



THERE ARE NO DO-OVERS IN MEDIATION

By Barbara A. Neal, Esq.

Most mediations begin and end in a single day. As much as the parties would benefit from a leisurely pace to explore all the factual and legal issues, today's practice is to schedule only one day, or even a half-day, to mediate a settlement. The result is often a settlement reached when counsel and parties are exhausted.

Did you get the best result for your client? Did you leave money on the table? Were there other remedies that you might have included in the settlement? If you have the luxury, the ideal procedure is to spend one day exploring the issues, likely outcomes, risks, possible remedies, then reconvene and turn to crafting a settlement.

Nine times out of 10, you don't have that luxury. You have one day to get it done. Be better prepared for your next mediation by following this pre-mediation procedure with these four simple steps.

Evaluate what the lawsuit is worth by using a decision tree.

With every new offer or demand, the client is faced with comparing the value of that offer or demand with the expected value of continuing on with the litigation. On the one hand there is a concrete offer or demand; on the other hand there is the uncertainty of a litigation result.

Using a simple decision tree can make this difficult task easier. A decision tree is a roadmap of the litigation with a few intersections and forks in the road. List each of the significant uncertainties in the case: Will defendant prevail on summary judgment? Will the jury believe your key witness? Will the judge use your key jury instruction? If damages are awarded, will they be in the high, medium or low range? Assign a range of probabilities to each significant uncertainty, multiply the probabilities and then apply that probability to your estimated high, medium and low damage predictions, and viola, you have a guesstimate of the net value of your lawsuit.

Make a list of potential offers and demands.

Assume that you, as plaintiff's counsel, value the case at \$1 million. Discuss each potential offer that the defendant may make: zero (unlikely, or they wouldn't have come to mediation) \$100,000 (a potential starting offer); \$200,000; \$250,000, etc. Expose your client to each of these offers.

Think through potential responses to each potential offer or demand.

Role-play with your client. How are they going to respond to each potential offer or demand? How will they respond when the mediator tells them that the other side is signaling that it is at or close to its "last, best and final?"

Consider all potential remedies and benefits

A great advantage to mediation over litigation is that the parties can agree upon remedies that a court could not order. \$450,000 plus a most-favored nation's clause for all orders placed within the next 12 months? \$350,000 plus a 10-year royalty-free license on the disputed intellectual property? A license to use the trade name in return for promotional services? \$45,000 plus reinstatement? There are so many ways in which the parties can do something for one another in addition to the exchange of money.

Conclusion

Athletes prepare for a competition by visualizing their game in advance, step by step, seeing all the options. When time is short and you have only a one-day mediation to get your case settled, use the same technique with your client so that you are both at your best and fully prepared on game day.

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