



“Take this!”

Steps a mediator can take to keep negotiation on track or restart it when all seems lost

BY JEFFREY KRIVIS

There is a short period of time in any difficult mediation where the tension escalates and tough negotiation decisions have to be made. Some people call this a “do or die” moment. It’s like the last vote in the Supreme Court in *Gore v. Bush*. Or it’s Tiger Woods chipping in from the fringe of the green to win the Masters. For this moment to succeed, someone must make a final concession that is beyond what they likely felt was their reservation number on the case. There are several things which the mediator can do to increase the likelihood of success in this “do or die” situation.

1. Take a bullet

To “take a bullet” literally means you would die for someone by jumping inside the path of a bullet. In litigated cases, the message is a bit different. The mediator is going to take the blame for something someone else did or said in order to protect that person from their own downfall. It’s a self-sacrificing sort of thing done strictly in favor of making a deal where the neutral pretends he is responsible so the actual litigant or counsel doesn’t get in trouble.

Surprisingly, this comes up all the time. Not surprisingly, most mediators prefer to dodge the bullet. This is so because the marketplace has in many

instances reduced the role of the mediator to messenger of information as opposed to formulator of ideas and concepts. As messenger, the mediator simply delivers numbers and has no stake in the outcome. As the idea or concept person, the mediator must constantly figure out ways to keep the conversation going until something breaks, no matter how unlikely a settlement might seem.

There are some very good mediators who are willing to take the bullet because their sole focus is on making a deal. Some recent examples come to mind: First, in a hard fought commercial case, the defense lawyer was anxious to settle, but his client was reluctant based on a bad experience at the first mediation session. In setting



up a second mediation session, the attorney notified the client that the current range of negotiations was better than they actually were, leading the client to believe it was wise to come back to the bargaining table.

Unfortunately, plaintiff's demands were actually far out of the realm of what the client considered reasonable. When the mediation commenced and numbers were exchanged, the client threatened to walk out and fire his lawyer. In order to salvage the client relationship, the attorney asked the mediator to pretend like the mediator accidentally sent the wrong information to the attorney, to "take the bullet" for the attorney. The mediator agreed and the case settled eight hours later.

Second, in a contentious sex harassment case, there was no settlement demand before the mediation and the claims department didn't put nearly enough reserve on the file to get it settled. Clearly the defense wanted the case settled, but the reporting on the file reflected an inaccurate settlement range. The defense counsel couldn't admit to the claims department that his evaluation was too low. Instead, he cornered the mediator in the bathroom and asked the mediator to provide the claims examiner with a much higher evaluation of the case so that more money could be put on the file. This would give the defense lawyer "cover" from the previous lowball evaluation.

Third, in a discrimination case, the defense would not allow the mediator to make a "mediator's proposal" to settle. The plaintiff demanded the mediator make such a proposal. In this stalemate situation, the parties were stuck in a competitive zero-sum game in which the bully usually wins. The plaintiff sent a confidential e-mail to the mediator asking if the mediator would have recommended the number the plaintiff wanted. The mediator knew his so called "confidential" reply might be used against him, but still responded with a "yes," giving the plaintiff ammunition to go back to the employer to get more money. Needless to say, the employer was not happy with the

mediator. The case settled shortly thereafter for a reasonable sum and the mediator survived the bullet wound.

2. Take a stance

Often the mediator will be required to take a side on a particular issue. The danger in doing this too early in the negotiation is that the mediator might alienate a party. This could have disastrous consequences that throw the mediation off the cliff. Yet, presumably, the parties hired this mediator for his or her persuasive skills and knowledge of the subject matter. A mediator who avoids taking a stance is like a car stuck in neutral. It is impossible to generate enough energy to make the gears run.

There is an art to taking a side that requires the mediator to be a little crafty in what position to take and when to take the position. A good mediator will draw the parties into talking about their goals for the case, revealing some key objectives that might be utilized later on by the mediator when taking a side. By carefully gathering information from each side, the mediator is able to position himself to take a side and be persuasive only after pre-qualifying his ideas with each party, and considering the appropriate timing of the position. By way of example, when my kids were young, they received an allowance. When they wanted a raise in their allowance, they had the good sense to wait until I was relaxed at home on a Sunday morning drinking coffee and eating bagels, as opposed to asking when I was stressed out after a day at the office.

3. Take incoming fire

People can become agitated when they are sued. They need to direct that agitation towards someone or something. That's where the mediator fits right in. Like a sponge, we end up absorbing a good deal of anxiety and negative energy. In a sense we are taking incoming fire that is really directed at someone else.

The mediator has to take the fire while at the same time keeping a straight

face and showing the parties that there is hope. In a strange way, the mediator is like candidate Obama, packaging hope so that the parties are true believers, with the idea that eventually the mediator will ask for their vote.

4. Take a chance

When the conventional negotiation kabuki dance slows down, the smart mediator will take a chance by trying something different or floating an idea that might create some movement in the negotiation that could lead to a favorable outcome. Here are just a few examples of what the mediator can do in traditional tort cases: 1) Float a recommended range that he asks each side to agree to in order to continue to negotiation. This is done like a hybrid mediator's proposal in order to advance the discussion to the next level; 2) Have a private, separate meeting with lawyers from each side without clients present; 3) Bring key lawyers together for the pre-designated purpose of showing some willingness to move off positions in a safe space outside the eyes of the client; 4) Negotiate to an artificial impasse in which the parties now see exactly what the gap is between their positions. At this point, escalate the discussion so that a mediator's number is actually negotiated in advance and agreed to by each side.

5. Take it back

Sometimes the parties have locked themselves into a negotiation position that will inevitably fail despite their strong desires to the contrary. While the mediator can show them where the minefields are placed, the parties continue down the path of destruction. Failure occurs and there is nowhere to go but out the door.

At this point, a good mediator might offer to rewind the tape, kind of like pressing the reset button on a computer. This is done by telling each side separately that their approach has failed, and that the choices are calling an impasse or trying a new approach to the negotiation that requires someone to take the lead.



The mediator can then throw out an anchor to jumpstart the talks by making a specific suggestion on a demand or offer, or by recommending a range.

Take it to the limit

To sum up, the chance for success or failure in mediation depends on a number of moving parts all coming together at the same time. A smart mediator will take those parts as far as humanly possible to determine the potential for resolution. In fact, the mediator might follow the advice of one of the greatest

rock bands of all time, and “take it to the limit:”

And when you're looking for your freedom
(nobody seems to care)
And you can't find the door
(can't find it anywhere)
When there's nothing to believe in
Still you're coming back, you're running back
You're coming back for more
So put me on a highway
And show me a sign

And take it to the limit one more time



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