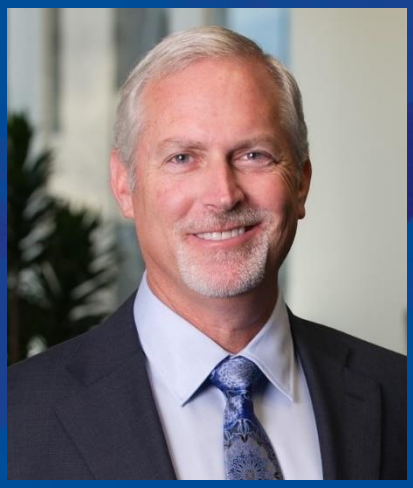
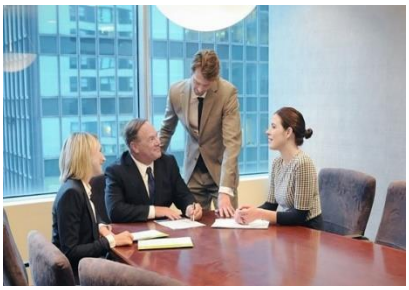
AN INSIDER'S VIEW

EFFECTIVE MEDIATION STRATEGIES



By Richard Huver

As a mediator, I have a unique behind-the-scenes view of cases with interesting fact patterns, fascinating parties, and some excellent attorneys. As the only one who sees what is happening in all of the rooms, I have identified the strategies that are most successful in getting cases settled, and those that are not. I will highlight five of the key strategies I have observed used by some of the best attorneys which I believe have helped resolve cases.



This article comes with a caveat: my view of your case, the facts and the legal issues is from 30,000 feet. While I do a deep dive into the facts to highlight certain strengths or weaknesses, I realize there are other facts or circumstances never disclosed to me during mediation. Thus, there may be a circumstance where one of these strategies might not make sense. With that exception, here are five of the most effective strategies to consider using in your next mediation.

Picking the "Right" Opening Demand/Offer

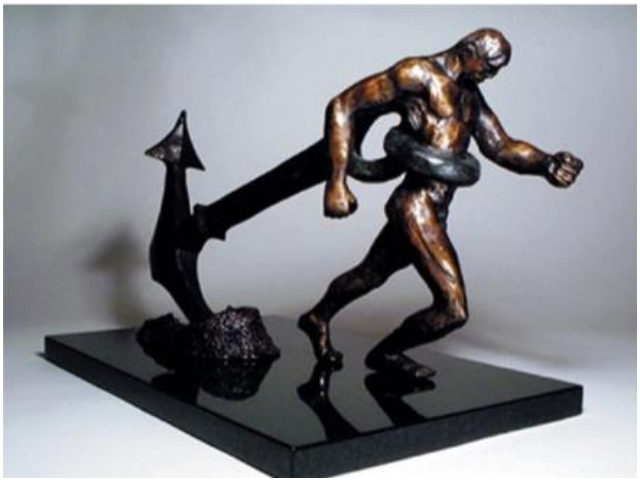
In any mediation involving monetary compensation, some negotiators believe they can affect the final outcome by starting with a dramatically high or low number. This strategy has its origins in anchoring bias – the concept that people give too much weight to the first number they hear. Often used in salary negotiations, research suggests that if your number is the first one mentioned, the end result may be closer to your number. While this might work in salary negotiations or retail sales, it can backfire in mediation. I see more success from the attorneys,

insurance adjusters, or principals who tailor their opening number in such a way that it sends the intended message about the strengths or weaknesses of their respective claims or defenses, without derailing the entire negotiation process.

The claims adjuster rarely comes to mediation with an open checkbook.

I realize there may be strategic reasons for you to start at a higher or lower number in a particular case. Negotiation strategies are as varied as the cases I mediate, and the topic consumes entire books. This article cannot possibly delve too deeply into the subject. The point I want to emphasize, however, is that I see how starting at the "right" number helps settle cases. It can also save everyone time spent in getting to the "right" starting numbers so the "real" negotiations can begin. Conversely, I see cases that do not settle because one side or the other – or both – started at too extreme a number. Rather than drive the negotiations in the intended direction, it drove a wedge into the entire negotiation process. Some cases never got back on track.

