



Mediation: The End Game

By Amy Lieberman

It's almost dark. You're tired, and our client is fading. You've been negotiating for eight hours. You wonder whether you're going to make dinner, whether this case is going to settle or not, whether this whole day has been a waste...you are still \$250,000 apart. Is it worth it to keep going, or should you pack it in?

Consider your choice of "end game" strategies to spur the quick close at the end of the day.

1. Split the Difference

This is the "Solomon's choice." Compromise by meeting in the middle. I often observe lawyers recording demands and offers, pacing and matching so as to aim towards a specific "split the difference" number. However, not everyone negotiates that way, and this approach can be problematic if it is based on the erroneous assumption the other side is doing the same.

Splitting the difference does work well at the end of the day, when everyone is confident that they have thoroughly analyzed strengths, weaknesses, positions, interests and likely outcomes, and it's time to make a prudent business decision just to get it done.

2. Take It or Leave It

When phrased this way, this choice is risky. It is aggressive and confrontational, and causes the other side to feel backed into a corner. It is an ultimatum, a "line in the sand," and how many of us respond well when we are given an ultimatum? It is not conducive to acceptance. Instinctively, it leads to resistance.

This strategy is best used when you know, *for sure*, you absolutely cannot get any more authority, that day or in anytime in the near future. Rigid posturing calls your credibility into question when it turns out there is in fact more money, especially when that fact is discovered immediately after the negotiations. This can also affect negotiations in future cases.

Consider other ways to phrase the same concept to invite a more positive response, such as, "That's the best we can do, and we hope it works for you."

3. Last, Best and Final

Personally, I like this approach. When I hear a party say, "That's it – last, best and final," I say, "Ok, good. Let me go see if that works. If it doesn't, I will see what *their* "last, best and final" is, and from there, you can see what you want to do." It sounds like the last step, but it really can allow for more movement.

4. The Mediator's Proposal

We tend to devalue suggestions that come from our opponents, so the fact that the idea comes from a third party is useful psychologically to bridge an impasse. If a suggestion comes from the mediator, it isn't an offer or a counter, so no one is bound if it doesn't work. It is most accepted when phrased this way: "Are you open to a mediator's proposal?"

The danger is that the mediator's proposal may not be something your client can live with. This option therefore requires that both sides have a very high level of trust in the mediator so that both are likely to live with the suggested resolution.

5. "We're Outta Here!"

"They are just not in the ballpark, and we aren't even going to respond."

Storming out without responding leads to bad feelings, increased litigation and higher legal fees. Settlement is still possible – but later, rather than sooner, after the bad feelings about how the session ended have faded.

There is a better way to leave, and set a positive note for continued discussion. "I think we need to wrap it for today, because...."

- a. We just can't get any more authority at this late hour;
- b. We need more information;
- c. We need something to change before we can alter our position, such as a summary judgment ruling;
- d. We are too tired to make a rational decision.

The difference in phrasing is the difference between leaving the discussion open, and closing it down.

6. Keep The Offer Open

Keeping an offer open with a fairly short deadline – 48 hours, or until the end of the week – keeps the ball in play and allows for the dignity of a considered decision.

Concluding Wise Words from Sigmund Freud

Freud's definition of insanity is doing the same thing over and over, and expecting a different result. When an end-game strategy isn't working, choose a different approach. Any difference can help shake things up just enough to close the deal.