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Preparing to Negotiate – Ten Tips for the Strategic Mediation Advocate

Anne E. Grant, LL.B, LL.M (ADR), C.Med

Successful advocates strategically assess and plan each negotiation and mediation. This includes understanding all relevant aspects of your case, setting goals and objectives as well as planning a strategy and backup plan to achieve those goals. This article provides a list of practical questions to be considered in preparing to participate effectively in direct negotiation or a mediated settlement discussion.

1. ***What are the issues in dispute? -*** Advocates should define the dispute in clear, concise and straightforward language. Likewise, any issues in dispute which require further information should be noted. Issues may be organized as procedural, psychological or substantive in nature.
2. ***Who are the parties? -*** When considering the appropriate parties in the ADR session, consider who influences each party – a spouse, children, or any trusted friends or financial advisors. These individuals may be influential in terms of reaching and/or reviewing any settlement. Institutional representatives themselves may have senior partners or work within teams that will influence strategy, approach and reaching agreement. Bear in mind that an individual absent from the ADR session can still be influencing the parties at the table. Ideally all relevant parties are present or accessible.
3. ***What are the facts relevant to resolving the problem? -*** Advocates should possess a thorough, working knowledge of the chronology of the dispute as well as the salient facts relevant to settlement discussions. The areas of discussion in a negotiation or mediation are not limited to the jurisdiction of a court, so advocates need to consider any facts that will persuade the other side to sympathize with their client's viewpoint.
4. ***Is there any additional information or documentation that the other side does not have that you could share either with the other parties and/or with the mediator? -*** Disputes are dynamic and circumstances continue to change. The sharing of information can have a persuasive effect on the views of the other side and can provide the impetus to consider different settlement options. In considering the evidence to be submitted during the session, think about whether there is any other information (i.e. costings, changes in circumstances, etc.) that will influence the other party's decision to reach agreement. Sharing information is also a way of expressing commitment to participate in the process in good faith and to resolving the problem. Consider data regarding your client's out of pocket expenses and whether you can provide documentation to substantiate any damages at this time.
5. ***What are the positions of the various parties? -*** While interest-based negotiation will ideally maximize results, it is always prudent to consider the positions, rights and entitlements of all the parties. The strategic advocate can argue their clients case utilizing either a positional or interest based model of negotiation.
6. ***What are the interests/needs/concerns of all the parties? -*** Interests are the basis for any individual action. Interests may be personal, professional, economic, psychological, business considerations, etc. Principled negotiation is premised on considering the underlying motivations, concerns and needs of all the parties to form a foundation for a mutually-acceptable solution. Remember that representatives and advocates may also have interests or hidden agendas that are propelling the dispute. The strategic advocate needs to consider the interests of those parties who are not at the table, but may influence any terms of settlement.

7. ***What are the alternatives to a negotiated/mediated outcome? -*** Part of any strategic negotiation analysis is a consideration of the alternatives. This reality check should be canvassed with the client in advance so that the parties are clear as to what possible results or process steps are available should negotiations flounder.
8. ***What options are available to resolve the situation? -*** Prior to any negotiation or mediation, possible options for resolution should be canvassed with the client. This investigation prepares the parties for settlement and allows the creative brainstorming to take place in advance of the meeting. Ask your client to be innovative and to reverse his or her assumptions and roles. In a negotiated or mediated settlement, many ideas can be transformed into settlement options that would be outside the jurisdiction of a trier of fact.
9. ***Is there anything that should be considered in finalizing an agreement? -*** The parties may, at times, require outside authorization in respect of a proposed resolution. For example, an insurance company may require a second signature or authorization from a higher level in some situations. A non-profit board may require the ratification of its members. Time constraints can be a consideration in finalizing an agreement as well as the impact of governing legislation.
10. ***Can you anticipate any challenges with regard to the implementation of the desired agreement?*** – Any settlement implementation problems should be considered during the preparatory stage. While confidentiality is a hallmark of the mediation process, some settlement options may require communicating the outcome to other parties. For example, in a workplace mediation where two key staff members have reached a mediated settlement, Human Resources or senior management may have an interest in knowing the outcome. Likewise where the organization is fulfilling a statutory requirement to maintain a harassment free workplace, the outcome of a mediated settlement of a bullying complaint may need to be documented/reported to demonstrate compliance.

Anne E. Grant has practiced as a full time mediator and ADR practitioner since 1994. She is President of the ADRIO and has held the national designation of Chartered Mediator since 1995. Her practice includes mediation of civil disputes, workplace interventions as well as facilitation of multiparty public policy consensus building.

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