WINNING MEDIATION TECHNIQUES FOR PLAINTIFFS

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I.
INTRODUCTION

Former Chief Justice Warren Burger once remarked: "Our [litigation] process is too costly, too painful, too destructive, too inefficient for civilized people.' This is a succinct statement of the reasons so many parties and lawyers n)w first turn to mediation as a basis for dispute resolution. The process is binding only N there first is an agreement -- the parties remain in control of the outcome. The process is confidential and generally non-confrontational. The mediator is not a judge who makes a decision but a facilitator, who is impartial (although he or she may seem partial when playing devil's advocate to check the strengths of a party's positions).

On average 80-95% of all cases which enter mediation settle. Those which do not generally fall due to one of the following: lack of key discovery; a psychological "lock" on positions as contrasted to interests; a lack of key decision makers at the process; reactive devaluation of offers from the other side; or extreme risk aversion.

It is natural for each side to have mixed feelings at the end of even a successful mediation process -- after all each has generally compromised based upon risk assessment. However, as both a mediator and an attorney, I have seen a i participated in a great many mediations where the result not only appeared to be lopsided but indeed was so. The difference in these cases came down to one or the other party's misunderstanding of the keys to the process and the lack of careful preparation.

II.
MEDIATION AND PREPARATION

Since there are no appeals from a settlement voluntarily consented to following mediation, it is essential that both parties and both lawyers prepare well. Strangely, however, most come to mediation sessions and simply "wing it." Most mediation participants fail:

- To have an advance game plan;
- To do a careful study of their own clients BATNA (Best Alternative To a Negotiated Agreement) or WATNA (Worst Alternative To a Negotiated Agreement);
- To analyze the opposing party's BATNA and WATNA;
- To have any sensitivity to the signals that are sent with each offer and counteroffer;
- To prepare effectively to impress the opposing decision maker during the joint opening statement; or
- To understand or use any of the tools of respect, empathy and even apology for the plight of the opposition.

III.
PRIOR TO THE MEDIATION SESSION

Before the mediation, counsel and the participating party representatives would get together and discuss the following:

1. .Who will be the primary spokesperson in each phase of the mediation process?

2. What are our BATNA and WATNA and what are the opposing party's?

3. What should the opening position of the party will be as to dollar demands or offers?

4. Should any particular information be reserved and withheld during the opening joint session for later use during the caucus sessions?

5. What should be included in the briefs and exhibits and whether to submit in the briefs and exhibits and whether to submit any special information for "the mediator's eyes only?"

6. How to put our best foot forward in the joint session opening statement and what persuasive exhibits should be used.

IV.
AT THE MEDIATION SESSION

Generally each mediation will start with a joint session attended by all party representatives. Come prepared to persuasively present your position. It is often said that mediators are neutral facilitators and do not need to be persuaded to a particular position. This in only partially true, however. A mediator will be unable to completely eliminate his or her biases and they will effect which party is pushed the hardest and longest during the individual caucus sessions.

Furthermore, while the mediator may be neutral the opposing decision maker is not. Each party's presentation should be aimed at persuading the opposing sides decision maker of the strength of the presenting party's case. Do not downplay the role of the joint session! Consider use of overheads and charts or, videotape. Think as though a short, punchy closing argument is being presented. One particularly effective technique is to use overheads that list both the strengths of your party's position and the weaknesses of the opposing party's position in a side by side comparison. Another is to list the key documentary exhibits and testimony that would be offered at trial with a brief explanation of the importance of each.

The joint session is always followed by private and confidential caucuses with each party individually. This is the time when shuttle diplomacy will be played out. During these sessions is the time to both share particularly important points with the mediator that can be used to gain leverage when needed. This is also the t me to share what you believe will be the primary obstacles to settlement that the mediator must deal with or defuse. Finally, it is the time to react to what the other side brings up. Give a reasoned response for the mediator to carry back to the opposition.

V.
DURING FOLLOW-UP

Often resolution is not reached in one mediation session. Do not give up on the process use the mediator to assist in follow-up and to suggest a specific date for a second session when needed. Stay flexible and prepared. Consider exchanging follow-up briefing on sticking points.

