

Tips to Optimize Settlement Outcomes in Mediations

Before the Mediation

Identifying Each Side's Goals

Understand your goals, risks, best alternative to a negotiated agreement (“BATNA”) & worst alternative to a negotiated agreement (“WATNA”). Understand the other side’s goals and interests. This allows you to gain power from information, accurately evaluate your case, and find creative resolutions.

Client Preparation

Prepare your client for the mediation so that your client does not become an obstacle to settlement. Make sure your client is comfortable with zoom technology (if you are using it) and has the ability to participate. Ensure they know that the mediation is not the forum to be “right,” that they are permitted to speak to the mediator, and that the mediator, even in a remote setting, is bound by confidentiality rules.

Communicate with the Mediator

Speak to your mediator in a pre-mediation conference about obstacles and avenues for settlement, the process, and information that you may not want your client to hear. If it’s a remote mediation, determine whether the mediator has an IT expert or assistant that can facilitate the session if the technology collapses, your client does not have state of the art technology, or your client has other concerns, apprehensions or expectations.

Sharing Briefs and Other Information

Share your mediation brief with the other side– this gives you an advantage in the mediation so that the other side comes to the mediation with a more realistic case evaluation (you can hide your smoking guns and confidential information). Often, the actual decision makers are not present and this is likely the best opportunity to get top results. Both sides need to be prepared for the discussion, including having a clear idea of the issues, the stakes and the demands/offers.

Confidentiality Considerations

Be prepared in advance if any participants in a remote mediation are actually situated elsewhere, whether another state or country. The rules of confidentiality may be different in different locations and this information should be addressed in advance.

During the Mediation

Making Reasonable Offers/ Demands & Negotiating Reasonably

Be appreciative of offers and concessions. Make sure the other side knows they have been heard and that you are trying to accommodate their interests. Even the appearance of collaboration, rather than aggressive tone-deaf bargaining, will produce more favorable results. People are pre-disposed to want to collaborate and likely will not agree without believing they have experienced a gain. Sometimes preexisting relationships exist that can either hurt or help. However, it is critical at all times to keep the flow of the conversation open and not stymied by an insult or attack that does not keep the momentum in a forward motion.

Anticipate Issues Arising From “Online” Nature of Mediation

Ensure that there is clear knowledge of the participants present at the remote session. Have each participant be recognized and confirm their understanding of the confidentiality of the session. Address the problem of distractions and practical issues that may reduce their ability to hear or understand what is being discussed (kids, pets, leaf blowers, loud conversations in adjoining offices, etc.) Also, revisit the issue of the physical location of participants so that the reach (or lack of reach) of confidentiality protections are not mistakenly ignored. The location may also bring in the issue of different time zones making some parties limited in their participation by time constraints.

Keep Your Numbers Within The “Sweet Spot”

Anchor (initial offer/demand) wisely - find the sweet spot that is high enough for concessions but not insulting enough to provoke retaliation in kind. Negotiations often resolve at the midpoint of the first “reasonable” offer and demand. There is a tactical advantage to making this first reasonable offer/demand and there is often a disadvantage to starting with an unreasonable demand or offer. As noted above, with remote sessions in particular, it can cause the conversation to implode quickly and spend time wasted trying to change the mindset of the decision makers.

Track Movements and Concessions Carefully

Concession patterns reveal messages, so be careful how much you compromise and what that can mean to the other side.

Consider Creative Solutions

Creative resolutions can bridge the gap (payment plans, structured settlement, accommodating business or reputational interests). Look for a trade-off of interests or mutual interests. If the other side wants something of low value to you, let them have it. This often kicks into gear the “rule of reciprocity,” a well-studied social obligation that influences people to repay favors/kind acts. Never lose track of the fact that in mediations, anything and everything can be on the table. The restrictions of the “law” do not exist here. Also, participants are able to remain in their space of choice, whether at home or at the office or elsewhere, allowing them safety and the opportunity to maximize their time and being open to a wider variety of potential benefits.

Civility During Negotiations

Place nice with opposing counsel – “Likeability” is the best way to achieve your goal. Show respect and generosity. It will be reciprocated. This is particularly true with respect to the one who will be writing the check. It does not pay to insult or disparage that check-writer.

Mediated In-Person or Not

Carefully analyze the advantages and disadvantages of mediating remotely or in-person. Remote sessions offer tremendous advantages, including financial savings, transportation time savings and the ability to participate from anywhere in the world. If an in-person mediation seems appropriate or necessary, they can be arranged as well as considering hybrid sessions, so the advantages of in-person sessions are not precluded. Solely digital or telephonic negotiations lose the access to rich information that comes from body language, and are often seeded with the pitfalls coming from loss of communication and nuance. Ninety-percent of all information is communicated through body language. This remains available both in person and remotely.

Be Mindful of “Power” v. “Force” v. “Control” During the Mediation

Use power to your advantage when you have it. Power can be in the form of information, resources, relationship dynamics, access, etc. Be careful not to intimidate too much such that the other side refuses to negotiate.

Consider Joint Sessions

If appropriate, such as when a dispute is between business entities or between parties who have had a cordial relationship in the past and the acrimony has not completely destroyed communication, consider a joint session at some point in the mediation. With remote technology, the session will be “safer” for the disputing parties and the mute button can be used to shut down explosions immediately, or can be used to ensure uninterrupted presentations.

Executing Settlement Agreements

Have your client sign the deal before you leave the mediation if at all possible. This is more difficult with remote sessions unless counsel are prepared. It is always helpful to have a draft settlement drafted in advance and shared virtually at the end of a successful session. When people “sleep on it,” they often have second thoughts or they have been influenced by persons without the same information not present during the mediation. If a signature cannot be obtained within the session, one option is to send an email to all participants relaying the deal points and to have each respond affirmatively that the characterization is accurate pending the actual execution of an agreement. While this may not be legally enforceable, when people affirmatively confirm positions and information, there is a far higher likelihood that the deal will be signed sealed and delivered.

Always Move Towards Resolution of The Case or At Least The Issues

Do not take a backward step when negotiating, unless something drastic has happened, as it almost always engenders poor negotiating behavior from the other side. Also, consider that brackets provide information about midpoints to the participants, while providing some cover.

Focus on Solutions, Not Fault or Blame

You can resolve a case even when the sides disagree about the underlying facts. However, if one side (or both) insist on being “right”, the likelihood of settlement is remote. All parties must untether from the need to be right.

Keep Risks and The Risk Takers In Mind

Use contingency agreements to derive value for the risk taker.

Strategically Using Time and Timing

Put time constraints on open offers. People are more likely to accept your offer given the concept of scarcity.

Argument Dilution

Avoid argument dilution when negotiating.

Be Prepared to Provide the Basis for Your Positions

Explain why you want what you want. It is more likely the other side will comply with your request when a reason is provided. However, the numbers will become untethered to legal and factual merit as the participants move closer to settlement. Calm your client and have them expect at some point that the exchange will only be about the numbers and not the merit or “legal justice.”

Post-Mediation Settlement Negotiations

Even if the case does not settle at the mediation, use the mediator to help negotiate stipulations, scheduling, and a later settlement. The mediator can also offer a mediator’s proposal.

Even a Failed Mediations Can Yield Information and New Insights

Good faith negotiations are rarely a waste of time. Both sides will learn about their case and the other side’s case. Pay attention to what the mediator is talking about and what evidence supports the other side’s positions. Pay attention to who is present.



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