

Top 10 Mediation Tips

The Countdown

Lou Jones: April 8, 2014

10 - Get all the Players to the Table

- Anyone or any entity that has the ability to thwart a successful outcome need to be at the table or at least “in the game room.”
- Use the mediator to extend invitations to subrogated parties or others who can impact the outcome.





9 - No pawns, only Kings



- All decision makers must be directly involved, and accessible to the mediator. In person attendance is best, constant teleconference access can work if needed.
- With institutions or government entities, get the participant with the highest authority possible.



8 - Know thy Batna and Watna (you don't want your Watna)



- Best Alternative to a Negotiated Agreement = provable damages discounted by risk ratio less transaction costs
- Worst Alternative to a Negotiated Agreement – What is the worse case scenario, and can your client tolerate it? Collectability, appeals?



7 - Corral “Loss Aversion” and other tricky emotions



- Most frequent cause of mediation failure: “loss aversion,” a disputant’s feeling that settling would impose an unacceptable loss compared to their internal benchmark.
- Having developed an expectation about the right outcome, take unreasonable risks to avoid a loss from settlement (Stanford Study)
- Manage expectations from the get go. Identify benchmarks



6 - don't get "sucked in"

Develop your own Negotiating Plan



- Who goes first (anchoring v. "negotiating against yourself)?
- Avoid reactive negotiations
- Know your range, let your moves send messages
- Understand that after "best offers" are exchanged, gap negotiations begin.



5 - Reactive Devaluation or You never agree with anything I say!



- Proposals from the other side will be viewed negatively, just because of the distrust of the source.
- Ask the mediator to “float,” endorse, or at least attest to the reasonable intentions behind the offer.
- Be aware of how this affects your client to a greater degree than you.



4 - Take advantage of the “Mediator’s Proposal”



- At final stages, or near impasse, mediator confidentially makes a proposal to each side. If a party declines, they never learn what the other party decided. Works at least 50%, but only upon impasse.
- Anticipate mediator's use of this tool, and suggest a range of an acceptable offer.



3 - Shhh - it's a secret: the most of confidential information



- Provide the information through the mediator with limitations:
 - Verbal mediator summary, but retain all documentary evidence
 - Mark any documents "confidential mediation communication" signed, dated by mediator
 - Present data in displays which cannot leave the mediation



2 - "Get it in Writing"

or the other sides' memories rarely err in your favor



- Have the mediator or a party summarize the agreement in a memorandum, to be formalized in a binding agreement later.
- While not necessarily enforceable, the process of writing it up verifies a "meeting of the minds."
- It also protects against failing memory



1 - Cookies, no really . . .



- An ice breaker
- A simple first indication of initial trust
- A metaphor for collaboration