

## IMPROVING THE PROBABILITY OF A SUCCESSFUL NEGOTIATION

It does not matter if you are going to be involved in direct negotiations or negotiating a settlement during mediation, the key is to determine the answers to five critical questions:

- Who will attend the negotiations?
- What is the extent of their settlement authority?
- How much time is committed for the negotiations?
- What issues must be addressed during the negotiations?
- How will the negotiations be managed?

### **Attendance**

Whether directly negotiating or doing so in mediation, be sure that everyone knows who will attend. It is critical that the client attends for two primary reasons: they need to hear and fully understand their case and to hear the perspective of the other side. An informed client is often much easier to work with when trying to settle a matter.

In addition, if the client is not present for the negotiation, that is often used as an excuse to only get a tentative agreement, which will fall apart as soon as the client sees the proposed settlement, thus making the negotiations a waste of time. It is so much easier for a person to say "no" when they have not participated in the negotiation discussions. This factor not only applies to clients but to all other individuals who may have a say in whether there is a binding settlement agreement.

### **Settlement Authority**

Even when all the necessary parties are present (client, insurance representative, manager, etc.) they must come with either settlement authority, or they must clarify in advance, what the process will be should the negotiations produce a tentative settlement that must be ratified or approved by some other entity. In other words, does a board of directors or city council need to ratify a settlement? Ideally, one needs to specifically clarify what settlement authority is required, explicitly define what "full authority" means, and then describe the process for achieving ratification. This will prevent a settlement from unraveling later.

### **Time**

A key factor is confirming the amount of time that everyone has committed for the negotiations. Without previous clarification on the amount of time that everyone will spend, the old trick of "I have a plane to catch in one hour" gets employed. Explicitly determining the duration of the negotiations in advance of the scheduled negotiations is important, and then reconfirming prior to starting the discussions will make it harder for the "rushing the process" gamesmanship. The tactic of trying to rush people is one of the oldest, and it increases the probability of either the negotiations failing or unraveling later.

### **Issues**

To prevent one of the oldest negotiation sabotage techniques from occurring, have the participants make a list in advance of the session of all the issues to be resolved. It is very common for the "unprincipled" negotiator to "hide the ball", as it were, and right at the point that it appears that all the issues have been addressed, they say, "By the way, there is one more thing."

Even with asking for all issues to be listed prior to the negotiations, this may happen merely because the negotiation discussions bring up a topic that no one had thought of previous. No matter the reason for the sudden addition of a heretofore-unidentified topic, a skilled negotiator will acknowledge the new item and then tactfully say something like, "It is good that you brought up this issue, while we are all together. Since the decision regarding this topic may influence our earlier decisions, I suggest we consider all the previous agreements as tentative. Once we resolve your latest issue, we can go back and reevaluate the other decisions. I am sure that you will agree that this is the fairest way to handle the situation." Nothing like "boxing" them in using their own tactic of "surprise"!

## **Management**

How the negotiations will be managed specifically applies to mediations. Although mediation is often defined as a "facilitated negotiation" there are many mediators who try to take over the negotiation process by separating the parties and essentially running back and forth with messages. Any skilled negotiator understands that the words of a message only represent seven percent of the communication.

When a mediator takes an offer and presents it to the other side, no one can be sure that the message conveyed is what was originally stated. Not only that, but also, ninety-three percent of the message is lost. Remember the old childhood game of "telephone" where a group of friends sit in a circle and one friend tells another something, and then that person repeats it to the next person, and so it goes around the room. Then the last person repeats what they were told and everyone laughs since the message is nothing like what was originally stated. That is a very close analogy to what happens when a negotiator allows the mediator to take over the process.

Negotiations are often more effective when people sit down and directly talk to one another. Not only does everyone hear what is stated, there is an opportunity for asking clarifying questions to help ensure that everyone understands what is proposed. It is also very advantageous to be able to watch the body language of the other side when an offer is made or countered. Did someone's face get red or did he/she start to sweat, or was there a furtive glance, smile, or smirk? These non-verbal factors are extremely important when negotiating a settlement. In order to effectively negotiate, one must have all the information—the complete message—not a summary of another person's perception or interpretation of the message.

## **Conclusion**

In short, clarify five things before agreeing to negotiate: who will attend, the extent of their settlement authority, how much time they will spend working on coming to a settlement, and identify all issues before the negotiations start. If the negotiations will occur during mediation, then clarify in advance a preference for direct negotiations. The key: retain control over the negotiation to enhance the probability of a meaningful and lasting settlement. Remember, unlike binding arbitration or trial, negotiations may be your last opportunity to control the settlement outcome.

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