



The Art of Settlement: Techniques for Better Deals

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This presentation will cover:

- ▶ **Before the Mediation**
How to prepare yourself and your client for a successful session
- ▶ **During the Mediation**
How to Negotiate in the Most Effective Manner
- ▶ **After the Mediation**
When Cases Settle and Do Not Settle

Before the Mediation



KEY TO SUCCESSFUL MEDIATION IS PREPARATION

KNOW YOUR CASE - INFO IS POWER

make sure to have an accurate evaluation of your case - know evidentiary support, BATNA, what other side wants, comparative verdicts, costs & risks

TIMING OF MEDIATION

SELECTION OF MEDIATOR

- *consider other side selecting – you can call to interview
- *consider: nurture, nuance in law, experience w facts, experience w creative resolutions, strong evaluation from a judge, consider personality of opposing counsel, ongoing relationship of parties & client control

DO NOT HIDE THE BALL

Exchange documents digitally – so you can understand your evidentiary support and the other side can understand the support for your position. Google drive, Dropbox, Email, Settlement Docs.

Other Preparatory Considerations



Know about the other side

Prepare your client



Share your brief

Collect Information About Similar Situations Because It Can Give Power in the Negotiation (Good Persuasive Technique)

- ▶ **Similar verdicts and settlements - i.e., shoulder surgery**
- ▶ **Similar values of property, etc**
- ▶ **Similar valuations of business**
- ▶ **Similar treatment of others (i.e., employees or tenants)**





If you are mediating, do not have earlier settlement discussions if possible: creates floors & ceilings



No backward negotiation steps without warning and good reason

Pros v Cons to Remote



PROS

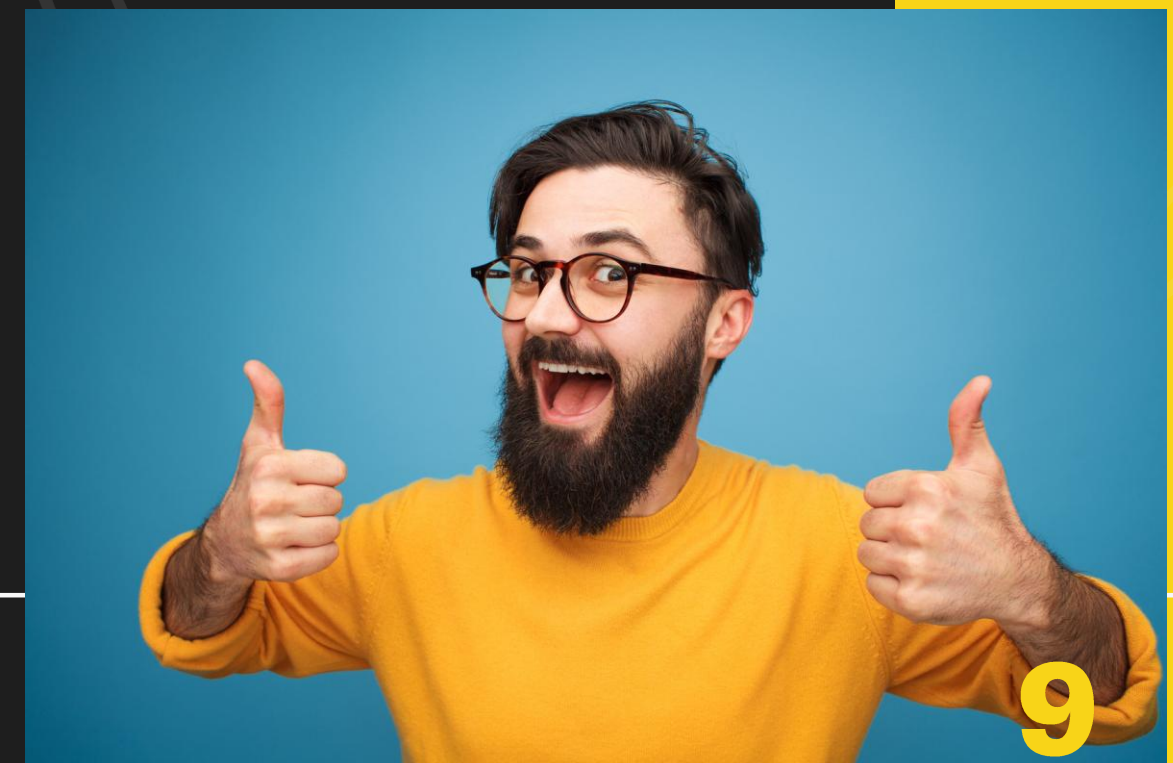
CONS

Consider: Client location, client focus, client connectivity

Speak with your Mediator

Identify obstacles & options to settlement

- Do not use to just argue your case
- Identify tricky dynamics
- Issue prioritization
- Conditions to the process – can be verbalized & negotiated
- Relationships with client, between clients and opposing counsel
- Allows mediators to ensure you bring important documentation
- Allows mediator to make sure critical participants are present or available on Zoom (i.e., insurance carriers when necessary)



Play Nice with Opposing Counsel

People give more to people they
"like"



MEDIATION DAY



Anchoring Number

First Demand/Offer



Who goes first? Does it matter?