There is another danger with very high or low numbers and that involves the unprepared client. They get anchored to the opening number and form unrealistic expectations. Even if the numbers get closer to a realistic settlement range later in the process, the client's mind is still anchored to the extreme number they heard first. The trick is knowing just where to start with your opening demand or offer for a successful negotiation.



One final point is for plaintiff's counsel. The successful plaintiff's lawyers know the critical importance of communicating a monetary demand well before mediation. Sending your first demand one hour into the mediation does not give the decisionmakers (i.e., the people with the checkbooks) adequate time to vet the demand. In a business or employment case, there may be coverage issues, self-insured retentions, or other considerations that need to be flushed out well in advance of the mediation. A demand before mediation is even more important in any case involving an insurance company. The appropriate management levels need time to evaluate, roundtable, and/or run the number further up the ladder. The claims adjuster rarely comes to mediation with an open checkbook.

Addressing the Emotional Issues

While not every case has emotional issues, many do. An obvious example would be an employment case alleging sexual harassment or discrimination. Not only can the plaintiff have emotional issues to address, so too can the accused supervisor, co-worker or employer. Likewise, business cases can be emotionally charged. I have mediated many disputes over ownership rights or business dissolutions between partners that involved significant underlying feelings of distrust, hurt or anger.

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It is challenging to make any real progress on the substantive issues when there are unresolved, unrecognized or ignored emotional issues. Mediation gives parties a safe place to express, vent and be heard, which is vital to the overall process. The best prepared attorneys are well-aware of the importance of addressing their client's emotions. Our pre-mediation phone call is the perfect time to discuss these issues, which helps me prepare for what to expect and how to tailor the process for the day. We can then discuss a game plan for how and when these issues will be handled.

I have also mediated cases where the emotional issues clearly have not been addressed because the built-up anger, hurt or sadness bursts out unexpectedly. Not only is it uncomfortable to be blind-sided by these unaddressed emotions, it also can derail the progress we have made or even jeopardize the opportunity to settle. The lesson is to identify and address these issues before mediation so everyone is prepared and on the same page. Your client will benefit from the process of being able to express, or even work through, some of their emotions, which will help us make substantive progress toward settlement.

Being Both a Counselor and an Advocate

I litigated cases for 30 years and understand the importance of hard-nosed, adversarial litigation. I firmly believe zealous advocacy is vital to our civil justice system. Mediation, however, is the day to objectively evaluate the strengths and weaknesses of your respective claims and defenses. Strapping on the battle armor to duke it out at mediation is counterproductive and does not set the tone for settlement. The best attorneys "check their weapons at the door," creating the appropriate atmosphere for resolution. Does this mean they are weak or pushovers? Of course not. They have zealously set forth their client's positions and advanced the facts and theories that best support their theory of the case.

That said, they recognize the danger of falling victim to confirmation bias – only seeing that which supports their position and ignoring anything to the contrary. There will be plenty of opportunities for battle later if the case does not settle.

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Keep in mind how unique mediation truly is – it is the only place where you can have a candid conversation with someone other than your client present (i.e., the mediator) about all aspects of their case, including its strengths and weaknesses, and still keep the conversation confidential. Be sure to take full advantage of this opportunity by actively engaging with your mediator.

The point to emphasize here is that the best attorneys know their role is to be a counselor as well as an advocate. These attorneys are not afraid to candidly discuss with their clients the risks of taking the case to trial and acknowledging the weaknesses of their claim or defense. They counsel their clients on the best course of action - for the client. It is in these mediations where the real work is done, allowing the parties to make a fully informed decision. These cases usually settle that day, or the table is set for further settlement negotiations thereafter.

