of a plaintiff's decisional error in negotiation is small, the average cost of a defendant's decisional error can be staggering. The study, "Let's Not Make a Deal: An Empirical Study of Decision Making in Unsuccessful Settlement Negotiations," is reported in the Journal of Empirical Legal Studies.

Before you just walk out declaring the mediation a failure, try again to work with the mediator to keep the dialogue moving toward resolution. A mediation may be temporarily adjourned, to be reconvened at a later date after the parties have had time to digest what has occurred during mediation or to obtain additional information, informally or formally, i.e. through discovery.

You might call the other side's bluff, if their message has been too strong to be productive, by asking for a face-to-face meeting of counsel. Another alternative might be to give a “bottom line,” a last, best and final proposal. Once you do draw a “line in the sand,” stick to it within reason. In making such a proposal, a wise mediator once said, “close the door, but do not lock it,” e.g. use words to the effect that this is the best that can be done *today*.

If a last, best and final proposal has been made to you, carefully consider the various needs and interests you and your client identified at the outset. While one might be inclined to simply reject a proposal which does not meet their own “bottom line,” pride or ego should not cause a categorical rejection of a proposal that, while not totally meeting your expectations, comes close. Nor should a moral high-ground derail an otherwise acceptable settlement. Negotiations may resume at some point in the future. Accordingly, if the other side’s last, best and final truly does not meet identified needs, it should be rejected with respect, grace, and an expression of appreciation, either directly or through the mediator, to the other side for its efforts.

Another tactic, which can also be effective to move a recalcitrant opponent into a different settlement range, is to withdraw a prior proposal. It is amazing how attractive a proposal may seem once it has been withdrawn and is no longer available. As a last resort, consider whether to allow the mediator to make a mediator's proposal. A proposal from the neutral may be considered in a different light than the same proposal if made by an opponent.

In conclusion, while table pounding and adamant positions may seem heroic at the time, the thrill of victory is generally short lived, while the agony of defeat may last much, much longer.