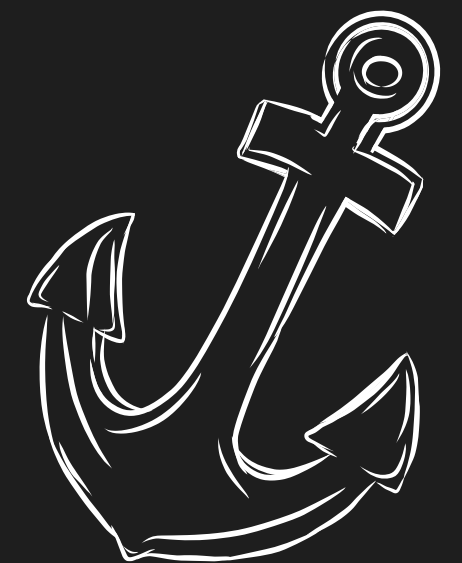
Cases settle at midpoint between "reasonable" numbers. Advantage to going reasonable first.



Find the sweet spot - too big causes an insulting response - goal is for generosity & positive negotiating behavior



Large, unsupported numbers are red flag - better to attach












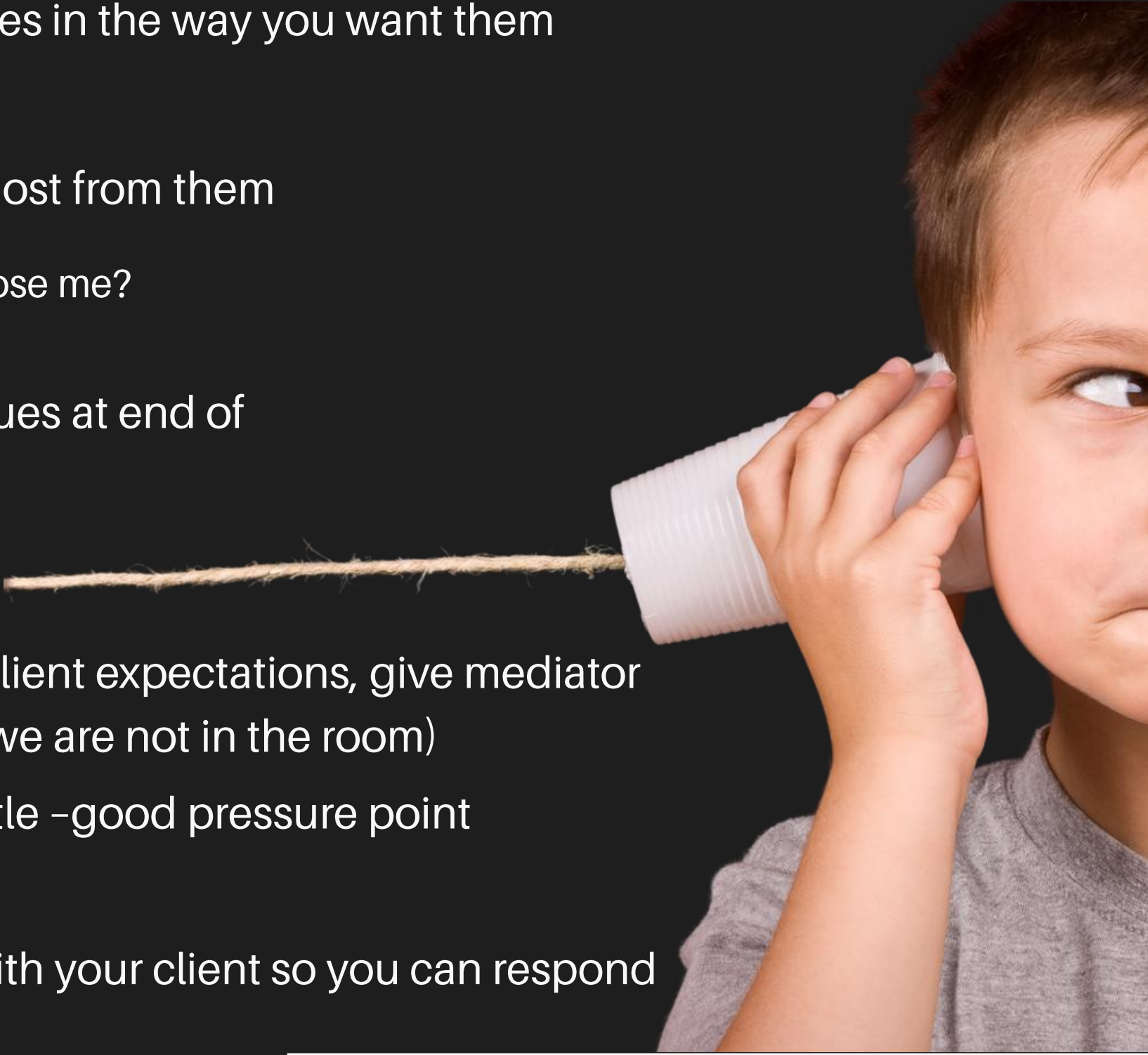
Concessions

- Pattern Sends Messages – not too big early
- Rule of Reciprocity – the dance
- Be flexible
- If you stop making concessions & offer something creative, other side will assume you have no more money to negotiate with
- Never give a concession without getting one in return
- % move v \$ move to justify
- Accompany requests with information – studies show that people give more when given information (*Triggers)
- Save some concessions for the end of the negotiation when mediator pushes
- Stop Short. No backward step – engenders negative negotiation behavior in other side
- Open to change of process – dance may not work w micro moves
- How many? Depends – don't let negotiation dance get stale



Mediator Communications

-  Mediators work for you! Make sure mediator is conveying messages in the way you want them conveyed
-  We do this everyday so make your mediator your partner to get most from them
- 
 - What would you do? What am I missing? How would you oppose me?
 - What should my next move be? How can I get more?
-  Make sure your mediator knows all issues at outset so no new issues at end of day
-  Ask mediator about emotional temp in the other room
-  Meeting w mediator without your client can be helpful (help set client expectations, give mediator true position without posturing for client, reveal dynamics when we are not in the room)
-  Share BATNA, litigation strategy, fees & costs should case not settle –good pressure point (costs/risk analysis), especially if attorney fees are recoverable
-  When mediator not in the room – consider the new information with your client so you can respond
-  No combative listening



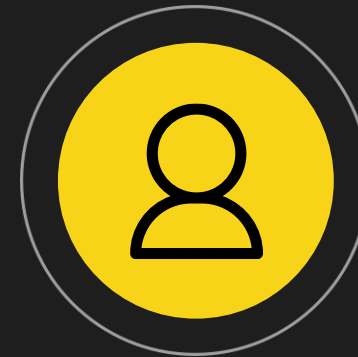
Should You Reveal Your Bottom Line to the Mediator?



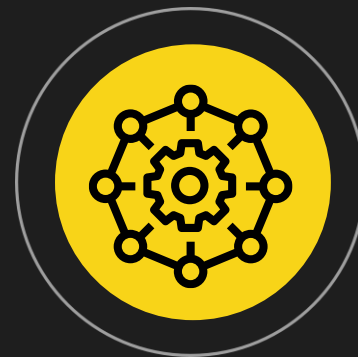
Mediator Tools to Bridge Impasse



Hypothetical Questions - behind the scenes without committing party



Use of Brackets - simultaneous jump when everyone scared to move



Objective Framework to determine valuations



Mediator Proposal

Consider Bridging Impasse with Creative Resolutions



Create win-win solutions by trade-offs of underlying interests or different priority of interests



