Obtaining better mediated settlements

There are five common obstacles to overcome in reaching a better settlement.

By Joe Ramsey

[Ed. Note: This is the second of a two-part article. Part 1 can be found in the April edition of Plaintiff.]

Common negotiating problems and solutions in mediation

As a mediator, I regularly encounter certain recurring problems during negotiations toward settlement. I will identify and discuss five such problems and how I try to solve them, in the following order:

- The most vexing problem are negotiations that start with a clearly unreasonable position, especially if money is the only or clearly the most important matter in dispute.
- Extreme distrust by one or more parties can paralyze the mediation process.
- Diametrically opposed perceptions of the same evidence are not uncommon.
- A marked change in negotiating direction well into the process can derail progress and set the process back.
- Finally, until a settlement is reached and reduced to writing, vacillation and doubt too often block progress and may predict buyer's remorse even after agreement is reached. Obviously, two or more of these problems may be happening at the same time.

Unreasonable starting positions

Especially when money is the only matter in dispute, a major recurring deterrent to good faith compromise arises when the parties assert *unreasonable positions at the outset.* Since plaintiffs seeking money damages usually begin the negotiations with an opening offer or "demand," plaintiffs often set the tone for at least the initial exchanges of offers. Unless the opening offer by the plaintiff is moderated somewhat, it frequently invites a "like kind" response: "That's absurd. I'll show them what's unreasonable. Offer them $1.98!" Almost always, this bad start takes valuable time to get the parties back into a range where both sides begin to experience some anxiety. I characterize this initial challenge getting from the "ozone" to the "twilight zone" in which both sides begin to realize that they will be better off reaching settlement.

I try to expedite the voyage to the "twilight zone" in several related ways. First, I encourage the parties and their counsel to share an objective evaluation with me in confidence. In this process, we are able to expose and discuss weaknesses in the parties' positions. Often a plaintiff will end up agreeing with me in private caucus that, on the plaintiff's "best day," he or she is not likely to get more than $X from a jury. Similarly, a defendant will often end up agreeing in private caucus that, on the defendant's "best day," a jury will likely find the defendant liable for something in the range of $Y. Usually, this approach does facilitate getting to resolution more quickly.

I often suggest a variation of this approach, especially if one side decides that the other is "not dealing in good faith" and refuses to respond to the last "non-offer." I assure both sides that I will persist with the process as long as there is any hope but that I have an ethical obligation to find out sooner rather than later if there is no hope. Most of the time, with that in mind, both sides will reevaluate their positions and tell me in confidence what they see as the least plaintiff will accept and the most defendant will pay. Even though the parties are probably still negotiating with me, most of the time I can get a pretty clear idea what will settle the case, and settlement follows relatively quickly.

Extreme distrust

Sometimes the parties distrust one another to such an extent that distrust precludes reason and shuts down communication altogether. Disabling distrust occurs most often when one or more parties perceive the opposing position as a betrayal or a personal attack. Examples include family business disputes, estate disputes, longtime business relationship breakups and many employment cases. I have seen extreme examples when the parties refuse even to be in the same room with one another. In such cases, there is an almost automatic rejection of whatever the opponent suggests on the reasoning that what the opponent suggests must be rotten and toxic. The initial challenge for counsel and the mediator is to find a way just to communicate negotiations.

This refusal to consider anything the other side suggests can be overcome in one or more of several related approaches. One solution is to have all sides submit what they consider to be a reasonable overall solution to the mediator who then makes a proposal based on the combined suggestions. In an especially malignant property dispute between neighbors, this approach proved dramatically effective. Each side had predicted darkly in private that the opposition would make specific demands that were absurd and unreasonable. I was delighted to find that neither side suggested anything remotely close to what the opposition had expected. So we started on a much more positive basis than either side had expected – with a proposal made by the mediator rather than communicated by the other side through the mediator. Since the source was not the opposition, each side listened and reacted rationally.

Counsel and the mediator can also work together to have an independent source suggest a solution. The mediator is a logical independent source, and fresh solutions often evolve from an exchange of ideas among counsel, the parties, and the mediator. Occasionally, I have carried this approach a step further by suggesting and getting authority from counsel to act as an intermediary to find independent expertise. A simple example is getting an independent real estate appraisal in a dispute in which both sides are convinced the other side has found and paid for a partisan appraiser.

If all else fails, patience and understanding usually work. In one memorable case in which the parties literally refused even to be in the same room, counsel and I simply outlasted the parties and patiently and assiduously communicated until compromise began to emerge. In another, we recessed the traditional mediation, and I was allowed to meet separately at each attorney's office for lengthy meetings that finally revealed the causes for the disabling distrust and led to a solution.

