PositivelyNeutral

Arbitration and Mediation for Attorneys and Their Business Clients

Rob Harris
robert.harris@positivelyneutral.com
www.positivelyneutral.com
914.482.2448

Kool-Aid®, Goalposts and Uncle Harry

Mediation provides a golden opportunity to bring closure to a matter, avoid lengthy trials, and protect the parties' interests. However, the effectiveness of mediation is heavily influenced by the parties' expectations. When preparing their clients for mediation, attorneys should be vigilant in order to avoid certain pitfalls that harm the chances of reaching a favorable settlement. Indeed, if not careful, failure to anticipate these problem areas can destroy potentially positive outcomes before the parties roll up their sleeves and get to work.

1. Failing To Ensure Clients Understand That Arguments Their Attorneys Advance Are Not "Sure Winners": Don't Drink the Kool-Aid®

One of the challenges faced by attorneys in preparing clients for mediation is setting realistic expectations about the strengths and weaknesses of their case. Overconfidence can be the Achilles' heel of any settlement negotiation.

Attorneys are skilled at designing and advancing legal arguments to support claims and defenses. While confidence is important, it is equally important for attorneys to temper optimism with reality. If clients believe that their legal arguments are so compelling that the other side will simply cave, they may be unwilling to consider reasonable settlement terms.

This mindset, “drinking the Kool-Aid®,” can cloud judgment and prevent a client from recognizing the need to be flexible or pragmatic in the mediation room. A client who is fixated on winning in court may resist the idea of compromise, undermining the purpose and goal of mediation.

To avoid falling into this trap, attorneys need to have honest conversations with their clients, making sure they understand the relative strengths and weaknesses of the arguments advanced in court filings. Believing that a favorable litigation outcome is a foregone conclusion will only serve to frustrate the mediation process.

Clients with realistic expectations are likelier to approach the mediation with a level-headed, open-minded perspective, increasing the chances of reaching a settlement.

2. Don’t Move The Goalposts: Establishing A Bargaining Position Consistent With Prior Communications

Often, prior to a formal mediation, the parties have already communicated settlement positions and expectations. Consider, for example, a dispute over an ownership interest in a company or a piece of property, where the parties—perhaps through expert reports or depositions--have exchanged respective views about the asset’s value.

Mediation day arrives with the expectation that settlement will be achieved somewhere between the parties’ respective valuations. The mediator’s goal is to refine the parties’ bargaining positions and to assess whether and how best to bridge the gap between the two sides.

Sometimes, however, a party decides that it no longer wants to live with the settlement position previously articulated—a plaintiff decides he wants more, or a defendant decides she will offer less. When a party starts the mediation with a surprising position that falls outside the parameters previously discussed, it meaningfully complicates the challenge of finding common ground. A party that changes a bargaining position with new or revised demands can come across as engaging in bad faith, undermining goodwill necessary to achieve a settlement.

To minimize this risk, attorneys should have clear discussions with their clients about their positions and objectives before mediation, and ensure that the client's expectations are properly aligned with what has already been communicated to the other side.

If a client wants to propose terms that materially depart from what was previously communicated, it is essential to reassess the likely impact of a change of position on the negotiations. At minimum, before mediation day, any change to a previously articulated position should be communicated to adversary counsel and to the mediator to avoid a mediation surprise that may end productive discussions before they begin.

3. Where's Uncle Harry? Ensuring That All Necessary Parties Attend The Mediation.

After the parties have spent much of mediation day inching closer to a resolution, one of the parties announces that he cannot commit until the terms are blessed by a previously unidentified and currently absent decision maker. The MIA decision maker may be a spouse, family member, or business partner whose input on the settlement terms is deemed necessary but regrettably is unavailable.

The parties leave, with fingers crossed, but momentum is lost and the anticipated settlement is subject to Uncle Harry's second guessing. When one of the attorneys subsequently communicates that Uncle Harry voiced objections or requirements that were not raised during the mediation, the progress previously made is undermined if not destroyed altogether.

This unforced error is avoidable. Attorneys always should discuss with their clients who needs to attend the mediation and make sure they are available to participate. The necessary individuals may be those with concrete knowledge (e.g., a business partner) or one whose blessing will be required as a practical matter (e.g., a spouse).

The attorneys also should advise the mediator who plans to attend and the nature of their involvement. The mediator can ensure the other party is made aware of the guest list to ensure there are no objections to the attendance by non-parties.

Some of the practical steps an attorney can take to ensure all necessary parties are appropriately involved include:

- Pre-Mediation Preparation: Confirm with the client who needs to be involved and whether they are available. If any key individuals are unavailable, make arrangements for them to participate by phone, video conference, or at least be readily reachable.
- Clear Communication of Authority: Make sure that clients and other involved parties understand their level of authority. Are they authorized to make final decisions, or do they need approval (whether formal or informal) from someone else? This ensures that no surprises occur when agreements are reached.
- Anticipate Who Should Attend From The Other Side: Sometimes a party or their attorney will recognize that the adversary party will benefit from having a supportive network (e.g. adult children of an elderly principal) attend the mediation. Alerting the mediator to this perception will enable the mediator to facilitate the inclusion of helpful participants.

Final Thoughts

Mediation can be challenging enough without complications that come from drinking Kool-Aid®, moving goal posts, and failing to invite Uncle Harry. By ensuring that clients' expectations are realistic, making sure they stick to their communicated positions, and coordinating the attendance of all required decision makers, attorneys are better positioned to facilitate effective and productive negotiations that lead to successful outcomes.

Rob Harris is a full-time arbitrator and mediator of commercial and employment disputes, often involving business entities and their owners, senior employees, investors and service providers. He is a longstanding panelist for the American Arbitration Association, including participation on its Commercial, Employment, Construction and Consumer panels, and its specialty panels for Large Complex Cases, Mergers and Acquisitions and Joint Ventures.

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