MOVING FROM PREPARATION TO NEGOTIATION – HOW TO CAUSE FAILURE IN MEDIATION – PART 2

By Alexander S. Polsky, Esq.

A previous post on this topic listed several actions by parties and counsel that can derail even the most straightforward mediation. This post continues that list.

Allowing someone with a separate agenda to influence the client's decisions: Plaintiff does not speak English. Her bilingual boyfriend attends mediation, obstenibly to translate. However, he has an agenda, which includes controlling the plaintiff's decisions. He consistently undermines the advice of the counsel and prevents direct communication between plaintiff and the mediator. The plaintiff has lost the opportunity for a meaningful discussion with the neutral. She has lost the ability to participate in the process, and her pre-conceived notions—and those of her boyfriend—remain obstacles to settlement. The only people attending mediation should be those necessary to advance the process.

Personal attacks on the opposing party or counsel: A sure way to derail negotiations is to begin by insulting the other side in pre-mediation letters, call or briefs. Gratuitously insensitive remarks in mediation serve only to inflame emotions. Criticisms may be entirely valid and should be aired, but the manner in which they are raised, as well as the person raising them, is important. Sometimes the mediator best delivers an unwelcome message.

Opening the negotiation with ridiculous demands and offers: A ridiculously high demand invites an equally ridiculous offer. A reasonable demand met by a low-ball offer discourages a counter demand. Participants justify these positions by their desire to communicate resolve. There are other, more effective, means of sending that message. The amount of movement in the offer or demand as the mediation unfolds communicates the degree to which a party is committed to a position without derailing the mediation at the outset. A ridiculous offer or demand requires a huge early jump that generally diminishes credibility. Every case has a range; start within it and you are more likely to settle.

Refusing to disclose information that is driving settlement decisions: Early in the life of a case before discovery is complete, one side has key information which it does not want disclosed. Yet it is making decisions based on the secret sauce. Trying to convince the other side, the mediator can only say, "They have evidence that I think will be a real problem for you, but I can't tell you what it is." Attorneys cannot negotiate with a phantom.

Introducing new terms late in the negotiation – lead with the deal points: In a highly emotional wrongful termination suit, counsel and the mediator have worked hard to keep the emotions under control. The parties are finally getting close to settlement. Suddenly the defendant adds two terms: confidentiality and return of some equipment the plaintiff possesses. The plaintiff announces he is leaving.

The mediator has spent hours building trust in the process to overcome the plaintiff's instinctive distrust of the other side. By introducing new terms, however minor, the defendant has derailed the process. If non-monetary terms are important, get them on the table early.

Asking the mediator what the case is worth: An hour in to the mediation, counsel asks what the mediator thinks the case is worth. The answer is irrelevant because no one knows what the case is worth. Settlement value is a function of what the defendant will ultimately pay and the plaintiff will accept. The mediator, particularly at the beginning of the process, has no way of knowing this figure with any degree of confidence.

The answer is also dangerous because it may polarize the parties and prevent settlement. The mediator's number, at least for the side that likes it, will assume the status of truth, seriously complicating further negotiations. A monetary evaluation early in the process may taint the mediator. Neutral evaluations and mediator proposals are a closing technique, made with consent under controlled conditions. They should be requested cautiously.

Failing to overcome biased and unwarranted confidence: The best way to kill a deal occurs where counsel is unable to view the evidence with impartiality. The plaintiff's reality rarely coincides with that of the defendant. More importantly,

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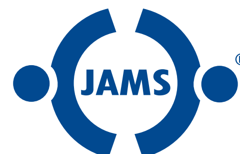

the parties' realities often have no relation to what a jury may conclude. A lawyer who cannot set aside the adversarial mindset during mediation compounds this problem. People who are unable to look beyond their partisan perceptions get mired in the dispute – rather than the risks. This is often compounded if the lawyers have a genuine lack of respect for one another.

Ultimately, the participants must focus not only on the facts as they see them, but on the relative benefits of a negotiated resolution versus the risks of a trial. They should objectively evaluate the adverse outcome potential, compromise outcome potential, and costs to get there and then, considering all these factors, determine a rational settlement range.

From these two posts it is clear that there are many factors that can affect whether or not a mediation is successful. Acting in good faith, being prepared, and avoiding emotional attacks can go a long way to ensuring the process works as it should. ■

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