



DEVELOPMENTAL NEGOTIATION: PRELIMINARY STAGE

By Alexander S. Polsky, Esq.

Developmental negotiation involves a plan and execution of the development of all five stages to maximize the likelihood of a beneficial outcome. The five stages are preliminary, preparation, information, negotiation and closing.

Let's take a closer look at the first stage, preliminary. In real time, your client has met with you and has been signed up, and you are considering approaches. When signing the client, you developed a thorough understanding of the client's needs, interests and capacity for risk, both financially and emotionally. Now you have initial decisions and recommendations to make.

Should there be an initial and early effort at negotiation?

There are many interests to be balanced here. One is whether protracted litigation will adversely impact the client's reputation, business interests and/or ability to fund the case if you are not trying to negotiate.

Another centers on your assessment of the quality of the case and client. Imagine a situation where the client does not present well, has a greater than 50 percent chance of an unsatisfactory outcome and cannot otherwise afford to litigate. This client needs an early resolution process, perhaps pre-suit.

Let's examine a claim for sexual harassment, hostile workplace and wrongful termination. The claimant is a 48-year-old who has been with the company for 10 years; the respondent is a large department store chain. You represent claimant. This person is angry and has a bent for vengeance and for creating procedural changes to better address complaints. When you analyze the interests of the respondent, what do you consider as possible motivating factors for early resolution?

- The impact of protracted discovery will be disruptive to the business;
- The impact of protracted discovery could bring out other complaints;
- A favorable judgment could bring out even more claims;
- Insurance considerations.

These are classic preliminary activities, which merge aspects of the information stage and negotiation stage.

The information stage uses open-ended questions to validate your own conclusions about the interests of the other side. While you are developing these opinions, you use them to develop your understanding of these interests and of the candor of the parties on the other side.

For example, the initial inquiry to the other side might begin like this: "I represent Judy Jones in connection with her assertions of hostile workplace, harassment and wrongful retaliatory termination. Prior to filing suit, I would like to meet with you to discuss the case and the potential for early resolution. Protracted litigation will result in disruption to your client's workplace and perhaps involve customers and prior employees, as well as delay my client's efforts to move beyond the experience. Before we meet, please advise of the status of insurance and deductibles, and some dates when you might be available."

This sets out assumptions and suggests a meeting without the clients. Such a meeting or call might permit freer communication and allow each side to assess the other's needs, interests and appetite for early resolution.

A word of caution in connection with pre-negotiation meetings or calls is necessary at this point. Please avoid discussing numbers. Even if you are presenting numbers in the most abstract sense, the other side will interpret any number or range as a demand or offer. "I do not think my client will consider any settlement unless it is in the six figures" will be construed as a clear indication that \$100,000 or more will settle the case. If you are the recipient of the statement, be careful how (and if) you respond!

There are key points that begin here and follow through to conclusion:

- Achieving a satisfactory resolution is a joint responsibility;
- Learn and share information regarding needs and interests;

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- Avoid posturing;
- Be trustworthy in your representations;
- Build on common interests;
- In a multiple-issue negotiation, examine the entire package and try to get all the issues on the table.

You have heard the preliminary stage discussion. You think an early negotiation is a good idea but want to protect the client from exposure to the other side. The answer is, of course, mediation—confidential, buffered and facilitated by a neutral.

It was once believed that suggesting mediation was a sign of weakness. This is no longer the case. Some lawyers believe that failure to explore early dispute resolution before entry into protracted litigation is below the standard of care. I express no opinion other than pointing out the value of settlement is often the highest at the inception. The risks and costs are the lowest, and the interests of both sides may be considered. Furthermore, the addition of a neutral may focus each side on risks and issues not yet considered.

Top 10 Considerations in the Selection of a Mediator:

1. Ability to understand the negotiation process and the role of the advocate. Negotiation is a process. It has stages for the negotiator and the mediator. Advocates employ differing styles, which the mediator must be able to address and manage within;
2. Ability to earn and hold trust. The mediator must be able to address sensitive needs and risks and convey competing analysis, in a manner that does not indicate judgmental bias;
3. Ability to help parties see the difference between positions and interests;
4. Ability to filter non-mediated interests and get them off the table and out of focus;
5. Ability to help the parties assess the true risks of not settling the dispute;
6. Ability to diffuse anger;
7. Ability to be aware of cross-cultural issues where appropriate—and their impact on the negotiation process;
8. Ability to observe, assess and understand non-assertive conduct;
9. Ability to reframe issues and interests into neutral and resolvable terms;
10. Ability to develop a durable resolution.

Conclusion:

As you see, the preliminary stage is more complicated than typically thought, yet it holds one of the keys to resolution of virtually all disputes. ■

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