Can include: payment plans, reputational rehab, media access, business interest, ongoing personal or business relations, etc.



Can agree to an objective framework for determining Value or settlement amount



Negotiation Tips



Exploding Offers



Avoid Argument Dilution



Contingency Agreements



The More That You Explain, The More Likely You Are To Get What You Want



Power in Negotiation



Stop Before Full Authority – so Other Side Feels the Stretch

After the Mediation

If Settlement is Reached, Put Terms into a Settlement Agreement

- Memorialize terms in writing and get a signature before leaving the mediation
- Short Form agreement / Email confirmation
- Long Form agreement – can negotiate this before arrive at the mediation, or ready when getting close to the settlement – in a reasonable range
- Use your mediator to help with language if have a disagreement
- Waive confidentiality for enforcement of the agreement
- Section 664.6 for court to retain jurisdiction

***Have mediator stay with you until agreement is signed**

Protect Your Client in the Settlement Agreement

1

If your client is accepting a Payment Plan:

- Stipulation to Entry of Judgment when using payment plans
- for total amount immediately due
- -Liquidated Damages Provisions (may not be enforceable) – sometimes tied to amount in complaint – puts added pressure for payment

2

If your client is paying with a payment plan:
Make sure to have a significant cure period should they miss a payment

3

If defendant has trouble paying each month (emotionally or administratively), set up for auto transfer through bank

4

Use Your Recitals if settlement relies upon a representation

- i.e., rep of no insurance, closing business, no tenants
- court can only look at 4 corners of the agreement so make sure everything is in there.

When a Case Does Not Settle

- 95% of cases will settle – so do not do anything to make it more difficult – “yet”
- Keep us mediators involved - when good time to reach out again
- Let the mediator set you up for a successful second session – what documents do you need? What discovery can they help you with? Dispositive motions?
- Memorialize terms of agreement thus far should there be any
- Set up an objective framework?
- Mediator’s Proposal?
- Cc mediators on your settlement correspondence
- Pay attention to Confidentiality Limitations



**Good Faith Negotiations are Never A Waste of Time.
Can get you closer to settlement and you learn
valuable information.**

**If You Have Any Questions,
please do not hesitate to
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