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New Year's Resolutions for Mediation

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This is the time of year when many of us reflect back and resolve to do things differently. While most New Year's resolutions send us to the gym or on a diet, what about resolutions to do things differently in our professional lives? With that in mind, here are my top 3 New Year's resolutions for mediations. And unlike the gym or diet, hopefully these resolutions will stick past March.

Communicate with Opposing Counsel About Any Obstacles to Settlement Before the Mediation.

One of the biggest reasons why mediations fail is because there is a major obstacle to a settlement that the other side did not expect.

Even if the obstacle is not necessarily a deal breaker, the problem is that the unexpected party feels blindsided, which undermines trust. Once trust is compromised, the negotiation process is more likely to break down.

Moreover, parties need time to process information. For example, if financial hardship is an obstacle to a settlement, then the party likely will need to review the other side's financial records. The party may even need to consult with a CPA or other expert regarding the content of the records before assessing their impact on the settlement value of a case. Doing this for the first time during the mediation can be challenging.

Also, sometimes the obstacle is a non-starter. An example is where the parties discussed a

certain settlement range during prior settlement negotiations and one or both sides have reversed course at the mediation. In that situation, the parties may not have agreed to mediate had they known they would be starting from scratch at the mediation.

And like the financial hardship example, learning about it for the first time at the mediation may result in erosion of trust and an unproductive session.

Keep Your Goals in Focus and Be Patient.

Those who view settlements as business transactions usually want to cut to the chase and close a deal quickly. If they perceive the other side as wasting time or engaging in overly aggressive negotiating tactics, they may be more prone to losing hope and walking away prematurely.

What these types of parties fail to realize is that not everyone views a settlement negotiation as they do. Indeed, many parties bring personal issues like pride and emotion to the table. These types of parties need time to reconcile their feelings before they can agree to a deal. This may require time and effort.

To illustrate, a party acting on emotion may take a hard line in the early stages of a negotiation. This may cause the other side to retaliate in kind, leading quickly to an impasse. The common refrain from the parties in this scenario is that they, “don’t want to reward bad behavior,” or “bid against themselves.”

The frustration and loss of hope for those looking to cut to the chase is understandable. At the same time, if the goal is to reach a settlement, then the parties owe it to themselves to be patient and let the process play out. And rather than fixate on the other side’s alleged bad behavior, focus on your goals for the mediation and how to achieve them.

If the parties end up walking away without a deal, at least they can say that they gave it their best effort.

Listen More Than You Speak.

When I was a junior litigator in court for an oral argument, I made the rookie move of going over what I was going to say in my head rather than truly listening to what my counterpart was saying. What I learned with experience is that there is a difference between listening and waiting to talk. When you don’t actively listen to what the other side is saying you are more likely to miss the point, which undermines your ability to respond effectively.

Along those same lines, at mediation the parties and their attorneys are often chomping at the bit to lay out their case and set the record straight. While laying out your case at mediation is important, active listening is just as, if not more, important to negotiating a settlement. In fact, those who listen more than they speak at mediation often get the best results.

Active listening can result in a deeper understanding of the nuances of an issue, the underlying interests of the parties and areas of common ground, all of which could lead to a breakthrough in a contentious settlement negotiation. On the flipside, bluster and posturing can derail a negotiation before the parties have explored all avenues to a deal.

So like many of us learned at oral argument, resist the urge to think about what you want to say next while the other side is talking and try active listening.

Thank you for reading!

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