Diametrically opposed perceptions

It is surprising how often well-prepared and intelligent opponents looking at essentially the same evidence perceive key issues in opposite extremes. I call this the "black/white" problem: One person points to a cat and exclaims: "Look at that beautiful black cat!" The other side looks up in amazement and exclaims: "What on earth is wrong with you? That cat is snow white!"

Zealous advocates do perceive the same evidence differently. In modern litigation, which often involves voluminous documents, it is understandable that perceptions will differ. But the black/white problem also arises when zealous advocates draw opposite inferences from the same undisputable evidence.

Counsel and the mediator can usually overcome this problem by meticulously identifying what each side is relying upon and then analyzing it together. This exercise rarely fails: Either one side has to concede or both sides realize that the evidence is not as clear as perceived. Confronted with reality, denial usually dissipates and then evaporates, and we move on to the next issue.

Marked changes in negotiation direction

In most mediations, a certain rhythm develops, with the parties consistently making positive compromises narrowing the distance between the sides. Sometimes, one party will disrupt this rhythm by making a marked change in direction. When this occurs, the result is almost always negative. At a minimum, negotiation slows or stops while the opponent absorbs the new information and formulates a response. At the extreme, the change can be perceived as sufficiently drastic that the opponent wants to go home. This problem usually arises in one of two contexts.

In the first context, money is the only issue. In money negotiations, the plaintiff starts at a higher amount than he or she is willing to accept after an exchange of reasonable compromising positions. As negotiations proceed, the plaintiff continues to demand less while the defendant continues to offer more. I call this the "North/South" rule: Plaintiffs must continue south, and defendants must continue north.

There is a major disruption when this rule is violated. If plaintiff reverses direction and demands more, the defendant is not likely to respond with a higher offer. Similarly, if defendant offers less, the plaintiff is not likely to respond favorably. Derailment is imminent, and mediation will fail unless counsel and/or the mediator can get the negotiations back on track.

The other context in which a late change of direction can threaten the progress and rhythm established in the mediation arises from the injection of a new and usually non-monetary issue. As an example, in a case of alleged professional negligence when defendants always want confidentiality, a plaintiff may first agree to confidentiality but then renege later in the process. As a related example, the parties may identify the issue early and agree that any settlement will be confidential, but, late in the negotiations, the defense demands substantial liquidated damages if there is a violation of the confidentiality provisions.

In either context, a late directional change is usually the result of poor preparation or a failure to anticipate that the problem might arise. In the North/South context, neither party should be so ill prepared as to realize in mid-negotiation that the case has more or less value. Similarly, in professional negligence cases, counsel and the mediator should have anticipated these confidentiality problems and put them on the table much earlier. In both types of late directional change, counsel for the side asked to respond to the change should be able to rely on the mediator to get matters back on track.

Vacillation and doubt

Vacillation and doubt can jeopardize settlement at two different times. First, even though the parties are proceeding toward resolution, either party or both parties can begin to second-guess the concessions they have already made. Second, "buyer's remorse" can threaten the enforceability of a negotiated settlement even if it has resulted in a written agreement. Both problems will be considered briefly here.

Second-guessing during the negotiating process is not an unusual human response from parties who started the process with a high confidence level but have kept open minds and feel that they have compromised enough – maybe too much. Counsel for such a party will likely inform the mediator that the client is experiencing some doubts and may even backslide. The mediator will likely react accordingly and seek closure from both sides or risk losing the settlement. Experienced counsel has presumably advised the client throughout the negotiations and should therefore work with the mediator to keep the process on course.

"Buyer's remorse" after a negotiated settlement has been reached will still jeopardize the settlement if one party has second thoughts and tries to back out. Experienced counsel and mediators will insist that the parties enter into a signed agreement to memorialize the settlement. If the settlement is reached after litigation has commenced, a provision in the settlement agreement that the parties acknowledge performance may be enforced by motion pursuant to Code of Civil Procedure section 664.6 should make the settlement ironclad. Even if litigation has not been commenced, counsel and the mediator should include a provision that any party may require performance by filing an action to enforce performance and then moving to enforce pursuant to Section 664.6. To my knowledge, this kind of provision has not been tested, but it seems likely most courts would view such an attempt to preserve a settlement favorably.

Parties can include in the written settlement agreement reached in mediation provisions requiring the parties to submit to binding arbitration before a properly selected arbitrator if any disagreement arises in the more formal documentation of the settlement after mediation or in the performance thereof. I have used such a provision in hundreds of settlements. To my knowledge, there has never been a problem with enforcement. In a handful of cases, some arbitration was required, and it resulted in preserving and enforcing the settlement.

Conclusion

By following these suggestions and techniques, the mediation process will be more productive and enable you to achieve a successful result.


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