VI.
TEN PROVEN WINNING TECHNIQUES

1. **Take the Opening Joint Session Seriously as a Time to Persuade.**

Open emphatically but leave the righteous indignation and polarizing language at the office. Use advocacy aids. Prepare exhibits and comparative charts to educate the decision maker for the other side on the strengths of your case and the weaknesses of his or her own.

Your goals are not merely to argue the merits of your position but also to: overcome the inherent distrust of the opposition; minimize the feelings of threat; aid maximizing the concept that dispute is a problem to be solved together more than an issue to be won or lost. Explain and persuade do not steamroll. Show off your level of preparation.

Match your strategy to the mediator. If the mediator tries to predict how a court would decide the case, your job will be to persuade the mediator, not just the opposition, of your strengths.

2. **Save a Few "Zinger" Points to Bring Out During the Caucuses.**

Remember the mediator is a resource. In addition to being a wise "friend" trying to help the parties discover an acceptable agreement, he or she is also an instrument or messenger through which you can effect the other side's expectations. Saving a few choice supporting points can help you and the mediator leverage the opposition into movement when the process appears to be walling.

3. **Keep a Chart of All Offers and Watch for Patterns.**

Almost all offers fall into certain patterns when charted. Keeping careful track of the size of movements will help to educate you on the opposing party's true range of authority. When necessary

be prepared to use your clients trust in t e mediator as a neutral evaluator to help shape counterdemands.

4. **Listen Acutely and Understand What are the Primary Needs of the Opposition.**

You will need to develop a deal that the opposition will accept. Listen to them, if you want them to listen to you. Try to express empathy for their problems arid avoid threatening or humiliating them.

5. **Focus on the Alternatives to a Negotiated Resolution Not Your "Bottom Line."**

Understand and focus on your BATNA and WATNA. Try not to have or communicate a "bottom line." Once the mediator has learned your bottom line he or she will generally go to work on changing it in order to bring the parties to overlapping positions. It is best not to disclose a "bottom line" but rather to disclose only current positions. The best mediators do not want "bottom lines" because they polarize the participants into hardened positions. If forced to disclose, however, leave some wiggle room so as not to bargain against yourself. Generally keep your disclosed "bottom line," if communicated to the mediator, about 20% high.

6. **Watch for the Mediator's Tricks for Learning Your True Bottom Line.**

One favorite trick used by mediators to discern your *bottom line" indirectly is to ask: "What is the most you think the other side will ever offer?" The premise is if you are in attendance and willing to entertain such an offer you will ultimately take it.

7. **Discuss Strengths and Weakness in Caucus.**

A better role for the mediator and the parties during the caucus session is to discuss both your primary strengths and weaknesses. and your perception of the strengths and weaknesses of your opposition. This allows the mediator to push on the opposing sides weaknesses in order to

encourage compromise. Do not downplay your weaknesses to the mediator. Act confident.-that you can overcome them.

8. **Never Threaten to Walk Out Unless You Mean It Stay Flexible and Avoid Anger.**

Keep working as long as the mediator sees hope. Walking out or even threatening to do so polarizes parties. Simply tell the mediator to convey that you were upset or offended by the last offer and lack of movement. Anger clouds judgment. Avoid it.

9. **Set a Time Deadline in Advance.**

Most of real movement in any negotiation comes at the tall end of the process. Deadlines stimulate that movement and tell you when to be most prepared for it. Set the deadlines at the beginning, however, by agreement. Artificial deadlines imposed later in the process are threatening and polarizing.

10. **Don't be Afraid to Seek Follow-up Joint Sessions When Appropriate.**

Remember that the key is to persuade the decision maker for the other side. Sometimes follow-up joint sessions can be effective t6 look that decision maker in the eye and politely but firmly refute or react. This is particularly true when the mediator appears weak. Ask for follow-ups when needed to persuade or ask clarifying questions directly.

It cannot be over emphasized that preparation is the key to persuasion. Like in trial, the better prepared party ends up with the better settlement deal. Good luck.

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