

What you Need to Know About Negotiation & Mediation



By Michael Hawkins

A key capability for a successful attorney is effective negotiation skills to resolve conflict and legal disputes. Negotiating more than 1,000 such disputes for clients and serving as a mediator in over 100 cases has been a tremendous education on how to successfully resolve conflict. As a mediator, I have attended two Harvard negotiation programs, been trained as an EEOC mediator, am a Center for Resolution of Disputes board member, have taught Mediation and Conflict Resolution at Xavier University, am a member of the National Academy of Distinguished Neutrals, and have served for more than 20 years as an American Arbitration Association mediator and arbitrator. In addition, I have had the opportunity to witness many very skilled, and some not so skilled, lawyers in mediation. Some have approached the process in a very prepared and strategic manner in dealing with the mediator and their client. Others have either not prepared their client or come to the mediation without a meaningful strategy.

The purpose of this and future articles is to share insight and provide best practices on how to resolve conflict and disputes faced by all lawyers. Whether you are involved with negotiating a contract or resolving a business dispute, a divorce or a simple or complex piece of litigation, all lawyers can enhance their negotiation and mediation skills.

The first and most important step in any successful negotiation or mediation is to get the facts. As a lawyer, our advice to our client, the opposing lawyer or the court is only as good as the facts. This is an essential component to a successful resolution. Get the “who, what, when, where, why and how.” I call it getting the 5 Ws and how.

Once you have thoroughly developed the facts and supporting documentation, your analysis should shift to the applicable law.

Whether statutory or common law, it is important to understand the prima facie elements, supporting case law and precedent including, if applicable, verdicts and settlements. Once you have this information, you will be prepared to move to the next steps. Remember, “Knowledge is Power.” Sir Francis Bacon coined this phrase in 1597, and it is truly applicable today as you approach any negotiation or mediation.

Finally, in the preparedness side of the equation, is the important step of preparing your client for negotiations or mediation. The most important step for the lawyer is not to create or allow your client to create false expectations at the outset. Supporting or allowing false and unreasonable expectations to linger is one of the biggest challenges for a mediator or a party in negotiations. Many times, this results from not having an objective analysis of the facts and/or the law. For mediation, the client must also understand that this is not a court proceeding and that the mediator will not make the decision. In a case several years ago, the client asked me, “When are you going to decide on how much money I will get today?” Obviously, the client was not fully prepared on the process, and I had to emphasize she would be making that decision with her lawyer. This prompted me to send out a mediation preparation questionnaire to be returned to me. It allows the attorney to have a conversation about important aspects of the mediation process. It also results in the parties being better prepared for the mediation. By following these guidelines, you and your client will be ready to proceed with the next steps for a successful negotiation or mediation.

Hawkins is a partner, mediator and arbitrator at Dinsmore. He is a past president of the Cincinnati Bar Association and chair of the ADR Committee.

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