Knowing When to Raise the "Devilish" Details

As the saying goes, the devil is in the details, and this applies especially to negotiations. Have you ever been in a lengthy mediation and finally reached an agreement, only to have negotiations go sideways because new conditions were brought up at the last minute? While this might be an inevitable part of some mediations, the most successful attorneys know the importance of introducing conditions at the right time. Some do so as part of the original demand or offer, while others wait until enough progress has been made on a key issue(s). The details may be specific, or they may simply be placeholders for further discussion. The key is to introduce any conditions or details at the right moment to avoid having your mediation grind to a halt, or even blow up.

A recent business mediation involving crossclaims for breach of contract illustrates this point. After a long day, the parties finally reached agreement on the key issue, the monetary amount. As the settlement memo was being drafted, one of the parties demanded – for the first time – non-disparagement and confidentiality clauses. There was no love lost between the companies, and after the long day the request was not well-received. Things further deteriorated as the parties argued about who would be personally bound by the non-disparagement clause, and how the confidentiality provision would be enforced. Having spent the better part of

the day in hard-nosed financial negotiations, there was no consideration left for these conditions, and the mediation hit a standstill.

Employment mediations are another instance where it is important to introduce any details early in negotiations. Monetary settlements that include compensation for past wages usually include details about tax ramifications and responsibility for any adverse IRS determinations. Consider introducing these, or allocation percentages between wage and hour vs. emotional distress claims, when discussing dollar amounts. Some attorneys even exchange a draft settlement agreement before the mediation begins with many of these details already spelled out. Doing so does not signal that settlement is guaranteed, but it encourages early discussion about the details.

The lesson to learn from successful attorneys is good timing. Avoid waiting to introduce these devilish details until it is too late in the negotiations. While I try my best to anticipate any conditions and address them early on, as the neutral mediator, I cannot be suggesting conditions to one side or the other that they have not thought about on their own. The onus is on the lawyers and their clients to know what they want as terms and conditions and to introduce these at the right time.

Dotting the I's and Crossing the T's

After a productive mediation, you successfully settled your case and it is time to memorialize the terms and conditions. How much specificity should you include? The spectrum of agreements I have seen range from a few terms jotted down on a short form memo to a full-length, multi-page, formal settlement agreement. The majority of cases I mediate use a short form agreement and the amount of detail is up to the individual lawyers. Beyond assuring the settlement memo itself is admissible in evidence, the best lawyers make sure all of the "devilish" details are clearly spelled out. Doing so avoids disagreements later when they dot the "I's" and cross the "T's" on the formal agreement. The more open issues there are when you leave the mediation, the greater the risk for delay in completing the settlement, or for what you thought was a settlement falling apart.

In complicated settlements, some attorneys include a dispute resolution provision, such as bringing any disagreement over the final terms back to the mediator or submitting the matter to binding arbitration. If this type of provision is going to be

included, it probably is best to have a formal settlement agreement typed up and signed by the parties at the mediation.

The important point to remember is that specificity in the settlement memo matters. Always ask yourself, if a motion were brought to enforce the settlement, would the terms be clear enough so that you have an enforceable settlement? Efforts to amend or modify the language after the fact usually fail. Follow the lead of the lawyers who spend the time needed to spell out all of the important details before they leave the mediation.

Conclusion

The five strategies discussed above are by no means exhaustive. There are plenty of other successful strategies we could discuss. I welcome your thoughts and suggestions about other strategies you have found equally useful in mediation. As John Wooden once said: "It's what you learn after you know it all that counts." Hopefully, this article will either reinforce what you are already doing in our practice or give you some ideas for your next mediation.

Richard Huver

Successful mediations require someone who understands the legal and practical issues, who appreciates the nuances of the process, and who listens to and acknowledges the myriad of interests and personalities at play. Through his 30 years of litigation experience and leadership roles, Richard developed the skills and expertise necessary to serve as a successful mediator for your case. Richard mediates cases in a variety of fields and specialties, including business, employment, insurance and personal injury. From the simple to the complex, and from the cooperative to the contentious, Richard has the experience, the temperament and the skills necessary to help parties resolve their disputes in an expeditious and professional manner. He can be contacted at rhuver@huvermediation.com.