

Tips to Optimize Settlement Outcomes
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***Before the Mediation**

Understand your goals, risks, best alternative to a negotiated agreement (“BATNA”) & worst alternative to a negotiated agreement (“WATNA”). Understand the other side’s goals and interests. This allows you to gain power from information, accurately evaluate your case, and find creative resolutions.

Prepare your client for the mediation so that your client does not become an obstacle to settlement.

Speak to your mediator in a pre-mediation conference about obstacles & avenues for settlement, the process, & information that you don’t want your client to hear.

Share your mediation brief with other side– gives you an advantage in the mediation so that other side comes to the mediation with a more similar case evaluation (you can hide your smoking guns and confidential information).

***During the Mediation**

If you are concerned about whether other side is negotiating in good faith, put conditions on the negotiation. If you are suspicious about the other side’s motivations, do not reveal sensitive information because it can be used against you. Time the revelation of information so the you can use it strategically to extract concessions.

Be appreciative of offers and concessions. Make sure the other side knows that they have been heard and that you are trying to accommodate their interests. Appearance of collaboration, rather than positional bargaining, likely will produce more favorable negotiation results. People are pre-disposed to want to collaborate & won’t agree without a feeling of gain.

Prioritize discussions about issues that likely resolve in your favor.

Anchor (initial offer/demand) wisely - find the sweet spot that is high enough so that you can make concessions, but not so extreme that it is insulting. Negotiations resolve at the midpoint of first “reasonable” offer and demand. There is a tactical advantage to making the first reasonable offer/demand.

Concession patterns reveal messages so be careful how much you compromise and what that can mean to the other side.

Creative resolutions can bridge the gap (payment plans, structured settlement, accommodating business or reputational interests, objective framework for determining a settlement amount). Look for a trade off of interests or mutual interests. If other side wants something of low value to you, give it because the “rule of reciprocity” is a social obligation that influences people to repay favors/kind acts.

Place nice with opposing counsel – “Likeability” is best way to achieve your goal. Show respect and generosity. It probably will be reciprocated.

When possible, negotiate in person (or zoom). Avoid email negotiations because they lose tone and body language. Seventy to ninety-percent of all information is communicated through body language.

When someone is discounting all of the information that you provide due to cognitive biases: ask questions (do not directly criticize positions), summarize, validate, use objective data, and use analogous situations. Good negotiation behavior is often reciprocated.

Use power to your advantage when you have it. Power can be in the form of information, resources, relationship dynamics, access, etc. Be careful not to intimidate too much that the other side refuses to negotiate.

Have your client sign the deal before you leave the mediation. When people “sleep on it,” they have second thoughts.

Do not take a backward step when negotiating unless something drastic has happened because it engenders poor negotiating behavior in the other side.

Focus on solutions, not fault and blame. You can resolve a case even when the sides disagree about the underlying facts.

Do not reveal your bottom line until you are almost there.

Use contingency agreements to derive value for the risk taker.

Put time constraints on open offers because people are more likely to accept your offer when there is a time pressure. (Concept of Scarcity)

Avoid argument dilution when negotiating.

Explain why you want what you want because it is more likely that the other side will comply with your request.

Good faith negotiations are not a waste of time because you will learn about your case and the other side’s case. Pay attention to what the mediator is talking about and what evidence supports the other side’s positions.

Even if the case does not settle at the mediation, use the mediator to help negotiate stipulations, scheduling, and a later settlement. The mediator can also offer a mediator's proposal.