Sotomayor Law
Rande S. Sotomayor, Esq.
Mediation, Arbitration and Business Dispute Services

USEFUL TECHNIQUES FOR GETTING THE BEST SETTLEMENT IN COMMERCIAL MEDIATION

By Rande S. Sotomayor, Esq.
February 3, 2023

Recently, I conducted a successful mediation session regarding a home purchase. The parties had a dispute over access to an adjacent lot also owned by the seller. The deal blew up; they were each alleging the other had breached the purchase agreement. Lawyers were engaged. Fortunately, the standard Residential Purchase Agreement in California requires the parties to mediate before pursuing any legal action.

I could see that both sides had made a few missteps that led to the dispute. But a very common problem, in both legal and personal contexts, was at the root of the legal claims. Read on to learn some valuable techniques for dealing with difficult negotiations, what the problem was in this matter, and how we solved it.

Technique #1: Sometimes just using a mediator can be an incredibly useful technique in a difficult negotiation.

Maybe you've noticed this decline over the last few years: a lot of people seem to misunderstand, and to interpret actions, words, and tone as deliberate and disrespectful insults. Their immediate response almost always is one of defensiveness, anger, and a "she-doesn't-know-what-she's-talking-about" arrogance – and so it goes, back and forth between the parties. The same goes for their attorneys.

If you want to get your deal done, you may need an "interpreter" to convey your messages to the other side. In some transactions involving brokers, the principals sometimes push them out of the way, or the brokers begin to posture out of "loyalty" to their clients. Hurry – call in a professional mediator!

Technique #2: Make certain you know *why* you are participating in a mediation so you can get your head in the right place.

You may be required to mediate either by contract or by Court rules. You might even plan to just "check that box" so you can have a trial or arbitration, where you just *know* the trier of fact will see it your way; you are willing to do *whatever it takes* to show your opponent that you are *right*. Did you know that somewhere around 97% of civil cases are resolved before trial? Every case has its strengths and weaknesses. It is crucial that the parties dispassionately consider whether a litigated solution is a better choice for them, their business, and their family than any other solution.

Do not waste your time and money on mediation if you have no intention of seeking a non-litigated resolution. If you are very angry, refuse to consider compromise, or are determined to teach the other side a lesson, you are not ready for the proceeding.

There is a reason contracts and Court rules mandate mediation – it almost always develops settlement terms that eliminate ferocious litigation and the related burdens of uncertain outcomes and potential losses. So, if you want to settle your case, apply a "mediation mentality" to the process as opposed to a "litigation mentality." While the mediator wants to know the strengths and weaknesses of your case, she does not want to hear for the zillionth time how you are "going to beat his a-- in court."

Technique #3: Take the advice of law school professors: Never Assume Anything!

In the case above, as in so many cases, each party assumed that the other was trying to get out of the deal, improperly change the deal, or refuse to cooperate in breach of the purchase agreement. When I caucused with both sides, I found that each was determined to find a way to conclude the purchase. This is frequently a surprise to the parties, as it was in this matter.

What was the problem in this case?

The problem, a common one, was that the parties allowed their misperceptions, assumptions, and personality conflicts to control the negotiation. They quickly lost sight of their common goals. This led the parties to suggest solutions that were viewed with suspicion and criticism. Their frustration blocked creative thinking.

How did we solve the problem and resolve the dispute?

With the parties' consent, I conducted a *facilitated negotiation* in a joint session. As a neutral third party, I exercised control over the negotiation process to prevent digression from the mutual goal of getting the deal done. The parties avoided outbursts and accusations. We corrected and smoothed misunderstandings and personality conflicts, and the parties developed a creative, and ultimately agreeable, solution: the buyer agreed to purchase the adjacent property instead, and thereby took responsibility for, and control of, the access issue. Along the way, each party found qualities to praise about the other and began to rebuild trust.

Then, a few days later, I was informed that the dispute did not settle because the buyer decided he didn't like the adjacent property, and returned to negotiating more details of the original agreement. The parties, both of whom remained determined to close the deal, are back at the negotiation table.

The mediation session was productive for everyone, and the facilitated negotiation was a successful process that allowed the parties to move forward. Even when the deal fell apart for a second time, the mediator-facilitated negotiation continued, and the parties successfully achieved their goals.