



DEVELOPMENTAL NEGOTIATION

By Alexander S. Polsky, Esq.

When you're gearing up for a negotiation, it's natural to want to focus solely on your client's interests. After all, it's what they pay you to do!

But by doing so, you may actually work against your client's best interest. Developmental negotiation recognizes that focusing only on one's own interests actually dulls the negotiation process and produces a less-than-satisfactory outcome.

When parties approach mediation or negotiation, each party has needs, some known and some unknown. Proficient negotiators focus not only on the interests of their own side, but also on the interests of the other side. In preparation for the negotiation, these negotiators will actually create interest and action charts to help illustrate the issues and demands that may come into play during discussions with the other party.

What is an Interest? It can be described by single words or phrases, such as "control," "acknowledgment" or "compensation."

The skilled negotiator creates a list of the interests of all stakeholders to the negotiation. Then a series of actions that match or address the specific issues is noted. In the context of a catastrophic injury case, "acknowledgment of loss" may be a specific interest of the injured party. An action could be as simple as the expression of regret or recognition of the impact of the event that brought the parties to the table. Soft actions can be given up early to set the tone of the negotiation.

Once the interests and actions are determined, the mediation process can begin.

There are five stages to mediation. Successful negotiators focus on each and every stage. They analyze, review and consider the interests of everyone, including the representatives, families and actual litigants. One by one, they develop the focus and negotiate with a view toward joint gains.

What are the stages?

Preliminary – This stage includes deciding to mediate, approaching the other side(s) and selecting the mediator and the time, place and manner issues predominate this space. *When should we mediate: the start of the dispute, pre-suit, post-filing and service, midway into discovery or just before trial? How do we communicate desire without signaling weakness? How do we pick a mediator? Should it be our choice or theirs? Should the mediator possess subject matter expertise or dispute resolution skills? What unique traits and sensitivities should the mediator possess considering the issues, parties and representatives?*

Preparation – This is the make-it-or-break-it stage. It is every bit as important as the negotiation itself. In this stage, you prepare yourself, your client, the mediator and the other side for the negotiation. What's critical here is to analyze the interests of the other side, and actions useful to address those interests, and conduct the same analysis of your client's interests. This is also the time where special conditions to "the deal" need to be shared with the mediator and other side. *Many deals fall below expectations because sometimes litigators try to "win" rather than evaluate common interests, find actions to meet the other side's interests and focus on their own key points of the deal.*

Information – This occurs during all pre-negotiation discussions and activities. Using open-ended questions, you are able to subtly ascertain whether the interests you considered important to the other side are in fact meaningful. It is also the time to learn and develop new interests and actions. *You have evaluated the interests of all stakeholders; you have created actions to meet many of the interests during the course of the give-and-take negotiation. In this informal but important stage, your carefully framed discussions will validate or moderate the conclusions you brought to the table.*

Negotiation – This is IT! All your preparation and analysis come into play at this stage. Decisions such as initial offers, demands, approaches and reactions to responses will be in play here. *Should I be competitive or cooperative? When do I make big moves versus little moves? Should I address issues at the beginning or later in the process?*

1.800.352.JAMS | www.jamsadr.com

This article was originally published by LAW.COM and is reprinted with their permission.



Closing – Deals are lost when the settlement is not properly documented. Hence, we will discuss this in detail in our future editions.

The proficient negotiator anticipates the issues that arise out of each of the above five stages. Combining that anticipation with fully recognizing the needs of both sides of a negotiation and aiming to satisfy them will go much further in serving a client's best interest. ■

Alexander S. Polsky is a mediator and arbitrator at JAMS in Southern California. He is also an adjunct professor of law at USC Gould School of Law and has written and lectured on attorney billing practice for the State Bar of California, firms and corporations. He can be reached at apolsky@jamsadr.com.